
(1950) 02 CAL CK 0002

In the Calcutta High Court

Case No : Civil Rule No. 1561R of 1949 in Revision Case No. 156 of 1948

Panchanan Pal

APPELLANT

Vs

Nani Gopal Niyogi

RESPONDENT

Date of Decision : 24-02-1950

Acts Referred:

Arbitration Act, 1940 — Section 14, 33, 37, 8(2)

Bengal Tenancy Act, 1885 — Section 26F

Limitation Act, 1963 — Article 181

Citation : (1951) 1 ILR (Cal) 438

Hon'ble Judges : Guha, J; Das, J

Bench : Division Bench

Advocate : Sushil Chandra Dutta, for the Appellant; Apurbadhan Mukherji and Dhires Chandra Chahrabarti, for the Respondent

Judgement

Das, J.—This Rule was issued by us for review of an order made on July 11, 1949, in Civil Rule No. 156 of 1948. The review was prayed for on the ground that a question of limitation arising out of Section 33 of the Arbitration Act was not placed before us at the time when we disposed of the aforesaid Civil Rule No. 156 of 1948.

2. In order to appreciate the contention raised by Mr. Dutta appearing on behalf of the Petitioner in the present Rule, it is necessary to state briefly the facts leading up to the present dispute.

3. One Tinkarhi Das died leaving a widow Narayani Dasi and a sister's son Nani Gopal Niyogi. Nani Gopal entered into an agreement with Panchanan Pal, the Petitioner in this Rule, on September 12, 1939, whereby Panchanan Pal agreed to finance the litigation to be started in the name of Nani Gopal Niyogi against his maternal aunt Narayani Dasi for possession of Narayani's husband's estate from her hands. The agreement provided that, in case of success in the proposed suit, Nani Gopal would pay to Panchanan Pal a sum of Rs. 9,000 for the costs to be incurred by Panchanan Pal and for his loss of business and labour and trouble

and in case of failure in the proposed suit, Panchanan Pal would bear the expenses.

4. It has now been decided finally and it is no longer disputed before us, that the agreement contained an arbitration-clause, whereby in case of a dispute, arising between the parties as regards the terms of the agreement, reference would be made to at least two of the attesting witnesses as arbitrators by the consensus of both the parties to the agreement. Narayani died in 1941. In our order the date was wrongly stated as February 14, 1939. This was a clerical mistake and may be corrected. After the death of Narayani, the proposed suit, which had already been filed, automatically succeeded and Nani Gopal became entitled to possession as next reversioner. A dispute then arose between Nani Gopal and Panchanan Pal about the terms of the agreement and the effect thereof. Panchanan nominated two of the attesting witnesses as arbitrators and required Nani Gopal to consent thereto. Nothing came out of this and later on, on May 25, 1943, an application was made by Panchanan Pal for extension of time to file the award. The application for extension of time was rejected by the learned Subordinate Judge on June 7, 1943. An application for review was dismissed on November 30, 1943.

5. Against these two orders an application for revision was taken to this Court which was dismissed on February 29, 1944. Thereafter, Panchanan Pal made an application u/s 14 of the Arbitration Act for the filing of an award, which was said to have been made in the meantime by opposite parties Nos. 2 and 3. This application was rejected on November 2, 1946. In the meantime, on April 3, 1944, Panchanan Pal had a notice u/s 8(2) of the Arbitration Act issued for service upon Nani Gopal. The notice was served on April 5, 1944. On November 25, 1946, an application u/s 8(2) of the Arbitration Act was made by Panchanan Pal. On February 15, 1947, a petition of objection was filed by Nani Gopal Niyogi raising various defences. The learned Subordinate Judge disposed of this application by an order dated December 1, 1947 and against that order the aforesaid Civil Rule No. 156 of 1948 was issued by this Court and was disposed of by us as stated already.

6. By our order we directed a remand of the case to the learned Subordinate Judge for a decision of the question whether the agreement dated September 12, 1939, was champertous or not and gave incidental directions.

7. In the present Rule, as already stated, Mr. Dutta raises a question of limitation. His submission is that the existence or validity of an arbitration agreement has to be challenged by an application filed u/s 33 of the Arbitration Act. This may be conceded. It is then argued that the period of limitation for filing such an application is governed by Article 181 of the Indian Limitation Act. The Arbitration Act does not specifically provide for any period of limitation within which an application u/s 33 of the Arbitration Act has got to be made. Section 37 of the Arbitration Act makes the provisions of the Indian Limitation Act applicable to proceedings under the Arbitration Act. Article 181 of the Indian Limitation Act

is a residuary Article, which lays down the period of limitation in regard to applications for which there is no express provision in the Indian Limitation Act. In a large majority of cases it was decided by this Court and other High Courts that Article 181 of the Indian Limitation Act governs applications which are contemplated by the Code of Civil Procedure. The decisions, however, are not uniform. There are instances in which applications under other Acts have been held to be governed by Article 181. See the case of *Asmatiali Sharip v. Mujaiharali Sardar* ILR (1948) 2 Cal. 54, where Article 181 was made applicable to proceedings u/s 26F of the Bengal Tenancy Act. But since the passing of the Arbitration Act in 1940, it is difficult to say that Article 181 is confined to applications under the Code of Civil Procedure. Schedule 4 of the Arbitration Act, 1940, amended Sections 158 and 178 of the Indian Limitation Act and made those Articles applicable to certain proceedings under the Arbitration Act. The basis of the decisions, which held that Article 181 governs only applications under the Code of Civil Procedure, has been taken away as result of the said amendment of the Arbitration Act. I may point out that the effect of Sections 2 and 4 of the Repealing and Amending Act, 1945, is to preserve the said amendments of the Indian Limitation Act.

8. In my opinion, the position now is that Article 181 of the Indian Limitation Act governs applications u/s 33 of the Arbitration Act. In this view, the period of limitation for an application u/s 33 of the Arbitration Act would run from the date when the right to apply accrues, that is first accrues, as construed in the case of *Bhagwati v. Sant Lal* ILR (1946) All. 570. The question is, when did the right of the opposite party in the Rule to challenge the existence or validity of the arbitration agreement first accrue. Mr. Dutta contends that this right accrued on November 15, 1942, when an affidavit was sworn by the opposite party to this Rule challenging the jurisdiction of the arbitrator to act, or, at any rate, on June 7, 1943, when the application for extension of time was rejected.

9. In my opinion, neither of these dates can be availed of by the present Petitioner. The opposite party to this Rule was not bound to take resort to a vain proceedings and his right to apply accrued only when there was a patent danger to his right to challenge the arbitration agreement. Neither at the time when the affidavit sworn in November, 1942, nor at the time when the application for extension of time was filed, there was an effective invasion of his rights and the right to apply did not also accrue because of initiation of certain infructuous proceeding by the present Petitioner.

10. The remedy, which was open to the Petitioner, has been held by us, was to make an application u/s 8(2) of the Arbitration Act on service of a notice u/s 8(2) of the Arbitration Act. This notice was served on April 15, 1944. The present opposite party filed his objection on February 15, 1947, that is, within three years from that date. It cannot, therefore, be said that his right to challenge the existence or validity of the arbitration agreement suffers from the bar of limitation.

11. There is another view of this matter. Section 33 merely provides for the making of an application by the party concerned for relief contemplated by that section. In my opinion, it has no application to a case where a defence is raised challenging the existence or validity of the arbitration agreement. *Suryanarayana Reddy v. Yenkata Reddi* ILR (1949) Mad. 111. Reference may be made in this connection to the decision in the case of *Bengal Jute Mills Co., Ltd. v. Jewraj Heeralal* ILR (1943) 2 Cal. 392 where the facts were that an award had been made out of court, the award, however, was not filed in court within the time prescribed. One of the parties filed an application for setting aside the award. It was objected that, as the award had not been filed, the application was misconceived. This contention was overruled and it was held that, unless steps were taken to file the award, it was not competent to the Plaintiff Applicant to dispute the existence or validity of the award.

12. Mr. Dutta next contended that, as no application had been filed in terms of Section 33 and the matter was raised only by way of defence in the petition of objection, there was no proper proceedings up till now in terms of Section 33 of the Arbitration Act. In my opinion, this objection ignores the substance of the petition of objection filed in this case. In fact, courts have not been slow enough to get rid of technicalities and to treat a petition of objection as being in substance an application in terms of Section 33 of the Arbitration Act: *Bhagwandas Atmasing Vs. Atmasing Jessasing*, . This case has been followed in this Court in the case of *Hanutmai Boid v. Khusiram Benarasilal* ILR (1949) 1 Cal. 199.

13. The contention raised by Mr. Dutta, accordingly, fails and this Rule must stand discharged with costs--hearing fee two gold mohurs.

Guha, J.

14. I agree.