

(1953) 09 CAL CK 0012
In the Calcutta High Court
Case No : Award Case No. 244 of 1953

Shah and Co.

APPELLANT

Vs

Ishar Singh Kirpal Singh and Co.

RESPONDENT

Date of Decision : 03-09-1953

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Limitation Act, 1908 — Article 181

Citation : AIR 1954 Cal 164 : (1956) 2 ILR (Cal) 541

Hon'ble Judges : S.R. Das Gupta, J

Bench : Single Bench

Advocate : G.P. Kar and S. Mukherji, for the Appellant; Sib Narayan Modak, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Das Gupta, J.—This is an application for an order:

(a) That the existence, effect and/or validity of the said alleged arbitration agreement and all questions relating thereto be decided and determined by this Court.

(b) That it be declared that there was no valid, binding or effective or subsisting arbitration agreement between the parties or that the disputes and differences, if any, are referable to such arbitration.

(c) That the said purported award dated 7th February 1949 be set aside.

(d) Costs and incidental expenses be paid to the applicant.

2. The facts necessary for me to determine the merits of this application, shortly stated, are as follows:

3. On April 26, 1948, there was a contract between the parties. The sowda in respect of the said contract has been set out in Annexure "A" to the petition. The said sowda contains amongst others the following term:

"All sowdas subject to rules and regulations of the Calcutta Kirana Association whose decision is final and binding on both the buyers and the sellers."

4. On September 25, 1948, the Calcutta Kirana Association went into voluntary liquidation by a special resolution passed on that date and one S. K. Chakravarty was appointed liquidator. Thereafter on October 29, 1949, another Association known as the Calcutta Kirana (Spices) Merchants' Association was incorporated and all the rules of the Calcutta Kirana Association were incorporated in the new Association and were filed with the Registrar. The special resolution which was passed on September 25, 1948, inter alia provides as follows: "Resolved that the Calcutta Kirana Association be voluntarily wound up and the members of the Managing Committee be authorised to take all necessary steps to wound up the affairs of the Association."

"Resolved that the Association consents to formation of an Association in the name of the Calcutta Kirana Merchants' Association by some of the members of the Association of such other name similar or identical to the existing name of the Association."

Disputes and differences arose between the parties with regard to the said sowda. The respondent referred such disputes to the Calcutta Kirana Merchants' Association. The petitioner received a letter from the Secretary of the said Kirana Merchants' Association dated 15th October 1948 asking the petitioner to attend the executive committee meeting of the said Association in respect of the said references made by the respondent to the said Association. The petitioner protested and refused to appear because the petitioner's case was that he never agreed to refer the disputes to the Calcutta Kirana Merchants' Association: the case of the petitioner being that the agreement to refer was to Calcutta Kirana Association as is embodied in the sowda itself. After a number of letters written to the petitioner asking the petitioner to attend the meeting of the said Association, the said Calcutta Kirana Merchants' Association on the 7th February 1949 made an award in favour of the respondent. It is with respect to that award that the petitioner has made the present application.

5. The ground taken by the learned counsel appearing for the petitioner in support of this application is that the arbitrators who purported to arbitrate over the said disputes and made the said award had no jurisdiction to do so, because, as would appear from what I have already stated, the case of the petitioner before me is that the body to which the party agreed to refer their disputes was not this Calcutta Kirana Merchants' Association but the Calcutta Kirana Association, and the parties never agreed to abide by their arbitration and this Calcutta Kirana Merchants' Association had no right or authority to make the award. This is the substance of the contention of the learned counsel appearing on behalf of the petitioner and this is the only ground which has been urged before me in respect of this application.

6. Mr. Kar appearing on behalf of the petitioner contended before me that in the

circumstances of the case I should hold that the award is bad on the face of it, because, the award is not the award of the arbitrators to whom the parties agreed to refer under the said arbitration agreement. In the circumstances as aforesaid he contended that I should set aside the award.

7. As would appear from the prayers in the petition to which I have already referred that the petition as framed consisted of two parts. In other words, there are really two applications contained in one, being an application u/s 33 of the Indian Arbitration Act and an application u/s 30 of the said Act. The first two prayers namely, that the existence, effect and/or validity of the said alleged arbitration agreement and all questions relating thereto be decided and determined by this Court and that it be declared that there was no valid, binding or effective or subsisting arbitration agreement between the parties or that the disputes and differences, if any, are referable to such arbitration, are certainly prayers relating to an application u/s 33 of the Indian Arbitration Act. The other prayer in the petition, namely, that the said purported award dated 7th February 1949 be set aside, is a prayer relating to an application u/s 30 of the Indian Arbitration Act.

8. The learned counsel for the respondent took a preliminary objection to the application, so tax as it is an application under 8. 33 of the Indian Arbitration Act. He contended that the application as an application u/s 33 of the Act, is barred by limitation. According to him Article 181 of the Indian Limitation Act should apply to an application u/s 33 of the Indian Arbitration Act. Article 181 reads as follows:

Art. 181.

Application for which no period of limitation is provided elsewhere in this schedule or by S. 43 of the Code of Civil Procedure, 1908.

Three years. When the right to apply accrues.

The learned counsel contended before me that the application u/s 33 of the Indian Arbitration Act is governed by this Article. He drew my attention to Sections 37 and 41 of the Indian Arbitration Act. Section 37 provides that "all the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court."

Section 41 of the said Act inter alia provides that

"Subject to the provisions of this Act and all the rules made thereunder the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court and to all appeals under this Act."

On the strength of these sections, the learned counsel contended that the provisions of the CPC have been made applicable to all proceedings before this Court which may be taken under this Act and he further contended that under 8. 37 of the Indian Arbitration Act the provisions of the Limitation Act have been

made expressly applicable to an arbitration in the same manner as they apply to proceedings in Court. Therefore the learned counsel contended that the provisions of Article 181 of the Indian Limitation Act should be applied.

9. The scope and effect of Article 181 of the Indian Limitation Act has come up for consideration in a large number of cases both in this Court as well as in other courts. It has no doubt been held in a long series of decisions that this Article is confined only to applications made under the Civil Procedure Code.

The main reason for these decisions was that on examination of the articles in the first schedule of the Limitation Act It appeared that in every one of them the application is made under the CPC and applying the doctrine of "ejusdem generis" the application which is contemplated in Article 181 of the Limitation Act must toe confined to the same type of applications which are contemplated in the other articles in the said schedule, that is to say, applications under the Civil Procedure Code. This undoubtedly was the position before some of the provisions of the aid schedule came to be altered as a result of the enactment at the Indian Arbitration Act of 1940. For instance Article 158 of the Limitation Act which is an article in the said schedule had to be amended in the manner as follows:

Description of application. Period of limitation. Time for which period begins to run.

Art. 158

Under the Indian Arbitration Act Act 1940 to set aside an award or to get an award remitted for re-consideration.

Thirty days. The date of service of the notice of filing of the award.

Thus it appears that originally the application which was contemplated under the said Article was an application to set aside the award under toe CPC but in the amended article an application under the Arbitration Act to set aside an award has been incorporated. Some other amendments have also been made in the said schedule. As for instance, in Article 178 in place of the words "some code" the words substituted are "under the Arbitration Act, 1940". Thus it appears that the first schedule to the limitation Act no longer relates exclusively to applications under the Civil Procedure Code; other matters have been incorporated in the said schedule. If that is the position, then the reason which was the basis of all the previous decisions are no longer applicable. It cannot now be said that applying file doctrine of "ejusdem generis" the residuary article must be held to apply only to applications under the Code of Civil Procedure. This question came up for consideration before the Court of Appeal in the case of -- "Hurdatrai Jagadish Prosad v. Official Assignee of Calcutta" ILR (1949) 1 Cal 1 (A) and Mukherjea J. in his judgment delivered in that case observed as follows:

"As regards Article 181 of the Indian Limitation Act, it has been held in a long series of decisions that the residuary Article is confined to applications made under the Civil Procedure Code." (His Lordship then referred to cases which have

been so decided)..... "The main reason underlying these decisions is that the examination of all the Articles in the First Schedule to the Limitation Act shows that, in every one of them, the application is made under the Civil Procedure Code. A residuary article, it is said, should be construed "ejusdem generis" with the other articles dealing with applications. The other ground put forward is that the preamble to the Limitation Act indicates that it is intended to apply not to all applications but only to certain applications.

It is to be pointed out that by the Arbitration Act of 1940, two Articles have been introduced in the Limitation Act, namely, Arts. 158 and 178 which relate to applications under the Arbitration Act; and it may be, as was observed in the Special Bench decision of -- Asmatoli Sharip Vs. Mujaharali Sardar and Others, , necessary to examine at some time or other closely the reasons upon which the decisions mentioned above purport to be based. But, on the present state of authorities, we are bound to say that Article 181 of the Limitation Act is confined to applications "under the CPC or those applications for the making of which the CPC gives authority."

Mukherjea J., has no doubt held in his Judgment that on the present state of authorities their Lordships were bound to say that Article 181 of the Limitation Act is confined to applications under the CPC or those applications for the making of which CPC gives authority but his Lordship has not in fact determined the effect of the incorporation of the Indian Arbitration Act in the said schedule, and has left that question open to be determined at some other time. In fact this question, namely, as to whether or not an application under the Indian Arbitration Act would be governed by Article 181 of the Indian Limitation Act did not arise for his Lordship's consideration in that case which was before him and was not decided by his Lordship. In my opinion, in view of the incorporation into the said schedule matters other than applications under the CPC the reason which was the basis for the said decisions can no longer be applicable to the question as to whether or not an application u/s 33 of the Indian Arbitration Act is governed by Article 181 of the Indian Limitation Act.

On the other hand the fact that some of the Articles in the said Schedule relate to some applications under the Indian Arbitration Act shows that the residuary article must apply to all other applications under the Indian Arbitration Act. Even on the principle laid down by Mukherjea J., in his judgment to which I have referred, I should hold that all applications u/s 33 are governed by Article 181 of the Limitation Act. Mukherjea J. has observed that Article 181 of the Limitation Act should be held to be confined to applications under the CPC or those applications for the making of which the CPC gives authority. The question is whether or not an application u/s 33 comes within that principle. Again I would refer to another judgment of Mukherjea J., delivered in the case of -- Asmatoli Sharip Vs. Mujaharali Sardar and Others, (B)".

This was a Full Bench decision and the judgment was delivered by Mukherjea J. In that case a question arose as to whether or not an application u/s 26(f) of the

Bengal Tenancy Act could be regarded as an application under the CPC or at any rate an application for the making of which the CPC gives authority. Section 26 (f) deals with the right of a co-sharer landlord to apply to have the holding or portion of the holding of his co-sharer transferred to himself, and their Lordships held that such an application which at any rate was subjected to and regulated by the rules of the CPC was an application to which the provisions of Article 181 of the Limitation Act applied. In his judgment Mukherjea J., gave the following reasons for the aforesaid conclusion:

"In our opinion, an application contemplated by Section 26 (f), Bengal Tenancy Act. can be regarded as an application under the Civil Procedure Code, or at any rate an application for the making of which the Civil Procedure gives authority. u/s 143, Bengal Tenancy Act, subject to any rules to the contrary that the High Court may frame with the approval of the Provincial Government, the Code of Civil Procedure is applicable to all suits under the Act. The same procedure is attracted to applications and other miscellaneous proceedings by virtue of the provision of Section 141, Civil P. C.

Section 144 (3), Bengal Tenancy Act, further lays down that all applications by landlord or tenant which are authorised to be made under the Act shall be made to the Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the application is made. The entire proceeding in an application u/s 26(f) is thus regulated by the CPC and we have no hesitation in holding that the residuary Article 181, Limitation Act would be applicable to such applications, except so far as any special provision has been made in regard to them in the section itself."

In my opinion, the reasons given in his Lordship's judgment as aforesaid are equally applicable to the case of an application u/s 33 of the Indian Arbitration Act. It can also be said that the same procedure as is laid down in CPC is attracted to applications under the Indian Arbitration Act and in fact Section 41 of the Arbitration Act has provided that the "provisions of the CPC shall apply to all proceedings before the Court and to all appeals under the Act."

Thus, as in the case of an application u/s 26 (f), of Bengal Tenancy Act, the entire proceedings in an application u/s 33 is regulated by the Civil Procedure Code. In the case of Section 26 (f) the right to make an application under that section is not derived from the Civil P. C. but from the Bengal Tenancy Act itself. Nonetheless their Lordships of the Pull Bench held that Article 181 would apply for the reasons mentioned as aforesaid. The position with regard to an application u/s 33 is also the same. An application u/s 33 is authorised by the Arbitration Act Itself but the provisions of the CPC have been made applicable to all applications under the said Act. Again an application u/s 33 has also to be made to the "Court" and "Court" has been defined in the Act itself as follows:

" "Court" means a civil Court having jurisdiction to decide the questions forming the subject-matter of the reference If the same had been the subject-matter of a

suit." In other words, all applications under the said Act have to be made to a Civil Court which would have jurisdiction to determine the subject-matter of the reference. The matter does not rest here. There is a specific provision in the Arbitration Act itself; that is, Section 37 of the Act wherein it has been clearly laid down that all the provisions of the Indian Limitation Act shall apply to arbitration as they apply to proceedings in Court. I am constrained to hold following the reasoning of Mukherjea J. given in the said case of -- "Asmatiali v. Mujaharali Sardar (B)", that an application u/s 33 of the Indian Arbitration Act is governed by the residuary Article 181 of the Limitation Act. The same view has been taken in a recent decision of the Punjab High Court in the case of -- Union of India (UOI) Vs. Firm Kiroo Mal Nawal Kishore and Another, (C). I am of the opinion that an application u/s 33 of the Arbitration Act is governed by Article 181 of the Limitation Act,

10. The next question which arises for my consideration is whether or not the application is barred by limitation even if Article 181 applies. In order to determine this question I shall have to go back once again to the first two prayers of the petition. As has been pointed out by the learned counsel for the respondent, the said prayers relate to the arbitration agreement and not to the award. In other words, a declaration, as to the existence, effect or validity, has been claimed not with regard to the award but with regard to the arbitration agreement and the prayer is that it be declared that there was no valid, binding or effective or subsisting arbitration agreement. In the premises, the learned counsel contended, the starting point of limitation would be the time when the respondent first sought to enforce the arbitration agreement i.e., when the respondent for the first time referred the disputes to the arbitration.

It is then that the cause of action to have the arbitration agreement declared null and void arose. I agree with that contention and if I had to finally adjudicate on this matter I would have held that the application so far as it relates to prayers 1 and 2 thereof is barred by limitation. But Mr. Kar at the close of his argument submitted before me that his client does not want to proceed with the application as an application u/s 33 of the Arbitration Act. What was the reason which prompted Mr. Kar to take that course of action I cannot say. I, however, see no objection to allow him to withdraw the said application and to confine his application only to an application u/s 30 of the Act. But I make it clear that I do not give him leave to file a fresh application u/s 33 of the Act, which may require determination of the questions involved in this application.

11. I now come to the second part of the petitioner's case, namely, that the award should be set aside. As I indicated before, the same grounds which have been urged in the petition so far as it is an application u/s 33 have also been taken in support of the prayer u/s 30. The said grounds are that the arbitrators who made the award had no jurisdiction to do so, because they were not the persons to whom the parties agreed to refer. Mr. Kar contended, that the award in these circumstances should be set aside as being bad on the face of it. In my

opinion, the said grounds relate to an application u/s 33 of the Indian Arbitration Act. They cannot form the grounds for an application u/s 30 of the said Act. In the case of -- AIR 1946 72 (Privy Council) the question arose as to whether or not an objection to the validity of a reference to arbitration does not come within the provisions of Section 15 of the 2nd Schedule to the Code of Civil Procedure.

It should be remembered that Section 15 corresponds to Section 30 of the Indian Arbitration Act. Relying on the words "being otherwise invalid" used in Section 15, which words also find place in the present Section 30 of the Indian Arbitration Act, majority of the Judges of this Court held that the award can be set aside. Their Lordships of the Judicial Committee disagreed with that view and in their Lordships' opinion all powers conferred on the Court in relation to an award on a reference made in a suit presupposes a valid reference and if there is no valid reference the purported award is a nullity and can be challenged in an appropriate proceeding. It is no doubt true that their Lordships of the Judicial Committee were concerned in their said decision with the 2nd Schedule of the CPC but, in my opinion, the position under the Indian Arbitration Act should also be the same.

In my opinion the power conferred on Court to set aside an award under the Act also pre supposes the existence of valid reference and if there is no valid reference, or no reference at all then the award is a nullity and a declaration to that effect can be obtained u/s 33 of the Act. I hold that an application u/s 30 is not maintainable on the ground that there was no valid reference or no reference at all and consequently the arbitrators had no jurisdiction to make the award. The proper application to make in such a case would be an application u/s 33 of the Indian Arbitration Act which is a specific provision made for that purpose in the Act itself. In my opinion, the question as to whether or not the arbitrators who made the award had any authority to proceed with the arbitration cannot be gone into in an application u/s 30 and the award cannot be set aside on that ground.

Mr. Kar contended that the words "being otherwise invalid" used in Section 30 indicate that such a question can be gone into in an application under the said section and the award can be set aside on that ground. I am unable to accept that contention. As I have just now pointed out, their Lordships of the Judicial Committee also did not accept the view that the same words used in Section 15 authorised the Court to set aside an award. Mr. Kar then contended that it would be a case of an award being "improperly procured." I am also unable to accept that view. This is a case where the arbitrators, according to the petitioner, had no jurisdiction to proceed with the reference or to make the award. The award, therefore, is a nullity and in such a case an application should be made u/s 33 for determination of the question as to the existence, effect or validity of an arbitration agreement and/or of the award made by the arbitrators.

Before concluding this matter I should refer to the case reported in -- "Rajlakshmi Dassee v. Katyani Dassee" 38 Cal 639 (E), relied on by Mr. Kar in his

argument. I do not see how that case is of any assistance to Mr. Kar. What was decided in that case was that if a Court has no jurisdiction over the subject-matter of the litigation its judgments and orders, however, precisely certain and technically correct, are merit nullities and are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are referred to be declared void but by every Court in which they may be presented. There can be no question as to the soundness of the observations made in that case, and I cannot dispute the proposition of law which has been laid down by their Lordships in that case, but the position here is different.

The question here is what would be the section of the Indian Arbitration Act under which a party who wants to challenge the existence or effect of an arbitration agreement should apply. I do not see how that decision is of any assistance to Mr. Kar in establishing his point of view with regard to this matter. The only other case cited by Mr. Kar in support of his contention is the case reported in -- Chetandas Daga Vs. Radhakisson Ramchandra, (F). That case also, in my opinion, is of no assistance to him and by no means supports his contention which is raised before me. What their Lordships held in that case was that in view of the fact that the actual award itself was not before their Lordships and there was no evidence as to whether or not the arbitrators gave notice of the amount of their fees and charges and in view of the fact that their Lordships did not know as to whether or not the award has in fact been filed, there was no award within the meaning of Section 14 of the Act before their Lordships.

Consequently, their Lordships held that if there was no award then there was nothing which can be set aside and their Lordships, in the circumstances, thought it unnecessary to decide whether the award mentioned in Section 14 extends to an unfiled award or whether it is confined to a filed award. I cannot make out how Mr. Kar can contend that this case is of any assistance to him. I do not see how this case is at all relevant to the question which I have to determine on this application. The result, therefore, is that, in my opinion, the grounds on which the petitioner seeks to make this application u/s 30 are all grounds relating to an application u/s 33 and cannot be available in an application u/s 30. But the application u/s 33 has been withdrawn by Mr. Kar. The result, therefore, is that the application u/s 30 is dismissed, with costs.