

BOMBAY HIGH COURT

Purshottamdas Hassaram Sabnani

Vs.

Impex (India), Ltd

First Appeal No. 228 of 1953, Bombay in Suit No. 579 of 1952

(Chagla, C.J. and Dixit, J.)

21.10.1953

JUDGMENT

Chagla, C.J.

1. This appeal arises out of a suit filed by the plaintiff claiming a sum of Rs. 2,008-14-0 being the difference between the preferential custom duty on textile goods of British manufacture and similar goods of non-British manufacture which he alleges he had to pay in clearing the contract goods after their arrival in the Port of Bombay. This amount he claimed as damages on the footing of a breach of warranty by the defendants.

2. The question that arises 'in limine' is whether the suit is barred by limitation. The contract of sale is dated 21 September, 1948, and the seller is the defendant and the purchaser is the plaintiff and the goods that were sold were printed cotton haircord which were described as of U.K. origin. The shipment was October/November 1948 and the contract was a C. I. F. contract. The payment was to be made by a confirmed and unequivocal letter of credit to be opened by the purchaser in favour of the British suppliers Messrs. Michael Settons' Sons and Hallwood Ltd., London. It appears that the plaintiff opened the letter of credit, the goods arrived in Bombay, and the suppliers were paid the price out of the letter of credit opened by the plaintiff. Dispute then arose between the plaintiff and the Customs authorities as to the duty that he had to pay. If these goods were of U. K. origin, the duty he would have to pay would be 18 per cent, and if they were of non-U. K. origin, then the duty he would have to pay would be 60 per cent. He was asked to pay and in fact he did pay at the rate of 60 per cent., the Customs authorities taking the view that the goods were of non-U. K. origin. The documents which constitute really the delivery under a C. I. F. contract was tendered to the plaintiff between 11 January, 1949, and January 17, 1949, and the plaintiff filed the present suit on 22 February, 1952, claiming the difference between the amount that he would have to pay on the basis of 18 per cent, duty and the 60 per cent, duty which in fact he paid. It is not disputed by the plaintiff that the article that governs this case is

Article 115, Limitation Act, and if no other factor was to be taken into consideration, the suit was filed beyond three years and the suit would be out of time. But what is relied upon by the plaintiff for the purpose of saving limitation is the fact that there were certain infructuous arbitration proceedings, and the plaintiff wishes to exclude the time taken up by these arbitration proceedings. The section of the Limitation Act on which the plaintiff relies is Section 14. That section provides :

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of like nature, is unable to entertain it."

There is no doubt that the arbitration proceeding was founded upon the same cause of action as the present suit and it is not in dispute that those proceedings were prosecuted in good faith. The trial Court has held that assuming Section 14 applies, those proceedings were not prosecuted with due diligence. For the purpose of this argument we will assume that they were prosecuted with due diligence, and the question which still remains to be determined is whether Section 14 has any application to the facts of this case. Looking at Section 14 and giving to it its plain natural construction, it is clear that the Legislature never intended that proceedings before an arbitrator should come within the ambit of this section. Undoubtedly, proceedings before an arbitrator may be civil proceedings, but what is emphasised by Section 14 is that they must be civil proceedings in a Court of first instance or in a Court of appeal. Therefore, the intention of the Legislature was to apply this section to judicial Courts which hear suits and from whose decision an appeal lies to a higher Court. The opening words of Section 14 refer to computing the period of limitation prescribed for any suit. Therefore, when the period of limitation is computed in respect of a suit filed in a civil Court, what has to be excluded is a suit or a civil application which was being prosecuted in another Court or in the Court of appeal. Therefore, if we were to strictly construe Section 14 it is clear that the plaintiff would not be entitled to exclude the period taken up in arbitration proceedings.

3. But what is relied upon by Mr. Chandiramani is a decision of the Privy Council which, has given an extended meaning to the expression "civil proceeding in a Court" used in Section 14, Limitation Act. The Privy Council case is reported in - *'Ramdutt Ramkissen v. E. D. Sasson and Co!'*, There the Judicial Committee was dealing with two arbitration proceedings. One arbitration proceeding had become abortive and the other arbitration proceeding on the same cause of action was undertaken, and the question that arose was whether in the second arbitration proceedings the time taken up in the first arbitration proceedings could be excluded, and the main question that the Judicial Committee had to decide was whether the Limitation Act itself applied to proceedings before an arbitrator, and the Privy Council held that if a claim was barred by

limitation and if no suit could be filed on that claim it stood to reason that that same claim could not be litigated before a domestic forum, and therefore the Privy Council held that the Limitation Act applied to arbitration proceedings. Then the next question, was whether time taken up in the earlier proceedings could be excluded under Section 14, and the Privy Council (and this is important to note)), not on an interpretation or construction of Section 14, but by analogy, applied the provisions of Section 14 to the earlier arbitration proceedings and held that the time taken up in the earlier arbitration proceedings could be excluded by analogy under Section 14, and the Privy Council cited with approval the observations of Greaves, J. at p.

¹ AIR 1929 PC 103

107 :

"...it is urged that having regard to the wording of Section 14, Limitation Act this section cannot apply. This argument however does not seem to me to be well founded. If limitation, as I think it does, applies in arbitration proceedings, the law of limitation applicable is that laid down in the Limitation Act, 1908, which is expressed to apply to suits, appeals and certain applications to Courts. If, therefore, this Act is to be applied to arbitration proceedings notwithstanding the words above referred to, I see no reason why Section 14 of the Act should not apply. If it is said that the wording of the section is not apposite to arbitration proceedings it could equally be said that the wording of the Act itself is not apposite."

And at the bottom of at p. 107 their Lordships make it clear that they were applying Section 14 by analogy because this is what they say :

"In their Lordships' opinion the analogy of the Indian Limitation Act requires that an arbitrator should exclude the time spent in prosecuting in good faith the same claim before an Arbitrator who was without jurisdiction."

And it was by analogy that the Privy Council held that the expression "civil proceedings in a Court" used in Section 14 must be held to cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the Judges of dispute between them.

4. Now, the case before us is not identical with the case which the Privy Council was considering. The Privy Council was considering two arbitration proceedings. The Limitation Act strictly did not apply to those proceedings at all. They applied the Limitation Act by analogy and they went on also to apply the principle of Section 14 to arbitration proceedings. Before us we have a suit to which the Limitation Act expressly applies and therefore there can be no question of applying Section 14 by analogy, and if Section 14 was strictly construed, as we have already pointed out, it cannot possibly cover a case of arbitration proceedings.

5. But Mr. Chandiramani relies on a decision of the Allahabad High Court in - '*Firm Behari Lal Baij Nath Prasad v. Punjab Sugar Mills Co., Ltd.*'², where on facts identical to those before us the Allahabad High Court held that Section 14, Limitation Act applied to arbitration proceedings. There Collister, J. and Bajpai, J. relied on the Privy Council decision and extended the application of Section 14 to a case which was not strictly before the Privy Council. With respect to the learned Judges, if they had said that they were extending the principle of Section 14 by analogy and they were giving it a wider interpretation than the Privy Council had given, we would have appreciated the argument.

But in the judgment it appears that the learned Judges have taken the view that even on a strict construction the word "Court" used in Section 14 would cover a domestic forum. It is difficult to agree with that view. As already pointed out, Section 14 does not merely refer to "Court", but it refers to "a Court of first instance and a Court of appeal", and these

² AIR 1943 All 162

expressions in our opinion make it amply clear that what the Legislature had in mind were judicial Courts, Courts established by the law of the land, and not Courts in the wider sense of domestic forums or tribunals. This decision of the Allahabad High Court has been followed by the Nagpur High Court in - '*Fatechand v. Wasudeo Shrawan*'³, That High Court also construed the word "Court" used in Section 14 of the Limitation Act as not only statutory Courts but also arbitrators and proceedings before them. The learned Judge below has found himself unable to accept the view taken by the Allahabad High Court and the Nagpur High Court and he has rightly pointed out that the Privy Council decision does not directly apply because the facts that their Lordships were considering were different and that the decision must be restricted to the facts of that case.

6. But the position now, in our opinion, has been wholly simplified by the new Arbitration Act. Neither the Allahabad High Court nor the Nagpur High Court had the new Arbitration Act before them, because the decisions' arose before the new Act was put on the statute book. The relevant section that we have to consider is Section 37(1) and that sub-section provides that all the provisions of the Indian Limitation Act shall apply to arbitrations as they apply to proceedings in Court. Therefore, the Legislature having the decision of the Privy Council before it, instead of leaving it to the Courts to apply the provisions of the Limitation Act by analogy, expressly by a statutory enactment applied the provisions before arbitrators. Therefore, after Section 37(1) was enacted no further question arises as to the application of the principles of the Limitation Act merely by analogy to proceedings before arbitrators. Then we have Sub-Section (5) of Section 37 and that provides :

"Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration)

with respect to the difference referred."

Therefore, we have now a statutory provision for exclusion of time taken up in arbitration, proceedings when a suit is filed, and the question arises of computing the period of limitation with regard to that suit, and the time which is taken up as provided in Section 37 (5). There must be an order of the Court setting aside an award or there must be an order of the Court declaring that the arbitration agreement shall cease to have effect, and the period between the commencement of the arbitration and the date of this order is the period that has got to be excluded. It is therefore no longer open to the Court to rely on Section 14, Limitation Act as applying by analogy to arbitration proceedings. If the Legislature intended that Section 14 should apply and that all the time taken up in arbitration proceedings should be excluded, then there was no reason to enact Section 37(5). The very fact that Section 37(5) has been enacted clearly shows that the whole period referred to in Section 14, Limitation Act is not to be excluded but the limited period indicated in Section 37(5). Therefore, whatever validity the Nagpur and the Allahabad decisions may have had before the Arbitration Act of 1940 was passed, in view of the provisions of Section 37(5) it is clear that Section 14, Limitation Act cannot be

³ AIR 1948 Nag 334

made applicable to arbitration proceedings. Undoubtedly, the time taken up in arbitration proceedings can be excluded, but that time can be excluded not under Section 14, Limitation Act but under Section 37(5), Arbitration Act, and in order to exclude time taken up in arbitration proceedings the tests laid down by the Legislature in Section 37(5) must be applied and satisfied.

7. Limitation Act by analogy, expressly by a statutory enactment applied the provisions of the Limitation Act to the proceedings before arbitrators. Therefore, after Section 37(1) was enacted no further question arises as to the application of the principles of the Limitation Act merely by analogy to proceedings before arbitrators. Then we have Sub-Section (5) of Section 37 and that provides :

"Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred."

Therefore, we have now a statutory provision for exclusion of time taken up in arbitration, proceedings when a suit is filed, and the question arises of computing the period of limitation with regard to that suit, and the time that has got to be excluded is only that time which is taken up as provided in Section 37(5). There must be an order of the Court setting aside an award or there must be an order of the Court declaring that the arbitration agreement shall cease to have effect, and the period between the commencement of the arbitration and the date of this order is

the period that has got to be excluded. It is therefore no longer open to the Court to rely on Section 14, Limitation Act as applying by analogy to arbitration proceedings. If the Legislature intended that Section 14 should apply and that all the time taken up in arbitration proceedings should be excluded, then there was no reason to enact Section 37(5). The very fact that Section 37(5) has been enacted clearly shows that the whole period referred to in Section 14, Limitation Act is not to be excluded but the limited period indicated in Section 37(5).

Therefore, whatever validity the Nagpur and the Allahabad decisions may have had before the Arbitration Act of 1940 was passed, in view of the provisions of Section 37(5) it is clear that Section 14, Limitation Act cannot be made applicable to arbitration proceedings. Undoubtedly, the time taken up in arbitration proceedings can be excluded, but that time can be excluded not under Section 14, Limitation Act but under Section 37(5), Arbitration Act, and in order to exclude time taken up in arbitration proceedings the tests laid down by the Legislature in Section 37(5) must be applied and satisfied.

7A. Now, if we were to apply those tests, no time can be excluded in this particular case. The award has not been satisfied, nor has there been an order declaring the arbitration agreement to cease to have effect. All that happened was that there were certain arbitration proceedings which were abortive and nothing came out of it. Time thus taken up before an arbitrator is time which cannot be excluded under Section 37(5). It may seem rather curious - and it may also in certain cases result in hardship - as to why the Legislature should not have excluded all time taken up in good faith before an arbitrator just as the time taken up in prosecuting a suit or an appeal in good faith is excluded. But obviously the Legislature did not intend that parties should waste time in infructuous proceedings before arbitrators. The Legislature has clearly indicated that limitation having once begun to run, no time could be excluded merely because parties chose to go before an arbitrator without getting an award or without coming to Court to get the necessary order indicated in Section 37(13).

8. In our opinion, therefore, in view of Section 37(5), Arbitration Act it is clear that the plaintiff is not entitled to exclude any time taken up in arbitration proceedings. The result, therefore, is that the suit, is barred by limitation and the learned Judge was right in dismissing it. (The rest of the judgment is not material to the report.)

The result is that the appeal fails and must be dismissed with costs.

Appeal dismissed.