Privy Council Appeal No. 107 *of* 1927.

Bengal Appeal No. 67 *of* 1926.

Ramdutt Ramkissen Dass - - - - - - *Appellants*

v.

E. D. Sassoon and Company - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1929.

Present at the Hearing:

LORD ATKIN.
LORD SALVESEN.
SIR JOHN WALLIS.

[*Delivered by* LORD SALVESEN.]

This is an appeal from an order of the High Court of Judicature at Fort William in Bengal, dated the 8th November, 1926, which on appeal confirmed an order passed by the said High Court in its original jurisdiction on the 19th April, 1926, and dismissed the appellants' application to have an award set aside and taken off the file.

The material facts which are not in dispute have been so fully set forth in the judgment now under review that the barest summary is all that is required to raise the two questions of law on which their Lordships have to decide. Under various contracts between the 16th September, 1913, and the 2nd March, 1914, the appellants sold to the respondents certain quantities of jute. The contracts were all in a form approved by the Calcutta Baled Jute Trade Association and contained an arbitration clause such as is usual in mercantile contracts at the present day. The reference is in the widest form and submits to arbitration "any disputes arising out of or in any way relating to this contract or

to its construction or fulfilment between the parties hereto and whether arising before or after the date of expiration of this contract." The clause also imports the rules and by-laws of the Association which provide machinery for carrying out the reference in the event of one of the parties failing to appoint an arbitrator within 48 hours after having been called upon to do so.

As the respective deliveries of jute sold under the contracts were made questions arose as to the quality of the goods supplied by the appellants and the respondents had to submit to large deductions in respect of alleged inferiority of quality. The cause of action arose at different times, but it is not material to consider the exact dates as the respondents showed due diligence in making their claims, for these were formulated in July, 1915, when a demand for compensation for breach of contract was made on the appellants, who refused to consider same.

On the 15th July, 1915, the respondents appointed an arbitrator to act on their behalf and called upon the appellants to appoint an arbitrator on their behalf, which after some delay they did in December, 1915. The appellants were, however, obviously not anxious that the arbitration should be proceeded with, and they endeavoured to obtain delay in every way that was open to them. Their arbitrator, Babu Gossain, refused to meet with the respondents' arbitrator, Mr. Allen, and ultimately Mr. Allen retired from the reference on the 7th March, 1916, and Mr. Singleton was appointed as arbitrator on behalf of the respondents in his place. The latter was equally unsuccessful in his efforts to get Babu Gossain to meet him, and after many excuses the latter on the 30th July, 1916, withdrew from the matter. On the 27th July, 1916, the respondents wrote to the appellants a letter, referring to the retirement of Babu Gossain, and adding " we therefore call upon you to appoint an arbitrator to act on your behalf in the place of Babu Gossain within 48 hours, failing which we shall apply to the Baled Jute Association to make an appointment on your behalf in accordance with By-Law 15 of the Association." To this letter the appellants replied on the 31st July as follows :—

> " The time limit under the Indian Arbitration Act is over, and we regret that we cannot agree to further extension of time. Regarding your suggestion that you will ask the Chairman of the Association to appoint an arbitrator, we beg to point out that the chairman has no authority to override the provision of the Indian Arbitration Act. Further, we hold that the dispute to settle which this arbitration was agreed upon does not come under the terms of the Allied Baled Jute Association Contract so the Chairman cannot exercise his right under the contract."

To this letter the respondents replied rejecting the contentions of the appellants and calling upon them to appoint an arbitrator to act on their behalf within seven clear days from the date of their letter, in default of which they stated that they would appoint their own arbitrator as sole arbitrator in the reference in accordance with the provisions of the Indian Arbitration Act, section 9 (*b*). As the appellants made no further appointment,

the respondents appointed Mr. Singleton to act as sole arbitrator, which he accordingly did, and in the end made an award of Rs. 68,574. His award, which was dated 28th September, 1916, was duly filed and a warrant was issued directing the sheriff to levy the amounts awarded by seizure of the appellants' goods, and this was done.

The appellants thereafter, on the 8th January, 1917, brought a suit for a declaration that Mr. Singleton's awards were void and inoperative on the ground that his appointment as sole arbitrator was illegal.

On 7th April, 1920, the Judge of the first instance upheld the award, but on appeal to the High Court at Fort William this judgment was reversed and an appeal taken by the present respondents to the Privy Council was dismissed.

These proceedings occupied a considerable time. It was not until 13th December, 1920, that the decision of the High Court was pronounced and the decision of the Judicial Committee of the Privy Council was only issued on the 20th July, 1922. Taking either of these dates, much more than three years had elapsed from the date when the cause of action had arisen. On the 13th December, 1922, the respondents again demanded from the appellants the amount which they claimed under the 11 contracts, and on the 28th December appointed Mr. W. G. Dredge as arbitrator. The appellants declined to appoint an arbitrator on the grounds that the alleged claims were barred by limitation. On the 16th March the Chairman of the Baled Jute Association nominated Mr. D. S. Henderson to act as arbitrator with Mr. Dredge. The appellants thereupon on the 10th April, 1923, applied to the High Court for an order reviewing the various submissions to arbitration. After sundry procedure a consent order was made on the 15th August, 1923, that the matter in dispute be referred to the arbitration of the two arbitrators appointed to "deal with the matter and to make their award in the said reference and at the same time to state a special case for the opinion of this Court [the High Court] on the legal question of whether the defence of limitation can be raised in these matters and if so whether the claim is barred."

The arbitrators having awarded a sum of Rs. 98,258–11–3 stated a case in accordance with the High Court's order. This was decided on the 3rd March, 1926. The High Court held that the arbitration proceedings had been in fact instituted on the 15th July, 1915, and therefore within the period of three years prescribed by the Limitation Act. It is from this order that the appeal has now been brought.

The first question of law which arises is the important general one, whether the Indian Limitation Act, 1908, applies to arbitration proceedings. The relevant section of that Act is section 3—"Subject to the provisions contained in sections 4 to 25 inclusive, every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by

the first schedule shall be dismissed, although limitation has not been set up as a defence."

Their Lordships will consider subsequently what effect, if any, is to be given to sections 4 to 25, but it is admitted that article 115 of the first schedule is that which applies to the subject matter of the present suit. It is expressed as follows :—" For compensation for the breach of any contract expressed or implied not in writing registered and not herein specially provided for," and the period of limitation is three years.

It will be observed that section 3 has in view primarily suits, appeals and applications made in the law courts and makes no reference to arbitration proceedings. Their Lordships were not referred to any case decided in India as to whether this clause can be extended by analogy to arbitration proceedings, but similar language is employed in the English Statute of Limitations, and the question has been considered and decided in one case in England. This is the case of *Astley and Tyldesley Coal and Salt Co.* v. *Tyldesley Coal Co.* (68 L.J., Q.B. p. 252). In that case it was held by the Divisional Court consisting of Bruce and Ridley JJ. that " a submission to arbitration does not *per se* exclude the right of either party to raise the defence of the Statute of Limitations, but if it be intended to exclude such a defence an express term to that effect must be imported into the agreement of submission." In his judgment Bruce J. said :—

> " There is nothing in the submission to take away the right of the Tyldesley Coal Co. to raise any defence in relation to their liability to damages. It seems to me unreasonable that parties to a submission should be precluded from raising the defence of the Statute of Limitation unless a provision to that effect be drawn up and embodied in the submission."

Previous to that decision there had been general statements in other cases which lay down more clearly the principle upon which the decision must be taken to have proceeded. In *Aubert* v. *Maze* (1801, 2 Bos. P. 371, 375), Chambre J. said " There is no doubt that an arbitrator is bound by the rules of law like every other judge," and in *Jager* v. *Tolme* ([1916] 1 K.B. 939 and 953) the judge said " the Council [that was the Council of the London Produce Clearing House] are to give a decision. They are to decide and in the absence of fuller and wider powers expressly given, that means to decide according to the legal rights of parties." The decision in *Tyldesley's* case was cited in a recent case that came before the King's Bench Division, *Board of Trade* v. *Cayzer Irvine & Co.* [1927]1 K.B. 269. In the course of his judgment, Rowlatt J., before whom the case first came, said that

> " the Statute of Limitations (21 Jac. 1 Cap. 16) does not in terms apply to arbitrations. It does not affect the debt. It only limits the remedy, and therefore it seems to me that in an arbitration it is a question of construction whether the submission requires the arbitrator to follow the analogy of the Statute."

In the Court of Appeal Lord Hanworth, M.R., found it unnecessary to consider this question, which as he observed involved the point whether *Tyldesley's* case was correctly decided. Scrutton L.J., reserved to himself liberty to consider " when the case arises whether it was rightly decided " and Romer J. also reserved his opinion upon that point. The case was taken to the House of Lords and is reported in [1927] A.C., p. 610. Viscount Cave in giving judgment, said :—

> " My Lords, I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *In* re *Astley and Tyldesley Coal and Salt Co.* v. *Tyldesley Coal Company*, that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against that view might seriously prejudice the practice of referring disputes to arbitration ; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred."

None of the other judges who took part in the decision of that case found it necessary to express any definite opinion upon the point, although for the purposes of the decision they were content to assume it. Such being the state of the authorities (the paucity of which may be explained by the fact that where contracts contain an arbitration clause the parties usually contemplate that their dispute will be disposed of), their Lordships are of opinion that the law was correctly laid down in *Tyldesley's* case. Although the Limitation Act does not in terms apply to arbitrations, they think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of Law can be equally proponed for the arbitrator's decision unless the parties have agreed (which is not suggested here) to exclude that defence. Were it otherwise a claim for breach of a contract containing a reference clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law courts.

Their Lordships are accordingly of opinion that the first question of law must be answered in the affirmative.

The next question which arises is whether limitation applies in the present case so as to bar the claim of the respondents under the award which they have obtained. The Judges of the High Court held that the arbitration proceedings which resulted in the award now under consideration were in effect a mere continuation of the former proceedings which had been instituted on the 15th July, 1915, but which proved abortive through want of jurisdiction of the arbitrator appointed. Their Lordships are unable to agree in this view. They think that these proceedings came to an end with the decision of the single arbitrator

whose award was ultimately set aside and that the proceedings instituted at a later date after the decision in the Privy Council had been announced cannot be regarded as a mere continuation of the first proceedings. It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject matter and the parties to the suits were identical. The hardships that might arise in such a case have, however, been expressly provided for by the sections to which reference will now be made.

The Indian Limitation Act, unlike the corresponding English Act, contains an elaborate code of provisions which deal, *inter alia*, with the mode of computing the period of limitation prescribed for any suit, etc., and also with the exclusion from the period of limitation of time which has been occupied in legal proceedings. The clause specially founded on Section 14 (1), is as follows :—

> " 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 a like nature, is unable to entertain it.

There is a similar provision as to " applications " and appended to the section there is this explanation :—

> " For the purposes of this section, a plaintiff or an appellant resisting an appeal shall be deemed to be prosecuting a proceeding."

It may be assumed that it had been ascertained before these provisions were formulated that there was a serious risk of injustice arising if the period of limitation, which is in many cases shorter than in England, should be too strictly applied. In Indian litigation it is consistent with the experience of their Lordships that the time necessary for the decision in a suit may be of much longer duration than one is accustomed to in the Courts of Great Britain. Hence the necessity for some provision to protect a *bona fide* plaintiff from the consequences of some mistake which had been made by his advisers in prosecuting his claim.

Holding, as they did, that the proceedings before the second arbitrators were merely a continuance of the first arbitration, it became unnecessary for the learned Judges of the High Court to deal with the question. It had, however, been dealt with by Greaves J. in the application which the appellants made to revoke the submission to the arbitrators and to restrain the present respondents from taking arbitration proceedings thereunder. He said :—

> " It remains for me to decide whether in computing the period of limitation the time occupied in prosecuting the proceedings above referred

> to is to be excluded. It is urged that having regard to the wording of section 14 of the 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. In my view, therefore, * * * * * * in computing the period of limitation the time occupied in the proceedings which ended in the decision of the Judicial Committee is to be excluded."

Their Lordships are in agreement with the reasoning of the learned Judge. Arbitrations under the Indian Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits, but by procuring awards and filing them in Court and resisting applications to set them aside. 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. The Limitation Act has no application in terms to arbitration proceedings and as Greaves J. has pointed out, if the words "suit instituted, appeal preferred, and application made" in Section 3 are to be applied to arbitration proceedings it seems to follow that the same interpretation must be put upon them in Section 14, and that civil proceedings in a Court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the judges of the dispute between them. There is no question here that the respondents were prosecuting with due diligence their claim against the appellants and that the second arbitration was founded on the same cause of action and was prosecuted in good faith before the previous arbitrator who from defect of jurisdiction was found not competent to exercise jurisdiction in the matter. If the period in question during which the respondents' claim was held up because of the proceedings instituted for the purpose of setting aside the first award and in obtaining final judgment on that question is excluded from the period of limitation, there can be no doubt that the respondents here were within the period prescribed. The result is that the anomaly is avoided of there being a different period of limitation in certain cases where a dispute has been referred to arbitration from that which is applied to disputes dealt with in the ordinary courts.

For these reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs to the respondents.

In the Privy Council.

RAMDUTT RAMKISSEN DASS

v.

E. D. SASSOON AND COMPANY.

DELIVERED BY LORD SALVESEN.

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