

PETITIONER:
PANCHU GOPAL BOSE

Vs.

RESPONDENT:
BOARD OF TRUSTEES FOR PORT OF CALCUTTA

DATE OF JUDGMENT 23/04/1993

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
MOHAN, S. (J)

CITATION:
1994 AIR 1615 1993 SCR (3) 361
1993 SCC (4) 338 JT 1993 (3) 537
1993 SCALE (2) 696

ACT:

Arbitration Act, 1940:
Ss. 5, 12, 33 and 37:
Limitation Act, 1908/1963:
Delay of 10 years in seeking reference to arbitration—Held,
limitation applies to arbitration—Claim barred by delay—
Courts below justified in rescinding arbitration agreement.

HEADNOTE:

On May 27, 1978, the petitioner entered into an arbitration agreement under which he had to execute a certain work within 9 months. He averred that he had sent his bills on July 12, 1979, but payment was not made. On November 28, 1989, for the first time he sent a notice to the respondent for reference to arbitration. The respondent approached the High Court under Ss. 5, 12 and 33 of the Arbitration Act, 1940. A learned Single Judge held that the claim was hopelessly barred by limitation, and cancelled the arbitration agreement. A Division Bench dismissed the Appeal.

On appeal, this Court addressed itself to 2 questions: Whether the High Court could permit a party to rescind an arbitration agreement; and whether delay can be a ground for rescinding such agreement.

Dismissing the appeal, this Court,

HELD: 1. The Court has the power and jurisdiction under Ss. 5 and 12 to grant leave to the applicant in exceptional circumstances to revoke the contract of arbitration. The Court should exercise the power sparingly, cautiously and with circumspection in permitting a party to rescind an arbitration agreement he had entered into voluntarily. (365-B)

2. By virtue of s. 37 of the Arbitration Act, the provisions of the Limitation Act would apply to arbitrations, notwithstanding any term in the contract to the contrary. (366-B)

3. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of

action would have accrued, just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued. (368-D-E)

Ram Dutt Ramkissen Dass v. Sassoon (E.D.) & Co. (1929) (56) 1A 128 (PC); Naamlooze Vennootschap Handels-En-Transport Maatschappij' Vulcan' v. A/S J. Ludwig Mowinckels Rederi [1938] 2 All ER 152; Pegler v. Railway Executive [1948] AC 332 at 338 and; West Riding of Yorkshire Country Council Huddersfield Corporation [1957] 1 AR ER 669 and Russell on Arbitrations; Justice Bachawat Law of Arbitration, applied.

4. Delay defeats justice: Defaulting party should hear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. (369-F)

Mustiu and Boyd's Commercial Arbitration (1982 edn.), referred to.

5. The claim in the case on hand is undoubtedly hopelessly barred by limitation as the petitioner by his conduct slept over his right for more than 10 years. The High Court justifiably exercised the discretionary power and jurisdiction under Ss. 5 and 12 (2) (b) in permitting the respondent to rescind the agreement. (370-E)

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Special Leave Petition (C) Nos. 4304-06 of 1993.

From the Judgment and Order dated 18.12.1992 of the Calcutta High Court in Appeal from Original Order Nos. 105, 104, and 106 of 1991.

Panchugopal Bose-in-person for the Petitioner.

D.P. Gupta, Solicitor General, A.K Sil and G. Joshi for the Respondent.

The Judgment of Court was delivered by

K. RAMASWAMY, J.: These three Special Leave Petitions arise out of Arbitration Agreement said to be executed by the petitioner on May 27, 1978 which provided that the petitioner had to execute the work within 9 months. It is 363

his claim that while executing the work he sent the bills on July 12, 1979 but payment was not made. For the first time he sent notice on Nov. 28, 1989 to the respondent for reference to the arbitration. On receipt thereof, the respondent filed an arbitration suits in the Calcutta High Court under ss. 5, 12 and 33 of the Arbitration Act, 1940 for short the Act. The learned Single Judge held that the claim was hopelessly barred by limitations. There was no proof that the petitioner had sent any claim in July, 1979. Since the Claim was made long after 10 years the arbitration cannot be proceeded with. Accordingly finding that it to be an exceptional case for interference, the learned Single Judge cancelled the arbitration clause 68 of the contract in matter Nos. 1326, 1364 and 1365/90 dated November 23, 1990. On further appeals the division bench by its order dated December 18, 1992 in Appeal Nos 104/90 etc. dismissed the appeals. Thus these special leave petitions.

The contention of the petitioner appearing in person is that Clause 68 of the Contract provides for appointment of an arbitrator and when the petitioner has legally invoked clause 68 and issued notice to the respondent, the

respondent is duty bound to appoint an arbitrator and on its failure it is open to him to approach the Court for appropriate remedy under s. 8 of the Act for appointment of an arbitrator. The High Court scuttled this procedure in exercising the power under S. 5 of the Act which is illegal and ultra vires. He further contented that Section 5 has no application to the facts of this case. We have heard also Shri D.P. Gupta, the learned Solicitor General for the respondent.

The question for consideration is whether the High Court was justified in permitting the respondent to rescind the contract of Arbitration provided in Clause 68 of the Contract. Undoubtedly, Clause 68 provides reference to arbitration of all or any of the disputes or differences enumerated therein that have arisen between the parties, at the instance of either party to the contract. It empowers either party to issue notice calling upon the Engineer to refer the dispute or difference for arbitration. In this case, as found by the High Court that though the petitioner was said to have made the claim for payment for the first time in July 12, 1979. Though there is no proof in that behalf, and the respondent claimed that the petitioner had abandoned the contract, even assuming that any claim was as a fact made in July, 1979 and payment was not made, the petitioner had not taken follow up action thereafter for well over 10 years. It was open to him to avail Clause 68 of the contract seeking reference to the arbitration. No such action was taken till November 28, 1989 Immediately on receipt of the notice, the respondent invoked the jurisdiction of the Calcutta High Court under ss. 5 and 12 at 330 of the Act.

Section 5 provides thus:

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"The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement".

Therefore, Section 5 postulates that there must be an order of appointing an arbitrator or umpire and thereafter the same cannot be revoked except with the leave of the Court, unless a contrary intention is expressed in the agreement. Exfacie it would appear that appointment of an arbitrator is a condition to avail the remedy under s.5. Section 12 accords consequential power which postulates that the power of the Court where Arbitrator is removed or his authority revoked. Subsection (2) says that:

"Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred."

Therefore, by a conjoint reading of ss. 5 and 12 (2) (b) it is clear that the court has been given power in given circumstances to grant leave to a contracting party to have the arbitrator or umpire removed and the arbitration agreement entered into with other contracting part revoked. Where the Court grants such authority consequentially arbitration agreement shall cease to have effect with respect to the difference or dispute. It flows therefrom that there exist implied power vested in the court permitting a party to avail the remedy under ss. 5 & 12 to rescind the arbitration agreement. In all cases it is not a

condition precedent that there should in the first instance be an order appointing an arbitrator or he should enter upon reference for adjudication. In given circumstances and the factual background the court may be justified to exercise the power under ss.5 and 12. The question then is under what circumstances such power would be exercised. This Court in M/s Amarch and Lalit Kumar v. Shree Ambica Jute Mills Ltd. [1963] 2 SCR 953 at 969 held thus: "In exercising its discretion cautiously and sparingly the Court has no doubt (kept) these circumstances in view, and consider that the parties should not be relieved from a tribunal they have chosen because they fear that the arbitrator's decision may go against them. The grounds on which leave to revoke may be given have been put under five heads:

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1. Excess or refusal of jurisdiction by arbitrator; 2. Misconduct of arbitrator; 3. Disqualification of arbitrator; 4. Charges of Fraud; and 5. Exceptional cases.

Thus it could be seen that the Court has the power and jurisdiction under ss. 5 and 12 to grant leave to the applicant in exceptional circumstances to revoke the contract of arbitration. The court should exercise the power sparingly, cautiously and with circumspection to permit a party to the contract of a arbitration voluntarily entered into to relieve the party from dispute or difference and to order that the arbitration agreement shall cease to have effect in respect of the dispute or difference.

In this case we have seen that even assuming that the petitioner had put forward his claim in July, 1979 and the respondent had not acted thereon till November 28, 1989 for long 10 years he did not move his little finger to approach the Engineer and later the Court. For the first time on November 28, 1989 he issued notice to the respondent to refer the case for arbitration. Clause 68 of the Contract provides that when any disputes or differences has arisen he should approach the Engineer in the first instance seeking reference of it to an arbitration and if the Engineer refuses to act upon or omits to refer the dispute to the arbitration within 15 days from the date of the receipt of notice, then it is open to him to approach a Civil Court for reference to the arbitration. On his own showing cause of arbitration has arisen in July, 1979, the petitioner did not take any action from then. On the other hand when notice was issued in November, 1989 the respondent immediately approached the Court and sought its leave to rescind the agreement explaining the circumstances. The Court exercised the jurisdiction in permitting the respondent to revoke the arbitration agreement. The question then is whether it is justified?

Section 37 (1) of the Act provides that all the provisions of the Indian Limitation Act, 1908 (since amended Act came into force in 1963) shall apply to arbitrations as they apply to the proceedings in court. Sub-section (2), employing non-obstanti clause, says that notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is--made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement. Sub-section (3) thereof states that for the purposes of this section and of the Indian Limitation Act, 1908 an arbitration shall-be

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deemed to be commenced when one party to the arbitration

agreement serves on the other party thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated. Sub-sections (4) and (5) are omitted as being not material. It would, therefore, be clear that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question is when the cause of arbitration arises in the absence of issuance of a notice or omits to issue for long time or contract to the contrary?

It is stated in Robertson's History that honest men dread arbitration more than they dread law suits. The arbitrations differ from legal proceedings proper only in the choice of tribunal and all ordinary defences legally permissible are available to the Parties. Parties to an arbitration may voluntarily determine among themselves the procedure to be followed including the constitution of the arbitral tribunal to adjudicate the dispute or differences arising from the contract including the power of the arbitrator. They could also contract restricting the limitation for adjudication. Subject to the above s. 37 of the Act regulates the limitation for the arbitration proceedings. In *Ram Dutt Ramkissendass v. Sassoon (E.D) & Co.* 1929 (56) Indian Appeals 128, the Privy Council held that although, it is indisputable that, in a modern arbitration, the principles of equity must be applied just as they would now be applied in a court of law, since upon a special case for the opinion of the court under Sec. 7 if the Arbitration Act or the Judicature Act, 1925, s.94 (replacing sec. 19 of the Arbitration Act), the court is, and has long been, bound to apply equitable rules and relief. It is difficult to see how the equitable view of the applicability of Limitation Act, 1908, to a case of debt can be excluded in a legal arbitration. Although the Limitation Act does not in terms apply to arbitrations, they (their Lordships of the Judicial Committee) think that in mercantile reference 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 contract containing a reference cause 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

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might be made to the law courts. This ratio was approved by House of Lords in *Naamlooze Vennootschap Handels-En-Transport-Maatschappij "Vulcaan" v. A/S J. Ludwig Mowinckels Rederi* [1938]2 All E.R. 152, Lord Maugham, L.C. speaking for the unanimous Court held that in considering whether the Limitation Act would apply to arbitration (pre-statutory arbitrations), it was held that this seems to be a good reason for holding that there may well be cases where the

object of both parties to the arbitration might be to determine whether a sum was due, though possible or certainly not recoverable by legal Proceedings. We are, however, here concerned with an arbitration in which legal rights are being advanced or denied. If the defence of the statute is to be deemed admissible, it would seem that the claims of one party or the other might be put forward long after the persons who could give useful evidence had died and the most relevant documents had been destroyed. If the legal defence were to be excluded, it was in this agreement that one would expect to find such a provision. The matter does not rest, because we have to consider how far the suggested elimination of defences available at law or in equity must logically be held to extend to other arbitrations. If the party defending may not rely on the Statute of Limitations, can he rely on the Statute of Frauds, or the Act partially replacing it? Could he rely in a commercial arbitration on the Gaming Act? A number of like questions might be asked. It is indisputable that, in a modern arbitration, the principles of equity must be applied just as they would now be applied in a court of law. In the concluding findings it is said thus:

"In the circumstances of this case as above-stated, it is, I think, impossible to come to the conclusion that there was an implied agreement between the parties to exclude any defence under any Statute of Limitations. In the absence of such an implied agreement, the Limitation Act was open to the respondents, and the consequence must follow that the arbitrator was acting rightly in admitting the defence under the statute".

In *Pegler v. Railway Executive* 1948 Appeal Cases 332 at 338, House of Lords held that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued. While accepting the interpretation put up by Atkinson, J. as he then was in the judgment under appeal, learned Law Lords accepted the conclusion of Atkinson, in the language thus: "the cause of arbitration" corresponding to "the cause of action" in litigation "treating a cause of arbitration in the same way as a cause of action would be treated if the proceeding were in a court of law."

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In *West Riding of Yorkshires Country Council v. Huddersfield Corporation* [1957] 1 All E.R. 669, the Queens Bench Division, Lord Goddard, C. J. (as he then was) held that the Limitation Act applies to arbitrations as it applies to actions in the High Court and the making, after a claim has become statute barred, of a submission of it to arbitration, does not prevent the statute of limitation being pleaded. Russell on Arbitration, 19th Edition, reiterates the above proposition. At page 4 it was further stated that the parties to an arbitration agreement may provide therein, if they wish, that an arbitration must be commenced within a shorter period than that allowed by statute; but the court then has power to enlarge the time so agreed. The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.

Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been

no arbitration clause, the cause of action would have accrued. Just as in the case of civil actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

In Russell on Arbitration, at pages 72 and 73 it is stated thus:

"Disputes under a contract may also be removed, in effect, from the jurisdiction of the court, by including an arbitration clause in the contract, providing that any arbitration under it must be commenced within a certain time or not at all, and going on to provide that if an arbitration is not so commenced the claim concerned shall be barred. Such provisions are not necessarily found together. Thus the contract may limit the time for arbitration without barring the claim depriving a party who is out of time of his right to claim arbitration but leaving open a right of action in the courts. Or it may make compliance with a time limit a condition of any claim without limiting the operation of the arbitration clause, leaving a party who is out of time with the right to claim arbitration but so that it is a defence in the arbitration that the claim is out of time and barred.

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Nor, since the provisions concerned are essentially separate, is there anything to prevent the party relying on the limitation clause waiving his objection to arbitration whilst still relying on the clause as barring the claim."

At page 80 it is stated thus:

"An extension of time is not automatic and it is only granted if "undue hardship" would otherwise be caused. Not all hardship, however, is "undue hardship,"-, it may be proper that hardship caused to a party by his own default should be borne by him and not transferred to the other party by allowing a claim to be reopened after it has become barred. The mere fact that a claim was barred could not be held to be "undue hardship."

The Law of Arbitration by Justice Bachawat in Chapter XXXVII at p.549 it is stated that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrues, as also in the case of arbitrations, the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of s. 37 (1) 'action' and cause of action' in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement.

Arbitration implies to charter out timely commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the court would be justified to permit a contracting party to rescind the contract or the court can revoke, the authority to refer

the disputes or differences to arbitration. Justice Bachawat in his Law of Arbitration, at p. 552 stated that "in an appropriate case leave should be given to revoke the authority of the arbitrator'. It was also stated that an ordinary submission without special stipulation limiting or conditioning the functions of the arbitrator carried with it the implication that the arbitrator should give effect to all legal defences such as that of limitation. Accordingly the arbitrator was entitled

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and bound to apply the law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings, and like interpretation was given to s. 14 of the Limitation Act, The Proceedings before the arbitration are like civil proceedings before the court within the meaning of s. 14 of the Limitation Act, By consent the parties have substituted the arbitrator for a court of law to arbitrate their disputes or differences. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence.

In Mustiu and Boyd's Commercial Arbitration (1982 Edition) under the heading "Hopeless Claim" in Chapter 31 at page 436 it is stated thus:

"There is no undoubtedly jurisdiction to interfere by way of injunction to prevent the respondent from being harassed by claim which can never lead to valid award for example in cases where claim is brought in respect of the alleged Arbitration agreement which does not really exist or which has ceased to exist. So also where the dispute lies outside the scope of Arbitration agreement".

The case on hand is clearly and undoubtedly hopelessly barred claim as the petitioner by his conduct slept over his right for more than 10 years. Statutory arbitrations stand apart. In these circumstances it is an exceptional case and the courts below have justifiably exercised their discretionary power, and jurisdiction under ss. 5 and 12(2) (b) to permit the respondent to rescind the arbitration agreement and declared that the arbitration agreement shall cease to have effect with respect to the difference or dispute referred to in the notice of the petitioner and relieved the parties from the arbitration agreement. The Special Leave Petitions are accordingly dismissed without costs.

U.R

Appeal dismissed.

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