

APPEAL FROM ORIGINAL CIVIL.

Before Costello and Panckridge J.J.

1938

April 7.

JETHA LAL LAXMI CHAND SHAH

v.

AMRITA LAL OJHA.*

Arbitration—Award made after time fixed by Court—Enlargement of time by Court—Code of Civil Procedure (Act XIV of 1882), s. 521—(Act V of 1908), Sch. II, paras. 3, 8, 15—Indian Arbitration Act (IX of 1899), s. 12.

Under the provisions of para. 8 of Sch. II of the Code of Civil Procedure, the Court has power to enlarge the time for making the award even after the award has actually been made.

Lord v. Lee (1) relied on.

Patto Kumari v. Upendra Nath Ghosh (2) approved.

Shib Krishna Dawn & Co. v. Satish Chunder Dutt (3) dissented from.

APPEAL by the defendant from the order of Ameer Ali J.

By an order of Court, all matters in dispute in the suit were referred to the arbitration of Mr. Tri Bhuban Hira Chand. By another order made on November 23, 1937, the time for making the award was extended for a month. The time having expired during the Christmas Vacation, the award should have been filed on January 3, 1938, when the Courts reopened. But it was actually submitted on January 4, 1938. On February 7, 1938, the defendant made an application to set aside the award on the ground that the award was made after the time had expired. When the application came to be heard before Ameer Ali J., an oral application was made on behalf of the plaintiff asking for extension of the time for completion of the award to operate retrospectively, and the learned Judge extended the time until the end of January, 1938.

*Appeal from Original Order, No. 20 of 1938, in Suit No. 595 of 1937.

(1) (1868) L. R. 3 Q. B. 404.

(2) (1919) 4 Pat. L. J. 265.

(3) (1911) I. L. R. 38 Cal. 522.

Clough for the appellant. The Court has no jurisdiction to extend the time after the award has in fact been made. *Shib Krishna Dawn & Co. v. Satish Chunder Dutt* (1). Enlargement of time will have the effect of interfering with the operation of para. 15 of Sch. II of the Code of Civil Procedure. Section 521 of the Code of Civil Procedure of 1882 and para. 15 of Sch. II of the present Code contemplate that award is void when it has been made after expiry of the time fixed by the Court and the Court cannot extend the time for making the award. *Har Narain Singh v. Chaudhrain Bhagwant Kuar* (2).

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S. N. Banerjee (Sr.) and S. N. Banerjee (Jr.) for the respondent. There is no material difference in the language of para. 8 of Sch. II of the Civil Procedure Code and the language of s. 12 of the Indian Arbitration Act and s. 9 of the English Arbitration Act. Under s. 15 of the Common Law Procedure Act of 1854 also the Court has power to enlarge the time for making the award. Under the English Acts the Court can enlarge the time even after the award has been made.

Lord v. Lee (3); *May v. Harcourt* (4).

Paragraph 15 of Sch. II of the Code does not render an award made out of time a nullity.

Patto Kuamri v. Upendra Nath Ghosh (5).

Shib Krishna Dawn & Co. v. Satish Chunder Dutt (1) was doubted by Chitty J. in *Sri Lal v. Arjun Das* (6).

COSTELLO J. The short point which arises in this appeal is whether or not the learned Judge had power to extend the time for the filing of the award which was submitted to the Court on January 4, 1938. No question has been canvassed before us as

(1) (1911) I. L. R. 38 Cal. 522.

(2) (1891) I. L. R. 13 All. 300.

(3) (1868) L. R. 3 Q. B. 404.

(4) (1884) 13 Q. B. D. 688.

(5) (1919) 4 Pat. L. J. 265.

(6) (1914) 18 C. W. N. 1325.

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to whether the learned Judge had before him materials upon which he could exercise his discretion, if, in fact, he had jurisdiction to make any order for the enlargement of time for the submission of the award; nor was that question raised in any of the grounds set forth in the memorandum. It follows, therefore, that the only question we have to determine is a very short point of law. It is perhaps desirable, however, that I should state briefly how the matter comes before this Court and refer to one or two chronological features of the case.

There was a suit brought for the determination of the question whether or not the plaintiff Amrita Lal Ojha was entitled to a declaration that a certain business belonged to him and if so, whether he was entitled to a sum of money from the defendant and to what sum. The matter was referred to arbitration by an order made by this Court on May 3, 1937. By that order the period fixed for the making of the award was two months. Then by an order, dated September 2, 1937, that period was extended to October 8, 1937. By another order, made on November 23, 1937, the time for making the award was by consent of the parties extended for a further month. The time thus allowed expired during the Christmas Vacation. The Court reopened on January 3, 1938, and, accordingly, the award ought to have been filed on or before that date. But it was actually submitted on January 4, 1938. It appears from the letter written by the arbitrator to the Registrar of this Court, which letter is dated January 3, 1938, that the arbitrator had not filed his award on or before January 3, 1938. Had that been done no question would have arisen. In the circumstances, the time for making the award had expired and then the present appellant was in the position of being able, so it is said, to ask the Court to set aside the award under the provisions of para. 15 of the Second Schedule of the Code of Civil Procedure. He, accordingly, on the 7th February, made an application to this Court for that purpose. The

application was that the award of Mr. Tri Bhuban Hira Chand, the arbitrator appointed in the suit, should be set aside; that the order for arbitration dated May 3, 1937, be superseded and that the suit should proceed in the ordinary way. In answer to that application, when the matter came before Ameer Ali J. an oral application was made asking for extension of time for the completion of the award to operate retrospectively. The learned Judge points out that normally such an application should be made in writing and should be supported by an affidavit. No serious objection was taken to the form of the application and we need not deal with the question whether or not any objection could have been taken on that score.

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The only matter which was seriously argued before the learned Judge was whether he had power to extend the time for the filing of the award having regard to the fact that the award had, in fact, been made and filed by the arbitrator some little time before the application was made to the Court. The learned Judge took the view that he had power to grant the application made on behalf of the plaintiff and he extended the time until the end of January, 1938. In order to ascertain whether there is power in the Court to extend time after the award was made it is necessary to consider the exact words of the relevant paras. of the Second Schedule of the Code, that is to say, para. 8, which provides that where the arbitrators cannot complete the award within the period specified in the order, the Court may, if it thinks fit, allow further time and from time to time either before or after the expiration of the period fixed for the making of the award and enlarge such time or may make an order superseding the arbitration and subsequently proceed with the suit.

On behalf of the plaintiff, who is the respondent in this appeal, it has been pointed out that there is no material difference between the wording of para.

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8 and the wording of s. 12 of the Indian Arbitration Act which is in these terms :—

The time for making an award, may, from time to time, be enlarged by order of the Court whether the time for making the award has expired or not.

That section itself is merely a reproduction of the corresponding s. 9 of the English Arbitration Act of 1889 which says :—

The time for making an award may from time to time be enlarged by order of the Court whether the time for making the award has expired or not.

In comparing these two enactments, however, one should observe that para. 8 begins by describing, as it were, a kind of condition precedent which must exist before the Court can exercise its power for enlargement of time. I refer to the words “where the arbitrators cannot complete the award within the period specified in the order”. For our present purposes, however, I do not consider it necessary to ascertain what is the precise effect, if any, of the existence of these words in para. 8, because I think that it must be assumed for the purposes of the present case that the arbitrator could not complete his award within the time specified, that is to say, on or before January 3, 1938, and, in eliminating those words for our present purpose, we arrive at this conclusion that there is really no marked difference between the language of para. 8 of Sch. II of the present Code and the language of s. 12 of the Indian Arbitration Act and s. 9 of the English Arbitration Act. This latter section is, as it were, the lineal descendant of the corresponding provision of the Common Law Procedure Act, 1854, in which s. 15 provides :—

The arbitrator acting under any such document or compulsory Order of Reference as aforesaid, or under any Order referring the Award back, shall make his Award under his Hand, and (unless such Document or Order respectively shall contain a different Limit of Time) within Three Months after he shall have been appointed and shall have entered on the Reference, or shall have been called upon to act by a Notice in Writing from any Party, but the Parties may by Consent in Writing enlarge the Term for making the Award; and it shall be lawful for the Superior Court of which such Submission, Document, or Order is or may be made a Rule or Order, or for any Judge

thereof, for good Cause to be stated in the Rule or Order for Enlargement, from Time to Time to enlarge the Term for making the Award.

Taking, however, the words that are relevant for our present purpose we find that in s. 15 of the Common Law Procedure Act, 1854, it is enacted that it shall be lawful for the Superior Court..... or any Judge thereof..... to enlarge the time for making the award. These words, as I have said, were subsequently put into the English Arbitration Act, 1889, when the law relating to arbitration was codified by that Act. The tracing of the history of the relevant provisions in the Indian Arbitration Act is of importance for the reason that there are in England a number of decided cases which make it quite clear that under the provisions of s. 15 of the Common Law Procedure Act, 1854, and under the provisions of s. 9 of the English Arbitration Act, 1889, it is competent to the Court to enlarge the time even after the award had actually been made. Of the English authorities, I need only refer to *Lord v. Lee* (1). In that case, it was held that a Judge had power to enlarge the time after the award had been made and that the effect of the enlargement was the same as if it had been made by consent of parties, namely, to ratify what had been done by the arbitrator without authority and that the award was, therefore, valid. Similarly, there are in this country a number of decisions which make it quite clear that, under the provisions of s. 12 of the Indian Arbitration Act, 1899, the Court can enlarge the time even after the award has in fact been made by the arbitrator. It comes to this that the only question that remains to be decided for the purpose of the present appeal is whether the power conferred on the Court by para. 8 of the Second Schedule of the Code is as extensive as the power conferred on the Court by s. 12 of the Indian Arbitration Act, 1899. Before the learned Judge there was apparently a considerable discussion as to whether or not the position was the same in the Code of 1908 as it had

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been under the analogous provision of the earlier Code. Decisions were cited before the learned Judge for the purpose of showing that, at any rate under the earlier law, the Court would not have been entitled to enlarge the time under circumstances such as those which presented themselves before Ameer Ali J. I do not think it necessary to discuss at all the question of what the legal position was prior to 1908. For, after all, we are only concerned to interpret the relevant paras. of the Second Schedule of the Code and they are (in addition to para. 8, which I have already quoted at length) paras. 3 and 15. The latter part of this paragraph is of some importance for our present consideration. In the relevant parts of this paragraph of the Code we find this enactment :—

An award remitted under para. 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely :—

(c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

Picking out once more the essentials for our present purpose of that paragraph we obtain this proposition. No award shall be set aside except on the ground of the award having been made after the expiration of the period allowed by the Court. It was on the strength of that proposition that the particular application out of which this appeal has arisen was made.

It has been argued by Mr. Clough on behalf of the appellants that, on looking at the section and comparing it with the corresponding section in the earlier Code, one ought to come to the conclusion that it is not possible in law for a Judge acting under the provisions of para. 8 to make an order which would have the effect of interfering with the operation of s. 15; but the cogency of that argument depends on the precise meaning which should be attached to para. 15. On the whole, I think the view taken by

the Patna High Court in the case of *Patto Kumari v. Upendra Nath Ghosh* (1) is the correct view of the position. That case was decided by Atkinson and Das JJ. We find at p. 269 of the report this passage in the judgment:—

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Now the essential difference between the old Code and the new Code appears to be this, that whereas the old Code, by s. 521, expressly made an award out of time a nullity, the existing rule varies the old section of the prior Code, by providing that if an award is made out of time it only affords a ground or reason for setting aside the award if the parties so desire to assert the right; provided the Court acting within its discretion is satisfied that the ground upon which the validity of the award is impeached is just and fair, and that in equity and fair dealing it ought and should be set aside. Rule 15, therefore, does not render an award made out of time *per se* a nullity; it is merely voidable, and if not sought to be set aside within ten days from the time when the award is filed it is binding upon the parties thereto notwithstanding its infirmities.

Sir Lawrence Jenkins laid down this principle in *Shib Kristo Daw & Co. v. Satish Chandra Dutt* (2) and authority will also be found in support of the same proposition in *Kahan Singh v. Mohan Lal* (3) in which Chief Judge Rattigan, referring to the decision of Sir Lawrence Jenkins, already cited, is reported as stating: "This exposition of the law accords, if I may venture to say so, with my own views as to the proper interpretation of para. 15 of Sch. II of the present Code of Civil Procedure, and I accordingly hold that the award before me, though made after the expiration of the period fixed by this Court, was not a mere nullity, and at most was liable to be set aside upon an application by one or other of the parties affected thereby."

Later on, in the course of their judgment, the learned Judges in the Patna High Court say this at p. 273:—

It is difficult to distinguish the English cases in principle from the law applicable to arbitration proceedings in India because the Civil Procedure Code is very much akin, and very alike, in its terms to the procedure provided by the corresponding statute in England, generally known as the Common Law Procedure Act, which applies to arbitration proceedings of such a character as we have in this case, *viz.*, arbitration proceedings in respect of a matter which affects the subject-matter of a suit pending before a Court of Justice.

From that the learned Judges drew an inference, in my opinion rightly, that as it had been clearly decided under the provisions of the Common Law of Procedure Act, 1854, the Court had a power to enlarge time even after the award had been made; the law must be taken to be the same in this country and, accordingly, in para. 15 of the Second

(1) (1919) 4 Pat. L. J. 265.

(2) (1912) I. L. R. 39 Cal. 822.

(3) [1916] A. I. R. (Lah.) 80.

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Schedule there is power to enlarge the time even though the award had already been made. It was laid down in the Patna case to which I have referred, that under r. 8 it is primarily the Court alone which has authority to extend the time for making an award but there may be circumstances arising from the conduct of the parties which would justify an inference that the parties intended and impliedly agreed, that even though the time for making an award was not extended by the Court, the arbitrators should make their award even though literally out of time. Ameer Ali J. seems to have treated the decision of the Patna High Court rather lightly and he must have relied more upon the analogy between para. 8 of the Second Schedule and the corresponding provision of the Arbitration Act. I ought perhaps to say that we are unable to agree with the decision of Harington J. in the case of *Shib Krishna Dawn & Co. v. Satish Chunder Dutt* (1) in which His Lordship says at p. 524:—

I agree with the view that if the time had expired, and no award had been made, that that section does give the Court power to extend the time for the making of the award, notwithstanding that it had expired at the time of the application; but it appears to me that that section does not enable the Court to extend the time for the doing of a particular act when in truth and in fact the act has already been done.

The correctness of that decision was doubted by Chitty J. in the case of *Sri Lal v. Arjun Das* (2). In my opinion, it seems quite clear from the wording of para. 8 itself considering it in conjunction with the corresponding paragraph of the Indian Arbitration Act that there is no such limitation on the power of a Court as Mr. Clough has contended. In my opinion, the words "fixed for the making of an award" are merely definitive of the period which is referred to in the paragraph. In other words, the whole phrase "period fixed for the making of an award" must be taken to be a description of the thing which the Court was entitled to enlarge. The period fixed for the making of the award is quite, obviously, it seems to me, either the period originally

(1) (1911) I. L. R. 38 Cal. 522.

(2) (1914) 18 C. W. N. 1325.

specified in the order of reference within, of which the award was to be made and submitted or a period subsequently allowed after the expiration of that period. In the present instance, consequently, the period fixed for the making of this award was the period which expired on January 3, 1938 and so in form the application made by Mr. Banerjee in answer to Mr. Clough's application was an application for extension of that period, that is to say, the period which expired on the 3rd January. The fact that the award had already been made, in my opinion, did not affect the power of the Court one way or the other. It is, however, a factor which ought to be taken into consideration for the purpose of determining whether or not the application for enlargement of time should be granted or not.

In my view, the words of para. 8 of the Second Schedule of the Code confers the same power on the Court as regards enlargement of time as is conferred by s. 12 of the Indian Arbitration Act, 1899.

The result is that this appeal is dismissed with costs.

PANCKRIDGE J. I agree.

Appeal dismissed.

Attorneys for appellant: *Kar Mehta & Co.*

Attorneys for respondent: *Mukherjee & Biswas.*

A. C. S.

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