

1930

DAMODAR  
NARAYAN  
v.THE SECRETARY  
OF STATE  
FOR INDIA

Murphy J.

section 63. Assuming that such an order could be made, it seems to me that Article 120 of the Indian Limitation Act would apply, and that the plaintiff's claim was time-barred in any case.

I agree that the appeal should be dismissed with costs.

*Decree confirmed.*

B. G. R.

### APPEAL FROM ORIGINAL CIVIL.

*Before the Honourable Mr. J. W. F. Beaumont, Chief Justice,  
and Mr. Justice Blackwell.*

1930  
September 12.

SHIVJI POONJA KOTHARI, A FIRM (ORIGINAL PETITIONERS), APPELLANTS *v.*  
RAMJIMAL BABULAL, A FIRM (ORIGINAL RESPONDENTS), RESPONDENTS.\*

*Letters Patent, clause 15—Appeal—Order refusing to set aside award—Indian Arbitration Act (IX of 1899), section 12—Extension of time for making award—Power of Court to extend time after award made—Substantive application by party praying for extension—Notice of application to other side—Bombay High Court Rules, 1930 (original side), rules 373, 377, 378.†*

An order dismissing a petition to set aside an award made under the Indian Arbitration Act (IX of 1899), is a "Judgment" within the meaning of clause 15 of the Letters Patent, and is appealable.

\*O. C. J. Appeal No. 3 of 1930.

†Rules 373, 377 and 378 are as follows:—

"373. Save as aforesaid all applications under the Act other than under section 19 of the Act shall be made by petition except as hereinafter otherwise provided and the person making any application shall be the petitioner, and the person served therewith the respondent. Applications under section 19 of the Act shall be made by motion or summons in the suit which the applicant seeks to have stayed. The respondents to such motion or summons or their attorneys on the record of the suit shall be served with notice thereof in the usual way.

377. Every petition or copy thereof shall specify the persons affected thereby, Persons on whom and upon whom notice has to be served as hereinafter notice to be served to be specified. provided.

378. Upon any application by petition under the Act the Judge shall direct notice thereof to be given to all persons specified in the petition as directed in Rule 377 and such other persons specified and others. as may seem to him to be liable to be affected by the proceedings, requiring if necessary such persons to show cause within the time specified in the notice why the relief sought should not be granted and if no sufficient cause be shown the Judge shall pass such order as the circumstances of the case may require."

The Court has power under section 12 of the Indian Arbitration Act to extend the time for making an award, even after the award is published and filed in Court.

*Tejpal Jamunadas v. Nathmull & Co.*,<sup>(1)</sup> followed.

A party seeking extension of time after the award is made must file a substantive application for the purpose by a petition under rule 373 of the Bombay High Court Rules, 1930 (original side), and under rule 378 should serve the same on the persons affected thereby.

#### PETITION under the Arbitration Act.

The petitioners and the respondents were members of the Bombay Marwari Chamber of Commerce Limited. The petitioners purchased wheat from the respondents and disputes arose between the parties in connection with those transactions which were referred to arbitration under the rules of the chamber. The time for making the award was fixed for January 20, 1929. Before the expiry of that period, the arbitrators applied to the chairman of the chamber to extend the time by one week. In the absence of the chairman the vice-chairman extended the time as requested and thereafter on an application made on January 27, 1929, also granted a further extension for one week. The award was made on February 1, 1929.

The award was filed in Court on August 2, 1929, and notice of filing the award was served on the petitioners on August 16, 1929. On August 26, 1929, the petitioners filed their petition, under the Arbitration Act, for setting aside the award. At the hearing of the petition, as it appeared that the award was technically beyond time, counsel for the respondents made an oral application to the Judge (Mirza J.) for extension of time for making the award, which was granted. The petition for setting aside the award was then dismissed.

The petitioners appealed against the order dismissing the petition.

<sup>(1)</sup> (1919) 46 Cal. 1059.

1930

SHIVJI POONJA

v.

RAMJIMAL  
BABULAL

*Sir Jamshed Kanga*, Advocate General, for the appellants.

*F. J. Coltman*, for the respondents.

BEAUMONT, C. J. :—This is an appeal from the judgment of Mr. Justice Mirza. The matter has got into a considerable state of confusion owing to the parties not having complied with the rules as to procedure. The rules of procedure are made in the long run for the convenience and benefit of litigants. Occasionally expense and delay may be involved in complying with the rules, but if the parties do not comply with the rules, they must take the consequences.

The material facts are these. The appellants and respondents are both members of the Marwari Chamber of Commerce, and as such they are bound under the rules to submit all disputes between them to arbitration. They had a dispute, and the matter was referred to the arbitration of two arbitrators. The arbitrators were unable to make their award within the fifteen days required under the rules, and they applied to the chairman on January 18, 1929, to extend the time. The time was in fact extended by the vice-chairman. On January 27, there was a further application to the chairman to extend the time, and again an extension was given by the vice-chairman. On February 1, within the extended time they made an award. On August 2, the award was filed in Court under the Indian Arbitration Act, and on the 16th notice was given to the appellants of the filing. On August 26, the appellants presented a petition to set aside the award, that petition being based mainly on the ground that there was in fact no dispute which was properly referable to the arbitrators, and they did not take the point in the petition that the time had been extended by the vice-chairman whereas it ought to have

been extended by the chairman, and therefore the award was out of time and on its face bad. On October 7, however, the appellants' solicitors wrote a letter to the respondents' solicitors in which in the last paragraph they gave notice that their clients would, at the hearing of the petition, contend that the award was bad as having been made after the time limited for the same under the by-law of the Marwari Chamber of Commerce Ltd., and that the arbitrators were *functus officio* on the expiry of fifteen days from the date of their appointment. Then they say: "If necessary, we shall apply to Court for the amendment of the petition so as to include such ground therein". In fact they did not apply to Court for the amendment of the petition, and that was the first irregularity. The respondents did not reply to that letter, but on the next day the matter came on for hearing, and a direction was given that it should stand over to the following Tuesday, respondents to furnish a copy of affidavit by noon on the Saturday. That certainly looks as if the respondents were asking to put in an affidavit in answer to the point raised in the letter written to them on the previous day. The matter was again adjourned on October 15 until November 18 and on November 16 the respondents put in an affidavit by the Secretary of the Marwari Chamber of Commerce stating that the vice-chairman had given an extension of time because the chairman was absent from Bombay. The matter then came on for hearing on November 18, and counsel for the respondents apparently asked the Court itself to extend the time, if in fact the award was out of time and the order of the learned Judge was: "I do enlarge the time for making the award till the 1st day of February 1929, and I do further order that the petition be and it is hereby dismissed". Now, there was no substantive application to the learned Judge to extend

1930

SHIVJI POONJA

v.

RAMJINAL  
BABULAL

Beaumont C. J.

1930

SHIVJI POONJA

v.

RAMJINAL  
BABULAL

Beaumont C. J.

the time, and the appellants say that they were taken by surprise.

Rule 373 of the rules of this Court provides that all applications under the Indian Arbitration Act, other than under section 19, shall be made by petition except as hereinafter otherwise provided; and rule 377 provides that every petition or a copy thereof shall specify the persons affected thereby, and upon whom notice has to be served as hereinafter provided. Then rule 378 provides for the service of the notice on persons specified in the petition. In my view if an application was to be made to the learned Judge to extend the time for making the award, particularly as the application was long after the award had in fact been made, there ought to have been a substantive application by petition which should have been served on the other side, and the matter could then have been argued.

The contentions put forward by the respondents are, first of all, that the appellants are not in a position to complain of irregularity in the respondents not having applied for the extension of time by petition, because they themselves had not taken the point that the award was out of time in their own petition, but had only done so in the letter of October 7, 1929. But I think that the respondents had waived that objection by themselves putting in an affidavit in answer to that particular point, and I think that in face of that conduct it is not now open to them to object that the point ought to have been raised in the petition and not by a letter. The point was in fact raised, and they were given notice of it.

Then it is said that there is in substance nothing in the point because as a matter of fact the vice-chairman had power to extend the time in the absence of the chairman. We have not got a copy of all the rules of

the Marwari Chamber of Commerce before us, and I do not propose to express any opinion as to their exact meaning. Rule 21 provides that the arbitrators shall make their award within fifteen days of their appointment or within such time as the chairman of the chamber may extend upon the request of the arbitrators, either at the time of appointment or subsequent thereto. And rule 7 provides for the appointment of a chairman and a vice-chairman before the annual ordinary general meeting, and directs them to take charge of their respective offices. It may be that the chairman has power in case of absence or illness or for some other reason to appoint the vice-chairman to act for him. I express no opinion on that. But there is no evidence here that the chairman did appoint the vice-chairman to act. The only evidence is that the chairman was absent from Bombay. It seems to me quite clear that under rule 21 it is for the chairman to act and the vice-chairman could at the most only act as the chairman's deputy. In my opinion, the vice-chairman was not entitled to extend the time, as he did, and I, therefore, think that the award was out of time, and that the defect could only be cured, as the learned Judge thought, by the Court extending the time.

It is, I think, established by the case, to which the learned Advocate General referred, *Tejpal Jamunadas v. Nathmull & Co.*,<sup>(1)</sup> that the Court has power under the Indian Arbitration Act to extend the time after the award has been made. But, as I have already said, I think that the learned Judge in exercising that power ought to have required a substantive application to be made under rule 373, and that notice of that application should have been served on the other side.

1930

SHIVJI POONJA

v.  
RAMJINAL  
BABULAL

Baumont C. J.

<sup>(1)</sup> (1919) 46 Cal. 1059.

1930

SHIVJI POONJA

v.

RAMJIMAL  
BABULAL*Beaumont C. J.*

It is also contended by Mr. Coltman that an order extending time for making an award is not appealable. But, in my view, it is quite clear that an order of this sort, which, first of all, extends the time for making the award, and then dismisses the petition to set aside the award, is clearly appealable. For these reasons, I think that this appeal must be allowed with costs.

We are not prepared on the materials before us to make any order on the petition to set aside the award. I think the matter will have to go back to the learned Judge, and the respondents will have liberty to raise by petition or otherwise as they may be advised within three weeks the question whether the time should be extended by the Court, and the two petitions will have to be heard together.

BLACKWELL, J. :—Mr. Coltman has contended that we ought to disregard that part of the Judge's order which enlarges the period for making the award, and ought to deal with this appeal on the merits of the petition. His argument on that point is that the original petition filed by the present appellants made no mention of the fact that at the hearing the petitioners would contend that the award was bad upon the ground that the time for making it had not been extended by the proper authority, namely, the chairman of the Marwari Chamber of Commerce. In my opinion, there is no substance in this argument, inasmuch as there was a petition before the Court as required by rule 373 of the High Court Rules, and notice of the further application had been given to the respondents' attorneys by the appellants' attorneys' letter of October 7, 1929. In that letter the appellants' attorneys expressly informed the respondents' attorneys that they would apply to the Court for the amendment of the petition so as to include the new point, if necessary.

Upon the receipt of that letter, no objection was taken by the respondents to the course suggested by the appellants' attorneys. On the contrary, when the matter came before the Court on October 8, 1929, the matter was ordered to stand over in order that the respondents might furnish a copy of their affidavit by noon Saturday next. They did in fact file an affidavit of the secretary of the chamber on November 16, 1929, in which they contended that the time was properly extended by the vice-chairman, that is to say, by that affidavit they were meeting the very point as to the raising of which notice had been given. In those circumstances, I do not think that it lies in the mouth of the respondents to contend that the matter had not been properly raised on the petition which was before the Court.

Then comes the question whether, that being the position, the respondents were entitled themselves to ask the Judge to enlarge the time under section 12 of the Indian Arbitration Act. In my opinion, it was not open to the Judge, having regard to rule 373 of the High Court Rules, to accede to the oral application made by the respondents at the hearing of the appellants' petition. He ought, if he had thought that the respondents should have an opportunity of making an application, to have granted them an adjournment to enable them to raise the matter in a proper form by petition which would be duly served upon the other side. Instead of adopting that course, the learned Judge dealt with the matter there and then, and refused an application by the petitioners' counsel for an adjournment to show cause why time should not be extended. In my opinion, even assuming that the learned Judge could have dealt with the matter in the absence of a petition in that behalf by the respondents, the petitioners ought to have had an

1930

SHIVJI POONJA

v.

RAMJIMAL

BABULAL

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Blackwell J.



1930

SHIVJI POONJA

v.  
RAMJIMAL  
BABULAL*Blackwell J.*

opportunity of placing on affidavit such facts as they deemed necessary to enable the Judge to exercise his discretion on the point of extension of time. They have had no such opportunity, and quite apart from the fact that in my opinion a petition by the respondents was necessary, I should have thought it necessary to send the matter back to the learned Judge on that ground alone, namely, that the petitioners had had no opportunity of meeting the point.

The Judge's order not merely enlarged the time, but dismissed the petition. If time was not enlarged, it was open to the petitioners to contend that the award was a nullity. In my judgment, the enlargement of time by itself affected the petitioners' right to contend that the award was a nullity. Be that as it may, the learned Judge went on to dismiss the petition. That clearly affected a right of the petitioners, the effect of the order being that the award was treated as binding upon them. In my opinion, therefore, the Judge's order is a "judgment" within the meaning of clause 15 of the Letters Patent and is appealable.

Accordingly, I agree with the order suggested by the learned Chief Justice, namely, that this appeal should be allowed with costs, with liberty to the present appellants, if so advised, to amend their petition, and with liberty to the respondents to file a substantive petition within three weeks dealing with the question of the enlargement of time.

Attorneys for appellants: Messrs. *Malvi, Moḍi, Ranchhoddas & Co.*

Attorneys for respondents: Messrs. *Shah & Co.*

*Appeal allowed.*

B. K. D.