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International Commercial Arbitration - New York Convention
A. Caja



94. NIGERIA: SUPREME COURT - 11 December 1974 - *Murmansk State Steamship Line v. Kano Oil Millers Ltd.**

Enforcement of a foreign arbitral award - Implementation of the New York Convention in Nigeria - Inapplicability of the New York Convention to actions commenced before the Convention entered into force

ELIAS, C.J., delivering the judgment of the court:

This is an appeal from the judgment of Wheeler, J. delivered in the Kano High Court on January 14th, 1974, in which he dismissed the plaintiff's claim for the enforcement of the award which he had been granted by a Moscow arbitral tribunal on February 28th, 1966 in accordance with a charterparty entered into between the plaintiff and the defendant in Nigeria. The defendant defaulted under the charterparty by failing to load the cargo of groundnuts when the ship was presented at the Apapa port by the plaintiff within time. The charterparty contained an agreement to refer any dispute to arbitration under Russian law, and this was done in due course on February 28th, 1966. The award was in favour of the plaintiff, which then brought an action on the Moscow award.

In order to sue on an award, it must be shown that there is a law binding a Nigerian court to entertain the claim. Learned counsel refers to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10th, 1958 and says that the U.S.S.R. ratified this convention on June 7th, 1959 and that the convention applies in Nigeria since March 1972. He further submits that *Treaties in Force* published by the United States Department of State shows at page 284 that Nigeria is a signatory. Learned counsel insists that we take judicial notice of this American publication when he says "I ask the court to take judicial notice of the American Department of State's book on treaties to which I referred."

Assuming, without deciding, that Nigeria is therefore bound to enforce a foreign arbitral award such as is involved here, it is to local enactment that we must turn in order to ascertain how this can be done in Nigeria. There is no law extant on the reciprocal enforcement of foreign judgments which binds Nigeria or the Kano State of Nigeria. The Foreign Judgments (Reciprocal Enforcement) Ordinance (Laws of Nigeria, 1948, *cap.* 73) which appeared in the 1948 edition of the Laws of Nigeria was never brought into force in Nigeria and was indeed omitted from the

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1958 edition of the Laws. We are accordingly left with the Arbitration Law (Laws of Northern Nigeria, 1963, *cap.* 7) as the only law on the subject of arbitration awards, but it does not deal with foreign awards. It is interesting to note the following provision of s.13 of this Law:

> "An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect."

It seems clear that, in order to sue for the enforcement of an arbitration award, leave of the court or of a judge must first be obtained. If enforcement of a foreign award must be governed by the *lex fori*, the present action is not competent as there is nothing on record to show that such leave was ever obtained. Indeed, the point was not taken by either party or by the judge in the lower court. We think we must take it here of our own motion in exercise of our general appellate jurisdiction by virtue of s.22 of the Federal Supreme Court Act, 1960. We are, therefore, of the view that the present action fails for non-compliance with s.13 of the Arbitration Law.

There is another ground why this action must fail. The Convention on Recognition and Enforcement of Foreign Arbitral Awards on which counsel for the appellant relies, according to him, applies in Nigeria since March 1972. But the writ of summons was issued by Jones, J. on February 2nd, 1972, that is, in the month previous to that when Nigeria first became bound, if at all. The present action was therefore commenced in the courts on the basis of a treaty to which Nigeria was not yet a party. On this ground also the action must fail, and the learned trial judge should have thrown it out on that account. These two points dispose of the appeal, and we should have stopped here but for the fact that, the arbitral award having been agreed by both parties as having been validly made in Moscow, the arguments in the lower court turned entirely on whether or not the claim by the appellant to enforce the award was statute barred. The judgment of the learned trial judge was that, since the cause of action must be deemed to have arisen on February 28th, 1964 and the award was given on February 28th, 1966, the action brought on February 2nd, 1972 was barred by s.3 of the Limitation Act, 1623, which requires that a civil action must be commenced within six years of the cause of action.

The appellant has appealed from this judgment to this court on

14 grounds all of which amount to a submission that the statutory period should run from the date of the award in 1966 and not from the date of the breach of the charterparty in 1964. Learned counsel for the appellant relied on *Board of Trade v. Cayzer, Irvine & Co. Ltd. (1)*, where the respondents' ship requisitioned by the British Crown under a charterparty was lost at sea in 1917 as the result of a collision and the plaintiff brought arbitration proceedings in 1923. The charterparty contained a clause that, when any dispute had been referred to arbitration, "it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law." On the basis of this clause, the House of Lords held that the arbitration proceedings commenced in 1923 were not statute barred. Learned counsel also submitted that *Norske Atlas Ins. Co. Ltd. v. London Gen. Ins. Co. Ltd. (6)* supports the proposition that, where an award is valid by the law of the foreign country where it was made, it should be enforced in England. We observe, however, that the main issue in that case was not really limitation, but mainly whether the insurance policy which was lawful in Norway but illegal in England should nevertheless be enforced in England, and it was held that it should be enforced. Also cited is *Turner v. Midland Ry. Co. (11)*, to the effect that an action upon an award must be brought within six years from the date of the award. In that case, the defendants had, under a special Act of Parliament, executed in 1903 certain works which injuriously affected the property of the plaintiff who, being unaware of her right to compensation therefor, brought a claim only in 1909. As provided in the Act, the matter was referred to arbitration and an award was made in her favour in 1910. When she then brought an action to enforce the award, it was held that she was not statute barred, as the cause of action accrued at the time of making the award and not of the execution of the work.

Learned counsel for the respondents, on the other hand, argued that the arbitration agreement in the instant case is not of the *Scott v. Avery (8)* type, in that is does not provide, as does *Board of Trade v. Cayzer, Irvine & Co. Ltd. (1)*, that an arbitration shall be a condition precedent to the commencement of an action at law; and that, therefore, the cause of action arose in 1964 at the date of the alleged breach of the charterparty. He would also distinguish the case of *Turner v. Midland Ry. Co. (11)* as deciding no more than that when the amount of claim is unknown by the

plaintiff until the arbitration award is made, then time begins to run only from the date of the award. The cause of action in the present case, he maintained, arose from the date when the respondents breached the charterparty in 1964. As there is not what is commonly known as the "*Scott v. Avery (8)* clause" in the agreement in question here, the court should not read one into it so as to import the notion that arbitration is necessarily a condition precedent to the running of the limitation period. Learned counsel argued that it is always possible and even necessary for a plaintiff to insure himself against the risk of being statute barred by bringing an action as soon as the breach of contract occurs whilst arbitration proceedings are being pursued under the agreement, unless, of course, there is an express *Scott v. Avery* clause therein: see *Central Electricity Generating Bd. v. Halifax Corp. (3)* ([1962] 3 All E.R. at 919-920; 61 L.G.R. at 128-129). That precaution was not taken by the appellant in this case.

We think that there is force in these submissions of learned counsel for the respondent. The present case is one of a simple reference of any dispute to arbitration and contains no clause making an arbitration award a condition precedent to the bringing of an action: *Thompson v. Charnock (9)*; a plaintiff can always bring an action at common law as soon as the cause of action arises. The action may then be stayed until the arbitration is disposed of: see *Graham v. Seagoe (4)*. Even in the case of *Board of Trade v. Cayzer, Irvine & Co. Ltd. (1)*, Lord Atkinson made it clear ([1927] A.C. at 625; 137 L.T. at 424) that *Thompson v. Charnock (9)* is still good law when he quoted Lord Campbell's words in *Scott v. Avery* (5 H.L. Cas. at 854; 10 E.R. at 1139) as follows:

> " '*Therefore, without overturning the case of Thompson v. Charnock*, and the other cases to the same effect, your Lordships may hold that, in this case, where it is expressly, directly, and unequivocably agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration.' " [Emphasis supplied.]

Later still, Lord Atkinson pointed out ([1927] A.C. at 628; 137 L.T. at 425):

> "With regard to the Statute of Limitation (21 Jac. 1, c.16) it has no application, I think, to actions or suits which, *by the contracts of the parties to them*, are placed in such a

position that they cannot be commenced, begun, or enforced. The whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use. I think it is obvious that the Act cannot apply to a cause of action which the person entitled to it cannot, *because of his own contract*, enforce against any one."[Emphasis supplied].

We have underlined the portions in the passage just quoted in order to emphasise the fact that the period of limitation is deemed to run after the date of the award only when a party has by his own contract expressly waived his right to sue as soon as the cause of action has accrued. If there is no such *Scott v. Avery (8)* clause, the limitation period begins to run immediately. A party is, however, precluded from setting up such an agreement as a defence if he has waived his right to insist on arbitration as a condition precedent: see *Toronto Ry. Co. v. National British & Irish Millers Ins. Co. Ltd. (10)*. As Lord Wright has rightly observed in *Heyman v. Darwins Ltd. (5)* ([1942] A.C. at 377; [1942] 1 All E.R. at 349):

"The contract, either instead of, or along with, a clause submitting differences and disputes to arbitration, may provide that there is no right of action save on the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition to any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect unless the condition has been 'waived,' that is, unless the party seeking to set it up has somehow disentitled himself to do so."

It seems relevant here to refer to *Russell on Arbitration*, 18th ed., at 4-5 (1970), where the following passage occurs:

"*Date from which time runs:* The period of limitation 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 take place upon the dispute concerned."

Thus, in *Pegler v. Railway Executive (7)* the House of Lords held that the "cause of arbitration" is the same as the "cause of action" and that a fireman who brought his action more than six years after his conditions of service had been altered to his detriment

was statute barred from the date of the alteration, not when his exact losses were later quantified at arbitration.

A case which, though not on limitation of action, is nevertheless instructive on the question as to when a cause of action arises in any matter involving arbitration is *Bremer Oeltransport G.m.b.H. v. Drewry (2).* There the plaintiffs as members of a limited partnership under German law entered into a charterparty with a British subject resident in France. The charterparty, which was made in England under English law, contained an agreement to refer any dispute to arbitration in Hamburg. A dispute which later arose was duly referred and the award was in favour of the plaintiffs, who thereupon brought an action in England for the amount due and payable under the award. The English court made an order for service out of the jurisdiction and the defendant objected on the ground that the action being on the Hamburg award was not maintainable. The Court of Appeal, however, held that the action of the plaintiff was an action upon the charterparty and not one upon the award itself and that, being really upon the charterparty made in England, the action was maintainable and the order for service out of the jurisdiction was proper. It follows, therefore, that if the action in such a case is really one on the charterparty and not on the award, which we think is the case in the present appeal, the statutory period of limitation must begin to run from the breach of the charterparty in 1964 and not from the making of the award in Moscow in 1966. It is interesting to recall here the following submission of learned counsel for the appellant at one stage of the proceedings in the court below:

> "I concede if we had brought a fresh action instead of seeking to enforce the arbitration award we would have been out of time. If we had sued on Exhibit 14 we would have been out of time, but we did not sue on the contract."

We think that the appellant's suit is, on the authorities, really one on the contract.

For the various reasons we have given above, the appeal accordingly fails and is dismissed. The judgment of Wheeler, J. in Suit No. K/10/1972 delivered in the High Court at Kano on January 14th, 1974, together with the order as to costs, is affirmed on the alternative ground on which it was decided, although we think that the case should have been thrown out on either of the two grounds canvassed by us above.

*Appeal dismissed.*