APPELLATE CIVIL

Before Kapur, J.

1952

June 19th

UNION OF INDIA,—*Appellant*

versus

FIRM KIROO MAL-NAWAL KISHORE,—*Respondents.*

First Appeal from Order No. 53 of 1951.

Arbitration Act (X of 1940), Sections 20 and 41—Limitation Act (IX of 1908), Article 181—Application under sec-

tion 20, Arbitration Act—Limitation—Article 181, whether applicable—Effect of 1940 Amendment in Articles 158 and 178, Limitation Act.

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Held, that Article 181, although before the amendment of 1940 in Articles 158 and 178 of the Limitation Act, was held applicable to applications under the Code of Civil Procedure only, must now be held applicable to applications made under the various provisions of the Arbitration Act.

Held further, that if the machinery of the Code of Civil Procedure is set in motion for any application under the Arbitration Act, Article 181 will be applicable unless a different period of Limitation is prescribed therefor.

First Appeal from the order of Shri Banwari Lal, Subordinate Judge, 1st Class, Jullundur, dated the 19th February, 1951, dismissing the petition and ordering the parties to bear their own costs.

A. N. GROVER, for Appellant.

D. K. MAHAJAN, for Respondents.

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JUDGMENT

This is an appeal brought by the Union of India against an order passed by Mr. Banwari Lal, Subordinate Judge, 1st Class, Jullundur, refusing to file an arbitration agreement under section 20 of the Arbitration Act.

The facts of the case in brief are that firm Kiroo Mal-Nawal Kishore (hereinafter termed the contractors) made a tender for the supply of potatoes to Lordist Regiment on the 14th of November 1945. The period during which supply was to be made was the 1st of January 1946 to the 31st of March 1946. This tender was accepted but it appears that some time before the supply was to be made, the shop and godown of the contractors were burnt down and they wrote on the 19th of January 1946 expressing their inability to make the supply and prayed to be relieved from making the supply. After some correspondence in regard to this had passed between the contractors and

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the Military Authorities, a notice was sent by the Military Authorities on the 27th of May, 1946, to the contractors calling upon them to pay up a sum of Rs. 35,289-3-7 being the amount which they assessed as damages due to the non-supply of goods. The contractors made further representations the gist of which was that they were not liable to pay any damages and also they sought an interview to place their case before the Area Commander. In none of the letters that were written by the contractors to the Area Commander did they ever accept their liability to pay for the alleged loss which was being claimed by the Army Authorities who were insisting that the contractors should pay the amount which they considered to be the loss caused to them through the non-performance of the contract.

On the 6th of January, 1948, the Area Commander again wrote to the contractors asking them to pay by the 20th of January 1948, otherwise action would be taken ; the contractors replied asking for time to make personal representation, but they never accepted their liability to pay. Ultimately, on the 3rd of December, 1949, the Military Authorities made an application under section 20 of the Arbitration Act praying for the filing of the arbitration agreement. An objection was raised on behalf of the firm of contractors that the application was barred by time, that the firm was not party to the contract, and that arbitration agreement did not apply to the contract, and that arbitration agreement did not apply to the facts of the case. The main controversy seems to have been confined to the question of limitation and the learned Judge found that the application was barred by Article 181 of the Limitation Act. It was also found that the defendants were bound by the terms of the agreement and that the arbitration clause did apply. The application was, however, dismissed as being barred by time. The Union of India have come up in appeal to this Court.

The sole question which has been debated in this Court is the question whether Article 181 applies to the facts of the present case. Section 20 of the Arbi-

tration Act is the provision for filing an arbitration agreement in Court and is in Chapter III of the Arbitration Act and is almost a copy of para 17 of the Second Schedule of the Code of Civil Procedure which has been repealed by the Arbitration Act. Before 1940 when an application for filing an agreement for reference to arbitration was to be made under para 17 of the Second Schedule of the Code of Civil Procedure, there was very little difficulty in regard to the application of Article 181 of the Limitation Act which is as follows :—

Application for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Code of Civil Procedure, 1908 (V of 1908.)	Three years	when the right to apply accrues."

The difficulty has arisen because section 20 of the Arbitration Act has taken the place of para 17 of the Second Schedule of the Code of Civil Procedure.

Mr. Grover for the Union of India has contended that Article 181 of the Limitation Act applies only to applications made under the Code of Civil Procedure and has no application to any application made under any other Act. He relied on a large number of cases, which I shall deal with.

The preamble of the Indian Limitation Act is as follows :—

> "Whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; it is hereby enacted as follows".

And the submission is that the Limitation Act, which although is a consolidating and amending Act, and,

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therefore, must be taken to be a complete Code, does not by the language of the preamble itself purport to be exhaustive in regard to applications; but in my opinion "certain applications" mean that they do not apply to certain kind of applications, e.g., those which are of a ministerial nature or are made to executive officers or to applications which are of a formal nature such as applications for adjournment of cases or to applications for which no period of limitation applies, e.g. applications under section 152 of the Code of Civil Procedure.

The cases in which it has been held that Article 181 does not apply to applications except those under the Civil Procedure Code were almost all decided on the application of the principle of *ejusdem generis*, i.e., as all the other applications in the Third Division of Schedule I of the Limitation Act were applications under the Civil Procedure Code, this Article must also be applicable to applications under that Code. But whatever may have been the case previous to the amendments made by the Arbitration Act (X of 1940) that interpretation is in my opinion not applicable to the construing of the Article after the amendments. By the Arbitration Act certain amendments were introduced in Articles 158 and 159, and 178 and 179 of the Indian Iimitation Act. The old Article 158 was :—

Article	*Description of application*	*Period of limitation*	*Time from which period begins to run*
158	Under the Code of Civil Procedure 1908, to set aside an award	*	*

Under the amended law Article 158 reads :—

158	Under the Arbitration Act, 1940, to set asiae an award	*	*
*	*	*	*

In Article 159, in place of the words "of the same Code" the words "Code of Civil Procedure, 1908" have been substituted. Similarly, in Article 178, in place of the words "under the same Code" the words substituted are "Under the Arbitration Act, 1940" and also in Article 179 in place of the words "same Code" the words "Civil Procedure Code, 1908" have been put in. Therefore, even if the correct way of interpreting Article 181 was to apply the principle of *ejusdem generis* that can no longer be confined to applications under the Code of Civil Procedure.

Mr. Mahajan for the respondent has emphasized the words "provided elsewhere in this Schedule" as they occur in Article 181. His submission is that Article 181 on the plain meaning of these words applies to applications for which no period is provided elsewhere in the schedule and applications cannot only be confined to applications under the Code of Civil Procedure, because in the Third Division dealing with applications provision is made for applications under the Arbitration Act as well as under the Code of Civil Procedure, 1908. *A fortiori* Article 181 must be applicable to applications made under statutes other than the Code of Civil Procedure such as the Arbitration Act. In this connection he has drawn my attention to section 37 of the Arbitration Act. Section 37 (*1*) provides :—

> "37 (*1*) All the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court".

Section 37 (*2*) deals with cause of action arising in case where there is a provision that the cause of action shall not arise until a particular contingency, that is, of bringing a suit. Subsection (*3*) makes provision for the commencement of arbitration, which is that arbitration shall be deemed to be commenced when one party to the agreement serves on the other parties a notice requiring appointment of an arbitrator, or where there is a named arbitrator

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the notice is that difference be submitted to that designated arbitrator. Similarly, subsections (4) and (5) make provision for other contingencies. But I am unable to derive much assistance from this section excepting to this extent that the law of limitation is now applicable as much to a cause of action as to a cause of arbitration, a phrase used by the House of Lords in *Pegler* v. *Railway Executive*, (1).

Mr. Grover in reply to this part of the argument has replied on a large number of cases where it has been held that Article 181 applies only to applications under the Code of Civil Procedure. *In the matter of the petition of Ishan Chunder Roy*, (2), it was held that Article 181 is not applicable to an application for the grant of a probate. Tottenham, J., at p. 708 said :—

> "But the preamble to the Act distinctly shows that it is not intended to apply to all, but to *certain*, applications to Courts : and an examination of the third Division of Schedule Second, which deals with applications, shows, that every article therein contained, No. 178 only excepted, specifically relates to some case pending or already decided. Article 178 must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis.*"

The same rule was laid down by Wilson, J. in *Govind Chander Goswami* v. *Rungunmoney*, (3). That Article 181 is not applicable to applications for probate was also held by the Bombay High Court in *Bai Manekbai* v. *Manekji Kavasji*, (4), where Westropp, C. J. held that Article 178 (now Article 181) cannot apply to probates on the principle of *ejusdem generis*.

(1) (1948) 1 A.E.L.R. 559.
(2) I.L.R. (1881) 6 Cal. 707.
(3) I.L.R. (1881) 6 Cal. 60.
(4) I.L.R. (1883) 7 Bom. 213.

Rattigan, J. in *Pandit Indar Narain Shiv Puri* v. *Pandit Onkar Lal,* (*1*) again laid down the same rule and did not apply Article 181 to an application for probate. The learned Judge followed *Kashi Chundra Deb* v. *Gopi Krishna Deb,* (*2*) where the same rule had been laid down, and observed :—

> "I have no hesitation, therefore, in holding both upon authority and principle that the petition was not barred by limitation."

Their Lordships of the Privy Council in *Hansraj Gupta* v. *Official Liquidator of Dehra Dun,* (*3*) where the question was whether Article 181 applied to an application under section 186(i) of the Indian Companies Act, said at pages 1075-1076 as follows :—

> "It is common ground that the only article in that schedule which could apply to such an application is Article 181 ; but a series of authorities commencing with *Bai Manekbai* v. *Manekji Kavasji,* (4), has taken the view that Article 181 only relates to applications under the Code of Civil Procedure, in which case no period of limitation has been prescribed for the application. But even if Article 181 does apply to it, the period of limitation prescribed by that Article is three years from the time when the right to apply accrued, which time would be not earlier than the date of the winding up order, the 26th of March, 1926. The application of the liquidators was made on the 26th of March, 1928, well within the three years. The result is that from either point of view the application by the liquidators, if otherwise properly made under and within the

(1) 20 P.R. 1912.
(2) I.L.R. (1892) 19 Cal. 48.
(3) I.L.R. (1932) 54 All. 1067.
(4) I.L.R. (1883) 7 Bom. 213.

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provisions of section 186 of the Indian Companies Act is not one which must be dismissed by reason of section 3 of the Indian Limitation Act. It is either an application made within time, or it is an application made for which no period of limitation is prescribed."

As I read this passage from their Lordships' judgment, I would say that their Lordships were not prepared to hold that Article 181 applied only to applications under the Code of Civil Procedure.

Commenting upon this passage from their Lordships' judgment in *Hansraj Gupta's case* Beckett, J. (sitting with Tek Chand, J.) said in *Abdul Aziz* v. *The Punjab Government* (1).

> "If their Lordships had regarded it as finally settled that Article 181 did not apply, it would have been unnecessary to give the finding in this alternative form. It seems to me that the only possible conclusion to be drawn from the language thus used is that their Lordships intended to leave the question still open, so far as the scope of Article 181 was concerned, inasmuch as it was not necessary for them to give any final decision on this point, in view of the facts before them."

Mr. Grover then quoted *Hurdatrai Jagdish Prasad* v. *Official Assignee of Calcutta*, (2) which is a Bench decision by Harries, C. J., and Mukherjea, J. At page 19 Mukherjea, J., dealing with Article 181, said :—

> "A residuary Article it is said should be construed *ejusdem generis* with the other Articles dealing with applications."

(1) I.L.R. (1943) Lah. 677 at p. 686.
(2) I.L.R. (1949) 1 Cal. I.

He then referred to the preamble and also to Articles 158 and 178 of the Limitation Act, as amended, and then observed :—

> "But, on the present state of authorities, we are bound to say that Article 181 of the Limitation Act is confined to applications under the Civil Procedure Code or those applications for the making of which the Civil Procedure Code gives authority".

The learned Judge relied on a judgment of the Lahore High Court in *Hindustan Bank, Limited* v. *Mehraj Din,* (1). The learned Judges of the Calcutta High Court decided the matter on the preponderance of authority in favour of confining Article 181 to applications under the Civil Procedure Code. With very great respect I am unable to agree with this view. If the Article is to be construed *ejusdem generis* then the fact that Articles 158 and 178 and 159 and 179 have been amended would go to show that the intention of the Legislature was not to confine this Article to applications under the Code of Civil Procedure.

Reference was then made to *Asmatali Sharin* v. *Mujaharali Sardar,* (2), which was referred to in *Hardatrai's case also*...That was a case where the question to be decided was whether to proceeding under section 26-F. of the Bengal Tenancy Act, Article 181, was applicable and it was held that it was because the entire proceeding under that section is regulated by the Code of Civil Procedure. At page 66 of this report Mukherjea, J. said :—

> "It is quite true that a residuary Article must refer to applications of the same kind as those already specified, but it cannot be said that an application under one statute must necessarily be of a different kind from an application under another statute."

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(1) I.L.R. (1920) 1 Lah. 187.
(2) I.L.R. (1948) 2 Cal. 54 (S.B.).

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The learned Judge then referred to the change made in Articles 158 and 178 by the Arbitration Act, but he did not think it necessary to give any final opinion as it was not necessary for the purposes of that case. In my opinion this opinion of Mukherjea, J., casts doubt on the applicability of Article 181 to applications under the Code of Civil Procedure only.

I have already dealt with one portion of Mr. Mahajan's arguments in which he has submitted that the words of Article 181 and particularly the words "provided elsewhere in this Schedule" negative the interpretation confining this Article to applications under the Civil Procedure Code only, even if the principle of *ejusdem generis* is applied. He referred then to the definition of the word "Court" as given in the Arbitration Act, which is :—

> "'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court".

According to his submission the 'Court' is the 'Civil Court' which would have jurisdiction if instead of the question being the subject-matter of a reference had been the subject-matter of a suit. He also referred to section 41 which makes the provisions of the Code of Civil Procedure applicable to all proceedings when are brought under the Arbitration Act. His contention is that the definition of the word 'Court' as given in the Arbitration Act, when read with section 41 of the Act makes it quite clear that the proceeding taken under section 20. which is really para 17 of the Second Schedule of the Code of Civil Procedure as it was before 1940, would fall under Article 181 of the Limitation Act even if it was confined to be applicable to applications under the Civil Procedure Code because, according to him an application under section 20 is nothing more than an

application under Schedule Second, paragraph 17 of the old Code. It is not necessary to decide this question although in my opinion the argument of the analogy which he relies may not be without force.

Ejusdem generis rule has been the subject-matter of decision in some of the English cases. And at page 170 Craies has stated the law in the following words :—

> "*There must be a category.* The *ejusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption in the absence of other indications of the intention of the Legislature. The modern tendency of the law, it was said, is 'to attenuate the application of the rule of *ejusdem generis*'. To invoke the application of the *ejusdem generis* rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply. 'Unless you can find a catagory,' said Farwell, L. J. 'there is no room for the application of the *ejusdem generis* doctrine', and where the words are clearly wide in their meaning they ought not to be qualified on the ground of their association with other words. For instance, where a local Act required that 'threatres and other places of public entertainment' should be licensed, the question arose whether a 'fun-fair' for which no fee was charged for admission was within the Act. It was held to be so, and that the *ejusdem generis* rule did not apply to confine the words 'other places' to places of the same kind as

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theatres. So the insertion of such words as 'or things of whatever description' would exclude the rule.

From this it is clear that the rule must apply where there is a distinct category or genus and from the fact that in the Third Division relating to applications there are applications under the Civil Procedure Code as well as Arbitration Act, it cannot be said that Article 181 will be applicable only to applications under the Code of Civil Procedure and not to applications under the Arbitration Act.

Mr. Mahajan then submitted that wherever the machinery of the Code of Civil Procedure is set in motion for the purposes of any application Article 181 will apply. Because by subsection (5) of section 20 read with section 41 of the Arbitration Act the provisions of the Civil Procedure Code are applicable to all proceedings before the Court, so it was submitted by Mr. Mahajan, Article 181 will become applicable. In this connection he relies on *Sambasiva Mudaliar* v. *Panchanda Pillai*, (1), which was a case where a purchaser of immovable property sold under section 36 of the Revenue Recovery Act, had applied to a Civil Court for delivery of possession under section 40 of that Act and it was held that Article 178 (corresponding to present Article 181) and not Article 179 (corresponding to present Article 182) applied. The learned Judges said at pages 27-28 :—

> " It was further contended that ' application ' in Article 178 meant application under the Code of Civil Procedure, and that if Article 179 did not apply, Article 178 also did not apply, and there was no time limit, and we were referred to *Janaki* v. *Kesavalu*, (2) and *Gnanamuthu Upadesi* v. *Vana Koilpillai Nadan*, (3). The short answer to this

(1) I.L.R. (1908) 31 Mad. 24.
(2) I.L.R. (1885) 8 Mad. 207.
(3) I.L.R. (1894) 17 Mad. 379.

contention is that inasmuch as an application under section 40 of the Act is an application that the machinery of the Code be put in motion, it is an application within the meaning of Article 178. In the cases referred to the application had no reference to the provisions of the Code."

He next relied on *Co-operative Credit Society Arungunam* v. *Chinnaswami*, (1), where it was held that Article 181 of the Limitation Act applies to applications to enforce in Court an award made in accordance with the procedure laid down by rule 14 (5) of the statutory rules which have been framed under the Madras Co-operative Societies Act. At page 496 Cornish. J. observed as follows :—

> "It is clear that the application is made to the Court to exercise its functions as a Court."

The learned Judge then refers to other cases which deal with the applications for probate or applications made under the special rules of the High Court for recovery of costs by a solicitor or applications by liquidators under the Indian Companies Act and says at page 497 :—

> "In each of these instances the remedy given by a particular Act is enforceable in the manner provided by that Act and not by the machinery of the Civil Procedure Code. In the present case the application is to the Court to exercise its execution jurisdiction as if the award was a decree. I think that means that it is to be executed in the same manner as decrees are executed under the Code".

And the learned Judge relied on *Sambasiva Mudaliar* v. *Panchanada Pillai* (2).

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(1) I.L.R. (1937) Mad. 495.
(2) I.L.R. (1908) 31 Mad. 24.

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Reference was then made to *The Hindustan Bank, Limited, in liquidation* v. *Mehraj Din*, (1). There an application had been made for setting aside an *ex parte* payment order. To applications such as this Shadi Lal, J. had held that Article 164 was not applicable as a payment order was not a decree, but applied Article 181 of the Limitation Act. When the matter was taken in appeal to a Letters Patent Bench, the judgment of Shadi Lal, J. (as he then was) was affirmed. The learned Judges said :—

> "We are inclined to think that the Article in question refers to all applications for the making of which the Civil Procedure Code gives authority".

This case is of some importance as Article 181 had been applied to setting aside a payment order under the Companies Act; and as it was an application not to set aside a decree but an order, Article 181 had been applied although the matter was under section 150 of the Indian Companies Act of 1882.

In *Promode Kumar* v. *Kusum Kamini*, (2) Edgley, J. applied Article 181 to an application under section 26-D of the Bengal Tenancy Act and relied upon another judgment of the Calcutta High Court in *Saktisaran Sinha* v. ~~*Mir Aman*~~ *Mandal*, (3).

In *Mir Afzal Ali* v. *Mir Aman Ali*, (4), case decided by Scott-Smith, J., of the Punjab Chief Court, it was held that Article 166 was not applicable to set aside a sale conducted by an Insolvency Court under sections 20 and 23 of the Insolvency Act, 1907, as it was not a decree, but Article 181 was applicable.

In the Nagpur Judicial Commissioner's Court in *Shaikh Kawadu* v. *The Berar Ginning Co., Ltd.*, (5) Article 181 was held to be applicable to every application made to a Court under the Companies Act

(1) I.L.R. (1920) 1 Lah. 187.
(2) 43 C.W.N. 217.
(3) 38 C.W.N. 50.
(4) 23 I.C. 397.
(5) 109 I.C. 559.

and it was said that this Article governs the limitation of every application made to a Court under any Act, except those for which different periods are prescribed in the Act itself under which they are made.

A perusal of the various authorities which have been cited leads me to the conclusion :—

(1) that Article 181, although before the amendment of 1940 in Articles 158 and 178, was held applicable to applications under the Code of Civil Procedure only, must now be held applicable to applications made under the various provisions of the Arbitration Act ; and

(2) that if the machinery of the Code of Civil Procedure is set in motion for any application under the Arbitration Act, Article 181 will be applicable unless a different period of limitation is prescribed.

I am, therefore, of the opinion that this appeal must fail and I dismiss it with costs.