Murmansk State Steamship Line v. Kano Oil Millers Ltd.

(1974) LPELR-1927(SC)

Murmansk State Steamship Line v. Kano Oil Millers Ltd.

CITATION: (1974) LPELR-1927(SC)

In The Supreme Court of Nigeria

On Wednesday, the 11th day of December, 1974

Suit No: SC.252/74

Before Their Lordships

TASLIM OLAWALE ELIAS	Justice of the Supreme Court
GEORGE SODEINDE SOWEMIMO	Justice of the Supreme Court
AYO GABRIEL IRIKEFE	Justice of the Supreme Court

Between

Murmansk State Steamship Line — **Appellant**

And

Kano Oil Millers Ltd. — **Respondent**

RATIO DECIDENDI

1 **PRACTICE AND PROCEDURE - ENFORCEMENT OF ARBITRATION**

AWARD: Procedure for suing for the enforcement of an arbitration award

"in order to sue for the enforcement of an arbitration award, leave of the court or of a judge must first be obtained." Per Elias, C.J.N. (P.4, para. C) - read in context

2 **LIMITATION LAW - LIMITATION ACT:** purpose of limitation act

"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 enforrcing them after they have lain by for the number of years respectively and omitted to enforce them." Per ELIAS, C.J.N. (P.8, Paras.F-G) - read in context

ELIAS, C.J.N. (Delivering the Leading Judgment): This is an appeal from the judgment
A of Wheeler, J., delivered in the Kano High Court on January 14, 1974, in which he dismissed plaintiff's claim for the enforcement of the award which he had been granted by a Moscow arbitral tribunal on
B February 28, 1966 in accordance with a charter-party entered into between the plaintiff and the defendant in Nigeria. The defendant defaulted under the charterparty by failing to load the cargo
C

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 28, 1966. The award was in favour of the plaintiff, who 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 10, 1958 and says that U.S.S.R. satisfied this Convention on June 7, 1959 and that the Convention applies in Nigeria since March, 1972. He further submits that "Treaties in Force" published by the U.S. Department of State at page 284 shows that Nigeria is a signatory. Learned counsel insists that we take judicial notice of this American publication when he says:

"I ask court to take judicial notice of the American Department of States 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 Reciprocal Enforcement of Foreign Judgments Ordinance which appeared in the 1948 Edition was

never brought into force in Nigeria and was indeed omitted from the 1958 Edition of the Laws. We are accordingly left with the Arbitration Law (Cap. 7 of the Laws of the Northern States) 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 section 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 lexfori, 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 suo motu in exercise of our general appellate jurisdiction by virtue of section 22 of the Supreme Court Act, 1960. We are, therefore, of the view that the present action fails for non-compliance with section 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 appellant relies, according to him, applies in Nigeria since March 1972. But the vious to that when Nigeria first became bound, if at all. The present action had, therefore, been 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 had turned entirely on whether or not the claim by the appellant to enforce the award was statute-baired. The judgment of the learned trial judge was that, since the cause of the action must be deemed to have arisen on February 28, 1966, the action brought which requires that a civil action must be commenced within 6 years of the cause of action.

The appellant has appealed from this judgment to this court on fourteen 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.* (1927) 43 TL.R. 625 HL. Where the respondents' ship requisitioned by the British Crown under a charterparty was lost at sea in 1917 as a 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 Insurance Co. Ltd. v. Wad General Insurance Co. Ltd*. (1927) 43 T.L.R. 541 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 was not really as to statute of limitation but mainly as to 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 Railway* (1911) 1 K.B. 832 to the effect that an action upon an award must be brought within 6 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 therefore, 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-baited as the cause of action accmed 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 insatant case is not of the Scott v. Avery type, in that it does not provide as does the *Board of Trade v. Cayzer Irvine & Co.*, 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 Turner's Case 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 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: *Central Authority Generating Board v. Halifax Corporation* (1962) 3 All E.R. 915, at pp. 919 and 920. 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* (1799) 8 Term Rep. 139; a plaintiff can always bring an action at common law as soon as the cause of action arose. The action may then be stayed until the arbitration is disposed of: *Graham v. Seagoe* (1964) 2 Lloyd's Report 564 (Sup. Ct., N.S.W.). Even in the Board of Trade Case (cited supra), Lord Atkinson made it clear that *Thompson v. Charnock* is still good law when he said at p. 625:

"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."

Later still, Lord Atkinson further pointed out at p. 628:

"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 enforrcing 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 that 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 anyone.

We have underlined the portions in the passage just quoted in order to emphasize 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 occurred. If there is no such Scott v. Avery clause, the limitation period begins to run immediately. A party is, however, precluded from setting up such an agreement as a defence if he had waived his right to insist on arbitration as a condition precedent. *Toronto Railway v. National etc. Insurance Co.* (1914) 20 Com. Cas. 1 As Lord Wright has rightly observed in *Heyman v. Darwins Ltd.*(1942) A.C. 336, at p. 377:

"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 upon the ward of an arbitration. The parties in such a case made arbitration followed by an award a condition of 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 Edition, at pp. 4 and 5 of which 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* (1948) 1 All E.R 559; (1948) A.c. 332, 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* (1933) 1 K.B. 753. 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 referany dispute to arbitration in Hamburg. Adispute which later arose was duly referred and a 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 defendant objected on the ground that the action being on the Hamburg award was not maintainable.

A 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. If B 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 C 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 learned counsel for the appellant's D submission at one stage of the proceedings in the coun 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 E Ex. 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.

F 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, 14, 1974, together with the order as to costs is G 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. We award to the

respondent costs assessed in this Court at N80.

Appearances

Mr. E. Noel Grey for the Appellant.	**For Appellant**
Mr. R.S. Horn for the Respondent	**For Respondent**

LAWpavilion

POWERED BY:

GRACE INFO TECH LTD

empowering professionals