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Court : Mumbai Nagpur

Decided On : Jan-16-2015

Judge : A.S. Chandurkar

Appeal No. : Writ Petition No. 1245 of 2014

Appellant : Jayantrao

Respondent : Sumatidevi and Others

Advocate for Def. : Shri. Rohit Joshi

Judgement :

Oral Judgment:

1. In view of notice for final disposal already issued, the learned counsel for the parties have been heard at length.

2. Rule, rule made returnable forthwith.

3. The challenge in the present writ petition is to the order dated 21/12/2013 passed on M.C.A. No.669 of 2013 by the learned Principal District Judge Nagpur, rejecting the application for condoning delay in preferring appeal under the provisions of Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (for short 'the said Act'). At the outset, Shri Rohit Joshi learned counsel appearing for respondent No.5 raised preliminary objection to the tenability of the writ petition

on the ground that an alternate remedy under Section 115 of the Code of Civil Procedure (for short 'the Code') was available to the present petitioner for challenging the aforesaid impugned order. He submitted that the application seeking condonation of delay was a separate proceeding in itself and hence the provisions of Section 115 of the Code provided such remedy to the petitioner. He relied upon the decision of Supreme Court in case of **ITI Ltd. Vs. Siemens Public Communications Network Ltd. (2002) 5 Supreme Court Cases 510** and especially paragraphs 8 to 13 of said judgment. He therefore submitted that it was well settled that when an alternate remedy was available, then jurisdiction under Article 227 of the Constitution of India could not be invoked.

4. In reply to aforesaid submissions, learned senior counsel Shri A.S. Jaiswal submitted that the application seeking condonation of delay could not be treated to be separate proceeding in itself. He submitted that under Section 115 of the Code, only if the order impugned is set aside and the same has the effect of disposing of the entire proceedings, only then the remedy of revision would be available. He submitted that if the application for condonation of delay would have been allowed, then the appeal filed would have been entertained on merits. He therefore submitted that in such situation, the proceedings would have rather commenced and would not have come to an end. He therefore submitted that remedy under Section 115 of the Code was not available in the present case. He also urged that the decision relied upon by the learned counsel for the respondent No.5 had been rendered on 20/05/2002 and it considered the unamended provisions of Section 115 of the Code.

5. The Supreme Court in **ITI Ltd**. (supra) considered the question as to whether a revision petition under Section 115 of the Code could be filed in the High Court against the order made by the civil Court in an appeal filed under Section 37 of the Arbitration and Conciliation Act. After referring to various decisions, it was observed that in the said Act, the application of the Code was not specifically provided nor was its applicability specifically excluded. In that context, it was held that when under the said Act an appeal was provided under Section 37 to the civil Court and the application of the Code not having been expressly barred, the revisional jurisdiction of the High Court would get attracted. It is to be noted that

the order impugned in said proceedings was passed on 18/04/2002 while the Supreme Court decided aforesaid case on 20/05/2002. The provisions of Section 115 of the Code came to be amended with effect from 01/07/2002 and the proviso to subsection 1 of Section 115 was substituted. As per the amended provisions, a limitation has been imposed on invoking revisional jurisdiction and only in those cases where the order under challenge if had been made in favour of the party applying for revision would have finally disposed of suit or other proceedings, is tenable. In the present case, the order under challenge is one that refuses to condone the delay in filing appeal. If the delay would have been condoned by the appellate Court, then the proceedings would have commenced and not finally disposed of. Considering the question that arose for determination in **ITI Ltd.** (supra) coupled with the fact that the provisions of Section 115 have been amended thereafter, the ratio of said decision cannot be applied to the facts of the present case.

6. The other contention raised on behalf of respondent No.5 that the application seeking condonation of delay was a distinct proceeding in itself, cannot be accepted. This Court in case of **Chandrakant Govind Sutar Vs. M. K. Associates and Anr. 2002 (1) Mh.L.J. 1011** considered an identical question and held that no revision application was tenable against an order dismissing the application for condonation of delay. It was further held that if the delay has been condoned, revision application would be tenable. In view of this clear position of law, the preliminary objection as raised on behalf of respondent No.5 cannot be accepted.

7. The petitioner was aggrieved by the order dated 30/09/2012 that was passed under Section 17 of the said Act. Against the said order, an appeal was filed on 16/12/2012. Thereafter on 09/07/2013, the application for condonation of delay came to be filed. In the application for condonation of delay, it was stated that the appellant was residing at Mumbai and was required to travel and visit various cities to manage his properties and other business assets. He therefore could not take necessary steps to instruct his counsel at Nagpur for challenging the aforesaid order. It was further stated that in view of the law laid down by this Court in case of **O.N.G.C. Ltd. V. M/s Jagson Intl. Ltd. 2005 (3) Mh.L.J.1141**, no

period of limitation had been prescribed for filing appeal. As aforesaid decision was subsequently held not to be good law in **O.N.G.C. Ltd. Vs. Dinamic Corporation 2013(1) Mh.L.J. 94**, the application seeking condonation of delay came to be filed. This application was opposed by the respondent on the ground that though the judgment of the Division Bench was rendered on 12/10/2012, application had been filed on 09/07/2013 in which there was no explanation.

8. The learned Principal District Judge while considering the application for condonation of delay observed in paragraph 18 that the petitioner had taken various steps to obtain copies of various orders to indicate that from 01/11/2012 till 28/06/2013, he was not present before the learned Arbitrator. Thereafter it was found that there was no sufficient cause from January 2013 till July 2013 explaining why the application for condonation of delay was not preferred immediately. On that count, said application came to be rejected.

9. Perusal of the impugned order indicates that the learned Principal District Judge has given much importance to the aspect that the application for condonation of delay had been filed on 19/07/2013 for which there was no sufficient explanation. The fact that the appeal had already been filed on 15/12/2012 was last sight of. Though it is urged on behalf of respondent No.1 that the petitioner should have entered the witness box and should have sufficiently explained delay, it is to be noted that even in the impugned order, the learned Principal District Judge has not found the explanation for delay of 46 days to be either unacceptable or false. Merely because the application for condonation of delay came to be filed subsequent to the filing of the appeal, it cannot be said that the entire period from filing the appeal till filing of application for condonation of delay was required to be satisfactorily explained. It is therefore clear that the learned Principal District Judge misdirected himself while rejecting the application for condonation of delay.

10. In view of aforesaid, it is clear that the delay in filing the appeal deserves to be condoned. The change in law is also a relevant factor in favour of the petitioner. Hence taking an overall view of the matter, I am inclined to exercise discretion in favour of the petitioner to facilitate adjudication of the dispute on merits.

11. Hence the following order is passed:

(i) The order dated 21/12/2013 passed below Exhibit-13 is set aside.

(ii) The application for condonation of delay is allowed and delay in filing appeal stands condoned.

(iii) Rule is made absolute in aforesaid terms with no order as to costs.

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