

The Chief Engineer Vs. Sri. Gopalkrishna

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SooperKanoon Citation : sooperkanoon.com/1227029

Court : Karnataka

Decided On : Nov-26-2019

Judge : B.V.Nagarathna and Ashok G.Nijagannavar

Appeal No. : MFA 6407/2011

Appellant : The Chief Engineer

Respondent : Sri. Gopalkrishna

Judgement :

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"R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS
THE26h DAY OF NOVEMBER, 2019

PRESENT

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA AND THE HON'BLE MR.
JUSTICE ASHOK G.NIJAGANNAVAR MISCELLANEOUS FIRST APPEAL
No.6407 OF2011[AA].

BETWEEN :

The Chief Engineer, The Karnataka State Health System Development Project, 1st
Floor, P.H.I. Building, Seshadri Road, Bangalore 560 001. (BY Sri.Zulfikir Kumar

Shafi and ... Appellant Sri.S.Lakshminarayan Reddy, Advocates) Class-I, Contractor, No.12-1-21 B, Krishnalochana, LIC Road, Ajjarkad, Udupi-576101.

AND:

1. Sri.Gopalkrishna, 2. (By Sri.K.G.Raghavan Senior counsel for Sri.C.Raghava Reddy, Sole Arbitrator, Chief Engineer (Retd.), PWD, No.351, 15th A Cross, 2nd Stage, Mahalaxmi Layout, Bangalore-560086. ...

... RESPONDENTS

Sri.S.Krishnaswamy and Sri.Ramakrishna S.Hegde, Advocates for respondent No.1; Notice to Respondent No.2 dispensed with Vide Court Order dated 04.08.2015) ***** -

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"THIS APPEAL IS FILED UNDER SECTION371)(b) OF THE ARBITRATION AND CONCILIATION ACT, 1996 AGAINST THE JUDGMENT AND DECREE DATED1301.2011 PASSED IN A.S. No.55/2007 ON THE FILE OF VI ADDL. CITY CIVIL JUDGE, BANGALORE CITY, DISMISSING THE SUIT FILED UNDER SECTION34OF THE ARBITRATION ACT, FOR SETTING ASIDE AWARD DATED2404.2007. THIS APPEAL COMING ON FOR FINAL HEARING ON2709.2019 AND THE SAME HAVING BEEN HEARD AND RESERVED, TODAY, NAGARATHNA J., PRONOUNCED THE FOLLOWING THROUGH VIDEO CONFERENCE:

JUDGMENT

This appeal is filed by the Karnataka State Health System Development Project represented by Chief Engineer (KSHSDP, for the sake of convenience), assailing the dismissal of Arbitration Suit No.55/2007 (A.S.No.55/2007) by the Court of VI Additional City Civil Judge, Bangalore City (CCCH No.11) (trial court for short) by its judgment and decree dated 13.01.2011.

2. A.S. No.55/2007 was filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act for the sake of brevity) seeking setting aside of arbitral award dated 24.04.2007.

3. For the sake of convenience, the parties shall be referred to in terms of their ranking and status before the trial court.-.

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"Facts of the Case:

4. Briefly stated, the facts are, certain hospital construction works at Udupi and Karkala Taluks and Maternity and Child Health Care Hospital (MCH) at Udupi were entrusted to defendant No.1 who is a Class-I Contractor at Udupi. It appears that the contractor completed the work of the Maternity and Child Health Care Hospital at Udupi, but did not complete the other two civil works, namely, at Karkala and Udupi Taluks within the stipulated period. As a result, the contract came to be terminated on 04.04.2002. The said works were World Bank Aided Projects and subsequent to termination of the contract, tenders were called for completion of the balance work at Karkala. On account of termination of the contract, defendant No.1 approached the adjudicator who stayed the termination order and also the tender notification issued to take up the balance work at Karkala. The decision of the adjudicator was referred to an arbitrator who passed an interim order on 10.10.2002 by quashing the termination order of the department and directed the department to settle the pending bills of defendant No.1 for all items of work which had been -

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"executed by him. The said interim order of the arbitrator was challenged before the City Civil Court in A.S. Nos.67 of 2002 and 68 of 2002. Defendant No.1 had also filed Writ Petition No.48163 of 2003, in which, this Court on 06.01.2004 directed the arbitrator to pass appropriate orders in the pending arbitration proceedings within a months time. Writ Appeal No.826 of 2004 filed against the said order was also later withdrawn on 12.06.2006. A.S. Nos.67 of 2002 and 68 of 2002 were also withdrawn. It is a case of the appellant-plaintiff that the Earnest Money Deposit (EMD) and Further Security Deposit (FSD) amounts and Liquidated Damages (LD) have been refunded to defendant No.1 as under: (i) EMD and FSD for the work of Renovation and Expansion of MCH, Udupi,

amounting to Rs.12,98,682/- has been paid on 04.07.2006. (ii) Liquidated damages in respect of the work of Renovation and Expansion of TLH, Udupi, has been paid on 22.07.2006. (iii) EMD for the work of Renovation and Expansion of TLH at Karkala, -

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"amounting to Rs.6,19,511/- has been paid on 21.08.2006.

5. On account of withdrawal of the writ appeal, the sole Arbitrator passed a final award in respect of the claims of the Contractor for the disputed items. That the respondent had also filed Writ Petition No.16827 of 2006 (GM) before this Court which was dismissed by order dated 24.04.2007.

6. Being aggrieved by the award passed by the arbitrator, the plaintiff filed the Arbitration Suit challenging the said award for a sum of Rs.84,73,000/-. Respondent No.1 herein as defendant No.1 filed objections contending that the suit was not maintainable. That Section 34(3) of the Act stipulates a limitation period of three months from the date of receipt of the award and a further period of thirty days to file a suit or an application under Section 34 of the Act seeking setting aside of the award. That in the instant case, the cause of action arose for the filing of the suit on 24.04.2007, but the suit was filed on 30.08.2007, that too, without any application under Section 5 of the Limitation Act, 1963 supported by an affidavit assigning reasons for the delay in filing the suit, which in any case -

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"was not maintainable. That the Court had no jurisdiction to condone the delay beyond three months and thirty days. Hence, the suit had to be dismissed on the ground of delay, as the filing of the suit beyond the period of limitation is not maintainable. Further, defendant No.1 contended that A.S. Nos.67 and 68 of 2002 had been filed earlier by the plaintiff-appellant herein during the pendency of the arbitration proceedings and the same were dismissed. That there is no merit in the suit which has been filed belatedly, that too, without making an application seeking condonation of delay and assigning reasons for the delay and hence, the suit is

not maintainable as the trial court has no jurisdiction to condone the delay under Section 34 (3) of the Act.

7. On the basis of the rival pleadings, the trial court framed the following points for its consideration: Whether this suit is within time?. (1) (2) Whether plaintiff has made out grounds mentioned under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award passed by the sole Arbitrator viz., Defendant No.2 / Respondent No.2?. -

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"(3) What Order?.

8. The trial court answered the aforesaid points in the negative and dismissed the suit as barred by time. Being aggrieved, the plaintiff has preferred this appeal under Section 37 of the Act. Submissions:

9. We have heard Sri.Zulfikir Kumar Shafi and Sri.S.Lakshminarayan Reddy, learned counsel for the appellant and learned senior counsel, Sri.K.G.Raghavan, for Sri.S.Krishnaswamy and Sri.Ramakrishna S.Hegde, learned counsel for respondent No.1 and perused the material on record and original record.

10. Learned counsel for the appellant contended that the trial court was not right in dismissing A.S. No.55 of 2007 filed by the appellant as being barred by time. Drawing our attention to Section 34(3) of the Act, he contended that the initial period of limitation stipulated under the said provision is three months from the date of receipt of the award and further a period of thirty days is provided for filing the application (suit) under Section 34(1) of the Act subject to the plaintiff proving that due to -

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"bona fide reasons, the plaintiff was prevented from filing the suit in time. That in the instant case, the award was passed by the arbitrator on 24.04.2007. The award was received by the plaintiff-appellant herein on 30.04.2007. The limitation period commenced from 01.05.2007. The limitation period prescribed under

Section 34(3) of the Act is three months and not ninety days. The three months were May, June and July 2007 i.e., 31.07.2007. The plaintiff had further thirty days thereafter to file the suit in the extended period of limitation, provided the plaintiff could make out a case to the effect that the plaintiff was prevented from filing the suit within the initial period of limitation of three months. He contended that in the instant case, the suit was filed on 30.08.2007 i.e., on the thirtieth day itself and not thereafter. That the suit filed on 30.08.2007 was within the extended period of limitation prescribed under the proviso to Section 34(3) of the Act. The trial court ought to have appreciated the said aspect of the matter. Instead, the trial court considered the limitation period to commence from the date of the award, which is contrary to Section 34(3) of the Act. He emphasised that the limitation period is three months from -

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"the date of the receipt of the award and not three months from the date of the award.

11. He next contended that the appellant-plaintiff before the trial court did not file an application seeking permission to maintain the suit in the extended period of limitation, i.e., thirty days from initial three months. That filing of an application is not a mandatory requirement. What is required is an explanation to the effect that the suit could not be filed within the stipulated limitation period of three months from the date of receipt of the award as the plaintiff was prevented from doing so. Even if it is held that a separate application had to be filed seeking permission to file the suit within the extended period of limitation by explaining that the plaintiff was prevented from doing so within the period of limitation stipulated under Section 34(3) of the Act, the suit could not have been dismissed on that basis. He submitted that the plaintiff could have been directed to file an application seeking condonation of delay under the proviso to Section 34(3) of the Act, so as to explain that the plaintiff was prevented by bona fide reasons in filing the suit within the stipulated period of limitation of three months. He -:

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"submitted that merely because there was no application seeking condonation of delay being filed, the suit could not have been dismissed.

12. Further, the trial court fell in error in holding that there was a delay in filing the suit and that it was time barred, by reckoning the period of ninety days and thirty days from the date of the award. That it is from the date of receipt of the award and not the date of the award. Learned counsel, therefore, submitted that the impugned judgment may be set aside and it may be held that the suit filed by the plaintiff was not time barred and was maintainable.

13. Learned counsel for the appellant also contended that the main purpose of pursuing this appeal by the appellant is not only to seek setting aside of the dismissal of the suit by the trial court, but also to ensure that the law is correctly applied in the matter so that it could be held that there was no delay in filing of the suit before the trial court by the appellant herein.

14. Learned counsel for the appellant further contended that even if this appeal is to be allowed, the -:

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"matter may not be remanded to the trial court as in A.S. No.55 of 2007, which is a suit filed by defendant No.1 herein giving rise to MFA No.909 of 2014 and MFA No.1324 of 2014, the same have been remanded to the trial court to consider as to whether defendant No.1 herein is entitled to Rs.14.30 crores with interest at the rate of 18% per annum from 04.04.2002 to 31.03.2007 and for the subsequent period also till realization. He contended that today (i.e., on 27.09.2019), this Court has set aside the judgment and order passed in A.S. No.42 of 2007 and has remanded the matter for a fresh consideration mainly on the point of ascertaining whether there was indeed a compromise between the parties entitling respondent No.1 herein to Rs.14.30 crores with interest at the rate of 18% per annum. Further, the appellant herein has satisfied the impugned arbitral award passed by the arbitrator who has awarded compensation of Rs.84.73 lakhs to respondent No.1 herein and the said award of the Arbitrator plus interest amounting in all to Rs.1,00,00,000/- has been satisfied by the appellant herein. Therefore, the

remand of the matter to the trial court in this case would be wholly academic, as in this case, by filing A.S. No.55 of 2007, the -:

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"award of the Arbitrator to the tune of Rs.84.73 lakhs was assailed and now that the said award amount plus interest thereon has been paid to defendant No.1, no purpose would be served in further agitating the matter by the appellant herein. He contended that the impugned judgment and order of the trial court dismissing A.S. No.55/2007 on the ground that it is belated may be set aside and the appeal may be allowed.

15. Per contra, learned senior counsel, Sri.Raghavan, appearing for respondent No.1 supported the impugned judgment and order of the trial court and contended that Section 34(3) of the Act is very specific in prescribing a limitation period for filing of a suit, i.e., three months from the date of receipt of copy of the arbitral award. In the instant case, the appellant herein did not file the suit within the said period of three months. Instead, the suit was filed belatedly even beyond the extended period of thirty days as stipulated in the proviso. That the trial court has no jurisdiction to condone any delay beyond three months plus thirty days in filing the suit. That, in the instant case, the suit was filed on 30.08.2007, whereas the suit had to be filed on or before -:

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"24.08.2007. Even a days delay cannot be condoned as the trial court has no jurisdiction to condone such delay in view of the proviso to Section 34(3) of the Act. That Section 5 of the Limitation Act, 1963 (hereinafter referred to as the Limitation Act for convenience) is not applicable to the case on hand and hence, Section 5 of the Limitation Act may not be invoked by the appellant nor any such application be filed offering any explanation. This is having regard to Section 29(2) of the Limitation Act. The suit being belated and barred by time has been rightly dismissed by the trial court. He submitted that there is no merit in this appeal and the appeal may be dismissed. Points for Consideration:

16. Having heard learned counsel and learned senior counsel for the respective parties and on perusal of the original record and the material on record, the following points would arise for our consideration: (i) Whether the trial court was right in dismissing the suit as being barred by time?. (ii) What order?. -:

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"Section 34 of the Act:

17. The fact that the Arbitrator passed an award on 24.04.2007 awarding an amount of Rs.84.73 lakhs is not in dispute. But, the point for consideration is, as to, whether, the said suit filed by the appellant herein under Section 34(1) of the Act was in time. Before going into the nitty gritty of the said point of controversy, it would be useful to refer to Section 34(3) of the Act, which reads as under:

34. Application for setting aside arbitral award. x x x (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

18. On a reading of Section 34 of the Act, it is noted that an application seeking setting aside of an -:

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"arbitral award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal. The proviso thereto states that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

19. Section 5 of the Limitation Act deals with extension of prescribed period in certain cases. Section 5 states that an appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he has sufficient cause for not preferring the appeal or making the application within such period. By way of explanation, it is stated that the fact that an appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the -:

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"meaning of this section. Section 5 of the Limitation Act may be contrasted with Section 34(3) of the Act.

20. Section 34(3) of the Act as well as Section 5 of the Limitation Act came up for interpretation before the Honble Supreme Court in several cases and the following decisions could be referred to: (a) In Union of India vs. Tecco Trichy Engineers and Contractors, [(2005) 4 SCC239, the Honble Supreme Court has held as under:

8. The delivery of an arbitral award under sub-Section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the arbitral tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award -:

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"under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to

exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings. (b) In *Union of India vs. Popular Construction Company*, [2001 (8) SCC470 (*Popular Construction Company*)], the question that arose for determination was whether Section 5 of the Limitation Act was applicable to an application challenging an award under Section 34 of the Act. Interpreting the expression but not thereafter used in the proviso to sub-section (3) of Section 34, the Honble Supreme Court held that the said phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act and would, therefore, bar the application of Section 5 of the Act. It was held that the expression but not thereafter clearly meant that an application to set aside the award beyond the extended period under the provision to Section 34(3) of the Act was -:

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"sufficient indication of the exclusion of Section 5 of the Limitation Act. In the circumstances, after going through the history and scheme of the Arbitration Act, it was held that Section 5 of the Limitation Act was not applicable to an application challenging an award under Section 34 of the said Act beyond the extended period and the question was answered in the negative. (c) In *State of Goa vs. Western Builders* [(2006) 6 SCC239, (*Western Builders*)], after referring to the scheme of the provisions under the Act, the Honble Supreme Court held that wherever the Parliament wanted to give power to the Court, it has been incorporated in the provisions of the Act. Thus, no further power would lie in the hands of the Court so as to enable to exclude the period spent in prosecuting a remedy before another forum, but it was further emphasized that there was no prohibition incorporated in the Act for curtailing the power of the Court under Section 14 of the Limitation Act. That, much would depend upon the words of the statute and not general principles applicable. That, by virtue of Section 43 of the Act, the Limitation Act applies to the proceedings under the Act and the provisions of the Limitation Act can -:

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"only stand excluded to the extent wherever different period has been prescribed under the Act. Since, there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act should not be read into the Arbitration Act, which would advance the cause of justice. According to the Honble Supreme Court, if a statute is silent and if there is no specific provision, then the statute should be interpreted which advances the cause of justice. The aforesaid view was reiterated in Coal India Limited vs. Ujjal Transport Agency, [(2011) 1 SCC117 (Ujjal Transport Agency)]. (d) Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur, [(2008) 3 SCC70 (Singh Enterprises)] considered the expression sufficient cause which is also found in proviso to Section 34(3) of the Act and elucidated on the same. The said expression is found in Section 5 of the Limitation Act and also other special statutes which prescribe a specific period of limitation and thereafter, a further grace period within which an appeal or any other proceeding could be filed. The Honble Supreme Court observed that sufficient cause therein means adequate or enough. There cannot be any -:

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"straight jacket formula for accepting or rejecting the explanation offered for condoning the delay caused in taking steps. It was also observed that when a statute prescribes a particular period of limitation, the Court cannot direct condonation of delay beyond that specific period; in such an event, the specific provision providing for limitation would be rendered otiose. (e)(i) Consolidated Engineering Enterprises vs. Prl. Secretary, Irrigation Department, [(2008) 7 SCC169, (Consolidated Engineering Enterprises)], is another judgment of a three Judge Bench of the Honble Supreme Court on the proviso to Section 34(3) of the Act. In the said case, after referring to section 34 of the Act, and considering the same in light of Section 29(2) of the Limitation Act, it was observed that when any special statute prescribes certain period of limitation as well as provision for extension up to specified time limit on sufficient cause being shown, the period of limitation prescribed under the special law shall prevail and to that extent, the provisions of Limitation Act shall stand excluded. This is because of the intention of the Parliament in enacting sub-section (3) of Section 34 of the -:

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"Act. That an application for setting aside the award must be made within three months and the period can be further extended on sufficient cause being shown by another period of thirty days, but not thereafter. Hence, Section 5 of the Limitation Act is inapplicable as it stands excluded under Section 29(2) of the Limitation Act. Further, it was also observed that even though Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Act for setting aside the award, one need not conclude that Section 14 of the Limitation Act would also be inapplicable to an application filed under Section 34 of the Act of 1996. (ii) In the said case, His Lordship, Raveendran J.

gave a separate but concurring opinion. His Lordship referred to Section 43 of the Act to hold that Section 43 makes an express reference to the Limitation Act both in the Court and in arbitration. That there is also no express exclusion by an application of the provision of the Limitation Act to the proceedings under the Act. But, there are some specific departures from the general provisions of Limitation Act, such as, the proviso to section 34(3) and sub-sections (2) to (4) of Section 43 of the Act. His -:

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"Lordship observed that where the schedule to the Limitation Act prescribes a period of limitation for appeals or applications to any court, and the special or local law provides for filing of appeals and applications to the Court, but does not prescribe any period of limitation in regard to such appeals or applications, the period of limitation prescribed in the Schedule to the Limitation Act will apply to such appeals or applications and consequently the provisions of sections 4 to 24 will also apply. But, where the special or local law prescribes for any appeal or application, a period of limitation different from the period prescribed by the Schedule to the Limitation Act, then the provisions of Section 29(2) would be attracted. In that event, the provisions of Section 3 of Limitation Act will apply, as if the period of limitation prescribed under the special law was the period prescribed by the Schedule to Limitation Act, and for the purpose of determining any period of limitation prescribed for the appeal or application by the special law, the provisions

contained in sections 4 to 24 will apply to the extent to which they are not expressly excluded by such special law. That the object of Section 29(2) is to ensure that the principles contained in -:

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"Sections 4 to 24 of Limitation Act apply to suits, appeals and applications filed in a court under special or local laws also, even if it prescribes a period of limitation different from what is prescribed in the Limitation Act, except to the extent of express exclusion of the application of any or all of those provisions. (iii) The next question considered by his Lordship was whether under the proviso to Section 34(3) of the Act, Section 14 of Limitation Act was excluded. Section 14 of Limitation Act relates to exclusion of time when proceeding bona fide in a court without jurisdiction. While considering Section 14 in light of Section 34(3) of the Act and the proviso thereto, it was observed that the use of the words but not thereafter in the proviso makes it clear that even if a sufficient cause is made out for a longer extension, the extension cannot be beyond thirty days. Differentiating between the proviso to section 34(3) of Act and Section 5 of the Limitation Act, it was observed that they both vest a discretion in a court to extend the prescribed period of limitation if the applicant satisfies the court that he had sufficient cause for not making the application within the prescribed period. Section 5 of Limitation Act does not -:

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"place any outer limit in regard to the period of extension, whereas the proviso to sub-section 3 of section 34 of the Act places a limit on the period of extension of the period of limitation. It differs in regard to period of extension and it has the effect of excluding section 5 alone of the Limitation Act. Hence, it was held that having regard to Section 29(2) of the Limitation Act, Section 14 of the Act would be applicable to an application under Section 34(1) of Act. Even when there is cause to apply Section 14, the limitation period continues to be three months and not more, but in computing the limitation period of three months for the application under section 34(1) of the Act, the time during which the applicant was prosecuting such application before the wrong court is excluded, provided the proceeding in

the wrong court was prosecuted bona fide and with due diligence. While holding so, the judgment in Western Builders was approved. (f) In M.P. Steel Corporation vs. C.C.E., [(2015) 7 SCC58 (M.P. Steel Corporation)], it was held that Section 14 of the Limitation Act contains a principle based on advancing the cause of justice, it would certainly apply to exclude time taken in prosecuting proceedings -:

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"which are bona fide and with due diligence pursued, which ultimately end without a decision on the merits of the case. The same has been applied to the provisions of Arbitration Act. (g) In P.Radha Bai and others vs. P. Ashok Kumar and another, [AIR 2018 SC5013 (P.Radha Bai)], the question that arose was the applicability of Section 17 of the Limitation Act for condoning the delay caused on account of alleged fraud played on the objector (party challenging the award), beyond the period prescribed under Section 34(3) of the Act. In the said case, there was a delay in filing the suit and an application under Section 34(3) of the Act was filed. The trial court had dismissed the said suit/application stating that it was filed beyond the limitation period stipulated under Section 34 of the Act. But the High Court remanded the matter by stating that the trial court had not considered the applicability or otherwise of Section 17 of the Limitation Act which deals with the effect of fraud or mistake on the period of limitation. Aggrieved by the remand order, the appellants therein had approached the Honble Supreme Court. The Honble Supreme Court held that the exclusion -:

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"of Section 17 was necessarily implied on a reading of the scheme and object of the Arbitration Act. Firstly, the purpose of the Act was to provide for a speedy dispute resolution process. Secondly, extending Section 17 of the Limitation Act to Section 34 would do violence to the scheme of the Act. If Section 17 of the Limitation Act were to be extended to Section 34, the determination of time for making an application to set aside the arbitral award in Section 36 will become uncertain and create confusion in the enforcement of the award. This would run counter to the scheme and object of the Act. Thirdly, Section 34(3) reflects the principle of unbreakability i.e., the period of limitation under Section 34(3) of the

Arbitration Act is unbreakable and is meant to run continuously. It was held that once the party has received the award passed under the Act, the limitation period under Section 34(3) of the said Act commences. Hence, Section 17 of the Limitation Act would not come to the rescue of such objecting party. (h) In *Simplex Infrastructure Limited vs. Union of India* [(2019) 2 SCC455 (*Simplex Infrastructure Limited*)] also it has been held that Section 5 -:

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"of the Limitation Act has no application to a suit / application filed under Section 34 of the Act. But Section 14 of the Limitation Act applies to Section 34 of the Act. In the said case, it was held that the High Court was not justified in condoning the delay of 514 days in filing the application (suit) under Section 34(3) of the said Act.

21. The aforesaid judgments shall be considered in light of the rival contentions advanced on behalf of the parties.

22. Learned counsel for the appellant contended that in the instant case, the award was passed on 24.04.2007 and it was received by the appellant-plaintiff on 30.04.2007. The day it was received has to be excluded. This is as per Section 12 of the Limitation Act, which provision is not excluded under Section 34(3) of the Act. The period of limitation would commence from 01.05.2007. Three months under Section 34(3) of the Act would end on 31.07.2007. The extended period of thirty days which would commence from 01.08.2007 would end on 30.08.2007. The suit in the instant case was filed on 30.08.2007. That the suit was filed within the extended -:

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"period of limitation and not thereafter. It was further contended that the trial court reckoned the period of limitation from the date of the award and not from the date of the receipt of the award, which is an incorrect approach and therefore, it may be held that the suit filed was in time.

23. It was further contended that it was not necessary for the plaintiff to have filed a separate application seeking condonation of delay in filing the suit under proviso

to Section 34(3) of the Act as all that was necessary was to offer an explanation as to why the appellant-plaintiff was prevented from filing the suit within the initial period of limitation. Alternatively, learned counsel for the appellant contended that merely because an application under Section 34(3) of the Act read with Section 5 of the Limitation Act was not filed, could not have resulted in the dismissal of the suit. This is because the suit was filed within the extended period of limitation stipulated under Section 34(3) of the Act. He submitted that the application had to be filed by the concerned advocate for and on behalf of the plaintiff-appellant herein and if the advocate had not filed such an application, the -:

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"party could not have suffered or put to prejudice. For, the trial court could have always directed the filing of an application seeking condonation of delay under the proviso to Section 34(3) of the Act read with Section 5 of the Limitation Act, was the submission. That the party could not suffer on account of a lapse on the part of his advocate.

24. On the other hand, learned senior counsel Sri.Raghavan, appearing for respondent No.1 drew our attention to the copy of the application (plaint) filed in A.S. No.55 of 2007 and particularly, to paragraph 10 wherein it has been stated that the award under challenge was passed on 24.04.2007; the limitation for filing the petition was ninety days from 24.04.2007; that the trial court was in Summer vacation from 24.04.2007 to 26.05.2007. After deducting the said period, the suit was filed on 30.08.2007. He contended that the contents of paragraph 10 are contrary to what is stipulated under Section 34(3) of the Act. Paragraph 10 reads as under: The award under challenge is passed on 24.4.2007. The limitation for filing this petition is 90 days from 24.4.2007. This Honble vacation started from 24.4.2007 to 26.5.2007. After -:

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"deduction this Honble court vacation now this petition filing in time 25. On hearing the learned counsel for the respective parties, we note that firstly, under Section 34(3) of the Act, the limitation period is not ninety days, but three months. That,

while calculating the said period of three months, it was wholly unnecessary to take into consideration the period of summer vacation of the Court in the instant case. That the said aspect would have become relevant if the period of three months had ended during the vacation of the Court as per Section 4 of the Limitation Act. Learned senior counsel for respondent No.1 has rightly submitted that the appellant has totally misconstrued Section 34 of the Act. That under a misunderstanding, it has been stated that the case was filed in time, by deducting the period of summer vacation from the prescribed period of limitation. The said aspect is totally irrelevant. That what is contemplated under Section 34(3) of the Act is the period of limitation being three months from the date of receipt of copy of the award, it is only when the said period of three months would come to an end during the period of court vacation, then Section 4 of the Limitation Act would apply. That in -:

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"the instant case, the suit under Section 34(3) of the Act was filed on 30.08.2007 which is clearly beyond the period of three months from the date of receipt of the copy of the award by the appellant herein. He further submitted that not even an application was filed by the appellant-plaintiff seeking condonation of delay under Section 5 of the Limitation Act so as to satisfy the Court below that the plaintiff was prevented bona fide from filing the suit in time even if it is to be held that the suit filed was within the extended period. He contended that on both these grounds, the suit has been rightly dismissed by the trial court as being barred by time.

26. We shall consider the aforesaid rival contentions in light of the facts of this case. As already noted, the award of the arbitrator in the instant case is dated 24.04.2007. It was received by the plaintiff- appellant herein on 30.04.2007. The stipulated period of limitation is three months from the date of the receipt of the award. The date of receipt of the award has to be excluded while computing the period of limitation of three months as per Section 12(1) of the Limitation Act. Thus, the limitation period would commence from 01.05.2007, -:

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"which is three months and not ninety days, which ended on 31.07.2007. The extended period of limitation under the proviso to Section 34(3) of the Act is thirty days which is from 01.08.2007 to 30.08.2007. It is not in dispute that the suit in the instant case was filed on 30.08.2007 i.e., on the thirtieth day. Thus, in the instant case, the arbitration suit was filed within the extended period of limitation. But, there was no application filed to explain that the appellant was prevented by bona fide reasons from filing the suit within the initial period of limitation i.e., within three months. According to the appellant, the suit filed is within the extended period of limitation and not beyond the period of limitation. Thus, this is not a case where the plaintiff-appellant herein is seeking condonation of delay beyond the extended period of limitation prescribed under the proviso to Section 34(3) of the Act but within the extended period of limitation. Even otherwise, Section 5 of the Limitation Act would not apply to Section 34(3) of the Act to condone the delay in filing the suit beyond the extended period of limitation as held in aforesaid judgments of the Honble Supreme Court. But, Section 5 -:

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"of the Limitation Act would apply when the proviso to Section 34(3) of the Act would apply.

27. But, while considering the said period of limitation (being three months as well as extended period of thirty days), Sections 4, 12 to 14 of the Limitation Act would apply. This is because on an interpretation of Section 34(3) of the Act vis--vis the applicability of Section 5 of the Limitation Act, it would also be necessary to consider Section 29(2) of the Limitation Act. Section 29(2) of the Limitation Act reads as under:

29. Savings.(1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872). (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so

far as, and to the extent to which, they are not expressly excluded by such special or local law.-.:

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"It would also be useful to extract Sections 4 and 12 to 14 of the Limitation Act, which read as under:

4. Expiry of prescribed period when court is closed. Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens. Explanation.A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day. x x x 12. Exclusion of time in legal proceedings. (1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. (2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded. (3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment shall also be excluded.-.:

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"(4) In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded. Explanation.In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.

13. Exclusion of time in cases where leave to sue or appeal as a pauper is applied for.In computing the period of limitation prescribed for any suit or appeal in any

case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded, and the court may, on payment of the court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the court fees had been paid in the first instance.

14. Exclusion of time of proceeding bona fide in court without jurisdiction.(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good -:

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"faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation. For the purposes of this section, (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted; (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding; -:

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"(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

28. As a preface to the matter under discussion, paragraphs 12 and 13 of Basavaraj vs. Land Acquisition Officer [(2013) 14 SCC81 (Basavaraj)] could be cited as under:

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means the law is hard but it is the law, stands attracted in such a situation. It has consistently been held that, inconvenience is not a decisive factor to be considered while interpreting a statute.

13. The Statute of Limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale.-.:

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"According to Halsbury's Laws of England, Vol. 28, p.266:

605. Policy of Limitation Acts. The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence. An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a

party's own inaction, negligence or laches. (See: Popat and Kotecha Property v. State Bank of India Staff Assn. (2005) 7 SCC510 Rajendar Singh & Ors. v. Santa Singh & Ors., AIR 1973 SC2537 and Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project, (2008) 17 SCC448. Object and Purpose of Limitation Act:

29. At this stage, it is necessary to delineate on the object and purpose of the Limitation Act, 1963. The said Act consolidates and amends the law of limitation of suits, appeals and applications and for purposes connected therewith. The law of limitation is an adjective law -:

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"containing procedural rules and do not create any right in favour of any person, but simply prescribes that the remedy can be exercised only up to a certain period and not beyond. The Limitation Act therefore does not confer any substantive right nor define any right or cause of action. The law of limitation is based on delay and laches. It is well known that the Limitation Act only bars the remedy without extinguishing the rights. It is made to ensure that a plaintiff does not resort to procrastination or dilatory tactics, but seeks the remedy within a time fixed by the legislature. But in certain special circumstances like Section 27 of the Limitation Act, once the remedy becomes barred by limitation, the right itself gets extinguished, that is, when a suit for possession of any property gets extinguished on the determination of period of limitation. That unless there is a complete cause of action, limitation cannot run and there cannot be complete cause of action unless there is a person who can sue and a person who can be sued. There is also an important principle which is crystallized in the form of maxim that when once the time has begun to run, nothing stops it.-.:

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"30. On a reading of Section 29(2) of the Limitation Act, it becomes clear that where any special or local law prescribes, inter alia, any appeal to be filed within a period of limitation different from the period prescribed by the schedule under the Act, Section 3 of the Limitation Act shall apply and the provisions contained in

Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law. Before ascertaining as to whether there is an exclusion of Sections 4 to 24 of the Limitation Act and particularly Section 5 thereof under the provisions of the Act, it is necessary to have a birds-eye view of relevant Sections from 4 to 24 of the Limitation Act applicable to appeals only.

31. Section 4 deals with expiry of prescribed period when the Court is closed. It states that where the prescribed period for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the Court re-opens. The explanation states that the Court shall be deemed to be closed on any day within the meaning of the Section, if during any part of its normal -:

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"working hours it remains closed on that day. Section 4 does not extend or enlarge the period of limitation, but such a provision has been made having regard to the practicality of the matter.

32. The exclusion of time in legal proceedings is delineated in Section 12 of the Limitation Act. Sub-section (1) of Section 12 states that in computing the period of limitation for, inter alia, a suit or application, the day from which such period is to be reckoned, shall be excluded. Sub-section(2) of Section 12 states that in computing the period of limitation inter alia, for an appeal or an application for leave to appeal, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, award or order appealed from shall be excluded. Sub-section (3) states that where a decree or order is appealed from or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment shall be excluded. Sub-section(4) which is relevant for the purpose of this case states that in computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of -:

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"the award shall be excluded. Under the explanation to Section 12 it is stated that in computing the period under this section, the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.

33. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a Court without jurisdiction. It states that in computing the period of limitation for any suit or an application, the time during which the plaintiff or the applicant had been prosecuting with due diligence another civil proceeding, whether in the Court of first instance or of appeal or revision, against the defendant or respondent shall be excluded, where the proceeding relates to the same cause of action and is prosecuted in good faith in a Court which, from the defect of jurisdiction or other cause of action of a like nature are unable to entertain it. Explanation (a) states that in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted. For the purpose of this Section, the plaintiff or -:

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"an applicant resisting an appeal shall be deemed to be prosecuting a proceeding; for the purpose of this Section, misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction. Under Section 14, insofar as an appeal is concerned, the time spent in prosecution before a wrong forum would have to be excluded. The principles stated therein would also be applicable insofar as the applications under the Act are concerned i.e., by filing an application under the proviso to Section 34(3) of the Act and seeking condonation of delay in filing an application before the competent Court having jurisdiction by seeking exclusion of time spent bona fide in prosecuting the appeal before the wrong forum. In such an event, if the competent Court is satisfied having regard to the requirement of Section 14 thereof, it could constitute sufficient cause for filing the application within the period of three months under Section 34(3) as well as the extended period of thirty days under the proviso thereto, as the case may be. Thus, the expression but not thereafter in proviso to Section 34(3) cannot be

applied in a literal sense as application of Section 14 of the Limitation Act is not -:

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"excluded under Section 34(3) of the Act. In such circumstances, the expression but not thereafter cannot be given a literal or a plain meaning but a contextual and practical meaning as, in our view, the said expression is applicable in relation to Section 34(3) of the Act. Non-filing of Application re. Condonation of Delay:

34. In the instant case, the appellant herein did not file an application seeking condonation of delay. On the approach of the Court in a case where there is a delay in filing the appeal and the memorandum of appeal is not accompanied by an application supported by an affidavit explaining the reasons for the delay in filing the appeal, whether the said omission is fatal to the appeal or is a curable defect was considered in the following decisions:

35. (a)(i) In State of Madhya Pradesh vs. Pradeep Kumar and Another, [(2000) 7 SCC3752, (Pradeep Kumar) the question considered was, what is the consequence if an appeal is not accompanied by an application mentioned in sub-rule (1) of Rule 3A of Order XLI of the Civil Procedure Code, 1908 (for short Code). On analyzing the same, the Honble Supreme Court observed that even though the Code indicates in Rule 1 that not complying with the requirement of Rule 1 may -:

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"entail rejection of the memorandum of appeal, even so, another option is given to the court by the said rule and that is, to return the memorandum of appeal to the appellant for amending it within a specified time, or then and there. That there is no such rule prescribing for rejection of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. That if the memorandum of appeal is filed in such appeal without accompanying the application to condone delay the consequence cannot be fatal. It may not be a valid presentation of the appeal. But, if subsequently an application is filed to condone the delay before the appeal is rejected, it could be taken up along with

the already filed memorandum of appeal. Only then the court could treat the appeal as lawfully presented. When the court returns the memorandum of appeal as defective when not accompanied by an application explaining the delay, such defect can be cured by the party concerned and present the appeal without further delay. 35.(a)(ii) That, though sub-rule (1) of Rule 3-A of Order XLI uses the word "shall", it cannot be interpreted very harshly so as to make the non-compliance punitive to -:

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"the appellant. That even when a litigant is vigilant, he is prone to commit mistakes and an unintentional lapse on the part of the litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the Court should be to find means so as to not to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him. 35.(a)(iii) Referring to Jagat Dhish Bhargava vs. Jawahar Lal Bhargava, [AIR 1961 SC832, (Jagat Dhish Bhargava) the Honble Supreme Court held that when a defective appeal is presented, it should be carefully scrutinised at the initial stage soon after it is filed and give an opportunity to the appellants to remedy the defects. After referring to certain judgments of various High Courts, the Honble Supreme Court held as under:

19. The object of enacting Rule 3-A in Order 41 of the Code seems to be two-fold. First is, to inform the appellant himself who filed a time barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get -:

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"ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the rule that it is intended to operate as unremediably or irredeemably fatal against the appellant if the memorandum is not accompanied by any such application at the first instance.

In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A of Order 41 of the Code. (emphasis supplied by us) 35.(a)(iv) In view of the above, the Honble Supreme Court held that when a memorandum of appeal is not accompanied by an application seeking condonation of delay, the deficiency is not fatal, but is a curable defect and if the required application is filed subsequently, the appeal can be treated as presented in accordance with the requirement of Rule 3-A of Order XLI of the Code. Consequently, the matter was remanded to the concerned High Court for disposal of the application to condone the delay and to deal with the appeal in accordance with law.-.:

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"35.(b) In Man Khan vs. Dr. Keshav Kishore and others [SA No.2043/2018]. (MANU/MP/1659/2019), (Man Khan) which is a judgment of the Gwalior Bench of High Court of Madhya Pradesh, dated 05.02.2019, the following two substantial questions of law were considered on admission of the second appeal: (i) Whether the Court below has erred in law by not giving an opportunity to the appellant to file an application for condonation of delay ?. (ii) Whether the Court below after having come to a conclusion that the appeal is barred by limitation and no application for condonation of delay has been filed, was right in also deciding the appeal on merits or not?." After referring to the aforesaid judgment of the Honble Supreme Court in the case of Pradeep Kumar, the substantial questions of law referred to above were answered in the affirmative and it was held that an opportunity must have been given to the appellant therein to file an application for condonation of delay and if the -:

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"appellate Court was of the view that the appeal was barred by limitation, then it should not have been decided on the merits of the appeal also.

36. Hence, the non-filing of an application under proviso to Section 34(3) is not fatal to the case. It is a curable defect and an opportunity must be provided to cure

the defect for filing the necessary application under Section 5 of the Limitation Act.

37. It is noted that in the instant case, admittedly, no application seeking condonation of delay in filing the suit was filed. But, we have held that there was indeed no delay as such in filing the arbitration suit in terms of the proviso to Section 34(3) of the Act, inasmuch as the suit was filed during the extended period of limitation as per the proviso to Section 34(3) of the Act, i.e., on the thirtieth day after the lapse of the initial prescribed period of limitation which is three months. However, the proviso prescribes that the applicant/plaintiff must explain as to why the application (Arbitration Suit) could not be filed within the initial period of limitation i.e., three months, to the satisfaction of the Court. Admittedly, in the instant -:

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"case, no such application seeking condonation of delay was filed. We have held that the omission to file such an application was not fatal to the filing of the arbitration suit.

38. Significantly, in the instant case, the omission occurred on account of an erroneous understanding of the decision of law under the provisions of the Limitation Act, particularly Section 4 thereof as well as the proviso to Section 34(3) of the Act, which we have extracted above. The closure of the Court for summer vacation from 24.04.2007 to 26.05.2007 has been excluded from the period of limitation under Section 34(3) of the Act while computing the three months limitation period. As a result, the filing of the Arbitration Suit on 30.08.2007 has been stated to be within the limitation period under Section 34(3) of the Act. Hence, no application for condoning the delay has been filed as it was found to be unnecessary, albeit erroneous. The same is erroneous since in the instant case, the award was passed on 24.04.2007 and the limitation period is not ninety days from 24.04.2007 but three months from the date of receipt of the award i.e., 30.04.2007. In view of the above, it was contended that after deducting the summer vacation period from the -:

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"limitation period, the application filed was in time. Hence, on that assumption, no application seeking condonation of delay was filed. We have observed that the said approach on the part of the advocate for the appellant was erroneous and on a wrong understanding or misunderstanding of Section 34(3) and the proviso thereto of the Act. But, the fact is that the arbitration suit was not filed in the initial period of limitation prescribed under Section 34(3) of the Act computed from the date of receipt of award, but it was filed in the extended period of thirty days and in fact on the thirtieth day. Therefore, it was necessary to file an application seeking condonation of delay explaining the reasons as to why the appeal could not be filed in the initial period of limitation prescribed under the Act, but the reason for not doing so though not fatal to the case, as per the aforesaid decisions, nevertheless, it was necessary on the part of the appellant to have filed the same, but the appellant did not do so on account of there being no advice to do it by the learned counsel or advocate for the appellant, which is on account of a misconception of Section 34(3) of the Act and Section 4 of the Limitation Act.-.:

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"39. Therefore, the question is, whether, on account of the lapse on the part of the advocate in not advising the party to file an application under the proviso to Section 34(3) of the Act, the party i.e., the appellant herein could have faced the consequence of dismissal of Arbitration Suit as not maintainable which has happened in the instant case. In this regard, one could refer to the observations of the Honble Supreme Court in the case of Rafiq and another vs. Munshilal and another, [AIR 1981 SC1400 wherein the Apex Court posed a question, as to, whether, it is proper that the party should suffer for the inaction, deliberate omission or misdemeanor of his agent, that is his advocate and answered it in the negative.

40. In this context, it would be useful to refer to the Latin maxim *actus curiae neminem gravabit*, which means a litigant should not suffer due to the act of the Court. In other words, an innocent litigant ought not to suffer injustice because of the default of his chosen advocate. When there are laches on the part of the advocate, the party cannot be penalized for the same.-.:

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"41. Further, it would be apposite to also consider another significant aspect of the matter, namely with regard to the condonation of delay in filing an appeal. As already noted, there was a delay in filing the arbitration suit in the instant case, inasmuch it was filed in the extended period of limitation and not within the initial period of limitation prescribed under Section 34(3) of the Act. There was no delay in filing the arbitration suit beyond the extended period of limitation. However, an application under the proviso to Section 34(3) of the Act read with Section 5 of the Limitation Act had to be filed. We have also observed that non-filing of the same was not a fatal defect but was a curable defect. If an application had indeed been filed in the instant case, probably the trial court on considering the same would have allowed it after being satisfied that the applicant was prevented due to bona fide reasons from filing the suit in time and on condoning the initial delay, the arbitration suit would have been heard on merits.

42. In this regard, it would be useful to refer to the judgment of the Honble Supreme Court in the case of N.Balakrishnan v. M. Krishnamurthy, [(1998) 7 SCC -:

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"123]. (N.Balakrishnan), wherein the Honble Supreme Court held as under:

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation).

Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

43. Similarly, in Pradeep Kumar (supra), on the question of a belated appeal being unaccompanied by an application seeking condonation of delay and the -:

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"consequences of not filing the said application along with the memorandum of appeal and the fact that the said defect is curable, the Honble Supreme Court has observed as under:

12. It is true that the pristine maxim *vigilantibus non dormientibus jura subveniunt* (law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the Court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.

Post Script:

44. Before parting with this case, we wish to emphasize the importance of pleading whether in the form of plaint or memorandum of appeal, a plaint is in fact a work of art and much effort would be required to draft a precise and concise plaint seeking specific remedies. Similarly, while filing an appeal, it would be absolutely necessary to peruse the relevant provisions of law -:

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"particularly the provision relevant to the filing of an appeal as well as the limitation period prescribed thereto. In the instant case, it is apparent that while filing the memorandum of appeal, Section 4 of the Limitation Act has not been taken note

of. Also, learned advocate who filed the memorandum of application (Arbitration suit in the instant case), lost sight of the fact that the initial period of limitation prescribed under Section 34(3) of the Act had lapsed and that the suit was being filed in the extended period as prescribed in the proviso thereto. There has been no application of mind to the said provision, as no effort has been made to file an application explaining the reason as to why the applicant was prevented from filing the suit within the period of three months from the date of receipt of the award.

45. It is necessary to emphasize the duty of advocates and counsel in perusing the relevant provisions of law whether procedural or substantive before filing a pleading in a Court of law. The advocates must double check and verify before making any presentation to the Court. This is absolutely necessary in order to ensure the citizens faith in the justice system. Further, it is also the -:

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"duty of the courts to consider whether a particular presentation made by a party is in accordance with law or has resulted in waste of precious time of the Courts. It is the duty of the Judge in a Court of law to carefully peruse as to whether the memorandum of plaint or for that matter, the memorandum of appeal or an application has been filed in accordance with the relevant provisions. In the instant case, neither the learned advocate for the appellant who filed the application in the form of Arbitration Suit under Section 34(3) of the Act, nor the learned Judge bothered to consider the said provision. Further, it is also the duty of the Court to ensure that justice is done in the matter and not dispose of cases on hyper-technical basis. Endeavour of the Court must be to render justice in the case and not merely dispose of the case. That is precisely what has not happened in the instant case.

46. Further, in the instant case, if there was any real controversy with regard to computing of the period of limitation, as to when the plaintiff received the copy of the award, etc., then, on that controversy, a preliminary issue could have been raised by the trial court. An enquiry could -:

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"have been held by giving an opportunity to the parties to let-in their evidence and thereafter, the controversy on the limitation could have been decided. Instead, in the instant case, there has been no enquiry with regard to the controversy regarding the limitation period and the suit has been simply dismissed as being barred by time. The approach of the trial court in the instant case is not right or justified. Hence, the impugned judgment is liable to be set aside and is set aside.

47. But, the matter does not end. The further question is as to whether the matter has to be remanded to the trial court for a fresh consideration. In this regard, we think that it is not necessary to remand the matter for fresh consideration as the appellant has already paid respondent No.1 an amount equivalent to the award made by the Arbitrator plus interest thereon i.e., about Rs.1,00,00,000/- and odd. Hence, there is no purpose in the appellant seeking to challenge the award for Rs.84,73,000/- passed by the Arbitrator when the appellant has already satisfied the award and released the payment to respondent No.1.-.:

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"48. In the circumstances, even though we have set aside the impugned judgment by allowing this appeal, in our view, it is wholly unnecessary to remand the matter to the trial court for a fresh disposal on account of the aforesaid reasons. Hence, there shall be no remand of the matter to the Court below. The appeal is allowed and disposed of in the aforesaid terms. Parties to bear their respective costs. Sd/- JUDGE Sd/- JUDGE RK/-

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