

**State of Karnataka Vs. M/S Naveena Constructions, Gulbarga and Another**

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**Court :** Karnataka

**Decided On :** Nov-18-1994

**Reported in :** ILR1994KAR3638; 1995(1)KarLJ324

**Judge :** G.P. Shivaprakash and;R.V. Vasanthakumar, JJ.

**Appeal No. :** M.F.A. No. 1578 of 1993

**Appellant :** State of Karnataka

**Respondent :** M/S Naveena Constructions, Gulbarga and Another

**Advocate for Def. :** Sh. K. Gopal Hegde, Adv.

**Advocate for Pet/Ap. :** Sh. H.J. Sundar Kumar, H.C. Govt.

**Judgement :**

**G.P. Shivaprakash, J.**

1. In these two appeals under Section 39 of the Arbitration Act, 1940 ('Act' for short), the common questions that arise for consideration being the same, the appeals were heard together and disposed of by the common judgment.

2. The main question that arises for consideration in these appeals whether the provisions of Section 5 of the Limitation Act, 1963, which provides for extension of prescribed period in certain cases, are applicable in a proceeding initiated by the

Arbitrator's under sub-section (2) of Section 14 of the Arbitration Act.

3. The facts of the case in brief are as follows : The Arbitrators concerned filed their respective awards in court at the instance of the claimants in terms of Section 14 of the Act. Section 14 of the Act reads as hereunder :

'Section 14. Award to be signed and filed : (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause, the award or a signed copy of it; together with any deposition and documents which may have been taken and proved before them, to be filed in court, and the court shall there upon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under Clause (b) of Section 13, the court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of the award.'

4. After the respective Arbitrators filed their awards in court, the court directed issue of the notice to the appellant herein, i.e., State of Karnataka. The appellant was represented by the Government Pleaders. However, 'objections' to the awards were not filed within 30 days, being the period of limitation prescribed under Article 190(b) of the Limitation Act, 1963. The objections were filed after the period prescribed with an application under Section 5 of the Limitation Act, 1963 seeking extension of the prescribed period for filing of 'objections'. The claimants, before the trial courts entered appearance and filed statements stating that they have no objections for passing decrees in terms of the award and since objections were not filed by the appellants within 30 days from the date of service of notice, the objections if any filed subsequent to the period prescribed cannot be

entertained. It was contended before the trial courts by the claimants that the courts have no jurisdiction to condone the delay in filing the objections and therefore the court may proceed to pass the judgment in terms of the award. The trial Courts have upheld the contention of the claimants and passed the judgments and decrees under appeal.

5. In the course of hearing of these appeals it was also contended on behalf of the claimants that since no application was filed under Section 33 of the Act before the trial court by the appellant taking exception to the award, the objection filed by the appellant cannot be construed as an application in terms of Section 33 of the Act. Section 33 of the Act reads as hereunder :

'S. 33. Arbitration agreement or award to be contested by application - Any party to an arbitration agreement any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the court and the court shall decide the question on affidavits :

Provided that where the court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.'

6. Shri H. J. Sunder Kumar, learned Government Advocate appearing for the appellant submitted that Section 5 of the Limitation Act is applicable in the facts and circumstances of these cases. Section 5 of the Limitation Act 1963 is reproduced below :

'S. 5. Any 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 had sufficient cause for not preferring the appeal or making the application within such period.

Explanation - The fact that the appellant or the 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 meaning of this Section.'

7. In this regard the learned Government Advocates invited our attention to the decision reported in : AIR1982 Ori18 , wherein the Orissa High Court has held that in view of the change brought about in Section 29 of the Limitation Act the court has jurisdiction to extend the time by condoning the delay in filing objection beyond 30 days. In the course of the order the court has observed that in view of the change brought about in Section 29 of the New Limitation Act (1963 Act) it must follow that a court has jurisdiction to extend the time by condoning the delay in filing objection beyond 30 days and in the facts and circumstances of the case therein the court has held that the objections filed after 30 days period as not out of time.

8. The learned Government Advocate also placed reliance on a decision reported in : AIR 1984 AP14 , wherein a Division Bench of the Andhra Pradesh High Court, after considering in detail the provisions of Section 5 as it was in the Old Act and as it is in 1963 Act, has concluded that the present section applies to all proceedings before court, except the proceedings under Order 21 of the C.P.C. The High Court has further held that in the absence of any specific period of limitation under the Act, the provisions of Sections 5 and 24 of the Limitation Act are applicable to the proceedings arising under the provisions of the Act and has ruled that the cumulative effect of Sections 5 and 29(2) of the Limitation Act, 1963 is, that the power to condone delay in deserving cases if sufficient cause is shown in all applications except under Order 21, CPC, is conferred on the courts and the provisions of Sections 4 to 24 are applicable to the proceedings under the Act.

9. The learned Government Advocate also invited our attention to the decision in : AIR1983 Ori262 . In the said case the party who had notice of the filing of the award in the court, instead of filing objection within the last date of the prescribed period of 30 day, sought time to file objection and the court granted adjournment for filing objection, and on the adjourned date which was clearly beyond 30 days from the date of receipt of notice from the court, the objection was filed. It was contended therein that the objection so filed cannot be entertained since the objection was not filed within the 30th days period. The court, however, ruled that

there was implied extension of time even without a formal application under Section 5 of the Limitation Act for condonation of delay, when it granted time to file objection and therefore the objections filed by the party could be entertained by the court.

10. The learned Government Advocate also cited the decision reported in AIR 1980 Delhi 40. In this decision the Delhi High Court has taken the view that in view of the amendment to Section 5 of the Limitation Act, 1963 the delay if any could be condoned if the party shows sufficient cause for not making the application within the time prescribed and that the expression 'after the time for making an application etc., has expired' has to be read as the period mentioned in the Limitation Act together with such further period that may be allowed under Section 5 of the Limitation Act.

11. On the question, in the absence of an application in terms of Section 33 of the Act, whether the objection filed could be treated as an application, the Government Advocate submitted that the objection to the award is as good as an application under Section 33 of the Act, if technicality is kept apart. In this context he cited the ruling of the Supreme Court in *Madan Lal v. Sunder Lal* : [1967]3SCR147 , wherein the Supreme Court has ruled thus :

'(8) It is clear, therefore, from the Scheme of the Act that if a party wants an award to be set aside on any of the grounds mentioned in Section 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Art. 158 of the Limitation Act. If no such application is made the award cannot be set aside on any of the grounds specified in Section 30 of the Act. It may be conceded that there is no special form prescribed for making such an application and in an appropriate case in objection of the type made in this case may be treated as such an application, If it is filed within the period of limitation. But if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation.'

'(9) It is not in dispute in the present case that the objections raised by the appellant were covered by Section 30 of the Act, and though the appellant did not

pray for setting aside award in his objection that was what he really wanted the court to do after hearing his objection. As in the present case the objection was filed more than 30 days after the notice it could not be treated as an application for setting the award, for it would then be barred by limitation. The position thus is that in the present case there was no application to set aside the award on grounds mentioned in Section 30 within the period of limitation and therefore, the Court could not set aside the award on those grounds. There can be no doubt on the scheme of the Act that any objection even in the nature of a written statement which falls under Section 30 cannot be considered by the court unless such an objection is made within the period of limitation (namely, 30 days), though if such an objection is made within limitation that objection may in appropriate cases be treated as an application for setting aside the award.'

12. Besides the learned Government Advocate referred to the decision of this court in Babu Rao Ghale v. Navaji Sorabji Bhalena (1968 (1) My. LJ 573), wherein it is held that though the party objecting to the award, did not make an application with the requisite court fee, the applications filed in time could be treated as such an application and the party permitted under Section 149 C.P.C. to pay the necessary Court fee.

13. On the other hand, Shri Gopal Hedge, learned Counsel for the claimant (respondent 1 in MFA 1578/93) contended, firstly, that the provisions of Section 5 of the Limitation Act 1963, despite the amendment, is not applicable to the proceedings in the instant case. Alternatively, he submitted that since no application in terms of Section 33 of the Arbitration Act has been made by the appellant challenging the award the objection filed even if it were to be construed, that the provisions of Section 5 of the Limitation Act is applicable and therefore, the delay in filing could be condoned by the court, the same cannot be treated as equivalent to an application contemplated in Section 33 of the Arbitration Act.

14. To appreciate the contentions of the learned counsel, we set out below the provisions of Sections 15 to 17, and 30 of the Act to which the learned counsel referred in the course of the arguments.

'Section 15. Power of Court to modify award :

The Court may by order modify or correct an award :

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.'

'S.16. power to remit award : The court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit :-

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the court shall fix the time within which the arbitrator or umpire shall submit his decision to the court :

Provided that any time so fixed may be extended by subsequent order of the court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.'

'S. 17. Judgment in terms of award : Where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing

it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award.'

S. 17. Judgment in terms of award : Where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award.'

'S. 30. Grounds for setting aside award : An award shall not be set aside except on one or more of the following grounds, namely :

(a) that an arbitrator umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceeding have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid.'

15. The learned counsel urged that under the provisions of Sections 15 and 30 of the Act, the award filed by the Arbitrator could be modified or set aside, only if exception is taken to any of the terms contained in the award by the opposite party, and if no exception is taken by the opposite party in the manner provided in the Act, the court has no option but to proceed to pronounce the judgment according to the award and the decree shall follow upon the pronouncement of the judgment. He submitted that this is evident from the provisions of Section 17 which enjoins, inter alia, that after the time for making an application to set aside the award has expired, the court shall proceed to pronounce the judgment according to the award and upon the judgment so pronounced the decree shall follow. The

learned counsel submitted that in the instant case when no application was filed by the appellant within 30 days of the date of receipt of the notice of filing of the award, the period of limitation as prescribed in Article 119(b) of the Limitation Act, 1963, the only thing that the court could do was to pass judgment in terms of award as provided in Section 17 of the Act.

16. In support of the above submission, the learned counsel invited our attention of Ss. 3 5 & 29 of the Limitation Act, 1963 and urged that the provisions of Section 5 of the Limitation Act, 1963 is not at all applicable in the instant cases and even otherwise since no application has been filed by the party in terms of Section 33 of the Act the trial court was right in passing the judgment in terms of the award. He emphasised that the objections filed by the appellant cannot be equated to an application in terms of Section 33 of the Act.

17. The learned counsel submitted that in the case of Madan Lal, (supra), the Supreme Court has held that any objection or application taking exception to the award has to be filed within the time prescribed and the court cannot consider the objection unless the same is made within the period of limitation. He urged that the Supreme Court in the said decision negated the contention that Section 17 of the Act empowers the court to set aside the award and that such power can be exercised even where the objections in the form of a written statement has been made more than 30 days after the service of the notice of filing of the award as the court can do so suo motu.

18. No doubt, in the aforesaid decision the Supreme Court has ruled that the court has power to set aside the award suo motu and that power could be exercised to set aside an award on grounds which fall under Section 30 of the Act if the objection is taken within the period prescribed, but if the objection is taken after service of notice of filing of the award, the court has no power to set aside the award on any of the grounds falling under Section 30 of the Act, as otherwise the period of limitation prescribed will have no meaning. However, the Supreme Court has not considered the question of the applicability of the provisions of Section 5 of the Limitation Act, 1963 which is the main bone of contention in these appeals.

19. The learned counsel next cited the decision of the Supreme Court in *Food Corporation of India v. E. Kuttappan* (AIR 1933 SC 2629 = 1993 (2) Arb. LR 266). The question that arose for consideration therein was the starting point of limitation when a party to arbitration through its counsel had placed the award before the court and the court had accepted it. In that context the Supreme Court held that it could be said 'that court did convey to the party placing the award before it, the factum of the award being filed in court. The mere fact that at a subsequent stage the court issued notice to the parties informing them of filing of the award in court for the purpose of any one to object to the award being made the rule of the court is an act of the court which cannot in law prejudice the rights of the parties'. The Supreme Court in the said case after noticing that the respondent had by the letter requested the Arbitrator to send to the lawyer the award for filing it into court and the Arbitrator chose to accede to the request of the respondent in specific terms, held 'he necessary implication authorised the respondent's counsel to file the award and the connected papers in court on his behalf. The law enjoined on the Arbitrator to file the award in court for which purpose he could even be directed by the court. The obligation of filing the award in court is a legal imperative on the Arbitrator.' Therefore, the Supreme Court held that when a lawyer files the award in court when given to him by the Arbitrator it has to be presumed that it was with the authority of the Arbitrator. This decision cited by the learned counsel does not in any manner assist in answering the moot point raised before us, namely, the applicability of the provisions of the Limitation Act.

20. Sri N. Kumar, learned counsel appearing for the claimant in MFA 2591/90 also urged that Section 5 of the Limitation Act, 1963 has no application in the instant case. In this regard he relied on the decision in *Indian Telephone Industries v. Jairam Reddy* (TLR 1985 Kar p. 2967). The facts of the case in the said decision are totally different. The court had proceeded to make the award the rule of the court before 30 days prescribed by Article 119(b) of the Limitation Act. In that context, a learned single Judge of this court held that Section 17 of the Act makes it clear that it is imperative for the court, after the award is filed by the Arbitrator in the court, to wait for the expiry of the time prescribed for making an application to set aside the award and that till the expiry of the statutory period 'the jurisdiction of court for the period mentioned in the statute' stands suspended. The court,

therefore, held that it amounts to lack of inherent jurisdiction to pass a decree till the expiry of the statutory period of 30 days and if the court were to pass a decree in terms of the award before the expiry of the statutory period, it would be a decree passed by a court without inherent jurisdiction and such a decree is nullity, Shri N. Kumar sought to derive support for his submission from the aforesaid ruling contending that the converse is equally true, that is, after the expiry of the period of 30 days the court gets the jurisdiction to pass the decree and by force of the provisions of Section 17 of the Act the court is obliged to pronounce the judgment pass the decree.

21. We have carefully considered the contentions of the learned counsel and we are of the opinion that it is not possible to hold that the provisions of Section 5 of the Limitation Act, 1963 are inapplicable to a proceeding under the provisions of the Act.

22. Sub-section (1) of Section 37 of the Act is clear on the question of the applicability of the provisions of the Limitation Act, 1963. The sub-section enjoins that it 'shall apply to the arbitrations' as they apply to proceedings in court, meaning thereby that the provisions of the Limitation Act are equally applicable to proceedings arising under the provisions of the Act. There is no provision in the Act to exclude the applicability of the provisions of Section 5 of the Limitation Act, 1963. The thirty days period for making the application for filing objection is prescribed under the provisions of the Limitation Act on which the claimants rely.

23. One more point was urged by Shri Gopal Hegde in the course of his submission. He submitted that the appeals are not maintainable. He urged that even though the appeals presented purport to be under Section 39 of the Act, as a matter of fact, the orders under appeals are not appealable orders contemplated in Section 39 of the Act. Section 39 of the Act reads as hereunder :

'Section 39. Appealable order : (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order : An order :

(i) superseding an arbitration;

- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award; Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.'

24. The learned counsel submitted, in the instant cases, if at all these appeals could be construed as one under Section 39 of the Act it could only be under Section 39(1)(vi) of the Act. He emphasised that in the instant cases since court has rejected the objections filed by the appellant on the ground that the said objections were barred by limitation the same cannot be construed as 'refusing to set aside an award.' Continuing his submission he referred to Section 30 of the Act which we have extracted above and submitted that an award could only be set aside on three grounds :

- (1) that an Arbitrator or Umpire has misconducted himself or the proceedings.
- (2) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under Section 35; and
- (3) that an award has been improperly procured or is otherwise invalid. According to the learned counsel, since the awards in the instant cases cannot be related to any of the aforesaid three grounds the appeals are not maintainable.

25. Section 39(1) of the Act enumerates the appealable orders. Setting aside of refusing to set aside an award is an appealable orders. the instant cases the trial

court has refused to set aside the awards under appeal on the ground that no objections were filed within the time prescribed. Therefore, in our opinion, the orders of the trial court under appeals are nothing but refusing to set aside the award. In these appeals what is contended by the appellant is that the awards passed by the courts are invalid. Therefore, it is a ground for setting aside the award contemplated in Section 30(c) of the Act. Hence, we reject this contention also made on behalf of the respondents.

26. In the result these appeals succeed. The judgments and awards which are under appeal are set aside and the matters are remitted to the trial courts for fresh disposal in the light of this judgment and in accordance with law.

27. In view of the success of these appeals and the setting aside of the awards, the appellant is permitted to withdraw the amounts deposited pursuant to any interim direction given by this court in the appeals and in no event the said amounts shall be paid to the claimants.

28. Appeals allowed.