

**P.C. Sharma and Co. Vs. Delhi Development Authority and anr.**

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**Court :** Delhi

**Decided On :** Sep-22-2008

**Reported in :** 2008(4)ARBLR228(Delhi)

**Judge :** Rajiv Sahai Endlaw, J.

**Acts :** [Arbitration Act, 1940](#) - Sections 5, 11, 12, 28 and 28(1); Arbitration Act, 1899 - Sections 12; Limitation Act - Schedule - Article 137; Code of Civil Procedure (CPC) - Order 2, Rule 2

**Appeal No. :** OMPs Nos. 51 and 52/2007

**Appellant :** P.C. Sharma and Co.

**Respondent :** Delhi Development Authority and anr.

**Advocate for Def. :** Gaurav Sarin, Adv. in OMP. No. 51/2007 and ; Bhupesh Narula, Adv. in OMP No. 52/2007

**Advocate for Pet/Ap. :** Sandeep Sharma, Adv

**Judgement :**

**Rajiv Sahai Endlaw, J.**

1. Both the petitions with respect to separate arbitration proceedings, but between the same parties and involving identical facts, have been preferred under Sections

5, 11 and 12 of the Old [Arbitration Act, 1940](#) with the prayer for removal of the respondent No. 2 (also same in both the petitions) appointed as the sole arbitrator by the respondent No. 1 DDA and for appointment of an independent arbitrator. Replies have been filed by the respondent No. 1 to both the petitions. However, the counsel for the petitioner, during the hearing, did not press for the relief of change of arbitrator but only pressed/argued for extension of time under Section 28 of the Act for extension of time for making of the award. The counsel for the respondents in each of the cases have opposed the said prayer for extension of time on the ground of the same being barred by time. The power of the court to extend the time for making of the award was not disputed and, in fact, Mr Gaurav Sarin, counsel for the respondent in one of the cases himself, cited *Hari Krishna Wattal v. Vaikunth Nath Pandya* : [1974]1SCR259 and *The Hindustan Construction Co Ltd v. Governor of Orissa and Ors.* : [1995]2SCR441 .

2. In the facts of the cases, three questions fall for adjudication i.e., (1) In the absence of the petitioner having filed the petition under Section 28 of the Act for extension of time, can an order extending the time for making of the award be made in the present petition; (2) Whether the prayer of the petitioner for extension of time is barred by time; (3) If the aforesaid two questions are answered in favour of the petitioner, whether in the facts and circumstances of the case, grounds for extension of time for making of the award are made out.

3. The two cases have had a chequered history. The agreements from which disputes and differences have arisen appear to be of the year 1985. Disputes and differences having arisen between the parties, the petitioner on 20th April, 1993 invoked the arbitration clause in the agreements. Alleging failure of the respondent No. 1 to appoint the arbitrator, the petitioner in or about 1994 instituted suits for appointment of arbitrator and which were allowed on 25th August, 1995 with direction to respondent No. 1 to appoint an arbitrator. The respondent No. 1 in terms of direction of this Court, appointed an arbitrator on 22.09.1995. The petitioner filed its claims before the arbitrator. The arbitrator appointed by the respondent No. 1 was changed from time to time. On 15th September, 1998, the then arbitrator adjourned the proceedings sine die owing to time for making award having expired and no request for extension having been received from both the

parties. After considerable time, the petitioner in or about 2001 instituted OMPs in this Court under Sections 5, 11 and 12 of the Act for removal of the arbitrator and for appointment of an independent arbitrator. The said OMPs (being OMPs No 28/2001 and 29/2001) were dismissed by this Court vide order dated 28th February, 2006. A perusal of the said order shows that the petitioner had therein stated that the petitioner had declined to give its consent to enlargement of time on the ground that in terms of arbitration agreement, the arbitrator could only be appointed by name and not by designation, as had been done by the respondent No. 1. However, at the time of hearing of the said OMPs, removal of the arbitrator was sought only on the ground that the arbitration proceedings had dragged on for too long and which called for removal of the arbitrator appointed by the respondent No. 1 and appointment of an independent arbitrator. This Court in the order dated 28th February, 2006 found that the petitioner itself was to blame for the delay in the arbitration proceedings and it was the petitioner who had not acceded to enlargement of time to enable the arbitrator to give the award. The OMPs were accordingly dismissed.

4. The petitioner preferred appeals against the said order being FAO(OS) 319/2006 and FAO(OS) 320/2006 to the Division Bench of this Court against the said order. The Division Bench held, vide order dated 3rd May, 2006 that the appellant remained silent for over four years after the proceedings were adjourned sine die and the delay in the disposal of the arbitration proceedings was attributable to the petitioner and dismissed the appeals in limine. I may clarify that the arbitration proceedings were adjourned sine die on 15th September, 1998 and OMPs were filed in the year 2001 i.e., after nearly three years and not four years, as apparently erroneously recorded in the order of the Division Bench.

5. The petitioner, after the dismissal of the appeals aforesaid, applied for revival of the arbitration proceedings. The SE(Arbitration) of the respondent No. 1 vide his letter dated 4th July, 2006 directed both the parties to appear before him on 3rd August, 2006 for clarification in the matter. On 3rd August, 2006, the respondent No. 1 sought time to seek legal opinion from the legal cell for enlargement of the time. The petitioner enlarged the time for making the award till the date of the award. In these circumstances, the matter was adjourned to 4th September, 2006.

On 4th September, 2006 the respondent No. 1 sought further time for seeking legal opinion. The matter was, thereafter, adjourned to 26th September, 2006 and then again to 19th October, 2006 when the respondent No. 1 intimated that the proceedings were adjourned sine die long back and the arbitrator had become functus officio and, therefore, the time could not be extended by mutual consent of the parties. It was thereafter that the present petitions came to be filed in or about February, 2007.

6. Though, as aforesaid, the hearing was only on the issue of extension of time and the limitation thereof but I may record that the reply of the respondent in both OMPs admits the power of the court to extend the time and, in fact, in reply to OMP 51/2007 the plea of limitation has not even been taken. The counsel for the respondents have fairly conceded that the replies have been filed on the premise that the petitions were for extension of time for making the award.

7. In my view, the petitions as drafted for appointment of an independent arbitrator even though not pressed for the said relief were misconceived. Similar prayer had been made by the petitioner in OMP Nos 28/2001 and 29/2001 filed earlier and which prayer at the time of hearing of the said OMPs was pressed only for the reason of delay and which reason had not found favour with the Single Judge of this Court in the order dated 28th February, 2006 and by the Division Bench in order dated 3rd May, 2006. Thereafter, there was no subsequent event entitling the petitioner to again seek for appointment of independent arbitrator. After the dismissal of the appeal, the arbitration proceedings could not take place owing to the refusal of the respondent No. 1 to consent to extension of time for making of the award. The respondent No. 1 was fully justified in so refusing and such refusal by the respondent No. 1, entitled the petitioner to only approach this Court for extension of time for making of the award and did not entitle the petitioner to again apply for appointment of an independent arbitrator. No fault could be attributed to the arbitrator for not proceeding with the arbitration owing to the refusal of the respondent to extend the time. Thus the petitions as filed for appointment of an independent arbitrator were/are not maintainable.

8. The petitioner has, in the rejoinder filed to the replies of the respondent No. 1 in these petitions, made a prayer for extension of time, in addition to the prayer for appointment of an independent arbitrator. As aforesaid, during hearing only extension of time for making the award was pressed.

9. In *Sakalchand Moti v. Ambaram* AIR 1924 Bom 380 and in *Madura Mills Co. v. Krishna Ayyar* : AIR1937 Mad405 , both under the Arbitration Act, 1899, it was held that time could be extended under Section 12 of the 1899 Act, which was narrower in language, though corresponding to Section 28(1) of the 1940 Act, even on an oral prayer made in that behalf and further that the court was empowered to exercise the power for extension of the time for making the award even without a party asking for it.

10. In *Narsing Das v. Firm Bisandaval* : AIR1954 Ori29 , it was held that Section 28(1) of the 1940 Act is very wide and confers full discretion on the court to enlarge time for making award at any time. In *Prahallad Rai v. F.C.I.* : AIR1980 Ori16 , power under Section 28 of the 1940 Act was exercised on the strength of a letter sent by someone who was neither a party to the arbitration proceedings nor a member of the panel of arbitrators. It was held that the court could extend the time even suo moto in a fit case, of course, after giving opportunity of hearing to all the parties. This Court also in *Union of India v. Khanchand Bhagat Ram Jain and Sons* : 6(1970)DLT460 held that power under Section 28 could be exercised by the court suo moto.

11. Thus, it appears that the courts have always favoured enlargement of time for making the award even when one of the parties to the arbitration expressed disinclination or even opposition to such extension, where the party seeking such extension had not been guilty of condemnable delay or contumacious conduct. In this regard see *Hari Om Properties v. B Datta* : 80(1999)DLT103 .

12. The case law was again reviewed in *Fertilisers and Chemicals Travancore Ltd v. Industry Side Pvt. Ltd and Ors.* 1988 (9) Arb L R 59 Ker where it was again held that (a) no application as such is necessary for the court to exercise the power under Section 28 of the Act; (b) if any application is filed it is only to be treated as a reminder of the court's power and if circumstances would justify enlargement of

time, it should be granted in appropriate cases. If the power is exercisable without any formal application, there is no question of Article 137 of the Limitation Act coming into play when a court proposes to enlarge time; (c) exercise of such powers cannot be refused merely because it is requested for through an application nor could any such application be dismissed as barred by limitation.

13. The aforesaid judgment in Fertilisers and Chemicals Travancore Ltd was concurred by this Court in Delhi Development Authority v. Girdhar Engineers and Contractors .

14. Thus, the absence of a petition under the provisions of Section 28 of the Act could not come in the way of this Court exercising the power under Section 28 of the Act. In the present case, of course, the petitioner has, in the rejoinder as aforesaid, made such a prayer. This Court even while dismissing the petition can suo moto exercise the power under Section 28 of the Act.

15. Similarly, argument of the counsel for the respondent that exercise of power to extend the time is circumscribed by limitation is no good, it having been held in the judgment (supra) that the same is not circumscribed by laws of limitation. It is the argument of the counsel for the respondent that the cause of action for extension of time had accrued to the petitioner when the proceedings were adjourned sine die on 15.09.1998 as aforesaid and under Article 137 of the Schedule to the Limitation Act, the time under Section 28 of the Act could have been extended within a period of three years only therefrom. It was also argued that the petitioner then, instead of applying for extension of time had filed OMPs No 28/2001 and 29/2001 for appointment of independent arbitrator and the exercise of power to extend time would also be barred under Order 2 Rule 2 of the CPC. I do not agree with either of the said contentions. Independently of the judgment (supra) that the exercise of the power is not circumscribed by any limitation, I find that the right, if any, to the petitioner to seek extension of time accrued only in October 2006 when the respondent No. 1 refused to concur in extension of time. The arbitration proceedings were adjourned sine die on 15.09.1998 owing to the petitioner itself having declined to extend the time - the respondents at that time had not declined to extend the time. Thus, even if the provisions of Article 137 of Schedule I to the

Limitation Act were to apply, the cause of action for applying for extension of time would accrue only in October, 2006 and the present petitions (and the rejoinders therein) were filed within three years. Irrespective of the applicability of the provisions of Order 2 Rule 2 of the CPC to the arbitration proceedings, the cause of action for extension of time and the cause of action for applying under Sections 5, 11 and 12 of the Act are independent and applying under one would not bar the application under the other.

16. That takes me to the last aspect as to whether in the facts and circumstances the power to extend the time should be exercised or not. I may in this regard notice the judgment of this Court in Mahalingashetty & Co. Ltd v. NPCC Ltd and Ors. : 126(2006)DLT142 wherein a Single Judge of this Court held while agreeing with the judgment (supra) that the powers under Section 28 are vast and vide and time can be enlarged even against the intention expressed in the agreement not to extend time and even suo moto, nevertheless held that if the delay has been caused on account of a party which seeks enlargement of time, normally, the court should not enlarge time, as a person who has caused the delay cannot be allowed to take advantage of his own wrong and extension of time cannot be allowed to work injustice to the other party. This Court had thus declined to extend the time.

17. In the present case there is already a finding in the OMPs No 28/2001 and 29/2001 and appeals preferred there from of the petitioner itself being guilty of delay. However, I find that the delay on the part of the petitioner was in keeping quiet from 15.09.1998 when the proceedings were adjourned sine die and till 2001 when OMPs No. 28/2001 and 29/2001 were filed. There is nothing to show that prior thereto, when nearly 4-5 arbitrators were changed by the respondent No. 1 and when the arbitration proceedings remained pending from 1995 till 15.09.1998, there was any delay on the part of the petitioner. The petitioner also cannot be blamed for OMPs No. 28/2001 and 29/2001 having remained pending before this Court from 2001 till 28th February, 2006. No person ought to suffer for the action (in this case delay) of the court. The petitioner in 2001 aggrieved by the frequent changes in the arbitrators and under the then legal advice that appointment of arbitrator ought to have been by name and not by designation had applied for appointment of an independent arbitrator. The same did not find favour with this

Court. The petitioner after the dismissal of the appeal approached for revival of the arbitration but it could not take place in the circumstances aforesaid. Of course, the action of the petitioner in filing the present petitions, again for the same relief which had been declined earlier, cannot be approved of.

18. However, the fact remains that when the petitioner had agitated its claim initially within time, merely because the petitioner has been guilty of delay in pursuing the arbitration from 15.09.1998, can the petitioner be condemned unheard. The courts, finding a litigant to be indulging in vexatious practice normally does not throw out his case or shut his defence but puts him to terms. In the present case also, in my opinion, it would be too harsh to shut out the claims of the petitioner and equities would be balanced by extending the time for making of the award but on the following terms: (1) the petitioner in the event of succeeding in the arbitration proceedings and in the event of any award in favour of the petitioner, would not be entitled to any interest therein from 15.09.1998 till the date of this order, inasmuch as the petitioner itself is to blame for the said delay. Though I have held that the petitioner is not to blame for delay in disposal of OMPs 28/2001 and 29/2001 but the petitioner at the time of disposal thereof having not requested the court for extension of time and having again filed the present misconceived petitions is not entitled to interest, if any, till date; (2) the petitioner, as a pre-condition to the revival of the arbitration proceedings to pay costs of Rs 25,000/- in each case to Delhi Legal Services Authority and furnishes proof thereof to the arbitrator; (3) The petitioner is directed not to take any adjournment before the arbitrator and to cooperate in the early disposal thereof.

19. Subject to the petitioner complying with the aforesaid terms, I extend the time for making of the award by four months w.e.f. first date before the arbitrator. The respondent No. 1 is directed to appoint /intimate the arbitrator to the petitioner within four weeks here from. The arbitrator shall proceed with the arbitration from the point at which the same were discontinued.

With these directions, both petitions are disposed of.