

Executive Engineer Vs. Sham Lal and anr.

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Court : Delhi

Decided On : May-11-2007

Reported in : 2007(3)ARBLR287(Delhi); 2007(96)DRJ430

Judge : Gita Mittal, J.

Acts : [Limitation Act, 1963](#) - Sections 5, 14 and 29(2); [Arbitration and Conciliation Act, 1996](#) - Sections 33, 34, 34(3) and 43; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 33, Rules 1 and 2

Appeal No. : I.A. Nos. 11211 and 13058/2006 in O.M.P. No. 474/2006

Appellant : Executive Engineer

Respondent : Sham Lal and anr.

Advocate for Def. : G.K. Sharma, Adv.

Advocate for Pet/Ap. : Niraj Singh, Adv

Disposition : Application dismissed

Judgement :

Gita Mittal, J.

1. By this judgment, I propose to dispose of I.A. Nos. 11211/2006 and 13058/2006 filed by the petitioner under Section 5 of the [Limitation Act, 1963](#). In as much as

the applications are based on identical facts, these applications are taken up together for consideration.

2. Having heard learned Counsels for the parties, I find that there is no dispute to the material dates. I find that the arbitral award dated 16th September, 2005 was received by the petitioner from the arbitrator. Inasmuch as no specific date of receipt is mentioned, it is contended on behalf of the petitioner that the same may be presumed to have been received on the same date.

3. The petitioner thereupon filed objections under Section 34 of the [Arbitration and Conciliation Act, 1996](#) before the District Judge, Delhi. These objections were registered as Suit No. 161/2005 and were listed before the court of Shri Y. Kumar, Additional District Judge, Delhi. The respondent filed its reply on the 26th December, 2005 wherein a specific objection was taken that the court did not possess the pecuniary jurisdiction to entertain and try the objections and that the same were liable to be rejected. The respondent had also pointed out the fact that the reference to the arbitration was made pursuant to orders passed by this Court on the 18th February, 2003 in A.A. No. 10/2003. Copy of the order passed by this Court was also placed on record along with the reply.

4. Despite these objections, the petitioner persisted with the objections before the same court. It was only on the 25th May, 2006 that a statement was made by Mr. S.P. Ali, Executive Engineer, Civil Division-IV, INFC Department, Govt. of NCT of Delhi whereby he sought permission to withdraw the petition with the liberty to file the same in this Court. In the statement which was made, Shri S.P. Ali had stated that the respondent had taken an objection that the jurisdiction is determined by the claim in the petition and not by the award. In these circumstances, by an order passed on the same date i.e. the 25th of May, 2006, the petitioner was permitted to withdraw the petition with liberty to file the same in this Court.

5. The submission of the petitioner before this Court is that in these circumstances, the present objections have been filed before this Court on the 12th of August, 2006. By way of I.A. No. 13058/2006, the respondent has submitted that for the period that the matter was being bona fide proceeded with in the district court, the petitioner would be entitled to condensation of delay.

According to the petitioner, there is delay of only 73 days in filing the objections before this Court.

Reliance has been placed on the provisions of Section 14 of the [Limitation Act, 1963](#) and the pronouncement of the Apex Court reported at : [2003]3SCR498 State of Goa v. Western Builders in support of these submissions.

6. So far as the limitation for filing objections is concerned, the same is statutorily prescribed under Section 34(3) of the [Arbitration and Conciliation Act, 1996](#) which reads thus:

34. Application for setting aside arbitral award -

(1) xxxx xxxx(2) xxxx xxxx(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.

7. The statutory scheme limits the extent of judicial intervention in proceedings under the Arbitration Act. There is no dispute that the permissible period of three months for filing the objections commencing from 16th September, 2005 had ended on the 15th December, 2005. Undoubtedly, the objections which were filed in the district court on the 26th November, 2005 were therefore within the limitation prescribed under Section 34(3) of the statute.

8. The respondent however has taken an objection with regard to the maintainability of those objections before the District courts at the very inception in its reply filed on 2nd September, 2005. The respondents enclosed the order of this Court appointing the arbitrator. The petitioner opted to persist with its objections in that court and withdrew the same only on the 25th of May, 2006. In the light of the objections which were taken by the petitioner purporting to the jurisdiction of the

district court, it certainly cannot be held that the action of the respondent in persisting with those proceedings even after the jurisdictional objection had been brought to its notice was bona fide on the part of the petitioner.

9. So far as the period of 30 days which is condonable under Section 34(3) after the expiry of 3 months is concerned, such period also came to an end on or about 14th January, 2006. On this date, the objections were still pending in the district court. Having withdrawn the same on 25th of May, 2006, still no immediate action for filing the same in this Court was taken. I therefore find force in the submission of the learned Counsel for the respondent that the petitioner has acted negligently, without good faith and failed to act with due diligence inasmuch as having withdrawn the objections on 25th May, 2006, it has opted to file the objections in this Court on or about the 12th of August, 2006.

10. Learned Counsel for the petitioner has contended that it would be entitled to the benefit of the period which has lapsed till the 12th of August, 2006 on the ground that it had originally filed objections to the arbitral award within the period statutorily prescribed and was bona fide pursuing a remedy in good faith in the district court. For the purpose of consideration of this submission, it becomes necessary to consider Section 14 of the [Limitation Act, 1963](#) in extenso which reads thus:

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 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 XXXIII 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.

11. In order to get the benefit of exclusion of the time which was spent by a party in a court without jurisdiction, there can be no manner of doubt that the statute itself requires that only the period during which the plaintiff has been prosecuting with due diligence other civil proceedings shall be excluded. It is also a statutory requirement that such proceedings should have been prosecuted in good faith in a court, which from defect of jurisdiction or other cause of a like nature is unable to entertain it. The important expression in the statute remains that the applicant 'has been prosecuting'.

12. A question has arisen before the courts as to whether the Section 14 of the Limitation Act would apply to the objections which are filed under Section 34 of the Arbitration Act. This question has been answered by the Supreme Court in its pronouncement reported at : [2003]3SCR498 State of Goa v. Western Builders wherein the court has held that the applicability of Section 14 of the Limitation Act is not excluded from applicability to proceedings under the [Arbitration and Conciliation Act, 1996](#). Section 43 of the [Arbitration and Conciliation Act, 1996](#) states that the [Limitation Act, 1963](#) shall apply to arbitration as it applies to proceedings in court. The court had drawn a distinction so far as the extent to which the provisions of the [Limitation Act, 1963](#) would apply. It was held that the provisions of the Limitation Act would stand excluded only to the extent wherever a different period has been prescribed under the [Arbitration and Conciliation Act, 1996](#). Inasmuch as there is no such prohibition under Section 34 of the [Arbitration and Conciliation Act, 1996](#), there is no reason why Section 14 of the Limitation Act should be read into the Arbitration & Conciliation Act, 1996 which would advance the cause of justice. therefore, I have no hesitation in holding that the petitioner

would be entitled to the benefit of the period that it was bona fide and diligently prosecuting its objection filed under Section 34 of the Arbitration & Conciliation Act, 1996 filed before the district court.

13. In this behalf, reference can also be appropriately made to a pronouncement of the Karnataka High Court reported at 2005 (2) RAJ 324 The Hatti Gold Mines Ltd. rep. by its Managing Director v. Vinay Heavy Equipments rep. by its proprietor.

14. The question which then remains to be answered is as to the period which could be so excluded. Undoubtedly, the petitioner was put to notice by the respondent in December, 2005 with regard to the objection as to the maintainability before that court. The respondent still opted to prosecute the same remedy despite knowledge of the objections and has withdrawn the same only on 25th May, 2006.

In these circumstances, as held hereinabove, it cannot be held that the petitioner was prosecuting with due diligence the proceedings or that he was prosecuting the same in good faith in the district court.

15. Even assuming that this Court was to hold that the petitioner was entitled to exclusion of the period up to the 25th May, 2006 when he withdrew the objections, I find that the petitioner still did not take any action for almost three months after withdrawing the same from the district court.

In these circumstances, the petitioner can be entitled to exclusion of only the period from 26th November, 2005 till 22nd December, 2005 when the respondent took the objection to the maintainability or at best till 25th May, 2006 when it has withdrawn the objections.

There is no dispute that even after exclusion of this period, the objections filed before this Court under Section 34 of the Arbitration & Conciliation Act, 1996 being O.M.P. No. 474/2006 are hopelessly beyond the three months period prescribed under Section 34(3) and the 30 days condonable period prescribed under the same statute.

16. In 2001 (3) RAJ 163 (SC) Union of India v. Popular Construction Co., the Apex Court has held that where the legislature has prescribed a specific period of limitation for filing the objections, the applicability of the Limitation Act to that extent would stand excluded. In the proviso to Sub-section (3) of Section 34 of the [Arbitration and Conciliation Act, 1996](#), the crucial words used by the legislature are 'but not thereafter', the Apex Court has held that this expression would amount to an express conclusion within the meaning of Section 29(2) of the Limitation Act and thereforee barred the application under Section 5 of the Limitation Act.

Therefore, it is well settled that this Court has no jurisdiction to condone the delay beyond the statutorily prescribed period.

17. In view of the foregoing discussion, the prayer made for condensation of delay in filing O.M.P. No. 474/2006 in these applications cannot be granted.

Accordingly, these applications are dismissed.

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