

Union of India Vs. M/S. Ktech Engineer Builders Co. Pvt. Ltd.

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Court : Delhi

Decided On : Dec-01-2010

Judge : Vikramajit Sen; G.P.Mittal.Jj.

Appeal No. : FAO(OS) No.426/2010

Appellant : Union of India

Respondent : M/S. Ktech Engineer Builders Co. Pvt. Ltd.

Advocate for Def. : Mr. Akhil Sibal; Mr. Pradeep Chhindra, Advs.

Advocate for Pet/Ap. : Mr. A.S. Chandhiok; Mr. P.S. Parmar, Advs.

Judgement :

G.P. MITTAL, J.

1. These appeals raise an important question of law. Whether an application for setting aside of an Award under Section 34 of the Arbitration & Conciliation Act, 1996 (for short A&C; Act) can be filed on the day when the Court reopens, by virtue of Section 4 of the Limitation Act, if the period of three months or for that matter additional period of 30 days on proof of sufficient cause expires on a day when the Court is closed?

2. We would like to extract the provisions of Section 34 (3) of the A&C; Act hereunder for ready reference:-

34. Application for setting aside arbitral award -

(1) xxxxxxxxx

(2) xxxxxxxxx

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.

(emphasis supplied).

3. The proviso to sub-Section (3) of Section 34 of the A&C; Act was subject of interpretation in Union of India v/s. M/s. Popular Construction Company, 2001 (8) SCC 470. It was held by the Apex Court that the history and scheme of the A&C; Act support the conclusion that the time limit prescribed under Section 34 to challenge an award is absolute and un-extendable by Court under Section 5 of the Limitation Act in view of the fact that a further period of 30 days had been provided in addition to the period of three months for preferring the objections whenever the Petitioner satisfies the Court that he was prevented by sufficient cause from making the application FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 3 of 19 for setting aside of the award within the period of limitation.

4. The questions: whether (1) in computing the period of limitation for filing an application for setting aside an arbitral Award during which the applicant had been prosecuting with due diligence proceedings in any Court in good faith which from defect of jurisdiction was unable to entertain it could be excluded (u/s. 14 of the Limitation Act) and whether (2) an application for setting aside of an Award could be filed on the re-opening day of the Court when the limitation for filing an application had expired on a day when the Court was closed (u/s. 4 of the Limitation Act) came up for consideration before various High Courts. The

observation in Popular Construction Company that the period of limitation prescribed under Section 34 was absolute and unextendable were so sweeping that most of the High Courts treated it sacrosanct and took the view that provisions of Ss. 4 and 14 of the Limitation Act are not applicable in the matter of filing an application for setting aside of an Award under Section 34 of the A&C; Act. In Durga Enterprises vs. Union of India & Ors., MANU/AP/0959/2003 the Andhra Pradesh High Court however took the view that since the FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 4 of 19 provisions of Section 4 had not been excluded by the provisions of the A&C; Act, there was no reason to exclude the applicability thereof to the filing of the application under Section 34 of the A&C; Act. The learned Single Judge in the impugned judgment (in OMP No.235/2004 decided on 12th October, 2007) preferred not to agree with the view taken by the Andhra Pradesh High Court and was swayed by the views of the Gauhati High Court in Assam Urban Water Supply & Sewerage Board vs. Subhash Project & Marketing Ltd., AIR 2005 Gauhati 112; of the Bombay High Court in HMP Engineers Ltd. & Ors. vs. Ralies India Ltd. & Ors., 2004 (1) RAJ 198 (Bom) and Pushpa P. Mulchandani & Ors. vs. Admiral Radhakrishin Tahilani (Retd.) & Ors., 201 (4) RAJ 139 (Bom); and of Himachal Pradesh High Court in State of H.P. vs. Kataria Builders, 2003 (2) ALR 526 (HP), where a strict interpretation of the words but not thereafter' was taken and it was held that the provisions of Section 4 of the Limitation Act cannot be made use of by an aggrieved party even if the period of limitation had expired on a holiday or during vacation.

5. With regard to the applicability of Section 14, the controversy was set at rest in State of Goa v/s. Western FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 5 of 19 Builders, (2006) 6 SCC 239, where after examining the provisions of the A&C; Act including Section 43 and the provisions of Section 29 (2) of the Limitation Act, the Apex Court opined that there was no provision which prohibited or excluded the applicability of Section 14 of the Limitation Act in case of filing application under Section 34 of the A&C; Act. It was observed that if statute was silent and there was no specific prohibition then the statute should be interpreted in a way which advances cause of justice.

6. The matter was again examined by three Judges Bench of the Apex Court in Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department & Ors., (2008) 7 SCC 169. The Apex Court held that merely because Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Act for setting aside an Award one need not conclude that the provisions of Section 4 to Section 24 of the Limitation Act are excluded by the proviso to Section 34 (3) of the A&C; Act. In para 10 of the report the Apex Court took pains to clarify that the provisions of Section 5 of the Limitation Act were impliedly excluded and it shall have to be examined whether other provisions of FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 6 of 19 Limitation Act have either been expressly or impliedly excluded. The Apex Court observed:-

"10. A bare reading of Sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in Sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the Court. Section 29 (2) of the Limitation Act, inter alia provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period of limitation prescribed by the schedule, the provisions of Section 3 shall apply as if such period was 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 shall apply only insofar as, and to the extent, they are not expressly excluded by such special or local law. When any special statute prescribes certain period of limitation as well as provision for extension upto specified time limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 7 of 19 Sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and

the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29 (2) of the Limitation Act."

7. In Consolidated Engineering Enterprises the question of applicability of Section 4 did not directly come up for consideration before the Apex Court. However, the observation in para 32 of the report "Thus the proviso to sub-Section 34(3) of the AC Act is also a provision relating to extension of period of limitation, but differs from section 5 of the Limitation Act, in regard to period of extension, and has the effect of excluding section 5 alone of the Limitation Act." clearly laid down that the proviso to Section 34 (3) of the A&C; Act had excluded only Section 5 of the Limitation Act. In other words, the applicability of other provisions of the Limitation Act was held to be applicable.

8. Section 4 of the Limitation Act has been enacted not to enlarge the period of limitation but on the maxim *lex non cogit ad impossibilia* . When any party is prevented from FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 8 of 19 doing a thing in Court on a particular day not by his own act but by the act of the Court he/she is entitled to do at the first available opportunity. As stated above, Section 4 does not enlarge the period of limitation but it only enables the party to file any suit, application, etc. on the reopening day of the Court if the Court is closed on a day when limitation expires. For instance, an Award is received by a party, say, on 28th of February. As per provision of Section 34 (3) of the A&C; Act, the objections can be filed upto 29th of May and if there is sufficient cause for condonation of delay then upto 28th of June of that year. The Courts are closed from 28th May to 1st of July. Any party aggrieved by the Award would be deprived to challenge the same not only in the extended period of 30 days but also in the initial period of three months as the initial period of three months and the extended period of 30 days as prescribed under Section 34 sub-Section (3) of the A&C; Act expired on 29th May and 28th June respectively when the Courts were closed.

9. We are of the considered view that the provisions of Section 4 of the Limitation Act would apply to the filing of the application under Section 34 of the A&C; Act because FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 9 of 19 in such cases there is neither any inaction nor any lack of diligence on the part of the aggrieved person. FAO (OS) No.503/2007

10. In this case, the Appellant has received the arbitral Award dated 13.02.2004 on 23.02.2004. The period of three months for filing an application for setting aside expired on 24.05.2004 and the extended period of 30 days, if there was sufficient cause expired on 23rd of June, 2004. As per the Notification dated 29.05.2004 issued by this Court, the Court was closed for Summer Vacation from 28th May to 3rd of July. It was also mentioned that for the purposes of limitation, the Court reopens on 5.07.2004. Admittedly, the application for setting aside of the Award was filed on 5.07.2004. Thus, if we hold that there was sufficient cause for condonation of delay upto 30 days, application would be deemed to be filed within the period of limitation. The reasons given for condonation of delay in para 1 of the impugned order are :-

(i) "Petitioner received arbitral award dated 13.2.2004 on 23.2.2004.

(ii) Various cells of the department like VAS, Legal & LF Cells of Department of Telecom (DOT) took time to examine the arbitral award from 24.2.2004 to 12.5.2004.

(iii) Arbitral award was referred to the department of Legal Affairs for their advice to challenge the award on 13.5.2004 which referred the matter for advice to Legal Cell and it was on 24.5.2004 that the department of Legal Affairs was requested for appointment of government counsel for defending the case.

(iv) Government counsel was appointed by the department of Legal Affairs on 27.5.2004. There is delay of approximately one month and 12 days in filing the objection petition which was filed on 5.7.2004."

11. In the impugned order the learned Single Judge has referred to :-

1. State of Rajasthan v. Shri Umrao Singh 1994(5) SLR 638.

2. State of Haryana v. Chandra Mani and Ors. -(1996) 3 SCC 132.
3. Collector, Land Acquisition, Anantnag and Another v. Mst. Katiji and others AIR 1987 SC 1353.
4. G. Ramegowda, Major etc. v. The Special Land Acquisition Officer, Bangalore AIR 1988 SC 897.
5. Union of India v. R.P. Builders 57 (1995) DLT 337 (DB).
6. Union of India v. Shiv Darshan Singh (Sh.) & Ors. - 1999 IV AD (Delhi) 226.
7. Kutch District Panchayat v. Premji V. Dudiya MANU/GJ/0239/2000.
8. State of West Bengal, represented by The Secretary, Department of Finance, Government of West FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 11 of 19 Bengal v. West Bengal Judicial Service Association and Ors.
9. State of Gujrat v. Heirs of Decd. Praga Dungar. wherein the delay on account of administrative exigencies was found to be sufficient cause for condonation of delay. The learned Single Judge, however, came to the conclusion that the said judgments were of no help because of the complete embargo placed by sub-Section (3) of Section 34 of the A&C; Act to entertain objections after a period of three months plus 30 days.
12. We have already held above that the application for setting aside an Award shall be deemed to be filed within the extended period of 30 days it having been filed on the reopening day of the Court provided there was sufficient cause for condonation of delay. The reasons disclosed for condonation of delay are that the application could not be filed within three months as file had to be moved to the various authorities who had to take the decision whether application under Section 34 is to be filed or not. In other words, there was delay on account of bureaucratic reasons. On the basis of the judgments referred to in para 11 above and a Division Bench judgment of this Court in Union of India vs. R.P. Builders, 57 (1995) DLT 337 (DB) FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 12 of 19 there is no manner of doubt that the Appellant had shown sufficient cause for not filing the

application within the initial period of three months and is entitled to the condonation of delay of 30 days on account of delay arising from bureaucratic procedure. The impugned order, therefore, cannot be sustained. The same is accordingly set aside. Consequently, application is remanded to the learned Single Judge for disposal of the objections on merits. No costs.

13. All pending applications also stand disposed of. FAO (OS) No.426/2010

14. In the application for condonation of delay moved before the learned Single Judge under Section 34 (3) of the A&C; Act, it has been stated that the Award passed on 28.08.2009 was received by the Appellant on 5.09.2009. Garrison Engineer being Executing Authority sent the same to Commander Works Engineer who forwarded the case to Chief Engineer and so on and ultimately final (legal) opinion was given on 24th December, 2009. The Appellant received the said opinion on 29.12.2009. Ultimately, Litigation Cell was contacted for appointment of Govt. Counsel and the application for setting aside of the Award was filed on 6th January, 2010. In substance, FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 13 of 19 the plea is that there was bureaucratic delay which could be condoned upto 30 days. The delay to that extent is therefore liable to be condoned.

15. During the course of arguments, it was very fairly admitted by Mr. A.S. Chandhiok, learned ASG that the Award had been received by the Chief Engineer on 2.09.2009 and by the Garrison Engineer on 05.09.2009. Mr. Chandhiok has however urged that as per Section 34 (3) the period of limitation for filing an application shall run from the date on which the party making the application (for setting aside the Award) had received the arbitral Award. The term "Party" as per Section 2 (h) of the A&C; Act means "A party to an Arbitration Agreement".

16. Mr. A.S.Chandhiok, submits that for all practical purposes Garrison Engineer was the party to the Arbitration Agreement in the sense that he was the Executing Authority of the work; vide letter dated 30th March, 2006 he had issued the work order to the Respondent and vide letter dated 29th March, 2006 it had been made clear to the Respondent (Contractor) that any correspondence in connection with the contract should be addressed to Garrison Engineer (Project), ABHM, Delhi

Cantt. Mr. A.S. FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 14 of 19 Chandhiok, heavily relies upon National Projects Constructions Corpn. Ltd. v. Bundela Bandhu Construction Company, 139 (2007) DLT 676 (DB) to which one of us (Vikramajit Sen, J.) was a party where it had been held that the notice of filing of the Award shall be effective from the date it is served on the concerned official. Reliance is also placed on Union of India vs. Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239 where it was held that in the context of a huge organization like Railways the copy of the Award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral Award and also to take a decision in the matter of moving an application under sub-Section (1) or (5) of Section 33 or under sub- Section (1) of Section 34.

17. It has been submitted that the proper party in the instant case would be the Garrison Engineer, particularly, in view of the acceptance of this position vide letter dated 29.03.2006 written by the Appellant to the Respondent.

18. On the other hand, Mr. Akhil Sibal, learned counsel for the Respondent has urged that the Chief Engineer was the party to the Arbitration Agreement as provided under FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 15 of 19 Section 2 (h) of the A&C; Act. Mr. Sibal also relies on Tecco Trichy Engineers particularly, paragraph 10 of the report which is extracted hereunder for ready reference:-

"10. In the present case, the Chief Engineer had signed the agreement on behalf of Union of India entered into with the respondent. In the arbitral proceedings the Chief Engineer represented the Union of India and the notices, during the proceedings of the Arbitration, were served on the Chief Engineer. Even the arbitral award clearly mentions that the Union of India is represented by Deputy Chief Engineer/Gauge Conversion, Chennai. The Chief Engineer is directly concerned with the arbitration, as the subject- matter of arbitration relates to the department of the Chief Engineer and he has direct knowledge of the arbitral proceedings and the question involved before the arbitrator. The General Manager of the Railways has only referred the matter for arbitration as required under the

contract. He cannot be said to be aware of the question involved in the arbitration nor the factual aspect in detail, on the basis of which the Arbitral Tribunal had decided the issue before it, unless they are all brought to his notice by the officer dealing with that arbitration and who is in charge of those proceedings. Therefore, in our opinion, service of arbitral award on the General Manager by way of receipt in his inwards office cannot be taken to be sufficient notice so as to activate the department to take appropriate steps in respect of and in regard to the award passed by the FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 16 of 19 arbitrators to constitute the starting point of limitation for the purposes of Section 34 (3) of the Act. The service of notice on the Chief Engineer on 19-3- 2001 would be the starting point of limitation to challenge the award in the Court."

19. It is not disputed that in the instant case the Chief Engineer had signed the Arbitration Agreement on behalf of the Union of India and was therefore a party as envisaged under Section 34 (3) read with Section 2 (h) of the A&C; Act. This view is further fortified from the fact that application for setting aside of the Award was preferred by the Union of India through the Chief Engineer, Delhi Zone. Even the instant Appeal has been preferred by Union of India, Chief Engineer, Delhi Zone.

20. In Tecco Trichy Engineers the General Manager of the Railways had simply referred the matter for arbitration as required under the contract. Since the Chief Engineer had signed the Agreement on behalf of the Union of India, entered into with the Respondent, the Chief Engineer represented Union of India in the arbitral proceedings and the notices during the proceedings were served upon the Chief Engineer. It was held that the Chief Engineer was directly concerned with the arbitration. In the instant case also the Chief Engineer was not only the signatory to FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 17 of 19 the Arbitration Agreement but he had also filed the claim statement before the arbitrator; UOI through Chief Engineer had also filed the application under Section 34 (3) for setting aside the Award. He has even filed the instant appeal. Simply because the day to day work of construction under the contract was to be looked after and correspondence entered into with the Garrison Engineer, the Garrison Engineer does not become a party to the arbitration agreement. Tecco Trichy Engineers therefore, does not help the Appellant, rather it supports the case of the

Respondent.

21. Under these circumstances, the receipt of Award by the Chief Engineer on 2nd September, 2009 shall be the starting point of limitation for filing an application under Section 34 (1) of the A&C; Act. The period of three months consequently expired on 3rd December, 2009 and a further period of 30 days on the ground of sufficient cause for not filing the application within the period of three months also comes to an end on 2nd January, 2010. The Court had opened on 2nd January, 2010. The application under Section 34 (1) of the A&C; Act, however, was preferred only on 6th January, 2010. Thus, assuming that there was sufficient cause for condonation of delay, the same was FAO (OS) No.503/2007 & FAO (OS) No.426/2010 Page 18 of 19 clearly barred by limitation. Section 4 of the Limitation Act comes to the rescue of the aggrieved party only when the Appeal, application etc. is filed on the reopening day and not thereafter. No extension is permissible on the basis of ratio of Popular Construction Company. Thus, there is no error or infirmity in the order impugned in this appeal. Appeal is without any merit. The same is accordingly dismissed with costs of `25,000/-.

22. All pending applications also stand disposed of.

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