
(2012) 09 CAL CK 0019

Calcutta High Court

Case No: APO NO. 157 OF 2012 and AP NO. 272 OF 2008

Union Of India and Another

APPELLANT

Vs

M/s. Shree Durga Iron Stores

RESPONDENT

Date of Decision: Sept. 25, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 33, 34, 34(3), 43
- Limitation Act, 1963 - Section 10, 10, 11, 11, 12

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: L.K. Chatterjee and Ms. Aparna Banerjee, for the Appellant; N.N. Choudhury, for the Respondent

Final Decision: Dismissed

Judgement

1. The respondent, a scrap dealer, participated in a public auction held by the Railway. The respondent was successful. It was supposed to lift the scrap upon deposit of the bid price. According to the respondent, it deposited Rs. 1.4 lakhs as and by way of earnest money. He was prepared to pay the balance simultaneously on lifting of the goods. The Railway, however, was not ready to deliver the goods. It expressed its inability vide letter dated July 11, 1995, appearing at page 88 wherein the concerned officer wrote to the respondent that he was busy in delivery in respect of the other consignment hence, the respondent should contact him after one month. Despite repeated letters, the Railway did not effect delivery that gave rise to a dispute that was ultimately referred to arbitration. The panelled arbitrator of the Railways being the deputy General Manager, published an award in favour of the respondent. The Railways challenged the said award before the learned Single Judge being the appropriate civil court, after 108 days of the scheduled date. The learned Single Judge dismissed the application holding it grossly delayed. Hence, this appeal before us. On perusal of the judgment and order dated March 2, 2011, appearing at pages 272 to 280 of the paper book, we find that His Lordship found

the application delayed by 108 days. His Lordship considered section 34(3) of the Arbitration & Conciliation Act, 1996 that would permit an aggrieved party to pray for setting aside of the award within ninety days from the date of publication and/or receipt of the award coupled with a power given to the court to condone the delay in appropriate cases if such delay was within thirty days and not thereafter.

Section 34(3) of the 1996 Act is quoted below:

Section 34(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 u/s 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.

2. The learned Single Judge considered two Apex Court decisions in the case of Union of India -vs- Popular Construction Co., reported in All India Reporter 2001 Supreme Court page-4010 as also the decision reported in the case of State of Goa -vs- Western Builders, reported in All India Reporter 2006 Supreme Court page-2525. His Lordship also considered two Division Bench decisions of this Court in the case of Rafik alias Rafique Vs. Magma Leasing Limited & Anr. reported in 2010 (1) Calcutta High Court Notes page-143 and in the case of State of West Bengal -vs- AFCONS Infrastructure Ltd., reported in All India Reporter 2008 Calcutta page-6. His Lordship held that the phrase "not thereafter" would debar the Court to consider any application beyond 120 (90+30) days. Admittedly, the present case would involve 108 days" delay that could not be considered by the learned Single Judge.

3. We heard Mr. L.K. Chatterjee, learned senior counsel appearing for the appellants and Mr. Nabi Choudhury, learned counsel appearing for the respondent.

4. Mr. Chatterjee would contend that the entire dealing was vitiated by fraud. The Railway officials were acting at the behest of the respondent. The letters relied upon by the respondent expressing inability of the Railways to effect delivery were sought to be procured. Even after receipt of the award, the concerned officials kept the same under the carpet and thus prevented the Railways from challenging the same before the court within the stipulated period. Mr. Chatterjee strenuously contended that the apex court decision in the case of Union of India -vs- Popular Construction (supra) stood distinguished on the subsequent decision in the case of State of Goa (supra). The decision in the case of State of Goa (supra) extended the scope and the power of the court in a given case, giving benefit of section 14 of the Limitation Act taking recourse to section 29 of the Limitation Act. Drawing our attention to section 17 of the Limitation Act, Mr. Chatterjee would contend that we should extend the

ratio decided in State of Goa (supra) in case of section 17 that would give this court ample power to condone 108 days" delay as a special case. Mr. Chatterjee strenuously contended that a fraud was committed upon the Railways. In case this appeal was not allowed and the Railways was not allowed to challenge the award that was based upon fraudulent act on the part of the respondent with the active connivance of a part of the officials such wrong doing would remain unchallenged causing substantial loss to the public exchequer. Mr. Chatterjee informed this court that the Railways already took steps against the erring officials by initiating disciplinary proceedings.

5. Per contra, Mr. Nabi Choudhury, learned counsel appearing for the respondent would contend that the Railways did not take the plea of fraud at any stage. The Deputy General Manager of the Railways acted as an arbitrator. Adequate opportunity was given to the Railways to contest the claim. Ultimately the award was passed. The Railways, in its wisdom, did not challenge the same within the stipulated period. The learned Single Judge would not be competent to condone such inordinate delay. The learned Judge of the court below rightly dismissed the application.

6. We have considered the rival contentions. We have also perused the award appearing at pages 175 to 178 of the paper book. The arbitrator held that time was the essence of the contract. The Railways were not prepared to deliver the goods. Hence it committed breach. Even then the learned arbitrator directed delivery of the goods within thirty days from the date of publication of the award simultaneously upon payment and in default thereof the sale would stand cancelled. We do not wish to make any comment on the merits of the objection raised by the Railways in its application for setting aside. Section 34(3) of the 1996 Act was clear and unambiguous. It restricted the power of the court to consider an application for condonation of delay if it was filed within thirty days after expiry of the stipulated period and "not thereafter".

7. The apex court, in the case of Union of India -vs- Popular Construction Co. (supra) considered the phrase along with section 29(2) of the Limitation Act. The apex court, in paragraph 12, categorically observed that the court's power was limited that would bar application of section 5 of the Limitation Act. Paragraph 12, being relevant herein, is quoted below:

12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this 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 that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.

8. The decision in the case of State of Goa (supra) did not have any conflict with Popular Construction (supra). In this case also section 29 of the Limitation Act was considered. The apex court was of the view that section 29 would make the provisions of sections 4 to 24 applicable in case of any limitation prescribed under any special law unless specifically excluded by such special law. The Apex Court considered the case u/s 14 of the Limitation Act and observed that section 14 would have a role to play. Paragraph 14 of this decision being relevant herein, is quoted below:

14. The question is whether Section 14 of the Limitation Act has been excluded by this special enactment i.e. the Arbitration and Conciliation Act, 1996. Section 43 of the Arbitration and Conciliation Act, 1996 clearly says that the Limitation Act, 1963 shall apply to arbitration as it applies to the proceedings in the court.

9. Section 14 of the Limitation Act did not extend the period of limitation unlike cases under sections 4 to 11. It was a case of exclusion in an eventuality. Section 17 would also provide for exclusion of period in another eventuality. We fully agree with Mr. Chatterjee that the analogy that was advanced by the State of Goa (supra) should also be extended to section 17. However, it would require appropriate particulars and proof. Taking a plea on fraud at the bar would not suffice. In the present case, from the pleadings we do not find any such case made out by the Union of India, either before the arbitrator or this court. Mr. Chatterjee would seek leave from us to amend his application for setting aside. We are not in a position to grant such leave at this belated stage that would cause immense prejudice to the respondent. Even if the principle set down by the State of Goa (supra) would clearly cover the present appeal, the facts would debar us from applying so.

10. Coming back to the factual matrix, we find that the plea of fraud was conspicuously absent at all stages. It was nothing but an attempt made at the bar that would not inspire us to extend the scope of the appeal. We fully agree that the dismissal of the appeal would foreclose the opportunity to challenge the award. We are unable to accede to the prayer of the Union of India. In fact we are not sure as to whether the Union of India would actually support the case made out at the bar by its counsel.

11. The appeal fails and is hereby dismissed. There will be no order as to costs.

12. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir Sinha, J.

I agree.