
Simplex Infrastructures Ltd. - Appellant @HASH Union of India

G.A. No. 1650 of 2016.

Court: CALCUTTA HIGH COURT

Date of Decision: June 20, 2016

Acts Referred:

Arbitration and Conciliation Act, 1996 - Section 34#Limitation Act, 1963 - Section 29(2), Section 5

Citation: (2016) AIRCC 2674

Hon'ble Judges: Indira Banerjee and Sahidullah Munshi, JJ.

Bench: Division Bench

Advocate: Abhrajit Mitra, Sr. Adv., Chayan Gupta, Advocate, for the Appellants; Tarun Jyoti Tewari, Advocate, for the Respondent

Final Decision: Disposed Off

Judgement

This appeal is against an order dated 27th April, 2016 whereby the learned Single Bench condoned the delay of about 131 days in filing an

application for setting aside of an arbitral award. The order of the learned Single Bench is set out hereinbe-low for convenience :-

After considering the submissions made by the learned advocate for the applicant/petitioner and upon perusing the application for condonation of

delay, it appears that sufficient cause has been shown and as such the delay is condoned. The application for condonation of delay, being G.A.

No. 958 of 2016, is accordingly allowed.

2. Section 34 sub-section (3) of the Arbitration & Conciliation Act, 1996 provides as follows :-

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 has 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.

3. It is nobody's case that there was any request under Section 33. Limitation started running from the date on which the respondent received

the arbitral award.

4. It is now settled that, for the purpose of limitation, the copy of the arbitral award received by the applicant under Section 34 would have to be a

signed copy of the arbitral award, and the same would necessarily have to be received from the Arbitral Tribunal itself, and not from any other

source.

5. It is not the case of the respondent that the copy received was not as per the requisites of Section 31(5) of the 1996 Act. From the language

and tenor of Section 34(3) of the 1996 Act, it is patently clear that the maximum time limit for filing an application for setting aside of an award

under Section 34 of the 1996 Act is three months and 30 days. In other words, the maximum time limit is approximately 120 days.

6. Section 29(2) of the Limitation Act, 1963 provides, that where any special or local law prescribes for any suit, appeal or application, a period

of limitation different from the period prescribed by the schedule of the Limitation Act, the provisions of Section 3 of the Limitation Act would

apply as if such period were 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 (inclusive) of the Limitation Act would apply

only in so far as and to the extent to which they are not expressly excluded by such special or local law.

7. The language and tenor of Section 34(3) expressly excludes the application of Section 5 of the Limitation Act. The proposition finds support

from the judgments of the Supreme Court in Union of India v. M/s. Popular Construction Co. reported in (2001) 8 SCC 470 : (AIR 2001

SC 4010) and State of Maharashtra v. Hindustan Construction Co. Ltd. reported in (2010) 4 SCC 518 : (AIR 2010 SC 1299).

8. In M/s. Popular Construction Co. (supra), Hon'ble Supreme Court held the following:-

7. There is no dispute that the 1996 Act is a "Special Law" and that Section 34 provides for a period of limitation different from that prescribed

under the Limitation Act.

8. Had the proviso to Section 34 merely provided for a period within which the Court could exercise its discretion, that would not have been

sufficient to exclude Sections 4 to 24 of the Limitation Act because mere provision of a period of limitation in howsoever peremptory or

imperative language is not sufficient to displace the applicability of Section 5.

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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.

9. In *Hindustan Construction Co. Ltd.* (AIR 2010 SC 1299) (supra) Hon'ble Supreme Court held -

19. 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 an 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.

25. There is no doubt that application for setting aside an arbitral award under Section 34 of 1996 Act has to be made within time prescribed

under sub-section (3) i.e., within three months and a further period of thirty days on sufficient cause being shown and not thereafter *** **

10. In no circumstances can delay be condoned beyond 30 days after expiry of three months. The question, however, is whether the order under

appeal is appealable before us in view of the specific bar of Section 37(1) of the 1996 Act which is set out herein below for convenience -

37. Appealable orders. - (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals

from original decrees of the Court passing the order, namely -

(a) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under Section 9;

(c) setting aside or refusing to set aside an arbitral award under Section 34.)

11. The language used in Section 37(1) of the 1996 Act is almost identical to the language used in Section 39(1) of the Arbitration Act, 1940

which is set out herein below -

39. Appealable Orders. -

(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 small Cause Court.

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

appeal to (the Supreme Court).

12. In *Union of India v. Mohindra Supply Co.* reported in AIR 1962 SC 256, the Supreme Court held that -

If the Legislature being cognizant of this difference of opinion prior to the Code of 1908 and the unanimity of opinion which resulted after the

amendment, chose not to include the reservation clause in the provisions relating to appeals in the Arbitration Act of 1940, the conclusion is

inevitable that it was so done with a view to restrict the right of appeal within the strict limits defined by Section 39 and to take away the right

conferred by other statutes. The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to

arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statute are plain

and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from

the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered.

13. In *Union of India v. K. Satyanarayan & Co.* reported in 1995 (1) CLJ 458 a Special Bench of Three Judges of this Court, clearly held

that if an appeal did not lie from an order passed by the single Judge in terms of Section 39 of the Arbitration Act, 1940, there could be no doubt

whatsoever that such an appeal would not be maintainable under Clause 15 of the Letters Patent.

14. In *Fuerst Day Lawson Limited v. Jindal Exports Limited* reported in (2011) 8 SCC 333 : (AIR 2011 SC 2649) the Supreme Court

referred to and relied upon *Union of India v. Mohindra Supply Co.* (AIR 1962 SC 256) (supra) and held that a letters patent appeal would be

excluded by the application of one of the general principles that where the special Act sets out a self-contained code, the applicability of the

general law procedure would be impliedly excluded.

15. Undoubtedly, the order under appeal is not appealable under Section 37 of the 1996 Act. The question is whether this Court can still interfere

with the order under appeal. In *Modi Korea Telecommunication Ltd. v. Appcon Consultants Pvt. Ltd.* reported in 1999 (II) CHN 107, a

Division Bench of this Court held that Letters Patent was subject to the provisions of Section 37(1) of the 1996 Act. However, when the order

was not under the provisions of the 1996 Act, the special power and jurisdiction of the High Court under Clause 15 of the Letters Patent to

entertain an appeal from any judgment would remain unaffected. Where a question of jurisdiction of the Court to entertain or proceed with a suit or

proceeding was involved, and a decision on that question was given, such decision was a "Judgment" within the meaning of Clause 15 of the

Letters Patent of Calcutta High Court.

16. In *M/s. Tanusree Art Printers & Anr. v. Rabindra Nath Pal* reported in 2000 (2) CHN 213, a Special Bench of three Judges of this

Court approved the judgment of the Division Bench in *Modi Korea Telecommunication Ltd. v. Appcon Consultants Pvt. Ltd.* (supra), to the

extent that the Division Bench had held that an appeal would lie from an order purported to have been passed under the Arbitration and

Conciliation Act, in the event it was found that the said order had been passed without jurisdiction and not in terms of the provision of the said Act.

17. Limitation goes to the root of the jurisdiction of the Court to entertain proceedings. The Court has no jurisdiction to entertain proceedings

which are barred by limitation. The learned Single Bench has invoked Section 5 of the Limitation Act, 1963. In view of the language of Section

34(3), as interpreted by the Hon'ble Supreme Court, we are constrained to hold that the Court has no jurisdiction to condone the delay beyond

three months and 30 days and entertain the application under Section 34.

18. The judgment of the Special Bench of three Judges in *M/s. Tanusree Art Printers* (supra) is binding on us. Our attention has not been drawn to

any contrary judgment of the Hon'ble Supreme Court. We thus hold that the order under appeal being without jurisdiction, the same is

appealable before the Division Bench under the Letters Patent.

19. The order under appeal is thus set aside. Connected stay application is disposed of.