
(2005) 02 GAU CK 0048

In the Gauhati High Court

Case No : Arbitration Appeal No's. 6 and 7 of 2004

Assam Urban Water Supply and Sewerage Board	APPELLANT
Vs	
Subhash Projects and Marketing Ltd. and Another	RESPONDENT

Date of Decision : 15-02-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34, 34(3), 36, 5
General Clauses Act, 1897 — Section 10
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : AIR 2005 Guw 112 : (2005) 57 ARBLR 423 : (2005) 1 GLT 501

Hon'ble Judges : D. Biswas, Acting C.J.; Ranjan Gogoi, J

Bench : Division Bench

Advocate : N.C. Phukan and R. Gogoi, for the Appellant; P.C. Markanda (Sr.), G.N. Sahewalla, R. Markanda and D. Senapati, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—Both the appeals being directed against two identical orders dated 01.6.2004 and 05.06.2004 passed by the learned District Judge, Kamrup, were heard together and are being disposed by this common judgment and order.

2. The respondent No. 1 in the two appeals under consideration was appointed as the contractor for execution of the works, relating to "Construction of Tezpur Town Water Supply Scheme" and "Tinsukia Town Water Supply Scheme". Certain disputes and differences having arisen between the parties under the above contracts, the same were referred to arbitration by one Shri M.N. Bhagawati as the sole arbitrator. The sole arbitrator made two separate awards, both dated 22.08.2003, in terms of which certain amounts of money has become payable to the respondent-contractor. The appellant received both the awards on 26.08.2003. On 02.01.2004 the appellant filed two separate applications before the learned District Judge, Kamrup, Guwahati u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) for setting aside the awards dated 22.08.2003. On the same date i.e. on 02.01.2004 the

applicant had also filed two separate applications placing before the Court the reasons for not being able to file the applications u/s 34 within 3 months. The learned District Judge, Kamrup by the impugned orders dated 01.06.2004 and 05.06.2004 dismissed the applications filed by the appellant u/s 34 of the Act of 1996 on the ground that the same were filed beyond the statutory period as provided by Section 34 of the Act of 1996. Aggrieved, the instant appeals have been filed.

3. We have heard Shri N.C. Phukan, learned counsel appearing for the appellant and Shri P.C. Markanda, learned senior counsel appearing for the respondents.

4. Shri Phukan, learned counsel for the appellant while assailing the orders dated 01.06.2004 and 05.06.2004 passed by the learned Court below, has argued that under the provisions of Section 34(3) of the Act of 1996, an application for setting aside an arbitral award has to be made within a period of 3 months from the date of receipt of the award by the party making the application. The period of 3 months stipulated, may, in an appropriate case be extended by another period of 30 days if sufficient cause is shown, to the satisfaction of the Court, that the party making the application was prevented by sufficient cause from filing the same within the prescribed period of 3 months. Shri Phukan, learned counsel for the appellant, has submitted that in the present case it is not disputed by the respondent that the appellant was served with the arbitral award on 26.08.2003. The appellant, therefore, could have filed the applications for setting aside the awards on or before 26.11.2004 (i.e. 3 months from the date of receipt of the awards) and if sufficient cause could be shown by the appellant for not being able to file the applications within the aforesaid time, the same could have been filed on any date on or before 26.12.2004. According to Shri Phukan, as per the calendar for the Civil Courts in the State of Assam for the year 2003, the dates between 25.12.2003 and 01.01.2004 (both days inclusive) were declared as holidays and it is on the reopening day i.e. 02.01.2004 that the appellant had filed the applications u/s 34 for setting aside the awards along with the separate applications explaining the reasons and showing cause as to why the applications u/s 34 could not be filed within the period of three months. According to Mr. Phukan, u/s 4 of the Limitation Act, 1963 the applications for setting aside the awards could have been filed by the appellant on the reopening day i.e. 02.01.2004 when the last date i.e. 26.12.2004 was a holiday. Shri Phukan has further submitted that there is no provision in the Act of 1996 which expressly excludes the application of Section 4 of the Limitation Act, 1963 to a proceeding u/s 34 of the Act of 1996. Consequently, it is argued that the applications filed by the appellant before the learned District Judge were within the period prescribed by Section 34 of the Act of 1996 read with the proviso thereof and the learned District Judge had erred in holding the said applications to have been filed beyond the period of time prescribed. Shri Phukan has further submitted that though before the learned District Judge the cases were not projected in the manner as has been now urged, the facts being undisputed and the question arising being one of law, it would be open for this Court to consider

the objections raised and decide on the tenability thereof. Shri Phukan, in the course of his submissions has also placed before the Court the provisions of Section 10 of the General Clauses Act to contend that the applications filed by the appellant must be construed to have been filed within time in a situation where the period prescribed by Section 34 read with the proviso thereof expired on a Court holiday.

5. Mr. P.C. Markanda, learned counsel for the respondents, did not dispute the entitlement of the appellant to raise the grounds now urged in the present appeals. He has, instead, sought to refute the arguments advanced on behalf of the appellant by referring to the objects of the Bill leading to the enactment of the Act of 1996 by contending that the role of the Courts in an arbitral process as well as in the judicial proceeding arising therefrom have been intended to be kept to the minimum and judicial interference must be understood to be confined to what has been expressly provided under the Act. Shri Markanda has contended that the main part of Section 34 provides an outer limit of 3 months, from the date of receipt of the arbitral award, for making an application to set aside the award. According to the learned counsel, the said period of 3 months is extendable by another 30 days if sufficient cause, to the satisfaction of the Court, is shown by the party making the application, for not being able to do so within the period of 3 months prescribed by the main part of Section 34(3). Shri Markanda lays stress on the concluding words contained in the proviso to Section 34(3) i.e. "but not thereafter". The legislative intent, learned counsel contends, is to provide an extended period of 30 days after the initial period of 3 months and no further period, in any circumstances, for making the application to set aside the award. Placing the provisions of Section 29(2) of the Limitation Act, 1963, Shri Markanda has contended that the Act of 1996 having prescribed a period of limitation different from the period prescribed by the schedule to the Limitation Act, the period prescribed by the Act must be understood to be the period of limitation prescribed by the schedule to which the provisions of Section 3 of Limitation Act, 1963 will apply. According to Shri Markanda, the provisions contained in any of the Sections 4 to 24 of the Limitation Act contemplate different situations when the period of limitation prescribed can be understood to be capable of extension; the said provisions shall apply to a proceeding u/s 34 only to the extent to which any of the said provisions are not expressly excluded by the Act of 1996. Shri Markanda has submitted that the use of the words "but not thereafter" appearing in the proviso to Section 34(3) is conclusive and must be understood by the Court to mean an express exclusion of any of the provisions contained in Sections 4 to 24 of the Limitation Act. Reliance in this regard has been placed by Shri Markanda on a judgment of the Apex Court in the case of Union of India Vs. M/s Popular Construction Co., Shri Markanda by placing reliance on two separate judgments of the Bombay and Himachal Pradesh High Courts reported in 2004(1) RAJ 198:2003(3) Arb. LR 510 (Bom.) --H.M.P. Engineers Ltd. and Ors. v. Ralies India Ltd. and Ors. and State of H.P. Vs. Kataria Builders, has submitted that the principles of law laid down by the Apex Court in

the case of Union of India v. Popular Construction Co. (supra), has been followed in the said judgments to hold the provisions of Section 14 of the Limitation Act, 1963 to be expressly excluded by the provisions of the Act of 1996. According to Shri Markanda, the decision of the Apex Court in Union of India v. Popular Construction Co. (supra), and the judgments of the High Courts referred to above are capable of leading to the conclusion that the provisions of Section 4 of the Limitation Act have also been expressly excluded by the provisions of the Act of 1996. On the aforesaid basis the contention advanced is that the learned Court below was perfectly justified in reaching the conclusion that the applications filed by the applicant on 02.01.2004 were beyond the prescribed period of time and, therefore, the said applications could not have been entertained by the learned Court below.

6. It must be noticed at this stage that as per the calendar regulating the working of the Civil Courts in Assam for the year 2003-2004, the period between 25.12.2003 and 01.01.2004 (both days included) were, indeed, holidays for the Civil Courts in the State of Assam. The rival submissions advanced on behalf of the parties, therefore, does give rise to a substantial question calling for an authoritative pronouncement by the Court. For a better analysis of the issue that has confronted the Court in the present case, the provisions of Section 34(3) of the Arbitration and Conciliation Act, 1996 and the provisions contained in Sections 4 and 29(2) of the Limitation Act, 1963 may be set out hereunder.

Section 34(3) of the Arbitration and Conciliation Act, 1996:

"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 that 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."

Sections 4 and 29(2) of the Limitation Act, 1963:

"4. Expiry of prescribed period when Court is closed--Where the prescribed period for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the Court reopens."

"29(2) 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, the provisions of Section 3 shall 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) shall apply only in so

far as, and to the extent to which, they are not expressly excluded by such special or local law."

7. What has been contemplated by provisions of the two different Acts, as extracted above, has already been noted. The proviso to Section 34(3) of the Act of 1996, after providing an additional period of 30 days for making an application to set aside an award on sufficient cause being shown, ends with the words "but not thereafter". The question that confronts the Court is whether the above words "but not thereafter" has to be understood to an express exclusion of Section 4 of the Limitation Act to a proceeding u/s 34 of the Act of 1996 by virtue of Section 29(2) of the Limitation Act.

8. In *Union of India v. Popular Construction Co.* (supra), the Apex Court was considering the question as to whether the provisions of Section 5 of the Limitation Act, 1963 are applicable to a proceeding u/s 34 of the Act of 1996. The Apex Court while dealing with the contention advanced that the Act of 1996 did not expressly exclude Sections 4 to 24 of the Limitation Act, held that such an exclusion can also be culled out on a consideration of the provisions of the special law in the event there is no express exclusion in the provisions of the special Act. The Apex Court, thereafter, took the view that the crucial words in Section 34 are "but not thereafter" as used in the proviso to Sub-section (3) and the aforesaid words display a clear legislative intent to embody an express exclusion of the provisions of Section 5 of the Limitation Act and further that "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". In reaching the aforesaid conclusion the Apex Court also considered the history and scheme of the Act of 1996 limiting judicial interference to a minimum and also the fact that u/s 36 of the Act of 1996, an award can be enforced as if it were a decree of the Civil Court, immediately following the expiry of the prescribed time for filing an application to set aside the award. Section 5 of the Limitation Act confers power on the Court to extend the time for filing an appeal or an application beyond the prescribed period of limitation, if sufficient cause is shown. In other words, Section 5 enables the Court to extend the prescribed time. So does, in a way, Section 4 of the Limitation Act, 1963 by providing that when the prescribed period expires on a day when the Court is closed, the suit, appeal or application may be filed on the day when the Court reopens. In fact, each one of the provisions contained in Sections 4 to 24 of the Limitation Act, 1963 deals with situations where suits, appeals or applications, as the case may be, can be filed after the prescribed period of limitation. If the proviso to Section 34 of the Act of 1996 had specifically provided for an additional period of 30 days and has also provided that no application for setting aside the award can be entertained by the Court thereafter, it must be understood that there has, indeed, been an exclusion of the provisions of Section 4 of the Limitation Act which enables the filing of a suit on a day subsequent to the expiry of the period prescribed in the given situation i.e. when the period prescribed expires on a holiday. The law laid down by the

Apex Court in Popular Construction Co. (supra), though, is strictly in the context of the applicability of Section 5 of the Limitation Act, 1963, the principles laid down, as already noticed, must be duly made applicable while construing the provisions of Section 4 of the Limitation Act also. Such a view has been taken by the Bombay High Court in the case of H.M.P. Engineers Ltd. (supra), and the Himachal Pradesh High Court in the case of Kataria Builders (supra), as mentioned above while deciding on the applicability of Section 14 of the Limitation Act to a proceeding u/s 34 of the Act of 1996. That an application u/s 34 can, in no circumstances, be filed beyond the period of four months has also been held by the Delhi High Court in the case of Sukumar Chand Jain Vs. Delhi Development Authority and Another, Having understood the judgment of the Apex Court in Popular Construction Co. (supra), in the manner indicated, we must respectfully concur with the views expressed by the Bombay, Delhi and Himachal Pradesh High Courts. Our conclusions, as indicated, make it wholly unnecessary for us to consider the contentions advanced on behalf of the appellant on the basis of the provisions of Section 10 of the General Clauses Act, the application of which, even otherwise, stand excluded by the proviso thereof as well as by Section 5 of the Act of 1996.

9. We, therefore, hold that the applications u/s 34 along with the applications explaining the reasons/showing cause for not filing the applications u/s 34 in time having been filed on 02.01.2004, the learned Court below could not have entertained the same and the said applications were rightly dismissed. We, therefore, dismiss both the appeals leaving the parties to bear their own costs.