

(2009) 09 DEL CK 0429

In the Delhi High Court

Case No : Ex. P. No. 366 of 2008, O.M.P. No. 518 of 2009 and I.A. No. 11403 of 2009

BWL Ltd.

APPELLANT

Vs

National Hydro Electric Power Corp.
 Power Grid
Corporation of India Ltd. (Formerly known as NHPC Ltd.) Vs
BWL Ltd

RESPONDENT

Date of Decision : 15-09-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 34, 34(3), 43(1)
Civil Procedure Code, 1908 (CPC) — Section 151
Limitation Act, 1963 — Section 14, 5

Citation : (2009) 09 DEL CK 0429

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : T.K. Ganju, Sandhya Kohli and Puneet Parihar, in Ex. P. No. 366/2008 and A.T.M. Rangaramanujam, Shubhra Goyal Rana, in OMP No. 518/2009 and IA No. 11403/200, for the Appellant; A.T.M. Rangaramanujam Shubhra Goyal Rana in Ex. P. No. 366/2008 and T.K. Ganju Sandhya Kohli and Puneet Parihar, in OMP No. 518/2009 and IA No. 11403/2009, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The execution petition was filed of arbitral award dated 14th March, 2006 stated to having the force of a decree under the Arbitration Act, 1996. Notice of the execution was ordered to be issued to the judgment debtor who appeared through counsel on 14th January, 2009 and sought time to file reply to the execution. No reply was filed and on 22nd April, 2009 a statement was made that the judgment debtor was ready to make the payment as per the award subject to verification of calculations. The matter was adjourned. On the next date i.e. 14th July, 2009, again statement was made by the counsel for the judgment debtor in court that the judgment debtor was in negotiation with the decree holder and shall pay the amount awarded/agreed between the parties within four weeks. It was ordered that if the payment is not

made within four weeks, the bank account of the judgment debtor shall stand attached for the monies claimed in the execution.

2. Neither was any payment made nor any attachment effected. Before the next date the judgment debtor filed OMP No. 518/2009 u/s 34 of the Act along with an application u/s 5 of the Limitation Act for condonation of delay in preferring the OMP. The OMP came up before this Court first on 4th September, 2009 when the senior counsel for the judgment debtor (petitioner in OMP) sought time for filing an additional affidavit in support of the application for condonation of delay. The additional affidavit has been filed.

3. Condonation of delay in preferring the OMP is sought on the ground that the judgment debtor had within the prescribed time preferred petition u/s 34 of the Act before the court of the District Judge, Delhi. At this stage, the contention of the senior counsel for the decree holder may be noted. It is stated that the objections before the District Judge were preferred on 3rd July, 2006 and which were also barred by time and objection in which respect was taken before the court of the Additional District Judge.

4. The decree holder made an application in the petition preferred by the judgment debtor before the Additional District Judge, pleading that the court of the District Judge was not the court within the meaning of Section 2(e) of the Act, competent to entertain the objections. The said application of the decree holder was allowed vide order dated 21st January, 2008 of the Additional District Judge. It was held that the claims before the arbitral tribunal being in excess of Rs. 20 lacs, which was the maximum pecuniary jurisdiction of the court of the Additional District Judge, the court within the meaning of Section 2(e) of the Act competent to entertain the objection petition u/s 34 of the Act was this court. The objection petition preferred by the judgment debtor was accordingly dismissed and liberty was given to the judgment debtor to collect the original documents if any filed in that court in accordance with law for presentation before the court of competent jurisdiction.

5. The petition u/s 34 of the Act came to be filed before this Court only on 26th August, 2009 i.e. after more than 18 months from the date of the order aforesaid of the Additional District Judge and which has attained finality.

6. The senior counsel for the judgment debtor (petitioner in the OMP) has contended that as per Section 43(1) of the Act, the Limitation Act applies to these proceedings. Section 151 of the CPC is also sought to be invoked for condonation of delay. It is contended that on the basis of the facts pleaded in the application for condonation of delay and in the additional affidavit filed in support thereof, the judgment debtor is entitled to condonation of delay. Reliance is also placed on *Rajpura Gas House v. B.S. Koli* 2009 (3) Arb. LR 38 (P&H) holding Section 14 of the Limitation Act applicable in relation to Section 34 of the Arbitration Act.

7. Relying upon *Radhey Shyam Gupta through Legal Representatives Vs. Kamal*

Oil and Allied Industries Ltd. and Others, it is contended that the condonation of delay in re-filing is less rigorous than the condonation of delay in filing.

8. Need is not felt to go into the facts justifying the delay. The Supreme Court in Union of India Vs. M/s Popular Construction Co., held on an interpretation of Section 34(3) of the Act that the court is empowered to condone delay of one month only beyond the period prescribed for preferring the objections and no more. Though Section 43(1) of the Act does not appear to find mention in the said judgment but the specific issue of power of the court to condone the delay in preferring the objections having been considered by the Supreme Court in the said judgment, the said judgment is binding on this court.

9. The Supreme Court has undoubtedly, subsequently in Consolidated Engg. Enterprises Vs. Principal Secy. Irrigation Deptt. and Others, held that Section 14 of the Limitation Act would still apply in the matter of preferring objections. However even if, in computing the period of limitation for preferring the petition, the time during which the judgment debtor has been prosecuting the proceedings before the District Judge is to be excluded, even thereafter there is delay of more than the time which the court as per Popular Construction Co. (Supra) is empowered to condone. It is for this reason that necessity is not felt to go into the reasons set out for condonation of delay.

10. As far as the contention of the senior counsel for the petitioner as to "re-filing" is concerned, re-filing is in the same court and not in a different court. The Supreme Court in Sri Amar Chand Inani Vs. The Union of India (UOI), had held that when the plaint was returned for presentation to the proper court and was presented in that court, the suit can be deemed to be instituted in the proper court only when the plaint was presented in that court; that suit in the proper court cannot be treated to be a continuation of suit filed in the wrong court. Thus, institution in a court which has no jurisdiction to entertain, is no institution and the only advantage which can be availed thereof is to have the time spent in the said other court excluded u/s 14 of Limitation Act, if conditions thereof are satisfied. Thus the institution of the petition by the judgment debtor in this Court cannot be said to be an act of "re-filing" for principles with respect thereto, to apply. I have even otherwise in Gautam Associates Vs. Food Corporation of India, held that the Original Side Rules of this Court do not permit condonation of delay in re-filing even. It was further held that the legislative intent in Section 34 of Arbitration Act cannot be defeated by condoning liberally the delay in re-filing.

11. The senior counsel for the decree holder has also contended that the action of the judgment debtor in this case of having preferred the petition u/s 34 of the Act after having made statements on two dates in the execution proceedings assuring payment is mala fide.

12. The application for condonation of delay is thus dismissed and consequently the OMP No. 518/2009 is also dismissed as barred by time.

13. With the dismissal of the OMP, there is no bar to execution. The senior

counsel for the judgment debtor again states that execution be deferred for two weeks. In the circumstances issue Warrants of Attachment with respect to the Bank Account No. CA 10596547153 with State Bank of India, Jawaharlal Nehru University, New Mehrauli Road, New Delhi-110067 and Current Account No. 10315031267 with State Bank of India, Gandhi Nagar, Jammu - 181152 in the total sum of Rs. 83,75,576/- stated to be due under the decree. If the amount in one account is sufficient for the aforesaid purposes the other account shall not stand attached. Else the monies in the two accounts for the aforesaid total amount shall stand attached. However in view of the submission of the senior counsel for the judgment debtor the warrants be issued after two weeks from today. Upon the decree holder filing affidavit after two weeks that the payment has not been made, the registry to give Warrants of Attachment dasti to the counsel for the decree holder.

14. List the execution awaiting report of warrants, on 25th November, 2009.