

(2006) 05 OHC CK 0017

In the Orissa High Court

Case No : Miscellaneous Appeal No. 346 of 2002

Dandapani Barik

APPELLANT

Vs

Divisional Manager, Orissa Forest Development Corporation
Limited, Berhampur (Plantation) Division and Another

RESPONDENT

Date of Decision : 18-05-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34, 34(3), 43, 43(4)
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 2
Limitation Act, 1963 — Section 14, 29(2), 5
Orissa Civil Courts Act, 1984 — Section 2(2)

Citation : (2006) 05 OHC CK 0017

Hon'ble Judges : I. Mahanty, J

Bench : Single Bench

Advocate : Manoj Mishra, P.K. Das, P. Mishra and B.K. Mishra, for the Appellant;
S.K. Pattnaik, U.C. Mohanty, P.K. Pattnaik and D. Pattnaik, for the Respondent

Final Decision : Allowed

Judgement

I. Mahanty, J

1. In the present appeal the Appellant challenges the order dated 15.2.2002 passed in O.S. No. 3 of 2001 transposed as M.J.C. No. 8 of 2002 by the learned District Judge, Ganjam-Gajapati, Berhampur in not admitting the appeal and thereby rejecting the petition u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), by the present Appellant seeking to set aside the arbitral award dated 20.11.2000 passed by the sole Arbitrator.

2. The learned District Judge in the impugned order has come to hold that the application of the Appellant u/s 34 of the Act seeking to set aside the award of the sole Arbitrator passed on 20.11.2000, was filed in the Court of the learned District Judge, Ganjam-Gajapati, Berhampur on 17.10.2000, i.e., much beyond the period stipulated in Section 34 of the Act and by relying on a judgment of the Hon'ble Apex Court in the case of Union of India Vs. M/s Popular Construction

Co., held that the petition filed by the Appellant under the Limitation Act, was not maintainable being barred by Section 34 and hence liable to be rejected.

3. The learned Counsel for the Appellant submitted that while arbitration award was passed on 20.11.2000, the Appellant challenged the said award by filing an application u/s 34 of the Act before the Civil Judge (Sr. Division), Chhatrapur on 24.1.2001, i.e., well within the 90 days period stipulated u/s 34(3) of the Act. It is further submitted that the proceeding initiated before the Civil Judge (Sr. Division), Chhatrapur on 24.1.2001 was concluded on 9.8.2001, by dismissing the suit as not maintainable. The Appellant filed M.J.C. No. 62 of 2001 on 14.09.2001 for review of the order dated 9.8.2001 and the said application was ultimately rejected on 12.10.2001. The Appellant contended that the suit was pending before the Civil Judge (Sr. Division), Chhatrapur right from 24.1.2001 till 12.10.2001, whereafter on 17.10.2001, i.e., within a period of 5 days of rejection of the Appellant's review application a direction was made to return the plaint for its presentation before the proper Court. On proper presentation of the appeal memo in the Court of learned District Judge, Ganjam-Gajapati, Berhampur, the same was registered as O.S. No. 3/01 and subsequently transposed as M.J.C. 8/02.

4. On the other hand the Respondents Counsel supported the judgment of the learned District Judge impugned here placing reliance on the decision in the case of Popular Construction Company (supra) wherein their Lordships have held that in the language of Section 34 of the 1996 Act the crucial words are "but not thereafter" used in the proviso to Sub-section (3). This phrase would amount to an express exclusion with the meaning of Section 29(2) of the Limitation Act, and would, therefore, bar the application u/s 5 of that Act. Further, learned Counsel for the Respondents contended that the Appellant has not satisfied the three ingredients of Section 14 of the Limitation Act, which imposes a very stringent requirement on a party seeking to rely on the said provision and since the Act has come in force on 25.1.1996 and the said provision read with Section 2(2) of the Orissa Civil Courts Act, 1984 leaves no scope for any doubt that the term "Court" for the purpose of Section 34 of the Act, is the Court of learned District Judge and the Appellant or his advocate could not have harbored any other bona fide belief. The Respondents further contended that learned Civil Judge (Sr. Division), Chhatrapur dismissed the suit on 9.8.2001 and there was no reason for filing review application before the self-same Court which again rejected the petition on 12.10.2001 and therefore, the period between 9.8.2001 and 12.10.2001 cannot qualify as a period during which the Appellant was pursuing a remedy before the Court in good faith with due care and attention. Section 34(3) stipulates as follows:

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 the 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.

5. The Hon'ble Apex Court has clearly and in unambiguous term in the case of Popular Construction Company (supra) has laid down that time limit prescribed u/s 34 to challenge an award is absolute and unextendible by the Court u/s 5 of the Limitation Act. Having come to the aforesaid conclusion, the Apex Court has declared Section 34 of 1996 Act as special law and therefore, it is the settled law that the Court before whom an application u/s 34 is filed is not competent to condone any delay beyond 30 days. The counsel for the Appellant drew the attention of this Court to a subsequent decision of the Apex Court in the case of Union of India (UOI) Vs. Tecco Trichy Engineers and Contractors, , in which it was held that the High Court erred in holding the application u/s 34 filed on behalf of the Appellant as having been filed beyond a period of three months and 30 days within the meaning of Sub-section (3) of Section 34. It was held that there was a delay of 27 days only and not 34 days as held by the High Court and in the facts and circumstances of the case the Apex Court came to hold that the delay in filing the application deserves to be condoned.

6. In the light of the decisions as cited above, no doubt in order to determine the dispute in the present case certain salient admitted facts are noted hereunder.

20.11.2000 ?. Award passed by the Arbitrator

24.01.2001 ?. Petition u/s 34 of the Act was before. the Civil Judge (Sr. Division), Chhatrapur.

09.08.2001 ?. Civil Judge (Sr. Division) dismissed the suit.

14.09.2001 ?. Review petition filed by the Appellant before the Civil Judge (Sr. Division), Chhatrapur.

12.10.2001 ?. Civil Judge (Sr. Division) rejected review petition and returned the plaint to the Appellant for presentation before the appropriate Court.

17.10.2001 ?. O.S. No3/01 converted to MJC No. 8/02 was filed before the learned District Judge, Ganjam-Berhampur u/s 34 of the Act.

On an analysis of the aforesaid dates, it would be clear that the original application u/s 34 of the Act against the award dated 20.11.2000 was filed on 24.1.2001, i.e., within 65 days of the award. The proceeding remained pending before the learned Civil Judge (Sr. Division) from 24.1.2001 to 9.8.2001 and a review petition was filed before the learned Civil Judge (Sr. Division) on 14.9.2001, i.e., within a period of 36 days and after rejection of the review application by the Civil Judge (Sr. Division) on 12.10.2001, the same was returned for presentation before the proper Court u/s 34 of the Act, which was presented before the learned District Judge, Ganjam-Gajapati, Berhampur on

17.10.2001, i.e., 5 days thereafter. Therefore, if the period during which the proceeding remained pending, though erroneously, before the wrong forum, is "excluded", then the Appellant has filed the petition u/s 34 of the Act before the appropriate forum, i.e., the learned District Judge, Ganjam-Berhampur within a period of 106 days (i.e. 65+36+5). Hence, the delay, if at all, in filing the petition u/s 34 of the Act before the appropriate forum, is only 16 days. The proviso to Section 34 (3) of the Act of course provides that the Court is competent to condone delay up to 30 days.

7. The next issue needs to be considered before reaching at a conclusion in the matter is, as to whether an application u/s 14 of the Limitation Act is at all entertainable in a proceeding arising out of the Act? In this regard, it is stated that Section 43 of the Act specifically lays down that "The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in the Court." Therefore, it can be safely be stated that general applicability of the Limitation Act, 1963 has not been excluded from the ambit and scope of the Act.

Further for better appreciation reference may be made to Section 43(4) of the Act, which reads as follows:

Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

8. In the case of Popular Construction Company (supra) the Apex Court came to hold that Section 5 of the Limitation Act would have no application but the said proposition, does not arise in the facts of the present case. What is relevant is whether an application u/s 14 of the Limitation Act, 1963 is excluded from consideration. I am of the view that since the Limitation Act, 1963 has been made specifically applicable to all proceedings arising under the Arbitration and Conciliation Act, 1996 an application u/s 14 of the Limitation Act would also be maintainable, of course, subject to the applicant satisfying the necessary criteria for extension of such benefit.

9. Sections 5 and 14 of the Limitation Act stipulate as follows:

5. Extension of prescribed period in certain cases- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the Appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

14. Exclusion of time of proceeding bona fide in Court without jurisdiction-(1) In computing the period of limitation for any suit the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the Defendant shall be

excluded, where the proceeding relates to the same matter n issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of Sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature.

10. While Section 5 of the Limitation Act cannot any longer be utilized for "extension of prescribed period" in view of the proviso to Section 34(3) of the Act and the decision of the Apex Court in the case of Popular Construction Company (supra), yet Section 14 of the Limitation Act does not contemplate "extension of prescribed period", on the contrary, it contemplates "exclusion of time". Therefore, I am of the view that the nature of two provisions, i.e., Section 5 and Section 14 are completely different and distinct. If criteria of Section 14 are satisfied, then, the time spent in a proceeding before a Court, which is bona fide without jurisdiction, shall be "excluded". It is distinct from Section 5, which authorizes the Court to grant "extension of prescribed period."

11. Section 14 of the Limitation Act, 1963 is meant for protection against the bar of limitation for a person honestly doing his best to get his case tried on merits, which is unable to give him such a trial due to a wrong forum. The element of mistake, which is bona fide, attracts operation of Section 14 since the said provision is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum.

12. From the narration of facts as enumerated in the date chart herein above, it would be clear that the Appellant and his learned Counsel were acting under a mistaken belief that Civil Judge (Sr. Division) was the competent Court for presentation of an application u/s 34 of the Act. Although, it is a fact that the Arbitration and Conciliation Act was enacted in the year 1996 yet, it is also a fact that can be judicially taken note of that many local counsel practicing in far corner of this vast country are not extremely well versed with the working of the "Act" and the Appellant being guided by the legal advice locally available, has mistakenly presented the application u/s 34 of the Act before the wrong forum. Further, acting under such mistaken belief, the Appellant has also filed the application for review before the self-same forum. I am convinced that the

Appellant had been prosecuting his case with due diligence and good faith, in a Court which did not have jurisdiction in the matter and therefore, the period of time spent in proceeding before the wrong forum ought to be "excluded," in computing the period of limitation.

13. If such period is "excluded", then the delay in presenting the application u/s of 34 of the Act before the appropriate forum, i.e., learned District Judge, Ganjam-Gajapati, Berhampur is only 16 days and therefore, is within the 30 days period which is condonable under the proviso to Section 34(3) of the Arbitration and Conciliation Act, 1996 and such delay having been adequately explained in the Appellant's application u/s 14 of the Limitation Act, 1963 filed before the learned District Judge, the said delay of 16 days deserves to be condoned.

14. In view of the above discussion, the Misc. appeal is allowed and the learned District Judge is directed to proceed with the case in O.S. No. 3/2001 which has been transposed as M.J.C. No. 8/2002 and dispose of the same as expeditiously as possible on its own merit in accordance with law.