
(2008) 12 CAL CK 0016
In the Calcutta High Court
Case No : C.O. No. 1221 of 2008

Darbari Industries

APPELLANT

Vs

President of India and Another

RESPONDENT

Date of Decision : 23-12-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34, 34(2), 34(3), 43
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : AIR 2009 Cal 131

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : A.K. Roy and P.R. Mitra, for the Appellant; S. Basu and N. Mukherjee for Union of India, for the Respondent

Final Decision : Allowed

Judgement

Partha Sakha Datta, J.—An Arbitrator under the Arbitration and Conciliation Act, 1996 made an arbitration in terms of arbitration clause in the agreement over disputes between the parties in respect of execution of the agreement entered into by and between the parties on 14th March, 2001. An award was passed which according to the Union of India is vitiated by partial attitude of the arbitrator, and that it was decided ex parte. u/s 34 of the Arbitration and Conciliation Act an appeal was preferred by the opposite party against the award. Since the appeal was time barred an application u/s 5 of the Limitation Act was taken out by the petitioner before the learned Additional District Judge, 6th Court, Alipore.

2. The learned Additional District Judge by an order dated 26th of July, 2006 allowed the application u/s 5 of the Limitation Act subject to payment of cost of Rs. 1,500/-. Before the learned Judge in the Court below the opposite party took out the plea that there was 60 days" delay in preferring the appeal and since the Government machinery did not run speedily there was delay in preferring the

appeal against the award which is vitiated by non-adherence to the principle of natural justice. The Judge was of the opinion that since the petitioner was the Union of India they are to go through some processes which take time and the illegality of award was also the ground for condonation of delay. The Court observed that it was also a Court of equity which cannot overlook the opposite party's plea for advancement of justice in the matter of adjudication of the dispute.

3. An application under Order 47, Rule 1 of the CPC was taken out by the petitioner for review of the order dated 26th of July, 2006 on the ground that in view of the express language of the statute the order impugned was a bad one thus necessitating its turning over. The review application was dismissed by the order dated 4th of December, 2007.

4. The learned Judge in the Court below refused to accept the position though it was pointed out to him that there was no scope of making an application u/s 5 of the Limitation Act in view of Sub-section (3) of Section 34 of the Arbitration and Conciliation Act (for short the Act). The Judge noted some citations as was referred to by both the parties but observed that he was unable to interfere with the order passed on 26th of July, 2006.

5. The petitioner-defendant No. 1 M/s. Darbar Industries being aggrieved with the order has taken out this application under Article 227 of the Constitution of India to assail both the orders i.e. the order dated 26th of July, 2006 and the order dated 4th of December 2007.

6. Learned Advocate -for the opposite party No. 1 took out a preliminary point regarding maintainability, this application under Article 227 of the Constitution of India on the ground that the petitioner who was favoured with an award by the arbitrator did not challenge the original order dated 26th of July, 2006 but has preferred this application to challenge the order dated 4th of December, 2007 which cannot be assailed because of the fact that the order dated 26th of July, 2006 could not be legally reviewed by the learned judge. I am unable to accept the submission. The present application before this Court is one under Article 227 of the Constitution wherein the Court has to examine the legality, propriety of the order or orders passed by a subordinate Court just to see whether the Court had jurisdiction to pass any such order. If there is any error on the face of the record, if the law prohibits a Court from doing something, if a special statute provides a special law of limitation but the Court overlooks and ignores the position of law then obviously invoking the jurisdiction under Article 227 of the Constitution of India so as to invite the attention of the Court to the illegality committed by the subordinate Court cannot be said to be without jurisdiction and the question whether the order dated 26th of July, 2006 has been primarily and directly assailed or not is not too much of importance. Reference in this connection may be had to the decision in Uma Addhya v. Biren Mondal and others, 2006(2) CHN 680 which referred to the decision of the Supreme Court in Commissioner of Sales Tax, J and K and Others Vs. Pine Chemicals Ltd. and

Others, . The Supreme Court held in the case that if the Court passes a decision overlooking a binding precedent and such decision is in conflict with the principle laid down then it is an error apparent on the face of the record. Therefore, there is no legal impediment on the part of this Court to examine the order dated 26th of July, 2006 and the subsequent order dated 4th of December, 2007 so as to ensure whether there has been any illegality in the order by overlooking the law declared by the. statute.

7. Sub-section (3) of Section 34 of the Act provides as follows:

(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.

8. Before the learned Judge in the Court below the ground of delay as was advanced for acceptance by the Court was that the Government machinery which is handled at different levels of authority ordinarily causes delay in deciding a matter. The party in whose favour the award was passed seriously challenged, the contention on the ground that Sub-section (3) of Section 34 clearly ousts the jurisdiction of the Court in condoning delay as, Section 5 of the Limitation Act has no manner of application.

9. Mr. S. Basu, learned Advocate appearing for the Union of India takes me to a decision in *Gulbarga University v. Mallikarjun S. Kodagoli* (SC) 2008 (4) CHN 63 : 2008 AIR SCW 6389 and also the decision in *State of Goa Vs. Western Builders*, . *Gulbarga University* (supra) referred to a decision in *Union of India Vs. M/s Popular Construction Co.*, . So far as the *Gulbarga University* (supra) is concerned. In, find on perusal of the same that the said decision is of no assistance to the petitioner herein. The principal question that arose in *Gulbarga University* (supra) was whether in a proceeding u/s 34 of the Act Section 14 of the Limitation Act, 1963 can have application or not and it was answered in the affirmative. While answering the question in the affirmative their Lordships referred to the *State of Goa v. Western Builders* (supra) wherein the following was held:

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.

10. Their Lordships went on observing as follows:

Therefore, general proposition is by virtue of Section 43 of the Act of 1996 the

Limitation Act, 1963 applies to the Act of 1996 but by virtue of Sub-section (2) of Section 29 of the Limitation Act, if any other period has been prescribed under the special enactment for moving the application or otherwise then that period of limitation will govern the proceedings under that Act, and not the provisions of the Limitation Act. In the present case under the Act of 1996 for setting aside the award on any of the grounds mentioned in Sub-section (2) of Section 34 the period of limitation has been prescribed and that will govern. Likewise, the period of condonation of delay is 30 days in the proviso.

But there is no provision made in the Arbitration and Conciliation Act, 1996 that if any party has bona fide prosecuted its remedy before the other forum which had no jurisdiction then in the case whether the period spent in prosecuting the remedy bona fide in that court can be excluded or not. As per the provision, Sub-section (3) of Section 34 which prescribes the period of limitation (3 months) for moving the application for setting aside the award before the Court then that period of limitation will be applicable and not the period of limitation prescribed in the Schedule u/s 3 of the Limitation Act, 1963. Thus, the provision of moving the application prescribed in the Limitation Act, shall stand excluded by virtue of Sub-section (2) of Section 29 as under this special enactment the period of limitation has already been prescribed. Like wise the period of condonation of delay is 30 days by virtue of the proviso.

Therefore, by virtue of Sub-section (2) Section 29 of the Limitation Act what is excluded is the applicability of Section 5 of the Limitation Act and u/s 3 read with the Schedule which prescribes the period for moving application.

Whenever two enactments are overlapping each other on the same area then the Courts should be cautious in interpreting those provisions. It should not exceed the limit provided by the statute. The extent of exclusion is, however, really a question of construction of each particular statute and general principles applicable are subordinate to the actual words used by legislature.

11. Thus in *Gulbarga University* (supra) it was held that Sub-section (2) of Section 29 of the Limitation Act would apply to an arbitration proceeding and consequently Section 14 of the Limitation Act would also be applicable. Now the fact as appeared from the *Gulbarga University's* case (supra) was that an application u/s 34 was first preferred before a wrong forum and then it was filed before the Principal Civil Court on 8th December, 2003 and the said Court held the petition to be barred by time.

12. The case at hand is not a case where application u/s 34 of the Act was initially filed before any wrong forum having no jurisdiction or that the opposite party bona fide and diligently pursued the application and then it dawned upon them that the forum where application was made was not the appropriate forum. It was simply a case where the opposite party could not prefer the application within time because of some delay caused by the Government machinery. Therefore, provision of Section 14 of the Limitation Act has no manner of

application herein, or in other word, there is no applicability of Section 43 of the Act with reference to the making of an application u/s 34 of the Act because Sub-section (3) of Section 34 of the Act makes it very specific that the arbitral award may be challenged only within three months from the date on which the party making the application received the arbitral award and such period of limitation of three months can be extended by the Court upon sufficient cause being shown for a period of 30 days but not thereafter. This special law of limitation in the matter of making an application u/s 34 of the Act clearly and expressly ousts the jurisdiction of the Court to invoke Section 5 of the Limitation Act.

13. The decision in Union of India Vs. M/s Popular Construction Co., may also be referred to here. Their Lordships held as follows:

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.

14. The three-Judge Bench decision in Consolidation Consolidated Engg. Enterprises Vs. Principal Secy. Irrigation Deptt. and Others, has referred to all the decisions as mentioned above and reiterated the same principle. With regard to the applicability of the Section 14 of the Limitation Act their Lordships held that there is no provision in the Arbitration and Conciliation Act, 1996 that excludes the applicability of Section 14 of the Limitation Act to an application submitted u/s 34 of the Act, on the contrary Section 43 of the Act makes provisions of the Limitation Act, 1963 applicable to arbitration proceedings but with respect to the applicability of Section 5 of the Limitation Act their Lordships held at paragraph 20 of the Judgment as follows:

Section 29(2) of the Limitation Act inter alia provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period of limitation prescribed by the Schedule, the provisions of Section 3 shall apply as if such period was 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 shall apply only insofar as, and to the extent, they are not expressly excluded by such special or local law. When any special statute prescribes certain period of limitation as well as provision for extension up to specified time-limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded As the intention of the legislature in enacting Sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can

be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act. However, merely because it is held that Section 5 of the Limitation Act is not applicable to an application filed u/s 34 of the Act for setting aside an award, one need not conclude that provisions of Section 14 of the Limitation Act would also not be applicable to an application submitted u/s 34 of the Act of 1996.

15. Thus, Section 14 of the Limitation Act and Section 5 of the Limitation Act operate in two different fields. In terms of Section 43 of the Arbitration and Conciliation Act operation of application u/s 14 of the Limitation" Act is not excluded because the special Act does not expressly exclude the applicability of Section 14, whereas applicability of Section 5 of the Limitation Act in the matter of making an application u/s 34 of the Arbitration and Conciliation Act is expressly excluded by the language of Sub-section (3) of Section 34 of the Act.

16. To repeat, it is not a case where the appellant before the learned District Judge made the application u/s 34 of the Act after pursuing the case in good faith in a different wrong forum so much so that applicability of Section 14 of the Limitation Act could have arisen for consideration. It is simply a case where on a certain ground, bona fide or otherwise application u/s 34 of the Act was not preferred within time and it was delayed filed but before the right forum.

17. In that view of the matter the learned Judge in the Court below was legally unjustified in allowing the application u/s 5 of the Limitation Act in the matter of condonation of delay for the purpose of entertainability of the application u/s 34 of the Act.

18. Thus, the application succeeds and is allowed. The order dated 26th of July, 2006 and the subsequent order dated 4th of December, 2007 are set aside.

19. A copy of this judgment shall be sent to the learned Additional District Judge, 6th Court at Alipore in the district of 24 Parganas (South) for information and necessary action.