

(2003) 02 BOM CK 0136

In the Bombay High Court

Case No : Notice of Motion No. 3476 of 2002 in Arbitration Petition (L) No. 458 of 2002

HMP Engineers Ltd. and Others

APPELLANT

Vs

Rallis India Ltd. and Hon'ble Mr. A.M. Ahmadi, (Chief Justice of India, Retd), Sole Arbitrator

RESPONDENT

Date of Decision : 21-02-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 34, 34(3), 37, 43
Limitation Act, 1963 — Article 119, 137, 10, 12, 14

Citation : AIR 2004 Bom 71 : (2003) 3 ALLMR 169 : (2003) 3 ARBLR 452 : (2003) 6 BomCR 313 : (2003) 3 MhLj 853

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Rohit Kapadia, Pratik Saxeria and Y. Gadiyali, instructed by Deepa Chhabaria, for the Appellant; E.P. Bharucha and Bobby Patel, instructed by Crawford Bayley and Co., for the Respondent

Judgement

F.I. Rebello, J.—The Petitioners by the present motion seeks condonation of delay in filing petition before this court under the proviso to Section 34 of the Arbitration & Conciliation Act, 1996, in respect of the proceedings which were earlier filed before Delhi High Court and which papers were returned to the Petitioners herein for filing before the appropriate court. The Petitioner wants that period to be excluded for computing the period of limitation u/s 34 of the Act of 1996.

The issue of law which arises for determination in this matter is whether the time taken in prosecuting a proceedings, between the same parties before a competent court can be excluded for the purpose of computing period prescribed by Section 34(3) of the Act of 1996 to challenge an award.

2. A few facts and dates may needed to be set out to answer the issue which has arisen. At the outset, it may be pointed out that in so far as application of

Section 5 of the Limitation Act is concerned, the matter is no longer *res integra* having been decided by the Apex Court by its Judgment in *Union of India Vs. M/s Popular Construction Co.,* . The question really is whether the judgment applies only to Section 5 and would not cover proceedings under Part III, namely exclusion of time as also other provisions. The award came to be passed on 31.10.2001. Petitioner to challenged the award by filing a Petition on 20.12.2001 within the period prescribed u/s 34 of the Act of 1996 before the High Court of Delhi. An application was moved for seeking correction to the Award before the learned arbitrator. The award came to be corrected by order dated 22.12.2001. Another application was made for correction of the award which was allowed by order dated 29.2.201. The awards as corrected both on 22.12.2001 and 29.12.2001 have not been challenged nor was any application moved for amendment before the High Court of Delhi where the challenge was made to the Award dated 31.10.2001.

The Respondents herein raised an objection before the High Court that it had no jurisdiction to entertain the petition because it was not the court within the meaning of Section 2(e) of the Act of 1996. On hearing parties, an order came to be passed on 18.4.2002 holding that the Delhi High Court would have no jurisdiction and pursuant to that returned the papers to the petitioners to present the proceedings before the competent forum. The papers were returned to the Petitioners on 18.5.2002. After the papers were returned, the petition was presented before this court on 22.8.2002. An application for condonation of delay has been filed on 18.12.2002.

3. On behalf of the Petitioners, their learned counsel contended that as the award was amended by Orders dated 22.12.2001 and 29.12.2001 and as the papers were returned on 18.5.2002 the period of limitation to challenge the award would commence only from 18.5.2002 and even if there be a delay of few days that is within the permissible period under the proviso to Section 34(3) namely 30 days period after the expiry of three month which the court can condone on cause being shown. It is contended that the cause shown is sufficient and in these circumstances, this Court ought to condone the delay. On the issue whether time taken before Delhi High Court can be excluded, it is contended that the judgment of the Apex Court in *Popular Construction Company (supra)* must be restricted to Section 5 of the Limitation Act, which is the provision in so far as extension of limitation but would not apply to the provision of Section 14 which is the provision for exclusion of time. It is set out that in applying the law, the ratio of the judgment must be culled out from what is in issue before the Apex Court. That alone would constitute the ratio decedent of the judgment. That alone would be the law binding on this court. The judgment of the Apex Court on Section 5 of the Limitation Act, 1963 ipso facto cannot apply to the provisions like Section 12 of the same Act. It is contended that those are provisions which do not extend time but only provide for exclusion of time in certain situation. Once limitation commences, what Section 34 does is to limit the period, within which challenge has to be made and for that purpose the provisions pertaining to

exclusion of time are not excluded, considering both Section 34 of the Act of 1996 and Section 29 of the Limitation Act. Pointing to Section 43 of the Act of 1996, it is pointed out that provisions of Limitation Act are made applicable to proceedings before the Arbitral Tribunal. The provisions of Limitation Act by operation of law apply to all proceedings before a court. As an illustration, it is pointed out that ordinarily time taken for certified copy, based upon which appeal has to be filed is excluded, if it is not to be excluded, then in a case where a certified copy is not issued to the party beyond the prescribed period, that time cannot be excluded and the remedy of the party would be defeated. A party thus would be deprived of challenging the order in appeal which otherwise u/s 37 the party has a statutory right.

On behalf of the Respondents, their learned counsel contends that the contention of the Petitioner that limitation commenced on 18.5.2002 is factually incorrect. Limitation would commence on 31.10.2001 itself. The only question would be whether the period during which the proceedings were pending before Delhi High Court can be excluded. Learned counsel contends that the judgment of the Popular Construction Company (supra) will have to be held to apply to such a situation also considering that in that case Apex Court has held that provisions of Section 4 to 27 are excluded by virtue of Section 29 of the Limitation Act, as Section 34 of the Act of 1996 provides special period of limitation. In other words, it is a special law. If this be the position, it is contended that the petition before this court is hopelessly barred by limitation and as such cannot be entertained.

Alternatively it is submitted that even if it is assumed that time can be excluded then factually also the petition is beyond the period prescribed by Section 34 of the Act of 1996. Considering that limitation commences on 31.10.2001 and the petition was filed only on 20.12.2001, papers were returned on 18.5.2002 and was lodged in this court on 22.8.2002. Dealing with the other aspect of the matter, namely of commencement of limitation from the date of the amended award considering Section 33, it is contended that even if it is held that challenge can be based on the amended award, then limitation would commence on 22.12.2001 and 29.12.2001 respectively and the time taken when the award was under challenge cannot be excluded. In these circumstances, also the petition is barred by limitation.

4. With this background, the controversy may now be decided.

Considering the judgment in Popular Construction Company (supra) the first issue to be considered is whether considering the provisions of Section 14 of the Limitation Act 1963, the time taken in proceedings before the court where it was filed which had no jurisdiction can be excluded. At this stage, I will not advert to the issues as to whether the party was bonafidely prosecuting the proceedings as that would be on the factual aspects of the matter.

5. Section 34(3) of the Act of 1996 reads as under:

"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."

Section 29(2) of the Indian Limitation Act, 1963 reads as under:

"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 Section 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."

Section 2(b) of the Limitation Act includes a petition. The schedule to the Limitation Act, III Division, deals with applications. Article 19 prescribes the period of limitation under the Arbitration Act of 1940. It does not cover petitions or applications under the Act of 1996. Nothing has been brought to my attention that the Limitation Act has been amended to provide that article 119 will apply to applications under the Act of 1996. There is also no order produced which has been made under the Adaptation of Laws Order Act. Therefore, what would be applicable would be Article 137, which is the period of three years from the date on which the right to apply accrues. However, considering Section 29(2) the limitation to challenge an award under the Act of 1996 would be the period of three months from the date the signed copy of the award is served on the party who seeks to challenge the award. The Proviso merely confers jurisdiction on the court to entertain an application within a period of 30 days of the period provided but not thereafter. In other words the matter which would ordinarily be governed by Article 137 is now to be governed by a Special/local law, being Section 34(3) of the Act of 1996.

The limitation Act in Part II deals with limitation of suits, appeals and applications. Section 3(1) provides that subject to the provisions contained in Section 4 to 24 (inclusive) every suit instituted, appeal preferred and application made after the prescribed period, shall be dismissed although limitation has not been set up as defence. Therefore, Section 3 would be subject to provisions of Section 4 to 24. Section 5 provides that any appeal or any application other than application under any of the provisions of Order 21 of C.P.C. 1908 may be admitted after the prescribed period, if the appellant or applicant satisfies the court, that there was sufficient cause in not preferring the appeal or making

application within such period. Therefore, ordinarily application/petition u/s 34 of the Act of 1996 would be subject to Section 5 being proceeding before a court. However, as already noted, Section 29 provides that if the limitation prescribed in the schedule is different from that provided in any special or local law, then it is that period provided by the Special local law that would govern the proceedings. In the instant case, therefore, apart from period of three months, jurisdiction of the court to entertain an application/petition, would be governed by the proviso to Section 34(3). If that be the case, after the expiry of three months from the date of receipt of the arbitral award, it is only the period of 30 days thereafter which can be amended and to that extent, Section 5 of the Limitation Act would not apply to the special law. The issue in issue in the case of Popular Construction Company (supra) is reflected in Paragraph 2 of the judgment. The question as formulated was thus: "The question raised in this case is whether provisions of Section 5 of the Limitation Act, 1963, are applicable to application when the award u/s 34 of the Arbitration & Conciliation Act, 1996 (referred to hereinafter as 1996 Act)".

As noted earlier Section 5 is in Part II which provides for extension of the period of limitation prescribed in the schedule. It is not necessary to the other aspects. However, in so far as Part III is concerned, it deals with computation of period of limitation. Basically in this part, the various situations are provided, for exclusion of time from the prescribed period of limitation as set out therein. Part II and III therefore, would operate in two different situations. Part II operate in the matter of extension of time. Part III operates in so far as exclusion of time is concerned. Part III only excludes time taken as set out therein. We are concerned here with the issue of exclusion of time u/s 14. As noted earlier, Section 14 is the provision where in computing the period of limitation in any suit or application, time during which a party had been prosecuting proceedings (suits/applications) with due diligence in another civil proceedings whether in the court of first instance or appeal or revision against the same party for the same relief would be excluded. Section 14 therefore, does not extend time. It only excludes the time taken in prosecuting the proceedings before a wrong forum whether the party was prosecuting with due diligence is another matter to be considered while considering sufficient cause. Under the Act of 1996 Section 2(e) defines "court". The court defined u/s 2(e) means the principal civil court of original jurisdiction in the district and includes a High Court in the exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration. If the same had been the subject matter of the suit. Judgments have been cited where courts have held that the principal civil court in the District is the District court even if it has no jurisdiction on the subject matter without considering the effect of expression having "jurisdiction over the subject matter". As an illustration, if based on such a judgment a party bonafidely had filed petition before the District Court as principal Civil Court of original civil jurisdiction, though not having jurisdiction over the subject matter, what will be the effect or consequence on such a party. Must the petition be

dismissed, considering that the party bonafidely has prosecuted the proceedings in the court having no jurisdiction, or that time has to be excluded. This illustration has been given as it is the crux of the matter, considering various decisions of various courts in this respect.

The test of the application of provisions of Limitation Act, 1963 are no longer *res integra*. In respect of the Act of 1963 itself, the Apex Court had summed up the law in the case of *Hukumdev Narain Yadav Vs. Lalit Narain Mishra*, , the Apex Court has observed thus):

"It was sought to be contended that only those provisions of the Limitation Act which are applicable to the nature of the proceedings under the Act, unless expressly excluded, would be attracted. But this is not what Section 29(2) of the Limitation Act says, because it provides that 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. If none of them are excluded, all of them would become applicable. Whether those sections are applicable is not determined by the terms of those sections, but by their applicability or inapplicability to the proceedings under the special or local law. A person who is a minor or is insane or is an idiot cannot file an election petition to challenge an election, nor is there any provision in the Act for legal representation of an Election Petitioner or respondent in that petition who dies, in order to make Section 16 of the Limitation Act applicable. The applicability of these provisions has, therefore, to be judged not from the terms of the Limitation Act, but by the provisions of the Act relating to the filing of election petitions and their trial to ascertain whether it is a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in Section 29(2) of that Act."

As noted earlier Section 34 specifically does not exclude provisions of the Limitation Act, 1963. On the contrary, Section 43 makes provisions of the Limitation Act applicable to the extent that they are applicable even before the Arbitral tribunal. In so far as the court is concerned, provisions of the Limitation Act will apply by operation of law. Let us take another illustration of the applicability of the provisions even under Part II. Section 4 of the provisions even under Part II. Section 4 of the Limitation Act sets out that where the prescribed period for any suit, appeal or application, expires on the date when the court is closed, suit, appeal or application may be instituted preferred or made on the date when the court reopens. If the argument on behalf of the Respondent is to be accepted namely that period of three months and 30 days is the only period, then in that event, the other provisions when the court's registry is closed or on holidays which the period expires cannot be excluded. It would tantamount to mean that the court would have no jurisdiction even to exclude that period when either the court was closed on account of holidays or during vacations when the registry was closed. This conclusion cannot be rejected on the ground that there is period of 30 days during which the court may condone the delay. That would

be wholly irrelevant for the purpose of computing the period. In this background, considering Section 29(2) of the Limitation Act, all those provisions stand (SIC) because of Section 34. From the law laid down in *Hukumdeo* (supra) the real test to be applied: Do the provisions of Special Act expressly or by implication exclude the provisions of Section 4 to 24 of the Limitation Act. If this test is applied, all that is seen is that the limitation provided in the schedule to the Limitation Act is substituted by new period of Limitation as set out in Section 34(3). There is otherwise, no express exclusion of the Limitation Act nor is there implied ouster. The object whereby the party can challenge the award within a particular time frame need not be read in such manner to defeat the very right to challenge an award. The same test as was examined in *Hukumdeo* (supra) were also considered and applied by the Apex Court in the case of renewal of transport permit in the case of *Mohd. Ashfaq Vs. State Transport Appellate Tribunal, Uttar Pradesh and Others*, . The relevant discussion is found in Paragraph 8 of the said judgment. The learned counsel for the Respondent has drawn my attention to the judgment of the Apex Court in *Suganthi Suresh Kumar v. Jagdeeshan* (2002) 2 SCC 3420. My attention is invited to the proposition that law laid down by the Supreme Court cannot be departed by a High Court on that ground that attention of the Supreme Court had not been drawn to the specific statutory provisions. There can be no doubt, that law laid down by the Apex Court is binding on all courts and must be given effect to. The Apex Court has laid down that what is binding is the ratio decedent of the judgment. The ratio decedent of the judgment. The ratio decedent of the judgment can be culled by applying the following tests (1) was the matter in issue; was it required to be decided and has it been decided by a reasoned order. In the judgment in *Popular Construction Co.* (supra) the only issue in issue raised was in respect of applicability of Section 5 of the Limitation Act. Section 5 had to be considered considering the limitation provided in the Schedule to the Limitation Act and Section 34(3). The Apex Court while considering Section 5 has not considered applicability or non applicability of the other provisions of the Limitation Act. As set out in *Hukumdeo* (supra), what is to be considered is whether the applicability of the provisions of the Limitation Act are expressly or impliedly barred. There is no specific provision for exclusion of time for prosecution. It cannot be impliedly said that it is excluded considering the language of Section 34(3). To my mind, therefore, it is clear that in so far as Section 14 is concerned, there is nothing to hold that the provisions of Section 14 would not apply.

6. With that, we may consider the judgment of the learned Single Judge of this Court to which my attention was invited by the learned counsel for the Respondent in the case of *Mrs. Pushpa P. Mulchandani and Others (All Petitioners Through Constituted Attorney/Authority Holder Shri Phatu R. Mulchandani) Vs. Admiral Radhakrishin Tahilani (Retd.) and Others*, . It is no doubt true that in that case a learned Judge of this court took a view that the provision of Section 21, would not be applicable to the proceedings under the Arbitration & Conciliation Act, 1996. Section 21 is the provision in the matter of substituting or

adding new Plaintiff or defendant. It has nothing to do with Section 14. The judgment of the learned Single Judge can also be distinguished on two grounds (1) that the issue which was in issue in the present application was not in issue before the learned Single Judge. The learned single Judge was only considering the issue of addition of party and limitation thereto as set out u/s 21 and consequently there was no occasion for the learned Single Judge to consider the test laid down by the Apex Court in *Hukumdeo* (supra). A precedent can be said to be precedent which another Single Judge must follow if it is respect of the same issue or question of law. Merely because the provisions of the Arbitration & Conciliation Act were involved would not mean to say that the Judgment in the case of *Pushpa Mulchandani* (supra) has decided the law of applicability of the provisions of Section 4 to 24 of the Limitation Act. For that purpose the first question that the court must pose to itself is the test laid down in *Hukumdeo* (supra). Apart from that, the case of *Pushpa Mulchandani* (supra) at the highest can be said to conclude the issue of abatement in so far as Section 21 is concerned. Apart from that my attention is also invited to the findings in Para 28 in the case of *Pushpa Mulchandani* where the learned Judge proceeded on the footing that though 1996 Act does not contain specific words of exclusion, examination of the scheme of the Act would suggest that the intention is to exclude the application of the provisions of Sections 4 to 24 of the Limitation Act. Ratio of the judgment in the case of the *Popular Construction Co.* (supra) in paragraph 8 may be gainfully reproduced:

"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."

Thereafter, in Paragraph 12, the Apex Court has observed as under:

"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."

It is thus clear that the proposition based on which the learned Judge held that the provision of Section 4 to 24 of the Limitation Act are excluded have been subsequently repelled by the Apex Court in *Popular Construction Co.* (supra) by specifically holding that because of the express language, provisions of Section 5 are not applicable. *Pushpa Mulchandani* (supra) must be held to be no longer good law on the issue of exclusion of Section 21 of the Limitation Act. Having so held, I am clearly of the view that the provisions of Section 14 of the Limitation

Act of 1963 are not excluded while considering provisions in so far as excluding time in presenting the petition which was filed in time or within the period provided before a court.

7. Having said so, we will have to come to the facts of the present case. Even if the period of 20.12.2001 to 18.5.2002 is excluded, can it be said that the petition as filed before this court was within the period of limitation. The Award was passed on 31.10.2001. The Petition was filed on 20.12.2001. In other words, the entire period of limitation had not expired. the papers were returned on 18.5.2002. The Petition was lodged before this court on 22.8.2002. Therefore, if the period from 20.12.2001 to 18.5.2002 are excluded, then this petition as filed based on the award dated 31.10.2001 would be barred by limitation, considering the date of the award, filing of the petition before the Delhi High Court and subsequent filing before this court after papers were returned.

8. The next issue is whether the stating point of limitation in so far as amended award dated 22.10.2001 and 29.12.2001 commences on 18.5.2002 when the papers were returned by the Delhi High Court. It is not possible to accept the contention as raised on behalf of the petitioners. The time limit as specifically set out in Section 34(3) starts from the date when the award was amended and copy served. If the award was amended, limitation would commence on 22.12.2001 or for that matter on 29.12.2001. For that purpose once limitation has commenced it will not be interrupted. It is not possible to exclude the period from 20.12.2001 to 18.5.2002 in so far as amended awards are concerned. To hold that no purpose would have been served in challenging the amended award, as the main award itself was under challenge before the court cannot be accepted. If the Petitioners had amended the petition by challenging the award as amended on 22.12.2001 and 29.12.2001, then limitation may have been (SIC) and starting point of limitation could have been 18.5.2002 less the period taken for applying to challenge the amended award. u/s 34(3), the language is clear, that the time would start operating from the date when the award was communicated. The Petitioners chose not to challenge the amended award. Therefore, the period that they were proceeding before the forum where award of 31.10.2000 was under challenge, cannot be excluded on the ground that party were bonafidely challenging to the Award in a competent court but having no jurisdiction assuming that they were bonafide proceedings.

It is no doubt true that the Respondents have contended that considering earlier application u/s 9 before this court and considering Section 42, this court alone would have jurisdiction and Delhi High Court would have no jurisdiction. I do not propose to go into that issue.

8. Having said so, to my mind, the case would not fall within the proviso to Section 34(3). The delay therefore, cannot be condoned as it is beyond the period prescribed and on that count the motion has to be rejected.