

(2004) 12 DEL CK 0067

In the Delhi High Court

Case No : IA 6805 of 1999 in CS (OS) 1084A of 1998

ITC Limited

APPELLANT

Vs

Mr. Pradeep Anand and Others

RESPONDENT

Date of Decision : 16-12-2004

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Limitation Act, 1963 — Article 158, 5

Citation : (2005) 1 ARBLR 187 : (2005) 116 DLT 450 : (2005) 80 DRJ 173

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : S. Ganesh and Kavita Dahiya, for the Appellant; Suhail Dutt, Kartike Anand for Defendant No.1, Rajeev Nayyar and Abhijit Sinha, for Toshiba, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.

1.This is an application filed on behalf of the Petitioner for amendment of the Objections to the Award dated 24.4.1998. Order VI Rule 17 of the CPC has been invoked. In brief, the case of the Petitioner/Applicant is that it had been led to understand that Shri C.L. Anand had died intestate and that his son, Shri Pradeep Anand, should, Therefore, be imp leaded in place of his deceased father. In the interim Award dated 20.3.1997 the learned Arbitrator had recorded that -

""The Applicant Shri Pradeep Anand claims to be the son and legal heir of Shri C.L. Anand (deceased). He and members of the family of the late Shri C.L. Anand would like to continue and to proceed with this arbitration proceedings; hence this application"".

2. In the present application it has been stated that -

""Respondent No.1 dishonestly suppressed the fact that Shri C.L. Anand had died

leaving a Will, in which his wife Mrs. Shiela Anand was named as the sole heir. This fact has come to light only very recently in the Affidavit by way of evidence in rebuttal of Respondent No.1 dated 22.3.1999 filed by Respondent No.1 before the Arbitrator. This crucial fact was not known to the Petitioner at any time prior thereto and was not disclosed by Respondent No.1 to the Petitioner at the relevant time during the period 1996 to 1997 when the said Application for substitution was considered"".

It is worthy to note that despite the rigours of limitation being ominously present, the applicant has not bothered to stat , with any exactitude, the date of gaining knowledge of the facts.

3. The application which falls for consideration was filed on 29.5.1999. The non-applicants have opposed the application on the grounds that it is barred by limitation.

4. is No.2411/1999 in Suit No.1084-A/1998 are the Objections filed on 16.3.1999 by the plaintiff/Applicant to the said Award. If this application were to be allowed, these Objections would stand amended. 5.As will be seen, the view taken by the Courts is that it does not possess any power/discretion in condoning the delay and Therefore it must be extremely careful while allowing amendments to pleadings in the nature of Objections. While a liberal approach h is recommended to permitting amendments to pleadings which are not time bound, the position stands altered in other cases. The judgment of the Division Bench in Hastimal Dalichand Bora and Others Vs. Hiralal Motichand Mutha, was auth red by Gajendragadkar, J. as his Lordship then was. It was held that ""the Court would have no jurisdiction to consider the contentions raised in such an application when it has been filed beyond time"". Thereafter the Learned Judge made the following obeservations: Section 33 deals with the applications to be made by the parties. Before we consider the provisions of this section, it may be relevant to point out that S. 32 enacts a bar to suits contesting arbitration agreements or awards. In other words, all questions with regard to the existence or validity of an arbitration agreement or an award must be determined by the Court in which the award under the agreement has been or may be filed under the provisions of the Arbitration Act and the decision of the Court in these proceedings is final and cannot be challenged by a separate suit. This marks an important departure from the provisions relating to awards contained in Sch.II of the Code of Civil Procedure, 1908.

Section 33, Therefore, requires parties to make applications if they wish to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, and it lays down the procedure for dealing with applications which are made under this section. Article 158 of the Limitation Act prescribes a limitation of thirty days for the purpose of applications made for remitting or setting aside an award. It is perfectly true that if a party to an award wants to challenge the validity of the award on any ground and desires that the award should either be remitted or set aside, he has to make an application in

that behalf under S.33 within the time prescribed by Art. 158.

It may be that if an application is made by a party raising some contentions against the award, the effect of which is not to have the award either remitted or set aside, the provisions of Art.158 may perhaps not apply to such an application. In the present appeal we are not called upon to consider that point. It is admitted before us that the contentions which the defendants sought to raise before the learned trial Judge fell within the mischief of Art.158. But from the fact that a party is precluded from challenging the validity of the award on the ground that he has not made a proper application within the limitation prescribed by Art. 158, it would not follow that the Court cannot "suomotu" consider the same question in a proper case. If the award directs a party to do an act which is prohibited by law or if it is otherwise patently illegal or void, we think it would be open to the Court to consider this patent defect in the award 'suomotu', and when the Court acts 'suomotu' no question of limitation prescribed by Art. 158 can arise. In our opinion, the words used both in S.17 and S. 30 are wide enough to include the jurisdiction of the Court to deal with matters covered by those sections 'suomotu'. It would appear that under the English law the Court has a similar power to set aside an award, apart from the motion made by the parties in that behalf. For Russell, while dealing with the power of the Court, to remit or set aside the award, observes:

The Court has further an inherent power to set aside an award which is bad on its face: either as involving an apparent error in fact or law, or as not complying with the requirements of finality and certainty. The inherent power to set aside also extends to an award which exceeds the arbitrator's jurisdiction, and possibly to cases where fresh evidence has become available.'" (Russell on Arbitration 15th edn., p. 263).

6. Similar views have subsequently been independently expressed by another Division Bench in *Kawalsingh Akbar v. Baldeosingh Akbar*, AIR 1957 Nag 57. The following passage is significant and deserves reproduction: An agreement of reference to arbitration is of a solemn character which is binding on the parties; so is the award. If, Therefore, a party wishes to avoid the effect of the agreement or award, he must strictly comply with the provisions of law. In *Haji Ebrahim Kassam Cochinwalla Vs. Northern Indian Oil Industries Ltd.*, an objection to the award was filed in time but the additional ground on which the award was sought to be set aside was taken after the period of limitation.

It was held that the application to take the additional ground should be treated as a new application to set aside the award and must be dismissed as it was barred by limitation. No quarter can, Therefore be given to the laches and delay which the appellant has been guilty of. This question, however, does not arise as S.5 of the Indian Limitation Act does not apply to the proceedings under the Arbitration Act and cannot, Therefore, be invoked. We, Therefore, affirm the finding of the Court below that the application filed by the appellant to set aside the award was barred by limitation.

7. Yet another Division Bench has voiced the same view in *State of Kerala and Anr. v. P.N. Sivan Pillai*, 1997 (2) LR 41 . This is what it said: The question now remains to be considered is whether Section 5 of the Limitation Act can be invoked for condoning the delay in filing a petition to set aside an award u/s 33 of the Arbitration Act, 1940. The Supreme Court in *Madan Lal Vs. Sunderlal and Another*, , observed thus:

Assuming that the court has power to set aside the award suomoto, we are of opinion that that power cannot be exercised to set aside an award on grounds which fall u/s 30 of the Act, if taken in an objection petition filed more than 30 days after service of notice of filing of the award, for if that were so the limitation provided under Article 158 of the Limitation Act would be completely negated.

8. In this context the following observations of the Division Bench of the Bombay High Court in *Hastimal Dalichand Barg v. Hiralal Motichand Mutha* (supra), are apposite. It is common ground that the written statement has been filed by the defendants in the present proceedings beyond the limitation prescribed by Article 158, and it is conceded by Mr. Kotwal that Section 5 of the Limitation Act has not been made applicable and the court has no jurisdiction to condone the delay which a party may make in filing an application u/s 33. In other words, even if the court was inclined to treat the written statement of the defendants as an application made u/s 33 of the Act, the difficulty created by the delay would be insuperable and the court would have no jurisdiction to consider the contentions raised in such an application when it has been filed beyond time, and yet, without considering this point, the learned Judge has proceeded to deal with the merits of the contentions, though it is true that in the end he has rejected them.""

In *Kawal Singh Akbar v. Baldeo Singh Akbar*, AIR 1957 Nag 57, the Nagpur High Court observed:

""It was held that the application to take the additional ground should be treated as a new application to set aside the award and must be dismissed as it was barred by limitation. No quarter can, Therefore, be given to the laches and delay which the appellant has been guilty of. The question, however, does not arise as Section 5 of the Indian Limitation Act does not apply to the proceedings under the Arbitration Act, and cannot, Therefore, be invoked. We, Therefore, affirm the finding of the court below that the application filed by the appellant to set aside the award was barred by limitation."" In view of the aforesaid decisions, we are of the view that the court has no jurisdiction to condone the delay in filing an application to set aside the award u/s 33 of the Act. That would mean the Court has no power to invoke Section 5 of the Limitation Act in such situation. An application to set aside the award u/s 33 of the Arbitration Act is like an Original Suit. Section 5 of the Limitation Act does not apply to suits. In the present case, the application to set aside the award was filed in a suit by the respondent praying to pass a judgment and decree in terms of the award. Even in such situation the character of the application u/s 33 remains in tact. Further, the

Arbitration Act does not provide that the powers contained in Section 5 of the Limitation Act would apply to the different proceedings under the said Act.'''

9. Even in *Ganesh Chandra Misra Vs. Artatrana Misra and Others*, , it was held that Section 5 could not be invoked to extend time to file an application to set aside an award.

10. In *Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others*, the Apex Court had held that notwithstanding acceptance of costs for permitting the amendment of the pleading/objections the Court was not precluded from considering whether the Objections introduced therein should be taken notice of. It had specifically noted that the minor respondent had not filed Objections within thirty days of his attaining majority, but had attempted to introduced fresh grounds for assailing the Award in the guise of carrying out an amendment to the pleadings. The Hon''ble Supreme Court opined that the High Court was in error in treating the said amendments as merely introducing better particulars of what had already been pleaded in the original Objections. It also noted that although sundry Objections had been raised pertaining to the misconduct of the Arbitrator none of them had any reference to the alleged facts which were covered by the proposed amendment.

11. Mr. Ganesh, learned Senior Counsel appearing for the Applicant has drawn attention to the opinion expressed by me in *Prakash Sharma Vs. D.D.A. and Others*, . I had discussed the case of *Rajender Prasad Sharma v. Ashok Kumar Sharma and Ors.*, 1996 (2) L.R.362 above and had concluded that the ratio extractable from it is that Objections sought to be introduced by amendments after the statutory period of thirty days cannot be entertained, unless they are merely elucidatory in nature. I adhere to that opinion even today. Mr. Ganesh has read my comments to the effect that - '''the ubiquitous view of the High Court, and of the Supreme Court, is that the amendment can be carried out even after the expiry of period of limitation''' in isolation and out of context. In that case the question was whether the Court was precluded from granting interest which has been declined by the Arbitrator because of the view of the Hon''ble Supreme Court prevailing at the time when the Award was published. The opinion of the Apex Court had changed a full circle when the case came to be considered by me. I had felt propelled by the jural duty to ensure that justice is done whether Objections are filed or not. I have considered this conundrum in some detail in *J.S. Sood v. Johnny Bakshi*, 2001 (2) LR 143 and in *International Security and Intelligence Agency Ltd. v. MCD and Ors.*, 2001 III AD 87. The view that Objections must be filed within thirty days has also been expressed in *Ansal Properties and Industries Ltd. v. H.P. State Electricity Board*, 1997 (2) L.R. 596 where an Objection taken in a Rejoinder was not considered by the learned Judge. In *Jagan Nath Vs. Des Raj and Others*, , Justice M.M Punchi, as his Lordship then was, took note of the fact that if a party is permitted to amend Objections and raise all sorts of new pleas it would transgress the salutary rule of limitation. In *C.C. Subbaraya Setty Vs. C.V. Ananthanarayana Setty and others*, a

new plea of misconduct was not permitted to be brought in after the period of limitation. This is also the opinion favored by the High Court of Orissa in Ganesh Chandra Misra Vs. Artatrana Misra and Others, The ratio in Shri Lakhi Ram (Dead) Through Lrs. Vs. Shri Trikha Ram and Others, can have no application to circumstances where Objections have to be raised within a time circumscribed by the Statute. Reliance on S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, is of no avail, since it cannot possibly be predicated that any fraud has been committed by Shri Pradeep Anand in holding himself out to be the sole legal representative of his deceased father , late C.L. Anand. The decision of the Hon"ble Division Bench of this Court in India Export House Pvt. Ltd. Vs. M/s Orient Enterprises and Others, is also not relevant for this very reason.

12. Finally, Mr. Ganesh has drawn my attention to the observations made in Ragu Thilak D. John Vs. S. Rayappan and Others, in which the Hon"ble Supreme Court has held that where it is arguable that the relief sought by way of amendment would be barred by law of limitation, the amendment should nonetheless be allowed and the disputed matter should be made the subject-matter of an issue. It is my opinion that the applicant need not have completely capitulated to the case set out by Shri Pradeep Anand and was duty-bound to make its own enquiry as to who were the legal representatives of late C.L. Anand. Having found the Applicant guilty of dereliction of duty it cannot be permitted to raise questions at a time beyond prescription and at an inappropriate place, i.e., other than not before the Arbitrator. This is not an arguable case so far as the question of limitation is concerned.

13. In the present case the applicant could have resisted the impleadment of Shri Pradeep Anand as the sole legal heir. It could have put the respondents/legal heirs to strict proof of their case and not have negligently rested on statements which are now categorised by them as evasive. I fail to appreciate why all the heirs of late C.L. Anand were not required to be impleaded as legal representatives, even assuming that late C.L. Anand had died intestate. The so-called knowledge of the Will whereby late C.L. Anand had declared his widow, Shiela Anand to be his sole heir is, Therefore, of no legal significance and entirely irrelevant.

14. The application is without merit and is dismissed.