

(2015) 04 BOM CK 0279

In the Bombay High Court

Case No : Notice of Motion No. 73 of 2013 and Arbitration Petition (L) No. 1634 of 2012

Jayshri Ginning and Spinning (P) Ltd.

APPELLANT

Vs

C.A. Galiakotwala and Co. Pvt. Ltd.

RESPONDENT

Date of Decision : 27-04-2015

Acts Referred:

Citation : (2015) 04 BOM CK 0279

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Rinku Valanju, for the Appellant; Rohan Rajadhyaksha and Anshika Misra instructed by AZB and Partners, Advocates for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By this notice of motion, the applicant/petitioner seeks condonation of delay of 24 days in filing arbitration petition. The said notice of motion was vehemently opposed by the learned counsel for the respondent.

2. It is the case of the applicant that Shri Parbatbhai B. Hirpara, one of the Directors of the applicant expired due to his ailment who was also the head of the family and was solely and independently handling all the business affairs of the applicant-company. It is the case of the applicant that the other directors were not involved in the business affairs and were not aware of the purported forward contract entered into on 9th August 2010. It is the case of the applicant that due to death of Shri Parbatbhai B. Hirpara, the operations of the applicant-company were at a standstill between March 2011 and October 2011. In paragraph 6 of the affidavit-in-support of the notice of motion, it is averred that it is only when the award dated 24th August 2012 was received by the applicant to their shock and surprise, they came to know about the arbitration proceedings. It is also averred by the applicant that the applicant's lawyers visited the office of Cotton Association of India and met Secretary to understand the arbitration proceedings that had taken place and collect some publication

from him. Drafting and settlement of petition took place thereafter in the third week of December 2012. It is averred that in these circumstances, there was a delay of 24 days in filing this arbitration petition.

3. Learned counsel appearing for the applicant invited my attention to aforesaid reasons rendered by the applicant in the affidavit-in-support of the notice of motion and submits that the applicant has good case on merits also and this Court shall take a lenient view and shall condone the delay of 24 days in filing arbitration petition.

4. Learned counsel appearing for the respondent, on the other hand, submits that Shri Parbatbhai B. Hirpara who was one of the Directors of the applicant-company amongst the several directors had expired on 10 January 2011. He submits that a notice invoking arbitration agreement was issued by the respondent only on 17 March 2012. Learned counsel invited my attention to the averments made by the applicant in the arbitration petition and more particularly in paragraphs 12 to 14 and would submit that the applicant was fully aware of the letter dated 17th March 2012 addressed to the Secretary of the Cotton Association of India requesting appointment of an Arbitrator. In paragraph 13 of the petition, it is averred that the Cotton Association of India had forwarded a copy of the statement of facts and claim dated 17th March 2012 along with covering letter dated 20th March 2012 to the applicant. In paragraph 14, it is averred by the applicant that the arbitration proceedings at Mumbai could not be attended on account of special circumstances, the applicant was put into and heirs were first required to settle pressing family/running of business issues post death of Shri Parbatbhai B. Hirpara.

5. Learned counsel for the respondent also placed reliance on various correspondence exchanged between the Cotton Association of India and the petitioner by which the Cotton Association of India had from time to time issued notices of hearing upon the petitioner. My attention is also invited to paragraph 6 of the affidavit-in-support of notice of motion in which it is averred by the applicant that it is only when the award dated 24th August 2012 was received by the applicant to their shock and surprise, they came to know about the arbitration proceedings. Learned counsel for the respondent also invited my attention to acknowledgments of the notices issued by the Cotton Association of India from time to time which are not in dispute.

6. Learned counsel for the respondent submits that though the petitioner was fully aware of the arbitration proceedings which were served upon the applicant/petitioner from time to time and had also referred to such proceedings in the arbitration petition itself and in the affidavit-in-support of notice of motion, it is falsely alleged that the applicant came to know about the arbitration proceedings only after the receipt of the arbitral award. He submits that though the said Shri Parbatbhai B. Hirpara expired on 10th January 2011 and Shri Pravin P. Hirpara had already been appointed on 1 January 2011, the petitioner made various false and incorrect statements in the affidavit-in-support of notice of motion and

suppressed this fact. This Court should not exercise its discretionary power to condone the delay in these circumstances.

7. Learned counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of Pundlik Jalam Patil (D) by Lrs. Vs. Exe. Eng. Jalgaon Medium Project and Another, (2009) 1 CLR 123 : (2008) 5 CTC 663 : (2009) 153 PLR 128 : (2008) 13 SCALE 773 : (2008) 17 SCC 448 and in particular paragraphs 12 and 14 which read thus:--

"12. The Law and Judiciary Department as early as on 13.4.2000 i.e. to say within the period of 15 days from the date of the award of the Reference Court communicated its decision to acquiesce in the decision of the Reference Court and communicated the same to all the concerned including the beneficiary of the acquisition. It is not the case that the Executive Engineer did not receive the said communication. Having received the said communication the respondent did not act in the matter and initiated any steps for filing the appeals if it was really aggrieved by the decision of the Reference Court. There is no doubt whatsoever in our mind that the respondent made totally incorrect statement in the application filed in the High Court. We express our reservation as to the manner in which a public authority conducted itself in its anxiety to somehow get the relief from the court. In our considered opinion incorrect statement made in the application seeking condonation of delay itself is sufficient to reject the application without any further inquiry as to whether the averments made in the application reveal sufficient cause to condone the delay. That a party taking a false stand to get rid of the bar of limitation should not be encouraged to get any premium on the falsehood on his part by condoning delay. [See: Binod Bihari Singh Vs. Union of India, AIR 1993 SC 1245 : (1993) 1 ARBLR 313 : (1992) JT 496 Supp : (1992) 3 SCALE 386 : (1993) 1 SCC 572 : (1992) 3 SCR 468 Supp .

14. It is true that the power to condone the delay rests with the court in which the application was filed beyond time and decide whether there is sufficient cause for condoning the delay and ordinarily the superior court may not interfere with such discretion even if some error is to be found in the discretion so exercised by the court but where there is no sufficient cause for condoning the delay but the delay was condoned, it is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior court. The High Court having found that the respondent in its application made incorrect submission that it had no knowledge of the award passed by the Reference Court ought to have refused to exercise its discretion. The High Court exercised its discretion on wrong principles. In that view of the matter we cannot sustain the exercise of discretion in the manner done by the High Court."

8. Learned counsel for the respondent placed reliance on the judgment of the this Court in the case of Ravji Khimji Chheda and Others Vs. Kesarben Laxmichand Dedhia and Others, (2013) 4 BomCR 218 and in particular paragraphs 45, 49, 55 and 57 thereof. Paragraphs 45, 49, 55 and 57 which are

relevant for the purpose of deciding this notice of motion read thus :--

"45. Paragraphs 11 to 14 and 32 of the judgment in case of Pundlik Jalam Patil (supra) relied upon by the respondents reads thus :--

11. Whether the respondent made incorrect statement in the application seeking condonation of delay? There is no dispute whatsoever that the respondent being the beneficiary of the acquisition has been duly impleaded as a party respondent in the reference cases as is required in law. It not only appeared in the matter through a properly instructed Counsel but also filed its written statement opposing the claim for enhancement of compensation but did not choose to lead any evidence whatsoever. In the application filed in the High Court the plea taken by the respondent is as under:

The applicant submits that, although the applicant being Acquiring Body, was arrayed as opponent in the said reference, the opponent No. 4 herein (Original Opponent No. 1) S.L.A.O. or his subordinate contested the said reference by filing written statement.

Therefore, this applicant was unaware about the stand taken by S.L.A.O. as well as the impugned judgment and award.

This averment in the application on the face of it is totally incorrect.

12. The Law and Judiciary Department as early as on 13.4.2000 i.e. to say within the period of 15 days from the date of the award of the Reference Court communicated its decision to acquiesce in kvm CHS1649.06 the decision of the Reference Court and communicated the same to all the concerned including the beneficiary of the acquisition. It is not the case that the Executive Engineer did not receive the said communication. Having received the said communication the respondent did not act in the matter and initiated any steps for filing the appeals if it was really aggrieved by the decision of the Reference Court. There is no doubt whatsoever in our mind that the respondent made totally incorrect statement in the application filed in the High Court. We express our reservation as to the manner in which a public authority conducted itself in its anxiety to somehow get the relief from the court. In our considered opinion incorrect statement made in the application seeking condonation of delay itself is sufficient to reject the application without any further inquiry as to whether the averments made in the application reveal sufficient cause to condone the delay. That a party taking a false stand to get rid of the bar of limitation should not be encouraged to get any premium on the falsehood on his part by condoning delay. [See: Binod Bihari Singh Vs. Union of India, AIR 1993 SC 1245 : (1993) 1 ARBLR 313 : (1992) JT 496 Supp : (1992) 3 SCALE 386 : (1993) 1 SCC 572 : (1992) 3 SCR 468 Supp .

13. Whether the High Court properly exercised its discretion? The High Court in its order having noticed the relevant fact in categorical terms held that there was no substance in the plea that it was unaware about the judgment and award

passed by the Reference Court since it was a party before the Reference Court and contested the matter. The High Court also found that the decision of the Joint Secretary to acquiesce was communicated to the beneficiary of the acquisition and therefore, its plea about the unawareness of the award and decision taken by the Government cannot be accepted. The High Court in its order emphatically rejected the ground raised by the respondent in that regard. In such view of the matter can it be said that the High Court properly exercised its jurisdiction?

14. It is true that the power to condone the delay rests with the court in which the application was filed beyond time and decide whether there is sufficient cause for condoning the delay and ordinarily the superior court may not interfere with such discretion even if some error is to be found in the discretion so exercised by the court but where there is no sufficient cause for condoning the delay but the delay was condoned, it is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior court.

The High Court having found that the respondent in its application made incorrect submission that it had no knowledge of the award passed by the Reference Court ought to have refused to exercise its discretion. The High Court exercised its discretion on wrong principles. In that view of the matter we cannot sustain the exercise of discretion in the manner done by the High Court.

32. For the aforesaid reasons, we hold that the High Court gravely erred and exercised its discretion to condone the inordinate delay of 1724 days though no sufficient cause has been shown by the applicants. It is for that reason, we interfere with the decision of the High Court and set aside the same. The appeals are accordingly allowed without any orders as to costs.

49. Considering the record produced by both parties, I am of the view that it is not possible to accept the contention of the applicant that the applicants were not at all aware of the pending proceedings in this court (Arbitration Petition No. 66 of 1991). In my view when petitioner No. 1 died, other petitioners were alive. Original petitioner No. 3 ought to have adopted appropriate proceedings for bringing legal heirs of the original petitioner No. 1 on record. On the death of petitioner No. 3, his legal heirs have taken out chamber summons in other proceedings for bringing them on record but did not take out similar proceedings in this matter. Perusal of the MOU indicates that applicants were fully aware of the present proceedings. Deponent of applicant No. 15 is electronic engineer and therefore I am not inclined to accept his contention that he did not give any instruction to prepare the MOU between him and Sunil Mantri HUF or that he did not read the said MOU and/or was not aware of the contents thereof. Supreme Court in case of *Grasim Industries* (supra) has held that when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read the document properly and understood it and only then he has affixed his signature thereon, otherwise no signature on a document can ever be

accepted. It is further held that in particular, businessmen, being careful people since their money is involved would have ordinarily read and understood a document before signing it.

Hence, the presumption would be even stronger in their case. It is not in dispute that MOU was signed by the applicant No. 15 in favour of Sunil Mantri HUF in which MOU there was a reference to arbitration petition No. 66 of 1991 and applicant No. 15 had given assurance of his clear title in respect of the said properties.

55. Perusal of the record however, indicates that the applicants were fully aware of the arbitration petition pending in this court and had taken out proceedings for bringing legal heirs of the petitioner No. 3 on record in the other suit. The applicant No. 15 had also signed the memorandum of understanding in which there was reference to the arbitration petition. The applicants were thus fully aware of the pending proceedings in respect of all the deceased petitioners. Record also indicates that applicants were also aware of the death of respondent No. 2 and did not take steps to bring his legal heirs on record within time prescribed by law. It is not in dispute that this court has already passed decree in favour of the respondents on abatement of the arbitration petition. The effect of such decree is subject to the outcome of this chamber summons. The fact however remains that due to gross negligence on the part of the applicants in not filing appropriate proceedings for bringing legal heirs of the deceased petitioners and respondent No. 2, the valuable rights has accrued in favour of the respondents. In my view, the explanation given by the applicant in affidavit in support does not appear to be true and plausible and does not reflect normal behaviour of the common prudent person. The facts brought on record by the respondents indicate the delay which is directly as a result of the negligence, default or inaction on the part of the applicants. In my view though the court has to take liberal view, while considering the application for condonation of delay or for setting aside the order of abatement, however, at the same time the court also has to examine whether by exercising discretionary powers in favour of such party, who was negligent, not prompt and because of his default or inaction, the other side also should not suffer. In my view, the application filed by the applicants lacks bona fide and does not contain true and correct facts. In my view, the applicants have failed in showing sufficient cause for condonation of delay as prayed in filing the application in question and for setting aside abatement.

57. As far as judgment of the Supreme Court in the case of Ramnath Sahu (supra) relied upon by the applicant is concerned, the Supreme Court has held that sufficient cause should receive a liberal construction so as to ensure that the substantial justice is done. It has been also held that it should be done so long as negligence or lack of bona fide cannot be imputed to the party concerned. The court has to see whether sufficient cause has been furnished on the facts of the particular case and straitjacket formula is not possible. The Supreme Court has

also held in the said judgment that while considering the matter, the court should not lose sight of the fact that by not taking steps within time prescribed, valuable right has accrued to the other party, which should not be lightly defeated by condoning the delay in routine like manner. The Supreme Court has also held that while considering the matter, the court has to strike balance between resultant effect of the order it is going to pass upon the parties either way. So far as judgment of the Supreme Court in the case of Collector of Land Acquisition, Anantnag is concerned, the application of the Collector for condonation of delay of 4 days was rejected by the High Court. Considering the facts of that case, the Supreme Court took a view that the State which represents the collective cause of the community, does not deserve a litigant non grata status. In the facts of that case, the Supreme Court laid down principles to be followed by the court while considering application for condonation of delay. In my view the facts of the said judgment are totally different and distinguishable with the facts of this case. In my view, as the record indicates that the applicants have not come to this court with clean hand and have suppressed true and correct facts, this court shall not exercise its discretionary power and shall not take any lenient view in this matter."

9. A perusal of the arbitration petition as well as in the averments made in the affidavit-in-support of notice of motion clearly indicates that the applicant was fully aware of the arbitration proceedings filed by the respondent. It is not in dispute that the said Shri Parbatbhai B. Hirpara died on 10th January 2011 i.e. 14 months prior to the date the respondent invoking the arbitration proceedings. A perusal of the documents filed by the respondent clearly indicates that the applicant was served by the Cotton Association of India all notices from time to time. Paragraphs 12 to 14 of the arbitration petition also clearly indicate that the applicant was fully aware of the said proceedings. The Cotton Association of India admittedly forwarded copies of the pleadings along with covering letter dated 20th March 2012. In paragraph 14 of the arbitration petition, it is alleged by the applicant that the arbitration proceedings at Mumbai could not be attended on account of special circumstances, the applicant was put into and heirs were first required to settle pressing family/running of business issues post death of Shri Parbatbhai B. Hirpara.

10. It is not in dispute that upon demise of said Shri Parbatbhai B. Hirpara, Shri Pravin P. Hirpara was appointed as a director on 1st January 2011. In addition to the said Shri Parbatbhai B. Hirpara, there were several other directors of the applicant-company. A perusal of paragraph 6 of the affidavit-in-support of notice of motion indicates that the applicant has suppressed the receipt of the proceedings and notices from the Cotton Association of India and has falsely pleaded that the applicant was not aware of any of the proceedings till the copy of the award was received by the applicant from the Cotton Association of India.

11. Though the Court takes a liberal view while condoning the delay if case is made out and hears the matter on merits but at the same time it is also duty of

the Court to see that no false and incorrect statements are made by any party while seeking condonation of delay and while applying for exercising the discretionary power of the Court. The Supreme Court in the case of Pundlik Jalam Patil (dead) by Lrs. (supra) has held that if there is no sufficient cause made out for condoning the delay, the discretionary power of the Court which has to be exercised judicially shall not be exercised. If a party comes to the Court with unclean hands and makes a false and incorrect statement, the Court shall not encourage such litigant. This Court has followed the judgments of the Supreme Court in the case of Pundlik Jalam Patil (dead) by Lrs. (supra), in the case of Ravji Khimji Chheda and Ors. (supra) and has rejected the chamber summons for condonation of delay on the ground of false and misleading statement made by the applicant while seeking condonation of delay.

12. In my view, the law laid down by the Supreme Court in the case of Pundlik Jalam Patil (dead) by Lrs. (supra) and by this Court in the case of Ravji Khimji Chheda and Ors. (supra) would squarely apply to the facts of this case. In my view, the applicant has not come to this Court with clean hands and has made false and incorrect statements and thus this Court shall not exercise its discretionary power and shall not take a lenient view in favour of the applicant. The applicant has not shown sufficient cause for condonation of delay and has come to the Court with unclean hands. No case is made out for condonation of delay. Notice of motion is accordingly dismissed. In view of dismissal of the notice of motion, the arbitration petition is also dismissed. No order as to costs.