

(2009) 04 KAR CK 0054

In the Karnataka High Court

Case No : C.R.P. No's. 727 and 1874 of 2003

K. Ramakrishna, Engineer and Contractors, R/by his Pa
Holder Aa Raghava Reddy

APPELLANT

Vs

The State of Karnataka, Zilla Panchayat Engineering Division,
(World Bank Project) and T.G. Radhakrishna Retired Chief
Engineer/Arbitrator

RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2 (e), 34
Limitation Act, 1963 — Section 14, 14 (2)

Citation : AIR 2010 Kar 7 : (2010) 1 KCCR 558 : (2011) 1 RCR(Civil) 551 :
(2011) 1 RCR(Civil) 551

Hon'ble Judges : K. Ramanna, J

Bench : Single Bench

Advocate : G.S. Bhat and Associates, Holla and Holla, Ravi, Nettar Aditya Soni,
B. Manjunatha, N. Rajanna, Rajiv Kumar Jha, Jayanthi Ramakrishnan and Vivek
Bajaj, for the Appellant; Y.V. Partha Sarathy, for R1 and P. Harishchandra Reddy,
for R2, for the Respondent

Final Decision : Dismissed

Judgement

K. Ramanna, J.—Both these petitions are filed u/s 151, C.P.C. challenging the orders dated 4.1.2003 and 7.3.2003 passed on I.A.4 and I.A.2 respectively in case No. A.C.1/02 on the file of the District Judge, Mandya, praying to set aside the said orders and to dismiss I.As.4 and 2 filed by respondent No. 1 herein.

2. The case of the petitioners is that he was a successful bidder for carrying out the work of laying water supply distribution system, construction of overhead tanks, laying of machines, supply of submersible and centrifugal pipes on a turn-key basis. To that effect an agreement/contract was entered into between the petitioner and the State of Karnataka on 7.4.1995 which provided for an arbitration clause in case of any dispute.

3. It is his further case that he carried out the work sincerely and diligently and completed the entire work to the satisfaction of the State Government by May 1999, and that at the instance of the State Government he had carried out additional work far beyond the scope of the contract and he had spent nearly fifteen crores for completing the work, that the Government had not at all paid for the extra work carried out at its instance. Further, that the Earnest Money Deposit (EMD) further security deposit and withheld amounts were not paid by the State Government after the completion of the work as such there is huge amount of money due by the Government to the petitioner. Therefore, the petitioner Invoked the arbitration clause and the respondent-2 herein was appointed as an arbitrator who, after hearing both the parties and giving full opportunity to both sides, passed an award dated 29.11.2000, directing the Government/respondents herein, to pay a sum of rupees eight crores to the petitioner towards EMD, further security deposit, withheld amounts, price adjustment and the cost of the work carried out, extra items, excess quantities etc. The Arbitrator also directed the respondent-1 State Government to pay interest on the said amount.

4. Being aggrieved by the said order the State Government/respondent-1 herein, on 27.12.2000 filed a petition u/s 34 of the Arbitration and Reconciliation Act, 1996, before the Principal Civil Judge (Senior Divn.), Mandya In A.C. No. 1/2001. After appearance, the petitioner filed his objections and ultimately the said application was returned to respondent-1 herein, as the learned judge had no jurisdiction to try the said application. Thereafter, the 1st respondent filed the petition A.C.1/2002 before the District Court at Mandya on 26.3.2002, along with an application I.A. No. 4 u/s 14(2) of the Limitation Act to condone the delay caused in filing the said petition, which came to be allowed by court below as per order dated 4.01.2003, excluding the period from 27.12.2000 to 26.3.2002 both days inclusive, spent by petitioner - respondent-1 herein in prosecuting the case A.C. No. 1/2001 before the principal Civil Judge (senior) Mandya being aggrieved by the said order, petitioner herein has come up with Cr.P.C. No. 727/03.

5. Further along with the petition AX. No. 1/2002 the 1st respondent-State had also filed I.A.2 u/s 151, C.P.C. seeking for stay of the operation of the award passed by arbitrator - respondent-2 herein, dated 29.11.2000. The court below by its order dated 7.3.2003, allowed the said application and stayed the said award. Being aggrieved by the said order, the petitioner has preferred C.R.P. No. 1874/03.

6. The case of the 1st respondent-State before the court below was that it has already paid rupees nine crores and odd to the petitioner, though the value of the contract was rupees six crores and odd. The arbitrator has not considered the documents produced before him and has passed the award at his whims and fancy. The award passed by the arbitrator for an Item is more than 461% of the B.O.Q. rate. It is further case of respondent No. 1 that the award of the arbitrator is dated 29.11.2000 and it came to know of it and collected copy only

on 4.12.2000. Aggrieved by the said award, it has filed the petition u/s 34 of the Arbitration Act in A.C. 1/01 before the Principal Civil Judge (Senior Divn.), Mandya, on 27.12.2000 believing it had jurisdiction to try and dispose of the said petition. After filing of the said petition, it came to know about the judgment of the Hon"ble High Court in the case of I.C.D.S. Ltd. Vs. Mangala Builders Pvt. Ltd. and Others, wherein it has been held that the proper court to try the said petition is Principal District Court within whose jurisdiction a suit could have been filed in the normal course without reference to the arbitration clause. In view of the said judgment, the respondent No. 1 filed Misc. 2/02 before the Principal District Judge, Mandya, seeking to transfer A.C. No. 1/01 pending before the Principal Civil Judge (Senior Divn.), Mandya, to the court of the Principal Civil Judge, Mandya. The said Misc. petition came to be disposed of, giving liberty to the respondent No. 1 to take back the petition in A.C.1/01 under Order VII Rule 10 and 10-A, C.P.C. Accordingly, A.C.1/01 was withdrawn on 26.03.2002 and on the same day it was presented before the Principal District Judge, Mandya, which is numbered as A.C.1/02, contending that the petition A.C.1/02 is In time, even if there is any delay, the time spent in prosecuting the case in A.C.1/01 before the Principal Civil Judge (Senior Divn.), Mandya, between 27.12.2000 and 26.3.2002 will have to be excluded for the purpose of Section 34 of the Arbitration Act, hence I.A No. 4 came to be filed contending that the time spent in prosecuting A.C.1/01 will have to be excluded in computing the period of limitation, that huge public money is involved in the matter and great hardship and irreparable injury will be caused to the State if the application is not allowed. So also I.A. No. 2 came to be filed seeking the stay the operation of award passed by the arbitrator - respondent-2 herein, and prayed for allowing the said applications as it has got a good case on merits.

7. On the other hand, the contention of the petitioner is that an application for setting aside the award cannot be filed after 90 days from the date of receipt of the copy of the award, and that the court has power to entertain the application for a further period of 30 days and not thereafter. Therefore, the respondent No. 1 is not entitled to seek exclusion of time spent in prosecuting A.C.1/01 on the file of the Principal Civil Judge (Senior Divn.), Mandya, the petitioner ought to have exercised due care and caution in filing the said A.C.1/01. The fact that respondent No. 1 prosecuted the said case for more than a year without realising the defect of jurisdiction shows that the State is not diligent in prosecuting the said proceedings.

8. It is the further case of the petitioner that the instant petition is not a case where the main proceedings cannot be entertained unless the delay is conducted. It is only in such cases delay condonation petition is to be disposed of before the main petition is taken on file. In the instant case, the question of limitation is a mixed question of fact and law and can only be decided along with the main proceedings. It is further contended that the trial court erred in passing the order of stay after a period of 4 years from the date of completion of work, and over 2 1/2 years from the date of passing of the award.

9. It is further contended that respondent No. 1 has not challenged the order passed by the District Judge dismissing his Misc. petition filed seeking transfer of petition from the court of Civil Judge to the District Court. Hence, he cannot seek for excluding the time spent prosecuting the petition before the civil judge.

10. While arguing the case, learned Counsel for the petitioner relied on the following judgments:

1) The Hatti Gold Mines Limited Vs. Vinay Heavy Equipments, ;

Exclusion of time in legal proceedings u/s 14- exclusion of time of proceeding bonafide in Court without jurisdiction - HELD - In order to get the benefit of Section 14 of the Act, the party has to show that he was bonafide, in good faith and with due diligence prosecuting the case before the wrong forum. ON FACTS HELD- when the prosecution of the proceedings by the appellant with due diligence is not proved, appellant Is not entitled for the benefit u/s 14 of the Act.

2) National Aluminium Co. Ltd. Vs. Pressteel and Fabrications Pvt. Ltd. and Another,

Arbitration & Conciliation Act, 1996 - Section 34 r/w Section 2(e)-mandatory nature of Section 34-challenge to arbitral award-executability of award once challenged-discretion of court to pass interlocutory orders defeats the very object of the alternate dispute resolution system to which steps would be taken by the authorities concerned at the earliest to bring about the required change in the law-Constitution of India-Article 142-long delay in disposal of arbitration proceedings-interference by Supreme Court under Article 142 to pass interlocutory orders in regard to arbitral award-propriety of-Civil Procedure Code, 1908-Order 39 Rule 1-jurisdiction of court to pass interlocutory orders in regard to arbitral award challenged u/s 34 of Arbitration & Conciliation Act, 1996.

11. I have carefully examined the material on record.

12. The award dated 29-11-2002 passed by the arbitrator - respondent No. 2 herein is the order impugned before the Court below. The impugned order herein in both the above petitions are the orders passed by the Court below in A.C. No. 1/2002 on the interlocutory application Nos. 4 & 2 respectively filed by respondent No. 1 herein seeking condonation of delay in filing the application before the Court below and also to stay the operation of award passed by the arbitrator-respondent No. 2 herein, which applications came to be allowed by Court below as per orders dated 4-1-2003 and 7-3-2003 respectively.

13. Since the impugned orders have been passed on the interlocutory applications, it Is not necessary to go into the merits of the case of each party in detail. From the arguments of the parties, it is clear that even the appellant is not seriously disputing the order of stay dated 7-3-2003 passed by the Court below which is impugned in CRP No. 1874/2003, since the same is consequential and interrelated to the order dated 4-1-2003 passed by Court below condoning the delay caused in presenting the application u/s 34 of Arbitration Act before the

Court below, challenging the award passed by the Arbitrator - respondent No. 2 herein. Therefore the only point that has to be answered is "whether the order dated 4-1-2003 passed by Court below is Incorrect and illegal, if the answer to this point is in affirmative, then the consequential order dated 7-3-2003 passed by the Court below staying the operation of award passed by respondent-2 should also be set aside.

14. Admittedly, award came to be passed by the arbitrator - respondent No. 2 herein on 29-11-2000. Challenging the said award, respondent No. 1 preferred an application u/s 34 of the Arbitration and Conciliation Act, 1996 before the Court below on 26-3-2002. Of course, under the Act, an application u/s 34 of the Act has to be filed within three months from the date of receiving the award passed by the Arbitrator and the Courts have power to receive the said application after the said period for a further period of 30 days. Further the Act makes it dear that no such application should be received after lapse of four months from the date of the party making that application had received the arbitral award. But in the instant case, it is the case of applicant i.e., respondent No. 1 herein that immediately after it received the arbitral award on 4-12-2000 (Award was passed on 29-11-2000) It preferred an application u/s 34 of the Act in A.C. No. 1/2001 before the Prl. Civil judge (Sr.Dn), Mandya on 27-12-2000 well within time, but subsequently, it came to know that the said Court has no jurisdiction to try the said application and that the same had to be preferred before the District Court, as such, it preferred Misc. No. 3/2002 before the District Court, Mandya, seeking to withdraw the said case in A.C. No. 1/2001 from the file of the Prl.Civil Judge (Sr.Dn), Mandya to District Judge, Mandya, wherein order came to be passed as per order dated 14-3-2002 dismissing the said Misc. Petition with liberty to respondent-1 to take back the said A.C. No. 1/2001 from Pri. Civil Judge (Sr.Dn), Mandya and to present it before the appropriate Court. Accordingly, it took return of the case filed in A.C. No. 1/2001 from the file of Pri. Civil Judge (Sr.Dn), Mandya and filed it before the District Judge, Mandya in No. A.C.1/2002 on the same day. However, with due diligence, it filed the application u/s 14 of the Limitation Act to condone the delay if any caused in preferring the said application.

15. On the other hand, according to appellant since the respondent No. 1 has not challenged the Arbitral Award within the stipulated period as provided under the Act before which the Court below which is the only Court which is competent to try the case, the Court below ought not to have received the said application by condoning the delay and that there is no provision under the Act to receive such application after lapse of four months and the provisions of Limitation Act are not applicable to the case on hand. Hence, appellant contended that the order under challenge is incorrect and illegal.

In this regard, Section 14 of the Limitation Act, reads thus:

Exclusion of time of proceeding bonafide 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 court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in 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.

Explanation - For the purposes of this section,:

(a) In excluding the time during which a former civil proceeding was pending, the day on which the proceeding was instituted and the day on which it ended shall both be counted;

(b) A Plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) Misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

Further, in the case of *Latadevi Vs. Ramnath and Others*, it was held thus:

Section 14 of the Limitation Act does not speak of delay, but it speaks only exclusion of time required by the proceedings before the trial Court. The proceedings must be held to have been terminated effectively only when the plaint was ready for handing over to the plaintiff for presentation to the proper Court. It was so on 18.04.1984 and admittedly enough it was presented before the proper court on the very same day without wasting any further time.

In *Ram Ujarey Vs. Union of India*, it was held thus:

(B) Administrative Tribunals Act (13 of 1985), Section 21 - Claim petition for declaring reversion illegal - Delay - Condonation of - Suit filed within time but before wrong forum i.e. before Court which had no jurisdiction - Court returned plaint for presentation before appropriate Bench of Tribunal - Limitations runs from date on which plaint was returned and made available to party, and not from date of order - Delay in re-filing plaint before appropriate Bench -

Condoned, in view of fact that it will be harsh to drive party out of litigative process which was started 18 years ago simply on ground of limitation.

16. Thus, from the reading of the above provisions of law and the decisions of Bombay High Court, it is dear that Section 14 of the Limitation Act nowhere speaks about the delay and condonation of the same, It only laid down the instructions and guidelines for calculating the period of limitation and speaks with regard to exclusion of time spent in prosecuting bonafidely in a Court having no Jurisdiction. Therefore, the question, whether the provisions of limitation Act applied to Arbitration Act is a different point not covered in this case. In the Instant case, the Court below excluded the period from 27-12-2000 to 26-03-2002 for calculating the limitation. Therefore, it cannot be said that the Court below had condoned the delay. In fact, it ordered that no delay has been caused in respondent No. 1 preparing the said application before the court below. It is not in dispute that even though the Arbitration Act is a special enactment, it will be governed under the provisions of CPC and Karnataka Civil Courts Act, the reading of Order 10 Rule 4 and Section 14 of Limitation Act makes It clear that the Court below is in no way barred from passing the impugned order. However, by passing such an order the only point which the Courts should consider as to whether the party was bonafide and that he proceeded in good faith and due diligence in prosecuting before wrong forum.

17. In the Instant case, facts reveal that the immediately after respondent-1 coming to know of the order passed in ILR 2001 KAR 1861, wherein, it is clearly-held that, it is only District Court which has jurisdiction to entertain such application. Therefore, the respondent-1 preferred Misc. Application before the District Court seeking for transfer of application filed by him before the Civil Judge [Sr. Dvn.] to District Judge, Mandya, which came to be dismissed and later, he took return of the said application filed before the Pri. Civil Judge, Mandya and presented it before the Court below, on the same day, without any lapse of time, which demonstrates the requirement of law to pass orders in favour of respondent-1 u/s 14 of Limitation Act, as such, the impugned order passed by Court below in CRP No. 727/2003 is in no way be called as illegal and incorrect.

18. As for as CRP No. 1874/2003 is concerned, the Court below after prima facie satisfying itself that there appears some incorrectness in the award passed by Arbitrator and that one of the items awarded is 461% more than the BOQ rates had passed orders staying operation of award passed by respondent No. 1, which can also not be called as incorrect and illegal. As such, viewed from any angle, I do not find any good grounds, to interfere with the same and hence both these revision petitions are liable to be dismissed.

Accordingly, both the revision petitions are dismissed as devoid of merits.

19. The award under challenge is incorrect. It indicates that the state has filed A.C.I/01 on the file of Principal Civil Judge Mandya, well within time but on

coming to know about the decision in the case of I.C.D.S. Limited (supra) that only the district court has jurisdiction to entertain the case. It has rightly filed Misc. 3/02 for transfer of the case to the court of District Judge, Mandya. Accordingly, directing the State to take back the papers, the case was dismissed for re-presentation to the competent court. Therefore, I do not find anything illegal committed by the sessions judge in allowing I.A.4 and holding that the period spent in prosecuting A.C.1/01 before the court of Civil Judge (Senior Divn.), Mandya, from 27.12.2000 to 26.3.2002 shall be excluded for the purpose of computing limitation. Likewise, the order passed on I.A.2 staying the award dated 29.11.2000 till disposal of the main petition also does not suffer from any illegality.

20. Thus, viewed from any angle, I do not find any ground to reverse the finding of the sessions Judge passed on I.As.2 and 4 which are impugned in these petitions. Hence, both the revision petitions are dismissed as devoid on merits.