

(2015) 03 KL CK 0192
In the High Court Of Kerala
Case No : W.A. No. 226 of 2015

Leela K.

APPELLANT

Vs

District Collector and Arbitrator and Others

RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:

Arbitration Act, 1940 — Section 20, 37, 37(1), 37(3), 8(2)
Arbitration and Conciliation Act, 1996 — Section 11, 21, 43, 43(2)
Limitation Act, 1963 — Section 14, 2(a), 2(b), 3, 5
National Highways Act, 1956 — Section 3(a), 3A, 3C, 3D, 3E

Citation : (2015) 2 ILR Ker 745 : (2015) 2 KHC 813

Hon'ble Judges : Ashok Bhushan, C.J;A.M. Shaffique, J

Bench : Division Bench

Advocate : George Sebastian, for the Appellant; C.R. Syam Kumar, Senior Government Pleader, Advocates for the Respondent

Final Decision : Dismissed

Judgement

A.M. Shaffique, J.—Petitioner in the writ petition is the appellant who challenges the judgment dated 15/10/2014 in WPC No. 26788/2014. The writ petition is filed to quash Ext. P3 and for a direction to the 1st respondent to entertain Ext. P2 application submitted by the petitioner and proceed with Arbitration under Section 3G(5) of the National Highways Act, 1956 (hereinafter referred to as "the NH Act") and to pass an award as contemplated under the provisions of the Act.

2. The short facts involved in the writ petition would disclose that the property having an extent of 6.10 Ares in Survey No. 8/18 and 0.35 Ares in Survey No. 8/19A of Panancheri Village was acquired by the National Highway authorities invoking the provisions under the NH Act. The notification under Section 3D of the Act was issued on 21/10/2005, declaration was published on 20/10/2006 and the competent authority determined the compensation at Rs. 15,44,984/-, which was paid to the petitioner on 16/04/2010. Possession was also taken on the same day. Ext. P1 is the award with reference to the proceedings initiated as LAC No. 1128/2009.

3. Petitioner submitted an application dated 10/05/2013 under Section 3G(5) of the NH Act seeking reference of the matter to Arbitration and claiming enhanced compensation. Ext. P2 dated 10/05/2013 is the said application. By Ext. P3 letter dated 07/03/2014, the Arbitrator informed the petitioner that her application cannot be entertained as the same is barred by limitation. Petitioner challenged Ext. P3 inter alia contending that the NH Act or the Rules framed thereunder do not provide any period of limitation for making application to refer the dispute to Arbitration and the provisions of the Limitation Act, 1963 has no application. It is neither a Civil Court nor has the trappings of the Civil Court and therefore the authority was under obligation to entertain the reference and adjudicate on the claim made by the petitioner.

4. The writ petition was disposed of at the admission stage itself whereby the learned Single Judge, having formed an opinion that the provisions of Limitation Act, 1963 shall apply to the Arbitration under the NH Act, the claim of the petitioner cannot be entertained and the authority was justified in rejecting the application as barred by limitation.

5. It is, impugning the aforesaid judgment, that this appeal has been filed inter alia reiterating the contentions urged.

6. We have heard Sri. George Sebastian, the learned counsel appearing for the appellant as well as Sri. C.R. Syamkumar, learned Senior Government Pleader on behalf of the respondents.

7. It is argued by the learned counsel for the appellant that though Limitation Act applies to the Arbitral proceedings, there is no statutory provision enabling the Arbitrator to reject an application for referring the dispute to Arbitration, as barred by limitation. No such limitation has been provided under the NH Act. That apart, even assuming that the claim was barred by limitation, insofar as the request for reference is only an application, Section 5 of the Limitation Act applies and the petitioner was entitled to submit an application to condone the delay in submitting the application. It is contended that the 1st respondent had the power to condone the delay and therefore an opportunity ought to have been granted to make an application under Section 5 of the Limitation Act. Learned counsel also relied upon the following judgments to substantiate his contentions.

"i) Union of India v. Gopalan 1986 KHC 336 : 1986 KLT 1279 : ILR 1987 (1) Ker. 344. By this Division Bench judgment, this Court held that no specific period of limitation has been prescribed for filing a petition under Section 20 of the Arbitration Act and therefore Article 137 of the Limitation Act, 1963 applies. In such circumstances, the benefit of Section 5 of the Limitation Act can be invoked by the parties.

ii) State of Kerala Vs. P. Mudhusoodanan Pillai, (1994) 1 KLJ 196 is relied upon wherein another Division Bench of this Court held that an opportunity should have been granted to the appellants to file a petition to condone the delay in filing the petition to set aside the award. That was a case in which the question

was whether Section 5 can be invoked to condone the delay in filing an application to set aside an award presented beyond time.

iii) Another judgment relied upon is Union of India (UOI) Vs. C.S. Vijayachandran, (1999) 2 KLJ 1037 in which another Division Bench of this Court, on the basis of the decision in State of Andhra Pradesh Vs. I. Chandrasekhara Reddy and Others, (1998) 7 AD 258 : AIR 1998 SC 3311 : (1998) 2 ARBLR 612 : (1998) 6 JT 519 : (1998) 5 SCALE 381 : (1998) 7 SCC 141 : (1998) AIRSCW 3243 : (1998) 7 Supreme 463 held that in appropriate cases, the Court has jurisdiction to condone the delay in filing the objection by invoking Section 5 of the Limitation Act. It was also held that the judgment dated 31/03/1998 in CMP No. 3131/1997 in MFA No. 724/97 has upheld the view taken in Madhusoodanan Pillai (supra).

iv) In Asia Resorts Ltd. Vs. Usha Breco Ltd., AIR 2002 SC 55 : (2001) 3 ARBLR 503 : (2002) 1 CompLJ 1 : (2001) 9 JT 301 : (2001) 7 SCALE 590 : (2001) 8 SCC 710 : (2001) AIRSCW 4511 : (2001) 8 Supreme 233 the Supreme Court held that the period of limitation in filing an application under Section 20 of the Arbitration Act, 1940 is as prescribed under Article 137 of the Limitation Act."

8. It is therefore argued that the application seeking for reference of dispute to Arbitration under Section 3G of the Act has to be construed, at best as an application in terms of Article 137 of the Limitation Act and therefore the Arbitrator has power to condone the delay in filing the application for arbitration, and viewed in that manner, the learned Single Judge was not justified in dismissing the writ petition.

9. The learned Government Pleader, however, referring to the statutory provisions under the NH Act as well as the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), argued that when law of limitation is made applicable to the 1996 Act, which in turn is made applicable to the provisions of NH Act, the request for Arbitration has to be made within the period of limitation.

10. Having regard to the arguments raised by either side, the short question to be considered is whether a request for arbitration in terms of Section 3G(5) of NH Act, has to be made within any specified time limit and if there is any delay whether Section 5 of the Limitation Act applies to the proceedings before the Arbitrator.

11. NH Act is a Central Act enacted specially for the purpose of acquisition of land for National Highways and for declaration of certain highways as National Highways. Section 3A gives power to Central Government to acquire land for public purpose by complying with the procedure prescribed therein. Section 3D requires a declaration to be published within the period prescribed which is one year from the date of publication of the notification under Section 3A. Section 3E enables the Government to take possession of the land subject to the statutory provisions. Determination of the amount payable as compensation is dealt with

under Section 3G which reads as under:

"3G. Determination of amount payable as compensation.--(1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of Section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration-

(a) the market value of the land on the date of publication of the notification under Section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change."

Section 3G(1) indicates that the competent authority has to determine the amount to be paid for acquisition of land. Competent authority is defined under

Section 3(a) which means any person or authority authorised by the Central Government, by notification in the Official Gazette, to perform the functions of the competent authority for such area as may be specified in the notification. Sub-section (5) of Section 3G indicates that if the amount determined by the competent authority is not acceptable to the parties, on an application submitted by the parties, the amount has to be determined by the Arbitrator to be appointed by the Central Government. Sub-section (6) indicates that the provisions of the 1996 Act applies to every Arbitration under the Act.

12. Reference to sub-section (5) of Section 3G does not indicate any period for submission of application or the Arbitrator to enter into the reference. Sub-section (5) only indicates that if the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable, on an application by either of the parties, the amount shall be determined by the Arbitrator.

13. Section 43 of the 1996 Act indicates that the Limitation Act shall apply to arbitrations as it applies to proceedings in Court. Section 43 reads as under:

"43. Limitations.--(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purpose of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case, undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

Section 43(2) indicates that for the purpose of the Limitation Act, an arbitration shall be deemed to have commenced on the date referred in Section 21, which reads as under:

"21. Commencement of arbitral proceedings.--Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

Section 21 clearly indicates that the arbitral proceedings shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Section 3G(5) of the NH Act also indicates that if the amount determined by the competent authority is not acceptable to either of the parties, on an application by any of them, the amount shall be determined by the arbitrator. Therefore, an application has to be submitted to enable the Arbitrator to decide the dispute, which shall be treated as the date of commencement of arbitration.

14. In *J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. and Another*, AIR 2008 SC 1363 : (2008) 1 ARBLR 238 : (2008) 1 JT 514 : (2008) 1 SCALE 597 : (2008) 2 SCC 444 : (2008) AIRSCW 800 , a three Judge Bench of the Supreme Court had occasion to consider the question of limitation in Arbitration matters. It was held that the limitation for a suit is calculated as on the date of filing of the suit and in the case of Arbitration, limitation for the claim is to be calculated on the date on which the Arbitration is deemed to have commenced. Referring to Section 8(2) and Section 37(3) of the Arbitration Act, 1940, the Supreme Court held in paragraphs 25 and 26 as under:

"25. The learned counsel for the appellant submitted that the limitation would begin to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 04/06/1980 seeking reference to arbitration. We are afraid, the contention is without merit. The appellant is obviously confusing the limitation for a petition under Section 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced.

26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 04/06/1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 04/06/1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in *Major (Retd.) Inder Singh Rekhi v. DDA*, *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta* and *Utkal Commercial Corpn. v. Central Coal Fields Ltd.* also make this position clear."

15. In *State of Goa Vs. Praveen Enterprises*, AIR 2011 SC 3814 : (2011) 3

ARBLR 209 : (2011) 112 CLT 659 : (2011) 8 JT 359 : (2011) 7 SCALE 131 : (2012) 12 SCC 581 : (2011) 10 SCR 1026 : (2012) AIRSCW 3879 , while considering the effect of Section 11 read with Section 43 of the 1996 Act, Supreme Court held that the Chief Justice or the Designate may consider whether an application was on the face of it hopelessly barred by time or whether a dead or stale claim deserves to be referred to arbitration.

16. In Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, AIR 1994 SC 1615 : (1993) 3 JT 537 : (1993) 104 PLR 775 : (1993) 2 SCALE 696 : (1993) 4 SCC 338 : (1993) 3 SCR 361 while considering the scope and effect of Section 37 of the Arbitration Act, 1940 and Section 3 of the Limitation Act, it was held that Section 3 of the Limitation Act applied by way of analogue to arbitration proceedings and like interpretation is given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the Court within the meaning of Section 14 of the Limitation Act and therefore, it is open for the parties to plead in the proceedings before him. Paragraphs 7 and 14 are relevant which reads as under:

"7. Section 37(1) of the Act provides that all the provisions of the Indian Limitation Act, 1908 (since amended Act came into force in 1963) shall apply to arbitrations as they apply to the proceedings in Court. Sub-section (2), employing non obstante clause, says that notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement. Sub-section (3) thereof states that for the purposes of this section and of the Indian Limitation Act, 1908 an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other party thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated. Sub-sections (4) and (5) are omitted as being not material. It would, therefore, be clear that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question is when the cause of arbitration arises in the absence of issuance of a notice or omits to issue for long time or contract to the contrary?

14. Arbitration implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant

consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the Court would be justified to permit a contracting party to rescind the contract or the Court can revoke the authority to refer the disputes or differences to arbitration. Justice Bachawat in his Law of Arbitration, at p. 552 stated that "in an appropriate case leave should be given to revoke the authority of the arbitrator". It was also stated that an ordinary submission without special stipulation limiting or conditioning the functions of the arbitrator carried with it the implication that the arbitrator should give effect to all legal defences such as that of limitation. Accordingly the arbitrator was entitled and bound to apply the law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings, and like interpretation was given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the Court within the meaning of Section 14 of the Limitation Act. By consent the parties have substituted the arbitrator for a Court of law to arbitrate their disputes or differences. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence."

17. Therefore, when Section 3 of the Limitation Act applies to Arbitration under the 1996 Act, it is to be verified as to when the Arbitration commences in terms of Section 21 of the 1996 Act which is akin to filing of a suit before the Civil Court.

18. While considering the question of limitation, what will be the period for making a claim for higher compensation under the NH Act is also germane for consideration. As there is no specific period provided for making such a claim necessarily the residuary clause under Article 113 has to be applied, which is three years from the date when the right to sue accrues. In this case, right to sue accrued when the amount is determined by the competent authority under Section 3G(1) of the NH Act, i.e. on 16/04/2010. If the parties desire to proceed for arbitration, they have to file an application for referring the dispute for arbitration in terms of sub-section (5) which is akin to filing a suit within three years from the date when the amount is determined by the competent authority and informed to the land owner. If no such steps are taken within the said period, the Arbitrator is entitled to reject the claim as barred by limitation.

19. Though Arbitration under the NH Act is statutory, insofar as the 1996 Act is made applicable to such Arbitration, the Limitation Act equally applies and if under normal circumstances, a request to refer the dispute to Arbitration is filed beyond time, that is after a period of three years from the date on which the right to sue accrued, the Arbitration has to be held to be beyond the period of limitation. The Apex Court has held that even in a petition filed under Section 11 of the 1996 Act, it shall be open for the Chief Justice or the designated Judge to verify whether the claim is hopelessly barred by limitation. Under such circumstances, it cannot be contended by the appellant that Limitation Act has

no application at all.

20. Another contention urged by the appellant is that the request for arbitration is an application filed under Article 137 of the Limitation Act, in which event the delay in filing request for arbitration can be condoned. First of all, no such application for condoning delay was filed nor such a request has been made before the Arbitrator. Secondly, there is no procedure to condone the delay in filing a suit, as Section 5 of the Limitation Act has no application for filing a suit. Learned counsel for the petitioner relied upon various judgments to contend that Section 5 of the Limitation Act applies to application filed before a Court under Arbitration Act, 1940. Of course, an application filed before a Court in a pending proceeding comes under Article 137 of the Limitation Act. The judgments relied upon by the learned counsel for appellant only substantiates the said view. That is not the situation here. This application for referring the dispute is not filed before Court and therefore Article 137 has no application. The position of law in this regard is made clear in the judgment of the Supreme Court in *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, AIR 1977 SC 282 : (1976) 4 SCC 634 : (1977) 1 SCR 996 : (1977) 9 UJ 16 , wherein it is held as under:

"21. The changed definition of the words "applicant" and "application" contained in Sections 2(a) and 2(b) of the 1963 Limitation Act indicates the object of the Limitation Act to include petitions, original or otherwise, under special laws. The interpretation which was given to Article 181 of the 1908 Limitation Act on the principle of *ejusdem generis* is not applicable with regard to Article 137 of the 1963 Limitation Act. Article 137 stands in isolation from all other articles in Part I of the third division. This Court in *Nityananda Joshi* case has rightly thrown doubt on the two-Judge Bench decision of this Court in *Athani Municipal Council* case where this Court construed Article 137 to be referable to applications under the Civil Procedure Code. Article 137 includes petitions within the word "applications". These petitions and applications can be under any special Act as in the present case.

22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a Civil Court. With respect we differ from the view taken by the two-Judge Bench of this Court in *Athani Municipal Council* case and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a Court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act."

Therefore, we agree with the view expressed by the learned Single Judge that the request for Arbitration being made after three years from the date when the Competent Authority has fixed the compensation, is barred by limitation.

Hence we do not find any merit in the grounds raised in the writ appeal and accordingly the appeal is dismissed.