
(2007) 09 OHC CK 0048
In the Orissa High Court

Lokanath Biswal

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 25-09-2007

Acts Referred:

Arbitration Act, 1940 — Section 33, 34
Arbitration and Conciliation Act, 1996 — Section 11, 34
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : AIR 2008 Ori 33 : (2008) 2 ARBLR 27 : (2008) 105 CLT 220 : (2007) 2 OLR 880 Supp

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—The Order Dated 12.5.2005 passed by Learned District Judge, Ganjam, Berhampur in C.M.A. No. 37 of 2004 is assailed in this Writ Petition. The dispute in the aforesaid case relates to an arbitration award dated 31st December, 2001. The points which need to be determined in this Writ Petition are as follows:

(1) Whether the provisions of Section 14 of the Indian Limitation is applicable to the proceedings under the Arbitration and Conciliation Act 1996 (hereinafter called the "Act") and

(2) The consequence of not filing a petition u/s 14 of the Limitation Act along with the petition filed u/s 34 of the Arbitration Act.

2. To answer the aforesaid two questions, shorn of unnecessary details, the facts which will be necessary are stated herein below:

A dispute arose with regard to construction of bye-pass road at Gopalpur-on-Sea in response to an tender call notice issued on 14th February, 1995. The said dispute having not been referred to arbitration, the Petitioner-contractor approached this Court u/s 11(c) of the Arbitration Act in M.J.C. No. 901 1998

with a prayer to appoint an Arbitrator. This Court by Order Dtd. 27th January, 1999 appointed Shri Justice J.M. Mohapatra, a retired Judge of this Court, as the sole Arbitrator to arbitrate the disputes and differences. The Arbitrator after observing all paraphernalia passed an award on 31st December, 2001. The said award was assailed by the Union of India on 16th March, 2002 by filing an application u/s 34 of the Arbitration Act before the Learned Civil Judge (Sr. Division), Berhampur with a prayer to set aside the same.

3. After receipt of the notice the Petitioner, it is submitted, appeared and raised an objection regarding the jurisdiction of the said Court to entertain an application filed u/s 34 of the Arbitration Act on the ground that it was not the Principal Civil Judge of the District. Learned Civil Judge (Sr. Division) after hearing Learned Counsel for the parties and on being satisfied that he had no jurisdiction to entertain the application filed u/s 34 of the Act, by Order Dated 16th September, 2003 directed to take return the application giving liberty to the Union of India to seek redressal of the grievance before the appropriate Court. After pronouncement of the said order a petition was filed under Order 7, Rules 10 and 10-A of the CPC by the Opposite Party praying to return the application filed u/s 34 of the Act for facilitating it to present the same before the appropriate Court. Consequently, the application filed u/s 34 of the Act was returned to the Opposite Party on 29th October, 2003 and the Opposite Party presented the said application in the Court of Learned District Judge, Ganjam on the same day. Thereafter on 4th March, 2005 the Opposite Party filed a petition u/s 14 of the Limitation Act with a prayer to exempt the period spent by the Opposite Party in prosecuting the lis erroneously before the Learned Civil Judge (Sr. Division), Berhampur.

4. After receiving notice the present Petitioner, who is the Opposite Party before the Learned District Judge, resisted the petition filed u/s 14 of the Limitation Act mainly on the ground that Section 34 of the Act having specifically stipulated the period of limitation, the provisions of Limitation Act are not applicable and an application filed after the prescribed period cannot be entertained. It was further averred that neither Section 5 nor Section 14 of the Limitation Act was applicable to the proceedings initiated under the Arbitration Act and the delay caused in presenting the application u/s 34 could not be condoned. After hearing Learned Counsel for the parties and after discussing the relevant law the Learned District Judge, on being satisfied that there was no deliberate laches and the wrong filing being made due to misconstruction of law and wrong advice by the lawyers, condoned the delay in presenting the petition and directed that the period from 16th March, 2002 to 29th October, 2003 was to be excluded. The said order is assailed in this Writ Petition.

5. According to Learned Counsel for the Petitioner the District Judge acted with material irregularity in allowing the application filed u/s 14 of the Limitation Act and committed an error of law by not appreciating the contentions raised by the Petitioner to the effect that the "Act" being a special statute the period of

limitation prescribed under Sub-Section (3) of Section 34 of the Act and the provisions of Limitation Act so far as Sections 4 to 24 being not applicable to the proceeding under the "Act", the conclusions arrived at by the Learned District Judge are contrary to law. In support of such contention, Learned Counsel for the Petitioner relied upon the decision of the Supreme Court in the case of Union of India Vs. M/s Popular Construction Co., .

6. On the other hand, according to Learned Counsel for the Opposite Party-Union of India, the said Opposite Party was diligently and bona fide prosecuting the lis, and as such, the District Judge rightly entertained the petition filed u/s 14 of the Limitation Act and was pleased to exclude the period from 16th March, 2002 to 29th October, 2003 and such conclusion being just and proper, this Court may not interfere with the same under writ jurisdiction.

7. I have heard Learned Counsel for the parties at length and perused the impugned Judgment and other materials annexed to the Writ Petition diligently. In consonance with the Arbitration Act an application for setting aside an award should be filed within three months from the date on which the party making the application had received the Arbitral Award or, if a request had been made u/s 33, from the date on which the request had been finally considered by the Arbitral Tribunal. The proviso to Section 34 of the Act further stipulates that if the applicant can satisfy the Court that sufficient cause prevented him from making the application within a period of three months, the Court may entertain the application within a further period of thirty days, but not thereafter. An application u/s 34 of the Act is required to be presented before the principal Civil Judge of the District.

8. In the case at hand, the application u/s 34 of the Act was presented by the Union of India in time but then in the Court of Civil Judge (Sr. Division), Berhampur under wrong assumption that the said Court was the principal Civil Court of the District. According to Learned Counsel for the Opposite Party (Union of India), the Civil Judge (Sr. Division) also accepted the application filed u/s 34 of the Act and issued notice to the Opposite Party and only after hearing them was satisfied that the said Court had no jurisdiction and returned the application on 29th October, 2003. On the very day, the application was presented in the Court of Learned District Judge, Berhampur which is the principal civil Court of the District. Thus, it is submitted, there was no deliberate laches and that the Union of India was prosecuting the lis diligently as per the advice of its Advocate bona fide.

9. Law is well settled that there is remarkable difference between the scope and ambit of Sections 5 and 14 of the Limitation Act. Section 14 provides for exclusion of time spent in proceedings bona fide, in a Court which lacked jurisdiction. The aims and objectives of the said Section are to afford protection against the bar of limitation to a litigant who was honestly prosecuting the lis before a Court which had no jurisdiction to grant the relief prayed for. The principle underlying the said Section is that limitation will remain in suspense

while the litigant was bona fide prosecuting for his rights in a Court of justice due to wrong advice. Section" 14 of the Limitation Act contains a general principle based on justice, equity and good conscience and the said principle should be applied without strict regard to the period of limitation prescribed. A person prosecuting under a mistake of law is entitled to the benefit of Section 14 whereas while dealing with a petition filed u/s 5 of the Limitation Act, a Court has to be satisfied that there was reasonable ground for approaching the Court late and that each day of delay is more or less explained. Thus, exclusion of time u/s 14 of the Limitation Act is mandatory, whereas the Court's power u/s 5 of the Limitation Act is discretionary. It would be pertinent to note that the words "due diligence and/ or good faith" which are sheet anchor of Section 14 of the Limitation Act do not appear in Section 5 of the Limitation Act, but on the other hand, Section 5 requires only sufficient cause to be explained. As has been stated earlier the confusion in the present case was with regard to the word "Court" as defined in Section 2(1)(e) of the Act which reads as follows:

Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court, in 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 a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of small causes.

10. Interpreting the said Section the Advocate engaged by the Union of India presented the application u/s 34 of the Act in the Court of Learned Civil Judge (Sr. Division), Berhampur within the time prescribed. But as per the definition of the word "Court" quoted supra, it should have been presented before the Learned District Judge which is the principal Civil Court.

11. In the case of Baladeb Jew Thakur Vs. Dhaneswar Misra, it was held that mistaken advice of a lawyer may be sufficient cause for coming to the conclusion that a litigant was misdirected, therefore he must be held to have acted with due diligence and in good faith in proceeding with the litigation. In consonance with Section 14 of the Limitation Act if a litigant in good faith, but under a mistake has sued in a wrong Court, in such a case, the litigant is entitled to , as of right, exclusion of the period spent in the proceeding before a wrong Court. An honest litigant who was prosecuting his lis in a wrong Court should be protected against the bar of limitation by extending the power of Section 14 of the Limitation Act. In other words the limitation will remain at suspense for the period for which the litigant was diligently prosecuting his lis in a Court of justice bona fide. Similar view was also taken in the case of Nrityamoni Dassi v. Lakhon Chandra Sen reported in AIR 1916 PC 96 .

12. The Supreme Court in the case of Union of India Insurance Co. Ltd. v. J.A. Infra Structure Pvt. Ltd. reported in 2006(6) SC 731 held that exclusion of time spent in prosecuting remedy before a wrong forum in a proceeding u/s 34 of the Arbitration Act would come within the scope of Section 14 of the Limitation Act.

The facts of the said case are almost identical to the present case.

In the case of *State of Goa v. Western Builders* reported in 2006 SCW 3436, the Supreme Court also came to the conclusion that in the proceeding under the Arbitration and Conciliation Act, 1996, does not expressly exclude the applicability of Section 14 of the Act.

13. In view of the aforesaid authoritative pronouncements, this Court finds that the Learned District Judge has rightly excluded the time spent by the Union of India in the Court of Civil Judge (Sr. Division), Berhampur. The first question is thus answered.

14. So far as the objection raised by Mr. Pattnaik, Learned Counsel for the Petitioner, with regard to non-filing of the petition u/s 14 of the Limitation Act along with the application u/s 34 of the Arbitration Act, after getting return of the same from the Court of Civil Judge (Sr. Division), Berhampur on 29.10.2003 is concerned, it is apt to mention here that there is no provision in the Limitation Act stipulating that a petition u/s 5 or Section 14 of the Limitation Act should accompany the plaint or application as the case may be. Order 41 sub-Rules (1) and (2) of Rule-3-A of the CPC deals with requirement of filing of an application for condonation of delay so far as a time barred appeal is concerned. Law is well settled that an application or memorandum of appeal barred by time cannot be entertained by a Court without condonation of the delay. Order 41, Rule 3-A of the Code lays down that when an appeal is presented after expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by an affidavit setting forth the facts upon which the Appellant relies to satisfy the Court that he had sufficient cause/reasons for not presenting the memorandum of appeal within such period. The important point which needs to be considered is as to whether the provisions of Order 41, Rule 3-A of the Code are mandatory or directory in nature.

15. A conjoint reading of Order 41, Rule 3-A(1) and (2) of the Code makes it explicit that filing of an application for condonation of delay under Rule 3-A(1) along with the time barred appeal or application is mandatory in the sense that the Appellant cannot, such application being decided, insist upon the Court to hear his time barred appeal. Rule 3-A does not indicate that its non-compliance, as a penalty will entail dismissal of the time barred appeal. It only presupposes that the Appeal cannot be heard or considered before condonation of delay. The procedure is always the handmaid of justice and cannot be considered for awarding severe penalty for its non-compliance. A Court before which a time barred appeal or an application comes up for hearing with no application along with it u/s 5 or Section 14 of the Limitation Act for condonation of delay or exclusion of the delay as the case may be, has to necessarily dismiss it not because of non-compliance with Order 41, Rule 3-A(1) of the Code, but because the same cannot be entertained no orders can be passed without condoning the delay. Therefore what a Court should do while time barred appeal or application is presented before it without being accompanied the application for condonation

of delay is to regard such presentation as defective for non-compliance with Order 41, Rule 3-A(1) of the Code and to afford to the litigant a reasonable opportunity to remedy the defect instead of dismissing the appeal outright or in limine. If the litigant does not avail the opportunity, the Court may dismiss the appeal/application. On the other hand, if the defect is remedied within the time allowed by the Court, the application/appeal should be regarded as one properly presented as on the date of its original presentation. A procedure is always meant to facilitate dispensation of justice. Too technical construction of a provision which leaves no room for reasonable elasticity of interpretation, should be guarded, against, lest the very means designed for the furtherance of justice gets frustrated. A party cannot be refused a just relief he is otherwise entitled to merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. Courts are required to apply law in a meaningful manner which subserves the ends of justice.

16. Before closing the discussion on the issue, this Court thinks it prudent to recapitulate what the Supreme Court observed in the case of Bhagwan Swaroop and Others Vs. Mool Chand and Others, . According to the Supreme Court, it is no doubt true that a Code of Procedure is designed to facilitate justice and further its ends and it is not a penal enactment for punishment and penalty and not a thing designed to trip people up". Procedural laws are no doubt devised and enacted for the purposes of advancing justice. Procedural laws, however, are also laws and are enacted to be obeyed and implemented. The laws of procedure by themselves do not create any impediment or obstruction in the matter of doing justice to the parties. On the other hand, the main purpose and object of enacting procedural laws is to see that justice is done to the parties. In the absence of procedural laws regulating procedure as to dealing with any dispute between the parties, the cause of justice suffers and justice will be in a state of confusion and quandary. Difficulties arise when parties are at default in complying with the laws of procedure.

17. In the case at hand, admittedly a petition u/s 14 of the Limitation Act was filed before the application filed u/s 34 of the Arbitration Act was taken up for hearing. Thus, according to this Court the order passed by the District Judge suffers from no vice. The second point framed is accordingly answered. Consequently the Writ Petition stands dismissed. Parties to bear their own costs.