

(2018) 05 DEL CK 0497

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 199, 200 Of 2018,
Miscellaneous Application No. 6320, 6323, 7584, 7591 Of 2018

Machine Tool [India] Limited

APPELLANT

Vs

Splendor Buildwell Pvt Ltd & Anr

RESPONDENT

Date of Decision : 29-05-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 80, Order 41, Order 41 Rule 1
Arbitration And Conciliation Act, 1996 — Section 8(2), 34, 34(3), 34(5), 34(6), 36, 48, 48(4)
Representation Of The People Act, 1951 — Section 117
Court Fees Act, 1870 — Section 6
Provincial Small Cause Courts Act, 1887 — Section 17

Citation : (2018) 05 DEL CK 0497

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Viraj Kadam, Sacchin Puri, Anirudh Bakhru, Mehak Tanwar, Kamil Khan

Final Decision : Dismissed

Judgement

Navin Chawla, J

1. These petitions have been filed by the petitioner challenging the Arbitral Award dated 10.11.2017 passed by the Sole Arbitrator in DAC/1195/05-

16.

2. Learned senior counsel for the respondents submits that the copy of the petition(s) was served on the respondents for the first time on 19.04.2018.

Relying upon Section 34 (5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"), he submits that as the petitions

could not be filed without service of a copy thereof on the respondents, the date of filing of the present petitions has to be considered as 19.04.2018.

He submits that if the date of filing of the petitions is considered as 19.04.2018, in terms of the Section 34(3) of the Act, the petitions were filed

beyond the period of 30 days after the expiry of three months from the date of the receipt of the Arbitral Award and this Court would not have

jurisdiction to condone this delay.

3. Learned counsel for the petitioner is not in a position to contest the submission of the respondents that the copy of the petition(s) was served on the respondents for the first time on 19.04.2018.

4. Section 34 (5) of the Act has been introduced into the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. The same is reproduced herein below:

“Section 34(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall

be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.”

5. A reading of the above provision would clearly show that the service of a prior notice on the other party is a mandatory requirement before filing of

an application under Section 34 of the Act. Not only is such notice to be given but also the application itself has to be accompanied by an affidavit of

the applicant endorsing the compliance of said requirement. This requirement of the service of prior notice therefore, cannot be said to be a mere

formality or directory in nature. The wording used in Section 34(5) of the Act clearly shows that the intent of the legislature was that no application

under Section 34 of the Act can be filed until and unless the same has been served on the other party. The use of the words “only after” clearly

demonstrates the mandatory nature of this requirement of issuance of prior notice to the other party. Any doubt in this regard is completely obliterated

by second part of the sub-section which provides that the application “shall” be accompanied by an affidavit by the applicant endorsing

compliance with the said requirement.

6. In *Haridwar Singh v. Bagun Sumbrui & Ors.* (1973) 3 SCC 889, the Supreme Court had held that for determining the question whether a provision

in a statute, or a rule is mandatory or directory, no universal rule can be laid down. In each case one must look to the subject-matter and consider the

importance of the provision disregarded and the relation of that provision to the

general object intended to be secured. Prohibitive or negative words

can rarely be directory and are indicative of the intent that the provision is to be construed as mandatory.

7. In *M.Y.Ghorpade v. Shivaji Rao M.Poal & Ors.* (2002) 7 SCC 28,9 the Supreme Court while considering the provision of Section 117 of the

Representation of the People Act, 1951, held that the stipulation that at the time of presentation of an election petition, the petitioner shall deposit a

sum of Rs.2000/- as security for the costs of the petition, was mandatory in nature.

8. Section 34 (5) of the Act has been introduced in the Act by way of the amendment made pursuant to the recommendations of the Law Commission

of India in its 246th Report.

9. The Law Commission of India in its 246th Report, while recommending the amendment to the Act, had observed as under:

â??3. The Arbitration and Conciliation Act, 1996 (hereinafter â??the Actâ?) is based on the UNCITRAL Model Law on International Commercial

Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The Act has now been in force for almost two decades, and in this period of time,

although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those

of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to

provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal

role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related

litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under section 34 makes the award

inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated.

4. There is, therefore, an urgent need to revise certain provisions of the Act to deal with these problems that frequently arise in the arbitral process.

The purpose of this Chapter is to lay down the foundation for the changes suggested in the report of the Commission. The suggested amendments

address a variety of issues that plague the present regime of arbitration in India

and, therefore, before setting out the amendments, it would be useful to identify the problems that the suggested amendments are intended to remedy and the context in which the said problems arise and hence the context in which their solutions must be seen.

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25. Similarly, the Commission has found that challenges to arbitration awards under sections 34 and 48 are similarly kept pending for many years. In this context, the Commission proposes the addition of sections 34 (5) and 48 (4) which would require that an application under those sections shall be disposed off expeditiously and in any event within a period of one year from the date of service of notice. In the case of applications under section 48 of the Act, the Commission has further provided a time limit under section 48 (3), which mirrors the time limits set out in section 34 (3), and is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously, and not by way of an afterthoughtâ??

10. The intent of the legislature clearly is that the parties must take their remedy as provided in Section 34 of the Act seriously and approach a judicial forum expeditiously and not by way of an afterthought. Unnecessary delays in adjudication of such objections are also to be avoided. It is with this intent that the legislature in form of Section 34(5) has mandated that the party filing its challenge to an arbitral award under Section 34 of the Act must issue a â??prior noticeâ?? to the other party before filing such application. This would ensure that the other party would remain present when such application is listed for hearing. Another important object sought to be achieved by this amendment is that under Section 36 of the Act as amended by the same Amendment Act, the arbitral award becomes enforceable immediately after the time for making an application to set aside the arbitral Award under Section 34 of the Act has expired. The Court is empowered to grant a stay on the enforcement of the Award subject to such conditions as it may deem fit. The other party, therefore, if has been given prior notice of the application, can make its submissions against grant of the stay or for seeking appropriate conditions to be imposed while granting such stay on enforcement of the Arbitral Award in favour of the party challenging the Award.

11. If this intent of the legislature is kept in mind, there can be no denial of the conclusion that the condition of issuance of prior notice contained in

Section 34(5) of the Act is mandatory in nature.

12. In *Bihar Rajya Bhumi Vikas Bank Samiti v. The State of Bihar & Ors.*, (Judgment dated 28.10.2016 passed in Letters Patent Appeal

No.1841/2016 in Civil Writ Jurisdiction Case No.746/2016), the Patna High Court has considered Section 34(5) of the Act and has held as under:

“82. The right to file an application in Sub- Section (5) of Section 34 of the 1996 Act (since after the 2015 amendment), arises only when a notice

has preceded and an affidavit is filed in support of issuance of such notice. The notice ought to have been issued prior to filing of the application and

the issuance of notice by the learned District Judge cannot obviate the initial error. The right to proceed with an application, under Section 34 of the

1996 Act, presupposes the sending of a notice under Section 34 of the 1996 Act and, unless the same is issued, there cannot be an inherent right to file

the application and, if so filed, to entertain the same by the Court before whom the same has been filed. The present notice, correctly submitted by the

learned Counsel for the appellant, is akin to notice under Section 80 of the Code of Civil Procedure. The object, behind the enactment of Section 34(5)

of the 1996 Act, is solely to expedite the process of disposal of the application within the time-frame of one year, but the issuance of notice is a

condition precedent before exercising right to challenging an award. The right is unavailable if the notice has not been issued. This is what emanates

from a plain reading of Section 34(5) of the 1996 Act. The 246th Report of the Law Commission of India, at least, indicates the desirability of

adjudication of the dispute expeditiously and sub-Section (6) of Section 34 of the 1996 Act clearly supports the same. This objective cannot be said to

be achieved if the party, challenging the award, for any reason, does not issue notice prior to filing of the application. Once the objective behind the

amendment is taken into account, the decisions, relied upon by the learned Counsel for the appellant, are not found misplaced. Unless a notice under

Section 80 of the Code of Civil Procedure with sufficient time of two months are served on the Government or its officials, as contemplated, there is

no inherent right to file a suit against the Government; so is the case at hand. Unless there is compliance with the statutory need of sending a prior

notice, there is no inherent right of filing the application, under Section 34 of the 1996 Act, challenging an award. If there is no right to initiate a proceeding, its continuation, if filed, ignoring the statutory provision, does not give right to its continuation. It cannot be regularized by subsequent issuance of notice by the learned Court below. The notice, as prescribed by Section 34 of the 1996 Act, is mandatory before proceeding with the filing of an application under Section 34 of the 1996 Act.â??

13. In *Shamsudeen v. M/s Shreeram Transport Finance Co. Ltd. & Anr.* 2016 SCC OnLine Ker 23728, the Kerala High Court has also held that

Section 34(5) of the Act is a mandatory provision and in absence of a prior notice having been issued to the other party and an affidavit certifying

compliance with this condition having been filed, the petition under Section 34 of the Act is liable to be dismissed.

14. I am in full agreement with the view expressed by the Patna and the Kerala High Court. As an application under Section 34 of the Act can be said

to be validly filed only after the issuance of a prior notice to the other party and has to be accompanied by an affidavit by the applicant endorsing the

compliance of the said requirement, the petitions can be deemed to be filed only on 19.04.2018.

15. It is also to be noted that this condition of issuance of prior notice is at the stage of filing of the petition under Section 34 of the Act as distinguished

from the date when such application is â??entertainedâ? by the Court. The word â??entertainedâ? has been used in Section 8(2) of the Act in

contra-distinction to word â??filedâ? in Section 34(5) of the Act. The legislature has intentionally drawn this distinction as the word â??entertainâ?

has been construed to denote a stage when the Court considers an application and not when such application is filed. (Refer to *Ananthesh Bhakta &*

Ors. v. Nayana S. Bhakta & Ors. AIR 2016 SC 5359).

16. In the case of *Lakshmi Rattan Engineering Works Ltd. v. Asstt. Commr. Sales Tax, Kanpur & Anr.* MANU/SC/0309/1967, the Supreme Court

has distinguished between the expressions â??fileâ?? and â??entertainâ?? in the following words:-

â??8. To being with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory

proof of the payment of the amount of tax admitted by the appellant to be due.

A question thus arises what is the meaning of the word

“entertained” in this context? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and

disposed of unless satisfactory proof is available? The dictionary meaning of the word “entertain” was brought to our notice by the parties, and

both sides agreed that it means either “to deal with or admit to consideration”. We are also of the same opinion. The question, therefore, is at

what stage can the appeal be said to be entertained for the purpose of the application of the proviso? Is it “entertained” when it is filed or it

“entertained” when it is admitted and the date is fixed for hearing or is finally “entertained” when it is heard and disposed of? Numerous

cases exist in the law reports in which the word “entertained” or similar cognate expressions have been interpreted by the courts. Some of them

from the Allahabad High Court itself have been brought to our notice and we shall deal with them in due course. For the present we must say that if

the legislature intended that the word “file” or “receive” was to be used, there was no difficulty in using those words. In some of the

statutes which were brought to our notice such expressions have in fact been used. For example, under order 41, Rule 1 of the Code of Civil

Procedure it is stated that a memorandum shall not be filed or presented unless it is accompanied etc.; in s.17 of the Small Causes Courts Act, the

expression is “at the time of presenting the application”. In section 6 of the Court Fees Act, the words are “file” or “shall be

reviewed”. It would appear from this that the legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is

now suggested by counsel for the State. It has used the word “entertain” and it must be accepted that it has used it advisedly. This word has

come in for examination in some of the cases of the Allahabad High Court and we shall now refer to them. xxxxxxxxxxxxxx

11. In our opinion these cases have taken a correct view of the word “entertain” which according to dictionary also means “admit to

consideration”. It would therefore appear that the direction to the court in the proviso to s.9 is that the court shall not proceed to admit to

consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by

the court for the first time. In the decision on which the Assistant Commissioner relied, the learned Chief Justice (Desai C.J.) holds that the words

“accompanied by” showed that something tangible had to accompany the memorandum of appeal. If the memorandum of appeal had to be

accompanied by satisfactory proof, it had to be in the shape of something tangible, because no intangible thing can accompany a document like the

memorandum of appeal. In our opinion, making “an appeal” the equivalent of the memorandum of appeal is not sound. Even under O. 41 of the

Code of Civil Procedure, the expression “appeal” and “memorandum of appeal” are used to distinct two distinct things. In Wharton’s

Law Lexicon, the word “appeal” is defined as the judicial examination of the decision by a higher Court of the decision of an inferior court. The

appeal is the judicial examination; the memorandum of appeal contains the grounds on which the judicial examination is invited.

12. For purposes of limitation and for purposes of the rules of the Court it is required that a written memorandum of appeal shall be filed. When the

proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is

satisfactory proof available of the making of the deposit of admitted tax.”

17. Therefore, it was incumbent on the petitioner to have served a copy of the petition(s) on the respondents before filing the present petition. In

absence of such prior notice to the respondents, the filing itself cannot be considered as valid in law, so as to stop the period of limitation.

18. The Award challenged in the present petitions has been passed on 10.11.2017 and it is not disputed that a copy of the same had been handed over by the Arbitrator to the parties on the same date.

19. Section 34(3) of the Act provides that an application under Section 34 of the Act can be filed only within a period of three months from the date of

the receipt of the Arbitral Award. Proviso to Section 34(3) of the Act states that the Court may condone the delay in filing of the said application

under Section 34 of the Act for sufficient cause being shown by the applicant, however, cannot condone the delay beyond 30 days from the expiry of

three months from the date of the receipt of the Arbitral Award. In the present case, taking the date of filing as 19.04.2018, the petitions would be

beyond the period of 30 days after the expiry of three months from the date of

the receipt of the Arbitral Award and this Court would not have the power to condone the delay even if the petitioner is able to make out a sufficient cause for this delay.

20. The same view has been taken by the Supreme Court in *Anil Kumar Jinabhai Patel v. Pravinchandra Jinabhai Patel and Ors*, 2018 SCC OnLine

SC 276. The relevant finding is reproduced herein below:

15. Section 34(3) provides that an application for setting aside an award shall not be entertained by the court if it is made after three months have

elapsed from the date on which the applicant had received the arbitral award. The proviso to Section 34 further provides that if the court is satisfied

that the applicant was prevented by sufficient cause from making the application within the prescribed time, it may entertain the application within a

further period of thirty days 'but not thereafter'. (vide *State of Arunachal Pradesh v. Damini Construction Co.* (2007) 10 SCC 742.) The words 'but

not thereafter' in the proviso are of mandatory nature, and couched in the negative, and leave no room for doubt. Proviso to Section 34 gives discretion

to the court to condone the delay for a sufficient cause, but that discretion cannot be extended beyond the period of thirty days, which is made

exclusively clear by use of the words 'but not thereafter'.

21. In view of the above, the present petitions along with pending applications are dismissed on the ground of delay with no order as to cost.

22. It is made clear that this order has not made any observation on the merits of the claims of either party.

23. It is found that in the present case the Registry had raised an objection only with respect to re-filing of the petitions without realising the import of

Section 34 (5) of the Act. The Registry should take note that no petition under Section 34 of the Act can be filed without giving advance copy of the

same to the other party. In case such application is filed without service of a copy of the same to the other party, the date of filing shall be taken as the

date when the copy of the petition has been served on the other side and thereafter filed or re-filed by the petitioner. This advice may be circulated to

the Registry by the Registrar General of this Court.