
(2018) 04 BOM CK 0141

In the Bombay High Court

Case No : COMMERCIAL ARBITRATION PETITION NO. 453 OF 2017, NOTICE OF MOTION NO. 536 OF 2017

MAHARASHTRA STATE ROAD DEVELOPMENT CORPORATION
LTD.

APPELLANT

Vs

SIMPLEX GAYATRI CONSORTIUM AND 2 OTHERS

RESPONDENT

Date of Decision : 19-04-2018

Acts Referred:

Arbitration & Conciliation Act, 1996 — Section 21, 34, 34(1), 34(3), 34(5), 34(6)
Limitation Act, 1963 — Section 14, 14(1), 14(2)

Citation : (2018) 04 BOM CK 0141

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

Bench : Single Bench

Advocate : F.De'vetre, Arun Siwach, Aditya Sikka, Priyanka Mitra, Neelakshi, Cyril Amarchand Mangaldas, Kishore Jawle, Raviraj Chillumuri, Shobhana Narayan

Judgement

By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 28th April, 2017

passed by the learned arbitrator allowing certain claims made by the respondents.

2. The respondents have raised an issue of limitation in the petitioner's filing this petition allegedly beyond the period of limitation prescribed under

section 34(3) of the Arbitration & Conciliation Act, 1996. This Court has thus heard the learned counsel for the parties on the issue of limitation raised

by the respondents first. Some of the relevant facts for the purpose of deciding the issue of limitation raised by the respondents are as under :

3. The petitioner lodged the Commercial Arbitration Petition (Lodging) 334 of 2017 in this Court on 26th July, 2017 inter-alia praying for setting aside

the impugned award dated 28th April, 2017 i.e. within a period of three months from the date of service of the signed copy of the award from the

learned arbitrator. By an Arbitration & Conciliation (Amendment) Act, 2015, section 34(5) of the Arbitration & Conciliation Act, 1996 was inserted,

which reads thus:

(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.

4. The petitioner did not issue any prior notice to the respondents before filing the said Commercial Arbitration Petition (Lodging) 334 of 2017. The

petitioner however, issued a notice under section 34(5) upon the respondents on 27th July, 2017. The petitioner also filed an affidavit proving the

service of the said notice dated 27th July, 2017 on 28th July, 2017.

5. On 27th August, 2017 the respondents filed an affidavit in reply in the said arbitration petition (L) No. 334 of 2017 which was numbered as 400 of

2017 opposing the submissions and the averments in the said arbitration petition. The respondents also raised an issue in the said affidavit in reply

that since the petitioner had not complied with the requirement under section 34(5) of the Arbitration and Conciliation Act, 1996 by not issuing prior

notice to the respondents, the said petition was not maintainable.

6. The said Arbitration Petition No. 400 of 2017 appeared before this court on 18th August, 2017. The respondents made oral submissions in that

petition on 18th August, 2017 that the petition was not maintainable in view of the amended Act having come into force. This court recorded the said

submission in the said order dated 18th August, 2017 and directed that the point raised by the respondents that the petition itself was not maintainable

would be considered by this court on the next date. The said arbitration petition was adjourned to 31st August, 2017.

7. On 31st August, 2017 this court granted liberty to the petitioner to withdraw the said Arbitration Petition No. 400 of 2017 with liberty to file a fresh

petition. The petitioner thereafter issued a notice to the respondents under section 34(5) of the Arbitration and Conciliation Act, 1996 on 1st

September, 2017. The petitioner lodged this arbitration petition (Commercial Arbitration Petition No. 453 of 2017) inter alia impugning the said arbitral

award on 1st September, 2017. The petitioner also filed an affidavit in compliance with section 34(5) of the Arbitration and Conciliation Act, 1996 on

1st September, 2017.

8. Mr. De'vetre, learned senior counsel for the petitioner invited my attention to some of the annexures to the petition. It is submitted that the

petitioner had received a signed copy of the award dated 28th April 2017 from the learned arbitrator on 30th April, 2017. Before expiry of three

months from the date of service of copy of the award, the petitioner lodged the said arbitration petition bearing No.400 of 2017 on 26th July, 2017.

The petitioner however had issued a notice under section 34(5) and had filed an affidavit proving service of the said notice dated 28th July, 2017 i.e.

after lodging of the said arbitration petition. He submits that the respondents however raised an objection before this court on 18th August, 2017

alleging non compliance of section 34(5) of the Arbitration and Conciliation Act, 1996. The matter was adjourned by this court to 31st

August, 2017.

9. On 31st August, 2017, the petitioner sought liberty to withdraw the said arbitration petition bearing no. 400 of 2017 [(L) No.334 of 2017] with liberty

to file a fresh arbitration petition. The respondents did not oppose the application made by the petitioner for withdrawal of the said arbitration

petition with liberty to file a fresh arbitration petition. This court granted liberty to the petitioner to withdraw the said arbitration petition with liberty

to file a fresh petition by an order dated 31st August, 2017. On 1st September, 2017 the petitioner lodged this arbitration petition impugning the said

arbitral petition. The petitioner also complied with the notice under section 34(5) by issuing a notice upon the respondents prior to the date of lodging

this petition and also filed an affidavit proving service of notice along with this petition.

10. It is submitted by the learned senior counsel that the question regarding the mandatory/directory nature of the notice under section 34(5) of the Act

was open to doubt. The petitioner had immediately on the next date of the lodging of the earlier arbitration petition had served a notice upon the

respondents and had filed an affidavit of service on 28th July, 2017. No sooner the respondents raised an objection before this court in the hearing

held on 18th August, 2017, when the matter appeared before this court on 31st August, 2017, the petitioner obtained leave to withdraw the said

arbitration petition with liberty to file a fresh petition. The arbitration petition

was already affirmed on 31st August,2017 on the very same date of the order passed by this court granting leave to withdraw the said arbitration petition with liberty to file a fresh arbitration petition.Â The petitioner issued notice under section 34(5) before lodging the second arbitration petition and complied with section 34(5) of the said Act.

11. It is submitted by the learned senior counsel that large number of such arbitration petitions were filed by various parties under section 34 who were aggrieved by the arbitral awards without issuing such notice under section 34(5).Â It is submitted that this court ultimately decided the said issue in a group of petitions by an order and judgment delivered on 21st February,2018 in case of Global Aviation Services Private Limited vs Airport Authority of India in Commercial Arbitration Petition No.434 of 2017 alongwith companion matters and holding that even in those cases where the notice invoking arbitration agreement under section 21 was received by other party after 23rd October, 2015, the provisions under section 34(5) and 34(6) are directory and not mandatory. The Court has ample power to direct the petitioner to issue notice along with papers and proceedings upon the respondent after the petitioner files the arbitration application under section 34(1) and before such petition is heard by the Court at the stage of admission.Â

12. It is submitted that the doubt of the petitioner about the nature of the notice contemplated under section 34(5) was whether directory or mandatory was ultimately removed by this court in case of Global Aviation Services Private Limited (supra).

13. It is submitted by the learned senior counsel that the petitioner was thus prosecuting the earlier arbitration petition in good faith and with due diligence and thus the time taken by the petitioner in pursuing the Arbitration Petition No.400 of 2017 i.e. during the period between 26th July, 2017 and 31st August,2017 shall be excluded under section 14(2) of the Limitation Act, 1963.Â It is submitted that under section 14 of the Limitation Act, 1963 applies to the application under section 34(1) and can be considered while computing the period of limitation under section 34(3) of the Arbitration and Conciliation Act, 1996.Â He submits that the expression â??other cause of a like natureâ? described in section 14(1) of the Limitation Act, 1963 should be read as ejusdem generis to the words â??defects

of jurisdictionâ??.

14. It is submitted by the learned senior counsel that the petitioner has not taken any undue advantage of not giving any prior notice under section

34(5) or not having filed any affidavit of compliance in respect of such notice.Â The petitioner had given such notice under section 34(5) on the very

next date of lodging the earlier arbitration petition and had filed affidavit of compliance on the next day of issuing such notice.Â

15. Learned senior counsel placed reliance on the following judgments :-

(a) India Electric Works Ltd. vs. James Mantosh and another, 1971(1) SCC 24 (paragraphs to 10)

(b) Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and others, (2008) 7 SCC 169, (Paragraphs 22, 24, 28, 31 and 32)

(c) Judgment of Himachal Pradesh High Court in case of Madhava Hytech Engineers Pvt. Ltd. vs. The Executive Engineers and ors. decided on 24th

August,2017 in OMP (M) No.48 of 2016.

16. Mr.Jawle, learned counsel for the respondents on the other hand submits that though section 34(5) of the Arbitration and Conciliation Act, 1996

clearly provided that a prior notice before filing arbitration petition under section 34 was required to be issued and an affidavit of compliance of notice

was required to be filed along with the Arbitration Petition No.400 of 2017, no prior notice under section 34(5) was issued by the petitioner and the

arbitration petition was not accompanied by an affidavit by the petitioner endorsing compliance with the said requirement.

17. It is submitted by the learned counsel that when the said arbitration petition (400 of 2017) appeared before this court on 18th August,2017, the

respondents had raised an objection about the maintainability of the arbitration petition in view of the non compliance of the provisions of section 34(5)

of the Act.Â The said objection was recorded by this court in the said order dated 18th August,2017.Â In spite of the said specific objection raised by

the respondents before this court and also in the affidavit in reply, the petitioner did not seek liberty to withdraw the said arbitration petition (400 of

2017) with liberty to file a fresh arbitration petition after complying with the provisions of section 34(5) of the Act immediately. He submits that the

petitioner sought such liberty only on 31st August,2017 when the matter again

appeared on board and obtained such liberty to withdraw the said arbitration petition with liberty to file a fresh petition.Â

18. It is submitted that since the petitioner continued to prosecute the said arbitration petition (400 of 2017), inspite of such specific objection raised by the respondent on 18th August,2017, the petitioner cannot be said to be have prosecuted the said arbitration petition in good faith and with due

diligence.Â The petitioner thus cannot be granted any benefit of section 14(2) of the Limitation Act, 1963 and the time taken in prosecuting the said

arbitration petition (400 of 2017) between 26th July,2017 and 1st September,2017 cannot be excluded.Â He submits that if the said time is not

excluded, this arbitration petition having been filed after expiry of three months from the date of service of the signed copy of the award on 30th April,

2017, the petition lodged on 1st September,2017 is ex-facie barred by limitation prescribed under section 34(3) of the Act.Â

19. Learned counsel placed reliance on the following judgments :(a) Deena (dead) Through LRs. vs. Bharat Singh (Dead) through LRs. And others, (2002) 6 SCC 336 (Paragraphs 4, 14 to 17)

(b) Rabindra Nath Samuel Dawson vs. Sivakasi and others,Â (1973) 3 SCC 381 (Paragraphs 4 and 5)

(c) Judgment of Allahabad High Court in case of Jagannath Prasad vs. Sri Sant Hardassram Sevashram and others, AIR 1978 All 250,Â (Paragraph

6)

20. It is submitted by the learned counsel for the respondents that this is not a case of bonafide mistake.Â The petitioner cannot be allowed to urge

that the petitioner was not aware of the provisions of section 34(5) brought into effect from 23rd October,2015.Â He submits that there cannot be a

bonafide mistake in respect of the express provisions of law.Â The respondents had already filed an affidavit in reply on 17th August,2017 raising an

objection of the maintainability of the arbitration petition for non compliance of the provisions of section 34(5) of the Act.Â

21. Mr.De'vetre, learned senior counsel for the petitioner distinguished the judgments relied upon by Mr.Jawle, learned counsel for the respondents on

the ground that the facts of those judgments are totally different.Â He submits that on 18th August 2017, this court had adjourned the matter to 31st

August,2017 for the purpose of deciding the objection raised by the

respondents.Â On 31st August,2017 itself the petitioner had already kept the arbitration petition ready duly affirmed. No sooner the liberty was granted by this court on 31st August,2017 for withdrawal of the said arbitration petition (400 of 2017) with liberty to file a fresh petition, the petitioner issued a notice under section 34(5) to the respondents and also filed an affidavit in compliance with section 34(5).Â It is submitted that section 14(2) has to be construed liberally. The petitioner has placed bonafide construction of section 34(5).Â The petitioner has not taken any advantage of any situation.

REASONS AND CONCLUSIONS

22. It is not in dispute that section 34(5) was inserted by Act 3 of 2016 w.e.f. 23rd October,2015 in the Arbitration and Conciliation Act, 1996.Â The petitioner had received a signed copy of the award on 30th April, 2017 from the learned arbitrator.Â Before expiry of three months from the date of service of the signed copy of the award i.e. on 26th July,2017, the petitioner lodged the said arbitration petition which was numbered as Arbitration Petition No.400 of 2017.Â The petitioner however issued notice of lodging of such arbitration petition upon the respondents only on 27th July, 2017 and filed an affidavit on 28th July,2017.Â The papers and proceedings were served upon the respondents by the petitioner at the earliest.Â The respondents filed an affidavit on 17th August,2017 raising various issues including issue of maintainability of the arbitration petition on the ground of non compliance of the provisions of section 34(5).Â

23. On 18th August,2017, when the matter appeared for the first time, this court recorded the said objection raised by the respondents and adjourned the matter to 31st August,2017 for deciding the said issue.Â A perusal of the papers and proceedings in this arbitration petition clearly indicates that the petition was already affirmed on 31st August,2017 when the matter appeared before this court.Â The petitioner obtained liberty from this court to withdraw the said arbitration petition (400 of 2017) with liberty to file a fresh petition.Â The respondents did not raise any objection to the said application made by the petitioner for withdrawal of the said arbitration petition with liberty to file a fresh petition nor raised an issue of limitation when liberty was granted to the petitioner.Â The respondents also did not challenge the said order passed by this court on 31st August,2017.Â

24. It is not in dispute that the petitioner issued a notice under section 34(5) on

the respondents on 1st September,2017 and also filed an affidavit of compliance along with this arbitration petition.Â The said notice under section 34(5) was issued upon the respondents before this petition was lodged.Â If the cause of action for filing arbitration petition under section 34(1) is considered from 30th April,2017, three months period would expire on 31st July,2017.Â

25. A question that arises for consideration of this court is whether non compliance of notice contemplated under section 34(5) by the petitioner before lodging the Arbitration Petition No.400 of 2017 and withdrawal of the said arbitration petition on 31st August,2017 in view of the objections raised by the respondents would fall within the expression "other cause of a like nature" prescribed under section 14(1) of the Limitation Act, 1963 and if so, whether the petitioner was prosecuting the said arbitration petition (400 of 2017) bonafide, in good faith and with due diligence.Â

26. It was the case of the petitioner that the question regarding mandatory/directory notice under section 34(5) of the Arbitration and Conciliation Act was open to doubt.Â The petitioner had relied upon the judgment of Patna and Kerala High Court taking a view that such notice was not mandatory but was directory.Â No sooner the respondents raised an objection about the maintainability of the petition on the ground that the petitioner had not issued any such notice under section 34(5) and had not complied with the said procedure, the petitioner prepared another petition and applied with liberty to withdraw when the matter appeared before this court on 31st August,2017.

27. Large number of petitions were filed in this court without issuing prior notice as contemplated under section 34(5) and without accompanying with an affidavit of compliance as contemplated under the provisions.Â A group of such petitions were heard together by this court.Â By a detailed order and judgment delivered by this court on 21st February,2018 in case of Global Aviation Services Private Limited (supra) it is held by this court that the provisions under section 34(5) and 34(6) are directory and not mandatory.Â In some of the petitions, the parties had complied with such provision.Â

In some of the petitions, the petitioner had filed notice of motion for a declaration that no such notice was mandatory.Â In my view, Mr.De'vetre, learned senior counsel for the petitioner is thus right in his submission that there

was a reasonable and bonafide doubt as to whether the said notice contemplated under section 34(5) of the Arbitration and Conciliation Act, 1996 was directory or mandatory.Â The parties had interpreted the said provision differently.

28. Supreme Court in case of India Electric Works Ltd. (supra) has considered the expression "or other cause of a like nature" prescribed in section 14(2) of the Limitation Act, 1963.Â Supreme Court held that if those words "or other cause of a like nature" were read along with the expression "is unable to entertain", they would denote that the defect must be of such a character as to make it impossible for the court to entertain the suit or application in its inception or at all events as to prevent it from deciding it on the merits. It is held that if the defects were of such a nature that they had to be decided before the case could be disposed of on merits or if they did not necessitated an examination of the merits of the case they would be defects of a "like nature". Supreme Court held that in each one of these cases the court did not lack jurisdiction in its inception but the suit could not be proceeded with and disposed of until the statutory conditions laid down had been satisfied or fulfilled.

29. In paragraph (7) of the said judgment, it is held that although all questions of limitation must be decided by the provisions of the Act and the courts cannot travel beyond them the words "or other cause of a like nature" must be construed liberally. In my view, the principles laid down by the Supreme Court in case of India Electric Works Ltd. (supra) applies to the facts of this case.Â The respondents themselves had raised an objection in the affidavit in reply that the Arbitration Petition No.400 of 2017 was not maintainable on the ground that there was non compliance of section 34(5).Â This court thus could not have proceeded with the hearing of the matter on merits without first deciding the issue of maintainability raised by the respondents.Â

30. In my view, the expression "or other cause of a like nature" has to be construed liberally and a situation of this nature where the notice under section 34(5) was contemplated before filing of the arbitration application under section 34, the same must be read as ejusdem generis or analogous to the word relating to the defect of jurisdiction. This court thus would have unable to entertain such petition unless such notice would have complied

with.Â The doubt in the mind of large number of parties was cleared by virtue of pronouncement of the judgment of this court.Â Thus even if the

objection of the respondents would have been considered, the said objection would fall under the expressionÂ ""or other cause of a like nature"".

31. Supreme Court in case ofÂ Consolidated Engineering Enterprises (supra) has held that section 14(2) of the Limitation Act applies to the

application filed under section 34(1) and can be considered if the conditions are satisfied for the purpose of computation of limitation under section

34(3) and benefit of exclusion can be granted.Â Supreme Court in the said judgment has held that due diligence cannot be measured by any absolute

standards but is measured of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular

circumstances. It is held that section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard and fast rule

as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of

degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake

intentionally made with a view to delaying the proceedings or harassing the opposite party. In my view, the principles of law laid down by the Supreme

Court would squarely applies to the facts of this case.Â

32. It is not the case of the respondents that the petitioner had intentionally and deliberately not issued notice under section 34(5) of the Arbitration and

Conciliation Act,1996 with a view to delay the proceedings or to harass the respondents or that the petitioner has received any benefit due to non

service of notice.Â In my view there was a honest and bonafide doubt in the mind of the large number of litigants whether such notice contemplated

under section 34(5) was mandatory or directory.Â A perusal of the record clearly indicates that the petitioner has not taken any advantage of not

giving notice under section 34(5) prior to the date of lodging such arbitration petition (400 of 2017).Â The respondents however made a statement

from time to time in the petition filed by the petitioner not to execute the impugned award.Â

33. In my view, since the petitioner had under the bonafide doubt as to whether the said notice contemplated under section 34(5) was mandatory or

directory as is apparent from the conduct of the petitioner and in view of the petitioner having withdrawn the Arbitration Petition No.400 of 2017 at

the earliest opportunity available, I am of the view that it cannot be said that the petitioner had not prosecuted the petition bonafide, in good faith and

with due diligence.Â The petitioner thus has made out a case for exclusion of time under section 14(2) of the Limitation Act, 1963 in view of the

petitioner having prosecuting the said arbitration petition (400 of 2017) bonafide in good faith and with due diligence.

34. Himachal Pradesh in case of Madhava Hytech Engineers Pvt. Ltd. (supra) construed section 34(5) and also the expression â??other cause of a

like natureâ?? described in section 14(1) of the Limitation At, 1963 and held that such defect falls within the scope of â??other cause of a like

natureâ?? which is equivalent to the defect of jurisdiction.Â I am in agreement with the view expressed by the Himachal Pradesh High Court in case

of Madhava Hytech Engineers Pvt. Ltd. (supra).

35. Supreme Court in case of Union of India and others vs. West Â Coast Paper Mills Ltd. and another (III), (2004) 3 SCC 458 has construed the

expression â??other cause of a like natureâ?? stated in section 14(1) of the Limitation Act, 1963 and has held that section 14 of the Limitation Act is

wide in its application, inasmuch it is not confined in its applicability only to cases of defect of jurisdiction.Â It is also applicable to cases where the

prior proceedings have failed on account of other causes of like nature. Supreme Court in the said judgment adverted to the earlier judgment in case of

Roshanlal Kuthalia and Ors. v. R.B. Mohan Singh Oberai, (1975) 4 SCC 628 in which it was held that Section 14 of the Limitation Act is wide enough

to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any

circumstances, legal or factual, which inhibits entertainment or consideration by the Court of the dispute on the merits comes within the scope of the

Section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right. In my view the

principles laid down by the Supreme Court in case of Union of India and others vs. West Coast Paper Mills Ltd. and another (supra) and in case of

Roshanlal Kuthalia and Ors. (supra) squarely applies to the facts of this case.Â

36. The respondents themselves had raised an objection across the bar as well

as in their affidavit in reply that without prior notice under section 34(5) of the Arbitration and Conciliation Act, 1996, the said arbitration petition (400 of 2017) was not maintainable.Â In my view, this objection thus would fall under the expression â??other cause of a like natureâ??.

37. Insofar as the judgment of Supreme Court in case of Rabindra Nath Samuel Dawson (supra) relied upon by Mr.Jawle, learned counsel for the respondent is concerned, in the said judgment, the Supreme Court has considered the fact where the defendants had raised an objection to the non-joinder of the Government as a party at the earliest possible opportunity.Â The plaintiffs however pursued the said suit and agreed to bear the risk of non-joinder of the State Government. In these circumstances, the Supreme Court held that the plaintiffs in that case were not prosecuting the suit in good faith and with due diligent and benefit of section 14(2) could not be thus given to such litigant.Â

38. The facts however in this case are totally different.Â Not only the petitioner but large number of other litigants were under the bonafide doubt that the notice under section 34(5) was not mandatory but was directory.Â In this case, the petitioner had already kept the petition ready along with notice under section 34(5) when the matter was on board on 31st August,2017.Â The day on which this court granted liberty to the petitioner to withdraw the said arbitration petition (400 of 2017), on the very next day of the said order, the petitioner filed this arbitration petition after complying with section 34(5).Â In my view the judgment of Supreme Court in case of Rabindra Nath Samuel Dawson (supra) relied upon by the learned counsel for the respondent thus is clearly distinguishable in the facts of this case and would not assist the case of the respondents.

39. Insofar as judgment of Supreme Court in case of Deena (dead) Through LRs. (supra) relied upon by Mr.Jawle, learned counsel for the respondents is concerned, in that matter before the Supreme Court, inspite of the objections raised by the defendants about the maintainability of the suit, the plaintiffs continued to prosecute the said proceedings and applied for withdrawal of the suit with liberty to file a fresh suit much later.Â The trial court as well as the appellate court in those circumstances rendered a finding that the plaintiffs were not entitled to the exclusion of time under section 14(2) of the Limitation Act, 1963.Â Those findings were confirmed by the

Supreme Court in the said judgment.Â The said judgment of Deena (dead) Through LRs. (supra) is distinguishable in the facts of this case and would not assist the case of the respondents.

40. Insofar as judgment of Allahabad High Court in case of Jagannath Prasad (supra) relied upon by Mr.Jawle is concerned, a perusal of the said

judgment indicates that the appellant in that matter though, on the basis of the higher valuation of the appeal was required to file an appeal in High

Court, filed the said appeal before the District Judge.Â An objection was immediately raised by the respondents in that appeal about the lack of

jurisdiction of High Court.Â The appellant however continued to prosecute the said appeal before the High Court. The Allahabad High Court held

that where the law is plain and does not admit of any doubt and the appellant or his agent could not possibly have any illusion as to the appropriate

forum for presenting appeal, it would be a case of palpable negligence and would not be covered by the provisions of Section 14 of the Limitation

Act.Â In the facts of this case however as already referred to aforesaid, large number of litigants filed application under section 34 without issuing

prior notice under section 34(5) having bonafide doubt as to whether notice under section 34(5) was mandatory or directory.Â The judgment

delivered by the this court in case of Global Aviation Services Private Limited (supra) has ultimately settled the issue and held that notice under

section 34(5) is not mandatory but is directory.Â In this case the petitioner cannot be held guilty of negligence for not giving prior notice under section

34(5).Â The facts before the Allahabad High Court in case of Jagannath Prasad (supra) are totally different and are distinguishable in the facts of

this case and thus would not assist the case of the respondents.

41. In my view the petitioner has made out a case for exclusion of time under section 14(2) of the Limitation Act, 1963 for a period from 26th July,

2017 to 31st August,2017. There is thus no delay in filing arbitration petition by the petitioner.Â The preliminary objection raised by the respondents

that the petition is barred by limitation has thus no merit and is accordingly rejected.Â The parties are directed to make submissions on the merits of

the arbitration petition.Â Â Â Â