

(2015) 08 DEL CK 0052

In the Delhi High Court

Case No : O.M.P. No. 186 of 2015

National Highway Authority of India

APPELLANT

Vs

Prakash Atlanta JV

RESPONDENT

Date of Decision : 07-08-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 20, 30, 31, 33, 33(4)
Civil Procedure Code, 1908 (CPC) — Section 152

Citation : (2015) 9 AD 301

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Pradeep Bakshi, for the Appellant; Sandeep Sethi, Senior Advocate and Chirag M. Shroff, Advocates for the Respondent

Judgement

Valmiki J. Mehta, J—A legal issue has been raised on behalf of the respondent in this case that the objection petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") is filed beyond the period of limitation prescribed under Section 34(3) of the Act, and that therefore the objections are liable to be dismissed in limine in view of the judgment of the Supreme Court in the case of Union of India Vs. M/s Popular Construction Co., (2001) 8 AD 297 : AIR 2001 SC 4010 : (2002) 1 CompLJ 46 : (2001) 8 JT 271 : (2001) 6 SCALE 657 : (2001) 8 SCC 470 : (2002) 1 UJ 4 : (2001) AIRSCW 3994 : (2001) 7 Supreme 354 .

2. In the present case, the issue is not an issue limited to deciding the commencement of period of limitation for filing objections under Section 34 of the Act from the date of filing of the Award, inasmuch as in the present case admittedly after passing of the original Award on 5.8.2014, both the parties thereafter had filed applications under Section 33 of the Act for correction of the Award. These applications were disposed of by the Arbitral Tribunal vide its Order dated 13.9.2014. By this Order dated 13.9.2014 the application of the objector for correction was dismissed and the application of the respondent for correction

was allowed whereby the amount awarded to the respondent has been enhanced to a sum of Rs. 9 crores.

3. The copy of the amended Award pursuant to the amendments made by the Arbitral Tribunal vide its Order dated 13.9.2014, was received by the objector on 7.11.2014. If the limitation period under Section 34(3) of the Act is considered to start on this date of 7.11.2014 then the objections filed would be within limitation inasmuch as objections were filed on 4.2.2015.

4. In order to appreciate the issue as to whether limitation starts from the date of the order passed under Section 33 of the Act or from the date of receiving the copy of the corrected/amended award, it will be necessary to set forth herein at the outset the provisions of Sections 31, 33 and 34 of the Act in their entirety and the same read as under:-

"31. Form and contents of arbitral award.- (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless-

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

(8) Unless otherwise agreed by the parties,-

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify-

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Explanation,- For the purpose of clause (a), "costs" means responsible costs relating to-

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

xxxxxx

33. Correction and interpretation of award; additional award.-

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties---

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any electrical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub- section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct an error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub- section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub- section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

34. Application for setting aside arbitral award.- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if---

(a) the party making the application furnishes proof that-----

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-----

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India. Explanation.- Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption

or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is 16 appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

5. Section 31 of the Act need not detain us for long because the same pertains to form and contents of an arbitral award and which is not an issue before us. Sub-Section (6) of Section 31 of the Act however is to be noted because it talks of an interim award as being an award under the Act i.e there can be more than one award under the Act. This will have relevance when we refer to an "additional award" under Section 33 of the Act.

6(i) Section 33 of the Act is similar to Section 152 of the Code of Civil Procedure, 1908 (CPC) and which latter provision also talks of correction of judgments or decrees or orders on account of clerical or arithmetical mistakes or errors arising from accidental slip or omission.

(ii) Section 33 of the Act essentially is in two parts. One part talks of and deals with what is known as an additional award on account of the arbitral tribunal omitting to deal with certain claims which have been made before it and which aspect is the subject matter of Section 33(4) of the Act with the related sub-Sections being sub-Sections (5) to (7) of Section 33 of the Act. Therefore, once there is an additional award, it is therefore a separate award, and hence there is no merger of the award already passed for some claims with the additional award. The later additional award is given by law a status of an additional award. This position is to be differentiated from when there is correction to the award in the nature of Section 33 of the Act qua an arithmetical or clerical error etc, and in which situation, the original award passed merges in the corrected award and hence limitation will necessarily and only start by applying the doctrine of merger from receiving the corrected copy of the corrected/amended award.

(iii) The other/second part of Section 33 of the Act pertains to making of corrections as computation errors, clerical errors, typographical errors or other errors of similar nature. For this purpose, any of the parties can make an

application to make such corrections in the award.

7(i) Section 34(3) of the Act on a literal reading provides that the period of three months commences for filing of objections from the date of the disposal by the tribunal of an application made under Section 33 of the Act. It is pertinent to note that whereas the first part of Section 34(3) of the Act talks of three months period for filing of objections from receiving of the arbitral award, the later part of Section 34(3) of the Act talks of commencement of period, not from receiving of the copy of the amended award pursuant to allowing of an application under Section 33 of the Act, but from the date of disposal of the application filed under Section 33 of the Act.

(ii) Learned senior counsel for the respondent has very vehemently argued that if the legislature has made a marked distinction in the language between two parts of sub-Section (3) of Section 34 of the Act, and such language consciously talks of filing of objections within three months of receiving of the copy of the award but when an application under Section 33 of the Act is disposed of then it is not three months from receiving the copy of the amended award but from disposal of the application under Section 33 of the Act, then it is the literal interpretation which must hold the field.

(iii) Learned senior counsel for the respondent in support of his arguments has placed strong reliance upon observations made by the Division Bench of this Court in para 25 of the judgment in the case of D.M. Jawhar Merican Vs. Engineers India Limited, AIR 2009 Delhi 104 : (2009) 2 CompLJ 272 : (2009) 4 ILR Delhi 571 and it is argued that as per this para 25 it has been held by the Division Bench that limitation period for filing of objections after disposal of an application under Section 33 of the Act commences from the date of disposal of the application. This para 25 in the judgment in the case of D.M. Jawhar Merican (supra) reads as under:-

"25. While in no way diluting our conclusion that the starting point of limitation for filing objections to the award was 18.1.2005, even if we were to proceed on the basis that the said application dated 12.2.2005 fell within the ambit of Section 33 of the Act, the fact of the matter is that the same stood rejected on 20.02.2005. Even if the starting point of limitation is taken to be 20.02.2005, the period of three months expired on 20.05.2005. As noticed above, the objections were preferred only on 04.07.2005. The appellant had not preferred any application to seek condonation of delay from 20.05.2005 and up till the 04.07.2005. The period of 30 days for which the Court can condone the delay, from 20.5.2005 onwards expired on 19.06.2005. Since 19.06.2005 fell during the summer vacations of the Court, and the Court re-opened on 04.07.2005, it was incumbent for the appellant to have sought the condonation of delay from 20.05.2005 to 19.06.2005 which was admittedly not done by the appellant. From the wording of the proviso to Section 34(3) it is clear that it is for the applicant to satisfy the Court that he was prevented from making the application under Section 34 within the period of three months. It is not for the Court, of its own to

condone the delay of up to 30 days."

8. I am unable to accept the argument urged on behalf of the respondent that the provision of Section 34(3) of the Act, and especially the later part thereof should be given literal interpretation inasmuch as different rules of interpretation; whether literal interpretation should be given or purposive interpretation should be given or the famous Heydon's rule/mischief rule should be applied or contextual interpretation should be given; all aspects which have to be seen are to be seen in the context of the relevant statute and the intendment of the legislature with respect to the statute and more pertinently the provision in question.

9. When we look at the provision of Section 34(3) of the Act as per the intendment of this provision and the rationale thereof, it is clear that objections are filed to an award only after receiving the copy of the award and this is because obviously it is only when an award is read it is understood and grievance is found to the same on account of the same deciding an issue in a particular manner, only therefore and thereafter objections are filed. What is being emphasized is that an award has necessarily to be read before the period of limitation can be said to have commenced for filing of objections to an award and for which there has to be available the copy of the corrected/amended award. Surely, it could not be the intention of the legislature that without knowing and understanding what is the award, and more particularly what is the corrected award under Section 33 of the Act, and which can be properly known only when a copy is received, limitation period should start not from receiving the copy of the corrected award but only from the date of disposal of the application under Section 33 of the Act. In my opinion to give literal interpretation to the later part of Section 34(3) of the Act would be to give an absurdity to the provision for filing of objections, inasmuch as, and as already stated above, surely a person has to read an award in order to decide the objection to the same, and a person can read the award only after he receives copy of the award. Provision of filing objections under Section 34(3) of the Act in some way can be said to be similar for filing of a challenge to the appellate tier from a judgment of a lower court and which appeals are filed only after receiving the certified copy of the judgment because it is the judgment which gives the rationale and the reasons for passing the same. Period for obtaining certified copy of the judgment is thus excluded from the limitation period for filing of the appeal. It is only after reading the rationale and the reasons and the language of the judgment that the grounds of appeal or the grounds of objections under Section 34(3) of the Act to an award can be drafted. Therefore, it cannot be held that the later part of Section 34(3) of the Act must be read literally inasmuch as absurdity will result from such a conclusion, and it is settled law that absurdity must be avoided while interpreting a legal provision.

10. No benefit can be derived by the respondent to the observations made in para 25 of the judgment in the case of D.M. Jawhar Merican (supra) because the

observations made in a judgment for the same to be a ratio, the same must necessarily be after the court gives the observations by crystallizing a particular issue for decision. A reading of the entire judgment in the case of D.M. Jawhar Merican (supra) alongwith its para 25 shows that in no manner the issue which is there before this Court, and which is being decided by the present judgment, was an issue before the Division Bench in the case of D.M. Jawhar Merican (supra). In fact, para 25 of the judgment in the case of D.M. Jawhar Merican (supra) without any reference to the provision of Section 34(3) of the Act proceeds on the basis that objections have to be filed from the date of the disposal of the application under Section 33 of the Act, and which is because the issue as argued before this Court was not argued or addressed before the Division Bench, that even if the corrected copy of the award prepared after making corrections under Section 33 of the Act is received by a party on a later date, yet, limitation period will start from the date of disposal of the application under Section 33 of the Act and not from the date of receiving the corrected copy of the award.

11. In view of the above, argument urged on behalf of the respondent that this petition under Section 34 of the Act is time barred, is rejected.

12. Notice.

13. Counsel for the respondent accepts notice. Reply be filed within six weeks. Rejoinder affidavit thereto be filed within four weeks thereafter.

14. List before the Joint Registrar on 24th November, 2015 for completion of pleadings, and receipt of the arbitral record. The Joint Registrar after completion of pleadings and receipt of the arbitral record, will list the matter in the Court.