

(2019) 11 DEL CK 0308

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 473 Of 2019,
Miscellaneous Application No. 15744, 15747 Of 2019

National Highways Authority Of India

APPELLANT

Vs

Ssangyong Engineering & Construction Co. Ltd

RESPONDENT

Date of Decision : 25-11-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 11, 34, 34(3), 37, 37(2)(B)
Limitation Act, 1963 — Section 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19,
20, 21, 22, 23, 24, 29(2)

Citation : (2019) 11 DEL CK 0308

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Sudhir Nandrajog, Ankur Chhibber, Bhanu Gupta, Navin Kumar
Sinha, Rashmeet Kaur, Arpana Majumdar, Priya Goyal

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J

I.As. 15746-15747/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Applications stand disposed of.

O.M.P. (COMM) 473/2019, I.As. 15744/2019 & 15745/2019

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996, ('Act of 1996', for short) is to an award / interim award dated May 18, 2019 passed by the Arbitral Tribunal whereby the Arbitral Tribunal has allowed the application filed by the respondent herein for grant of two amounts of Rs. 1,32,79,591/- and Rs. 92,22,236/-.

2. Mr. Navin Kumar Sinha, learned counsel appearing for the respondent has taken a preliminary objection on the maintainability of the petition on the ground

that it is barred by limitation. Hence, the petition needs to be dismissed.

3. This submission of Mr. Navin Kumar Sinha is in view of the fact that the impugned award is dated May 18, 2019 and the period of three months for filing the petition under Section 34 of the Act of 1996, expired on August 18, 2019. Even the further period of 30 days, which period, can be condoned by the Court has also expired on September 23, 2019 and whereas the petition is filed only on November 06, 2019.

4. In support of his submission, he stated that an appeal was filed by the petitioner under Section 37 of the Act of 1996, that too on August 14, 2019. The appeal was returned under objections on August 17, 2019. The objections raised by the Registry, included the petition, be filed in correct category.

5. But it appears that the petitioner pursued the appeal under Section 37 of the Act of 1996. The said appeal was listed before this Court on October 22, 2019 on which date, the learned counsel for the petitioner conceding to the fact that the appeal is not maintainable, withdrew the said appeal. It is thereafter, that the present petition under Section 34 of the Act of 1996 has been filed on November 06, 2019.

6. In substance, it is his submission that the date of award being May 18, 2019, three months have expired on August 18, 2019 and even 30 days thereafter also expired on September 18, 2019.

The petitioner despite being notified by the Registry that the petition has to be filed in the correct category i.e. under Section 34 of the Act of 1996 had not corrected the category, and rather pursued the appeal under Section 37 of the Act of 1996, which ultimately was withdrawn on October 22, 2019, hence shall not be entitled to the benefit of Section 14 of the Limitation Act and the petition is liable to be dismissed.

7. On the other hand, Mr. Sudhir Nandrajog, learned Senior Counsel appearing for the petitioner states that the first petition was filed as an appeal under Section 37 of the Act of 1996 on August 14, 2019 and the appeal was pursued by the petitioner till October 22, 2019, when the counsel appearing for the petitioner withdrew the appeal as was not maintainable. As, between August 14, 2019 and October 22, 2019, the petitioner, was prosecuting a wrong remedy, it shall be entitled to the benefit of Section 14 of the Limitation Act, 1963 and if that period is excluded, the petition filed by the petitioner on November 06, 2019 is within limitation.

8. Mr. Navin Kumar Sinha contest the submission made by Mr. Sudhir Nandrajog by reiterating his submissions and by relying upon the judgment in the case of Simplex Infrastructure Limited. V. Union of India, (2019) 2 SCC 455 to contest, the petitioner is not entitled to the benefit of Section 14 of the Limitation Act.

9. I am not in agreement with the submission made by Mr. Sudhir Nandrajog for the reason that the date of award being May 18, 2019, and there is no dispute

that the copy of the award having received on that day itself, the limitation of three months as contemplated under Section 34(3) of the Act of 1996 expired on August 18, 2019. Assuming for a moment, the petitioner could have sought the benefit of further 30 days in filing the petition, even those 30 days had expired on September 18, 2019. Even if the petitioner was pursuing wrong remedy of filing an appeal under Section 37 of the Act of 1996, the fact that the Registry had notified the objections to the petitioner who re-filed the appeal on October 09, 2019 without correcting the category, the limitation for section 34, petition shall stop running on that date. It is that date, when the petitioner had the knowledge, that the appeal has been wrongly filed, and was required to file a right petition immediately thereafter or corrected the existing one. So, the benefit of Section 14 shall stop running on that date. In fact, I note the appeal which was not maintainable, was withdrawn only on October 22, 2019, when the Court passed the following order:

"IAs. 14736/2019 and 14737/2019 (for exemptions)

Exemptions allowed subject to all just exceptions.

Applications stand disposed of.

IA 14735/2019 (for delay)

This is an application filed by the petitioner seeking condonation of 24 days delay in re-filing the petition.

For the reasons stated in the application delay of 24 days in re-filing the petition is condoned.

Application stands disposed of.

ARB. A. (COMM.) 32/2019

This petition has been filed by the petitioner challenging the order dated May 18, 2019 passed by the Arbitral Tribunal.

Mr. Ankur Chhibber, learned counsel appearing for the petitioner states, appropriate remedy for the petitioner is to file a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (Act in short). He states, in fact, the petitioner had filed a petition under Section 34 of the Act, however on an objection raised by the Registry that it should be a petition under Section 37 of the Arbitration and Conciliation Act, necessary amendments have been carried out.

According to him, a petition under Section 37 of the Act is not maintainable in view of the judgment of the Supreme Court in the case of Indian Farmers Fertilizers Cooperative Limited v. Bhadra Products 2018 2 SCC 534. Mr. Chibber, states that he wishes to withdraw this petition and pursue the petition under Section 34 of the Act as has been filed in the Registry. If that be so, liberty is with the petitioner to pursue the petition under Section 34 of the Act. At the

same time liberty is with the respondent to raise any objection including the maintainability of the petition on any ground except filing of the petition under Section 34 of the Act.

In the peculiar facts of this case, Registry of this court shall return the papers of this petition to the petitioner.

Petition stands disposed of.

IA. 14734/2019 (for stay)

Dismissed as infructuous."

10. The above reveals that a submission was made that the petition was filed under Section 34 of the Act of 1996 but on the objection of the Registry, the same was converted under Section 37 of the Act of 1996. This position is contested by Mr. Kumar by stating that initial petition was filed as an appeal under Section 37 of the Act of 1996, in as much as the Registry had notified the objection as under:-

"Total 49 pages filed without bookmarking & without pagination. This is an appeal u/s 37(2)(B) of the Arbitration and Conciliation Act, 1996. Please file in the correct category. Format be followed strictly. Affidavits not attested. No documents filed. No award filed. In addition to the e-filing, it is mandatory to file hard copies of the fresh matters filed u/s 9, 11 & 34 with effect from 22.12.2018."

11. It is clear that the petitioner was notified by the Registry to file it in the correct category which is under Section 34 of the Act of 1996 and the petition having been filed on November 06, 2019, which concedingly, is beyond the period of limitation which has expired on September 18, 2019 or for that matter on October 09, 2019, in view of the judgment of the Supreme Court in the case of Union of India v. Popular Construction Company, (2001) 8 SCC 470, it is settled position of law that recourse to the Court against an arbitral award cannot be made beyond the period prescribed under Section 34 of the Act of 1996, the petition is liable to be dismissed. The relevant portion of the judgment reads as under:

"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result.

13. Apart from the language, 'express exclusion' may follow from the scheme and object of the special or local law. "Even in a case, where the special law does

not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation".

Here by history and scheme of the 1996 Act support the conclusion that the time limit prescribed under Section 34 to challenge an Award is absolute and unextendable by Court under Section 5 of the Limitation Act.

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12. Similarly, reiterating the position of law as held in the case of Popular Construction Company (supra), the Apex Court in *P. Radha Bai and Ors. v. P. Ashok Kumar and Ors.*, AIR (2018) SC 5013, also held that a party to an arbitration proceeding can challenge the arbitral award as soon as he receives it. It was further held that once an award is received, the party is presumed to have knowledge of the same, and the limitation period under Section 34(3) of the Act of 1996 is said to have commenced.

13. The present petition being hit by limitation is not maintainable and the same is dismissed without going into the merits on the challenge to the impugned award dated May 18, 2019.

14. No costs.