

(2016) 10 DEL CK 0075

In the Delhi High Court

Case No : O.M.P. (COMM.) No. 94 of 2016.

National Highways Authority of India - Petitioner @HASH Hindustan Steelworks Construction Ltd. + Sipl

Date of Decision : 19-10-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, Section 42
Limitation Act, 1963 — Section 14

Citation : (2016) 10 ADDelhi 78 : (2016) 234 DLT 257 : (2017) 3 RAJ 135

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Mr. Parag Tripathi, Senior Advocate with Mr. Mukesh Kumar and Ms. Gunjan Sinha Jain, Advocates, for the Petitioner; Mr. P.S. Patwallia, Additional Solicitor General with Mr. G. Umamathy, Mr. Kishore Sen, Ms. R. Mekhala and Mr. Vinod Tiwari, Advocates, for

Final Decision : Dismissed

Judgement

S. Muralidhar, J. - IA No.4908/2015 (for condonation of delay):

This is an application filed by the National Highways Authority of India (NHAI) seeking to explain the delay of 296 days in filing the petition under Section 34 of the Arbitration & Conciliation Act, 1996 (the Act) to challenge the Award dated 24th February, 2015 of the Arbitral Tribunal (AT) in the disputes between NHAI and the Respondent, Hindustan Steelworks Construction Ltd. + SIPL (HSCL) arising out of a contract dated 18th July, 2005 for the construction of a four lane highway from KM 94.000 to KM 123.00 of Nagpur ? Hyderabad section of NH-7 in the State of Maharashtra.

2. It is stated by NHAI that it received a copy of the Award dated 24th February, 2015 only on 27th February, 2015 by courier and that was the date from which the period of limitation for the purposes of Section 34 (3) of the Act commenced. Even NHAI admits that the 90 days period in terms of Section 34(3) of the Act expired on 26th May, 2015.

3. It is explained by Mr. Parag Tripathi, learned Senior Advocate appearing for the

NHAI, that since the Project Implementation Unit (PIU) was based in Nagpur and the project was being implemented in Yavatmal District in Maharashtra, it was mistakenly thought by the PIU that the petition under Section 34 of the Act challenging the Award had to be filed in the District Court at Yavatmal. It is pointed out that the said Court in Yavatmal was closed for summer vacation from 5th May, 2015 to 7th June, 2015 and immediately upon reopening of the court, the petition was filed on 8th June, 2015 and thus it was within the limitation period of three months. It is then stated that the matter was pending in that Court till 11th March, 2016 on which date the District Court at Yavatmal issued directions to the effect that it did not have jurisdiction to entertain the present petition. Included in the documents filed with the present petition is a copy of the order dated 11th March, 2016 passed by the Principal District Judge, Yavatmal to the effect that it had no jurisdiction to decide the said application, which would have to be returned to NHAI for presenting it to the court of proper jurisdiction. The question of limitation was kept open.

4. It is stated that within five days of the said order the present petition was filed in this Court on 16th March, 2016. Referring to Section 14(2) of the Limitation Act, 1963, it is submitted that the time spent in the District Court at Yavatmal should be excluded for the purposes of computing limitation and if so computed there would be no delay in filing the present petition.

5. Mr. P.S. Patwalia, learned Additional Solicitor General (ASG) appearing for HSCL refers to the reply filed to the present application in which it is submitted that Section 14 of the Limitation Act, 1963 can be invoked only where the NHAI can show that it was prosecuting the matter in a good faith in a Court which lacked the jurisdiction to entertain it. It is submitted that in the present case NHAI can hardly claim that it approached the District Court at Yavatmal for bona fide reasons.

6. Mr. Patwalia referred to the order passed by the Calcutta High Court on 10th August, 2010 directing the parties to maintain status quo for a period of four weeks to enable the Petitioner to approach the appropriate forum. The objection as to jurisdiction raised by NHAI was accepted by the Calcutta High Court. The objection was to the effect that the Court of appropriate jurisdiction was Delhi.

7. Mr. Patwalia then refers to the orders passed in OMP No.530/2010 filed under Section 9 of the Act by the Respondent in this Court. It appears that NHAI participated throughout in the case and in its presence the NHAI was permitted to file a separate petition under Section 11 of the Act in this Court formalising the appointment of the former Chief Justice of India as the Sole Arbitrator.

8. It is submitted that NHAI knew fully well that the appropriate court as far as the jurisdiction was concerned was this Court and therefore its approaching the Yavatmal District Court could not be said to be bona fide. It is pointed out that in 2015, this Court opened after summer vacation on 29th June, 2015 itself. On that date NHAI would have had to file the petition under Section 34 of the act if

it had to be within limitation in terms of Section 34(3) of the Act. Since NHAI was not ready with its petition on that date it chose to go to the District Court at Yavatmal where the summer vacations were still on. It, therefore, sought to avoid the consequences of a delayed filing of the petition.

9. Mr. Patwalia then contended that under Section 42 of the Act with the initial order having been passed under Section 9 of the Act and thereafter under Section 11 of the Act, all subsequent petitions including the petition under Section 34 of the Act had to be filed only in this Court. He placed reliance on the decision in *Amar Chand Inani v. Union of India* (1973) 1 SCC 115 to urge that the Yavatmal District Court did not have any jurisdiction at the first place and in those circumstances the Petitioner was not entitled to the benefit of Section 14 of the Limitation Act, 1963. Reliance was also placed on the decisions in *Assam Urban Water Supply and Sewerage Board v. Subash Projects and Marketing Ltd.* (2012) 2 SCC 624 and *Neeraj Jhanji v. Commissioner of Customs and Central Excise* (2015) 12 SCC 695.

10. Mr. Tripathi, learned Senior Advocate appearing for NHAI, on the other hand, referred to *Coal India Limited v. Ujjal Transport Agency* (2011) 1 SCC 117 where according to him in similar circumstances the Supreme Court had condoned the delay in filing the petition under Section 34 of the Act with reference to Section 14 of the Limitation Act, 1963. He submitted that at the highest NHAI would have had to file an application for condonation of delay if it had filed the petition in this Court on 10th July, 2016 and since it was a 30 days period beyond 90 days in terms of the proviso to Section 34(3) of the Act it was entitled to the condonation of delay. According to him, the NHAI approaching the Yavatmal District Court was not for mala fide reasons and therefore, this Court ought to condone the delay of 296 days in filing the present petition.

11. The Court is unable to agree with the submissions of Mr. Tripathi and is of the view that the present application requires to be dismissed for the following reasons:

i. NHAI was conscious, in the present case, that it is the Delhi High Court, which has jurisdiction to entertain the petition arising under the Act as a result of the arbitration clause between the parties. It is for this reason the NHAI opposed jurisdiction of the Calcutta High Court to entertain the Respondent's application under Section 9 of the Act. Orders dismissing that petition were passed by the Calcutta High Court in the presence of NHAI permitting the Respondent to approach the court of appropriate jurisdiction, which was this Court.

ii. Pursuant to the order dated 10th August, 2010 of the Calcutta High Court, the Respondent filed the Section 9 petition in this Court. In the presence of NHAI orders were passed in the said petition as well as in the subsequent petition under Section 11 of the Act filed by the Respondent.

iii. The mere fact that the PIU was in Nagpur does not appear to be a convincing reason why the NHAI would have gone before the District Court at Yavatmal for

filing the Section 34 petition. What requires to be noticed at this stage is that NHAH files numerous petitions on a constant basis in this Court under Section 34 of the Act challenging the Awards passed by various ATs in the disputes involving NHAH. This is irrespective of the place in India where the project is implemented. It is indeed difficult to accept the plea of NHAH that given its track record of approaching this Court time and again with petitions under Section 34 of the Act.

iv. It cannot be a mere co-incidence that on the date i.e., 29th June, 2015 the limitation for filing the petition under Section 34(3) of the Act, even according to the date of receipt of the Award, as claimed by NHAH expired.

Clearly NHAH was not ready with the petition on that date. It cannot also be a co-incidence that summer vacations of the Yavatmal District Court was still continuing as of that date and went on till 7th June, 2015. There is merit in the contention of the Respondent that in the above circumstances, NHAH could not be said to have acted bona fide in approaching the District Court at Yavatmal under Section 34 of the Act.

v. The contention of Mr. Tripathi that the Petitioner could have well filed the petition on 10th July, 2016 in this court instead of Yavatmal District Court along with an application for condonation of delay cannot be accepted for the simple reason that this question is purely hypothetical. The fact remains that NHAH did not file the petition in this Court on 10th July 2016 or prior thereto along with an application for condonation of delay. The explanation offered for not so doing, which in any event are not convincing, has been rejected for the reasons already noted.

vi. The reliance placed by NHAH on the decision in Coal India Limited(supra) is to no avail for the simple reason in the said decision there is no reference made at all to Section 42 of the Act, which reads as under:

"42. Jurisdiction.-Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

12. The statutory mandate, therefore, is that once the parties have approached a certain court for relief under the Act at the earlier stages of the disputes then it is the same court that the parties must return to for all other subsequent proceedings. The intention was to avoid multifarious litigations in different courts and to avoid the possibility of inconsistent orders passed by different courts. The language of Section 42 of the Act is categorical and brooks no exception. In fact, the language used has the effect of jurisdiction of all courts since it states that once an application has been made in Part I of the Act then that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that

Court and in no other Court. In view of the categorical mandate of Section 42 of the Act, which was not noticed in Coal India Limited (supra), the Court declines to accept the plea of Mr. Tripathi that notwithstanding Section 42 of the Act the Court should consider for the purposes of Section 14 of the Limitation Act, 1963 filing of the petition under Section 34 of the Act by NHAI in the District Court at Yavatmal to be bona fide.

13. Accordingly the Court holds that NHAI in the present case cannot take advantage of Section 14 of the Limitation Act, 1963 for explaining the inordinate delay in filing the present petition under Section 34 of this Act in this Court.

14. For the aforementioned reasons the application is dismissed.

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15. In view of the dismissal of the application for condonation of delay in filing the petition, the petition and the pending applications are dismissed.