
(2013) 12 PAT CK 0084

In the Patna High Court

Case No : Miscellaneous Appeal No. 587 of 2009

NTPC Super Thermal Power Project (NTPC Ltd.), Kahalgaon,	APPELLANT
Vs	
M/S Dip Narayan Roy and Company	RESPONDENT

Date of Decision : 20-12-2013

Acts Referred:

Citation : (2014) 2 BBCJ 194 : (2014) 1 BLJud 142

Hon'ble Judges : Mr. Jyoti Saran, J.

Bench : Single Bench

Advocate : Mr. Anil Kumar Sinha, Advocate, for the Appellant; Mr. Ram Sumiran Rai, Advocate, for the Respondents

Final Decision : Allowed

Judgement

Mr. Jyoti Saran, J.(Oral)—This appeal under section 37 (1) (b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") is directed against the judgment and order dated 3.7.2009 passed by the learned Sub-Judge-1, Bhagalpur in Misc. Case No.2 of 2008, whereby the learned court below has been pleased to dismissed the application filed by the appellant under section 34 of the Act for setting aside the award dated 30.9.2007, inter alia, on the ground of being barred by limitation.

2. Mr. Anil Kumar Sinha, learned counsel appearing on behalf of the appellant has referred to the provisions underlying section 34 of the Act more particularly sub-section (3) thereof to submit that the legislative intent debars the party concerned from making an application to set aside the award, beyond three months from the date on which he has received an award or in case he has made a request under section 33 of the Act then from the date the same has been disposed of by the arbitral tribunal. With reference to the proviso to sub-section (3) of section 34 of the Act it was submitted that the power to condone the delay by a further period of thirty days is vested in the court provided it is satisfied that the applicant was prevented by a sufficient cause.

3. Learned counsel further with reference to the definition of the term "party" as defined in section 2(1)(h) of the Act submits that a "party" means a party to an arbitration agreement and none else. He submits that although the award was pronounced on 30.9.2007 and the hard copy whereof was received by the Chairman-cum-Managing Director of the appellant-Corporation on 3.10.2007 and while the award is stated to have been sent by email on 4.10.2007 but neither the hard copy nor the email was sent at the email address of the party concerned. He next submits that the Chairman-cum-Managing Director of the Corporation forwarded the hard copy of the award to the General Manager of the Super Thermal Power Project of the NTPC who is the party concerned in the present case and which was received by him on 12.10.2007. It is contended that the application under section 34 of the Act was filed on 5.2.2008, i.e. within 120 days of the receipt of the award on 12.10.2007 by the "party" and which would have expired on 9.2.2008. He thus submits that the opinion formed by the court below to reject the application filed by the applicants under section 34 of the Act is on a mis-appreciation of the legal provisions.

4. In support of his contention as to the definition of "party" learned counsel relied upon a judgment of the Supreme Court reported in (2005)4 SCC 239 (Union of India v. Tecco Trichy Engineers & Contractors) more particularly paragraphs 6 to 9 thereof. It is submitted that the judgment rendered in the case of Tecco Trichy Engineers & Contractors (supra) was quoted with approval in a subsequent judgment of the Supreme Court reported in (2011)4 SCC 616 (State of Maharashtra v. Ark Builders Private Limited) and paragraphs 14 and 15 of the judgment are complete answer to the issue posed. It is submitted that the Supreme Court has held that the period of limitation prescribed under section 34(3) of the Act would start running only from the date the copy of the award is delivered/received by the party making the application under section 34(1) of the Act. He thus submits that even when it was not the case of the respondents that the General Manager of the Project who filed the application under section 34 of the Act, had received the copy of the award on any date prior to 12.10.2007, yet the court below has misdirected itself to dismiss the case on the anvil of limitation.

5. The arguments of Mr. Sinha has been contested by learned counsel appearing on behalf of the respondents who has merely reiterated the position as is reflected from the reasons given by the court below to reject the miscellaneous case. He submits that the award dated 30.9.2007 was forwarded to the Chairman-cum-Managing Director and other officers of the Corporation on 4.10.2007 and since the miscellaneous case was filed only on 5.2.2008, it was beyond the period of 120 days and in no circumstance the court below could have condoned the delay in view of the stipulations provided under section 34(3) of the Act and the proviso thereto.

6. I have heard learned counsel for the parties and have perused the materials on record. It is not in dispute that the party to the agreement was the General

Manager of the Project as is manifest from the award present at Annexure-2, the miscellaneous case filed under section 34 of the Act present at Annexure-4 series as well as the impugned order passed in the miscellaneous case. It is also not the case of the respondent that the General Manager of the Project was not the "party to the agreement" or the party making application under section 34 of the Act.

7. Section 34(3) of the Act reads as under:

"34. Application for setting aside arbitral award-

... ..

... ..

(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:

8. 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. The term "party" has been defined under section 2(1) (h) of the Act and reads as under:

"2. Definitions.- (1) In this Part, unless the context otherwise requires-

... ..

... ..

(h) "party" means a party to an arbitration agreement."

9. A conjoint reading of the two provisions makes it eloquent that the period of limitation for a party making an application under section 34(1) of the Act would begin from the date on which the said party to the agreement received a copy thereof. It is immaterial and insignificant whether the copy of the award was received in the office of the Corporation on an earlier date. The material date would be the date on which the party, i.e. the General Manager of the Project received the award and it is the specific case of the applicant that the General Manager of the Project who filed the application under section 34 of the Act, received the award on 12.10.2007 and admittedly the application under section 34 of the Act was filed on 5.2.2008, i.e. within the period of 120 days.

10. Having held as such, the question yet remains that the case was filed beyond the statutory prescribed period of three months and thus it is to be seen whether the appellant had made out a case for condonation and whether the refusal by the court below to exercise power vested under the proviso, is sustainable. The legal position being as such, it is to be seen whether the appellant made out a case for condonation of delay.

11. Perusal of the impugned order manifests that the miscellaneous case has not only been rejected upon miscalculation of the period of 120 days rather the court below has also not found the explanation given by the appellant satisfactory enough to condone the delay.

12. The proviso to sub-section (3) of section 34 of the Act is not a luxury rather casts a duty upon the court concerned to condone the delay upon a satisfactory explanation made out by the party concerned. Every case of delay does not reflect a mala-fide or dilatory attitude of the litigant to delay the proceedings rather the circumstances governing each case have to be tested on its own merits, especially when it relates to an organization where a matter has to pass through different stages until it is finally approved for taking recourse to a legal remedy. Reference in this regard is made to a judgment of the Supreme Court reported in (1998)7 SCC 123 (N. Balakrishnan v. M. Krishnamurthy) and paragraph 13 of the judgment would be relevant for the purpose the relevant extract of which is quoted hereunder:

"13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor... .."

13. Adverting back to the case in hand, Annexure-4 series also encloses the condonation application and the reasons explained by the appellant in support of his prayer for condonation of delay appear rather reasonable and merited consideration. Perusal of the impugned order manifests that not only the court below has completely misdirected itself in the interpretation of the provisions underlying section 34(3) of the Act rather it has also not well appreciated the power vested under the proviso to the said section. Even while rejecting the explanation offered by the appellant to condone the delay, the court below has neither assigned any reasons therefor nor has held that the delay in any matter was attributable to the mala-fides of the appellant or was a dilatory tactics. A delay simpliciter is not enough to shut the door of the litigant as observed by the Supreme Court and which observation applies with all force to the present case.

14. For the reasons aforementioned the order impugned dated 3.7.2009 passed by the learned Sub-Judge-1, Bhagalpur in Misc. Case No.2 of 2008 cannot be upheld and is accordingly set aside. The delay stands condoned and the matter is remitted back to the court below for hearing and disposal of the miscellaneous case on merits in accordance with law and after hearing the contesting parties. Since the miscellaneous case arises from an arbitration agreement the court below would be well advised for an expeditious disposal of the case without giving any undue adjournment to either of the parties.

15. This appeal is allowed. There shall be no order as to costs.