

(2012) 10 BOM CK 0207

In the Bombay High Court

Case No : Notice of Motion No. 3054 of 2011 in Appeal (L) No. 390 of 2011 in Arbitration Petition No. 153 of 2008

Oil and Natural Gas Corporation Ltd.

APPELLANT

Vs

M/s. Dinamic Corporation

RESPONDENT

Date of Decision : 12-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 13, 16, 17, 2(e)
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (2013) 2 BomCR 362 : (2013) 1 MhLj 94

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : S.A. Bhalwal with Mr. P.N. Singh and Ms. Hemali K. instructed by Vyas and Bhalwal, for the Appellant; Pravin Samdani, Amicus Curiae Present with Advocate Mr. Gauraj Shah, for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.—The present Motion is for condoning a delay of sixty days in filing an Appeal against an order of a learned Single Judge arising out of a Petition for setting aside an arbitral Award u/s 34 of the Arbitration and Conciliation Act, 1996. When the Motion came up on Board for hearing, Counsel appearing on behalf of the Applicant relied on a judgment of a Single Judge of this Court in Oil and Natural Gas Corporation Ltd. Vs. Jagson Intl. Ltd., and urged that since the Arbitration and Conciliation Act, 1996 has not prescribed any limitation for filing an appeal u/s 37(1)(b) against an order setting aside or refusing to set aside an arbitral Award u/s 34, such an appeal would not be governed by the Limitation Act, 1963. On the basis of the judgment of the learned Single Judge in ONGC vs. Jagson International Ltd. it was sought to be urged that an appeal could be filed within a reasonable period of time. The Respondents have not appeared despite service of notice and an order of substituted service. Since the issue raises a matter of some importance, we requested Mr. Pravin Samdani, learned Senior Counsel to assist the Court as amicus curiae. Before we deal with the issue which arises in these proceedings, it

will be necessary, at the outset, to notice the judgment of the learned Single Judge in Oil and Natural Gas Corporation Ltd. vs. Jagson International Ltd. (supra). In that case, an appeal was filed u/s 37 of the Arbitration and Conciliation Act, 1996 against an order of the Arbitral Tribunal u/s 17. An objection was raised to the maintainability of the appeal. The learned Single Judge held that Parliament was cognizant of the necessity of providing a period of limitation and whenever it found it necessary to so provide, specific provisions were made in the Act such as in Section 34 as well as in Sections 11, 13 and 16. However, the Single Judge held that while providing an appeal u/s 37, Parliament did not provide any period of limitation. Moreover, the Single Judge held that there was no provision in the Limitation Act, 1963 for providing a period of limitation for filing an appeal u/s 37. The Single Judge held as follows:

Perusal of Section 37 also shows that there is no period of limitation laid down for filing an appeal under that provision. Perusal of the provision of Section 34 shows that there is a clear provision made for filing an application under that provision for challenging an award made by the Arbitral Tribunal. Therefore, when the Legislature provided the remedy against the arbitral award, it also provided a period of limitation for making an application u/s 34. Perusal of the provisions of Section 11, Section 13 and Section 16 show that the Legislature has mentioned a period of time for taking various steps. Therefore, it is clear that while the Legislature was aware of the necessity of providing a period of limitation and wherever the Legislature thought that providing a period of limitation is necessary it has been so provided for by various provisions of the Act. However, while providing an appeal u/s 37, the Legislature has chosen not to prescribe any period of limitation. In this view of the matter, therefore, in my opinion, the Court will not be justified in importing the period of limitation provided by Section 34 for filing an application and making it applicable to an appeal filed u/s 37. Sub-section 1 of Section 43 makes the provisions of Limitation Act applicable to arbitration as it applies to proceedings in Court. Perusal of the provisions of the Limitation Act also shows that the Limitation Act does not provide for any period of limitation for filing an appeal u/s 37. It is second Division of the Schedule to the Limitation Act which deals with appeal. Perusal of those provisions show that Articles 114 and 115 lays down period for filing an appeal under the Code of Criminal Procedure and Article 116 provides for limitation for filing an appeal under the CPC and Article 117 provides period of limitation for filing an appeal from decree or order passed by the High Court to the same court. Thus in the Limitation Act there is no provision made prescribing the period of limitation for filing an appeal u/s 37.

2. Section 37 of the Arbitration and Conciliation Act, 1996 provides as follows :

Section 37. Appealable orders. --(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) granting or refusing to grant any measure u/s 9:

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure u/s 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or taken away any right to appeal to the Supreme Court.

3. Under Clause (b) of Sub-section (1) of Section 37 an appeal lies from an order setting aside or refusing to set aside an arbitral award u/s 34, to the Court. The expression "Court" is defined in Section 2(e) to mean the Principal Civil Court of original jurisdiction in a district and to include the High Court in the exercise of its ordinary civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit, but so as not to include any civil Court of a grade inferior to such Principal Civil Court, or any Court of Small Causes. Section 43(1) provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court.

4. Section 29(2) of the Limitation Act, 1963 stipulates that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if the said period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any such appeal or application by any special or local law, the provisions contained in Sections 4 to 24 shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law.

5. In Consolidated Engg. Enterprises Vs. Principal Secy. Irrigation Deptt. and Others, the issues which fell for consideration before the Supreme Court included whether the Limitation Act, 1963 is inapplicable to a proceeding in a Court under the Arbitration and Conciliation Act, 1996. In a concurring judgment Mr. Justice R.V. Raveendran observed that if the Limitation Act is inapplicable to Court proceedings under the Act, there will be no limitation for filing an appeal u/s 37. Conversely if the Limitation Act is applicable, the period of limitation for appeals filed u/s 37 will be governed by Article 117 of the Schedule to the Limitation Act. The judgment took note of the well settled principle of law that the words "appeals under CPC 1908" occurring in Article 116 of the Schedule to the Limitation Act refer not only to appeals preferred under the CPC but also to appeals where the procedure for filing such appeals and the powers of the Court for dealing with such appeals are governed by the Code. Explaining the import of Section 29(2), the concurring judgment holds thus:

The object of Section 29(2) is to ensure that the principles contained in Sections

4 to 24 of the Limitation Act apply to suits, appeals and applications filed in a court under special or local laws also, even if it prescribes a period of limitation different from what is prescribed in the Limitation Act, except to the extent of express exclusion of the application of any or all of those provisions.

The Supreme Court held that the purpose of Section 43(1) of the Arbitration and Conciliation Act, 1996 is not to make the Limitation Act inapplicable to proceedings before the Court but on the other hand to make the Limitation Act applicable to arbitrations. The Supreme court has, hence laid down that the provisions of the Limitation Act, 1963 apply to all proceedings under the Arbitration and Conciliation Act, 1996 both in Court and in arbitration except to the extent expressly excluded by the provisions of the latter Act.

6. In the judgment in I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., the Supreme Court held that an appeal u/s 37(1) is not to any designated person but to a civil court and in such a situation the proceedings before the Court will have to be controlled by the provisions of the Code of Civil Procedure, 1908. The conferment of appellate power on the civil court under Part I of the Arbitration and Conciliation Act, 1996 would, it was held, also attract the provisions of the Code of Civil Procedure, 1908.

7. With great respect, the judgment of the learned Single Judge in Oil and Natural Gas Corporation Ltd. vs. Jagson International Ltd. (supra) proceeds on an erroneous premise when the Court holds that since Parliament had provided a specified period of limitation in respect of certain provisions of the Arbitration and Conciliation Act, 1996, no limitation would be applicable in respect of those provisions where a period of limitation is not specifically prescribed. The view of the learned Single Judge overlooks both the provisions of Section 43(1) of the Arbitration and Conciliation Act, 1996 and Section 29 of the Limitation Act, 1963. Section 43(1) which lays down that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court has been specifically held to mean that the Limitation Act, 1963 would apply to all proceedings under the Act of 1996 both in Court and in arbitration except to the extent excluded by the latter Act. The learned Single Judge, with respect, overlooked the fundamental position that if an appeal is provided by the Arbitration and Conciliation Act, 1996 to a Court that will be governed by the Code of Civil Procedure, 1908.

8. Article 116 of the Schedule to the Limitation Act, 1963 provides a period of limitation of 90 days when an appeal is under the Code of Civil Procedure, 1908 to the High Court from any decree or order and a period of limitation of 30 days when an appeal is to any other Court from any decree or order. Under Article 117 when the decree or order is of the High Court and an appeal is filed to the same Court, the period of limitation is of 30 days. The expression "order" for the purpose of Articles 116 and 117 must receive a broad construction. In a judgment of the Constitution Bench of the Supreme Court in Jaswant Sugar Mills Ltd., Meerut Vs. Lakshmichand and Others, the Supreme Court while construing the expression "order" for the purposes of Article 136 observed that a

determination or an order must be judicial or quasi-judicial. A determination is an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The Supreme Court observed that the expression "order" must also have a similar meaning though it does not operate to end the dispute. A Division Bench of the Allahabad High Court in the State of U.P. And another v. Mahendra Pratap Timamah and others, 1956 Allahabad 585 has similarly held that the term "order" is general and comprehensive enough to include all kinds of orders including a "formal order". This observation was made in the context of the provisions of the Limitation Act, 1908. The same view has been taken by a Division Bench of the Andhra Pradesh High Court in Divisional Forest Officer vs. District Officer & Ors. AIR 2002 AP 224 in holding that the term "order" in legal parlance would always indicate some expression of opinion which is to be carried out or enforced.

9. For these reasons, we are of the view that the judgment of the learned Single Judge in Oil and Natural Gas Corporation Ltd., vs. Jagson International Ltd. (supra) does not reflect the correct position in law. The Appeal filed by the Applicant against an order of the learned Single Judge allowing a Petition u/s 34 and setting aside an arbitral Award would be governed by Article 117 of the Schedule to the Limitation Act. Though the appeal was filed beyond the period of limitation prescribed, we find from the Affidavit in support that sufficient cause has been shown for condoning the delay having regard to the fact that at the relevant time the judgment of the learned Single Judge in Oil and Natural Gas Corporation Ltd., vs. Jagson International Ltd. (supra) held the field.

10. The Motion is made absolute in terms of prayer clause (a). Before concluding, the Court would like to express its appreciation for the able assistance rendered by the learned Amicus Curiae.