

(2016) 04 BOM CK 0180

In the Bombay High Court

Case No : Notice of Motion (L) No. 80 of 2016 In Appeal No. 569 of 2014 In Arbitration Petition No. 380 of 2005

Padmsey Khimji Chheda

APPELLANT

Vs

Kesarben Laxmichand Dedhia

RESPONDENT

Date of Decision : 27-04-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Limitation Act, 1963 — Section 5

Citation : (2017) 1 BCR 497 : (2016) 5 MhLJ 429 : (2017) 2 RAJ 320

Hon'ble Judges : Anoop V. Mohta and A.A. Sayed, JJ.

Bench : Division Bench

Advocate : Mr. Bhavin H. Gada a/w Ms. Yogini Gada, Mr. N.B. Merchant i/b M/s. Harakchand and Co, for the Applicants; Mr. Gaurav Joshi, Senior Advocate a/w Mr. Sankalp Anantwar, Mr. Rishabh Vora i/b M/s. Hariani and Co, for the Respondent Nos. 1(A) to 1(F)

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—Applicants/Appellants have taken out this Notice of Motion dated 6 January 2016 for a condonation of delay of 3014 days in filing Appeal (Lodging) No. 569 of 2014, against the Judgment and order dated 14 November 2005 passed in Arbitration Petition No. 380 of 2005.

2. The prayers are as under:

"(a) that this Hon'ble Court be pleased to condone the delay of 3014 days in filing the present Appeal which delay has occurred as following manner:

(i) Delay of 360 days in filing the Appeal No.210 of 2008 (lodging No. 1056 of 2006) in this Hon'ble Court from Impugned Order dated 14th November 2005 in Arbitration Petition No. 380 of 2005 which Appeal was dispose off as withdrawn with liberty on 1st April 2008.

(ii) Delay of 467 days in prosecuting the Appeal No. 210 of 2008 which was filed

on 19.12.2006 before Division Bench of this Hon'ble Court and withdrawn with liberty on 1st April, 2008.

(iii) Delay of 2187 days in prosecuting the following proceedings:

(a) the Chamber Summons No. 1649 of 2006 in Arbitration Petition No. 66 of 1991 for setting aside the order of abatement dated 13th September, 2005 and 26th September, 2005 disposing off the Petition No.66 of 1991 which Chamber Summons was dispose off as dismissed on 15th February, 2013.

(b) the Appeal No. 195 of 2013 filed before Division Bench of this Hon'ble Court to set aside the order dated 15th February, 2013 which Appeal was dispose off on 22nd July, 2013.

(c) SLP No. 15519 of 2013 filed in Supreme Court of India to set aside the order dated 15th February, 2013 and 22nd July, 2013 which was dismissed on 11th November, 2013.

(d) Two Review Petitions No. 327 of 2014 and 328 of 2014 filed in Supreme Court of India which were dismissed on 25th February, 2014."

3. The Notice of Motion and averments made in the supporting affidavit with documents, are resisted by the Respondents by filing reply dated 16 February 2016.

4. The case of the Appellants is as under:-

On 31 May 1984, Memorandum of Understanding (for short, "MOU") was executed between Ravji Khimji Chheda and Shamji Khimji Chheda agreeing to sell 9 Lac sq.ft. area on a piece of land situated at Peston Sagar, Chembur, bearing old Survey No.316 and New Survey No.320 admeasuring 140 acres and 12? gunthas or thereabouts in favour of Keshavji Palan Shah and Laxmichand Liladhar Shah (Original Respondent Nos. 1 and 2). The MOU contain terms and conditions to be complied by original Respondent Nos.1 and 2. The said MOU was witnessed by Visanji Khimji Chheda, Appellant Nos.1 and 2. Ravji Khimji Chheda, Shamji Khimji Chheda and Visanji Khimji Chheda, Appellant Nos.1 and 2 are hereinafter collectively referred to as "the Brothers".

5. On 30 June 1984, a letter was executed by Appellant Nos.1 and 2 confirming the execution of the said MOU. On 21 September 1984, a receipt acknowledging payment of Rs. 5,00,000/- was received by the Brothers from original Respondent Nos.1 and 2. On 18 August 1986, Supplemental Memorandum of Understanding ("Supplemental MOU") was executed by the Brothers in favour of Original Respondent Nos.1 and 2 whereby, certain terms of the said MOU were amended and/or modified.

6. On 2 January 1989, disputes and differences arose between the Brothers and Original Respondent Nos.1 and 2. The said disputes and differences were referred to arbitration, consisting of two Arbitrators viz, Mr. Ravilal Sanghoi and Mr. Shantilal Meckoni (the Arbitrators). On 25 April 1989, an Award was passed

and published by the Arbitrators.

7. On 31 May 1990, a letter issued by the Advocates of the Brothers to Respondent Nos.1 and 2, inter alia, stating that the award travels beyond the scope of the reference and instead of determining the breaches under the MOU and Supplemental MOU, the Award tries to rewrite terms between the parties and actually stipulates conditions, which were not agreed to between the parties and/or requires the parties to act as per the contract drawn-up by the Arbitrators. It was also stated that the MOU was not in nature of MOU for Sale but, in the nature of development rights. It was also stated that Original Respondent Nos.1 and 2 have not complied with their obligations under the MOU and the Supplemental MOU and therefore, the MOU and the Supplemental MOU were terminated.

8. On 14 June 1990, reply was filed by original Respondent Nos.1 and 2 to the Brothers' Advocates' letter. None of the contentions raised by them, were dealt with in the letter according to the Brothers.

9. On 1 February 1991, a letter given to Messrs Singaporla & Dalvi by Advocate of Shri Shantilal Nemji Mackoni (one of the Arbitrators), inter alia, stating that their client the Arbitrator Mr. Meckoni, was not aware that the Award was made and declared by the Arbitrators and the same was filed in this Court. It was also stated that the Arbitrator (Mr. Meckoni) denies that the Award was filed under his instructions. Moreover, it was stated that no instructions were given by their client Mr. Meckoni nor has their client ever met the Advocates or even appointed them in the matter. It is also that their client Mr. Meckoni has not declared any Affidavit relating to the filing of the Award and/or service of the copy of the Award upon the parties to the Award and that the Affidavits are a fraud.

10. On 1 April 1991, the Brothers filed Petition No.66 of 1991 to set aside the Award. On 13 September 2005, an order was passed by this Court by observing that the Petition in respect of Ravji Khimji Chheda, Shamji Khimji Chheda and Visanji Khimji Chheda stands abated. On 23 September 2005, the heirs and legal representatives of the said Ravji, Khimji and Visanji preferred Chamber Summons No.1245 of 2005 for setting aside order dated 13 September 2005 for abatement and for bringing the heirs of Ravji, Khimji, Visanji and of original Respondent No.2 on record.

11. On 26 September 2005, an order passed by this Court disposing of the Petition on the ground that the Petition stood abated as a whole. On 17 October 2005, original Respondent Nos.1 and 2 filed Arbitration Petition No.380 of 2005 in this Court praying that Award dated 25 April 1989 be made rule of the Court. On 14 November 2005, the Arbitration Petition was decreed on the ground that the Petition to set aside the Award was abated.

12. On 14 November 2005, the heirs and legal representatives of Ravji, Khimji and Visanji preferred Appeal No.1058 of 2005 for setting aside order dated 26 September 2005. Appellant Nos.1 and 2 preferred Appeal No.1057 of 2005

against order dated 26 September 2005.

13. On 29 November 2005, both the above appeals were disposed off and this Court was pleased to observe in its orders that (a) the rights of the surviving parties were inseparable with the rights of the deceased parties, (b) if the learned Chamber Judge is pleased to grant the Chamber Summons and the abatement is set aside, in that event, order dated 26 September 2005 shall be rendered ineffective and the Petition shall be restored to file for fresh consideration in accordance with law.

14. On 19 December 2006, the heirs and legal representatives of Ravji, Khimji and Visanji, Appellant Nos.1 and 2 preferred Appeal No.1056 of 2006 against order dated 14 November 2005 passed in Arbitration Petition No.380 of 2005. On 21 December 2005, the said Chamber Summons was withdrawn with liberty.

15. On 27 December 2006, Appellant Nos.1 and 2 heirs and legal representatives of Ravji, Khimji and Visanji filed Chamber Summons No.1649 of 2006, in Arbitration Petition No. 66 of 1991. By this Chamber Summons filed under Order 22, Rule 9 of the Code of Civil Procedure, 1908 (for short, CPC), Applicants sought to set aside abatement of Arbitration Petition dismissed by orders dated 13 September 2005 and 26 September 2005 and also sought condonation of delay of 676 days in taking out Chamber Summons for bringing the heirs and legal representatives of deceased Petitioner No.2, 1707 days delay in taking out Chamber Summons for bringing the heirs and legal representatives of deceased Petitioner No.3 and 3200 days delay in taking out Chamber Summons for bringing the heirs and legal representatives of deceased Petitioner No.1 and 284 days delay in taking out Chamber Summons for bringing on record the heirs and legal representatives of deceased Respondent No.2. On 1 April 2008, the heirs and legal representatives of Ravji, Khimji and Visanji, Appellant Nos.1 and 2 withdrew the Appeal No.1056 of 2006, with liberty to approach the Court again in case need arises in the matter.

16. On 15 February 2013, detailed order was passed dismissing the Chamber Summons, by holding that "In my view, as the record indicates that the applicants have not come to this court with clean hand and have suppressed true and correct facts, this court shall not exercise its discretionary power and shall not take any lenient view in the matter.... In my view, no case is made out by the applicants for setting aside abatement order passed by this court. Chamber summons is therefore, dismissed. Order of abatement of the petition is restored.... In view of the dismissal of the Chamber Summons and in view of the dismissal of the Arbitration Petition, it is clarified that the decree already passed by this Court would stand revived. There shall be no order as to costs."

17. In March 2013, the heirs and legal representatives of Ravji, Khimji and Visanji, Appellant Nos.1 and 2 preferred an Appeal against order dated 15 February 2013 before this Court. On 22 July 2013, a Division Bench of this Court held that the Appeal against the Single Judge's order dismissing the Chamber

Summons was not maintainable in view of Section 39 of the Arbitration Act, 1940. It is observed that :

"An order refusing to set aside an award is an order passed by the Court upon a consideration by the court of the challenges to the arbitral award. Abatement of a proceeding results as an operation of law. Where the proceeding has abated, this Court has no occasion to exercise the jurisdiction to set aside or to refuse to set aside the award. There is hence no merit in the submissions.

For these reasons, we hold that the Appeal in the present case is not maintainable."

18. On 11 November 2013, Special Leave Petition No.3540010 35401 preferred by the heirs and legal representatives of Ravji, Khimji and Visanji, Appellant Nos.1 and 2 was dismissed. On 25 February 2013, the Review Petition preferred challenging the dismissal of the said Special Leave Petition was dismissed. On 28 March 2014, Appellant Nos.1 and 2 filed Appeal (L) No.195 of 2014.

19. We have read the affidavit and counter affidavit and various orders as relied upon and noted the submissions of the learned counsel appearing for the parties.

20. Admittedly, there is delay of 3014 days in filing the Appeal. The Appeal under Section 37 is filed on 28 March 2014. However, the Notice of Motion is filed on 6 January 2016, for condonation of delay. The case of the Appellants is reproduced, in paragraph 17, as under:

"17. I say that this, coupled with the aforesaid facts and circumstances, constitutes sufficient cause. For all these reasons, the Appellants say and submit that they have made out sufficient cause for condonation of delay of 3014 days in filing the present Appeal which delay has occurred as follows in the following manner:

(i) Delay of 360 days in filing the Appeal No.210 of 2008 (lodging No. 1056 of 2006) in this Hon"ble Court from Impugned Order dated 14th November 2005 in Arbitration Petition No. 380 of 2005 which Appeal was dispose off as withdrawn with liberty on 1st April 2008.

(ii) Delay of 467 days in prosecuting the Appeal No. 210 of 2008 which was filed on 19.12.2006 before Division Bench of this Hon"ble Court and withdrawn with liberty on 1st April, 2008.

(iii) Delay of 2187 days in prosecuting the following proceedings:

(a) the Chamber Summons No. 1649 of 2006 in Arbitration Petition No. 66 of 1991 for setting aside the order of abatement dated 13th September, 2005 and 26th September, 2005 disposing off the Petition No.66 of 1991 which Chamber Summons was dispose off as dismissed on 15th February, 2013.

(b) the Appeal No. 195 of 2013 filed before Division Bench of this Hon"ble Court to set aside the order dated 15th February, 2013 which Appeal was dispose off

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(d) Two Review Petitions No. 327 of 2014 and 328 of 2014 filed in Supreme Court of India which were dismissed on 25th February, 2014."

All the above proceedings were preferred by the Appellants out of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under particular circumstances as mentioned herein above. It is submitted that the Appellants herein took sufficient care so far as circumstances demanded and there was absence of negligence. The Appellants submit that all the above proceedings were preferred with due care and attention. The Appellants state that none of the prior proceedings were intentionally preferred with a view to delay the proceedings or harass any of the Respondents. In fact the Appellants state that it was in its interest that it preferred the appropriate proceedings to get reliefs and justice in the matter. It is, therefore, submitted that the Appellants preferred the above proceedings in good faith and with due diligence. I say that in the interest of justice and fair play as mentioned herein the delay of 3014 days in filing the present Appeal be condoned."

21. Reliance was also placed on ONGC v. Jagson International Limited, 2005(3) Mh.L.J. 1141. The Division Bench of this Court in ONGC v. Dinamic Corporation, 2013 (1) Mh.L.J. 94, has reversed the Judgment Jagson International (supra) and confirmed the position with regard to the intra Court Appeal, even under Section 37 of the Arbitration and Conciliation Act, 1996 from the order passed by the learned Single Judge to the Division Bench and reinforced the principle of Article 117 of the Limitation Act, thereby the Original position of 30 days limitation in filing the intra Court Appeal, has been brought into force. This law of limitation in this regard was settled. The Respondents, in the affidavit, apart from resistance of delay on the grounds so raised in the reply, opposed the same stating that there is no sufficient cause and/or reason made out for condonation of delay. Now, the limitation of filing such Arbitration Appeal will be governed by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

22. The ignorance of law and the Division Bench Judgment in Dinamic Corporation (supra), itself cannot be a reason for condonation of delay in the matters. The issue of ignorance of law, specifically about the limitation in the intra Court Appeal, ought not to have been overlooked. The case of negligence and deliberate inaction, therefore, as sought to be contended by the Respondents, is made out. There is no justification for the delay of 3014 days (more than 8 years) in filing the present Appeal.

23. The present Notice of Motion is also taken out by the Appellants in January 2016, after two years of filing of the Appeal. The Appellants therefore, never

acted diligently and bonafidely in the matter of Arbitration Appeal of this nature. There is force in the contention of the Respondents that the grounds so raised are devoid of merits, as no detailed reasons given for the delay so occurred from time to time. It is not the question of seeking even day explanation, but in the present case, the delay is of more than 8 years, without justification and/or reasons, which in our view, are not sufficient to condone the delay.

24. This is also in the background that the initial challenge so raised by the Appellants have already been rejected by the High Court and the Apex Court. Chamber Summons No. 1245 of 2005 in the Arbitration Petition for setting aside the abatement was taken out. There was also delay of 2747 days in filing the same. The said Chamber Summons was withdrawn with liberty. There was no order of condonation of delay for the same. The issue of delay remained as it is. The next Chamber Summons is taken out after 8 years. The Appeal (L) No. 1056 of 2006 against order dated 14 November 2005 was also filed after a gross delay of 360 days. The Appeal was also withdrawn on 1 April 2008, with liberty to approach the Court again. The delay was not condoned there also. The issue of delay remained as it is. Order dated 29 November 2005, whereby the rights of surviving Petitioners was held to be inseparable from the rights of the deceased Petitioners and therefore, it was held that the Petition had abated in its entirety.

25. Chamber Summons No. 1649 of 2006 was filed on 18 December 2006 after lapse of one year for seeking condonation of delay of 676 days, 1707 days and 3200 days for filing and pursuing the Chamber Summons for bringing Legal heirs of the Petitioner-Appellant Nos. 2, 3 and 1 respectively. The learned Judge, by reasoned order on 15 February 2013 dismissed the Chamber Summons by rejecting the contention that the Appellants were not aware of the pending proceedings in the Court. It is also observed that the plea of Appellants were inconsistent and contradictory about the date of knowledge of the Appellants with proceedings in the Court. The order passed by the learned Judge was challenged before the Division Bench. On 22 July 2013, that was dismissed as not maintainable. The Appellants, therefore, approached the Hon'ble Supreme Court by way of SLP. The said SLP was also rejected on 11 November 2013. The Review against the same, was also dismissed on 25 February 2014.

26. Taking overall view of the matter, therefore, the submission of the Appellants revolving around the liberty granted by the Court in order dated 1 April 2008 is of no assistance. The Appellants, are not entitled for the benefits of the said liberty, in the facts and circumstances of the case, as the delay so caused was not bona fide and was deliberate. Order dated 14 November 2005, therefore has attained finality. The Appellants' challenge in the Appeal along with this Notice of Motion for condonation of delay stating it to be within time and/or not barred by law of limitation, is unacceptable.

27. The aspect of delay, as dealt with by the learned Judge in detail and as the same reasons are also raised in the present Appeal for condonation of delay, in our view, cannot be reopened. The delay issue has attained finality, specifically in

the Arbitration proceedings like this. No sufficient case is made out. The law of limitation is settled. This is not the case of reasonable delay, but the delay so made and the grounds so raised in the present case, in our view, are not liable to be condoned. The liberty to withdraw the Appeal, that itself cannot be the reason to hold that the delay caused earlier, got condoned. The Appellants all the time are required to explain the delay, which was recorded by the earlier orders and even otherwise, unable to justify. The change of law and no knowledge of Judgment, that itself cannot be the reason to condone the delay. The delay in filing the earlier Appeal after 360 days, remained unexplained. The explanation given are unacceptable. The mandate of filing Arbitration Appeal in time and/or within a reasonable time, just cannot be overlooked.

28. Considering the totality of the matter, therefore, no case is made out to condone 3014 days delay in filing the Appeal. Notice of Motion (L) No.80 of 2016 is accordingly dismissed. There shall be no order as to costs.

29. In the result, Appeal No. 569 of 2014 is also dismissed.

30. No costs.