

(2019) 05 SHI CK 0074

In the High Court Of Himachal Pradesh

Case No : Original Miscellaneous Petition No. 646 Of 2018 Original Miscellaneous Petition (M) No. 3 Of 2017

Ram Lal Thakur

APPELLANT

Vs

Executive Engineer HPPWD

RESPONDENT

Date of Decision : 16-05-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 80, 151
Arbitration And Conciliation Act, 1996 — Section 21, 34, 34(3), 34(5), 34(6)
Arbitration And Conciliation (Amendment) Act, 2015 — Section 13(6), 22, 26
Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 — Section 14

Citation : (2019) 05 SHI CK 0074

Hon'ble Judges : Ajay Mohan Goel, J

Bench : Single Bench

Advocate : I.S. Chandel, Hemant Vaid, Sanjeev Sood

Final Decision : Disposed Off

Judgement

Ajay Mohan Goel, J

1. By way of this application, filed under Section 151 of the Civil Procedure Code, a prayer has been made for revival of OMP(M) No. 3 of 2017, by recalling the order dated 02.03.2017. Vide order dated 02.03.2017, recalling of which has been sought, OMP(M) No.3 of 2017 was disposed of in the following terms:-

"Undisputedly, statutory provisions have not been complied with. No notice stands served upon the State prior to the filing of the present petition. As such, present petition is permitted to be withdrawn, reserving liberty to file afresh, in accordance with law. Limitation for such period for which the present petition came to be pursued shall not come in the way of the present petitioner.

With the aforesaid observations, present petition stands disposed of, so also, pending application(s), if any."

2. Learned counsel for the applicant has submitted that order dated 02.03.2017, needs to be recalled because while passing the said order, this Court has erred in not appreciating that non issuance of Notice under sub-section (5) of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 1996 Act), was not fatal as arbitration proceedings stood initiated before the said sub-clause was inserted vide an amendment, which came into force w.e.f. 23.10.2015 and further for the reason that Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 2015 Act), which came into force with w.e.f. 23.10.2015, clearly contemplated that nothing contained in the said Act which apply to arbitral proceedings commenced, in accordance with the provisions of Section 21 of the Principal Act before commencement of the said Act, unless parties otherwise agreed.

3. Having heard learned counsel for the parties and having gone through the provisions of sub-section (5) of Section 34 of the 1996 Act as also Section 22 of the 2015 Act, in my considered view, there is force in the contention of the learned counsel for the applicant.

4. It is not in dispute that in the present case, arbitration proceedings stood commenced before the learned Arbitrator on 18.10.2014 i.e. before coming into force of the 2015 Act. Though the award is dated 06.04.2016, meaning thereby that it was announced after the 2015 Act came into force, however the fact of the matter still remains that in view of the specific language of Section 26 of the 2015 Act, said Act was not to apply to the said arbitral proceedings, as the same stood commenced in accordance with the provisions of Section 21 of the Principal Act, and there is nothing on record to demonstrate that after the 2015 Act came into force, parties had agreed that henceforth the arbitration proceedings shall be governed as per the provisions of 2015 Act.

5. Besides this, even otherwise, said issue is squarely covered by the judgment of Hon'ble Supreme Court in State of Bihar and others vs. Bihar Rajya Bhumi Vikas Bank Samiti, (2018) 9 SCC 472, in which the Hon'ble Supreme Court has held that the provision of sub-section (5) of Section 34 of the 1996 Act, as it stands post amendment cannot be considered as mandatory. The relevant paras of the said judgment are quoted hereinbelow:-

"24. Shri Tripathi then argued that Section 34(5) is independent of Section 34(6) and is a mandatory requirement of law by itself. There are two answers to this. The first is that sub-section (6) refers to the date on which the notice referred to in sub-section (5) is served upon the other party. This is for the reason that an anterior date to that of filing the application is to be the starting point of the period of one year referred to in Section 34(6). The express language of Section 34(6), therefore, militates against this submission of Shri Tripathi. Secondly, even if sub-section (5) be construed to be a provision independent of sub-section (6), the same consequence in law is the result -namely, that there is no consequence provided if such prior notice is not issued. This submission must therefore fail.

25. We come now to some of the High Court judgments. The High Courts of Patna, Bihar *Rajya Bhumi Vikas Bank Samiti v. State of Bihar*, 2016 SCC OnLine Pat 10104, Kerala, *Shamsudeen v. Shreeram Transport Finance Co. Ltd.*, 2016 SCC OnLine Ker 23728, Himachal Pradesh, *Madhava Hytech Engineers (P) Ltd. v. Executive Engineers*, 2017 SCC OnLine HP 2212, Delhi, *Machine Tool India Ltd. v. Splendor Buildwell (P) Ltd.*, 2018 SCC OnLine Del 9551 and Gauhati, *Union of India v. Durga Krishna Store (P) Ltd.*, 2018 SCC OnLine Gau 907, have all taken the view that Section 34(5) is mandatory in nature. What is strongly relied upon is the object sought to be achieved by the provision together with the mandatory nature of the language used in Section 34(5). Equally, analogies with Section 80 CPC have been drawn to reach the same result. On the other hand, in *Global Aviation Services (P) Ltd. v. Airport Authority of India*, 2018 SCC OnLine Bom 233, the Bombay High Court, in answering Question 4 posed by it, held, following some of our judgments, that the provision is directory, largely because no consequence has been provided for breach of the time-limit specified. When faced with the argument that the object of the provision would be rendered otiose if it were to be construed as directory, the learned Single Judge of the Bombay High Court held as under: (SCC OnLine Bom para 133).

"133. Insofar as the submission of the learned counsel for the respondent that if Section 34(5) is considered as directory, the entire purpose of the amendments would be rendered otiose is concerned, in my considered view, there is no merit in this submission made by the learned counsel for the respondent. Since there is no consequence provided in the said provision in case of non-compliance thereof, the said provision cannot be considered as mandatory. The purpose of avoiding any delay in proceeding with the matter expeditiously is already served by insertion of appropriate rule in the Bombay High Court (Original Side) Rules. The Court can always direct the petitioner to issue notice along with papers and proceedings upon other party before the matter is heard by the Court for admission as well as for final hearing. The vested rights of a party to challenge an award under Section 34 cannot be taken away for non-compliance of issuance of prior notice before filing of the arbitration petition."

The aforesaid judgment has been followed by recent judgments of the High Court of Bombay, *Maharashtra State Road Development Corpn. Ltd. v. Simplex Gayatri Consortium*, 2018 SCC OnLine Bom 805 and Calcutta, *Srei Infrastructure Finance Ltd. v. Candor Gurgaon Two Developers and Projects (P) Ltd.*, 2018 SCC OnLine Cal 5606.

26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application

within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act."

6. In view of the discussion held hereinabove, this application is allowed and order dated 02.03.2017 is recalled and OMP(M) No.3 of 2017 is ordered to be restored to its original number and position.

7. The application stands disposed of in the aforesaid terms.