

(2018) 07 BOM CK 0143

In the Bombay High Court

Case No : Arbitration Appeal No.5 Of 2017

Ramdeobaba Charitable Society, Through its President,
Laxminarayan Jainarayan Rathi

APPELLANT

Vs

Chief Officer, Narkhed Municipal Council Narkhed, Tq.
Narkhed, Distt. Nagpur

RESPONDENT

Date of Decision : 27-07-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 3, 34, 34(3)
Limitation Act, 1963 — Section 4, 5, 14, 29(2)
Maharashtra Municipal Councils, Nagar Panchayats And Industrial Townships Act, 1965
— Section 77, 77(1)(b)

Citation : (2018) 07 BOM CK 0143

Hon'ble Judges : S.B. SHUKRE, J

Bench : Single Bench

Advocate : Firdos Mirza, Anand Deshpande, P.A. Markandeywar

Final Decision : Allowed

Judgement

1. Heard.Â Rule.Â Rule made returnable forthwith.
2. Heard finally by consent.
3. This petition involves a very short point which can be determined on the basis of the settled legal position.Â An application under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, â??Arbitration Act?) challenging the award passed by the Arbitral Tribunal, which was a general body of Municipal Council of Narkhed passed on 13.3.2013 was filed on 10.6.2014.Â It was stated to be in compliance with the limitation prescribed under Section 34, subÂSection 3, which is of 90 days initially and a further period of 30 days, if granted by the Court, from the date on which the signed copy of the award is delivered or received by the party.Â When objection

of bar of limitation was raised by the petitioner, it was rejected by learned Principal District Judge by condoning the delay by passing an order dated 22nd September, 2016 which is impugned herein.Â By the same order learned Principal District Judge remanded the dispute to the Arbitral Tribunal which was the general body of Municipal Council of Narkhed for a decision afresh.

4. Initially, as the hearing began, upon the doubt expressed by this Court on applicability of Section 5 of the Limitation Act to proceedings filed under Section 34 of the Arbitration Act, learned counsel for the respondent responded in saying that he would not dispute the proposition of the law that Section 5 of the Limitation Act has no application, but what he would contend is that the limitation period starts from the day on which the copy of the signed award is delivered or served upon the party and since the award under challenge was not signed by all the members, and it is not signed even till date, the limitation period contemplated under subÂ?section (3) of Section 34 never started to run.

5. Shri F.T. Mirza, learned counsel for the petitioner, however, submits that when the true copy of the award was served upon the petitioner by the respondent himself, verifying the copy as the true copy of the original award, now it does not lie in the mouth of the respondent to say that the award was not duly signed.

6. It is not in dispute that the award was served upon the petitioner by the respondent himself vide his communication dated 6.4.2013.Â TheÂ copy of the award annexed to this communication bears an endorsement to the effect that it is a true copy of the original award and it is signed by the Chief Officer i.e. respondent.Â So, learned counsel for the petitioner is right in his submission that now, the clock cannot be turned back and submitted by the respondent that the award was not duly signed by the Arbitral Tribunal.Â If the respondent is permitted to say it now, it would amount to accepting the fact that the respondent earlier misled the petitioner by falsely stating in writing that he had verified the copy of award for it's correctness from the original award. The respondent, however, does not give any explanation about his sending the communication dated 6.4.2013 along with a copy of the award, certified by him to be a true copy of the original award.Â It is not his case that the copy of the award certified by him

as a true copy was on account of a mistaken conception of the reality.

7. Even otherwise, being a Chief Officer of the Municipal Council the respondent functions and performs duty, subject to the control, direction and

supervision of the President and the elected body of the Councilors. Therefore, it is his duty to not only render secretarial assistance to the general

body acting as Arbitral Tribunal, but also obtain signatures of all the Councilors who were party to the resolution by which the award was passed in

the present case, if they had not signed it. The powers and duties of the Chief Officer are spelt out in various provisions of the Maharashtra Municipal

Councils, Nagar Panchayats And Industrial Townships Act, 1965 and in particular, Section 77 of the Act. Under subsection (1) clause (b) of Section

77, a duty has been imposed upon the Chief Officer to give effect to all the decisions or resolutions of the Council. This duty would require a Chief

Officer to take immediate steps for giving effect to the resolution of the Council and this would include obtaining of signatures of all the Councilors

who were party to the resolution or otherwise, it would not be possible for him to give effect to and implement the resolution passed by the general

body of the Councilors.

8. Considering the nature of powers and duties conferred upon and performed by the Chief Officer i.e. respondent in the present case, the submission

now being advanced on behalf of the respondent cannot be accepted and if it is to be accepted, it would have to be further said that the respondent

would have to blame himself in the matter, making him, prima facie, guilty of misconduct of dereliction of his duty, resulting

from his failure to obtain signatures of all the Councilors on the resolution and this would result in a possibility of initiation of disciplinary action against

him.

9. I must say, Chief Officer is not a functionary who would control and supervise the Councilors taking decisions and passing resolutions in the

meeting of the general body and the Councilors performing their functions in the general body meeting are not subordinate to the Chief Officer

either. It is also not expected that the Councilors would themselves prepare the draft resolution, place the resolution for consideration before the

general body, prepare the minutes of the meeting and then obtain each others signatures and finally handover the copy of the resolution so passed to

the Chief Officer, as if the Chief Officer is the superior authority of the general body.Â On the contrary, as stated earlier, the Chief Officer being

subject to the control and directions of the President heading the general body, it is the job of the Chief Officer to render all secretarial assistance to

the Councilors who meet in the general body and take some decisions.

10. What would emerge from the discussion so far made is that the argument of the learned counsel for the respondent that the Arbitral Tribunal did

not serve upon the respondent a copy of the resolution passing the award signed by all the Councilors cannot be accepted.Â In suchÂ a case, when

the Chief Officer like the respondent, raises an objection about not signing of the resolution passing the arbitral award by all the Councilors, the first

responsibility for such a mistake has to be fastened upon the Chief Officer himself rendering him answerable to the charge of dereliction of the duty

and further necessary disciplinary action.Â However, on this aspect of the case, this Court would not make observations any further and would leave

it to the competent authority to take an appropriate decision in the matter.Â Suffice it to say that the argument so canvassed for bringing the

application filed under Section 34 within the limitation period of 90 days and also further period of 30 days if granted by the Court, cannot and does not

cut ice with law and hence this Court.Â Therefore, I find, the subject application having been filedÂ beyond the limitation period prescribed under

Section 34(3) of the Limitation Act, ought not to have been entertained by the learned Principal District Judge.

11. Learned Principal District Judge, it appears, has placed reliance upon the case of Shakti Tubes Limited, through Director vs. State of Bihar and

others, reported in (2009)1 SCC 786 for entertaining the application and condoning the delay by resorting to the power of the Court under Section 5 of

the Limitation Act.Â However, the case of Shakti Limited (supra) is on the question of computation of limitation period and lays down a proposition

that the time spent in a proceeding initiated bona fide in a Court not having jurisdiction, would have to be excluded while computing the period of

limitation in terms of Section 14 of the Limitation Act. This case does not say that with the aid of Section 5, Limitation Act, delay occurred in filing an

application under Section 34 of the Arbitration Act can be condoned by the Court.Â It only holds that while computing the limitation period, Section 14

of the Limitation Act would have its application.Â But, it was never the case of the respondent in the present case that he had filed a proceeding challenging the arbitral award initially before a wrong forum not having jurisdiction.Â Therefore, the learned Principal District Judge, it is seen, wrongly applied the ratio of this case to the facts involved in the present case and condoned the delay, without considering the provision of Section 29(2) of the Limitation Act.

12. Section 29(2), Limitation Act lays down that when any special law or local law prescribes for any suit, appealÂ or application any period of limitation which is different from the period prescribed by the schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the schedule.Â This would mean, in the present context the application which was filed beyond limitation period prescribed under Section 34(3) of the Arbitration Act ought to have been dismissed there being no express provision made in the special Statute like the Arbitration Act regarding power of the Court to condone the delay.

13. As regards the applicability of Section 5 of the Limitation Act to the arbitration proceedings under Section 34 of the Arbitration Act the law is true well settled to be discussed here.Â There are several judgments of the Hon'ble Apex Court which now over the period settled the law.Â In the case of Union of India vs. PopularÂ Construction Co., reported in (2001)8 SCC 470 the effect of crucial words â??but not thereafterâ? used in the proviso to subÂsection (3) of Section 34 has been considered by an express exclusion within the meaning of Section 29(2) of the Limitation Act and could therefore bar of application of Section 5 of the Limitation Act.Â The Hon'ble Supreme Court also held that no other interpretation is permissible when it observed in paragraph 12 Â â??..... To hold that court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase â??but not thereafterâ? wholly otiose.Â No principle of interpretation would justify such a result.Â?

Similar is the view taken by the Hon'ble Supreme Court in the case of Assam Urban Water Supply and Sewerage Board vs. Subash Projects and Marketing Limited, reported in (2012)2 SC 624, when it held that Section 4 of the Limitation Act is not applicable in respect of a case wherein a relief for extension of period by Court in exercise of its discretion is sought.

14. In the case of State of Goa vs. Western Builders, reported in (2006)6 SCC 239 the Hon'ble Supreme Court has held that Section 5 of the

Limitation Act has no application to a proceeding initiated under Section 34 of the Arbitration Act.Â The case of Consolidated Engineering

Enterprises vs. Principal Secretary, Irrigation Department and others with Hatti Gold Mines Company Limited vs. Vinay Heavy Equipments, reported

in (2008)7 SCC 169 is also the case wherein same principle of law has been reiterated by the Hon'ble Supreme Court.

15. In view of above, I find that the application filed under Section 34 of the Arbitration Act much after the expiry of total limitation period of 120 days

was hopelessly barred by law, and so not maintainable before the learned Principal District Judge and ought to have been dismissed by her on this

ground alone.

16. It is also seen that Section 34 application has been filed by the respondent without any prior sanction having been obtained by him from the State

Government or at least from the President of the Municipal Council of Narkhed. Whenever a decision is taken by general body of Councilors, the

power and duty of the Chief Officer are restricted to performing all those acts which are necessary for giving effect to and implementing the decisions

of the general body and this power of the Chief Officer does not include any power to independently take a decision to challenge the decision of the

general body.Â For this purpose, the Chief Officer would require sanction from a superior authority like the President or the State Government, as the

case may be.Â This sanction, admittedly was never obtained by the Chief Officer in the present case and, therefore, on this ground also Section 34

application could not have been entertained by the learned Principal District Judge.

17. It is further seen from the impugned order that the learned District Judge has quashed and set aside to the arbitral award and remanded the case

back to the Tribunal for fresh consideration and decision in accordance with law.Â However, there is no power of remand available in a Forum

exercising power under Section 34 of the Arbitration Act.Â This law is now well settled.Â The Hon'ble Apex Court in the case Kinnari Mullick and

another vs. Ghanshyam Das Damani, reported in AIR 2017 SC 2785 has held that Section 34 of the Arbitration Act does not empower the Court to

relegate parties to Arbitral Tribunal after setting aside the arbitral award.Â On this count also, I find the order impugned in this petition as contrary to the law.

18. In the result, this petition deserves to be allowed.

19. The writ petition is allowed.

20. The impugned order is hereby quashed and set aside.

21. Rule is made absolute in the above terms.Â No costs.