
(2008) 09 J&K CK 0028

In the Jammu And Kashmir High Court

Case No : CONAA No. 1 Of 2007 and AA No. 1 Of 2007

Romesh C.Chandhoke

APPELLANT

Vs

Principal Ch.Conservator of Forests

RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34

Citation : (2009) 3 JKJ 502 : (2009) JKJ 67 Supp

Hon'ble Judges : Y.P.Nargotra, J

Bench : Single Bench

Advocate : Seema Shehkar, Anil Mahajan, Advocates appearing for the Parties

Judgement

1. The Principal Chief Conservator of Forests invited tenders for forest fire protection equipment vide tender notice dated 9.2.2000 which

included supply of fire beaters. The nonobjector/respondentfirm submitted its tender, which was accepted and whereafter the agreement dated

11.3.2000 came to be entered between the parties, which contained an arbitration clause as well.

2. The respondentfirm made the supplies which were accepted by the objector/petitionerdepartment, but the payment therefor was not made. The

nonobjector/respondent invoked the arbitration clause, which resulted into the appointment of an arbitrator vide this Court order dated 7.3.2002.

3. The learned arbitrator entered upon the reference and made and published the award on 25.11.2005 (wrongly dated as 25.11.2000) and the

same was admittedly received by the objector/petitionerdepartment on 30.11.2005.

4. Undisputedly, the objectorpetitioner did not file any application under section 34 of the Arbitration & Conciliation Act, 1997 (hereinafter called

the Act of 1997) for challenging the arbitral award within the period of three months from the date of receipt of the arbitral award, but filed the same on 30.12.2006 that is about 305 days that is much after the expiry of period of limitation of three months prescribed, so has also filed the application for condonation of delay.

5. The ground urged for seeking condonation of delay primarily is that after receipt of the arbitral award on 25.11.2005, the

petitioner/department/objector took up the matter with the Government vide communication dated 8.12.2005 and while the same was in process,

the nonobjector/respondent/firm served a notice upon the petitioner/objector intimating that he was making a request to the arbitrator under section

33 for an additional award, therefore, awaiting the decision of the arbitrator, the objector/petitioner deferred the filing of the application for

challenging the award. However, when on the execution application being filed by the respondent/firm the learned Principal District Judge attached

the Account Head of the objector/petitioner/department vide order dated 25.11.2006, the petitioner filed the application for challenging the award.

6. The contention of Mrs. Shekhar, learned AAG for the petitioner/department is two fold. Firstly, she submits that there being a sufficient cause for

not filing the application for setting aside the award within the time prescribed, the delay deserves to be condoned under section 5 of the Limitation

Act. Her next submission is that even otherwise the limitation for filing the application under section 34 of the Act of 1997 would have started to

run from the date of decision of the request made by the opposite party under section 33 and as the same is still awaiting decision, there is no

question of expiry of limitation.

7. On the other hand, Mr. Mahajan, learned counsel for nonobjector/respondent/firm contends that Section 5 of the Limitation Act does not apply

and there cannot be any question of extension of period of limitation, as the request made to the arbitrator was not in accordance with the

provision made in section 33 being not made within the period prescribed, so the learned arbitrator has not entertained and adjudicated thereupon.

8. I have given thoughtful consideration to the contentions raised and perused the record.

Whether Section 5 of the Limitation Act can be invoked for extension of period of

limitation prescribed by Section 34(3) of the Act of 1997", is one of the questions in issue.

Section 29(2) of the J&K Limitation Act provides as follows:

(2) Where any special or local law prescribed for any suit, appeal or application a period of limitation different from the period prescribed

therefore by the first Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefore in that Schedule, and for the

purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law.

(a) The provisions contained in section 4, 9 to 18 and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply.

9. A bare perusal of the abovequoted provision would show that sections 4,9 to 18 and 22 will apply in so far as and to the extent special law or

local law which prescribes a different period of limitation for any suit, appeal or application does not exclude expressly their application, while

other provisions including Section 5 do not apply.

10. No doubt that the Act of 1997 is a special law and Section 34(3) prescribes the period of limitation different from the one prescribed under

the Limitation Act, therefore, Section 5 of the Limitation Act in view of the provisions made in the section perse does not apply to the applications

to be filed under Section 34 of the Act of 1997.

11. The Hon'ble Supreme Court in the case Union of India vs. Popular Construction Co., 2001 (3) Arb. LR 345 (SC), noticing Section 29(2) of

the Central Limitation Act, 1963 has held as follows:

12. As far as the language of Section 34 of 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to subsection (3).

In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore

bar the application of Section 5 of the Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside

the award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation

would justify such a result.

12. Section 5 of the Limitation Act thus can have no application to the application under Section 34 of the Act of 1997 for setting aside the arbitral award.

13. The next question arising for consideration is "whether filing of a request under Section 33 by the opposite party by itself extends the period of limitation for filing an application for setting aside the award under section 34 of the Act of 1997 for the other party to the arbitration proceedings as well?

14. Subsection (3) of Section 34 prescribes the period of limitation for filing application for setting aside an arbitral award in the following terms:

34(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:

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.

15. From the bare reading of above provision, it would transpire that the period prescribed for filing an application for setting aside an arbitral award is three months, which starts running from the date on which the party filing application received the arbitral award, but in case a request under section 33 of the Act had been made to the arbitrator, the said period of three months would run from the date on which that request is disposed of by the arbitral tribunal. Even where such period of three months has expired, the Court is vested with the power to entertain the application within a further period of thirty days alone if it is satisfied that the applicant was prevented by a sufficient cause from making the application within the said period of three months and not thereafter.

16. Thus, the initial period of three months prescribed for filing application for setting aside the award ordinarily starts running from the date the applicant receives the award, but such running of the limitation would get deferred and shifted in case of a request made to the arbitrator in terms of

section 33, to the date on which that request is finally disposed of.

17. Section 33 provides for correction and interpretation of award by the arbitrator by making an additional award on the request of any of the

parties to the arbitration proceedings. In terms of subsection (1) of Section 33 such request can be made either within thirty days from receipt of

the arbitral award or within such other period as has been agreed upon by the parties.

18. In subsection 3 of Section 34 the expression ""if a request had been made under section 33"" has been used. The word 'had' used in the said

expression contemplates the filing of the request under section 33 before the expiry of the period of three months; meaning thereby that if within the

initial period of three months prescribed for filing the application for setting aside the arbitral award a request Under section 33 has been made, the

limitation would start running from the date of decision of such request and not from the date of receipt of the award by the party filing application.

19. Therefore, if the request under Section 33 is made within a period of one month from the date of receipt of the award, the same having been

made within the prescribed period of three months, the limitation of three months prescribed by Subsection 3 of Section 34 would run from the

date of decision of such request by the arbitrator and not from the date of receipt of the award.

20. It be seen that Section 33(1) also entitles the parties to agree and fix any other period (which can be less or more than the period of one

month) and if they do so then such period would be the limitation for filing the request under Section 33. In case such period is less than the initial

period of one month, still the same being within the bracket of three months from the date of receipt of the award, the limitation of three months

prescribed for filing the application in the Court for setting aside the award would start running from the date of decision of the request made to the

arbitrator. Same shall be true if such agreed upon period is more than one month but less than three months prescribed in terms of Section 34.

21. However, if the parties mutually agree for a period which is more than three months for making a request under Section 33, whether limitation

for filing application under Section 34 would run from the date of decision of the request made after the expiry of initial period of three months.

22. It can be argued that as the parties can stipulate and fix any period for filing request other than the period of one month, then how can the restriction of making the request within the initial period of three months can validly be read into section 34(3).

23. To illustrate, let us say that the parties agree upon and stipulate the period of four months for filing request under section 33 before the arbitrator and actually file the request in the 4th month. Would in that eventuality they shall lose the right of extension of period of limitation envisaged under section 34(3) for filing application for setting aside the arbitral award, despite the fact that the request under Section 33 is maintainable?

24. The answer to the above question shall be in the affirmative. Sections 33 and 34 operate in different situations. Section 33 vests the option with

the parties to approach the arbitrator, while section 34 gives right to an aggrieved party to approach the Court for setting aside the award. Section

34(3) enacts the complete code for limitation for filing applications before the Court for setting aside the award, leaving no option with the parties

to change, reduce or enlarge the period prescribed for filing application for setting aside the award. As already said, the starting point of limitation

of three months is the date on which the party filing application receives the arbitral award. However, if within that period the request in terms of

section 33 has been made, the starting point of limitation would get deferred and shifted to the date on which the request is disposed of.

25. If within the initial period of three months prescribed no request has been filed, the limitation period for filing application for setting aside the

award starts running from the date of receipt of the award. After such start of the limitation, it stops with the expiry of the period of three months

and therewith extinguishes the right to file the application for setting aside the award subject, however, the power of Court to condone the delay for

a sufficient cause on an application filed within a further period of 30 days alone and not thereafter. Once the period of limitation has expired and

right to file the application for setting aside the award extinguished, the same cannot in law be revived either by mutual agreement of the parties or

by filing the request under section 33. Filing of request under section 33 during the currency of limitation period is sine qua non for deferment and

shifting of starting point of limitation. Subsequent filing of the request does not extend or create fresh period of limitation for such an application.

26. In the above legal position, the parties if stipulate a period for filing request under section 33 beyond the period of three months prescribed by

subsection 3 of section 34 for filing application for setting aside the award and make request under Section 33 thereafter, they would do so at the

peril of losing the right of moving the Court for setting aside the arbitral award. They shall have to be contented with the remedy of request under

section 33.

27. Now supposing one of the parties to the arbitral award has filed the request in terms of section 33 with the arbitrator within the period of three

months contemplated by subsection 3 of section 34 and as such in respect of him the limitation for filing the application for setting aside the award

runs from the date his request is finally disposed of. "Whether the starting point of limitation for filing the application for setting aside the award qua

other party who has not filed the request under section 33 would also automatically get deferred and shifted to the date on which the request filed

gets disposed of", is another important question of law arising for consideration.

28. A bare perusal of subsection 3 of section 34 would show that it enacts the rule of limitation for the party to an arbitral award who intends to file

an application for setting aside the award before the Court. Against such party the limitation of three months for filing the application starts to run

from the date he receives the arbitral award. Once it starts to run, it does not stop. Such running of limitation so far as he is concerned can defer to

a future date only if he has made a request under section 33 to the arbitrator. Making of a request under section 33 by the opposite party would

not change the starting point of limitation for such party who has not made such a request. For him the limitation for filing application for setting

aside the award will be three months from the date he received the award.

29. Mrs. Shekhar, however, contends that if the above interpretation is given to the provision contained in Section 34(3), it would lead to a

situation for the party which has not filed the request in terms of Section 33 that he may have to challenge firstly the basic award and then the

additional award in case request made by the other party is allowed by the arbitrator resulting into multiplicity of the proceedings which can never

be the intention of the legislature in enacting the provision.

30. The contention of Mrs. Shekhar though attractive does not merit acceptance in law. Rule of limitation prescribing time for availing a remedy in

law from a forum applies to the party who intends to avail that remedy. Section 34 creates and confers independent right to file an application in

the Court for setting aside an arbitral award on each of the parties to the arbitration. Likewise, each of such parties is entitled to make a request

independently to the arbitrator under Section 33. Individual right of a party of filing an application for setting aside the award before the Court is

not dependant upon other party's right of making of the request under Section 33 to the arbitrator. Therefore, whether or not other party has made

the request to the arbitrator, the right of the party who has not made the request to file application for setting aside the award before the Court

neither can get suspended nor put in jeopardy, as such, so far as he is concerned, he is bound by the rule of limitation which would start to run

from the date he received the award.

31. In case the arbitrator allows the request of other party and makes additional award, he would get fresh and independent cause of action for

challenging the additional award in terms of Section 34, the additional award still being an arbitral award. Filing of independent proceedings on

independent causes of action cannot be legally termed as multiplicity of proceedings.

32. For the aforesaid reasons, neither delay can legally be condoned nor the application filed by the petitioner for setting aside the award can be

held to be within time for having been filed beyond the period of three months. The petitioner can also not invoke the jurisdiction of the Court for

condonation of delay in terms of proviso to Subsection 3 of Section 34 for having not approached the Court within thirty days from the date of

expiry of period of three months, i.e., initial period of limitation prescribed.

33. Even otherwise, the request made by the respondent before the learned arbitrator can not legally be said to be a valid request under Section

33 for having been made beyond the period prescribed, therefore mere nonconsideration thereof by the learned arbitrator would not defer the date

of running of limitation. The starting point of limitation shifts to the date of decision only in case of a valid request has been made and a request can

be valid only if it is made within the period prescribed and not thereafter.

34. Therefore, there being no merit in the application of the petitioner filed for condonation of delay, the same is dismissed. Consequently, the

application of petitioner filed for challenging the award is also dismissed being barred by time along with the connected CMP.