

(2004) 11 DEL CK 0071

In the Delhi High Court

Case No : I.A. No's. 11792-94/99 in A.R.B.P. 177 of 1998

Skyline Engineering (India) Private Limited

APPELLANT

Vs

Girnar Fibres Limited

RESPONDENT

Date of Decision : 19-11-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151
Limitation Act, 1963 — Section 5

Citation : (2004) 115 DLT 660 : (2005) 79 DRJ 474

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : Raman Kapur, for the Appellant; Abhinav Vasisht and Prachi Vasisht, for the Respondent

Judgement

Mukul Mudgal, J.

IA. No. 11792/99(under Section 5 of the Limitation Act for condensation of delay)

Allowed subject to all just exceptions. Delay in filing the application(IA. No. 11793/99) under Order IX Rule 13 CPC stands condoned. is stands allowed and disposed of accordingly.

IA.No. 11793/99

1. This application on behalf of the respondent under Order IX Rule 13 CPC seeks setting aside/recalling the Order dated 22nd September, 1999.

2. On 1st November, 2004, the following order was passed by Hon''ble Mr. Justice O.P. Dwivedi sending back the matter to this Court on the ground that the IA. No. 11793/99 seeks the recall of the Order dated 22nd September, 1999, appointing an arbitrator:-

"IAs 11792(Under Section 5 Limit Act), 11793(O IX 13), 11794/99(stay) in Arb Petition 177/1998

Through application being is No. 11793/99, petitioner seeks recalling of the Order dated 22.9.1999.

A perusal of the records show that the order dated 22.9.1999 was passed by Hon"ble Mr. Justice Mukul Mudgal in the main petition. Under these circumstances, it is appropriate that these applications be listed before Mukul Mudgal, J for hearing on 19.11.2004."

3. Accordingly I am taking up this application, IA.11793/99. Pleas were raised in respect of the appointment of an arbitrator u/s 11 of the Arbitration & Conciliation Act, 1996(in short the `1996 Act"), who is an architect of the respondent. In this application under Order IX Rule 13 CPC which is not a review application, it has been contended on behalf of the respondent that the there were good grounds for setting aside the ex-parte order dated 22nd September, 1999 as neither his client could appear nor the erstwhile counsel was present on its behalf on 22nd September, 1999. The respondent was served with an application u/s 11 filed by the petitioner in 1998 for appointment of an arbitrator. Time of 4 weeks was granted on 15th January, 1999 to file a reply to the application, the date of service on the respondent which was not disclosed and the case adjourned to May, 1999. Significantly the position of law laid down by the Hon"ble Supreme Court in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., is clear that for appointment of an arbitrator u/s 11, no notice is required to be given to the respondent. Even on 4th May, 1999 time of six weeks was sought to file the reply on the ground that counsel was not attending the Court. Even this period of six weeks was not availed of though by this time the respondent knew of the confinement of its counsel as is evident from the order dated 4th May, 1999 which reads as follows:-

"04-05-99 Present: Mr. B.K. Dewan for the petitioner.

Mr. Nikhilesh for counsel for respondent.

IA.No. 5476/98 in A.A. No. 177/98

Time is sought to file reply on the ground that the counsel is not attending the Courts. Let reply be now filed within six weeks. Rejoinder thereto be filed within four weeks thereafter. Put up on 22nd September, 1999."

4. The respondent thus knew on 4th May, 1999 that the reply was to be filed within six weeks of 4th May, 1999 and that his erstwhile counsel stood confined on 4th May, 1999. In the entire application, there is no Explanation as to why the reply to the Section 11 was not filed within six weeks of 4th May, 1999 i.e., by the end of June 1999. Even if it assumed that date noted was 22nd December, 1999 instead of the actual date of 22nd September, 1999 no reason has been given why the reply was not filed by June 1999.

5. Furthermore since the duration of the confinement of the erstwhile counsel have been kept away from the Court, I have no option but to come to a conclusion that while taking into account the fortuitous circumstance of the

counsel's confinement, an elaborately crafted reply has been woven around it which however does not explain the cause of non-filing of the reply by June, 1999. The presumption that even on 22nd December, 1999 the Court would have extended the time granted on 4th May, 1999 or extended it beyond 22nd December, 1999 is too facile to be believed

6. In any event to avoid further delay and to assuage the sentiment of the respondent that the arbitrator appointed was not entitled to be appointed, Mr. Vashisht, the learned counsel for the respondent/applicant was asked whether without prejudice to the pleas of the other side, i.e., petitioner's counsel, Mr. Raman Kpaur, a fresh arbitrator named by this Court will be acceptable to the respondent. Mr. Vashisht categorically states that his client does not agree to any such offer because according to him no arbitrator could have been appointed by the Court as the arbitration agreement is not signed by his client. He has also attempted to raise several other collateral pleas to contend that since the requirements postulated u/s 11 of the 1996 Act not have been complied with, no arbitrator could have been appointed.

7. The respondent chose to stay away from the proceedings. Since the indisposition of the lady counsel was relied upon and which fact was disputed by the petitioner's counsel as a mere ruse, Mr. Vashisht was asked as and when the confinement ceased and Mr. Vashisht states that he is unable to communicate this at this juncture to the Court. Accordingly, the submission of indisposition of the lady counsel while no doubt would have entitled to the respondent to some benefit but since the actual dates have been kept back from the Court, I have no hesitation to come to the conclusion that this reason though genuine has been amplified to seek benefit of Order IX Rule 13 CPC from the Court. Furthermore submissions based on the wrong notation of dates by the ground of counsel have become very frequent and in the absence of any Explanation why a certified/ordinary copy of the Order dated 4th May, 1999 was not applied for, to this plea has no merits either and deserves to be and is rejected.

8. Accordingly, the application has no merits and has successfully delayed the arbitration proceedings due to the pendency of this application for 5 years since 1999 on account of the carefully fashioned but meritless pleas raised by the respondent. Consequently this application is dismissed with costs quantified at Rs. 20,000/- payable to the petitioner, through counsel within four weeks from today.

IA.No. 11794/99(under Section 151 CPC for stay of the operation of the judgment/order dated 22.9.1999)

In view of the dismissal of the IA. No. 11793/99, this application has become infructuous and the same accordingly stands dismissed as having become infructuous.

List the matter on 16th December, 2004 for reporting compliance.