
(2007) 02 OHC CK 0027
In the Orissa High Court

State of Orissa and Others

APPELLANT

Vs

Durga Charan Routray

RESPONDENT

Date of Decision : 08-02-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 14, 2, 29, 31, 33
Limitation Act, 1963 — Section 14, 29, 5

Citation : AIR 2007 Ori 90 : (2007) 3 ARBLR 241 : (2007) 104 CLT 528 : (2007) 1 OLR 548 Supp

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—The aforesaid ARBA No. 25 of 2006 has been filed by the State of Orissa represented through its concerned officers assailing the order of the learned District Judge, Mayurbhanj in Misc. case No. 28 of 2006 arising out of Arbitration Misc. Case No. 222 of 2006 declining to condone the delay in filing the aforesaid Arbitration Misc. Case.

This ARBA was also filed after the prescribed period of limitation with a petition u/s 5 of the Limitation Act for condonation of delay.

With consent of learned Counsel for both sides the ARBA and the Misc. Case both were heard together.

Misc. Case No. 50 of 2006 has been filed before this Court to condone the delay in filing the said ARBA, With consent of learned Counsel for both sides the ARBA along with Misc. Case was heard for final disposal.

2. The sole question for consideration in this case is whether Section 5 of the Limitation Act would be applicable to condone delay in filing a petition u/s 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the "1996 Act.

3. Before delving into the said question. it would be prudent to pay a bird's eyeview at the facts of the case in brief. The respondent in the ARBA, a contractor, entered into a contract with the State of Orissa for execution of the work "Construction of Earth Dam of NESIA Irrigation Project" under Khadkhai Irrigation Division at Rairangpur in the district of Mayurbhanj. It is, pertinent to mention here that the Executive Engineer, Khadkhai Irrigation Division, present appellant No. 2, had signed the agreement with the respondent-contractor on behalf of the Governor of Orissa in respect of the said work. During execution of the work, certain disputes cropped up between the parties. On the basis of a petition filed before this Court, the Hon'ble Chief Justice, vide order dated 14-9-2001 passed in MJC No. 222 of 2001, appointed Shri Justice P.C. Misra, a retired Judge of this Court, as the sole Arbitrator. The Executive Engineer-appellant No. 2 throughout participated in the proceedings before the Arbitrator for self and on behalf of the State. After conclusion of the proceeding, the Arbitrator passed an Award on 28-9-2005, a copy of which was duly served on the Executive Engineer on 5-10-2005. Thereafter on 6-2-2006 an application u/s 34 of the 1996 Act before the learned District Judge, Mayurbhanj, Baripada which was registered as Arbitration Misc. Case No. 222 of 2006 by the State and others. Along with the said Arbitration Misc. Case, a petition was filed u/s 5 of the Limitation Act, registered as Misc. Case No. 28 of 2006, with a prayer to condone the delay in filing the petition u/s 34 of the 1996 Act. mainly on the ground that the copy of the Award passed by the Arbitrator on 28-9-2005 was received by the Executive Engineer concerned on 5-10-2005. After receipt of the copy of the Award, the Executive Engineer intimated about the same to the concerned Superintending Engineer and other concerned authorities who in turn sought legal advice. After that the Arbitration Misc. Case u/s 34 was filed with a delay of thirty-four days, the prescribed period of limitation being ninety days from the date of the award.

4. For brevity and better understanding para-5 of the said Misc. Case No. 28 of 2006 filed before the learned District Judge is quoted hereunder:

5. That it is relevant to mention here that the limitation prescribed under the Arbitration and Conciliation Act, 1996 is 90 days, but since the petitioners are prevented by sufficient cause due to official formalities and sanction order was obtained from the Law Department, necessary application u/s 34: of the Arbitration and Conciliation Act, 1996 could not be filed within the prescribed period of limitation, i.e. 90 days from the date of the Award.

5. The learned District Judge, relying on the ratio of the decision of this Court in the case of Orissa Pisciculture Development Corporation (OPDC) Limited Vs. Indian Oil Corporation (IOC) Ltd. and Others, , vide the impugned order dated 25-8-2006, held that Section 5 of the Limitation Act was not applicable to a petition filed u/s 34 of the 1996 Act and as such he had no jurisdiction to condone the delay in filing the said petition. Accordingly the learned District Judge dismissed the Misc. Case filed for condonation of delay and consequently

did not entertain the petition filed u/s 34.

6. Mr. S.S. Das, learned Addl. Govt. Advocate appearing for the State challenges the aforesaid order of the learned District Judge mainly on the ground that copy of the Award passed by the Arbitrator was not served on appellant Nos. 1 and 3, respectively the State of Orissa represented through its Secretary, Water Resources Department and the Chief Engineer and Basin Manager of Baitarani-Subarnarekha Budhabalanga Basin, Baripada who were parties to the arbitration proceeding, as required under Sub-section (5) of Section 31 of the 1996 Act. According to him, the provision of Sub-section (5) of Section 31 is not an empty formality, but it is incumbent upon an Arbitrator to deliver a signed copy of the arbitral award to each party. In the case at hand, as no copy of the Award was served on appellant Nos. 1 and 3, and as the said mandatory requirement had not been complied with, there was no starting point of limitation or any date from which the period of limitation would commence. In support of such submission, Mr. Das relies upon a decision of the Supreme Court in the case of Union of India (UOI) Vs. Tecco Trichy Engineers and Contractors, , and submits that service of the copy of the arbitral award only on the Executive Engineer does not satisfy the requirements of Sub-section (5) of Section 31 of the 1996 Act and as such there being no starting point or any cut-off date for computing the period of limitation to file the petition u/s 34 so far as the said respondents are concerned, treating the petition filed u/s 34 as barred by limitation was a misnomer. He further submitted that even otherwise the provisions of Section 14 of the Limitation Act were very much available, taking aid of which the learned District Judge ought to have condoned the delay, as was done in the case State of Goa Vs. Western Builders, .

7. Mr. Sanjit Mohanty, learned Sr. Advocate appearing on behalf of the respondent-contractor, resisted the aforesaid submissions of Mr. Das. According to Mr. Mohanty, admittedly the Executive Engineer did sign the agreement in question for and on behalf of the Governor of Orissa. Section 2(h) of the 1996 Act defines the word "party" as a party to an arbitration agreement. In the present case the only party to the agreement was the Executive Engineer, Khadkhai Irrigation Division, Rairangpur apart from the other respondent. In consonance with Section 31(5) after an arbitral award is made, a signed copy thereof is required to be delivered to each party. In the present case, the agreement was executed with the contractor by the State of Orissa through the Executive Engineer, appellant No. 2. A copy of the award was served on the Executive Engineer who received the same on 5-10-2006. He also filed the aforesaid application u/s 34 along with the other two appellants. Thus the argument of Mr. Das that a copy of the signed award was not delivered to each of the appellants cannot be entertained.

8. The admitted case of the appellants being that the Executive Engineer had received a copy of the award on 5-10-2005, vide para 2 of Misc. Case No. 28/2006 filed before the District Judge for condonation of delay, the petition u/s

34 ought to have been filed within ninety days from that date. In other words, the last date of filing the said petition was 3-1-2006. Admittedly the petition u/s 34 was not filed on or before 3-1 -2006, and not even within thirty days beyond ninety days by availing the benefit of the proviso to Sub-section (3) of Section 34 of the Act, and in fact the petition was filed only on 6-2-2006. Thus the petition filed u/s 34 was grossly barred by time and the learned District Judge rightly declined to entertain the said petition.

9. In this connection it would be profitable to refer to the relevant portions of Section 34 of the Act which are quoted herein below:

34. Application for setting aside arbitral award.

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) xxx xxx xxx

(3) An application for setting aside may not be made after three months have elapsed from the date on the which party making the application had received the arbitral award or, if a request had been made u/s 33, from the date on which the 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.

10. It is pertinent to mention here that the 1996 Act prescribes the period of limitation for filing an application u/s 34. The limitation is three months from the date on which the party making the application receives copy of the arbitral award, or if a request has been made u/s 33 for correction or interpretation or an additional award, from the date on which that request was disposed of by the Arbitrator, as would be evident from Sub-section (3) of Section 34. Under the proviso to the aforesaid sub-section, the Court may condone a delay of thirty days in the maximum, and that too if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months. The words "but not thereafter" appearing in the proviso to Sub-section (3) of Section 34 are mandatory and that being the intention of the Legislature, cannot be bypassed. Thus the provisions of Section 29(2) of the Limitation Act cannot be extended to arbitration proceeding in view of the specific language used by the Legislature under the proviso to Sub-section (3) of Section 34 of the 1996 Act.

11. Interpreting the words "but not thereafter" the Supreme Court in the case of Union of India Vs. M/s Popular Construction Co., , observed:

As far as the language of Section 34 of the 1996 Act is concerned, the crucial

words are "but not thereafter" used in the proviso to Sub-section (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 that 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. This Court also in the case of Orissa Pisciculture Development Corporation Limited v. Indian Oil Corporation Ltd. (supra) relying upon the decisions of the Supreme court in the cases of Union of India Vs. M/s Popular Construction Co., and The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur, , held that the limitation prescribed was three months from the date on which the party making the application received the arbitral award, or if a request had been made u/s 33 from the date on which that request had been disposed of by the arbitral tribunal. Under the proviso to Sub-section (3) of Section 34, the Court may condone the delay of thirty days in the maximum if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months.

13. It is apt to mention here that the petition u/s 34 was filed by the appellants before the District Judge after a lapse of 120 days. Being conscious of the fact that the same had become barred by time, a petition u/s 5 of the Limitation Act had been filed praying for condonation of delay. The main ground on which the delay was sought to be condoned, as would be evident from the narration of facts made in para-5 of the limitation petition (supra) was that the appellants were prevented due to official formalities and sanction of the Law Department and only after that the application u/s 34 had been filed. It was not the case of the appellants that as the signed copy of the award was not served on the State of Orissa and the Chief engineer concerned, there was no starting point of limitation or any date from which the limitation would commence. At the other hand, in para-3 of the petition filed u/s 5 of the Limitation Act, it was candidly averred that after receiving copy of the award, the Executive Engineer who was a signatory to the agreement and was looking after the arbitration proceeding made necessary communication with the State Government as well as the concerned Superintending Engineer for taking necessary steps in the matter. A copy of the award was admittedly received by the Executive Engineer on 5-10-2005. It appears that only on 15-10-2005 the State Government directed the Executive Engineer to obtain necessary opinion from the conducting lawyer. The official procedure was carried on in a snail's speed without keeping in mind the mandatory requirements of Section 34(3) of the 1996 Act.

14. According to Mr. Das, as copies of the award were not served on the State of Orissa represented through the Secretary of the concerned Department and the Chief Engineer, the limitation never commenced. In support of such submission he relied upon a decision of the Supreme Court in the Union of India (UOI) Vs.

Tecco Trichy Engineers and Contractors, . In para-9 of the said decision, the Supreme Court observed that in the context of huge organizations like Railways, copy of the award has to be received by the person who had knowledge of the proceeding and who would be best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving application under Sub-section (1) or Sub-section (5) of Section 33, or under Sub-section (1) of Section 34. In the said case, service of copy of the award on the Chief Engineer was held to be the starting point of limitation to challenge the award. The Supreme Court further observed that the General Manager of Railways was only a nominal party. He could not be said to be aware of the questions involved in the arbitration nor factual aspects in details on the basis of which the arbitral tribunal had decided the issue, unless they were brought to his notice by the officer dealing with arbitration and who was in-charge of the proceeding.

15. In the case at hand, as stated earlier, the agreement was signed by the Executive Engineer for and on behalf of the State of Orissa. He was the person in-charge of the work in question. He was the person to take part in the arbitration proceeding. He was also the person who had knowledge about the execution of the work. He was also the person who had knowledge about the execution of the work. He was also the person who participated in the arbitration proceeding and the best person to understand and appreciate the Arbitrator's award. Therefore, even in consonance with the ratio of the decision of the Supreme Court in Union of India (UOI) Vs. Tecco Trichy Engineers and Contractors, (suprah the date of service of copy of the award would be the starting point of limitation.

16. The only other question raised by Mr. Das is that even if Section 5 of the Limitation Act is not attracted to the present case, the learned District Judge ought to have exercised jurisdiction u/s 14 of the Limitation Act and condoned the de-lay. In support of such submission, he placed reliance on the decision in the case of State of Goa Vs. Western Builders, . But then as per Section 14 of the Limitation Act while computing the period of limitation for any suit, the time during which the plaintiff had been prosecuting with due diligence another civil proceeding whether in a Court of first instance or of appeal or revision against the defendant would be excluded, where the proceeding related to the same matter in issue and he was prosecuting in good, faith in a court, due to defect of jurisdiction or other cause of like nature, was unable to entertain it. This Court has absolutely no hesitation to hold that none of the aforesaid ingredients are satisfied in the instant case. It is not the case of the State that with due diligence or indiligence it was prosecuting any lis assailing the order" passed by the Arbitrator before any other forum. Thus Section 14 of the Limitation Act cannot be pressed into service in the case at hand.

17. The discussions made above lead to an irresistible conclusion that if the Legislature by a special statute has prescribed the period of limitation for filing an application, and has provided in clear terms that such period, on sufficient causes being shown, may be extended in the maximum only up to a specified

time-limit and no further, the Court concerned would have no jurisdiction to entertain such application beyond the time-limit prescribed in the statute. This Court therefore concludes, that Section 5 of the Limitation Act cannot, be pressed into service in aid of a belated application filed u/s 34 of the 1996 Act. The right to set aside an award passed under the 1996 Act is a statutory right which has to be exercised strictly in terms of the said Act. As the maxim *vigilantibus non dormientibus, jura subveniunt* goes, law always assists the vigilant and not those who sleep over, their right. A party who is insensible to the value of civil remedies and who does not assert his own cause with promptitude, has little or no right to enforce the same. Thus the application u/s 34 of the 1996 Act having not been filed within the time prescribed therefor, and the benefit of Section 5 of the Limitation Act being not available, the same entitled rejection. The impugned order of the learned District Judge thus suffers from no infirmity or illegality, warranting interference of this Court exercising Certiorari Jurisdiction.

This Court dismisses the ARBA and so also the Misc. Case.