
(2023) 12 UK CK 0072

In the Uttarakhand High Court

Case No : Appeal From Order No. 127 Of 2021

State Of Uttarakhand & Others

APPELLANT

Vs

M/s Hillways Construction Company Pvt. Ltd.

RESPONDENT

Date of Decision : 12-12-2023

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 33, 34, 34(3), 36
Limitation Act, 1963 — Section 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,
19, 20, 21, 22, 23, 24, 29(2)

Citation : (2023) 12 UK CK 0072

Hon'ble Judges : Manoj Kumar Tiwari, J; Vivek Bharti Sharma, J

Bench : Division Bench

Advocate : P.C. Bisht, Siddhartha Singh

Final Decision : Dismissed

Judgement

Manoj Kumar Tiwari, J

1. This appeal is directed against judgment and order dated 10.2.2021, passed by Commercial Court, Dehradun in Miscellaneous Case No. 42 of 2020. By the said judgment, application filed by the appellants under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") was dismissed on the ground of delay.

2. It is not in dispute that the appellant had earlier filed application under Section 34 of the Act before District Judge, New Tehri challenging the award dated 28/30.5.2018, which was dismissed as not pressed on

3. 7.2019. Subsequently, appellants filed application before District Judge, New Tehri seeking restoration of the application under Section 34 of the Act; in the meantime, Commercial Court was established at Dehradun and the application seeking restoration of proceedings under Section 34 of the Act was transferred to Commercial Court, Dehradun; Commercial Court, Dehradun rejected the said application vide order dated 12.12.2019 and the said order was challenged by

the appellants in Appeal from Order No. 42 of 2020, which was disposed of by Division Bench of this Court vide order dated 18.2.2020. Para 7 and 8 of the said order are extracted below:

"7. At this stage, however, the learned counsel for the respondent Construction Company, very fairly submits that he has no objection if the State Government moves a fresh application for setting aside the award along with the delay condonation application before the Commercial Court at Dehradun.

8. In view thereof, and on consideration of the fact that the application for setting aside the award which has also been filed by the Construction Company is already pending before the court below, we dispose the present appeal with a direction to the State Government/appellant to move a fresh application before the Commercial Court at Dehradun, which shall be considered by the court in the light of our above observation."

3. In terms of the liberty granted by Division Bench of this Court in A.O. No. 42 of 2020, appellants moved fresh application under Section 34 of the Act before the Commercial Court, Dehradun, which was registered as Miscellaneous Case No. 42 of 2020. Learned Commercial Court dismissed the said application on the ground of delay vide order dated 10.2.2021, which is under challenge in this appeal.

4. Learned Commercial Court considered and discussed the matter in great detail. Perusal of para 12 of the impugned order reveals that learned Commercial Court has factored in the time spent by the appellant while pursuing the remedy before the District Judge, Tehri Garhwal and held that even if the time spent before District Judge, Tehri Garhwal is excluded, then also the application filed by the appellant is beyond time.

5. In our considered opinion, the view taken by the learned Commercial Court cannot be faulted. Arbitration and Conciliation Act, 1996 is a self contained code. Section 34(3) of the Act, which prescribes the period of limitation for challenging an award under Section 34 of the Act, reads as under:

"34. Application for setting aside arbitral award.—(1).....

(2).....

(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."

6. Thus, from perusal of provision contained under Section 34(3) of the Act, it is

quite apparent that the period of limitation prescribed for challenging an award is three months, which can be extended in appropriate cases for a further period of 30 days. The expression “but not thereafter” in the proviso to Section 34(3) of the Act makes it clear that the Court, before which an arbitral award is challenged under Section 34 of the Act, cannot extend the period of limitation beyond 30 days. This aspect has been dealt with by Hon’ble Supreme Court in the case of *P. Radha Bai v. P. Ashok Kumar*, reported as (2019) 13 SCC 445. Relevant paragraphs of this judgment are extracted below:

“19. This analysis has to necessarily begin from Section 29(2) of the Limitation Act, which states:

29. 2) Where any special or local law prescribes for any suit, appeal or application a period of limitation 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 and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law.

(emphasis supplied)

20. Section 29(2) is divided into two limbs. This is evident from the conjunctive “and” in the said provision. The interrelation between these two limbs was considered by a Bench of five Judges of this Court in *Vidyacharan Shukla v. Khubchand Baghel*.

32. Section 34(3) deserves careful scrutiny and its characteristics must be highlighted:

32.1. Section 34 is the only remedy for challenging an award passed under Part I of the Arbitration Act. Section 34(3) is a limitation provision, which is inbuilt into the remedy provision. One does not have to look at the Limitation Act or any other provision for identifying the limitation period for challenging an award passed under Part I of the Arbitration Act.

32.2. The time-limit for commencement of limitation period is also provided in Section 34(3) i.e. the time from which a party making an application “had received the arbitral award” or disposal of a request under Section 33 for corrections and interpretation of the award.

32.3. Section 34(3) prohibits the filing of an application for setting aside of an award after three months have elapsed from the date of receipt of award or disposal of a request under Section 33. Section 34(3) uses the phrase “an application for setting aside may not be made after three months have elapsed”. The phrase “may not be made” is from the UNCITRAL Model Law and has been understood to mean “cannot be made”. The High Court of Singapore in *ABC Co. Ltd. v. XYZ Co. Ltd.* held:

"The starting point of this discussion must be the model law itself. On the aspect of time, Article 34(3) is brief. All it says is that the application may not be made after the lapse of three months from a specified date. Although the words used are 'may not', these must be interpreted as 'cannot' as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst the drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three months' period as Article 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the court derives its jurisdiction to hear the application from the Article alone, the absence of such a provision means the court has not been conferred with the power to extend time."

(emphasis supplied)

32.4. The limitation provision in Section 34(3) also provides for condonation of delay. Unlike Section 5 of the Limitation Act, the delay can only be condoned for 30 days on showing sufficient cause. The crucial phrase "but not thereafter" reveals the legislative intent to fix an outer boundary period for challenging an award.

32.5. Once the time-limit or extended time-limit for challenging the arbitral award expires, the period for enforcing the award under Section 36 of the Arbitration Act commences. This is evident from the phrase "where the time for making an application to set aside the arbitral award under Section 34 has expired". There is an integral nexus between the period prescribed under Section 34(3) to challenge the award and the commencement of the enforcement period under Section 36 to execute the award.

33. If Section 17 of the Limitation Act were to be applied to determining the limitation period under Section 34(3), it would have the following consequences:

33.1. In Section 34(3), the commencement period for computing limitation is the date of receipt of award or the date of disposal of request under Section 33 (i.e. correction/additional award). If Section 17 were to be applied for computing the limitation period under Section 34(3), the starting period of limitation would be the date of discovery of the alleged fraud or mistake. The starting point for limitation under Section 34(3) would be different from the Limitation Act.

33.2. The proviso to Section 34(3) enables a court to entertain an application to challenge an award after the three months' period is expired, but only within an additional period of thirty days, "but not thereafter". The use of the phrase "but not thereafter" shows that the 120 days' period is the outer boundary for challenging an award. If Section 17 were to be applied, the outer boundary for challenging an award could go beyond 120 days. The phrase "but not thereafter" would be rendered redundant and otiose. This Court has consistently taken this view that the words "but not thereafter" in the proviso of Section 34(3) of the

Arbitration Act are of a mandatory nature, and couched in negative terms, which leaves no room for doubt. (State of H.P. v. Himachal Techno Engineers, Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd. and Anilkumar Jinabhai Patel v. Pravinchandra Jinabhai Patel)

34. In our view, the aforesaid inconsistencies with the language of Section 34(3) of the Arbitration Act tantamount to an "express exclusion" of Section 17 of the Limitation Act."

7. Similar view was taken by Hon'ble Supreme Court in the case BBM Enterprises v. State of West Bengal, reported as (2020) 9 SCC 448. Para 3 and 8 of this judgment are extracted below:

"5. In the first round of litigation, the Section 34 petition was dismissed by the learned District Judge on 22-3-2012, stating that the period of 120 days was over, and hence no foray into the merits would be permissible at this stage. However, by an order dated 11-1-2013, the Division Bench set aside this judgment and remanded the matter for a fresh hearing.

8. The stay that has been granted throughout the hearing would continue. A resume of these facts would show that the matter has gone up and down already twice. We may only state that even though it does not appear that, in the second round, the point of limitation was argued, since a de novo hearing by the Division Bench was ordered on 11-1-2013, this point also stared at the Court like a sore thumb. We are not satisfied that there is any answer to the limitation point. Even otherwise, having perused the order of the learned District Judge, we are of the view that adequate reasons were given to dispose of the Section 34 petition filed by the respondent. We do not agree with the High Court that no reasons were given as a result of which a remand ought to be ordered. Resultantly, therefore the impugned High Court judgment is set aside and the judgment dated 22-12-2016 passed by the learned District Judge is affirmed."

8. The above being the legal position, the reliance placed by learned Counsel for the appellants on the observation made by Division Bench of this Court in A.O. No. 42 of 2020 is inapposite. Since the statute prohibits entertainment of application under Section 34 of the Act after the expiry of period of limitation prescribed under Section 34(3) of the Act, therefore, delay could not have been condoned merely because Division Bench gave liberty to the appellants to move delay condonation application.

9. For the reasons recorded above, we do not find any infirmity in the impugned order passed by the Commercial Court, Dehradun. Accordingly, we dismiss this Appeal from Order.