

(2017) 03 CAL CK 0095
In the Calcutta High Court
Case No : 555 of 2010

Steel Authority of India Ltd.

APPELLANT

Vs

Amiya Steel Private Limited

RESPONDENT

Date of Decision : 30-03-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 23 Rule 2](#) -
[Limitation Act, 1963](#), [Section 14](#), [Section 42](#), [Section 5](#) - Exclusion o

Citation : (2017) 03 CAL CK 0095

Hon'ble Judges : I.P. Mukerji

Bench : SINGLE BENCH

Advocate : Pradip Kumar Ghosh, ?Abhijit Gangopadhyay, ?Supriya Dubey, ?Gopal Chatterjee, S.N. Mitra, ?D.N. Sharna, ?Shailendra Jain, ?Tirthankar Dey

Judgement

1. This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside an award dated 30th September, 2008 passed by a departmental arbitrator of Steel Authority of India Limited, Sri B.M.K. Singh. It was heard on a preliminary objection that it was barred by the laws of limitation.

2. Section 34 (3) of the said Act provides that an application to set aside the award may be made by a party not after three months of the date of receipt of the award. The court, before which such an application is made, has the power to condone delay of 30 days only. Therefore the maximum time period to file this kind of an application is 120 days from the date of receipt of the award by a party. It is now very firmly established that no court has the power to condone delay beyond this period, as this time period has been held to be a special period of limitation, in the case of Union of India v. Popular Construction Company reported in (2001) 8 SCC 470.

3. In this case the award was made on 30th September, 2008. It was served on the petitioner on 5th October, 2008. On 23rd December, 2008 they filed an

application before the learned Sub Judge, Bokaro to set aside the award. On 21st February, 2009 the respondent made an application in that court under Section 42 of the Limitation Act stating that the application did not lie before it, for want of territorial jurisdiction. Nothing happened in that application. Finally, the petitioner applied for withdrawal of their main application on 31st July, 2000. The learned Court allowed its withdrawal on 4th September, 2010 with liberty to file a fresh one on the self-same cause of action in the appropriate court. On 20th September, 2010 the present application was filed in this court.

4. The application to set aside the award was filed in the Bokaro court within seventy eight days of receipt of the award. If this period of time during which the application was pending in that court is not excluded under Section 14 of the Limitation Act, 1963 the application to set aside the award is hopelessly barred. If it is excluded then the application was filed in this court, on the 94th days of receipt of the award, by adding the 16 days? time taken to file the application in this court on 20th September, 2010 after withdrawal thereof on 4th September, 2010 from Bokaro court. Thus there was a marginal delay of 4 days only.

5. The first question is whether Section 34 (3) of the said Act excludes the operation of Section 14 of the Limitation Act, 1963. Section 14 is in the following terms:

"14. Exclusion of time of proceeding bona fide in court without jurisdiction.-

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.? For the purposes of this section,?

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall

both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

6. This point was considered by the Supreme Court in *State of Goa v. Western Builders* reported in (2006) 6 SCC 239 Mr. Justice A.K. Mathur while delivering the judgement of the court opined that the said sub- Section excluded the operation of Section 5 of the Limitation Act, 1963. The operation of Section 14 had to be expressly excluded. There was no such exclusion in the words of Section 34. Therefore, Section 14 was applicable. This view was affirmed in *Union of India and Another v. Bhavna Engineering Company* reported in (2008) 13 SCC 546 and *Gulbarg University v. Mallikarjun S. Kodagali and Another* reported in (2008) 13 SCC 539.

7. In paragraph 20 of the present application the petitioner avers that they proceeded with due diligence and in good faith before the learned court at Bokaro. The application in that court had been filed due to "wrong legal advice" obtained. There was no negligence on their part. Filing of the application in that court was a mistake. The petitioner did not gain any advantage by the said mistake. The same grounds were more or less maintained in the affidavit in reply.

8. Mr. Ghosh for the petitioner submitted that on 23rd September, 2008 the application to set aside the award was filed before the learned sub-Judge, Bokaro. On 21st February, 2009, the respondent filed an application stating that the court had no jurisdiction to hear the matter. He argued that the respondent did not pursue this application diligently. It lay pending in the file of the Court. On 31st July, 2010 the petitioner made an application for withdrawal of the case with leave to file it in the appropriate court. In that application an order was passed within just a little over one month of filing of this application, on 4th September, 2010, giving leave to the petitioner to withdraw from the application and file a fresh one on the same cause of action in an appropriate court. It was filed in this court on 20th September, 2010. The petitioner had pursued their application with abundant zeal, due diligence and good faith.

9. Mr. Surajit Nath Mitra appearing for the respondent submitted that this period should never be excluded because the proceedings before the Bokaro Court was not prosecuted by the petitioner with due diligence and or in good faith. It was also submitted that unless the petitioner was able to establish pursuit of the litigation in Bokaro in good faith and with due diligence they should not be given the benefit of Section 14 of the said Act. The protection under Section 14 is given to those litigants who out of a bona fide mistake institutes a proceeding in a wrong forum which owing to lack of jurisdiction is unable to entertain the case on merits. In such a situation the plaintiff or applicant has to withdraw from that proceeding, taking leave of the court to institute the proceeding in the court with

jurisdiction (see order XXIII R 3 of the Code of Civil Procedure). But time continues to run for the purpose of limitation. When the plaintiff or applicant files the proceeding in the proper court, he has to show that he is filing it within the period of limitation. The law comes to the aid of such a litigant who out of a bona fide mistake had instituted the proceeding in a wrong forum, provided he shows that the proceeding in the wrong forum was filed and prosecuted bona fide, with due diligence, good faith etc. The time period during which the suit or application was pending before the wrong forum is excluded for the purpose of calculating the period of limitation.

10. Now, two decisions cited by Mr. Mitra, *Ram Bhawan Singh and Others v. Jagdish and Others* reported in (1990) 4 SCC 309 and *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others* reported in (2008) 7 SCC 169 laid down the proposition that lack of due diligence bona fide and good faith on the part of the party seeking the protection of Section 14 had to be examined.

11. In *Ram Bhawan Singh and Others v. Jagdish and Others* reported in (1990) 4 SCC 309 the question arose whether the earlier litigation was prosecuted by the petitioner therein in good faith. In that case also reliance was placed on an erroneous advice obtained. The delay was 1198 days. The Supreme Court, on the peculiar facts of that case, held that no material was brought before the court to explain delay or establish due diligence good faith etc. In *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others* with a connected matter reported in (2008) 7 SCC 169 the Supreme Court opined as follows:- "21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

- (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;
- (2) The prior proceeding had been prosecuted with due diligence and in good faith;
- (3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;
- (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;
- (5) Both the proceedings are in a court.

22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and provisions will have to be interpreted so as to advance the cause of

justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant bring his application in the court, that is, a court having no jurisdiction to entertain it but also where he bring the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.

31. To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this judgment have to co-exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essential prerequisites for attracting Section 14. Due diligence cannot be³ measured by any absolute standards. Due diligence is a measure of prudence or activity expected from an ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2 (h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse of inaction. However, there can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith."

12. Now, I come to my findings.

13. The petitioner is a gigantic Government of India company and a public enterprise. It has suffered an award for 3,83,73,200 on account of loss of profit

and costs assessed at Rs. 4 lakhs. The application was filed in the Bokaro court on 23rd December, 2008 after 78 days of receipt of the award, on 5th October, 2008. Undisputedly, this court had no jurisdiction. The petitioner says that this application was filed in the wrong court out of improper legal advice. The proceedings were pending in that court between 23rd December, 2008 and 4th September, 2010, for nearly a period of about three months short of two years. The petitioner had no advantage in keeping the proceedings pending in that court because if the respondent ultimately succeeded the petitioner may have had to pay interest for this period.

14. I do not agree with Mr. Mitra that the petitioner had not taken any steps after the respondent filed their application on 21st February, 2009 before the Bokaro court for dismissal thereof, demonstrating lack of bona fide or due diligence or lack of good faith on their part. If the respondent made the application it was for the respondent to have prosecuted it.

15. Any petitioner's due diligence or lack of it or good faith or lack of it cannot be tested by the action they had taken to withdraw the case from the wrong court. The test laid down in Section 14 is the due diligence with which they had tried to prosecute that application in the court without jurisdiction. This assumes prosecution of a case in good faith with due diligence on the mistaken belief that the court had jurisdiction.

16. On 31st July, 2000 the petitioner realised their mistake and made an application for withdrawal of the application which was allowed on 4th September, 2010. Within a fortnight, on 20th September, 2010 the present application was filed in this court. Considering the long pendency of cases in Indian courts pendency of a Section 34 application in the Bokaro court for three months less than two years cannot be said to be evidence of lack of due diligence or good faith or bona fide on the part of the petitioner.

17. If I were to dismiss this application on the ground of delay, it would amount to an award of about Rs. 4 crores being confirmed in favour of the respondent, without any opposition on merits. Furthermore, even if it is assumed that the petitioner was a little slow in their movement, this latitude has to be given to a public corporation. Otherwise, considering the state of affairs, the state machinery will break down.

18. There is a marginal delay of 4 days delay in filing this application as noted above. Such delay is condoned. This application is formally admitted. Since affidavits are complete, list this application for hearing on 25th April, 2017. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.