

(2006) 09 CAL CK 0025

In the Calcutta High Court

Case No : APO No. 212 of 2005, AP No. 301 of 2003 and APOT No. 739 of 2004

Union of India (UOI)

APPELLANT

Vs

Mukherjee and Mukherjee Pvt. Ltd.

RESPONDENT

Date of Decision : 20-09-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34, 34(3)
Limitation Act, 1963 — Section 29, 5

Citation : (2007) 1 ARBLR 548

Hon'ble Judges : Sanjib Banerjee, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This appeal is directed against a judgment and order of the learned Single Judge of this Court dated 23.09.2004 whereby and whereunder His Lordship has been pleased to dismiss an application for setting aside of an award u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act").

2. The time limit has been fixed for making an application of this nature in Section 34 of the said Act. Sub-section (3) of the said section is quoted hereunder for this purpose:

(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 u/s 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.

3. Thus, it appears that court has the discretion to entertain an application beyond the period of three months but this must be done within a further period

of 30 days. Upon proper construction of the aforesaid proviso it is clear and it has also been settled by the Supreme Court that beyond the period of 30 days as mentioned in the proviso, the court had no power to entertain an application. The provision of Section 5 of the Limitation Act, 1963 will have no manner of application by reason of Section 29 of 1963 Act. Since the date of filing of the application, in this case, was said to be beyond the period of three months and thirty days, it was necessary to ascertain the exact date of the making of the application.

4. It appears to us that the learned Trial Judge was not properly assisted by the learned lawyers. The relevant facts relating to the date of filing of the application were not placed before His Lordship. It has been observed by His Lordship that the application was made beyond the period as permissible under the aforesaid section. The records would, however, show otherwise.

5. The application was filed in the Central Filing Section on 27.11.2003 which was the last day for making that application. On that day itself, an appropriate number was also allotted. We have seen the report of the department filed in terms of our previous order. The aforesaid fact is substantiated thereby. It is thereafter contended by Mr. Banerjee, learned senior Counsel appearing for the appellant, that after the petition was filed in the Central Filing Section it was attempted to be moved before the learned Single Judge but the petition was not allowed to be moved, as at that particular point of time the petition was not accompanied with a notice of motion. The learned judge observed that without the notice of motion the petition simpliciter had no value in the eye of law. We think that the learned Trial Judge has observed the correct procedure. Mr. J.K. Mitra, learned senior Counsel, appearing for the respondent, however, does not dispute the fact of moving the petition on 27.11.2003 nor does he dispute the factum of return of the petition in absence of notice of motion being taken out.

6. Thereafter, we find that on 27.11.2003 notice of motion had indeed been taken out and the same was served and was received by the office of the learned advocate on record of the respondent. This factum of receipt of the same is substantiated by the endorsement made on the back sheet of the original notice of motion and this notice of motion thereafter was filed on 01.12.2003.

7. Before the incorporation of Chapter XXIXA in the Original Side Rules, ordinarily a petition was deemed to be filed as and when the notice of motion after having been served upon respondent was filed in the department together with affidavit of service and the petition. But in case of urgency one could straightway move the petition before the court either to save limitation or for other purpose and in that case, the application was deemed to have been made on the date of moving and thereafter the notice of motion was required to be served.

8. But, in view of the incorporation of this new chapter now, every plaint, petition or memorandum of appeal or application has to be filed in the Central Filing Section and, thereafter, action can be taken. Therefore, it may so happen on the

last date of limitation one has to file the application in the Central Filing Section and, thereafter, it goes down systematically travelling through various departments to the department concerned for making appropriate registration.

9. Mr. Mazumder led by Mr. Mitra submits that in this case there is no evidence that the petition was registered in the appropriate ledger. We are of the view that in view of the aforesaid new provision once the petition is filed in the Central Filing Section the same can be said to have been made for the purpose of limitation.

10. Here the learned Trial Judge thought that no notice of motion was taken out within the time nor the petition was filed within the time. The learned judge noted that all steps were taken beyond the period of limitation as prescribed in the said section.

11. Had the above fact been drawn to the attention of the court perhaps the learned Trial Judge would have decided the matter otherwise.

12. Moreover, we find that it has been incorrectly recorded that notice of motion was filed on 04.12.2003. From the records, we find that it was filed on 01.12.2003.

13. In view of our finding that, for all practical purposes, the petition was filed on 27.11.2003, notice of motion having been taken out and was served on 27.11.2003 itself and further, when the petition was attempted to be moved before the court and it was returned in view of absence of notice of motion, we hold that the application was made within the time as permissible under the aforesaid section. Accordingly, we set aside the judgment and order of the learned Trial Judge. The matter was not dealt with on merits. Hence, the application is restored on file and remanded before the learned appropriate court for hearing on merit.

14. We find that there are sufficient reasons set out in the petition for which the petitioner was prevented from filing the application within the period of three months. Accordingly, we condone the delay.

15. Thus, the appeal is allowed to the extent as above.

16. In view of the aforesaid judgment and order now the matter needs to be heard on merits. Accordingly, affidavit in opposition may be filed within two weeks after the reopening of Puja Vacation, reply, if any, within two weeks thereafter. Matter may be mentioned before the appropriate Single Bench for early hearing after completion of filing affidavits.

17. We make it clear that if any extension or direction is required, the same may be prayed before the appropriate Single Bench and the parties need not come to the appellate court.