

(2009) 10 DEL CK 0131

In the Delhi High Court

Case No : I.A. No. 6124 of 2009 in O.M.P. 173 of 2005

Vishal Exports Overseas Ltd.

APPELLANT

Vs

Hamburg Bulk Carriers, GMBH

RESPONDENT

Date of Decision : 22-10-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34, 34(1), 34(2), 34(3)
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10
Limitation Act, 1963 — Section 14, 21, 29(2), 5

Citation : (2009) 10 DEL CK 0131

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : U.D. Shukla, Ashish Dholakia and Princy, for the Appellant; Prashant Pratap and O.P. Gaggar, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—On the last date of hearing, this Court passed the following order:

IA No. 6124/2009

Reply to the application has been filed. This is second time that the petition u/s 34 is being dismissed in default. On first occasion, i.e., 4th July, 2007 while this Court dismissed the petition, it was also observed that the petition was barred in view of Section 34(3) of the Arbitration and Conciliation Act.

Counsel has to satisfy not only on restoration but on the issue of petition being within limitation simultaneously. So the arguments of both the issues shall be heard together. List on 22nd October, 2009.

2. Consequently, today the matter is listed for arguments on the restoration application as well as the maintainability issue, namely, whether the present objection petition filed by petitioner was barred by limitation in view of Section 34(3) of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996").

3. The relevant facts of the present case are that on 30th August, 2002 an Award was rendered by an Arbitral Tribunal. Though, petitioner received a copy of the Award on 31st August, 2002, it filed its objections after a gap of 82 days before the City Civil Court at Ahmedabad u/s 34 of Act, 1996.

4. Since, the trial court dismissed respondent's preliminary objection with regard to territorial jurisdiction, respondent filed a special civil application bearing No. 9054/2004 before the Gujarat High Court. On 3rd November, 2004, Gujarat High Court allowed respondent's said application and directed that "the trial court may return the plaint to the party for presentation of the same before the appropriate court."

5. After a gap of 3 days, petitioner applied for a certified copy of the aforesaid judgment passed by the Gujarat High Court. Though on 2nd December, 2004, the Gujarat High Court's Registry notified the petitioner that certified copy was available, petitioner collected the same after a gap of 5 days, i.e., on 7th December, 2004.

6. However, it was only after a gap of nearly 5 weeks, i.e., on 13th January, 2005, that the petitioner filed an application before the City Civil Court at Ahmedabad for taking back the original objection petition for presentation before this Court. On 30th March, 2005, the City Civil Court at Ahmedabad passed the order directing return of the original objection petition as well as the documents for presentation of the same before an appropriate Court on or before 15th April, 2005. The trial court made it clear that in view of the submissions advanced by the learned Counsel for respondent, it was not deciding the issue whether the petitioner's application for return of objection petition was barred by limitation.

7. However, it was only on 12th April, 2005 that the petitioner filed the present objection petition before this Court. It is in the aforesaid facts that the issue whether the objection petition was barred by limitation in accordance with Section 34(3) of Act, 1996 needs to be determined.

8. Mr. U.D. Shukla, learned Counsel for petitioner drew the attention of this Court to Section 14 of the Limitation Act, 1963 (hereinafter referred to "Act, 1963"). The relevant portion of the said Section reads as under:

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 the 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 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.

9. Mr. Shukla submitted that in view of the aforesaid provision, the time between the date the petitioner filed its objection petition before the City Civil Court and the date on which the objection petition was returned to the petitioner, needs to be excluded. In this context, he referred to a judgment of the Supreme Court rendered in the case of Ram Ujarey Vs. Union of India, wherein it was held as under:

21. The period of limitation within which claim petitions can be filed before the Tribunal is indicated in Section 21 of the Act. The contingencies contemplated by Section 21 are not applicable to the present case. The suit, admittedly, was filed within time. It is another matter that it was filed in a court which had no jurisdiction and, therefore, the Tribunal, while allowing the appeal filed against the decree passed by the trial court, directed the plaint to be returned to the appellant for presentation before the appropriate Bench of the Tribunal. Some delay had occurred in the refile of the plaint before the Tribunal and as pointed out by the Tribunal itself, the delay was only of one-and-a-half months, although at one place the Tribunal observed that there was a delay of about eight months. The period of eight months has been calculated by the Tribunal from the date on which an order was passed at Allahabad for the return of the plaint. The limitation would not run from the date of the order, but would run from the date on which the plaint was returned and made available to the appellant, if the appellant was not at fault....

10. Mr. Shukla further submitted that the expressions "due diligence", "good faith" and "time to be excluded" in Section 14 of Act, 1963 would include within their ambit, a reasonable time the petitioner took "to mull over its option" after the order dated 3rd November, 2004 was passed by the Gujarat High Court upholding the respondent's submission with regard to territorial jurisdiction. In this connection, Mr. Shukla placed reliance upon a judgment of the Supreme Court rendered in case of Consolidated Engg. Enterprises Vs. Principal Secy. Irrigation Deptt. and Others, wherein it was held as under:

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 be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances....

11. On the other hand, Mr. Prashant Pratap, learned Counsel for respondent

submitted that the present objection petition was barred in view of Section 34(3) of the Act, 1996. He submitted that Section 14 of Act, 1963 only provided for exclusion of time which a party spent upon prosecuting a proceeding with due diligence. He stated that in the present case, petitioner had filed the objection petition in City Civil Court at Ahmedabad even though the agreement between the parties had been signed in Delhi and arbitration proceedings had been conducted in Bombay. He submitted that petitioner was not entitled to the benefit of Section 14 of Act, 1963 inasmuch as the objection petition had been filed in Ahmedabad even though no cause of action had arisen there. He further stated that the petitioner should have filed its objection petition before this Court latest by 6th January, 2005 as by the said date even the additional 30 days granted by the Proviso to Section 34(3) had expired. He submitted that this Court had no power or jurisdiction to condone the delay beyond a period of 120 days after rendering of an arbitral award.

12. Mr. Pratap further submitted that principle analogous to Order 7 Rule 10 of CPC would not apply in the present case as firstly, an objection petition was not a plaint and secondly, the original objection petition had not been re-filed in this Court.

13. Having heard the parties at some length, I am of the opinion that it would be appropriate to first refer to Section 34(3) of Act, 1996 which provides a period of limitation for filing objections to an arbitration award. The said Sub-section is reproduced hereinbelow:

34. Application for setting aside arbitral award.-

xxxx xxxx xxxx (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.

14. Consequently, three months is the period of limitation for filing objections to an arbitration award. However, Courts have the power to condone a further delay of thirty days. Accordingly, three months plus thirty days is the maximum period within which an objection petition challenging an arbitration award can be filed. In fact, Supreme Court in Union of India Vs. M/s Popular Construction Co., after referring to Section 34 of the Act, 1996 has held as under:-

12. 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.

xxx xxx xxx 14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed u/s 34 to challenge an award is absolute and inextensible by court u/s 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimize the supervisory role of courts in the arbitral process". This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

5. Extent of judicial intervention- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

15. The "Part" referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act. 16. Furthermore, Section 34(1) itself provides that 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). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, Sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed u/s 34 is emphasized by the provisions of Section 36 which provide that

where the time for making an application to set aside the arbitral award u/s 34 has expired...the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court.

15. Undoubtedly, keeping in view the observations of Supreme Court in Consolidated Engineering Enterprises's case (supra), petitioner would certainly be entitled to exclusion of time that petitioner spent in prosecuting with due diligence a proceeding in another Court even though the said Court did not have jurisdiction to entertain the same. Since in the present case, the trial court had come to the conclusion that it had territorial jurisdiction to entertain the petition, it cannot be said that the proceedings filed by the petitioner were either vexatious or vitiated by malice.

16. However, in my opinion, petitioner would only be entitled to exclusion of time that it spent either in prosecuting its objections in the City Civil Court at Ahmedabad or in contesting the appeal filed by respondent. The petitioner would certainly not be entitled to exclusion of time that it took "to mull over its option.

after the Gujarat High Court upheld the respondent's contention that the Ahmedabad City Civil Court had no territorial jurisdiction to entertain petitioner's objection petition because Section 14 of Act, 1963 only provides for exclusion of time that a party has spent on prosecuting with due diligence another civil proceeding. In any event, after the Gujarat High Court had decided against the petitioner, it still had a reasonable time period of thirty days "to mull over its option" and refile its objections before a court of competent jurisdiction inasmuch as by that time ninety days had only expired (i.e. 82 days prior to filing of initial objections + 3 days delay in applying for certified copy + 5 days delay in collecting the certified copy). Moreover, as the petitioner has admittedly not re-filed its initial objection petition before this Court, the judgment of Ram Ujarey (supra) referred to by learned Counsel for the petitioner has no application to the facts of the present case.

17. In the present case, I also find that the petitioner has not been diligent in pursuing its objection petition. As mentioned hereinabove, the present objection petition was dismissed in default on 4th July, 2007 as well as on 24th March, 2009. It is pertinent to mention that the Arbitral Tribunal has already informed this Court that since the matter was very old, the arbitral record had been destroyed. Consequently, both the application and petition are dismissed.