

GAHC010044732022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.A./6/2022

UNION OF INDIA AND 2 ORS.
REPRESENTED BY THE GENERAL MANAGER, NF RAILWAY, MALIGAON,
GUWAHATI 781011

2: THE DIVISIONAL RAILWAY MANAGER

NF RAILWAY
TINSUKIA DIVISION
TINSUKIA
ASSAM 786125

3: THE SENIOR DIVISIONAL ENGINEER (II)
NF RAILWAY
TINSUKIA DIVISION
TINSUKIA
ASSAM 78612

VERSUS

M/S JYOTI FORGE AND FABRICATION
COL. J. ALI ROAD, LAKHTOKIA, GUWAHATI 781001

Advocate for the Petitioner : MR H P GUWALA

Advocate for the Respondent : MR. M BISWAS

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

JUDGEMENT AND ORDER (CAV)

Date : 12-04-2023

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Heard Mr. B.K. Das, learned counsel for the appellants. Also heard Mr. M. Biswas, learned counsel for the respondent.

2. This appeal has been preferred by the appellants under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter for brevity as Arbitration Act, 1996) against the order dated 20.01.2022 passed by the learned District Judge, Tinsukia in Misc(J) Case No. 5/2020.

3. The brief facts of the case is that the respondent was found successful in tender process initiated by the appellant/Railway for execution of works "Provision of Separator made of 'W' Steel Section Mounted on Steel Channel Post in connection with the work at Dibrugarh Town-New Tinsukia to protect track mounting (11kms)." The letter of acceptance was issued to the respondent in respect of the work on 22.02.2013. The original period of completion of the contract work was 9(nine) months and the original contract value was Rs.34,34,980.75/- but the final value of work was increased by 21.99% i.e. Rs.4,18,48,959.75/-.

4. The parties signed the formal contract agreement and the contract is to be governed by the provisions of General Condition of Contract, 1988(GCC) and Standard Specification of Indian Railway Engineering Department, 2010. The Clause 3.15 of the agreement provides for payment of price variation(PVC). Although the respondent was required to complete the work by 21.11.2013, however, they could not and therefore, the respondent requested the Railway for granting extension of time for completion of work and ultimately time was extended from time to time and finally the respondent had completed the work on 18.07.2014. After

completion of the work, the respondent signed a no claim certificate while claiming refund of security deposit and earnest money. Thereafter, only the respondent vide letter dated 21.07.2015 claimed enhanced price variation. The Railway denied the price variation on the ground that the extension was granted on the condition 'without Liquidated Damage(LD) and without allowing Payment of Price Variation(PVC)' and that apart the respondent has already signed no claim certificate and as such, the respondent could not make any claim.

5. Subsequently, after exchange of pleadings and on consideration of materials on record, the learned Sole Arbitrator vide impugned award dated 25.05.2019 allowed the price variation (PVC) to the tune of Rs.26,62,378/- with interest @ 6.5% per annum from the date of completion of the work along with the cost.

6. The appellant has challenged the said order dated 25.05.2019 before the court of learned District Judge, Tinsukia under Section 34 of Arbitration Act, 1996 by way of filing Misc.(Arbitration) Case No. 04/2020 for setting aside the award on the ground that the extension was granted to the respondent by the competent authority of railway as per Clause 17B of GCC without LD and without PVC and as such, the respondent is not entitled for price variation. Along with Misc(Arbitration) Case No.04/2020, another petition was also filed by a separate application for condonation of delay being Misc(J) Case No. 05/2020.

7. It is also stated in the petition that as per Section 34(3) of the Arbitration Act, 1996 the petitioner, under Section 34 for setting aside the award dated 25.05.2019 could be filed within 3(three) months with further extension of time by days thereafter from the date of receipt of arbitral award. The appellant i.e. the Divisional Railway Manager, Tinsukia, who is the competent authority to take decision in the matter, received the award only on 19.12.2019. Therefore, the petition filed under Section 34 of Arbitration Act, 1996 was accompanied by a separate application for condonation of delay being Misc.(J) Case No. 05/2020. The condonation petition was taken up for hearing by the learned District Judge on 20.01.2022. After hearing the parties, vide impugned order dated 20.01.2022, the learned District Judge, Tinsukia passed the order by stating that the provision under Limitation Act is

not applicable to the case filed under Section 34 of the Arbitration Act and therefore, dismissed the Misc.(J) case vide No.05/2020.

8. Being highly aggrieved with impugned order dated 20.01.2022, the appellants have preferred this appeal.

9. The learned counsel for the appellants has argued that the arbitral award dated 25.05.2019 received by the Divisional Railway Manger only on 19.12.2019 who is the competent authority to approve the file for filing of petition under Section 34 of the Arbitration Act. Therefore, the limitation for filing the petition under Section 34 of the Arbitration Act shall commence from the date of receipt of the award but the learned District Judge failed to appreciate the said aspect of the matter.

10. It is also submitted by the learned counsel for the appellants that the period of limitation for filing petition under Section 34 of Arbitration Act starts from the date of receipt of the award by the party concerned i.e. parties to the arbitration proceeding. Since the award was received by respondent No.2 on 19.12.2019 as such, the limitation for filing petition under Section 34 of the Act starts from 19.12.2019 and the period of initial 3(three) months without condonation is up-to 19.03.2020. The Outer limit of limitation 30 days falls on 19.04.2020 with condonation. Since the petition under Section 34 of the Arbitration Act was filed on 24.01.2020 as such, the same is within the limitation. But the learned District Judge has failed to appreciate this aspect on the matter and thereby erred in law in passing the impugned order which is liable to be set aside.

11. In support of his submission learned counsel for the appellants has placed reliance on the following case law *2011(vol.4) SCC 616 (State of Maharashtra and Ors. vs ARK Builders Private Limited)*. By referring the aforesaid judgment, the learned counsel for the appellants submitted that the period of limitation for filing petition under Section 34 of Arbitration Act starts from the date of receipt of the award by the party concerned i.e. parties to the arbitration proceeding.

12. On the other hand, the learned counsel for the respondent has submitted that the appellants in their petition admitted that the Divisional Engineer, Tinsukia placed the award before the competent authority i.e. Divisional Railway Manager, Tinsukia on 06.09.2019 but the competent authority i.e. Divisional Railway Manager, Tinsukia approved the file for filing appeal on 19.12.2019 as such, the petition filed under Section 34 of Arbitration Act, 1996 was filed beyond the period of limitation as per Section 34(3) of Arbitration Act. Hence, the order passed by the District Judge, Tinsukia does not call for any interference.

13. I have considered the submissions of the learned counsel for the parties.

14. The issue involved in the appeal is whether the court has power to condone the delay in filing an application challenging the award by preferring appeal under Section 34 of the Arbitration Act, 1996, after the lapse of three months and thirty days and thereafter. Hence, it is necessary to reproduce section 34(3) of the Arbitration Act, 1996 which reads as follows –

“34(3) An application for setting aside may not be made after 3 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 3 months, it may entertain the application within a further period of 30 days, but not thereafter.”

15. Having regard to Section 34 of the Arbitration Act, 1996, which places the limit on the period of condonation of delay by using the word “may entertain the application within a further period of 30 days but not thereafter.” Therefore, if a petition is not filed within the prescribed period of 3 months, the court is left to exercise its discretion to condone the delay only to the extent of 30 days and that too, if a sufficient cause is shown which would mean that when a petition is filed beyond a period of 3 months plus 30 days even if sufficient cause

is made out, the delay cannot be condoned. So far as language of Section 34 of Arbitration Act, 1996 is concerned, the crucial words "**but not thereafter**" used in proviso to sub-section (3) of section 34 of the Arbitration Act, 1996 would amount to an express exclusion within the meaning of Section 29 (2) of the Limitation Act and therefore, the same would bar the application of section 5 of the limitation Act. In fact the Hon'ble Apex Court in the case of *Union of India vs. Popular Construction Company*, reported in (2001) 8 SCC 470 observed as under –

"Before us, the appellant has not disputed the position that if the Limitation Act, 1963 and in particular section 5, did not apply to Section 34 of the 1996 Act, then its objection to the award was time barred and the appeal would have to be dismissed. The submission however is that Section 29(2) of the Limitation Act makes the provisions of section 5 of the Limitation Act applicable to special laws like the 1996 Act, since the 1996 Act itself did not expressly exclude its applicability and that there was sufficient cause for the delay in filing the application under Section 34. Counsel for the respondent, on the other hand, has submitted that the language of Section 34 plainly read, expressly excluded the operation of Section 5 of the Limitation Act and that there was as such no scope for assessing the sufficiency of the cause for the delay beyond the period prescribed in the proviso to Section 34."

16. Section 34 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 the grounds for setting aside an award. An application filed beyond the period mentioned in sub-section(3) of Section 34 would not be an application in accordance with that sub-section. By virtue of Section 34 (3), recourse to the court against an arbitral award cannot be beyond the period prescribed. Sub-section(3) of Section 34 read with the proviso makes it abundantly clear that the application for setting the award on one of the grounds mentioned in sub-section(2) will have to be made within a period of 3 months from the date on which the party making that application receive the arbitral award. The proviso allows this period to be further extended by another period of 30

days on sufficient cause being shown by the party for filing an application. The intent of the legislature is evinced by use of the words "but not thereafter" in the proviso. These words make it abundantly clear that as far as the limitation for filing an application for setting aside an arbitral award is concerned, the statutory period prescribed is 3 months which is extendable by another period up to 30 days subject to the satisfaction of the court that sufficient reasons were provided for the delay and no more.

17. Section 5 of the Limitation Act provides thus –

“S. 5. Extension of prescribed period in certain cases- Any appeal or any application other than an application under any of the provision of order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he has sufficient cause for not preferring the appeal or making the application within such period.

Explanation– The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

18. Section 5 of the Limitation Act, 1963 deals with the extension of the prescribed period for any sufficient cause for not preferring the appeal or making the application within the prescribed period. Section 5 of the Limitation Act, 1963 has no application to an application challenging an arbitral award under Section 34 of the 1996 Act. This has been settled by the Hon'ble Apex Court in Popular Construction Company (Supra) which reads as follows –

“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 the Act. Parliament did not need to go further. To hold that the court would 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. Here the history and scheme of the 1996 Act support the conclusion that the time limit prescribed under Section 34 to challenge an award is absolute and unextendable by court under Section 5 of the Limitation Act....."

19. The Hon'ble Apex court has further observed in the case of *Simplex Infrastructure Ltd vs. Union of India* reported in (2019) 2 SCC 455, as under –

"A plain reading of sub-section(3) along with the proviso to Section 34 of the 1996 Act shows that the application for setting aside the award on the grounds mentioned in sub-section(2) of Section 34 could be made within 3 months and the period can only be extended for a further period of 30 days on showing sufficient cause and not thereafter. The use of the words "but not thereafter" in the proviso makes it clear the extension cannot be beyond 30 days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section(3) read with proviso to section 34 of the 1996 Act. The delay of 131 days cannot be condoned. To do so, as the High Court did, is to breach a clear statutory mandate."

20. In another case *P.K. Ramchandran vs. State of Kerala* reported in AIR 1998 SC 2276, the Hon'ble Apex Court has observed as follows –

"Law of limitation may harshly affect a particular party but it has to be applied with all its rigour, when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal therefore, succeeds and the impugned order is set aside."

Consequently the application for condonation of delay filed in the High Court would stand rejected and the Miscellaneous First Appeal shall stand dismissed as barred by time. No cost."

21. Reverting back to the case in hand, a perusal of the record in general and the instant application in particular would reveal that the appellant has offered no plausible explanation warranting condonation of delay. Nothing is stated in the application as to how much time was lost in making departmental communication and in obtaining approval. It is stated in the petition that though the office of Divisional Manger, Tinsukia received the copy of the award on 06/09/2019, but the competent authority has approved the matter for filing appeal on 19/12/2019. No explanation was given in the application as to what prevented the appellants i.e., the competent authority in filing the application under Section 34 of the Arbitration Act, 1996, immediately after receipt of the copy of the arbitral award.

22. The Hon'ble Apex court in the case of *State of Madhya Pradesh and others vs. Bherulal* reported in (2020) 10 SCC 654, has observed as under –

"No doubt some leeway is given for the government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the government. This position is more than elucidated by the judgment of the Hon'ble apex court in Post Master General vs. Living Media India Ltd reported in (2012) 3 SCC 563, where the court observed as under –

"It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this court. They cannot claim that they have a separate period of limitation when the department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to

be condoned mechanically merely because the government or the wing of the government is a party before us. The law of limitation undoubtedly binds everybody including the government."

23. The aforesaid being the legal position which clearly established that the court has no power to condone the delay beyond the period of 30 days after a period of 3 months from the date of receipt of arbitral award or from the date on which the request under Section 33 had been disposed by the Arbitral Tribunal and therefore, in the instant case, it is an admitted position that an application for condonation of delay was made beyond the extended period of 30 days after 3 months period was over. Since Section 34 (3) of the Arbitration Act, 1996 bars condonation of delay beyond the period of 30 days after a period of 3 months is over as section 5 of Limitation Act is not applicable to Arbitration Act, 1996.

24. In view of the above discussion, this Court does not find any reason to interfere with the findings and conclusion arrived at by the learned District Judge, Tinsukia while dismissing the Misc.(J) Case No. 05/2020.

25. In the result, the appeal is dismissed. However, there shall be no order as to cost. Consequently, connected civil applications, if any, also stand disposed of.

26 . Send back the LCR.

JUDGE

Comparing Assistant