Bombay High Court

E-Square Leisure Pvt. Ltd. vs Engineers Pvt. Ltd. on 1 February, 2013

Bench: R.D. Dhanuka

kvm

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 43 OF 2012

IN

CIVIL MISC. APPLICATION NO. 314 OF 2012

IN

PETITION NO. 5 OF 2011

E-Square Leisure Pvt. Ltd.)
having its Registered office at 132,)
University Road, Ganeshkhind,)

Pune - 411 016.)
Through its Managing Director,
ig)
Mr.Hemant Panchamiya,)
Age - Adult, Occ. : Business,)
Residing at 102, Silver Leaf,)

Gokhale Road, Behind Mafatlal)
Bungalow, Pune - 411 016.) ..... Appellant

VERSUS

K.K.Dani Consultants and)

Engineers Pvt. Ltd.)
767/9, Bhandarkar Institute Road,)
Pune - 411 004.) ..... Respondent

Mr.Vivek Kantawala, i/b. M/s.Vivek Kantawala & Co. for the Appellant.

Mr.R.Nehru, i/b. Ms.Krupa Sawant for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 1st FEBRUARY, 2013

ORAL JUDGMENT.

By this appeal filed under section 37 of the Arbitration and Conciliation Act, 1996, appellant seeks to challenge order dated 1st August, 2012 passed by the kvm ARA43_12 learned District Judge, Pune rejecting the application filed by the appellants seeking condonation of delay in filing arbitration application under section 34 of the Act. Some of the relevant facts for the purposes of deciding this appeal are as under :-

2. The disputes between the the parties were referred to the arbitration under the provisions of Micro Small and Medium Enterprises Development Act, 2006.

By an award dated 12th October, 2011, the Micro and Small Enterprises Facilitation Council (for short 'Council') directed the appellant to pay certain amounts to the respondent (original claimant before the Council).

3. It is the case of the appellant that a copy of the award was received by the appellant from the respondent on 12th December, 2011. The appellant filed a writ petition in this court challenging the said award (1057 of 2012). By an order dated 7th March, 2012 passed by this court, the appellant was allowed to withdraw the said writ petition with liberty to file arbitration petition. This court observed that the time spent in filing and prosecuting the writ petition will have to be excluded in view of the law laid down by the Supreme Court in case of State of Goa vs. M/s.

Western Builders, AIR 2006 SC 2525 and permitted the appellant to make that request to the court

before which the arbitration petition was to be filed.

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4. The appellant filed an application under section 34 before the learned District Judge on 9th April, 2012 with application for condonation of delay which was resisted by the respondent on various grounds including a ground that under section 19 of the Micro Small and Medium Enterprises Development Act, 2006, application under section 34 could not be entertained by any court unless the appellant had deposited 75% of the amount in terms of the award. By the impugned order dated 1st August, 2012, the learned District Judge rejected the application for condonation of delay of 23 days on various grounds.

5. Mr.Kantawala, the learned counsel appearing for the appellant submits that the appellant had filed writ petition instead of filing arbitration application under section 34 of the Act and such proceeding was filed in good faith and with due diligence. The learned counsel placed reliance upon the judgement of the Supreme Court in case of State of Goa vs. M/s. Western Builders1 and more particularly paragraphs 18, 24 and 25 in which the Supreme Court has held that section 14 of the Limitation Act would apply in Arbitration and Conciliation Act, 1996. The said paragraphs read thus :-

> **18. There is no provision in whole of the Act which prohibit discretion of the court. Under Section 14 of the Limitation Act if the party has been bona fidely prosecuting his remedy before the 1 AIR 2006 SC 2525 kvm ARA43_12 court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not.**
>
> **Learned Counsel for the respondent has taken us to the provisions of the Act of 1996; like Section 5, Section 8(1), Section 9, Section 11 Sub-section (4), (6), (9) and Sub-section (3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) (4) , Section 41, Sub-section (2) Section 42 & 43 and tried to emphasis with reference to the aforesaid sections that the legislature wherever wanted to give power to the Court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the court so as to enable to exclude the period spent in prosecuting remedy before other forum. It is true but at the same time there is no prohibition incorporated in statute for curtailing the power of the court under Section 14 of the Limitation Act Much depends upon the words used in statute & not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act, 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of Limitation be read in Act of 1996, which will advance the cause of justice. If statute is silent and there is no specific prohibition then statute should be interpreted which advances the cause of justice. Our attention was invited to various decisions of this Court but we shall refer to a few of them which has some relevance.**

24. Therefore, in the present context also it is very clear to us that there is no two opinion in the matter that the Arbitration and Conciliation Act, 1996 do not expressly excluded the applicability of Section 14 of the Limitation Act. The prohibitory kvm ARA43_12 provision has to be construed strictly. It is true that the Arbitration and Conciliation Act, 1996 intended to expedite the commercial issue expeditiously. It is also clear in the statement of objects and reasons that in order to recognize economic reforms the settlement of both of domestic & international commercial disputes should be disposed of quickly so that country's economic progress be expedited.

The statement of objects and reasons also nowhere indicate that Section 14 of the Limitation act shall be excluded. But on the contrary intendment of legislature is apparent in the present case as Section 43 of the Arbitration and Conciliation Act, 1996 applies the Limitation Act, 1963 as a whole.

It is only by virtue of Sub-section (2) of Section 29 of the Limitation Act, its operation is excluded to that extent of the area which is covered under the Arbitration and Conciliation Act, 1996. Our attention was also invited to the various decisions of this Court interpreting Sub-section 2 of Section 29 of Limitation Act with reference to other Acts like The Representation of Peoples Act or the provisions of Criminal Procedure Code where separate period of limitation has been prescribed. We need not over-burden the judgment with reference to those cases because it is very clear to us by virtue of Sub-section (2) of Section 29 of the Limitation Act that the provisions of Limitation Act shall stand excluded in Act of 1996 to the extend area which is covered by the Act of 1996. In the present case under Section 34 by virtue of Sub-section 3 only the application for filing and setting aside the award a period has been prescribed as 3 months and delay can be condoned to the extent of 30 days To this extent the applicability of Section 5 of Limitation will stand excluded but there is no provision in the Act of 1996 which excludes operation of Section 14 of the Limitation Act. If two Acts can be read harmoniously without doing violation to the words kvm ARA43_12 used therein, then there is no prohibition in doing so.

25. As the result of the above discussion we are of the opinion that the view taken by the court below excluding the applicability of Section 14 in this proceeding is not correct. We hold that Section 14 of the Limitation Act, 1963 is applicable in the Arbitration and Conciliation Act, 1996. We set aside all the judgments/Order and remand all these cases back to the Trial Court/District Court for deciding the application under Section 14 of Limitation Act on merit after hearing both the parties and in case the delay is condoned then the case should be decided on merits after hearing all the concerned parties. All the appeals are allowed. No order as to costs.

6. The learned counsel submits that it is not in dispute that copy of the signed award was not delivered upon the appellant by the Arbitral Tribunal (Council) though is mandatory under section 31(5) of the Arbitration and Conciliation Act.

The learned counsel submits that the limitation for filing an application under section 34(3) of the Act would commence only when signed copy of the award was received by the appellant from the Arbitral Tribunal (Council).

7. It is submitted that in view of the admitted fact that no signed copy of the impugned award was served upon the appellant by the Council, the limitation under section 34(3) of the Act did not commence and therefore there was no delay kvm ARA43_12 in filing application under section 34 of the Arbitration Act by the appellant. In the alternate to the aforesaid submissions, the learned counsel submits that there were sufficient reasons setout in the application for condonation of delay filed by the appellant which ought to have been considered by the learned District Judge while considering application for condonation. The learned counsel placed reliance upon the judgment of the Supreme Court in the case of State of Maharashtra & Ors. vs. M/s. Ark Builders Pvt. Ltd.2 and more particularly paragraphs 10, 12 and 13 which reads thus :-

> **10. The Appellants are now before this Court by grant of special leave. The two provisions of the Arbitration and Conciliation Act, 1996, relevant to answer the question raised in the case are Sections 31 and 34. Section 31 deals with `form and contents of arbitral award; and in so far as relevant for the present provides as follows:**
>
> **31. Form and contents of arbitral award.-**
>
> **(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.**
>
> **(2) xxxx (3) xxxx (4) xxxx (5) After the arbitral award is made, a signed copy shall be delivered to each party.**

(6), (7), (8) xxxx 2 AIR 2011 SC 1374 kvm ARA43_12 (Emphasis added) Section 31(1) obliges the members of the arbitral tribunal/arbitrator to make the award in writing and to sign it and Sub-section (5) then mandates that a signed copy of the award would be delivered to each party. A signed copy of the award would normally be delivered to the party by the arbitrator himself. The High Court clearly overlooked that what was required by law was the delivery of a copy of the award signed by the members of the arbitral tribunal/ arbitrator and not any copy of the award.

12. We are supported in our view by the decision of this Court in Union of India v. Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239 : AIR 2005 SC 1832; in paragraph 8 of the decision it was held and observed as follows:

" 8. The delivery of an arbitral award under Sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise

those rights on expiry of kvm ARA43_12 the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings. "

(Emphasis added)

13. The highlighted portion of the judgment extracted above, leaves no room for doubt that the period of limitation prescribed under Section 34(3) of the Act would start running only from the date a signed copy of the award is delivered to/received by the party making the application for setting it aside under Section 34(1) of the Act. The legal position on the issue may be stated thus. If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the law.

8. The learned counsel submits that in view of the Supreme Court judgment in case of State of Maharashtra (supra), the learned District Judge ought to have held that there was no delay in filing application under section 34.

9. The learned counsel appearing on behalf of the respondent on the other hand placed reliance upon section 19 of the Micro Small and Medium Enterprises kvm ARA43_12 Development Act, 2006 which reads thus :-

> **19. No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court : Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose.**

10. The learned counsel would submit that as there was no deposit of 75% made by the appellant before learned District Judge, the application filed under Section 34 of the Arbitration Act, 1996 itself could not have been entertained by the learned District Judge and thus question of entertaining any application for condonation of delay would not arise.

11. The learned counsel for respondent submits that the exclusion under section 14 of the Limitation Act would be available only if the appellant would have filed proceedings before the court not having jurisdiction and in good faith and with due diligence. The learned counsel submits that though the proper remedy of the kvm ARA43_12 appellant was to file application under section 34 to challenge

the impugned award, the appellant had filed writ petition in this court which was not in good faith and with due diligence. The learned counsel would then submit that as the application under section 34 has not been disposed of by the learned District Judge and an order rejecting an application for condonation of delay is not an appelable order under Section 37, present appeal is not maintainable. The learned counsel submits that appeal under section 37(1) (b) of the Arbitration and Conciliation Act is maintainable only if an order refusing to set aside or setting aside an award is passed. In support of this plea, the learned counsel placed reliance upon the judgment of Karnataka High Court in case of M.A. Mohd. Amanulla vs. B.R.Chandrashekar3 and more particularly paragraph 7 hereof which reads thus :-

> **7. By going through the provision under Section 37(1) (b) of the Act as above, it is clear therefrom that filing of an appeal arises only when there is either setting aside of the award or refusing to set aside the award. Admittedly, as argued by the learned Counsel for the respondent that there was no award as such, but for the reason best known to the appellant himself by terming the order of the Arbitrator as an 'interim award' he had filed an application before the City Civil Court. According to me, when there was no award, the question of preferring an application under Section 34 of the Act as resorted to by the appellant as against that order passed by the Arbitrator before the learned City Civil Judge did not arise at all.**

Therefore, in my considered view, on the point of 3 AIR 2005 Karnataka 17 kvm ARA43_12 maintainability alone, the instant appeal is liable to be rejected.

12. Placing reliance upon the said judgment, the learned counsel would submit that if there was no award before the court, there could not be any application under section 34 of the Act and resultantly appeal under section 37 was not maintainable.

13. On perusal of the impugned order passed by the Learned District Judge, it is clear that the entire order is based on the premise that the appellant had not applied for certified copy of the award to the Arbitral Tribunal (Council) though award was delivered on 12th October, 2011. It has been observed that the appellant was treating copy of the award received from the respondent as if it was certified copy of the award and was computing period of limitation from the date of receipt of such copy of the award from the respondent. The learned District Judge has then rendered finding that there was no sufficient reasons setout in the application for condonation of delay of 23 days and has thus rejected the application.

14. The question that arises for consideration of this court is whether appellant was bound to apply for any certified copy of the award under section 34 (3) of the Arbitration Act for the purposes of commencement of the limitation. On conjoint reading of section 34 (3) of the Act with section 31(5) of the Act, it is clear that kvm ARA43_12 there is no such requirement under the Arbitration Act for making an application for certified copy of the award. Limitation would commence only after signed copy of the award is received by a party from the Arbitral Tribunal. Section 31(5) provides that the Arbitral Tribunal has to deliver a signed copy of the award to each party. It is not in dispute that in this case a signed copy of the award was not delivered by the Arbitral Tribunal (Council) to the

appellant. On reading of Section 34(3), it is clear that application for setting aside can be made within three months from the date on which the party making an application had received a signed copy of the arbitral award from the Arbitral Tribunal. In my view, as the signed copy of the award was not delivered by the Arbitral Tribunal (Council) to the appellant, limitation for filing application under section 34(3) for challenging that award did not commence. Merely because a copy of the award was subsequently delivered by the respondent to the appellants would not commence period of limitation. The learned District Judge in my view has committed a patent error in overlooking the provisions of 31(5) read with section 34(3) of the Act and has proceeded on the erroneous premise that there was delay in filing application under section 34.

15. The learned counsel for the respondent in my view is right in his submission that if according to the appellant, there was no delay in filing application under kvm ARA43_12 section 34, there was no necessity to file any such application for condonation of delay. Be that as it may, the fact remains that as there was no delay in filing application under section 34, the learned District Judge could have rejected the said application on that ground and would have proceeded to hear the application under section 34 on merits. The learned District Judge however, has not rejected the said application on that ground.

16. In so far as the submission of the learned counsel appearing for the respondent that there was no order passed by the learned District Judge refusing to set aside an award and thus no appeal could be filed under section 37(1) (b) of the Act is concerned, I am of the view that as the application for condonation of delay itself is rejected, as a consequence thereof, the application filed under section 34 is also rejected. In my view, an order refusing to condone delay in filing application for setting aside award would amount to an order refusing to set aside award. In my view, appeal is thus maintainable under section 37(1) (b) of the Act against such an order refusing to condone the delay resulting in dismissal of application for setting aside an award.

17. In so far as the next submission of the learned counsel of respondent that in view of non deposit of 75% under section 19 of the Micro Small and Medium kvm ARA43_12 Enterprises Development Act, 2006 by the appellant admittedly, the Learned District Judge could not have entertained the petition is concerned, in my view, there is bar under section 19 from entertaining the petition under section 34 for non deposit of 75% but there is no bar from filing an application under section 34 of the Act. The stage of entertaining the petition would arise only after it is filed before the District Court. In my view such objection of non deposit of 75% could have been entertained by the learned District Judge only if he would have allowed the application for condonation of delay in filing section 34 application. Since the application for condonation of delay itself was rejected, that stage did not arise.

18. In my view, as limitation for filing application under section 34 did not commence for want of service of signed copy of the award upon the appellant by the Arbitral Tribunal (Council), there was no delay in filing application under section 34.

19. I, therefore, pass the following order :-

(a) Order passed by the District Judge 6 and the Additional Sessions Judge, Pune in Civil Misc.

Application No.314 of 2012 (Ex.15) on 1st August, kvm ARA43_12 2012 is set aside. The arbitration application filed by the appellant under section 34 of the Act is restored to the file before the learned single judge who shall proceed to hear the parties on merits and pass an order on the application in accordance with law.

(b) It is made clear that respondent would be at liberty to oppose the said application on the ground of non compliance of section 19 of the Micro Small and Medium Enterprises Development Act, 2006 and all other grounds permissible in law and if raised the same shall be dealt with in accordance with law.

(c) The learned district judge shall make an endeavour to dispose of the application filed under section 34 expeditiously and not later than four months from the date of producing copy of this order by the applicant.

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(d) Appeal is disposed off in the aforesaid terms.

(e) There shall be no order as to costs.

[R.D. DHANUKA, J.]