

* **HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 15th May, 2013

+ **F.A.O. (OS) No.261 of 2009**

MMTC LTD (INDIA) Appellant
Through: Mr. J.P. Sengh, Senior Advocate with
Ms. Padma Priya, Ms. Meenakshi Sood,
Mr. Sumeet Batra & Ms. Ankita Gupta,
Advocates.

versus

ALCARI, SA (SWITZERLAND) Respondent
Through: Mr. Dharmendra Rautray, Ms. Ankit
Khushu & Ms. Yashika Vats, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S. RAVINDRA BHAT, J. (ORAL)

1. The present appeal questions the judgment and order of the learned Single Judge dated 16.3.2009. By that order, the learned Single Judge proceeded to treat the request of the respondent (hereinafter called the petitioner) as an application under Section 14 (1) of the Arbitration Act, 1940 thereafter also condoned the delay in filing the suit.

2. Brief facts of the case are that the petitioner had invoked an arbitration clause in terms of which the Sole Arbitrator was appointed under

the aegis of the International Chamber of Commerce. The arbitration proceedings have been held in terms of the ICC rules; they culminated an award dated 17.2.2000. The petitioner filed execution proceedings, i.e., Ex. P. No.181/2000 sometime after the publication of the award, under the assumption that the provisions of the Arbitration and Conciliation Act, 1996 were applicable. During the course of those proceedings, in the light of the submissions made as well as the observations of the court, the petitioner withdrew the execution proceedings on 5.2.2002. On 11.2.2002, it filed proceedings under Section 17 of the Arbitration Act, 1940. Along with these proceedings, the petitioner filed an application (under Section 151 CPC – for consolidation of the proceedings in Suit No.379-A/2002 – one filed under Section 17) with the files in the previous proceedings in Execution Petition No.181/2000. Another application, i.e., I.A. No.1708 of 2002 was filed seeking condonation of delay in preferring the petition under Section 17. On these later matters, i.e., the petition (suit No.379-A/2002) and the two applications, the court issued notice on 7.8.2002. Apparently, the notice was served upon the appellant on 10.10.2002. It proceeded to file objections in the form of an application, i.e., I.A. No.353/2003 on 7.1.2003. On 23.4.2003, the court allowed I.A. No.1718/2002 – by which the

26

petitioner had sought consolidation of the files and the proceedings, instituted by it, stating as follows :-

"Counsel for the respondent submits that he does not contest the I.A. Record of the Execution No.181/2000 be summoned and listed with the present matter."

3. In these circumstances, it appears that the appellant filed its reply to I.A. No.1708/2002, i.e., the application seeking condonation of delay, on 6.3.2007 contesting that 'sufficient cause' existed for condonation of delay.

4. The appellant had contended that the proceedings under Section 17 were not maintainable. It had argued before the learned Single Judge that since the petitioner did not disclose any authority – express or implied – for filing the award under Section 14 (2), the proceedings for seeking to make the award rule of court were not maintainable. It was urged in this regard that the original award itself was not a part of the proceedings in Suit No.379-A/2002. In this regard, the petitioner had relied upon the decision reported as *Secretary to Government of Karnataka & Anr. Vs. V. Harishbabu; (1996) 5 SCC 400*. Additionally, the appellant contended that the delay in filing Section 17 should not be condoned since the petitioner had not taken *bona fide* steps, a condition precedent to the exercise of

discretion under Section 14 of the Limitation Act in condoning the delay. The learned Single Judge by the impugned judgment accepted the contention of the appellant that the award could have been filed in a properly constituted proceedings only with the authority of the Arbitrator and could not have been made rule of court unless the procedure prescribed under Section 14 of the 1940 Act was followed. The court also concluded that the petitioner had not shown such authority. However, the court granted the relief of condoning the delay observing that the original award had already come on record in the execution proceedings i.e., Execution Petition No. 181/2000, which had been assimilated in the later Section 17 proceeding, i.e., Suit No.379-A/2002.

5. Taking into account the entire circumstances, the court condoned the delay and thereafter proceeded to hear the request for making the award rule of court on merits along with the objections of the appellant.

6. It is argued on behalf of the appellant by Mr. J.P. Sengh, the learned senior counsel that the approach and order of the learned Single Judge is not sustainable in law. He placed reliance upon the decision of the Supreme Court in *V. Harishbabu's case (supra)* to state that the mere circumstance of

one of the litigants approaching the court and filing the award did not vest the court with jurisdiction to deal with it. Learned counsel stressed upon the statutory mandate in Section 14 of the 1940 Act and contended that the statute envisions only 2 situations whereby the original award of the proceedings could be taken on record. The first is where the Arbitrator files the award pursuant to the request by one of the parties and second would be where the Arbitrator is called upon by the court to place the award on its record in a properly constituted proceeding.

7. It was urged that in the present case, neither did the Arbitrator file the original award nor was a request made for bringing on record the proceedings of the ICC and in the circumstances, the learned Single Judge could not have taken cognizance of the matter at all in proceeding under Section 17. Learned counsel also relied upon the decision reported in *Koneru Venkata Subbaiah vs. Koneru Venugopal & Ors.*; 2001 (3) APLJ 256. It was urged that a party to the arbitration agreement has to make an application under Section 14 and not directly approach the court under Section 17 to make the award a rule of the court. Counsel also emphasized upon the consequence of the limitation period prescribed under Article 119 of the Limitation Act expiring and stated that in the facts and circumstances

of this case, the petitioner did not explain the delay of almost two years in filing the award, under Section 17.

8. To say that the court should not have exercised its discretion and condone the delay under Section 14 of the Limitation Act, learned counsel for the appellant relied upon the decision reported in *Deena (Dead) through LRs. Vs. Bharat Singh (Dead) through LRs. & Ors.*; AIR 2002 SC 2768 where the Supreme Court held as follows :-

"15. The main factor which would influence the Court in extending the benefit of Section 14 to a litigant is whether the prior proceeding had been prosecuted with due diligence and good faith. The party prosecuting the suit in good faith in the court having no jurisdiction is entitled to exclusion of that period. The expression 'good faith' as used in Section 14 means 'exercise of due care and attention'. In the context of Section 14 expression 'good faith' qualifies prosecuting the proceeding in the Court which ultimately is found to have no jurisdiction. The finding as to good faith or the absence of it is a finding of fact."

9. Learned counsel also relied upon the judgment reported as *Rabindra Nath Samuel Dawson vs. Sivakasi & Ors.*; AIR 1972 SC 730, where the court set out certain parameters to determine whether an earlier proceedings is prosecuted in 'good faith' as to warrant due exercise of jurisdiction under Section 14 of the Limitation Act. In this context, counsel urged that the

petitioner was well aware of the fact that its earlier proceeding under Section 36 of the Arbitration and Conciliation Act, 1996 was not maintainable and yet chose to keep it on the file of the court for about two years, after which it withdrew the same, for facing any adverse order on the maintainability. It was submitted that this conduct disentitled it to the relief of condonation of delay and assailed that the impugned judgment and order of the learned Single Judge requires to be set aside.

10. Counsel for the petitioner (respondent in this case) submitted that the initial mistake in preferring an application under Section 36 was on account of the unsettled position in law. He highlighted the fact that the proper interpretation of Section 85 (2) of the 1996 Act got finally settled by the decision in Delhi Transport Corporation Ltd. vs. Rose Advertising (2003) 6 SCC 36 in 2003 till then, the law was in a state of flux. Since the petitioner became aware that the proceedings were covered by the 1940 Act, it took active steps to withdraw the earlier proceedings i.e. Ex. P. No.181/2000 and preferred the Section 17 petition i.e. Suit No.379-A/2002. Counsel submitted that so far as the question of original award not being part of the record or that the proceedings under Section 14 not being maintainable are concerned, no such objection was articulated or even urged in the

application made by the present appellant under Section 30/33 of the Arbitration Act 1940, i.e., I.A. No.353/2003. It was submitted that on the other hand on 23.4.2003, the court made an order which clearly indicated that the appellant did not contest the request for consolidation of the earlier proceeding which in turn led to the logical conclusion that the original award had to be considered as an intrinsic part of Section 17 proceedings i.e. Suit No.379-A/2002.

11. Learned counsel submitted that in almost identical circumstances, the Allahabad High Court in *Hazi Rahmetulla vs. Chaudhari Vidya Bhusan*; AIR 1963 Allahabad 602, held that proceedings under Section 17 of the 1940 Act were maintainable, if no objection had been voiced on behalf of the other party, in the pleadings. Learned counsel particularly relied upon the following observations :-

"7. When notice was issued to the opposite party no objection was raised on behalf of that party that the award had not been properly filed by Rahmatullah in Court, nor was it even hinted that when Rahmatullah filed the award he filed it surreptitiously or that there was no authority by the arbitrators with Rahmatullah to file the award. So that, there were no circumstances which could even remotely indicate that the award had been improperly filed or that there was anything in the terms of Section 14 of the Arbitration Act which could preclude the Court taking into consideration the award for purposes of acting under the

powers- conferred on the Court under Section 17.

xxxxxxxxxxxx

11. *The question whether a party had the authority of the umpire or the arbitrator to file the award in Court as his agent or on his behalf was a question of fact and as all questions of fact, it had to be determined on the evidence and circumstances of each particular case. As we pointed out earlier, in this particular case, we find that the original award had been filed along with the record of all the proceedings taken before the Arbitrators by Rahmatullah in the Court. We also find that the other party never made any objection as to the competence of Rahmatullah to file the award in Court. No question was raised as to there being any want of authority in Rahmatullah for his having acted in the manner in which he did act. The Arbitrators were examined in the case and it was never suggested to them that Rahmatullah had surreptitiously filed the award in Court, or at any rate, he had done so without their specific authority. The Arbitrators came to give evidence and they supported the award. The opposite-party challenged the award on all possible grounds but not on this ground, namely, that the award had not been properly filed. Further, the point was neither raised before the Civil judge nor before the learned single Judge who made this reference to us. Therefore, in such circumstances it could not but be held that the award when it was filed by Rahmatullah was filed with the authority of the Arbitrator and that the award could be acted upon by the Court for the purpose of making a decree on its basis."*

12. Learned counsel submitted that on the question of exercise of discretion under Section 14, the learned Single Judge had applied the

principles properly and condoned the delay in filing of the application i.e. in Suit No.379-A/2002.

13. Counsel also additionally relied upon the judgment reported as *Radha Kishen vs. Madho Krishna & Anr.*; AIR 1952 Allahabad 856 to submit that the bar of limitation did not apply in the facts and circumstances of this case.

14. From the discussion in the preceding portion of the judgment, it is evident that the controversy in the present appeal is narrow, i.e., whether the award is said to have been filed. At the outset, this court notices that in the application/objections preferred by the appellant under Section 30/33 of the 1940 Act (I.A. No.353/2003), no objection as to the question of limitation or even to the maintainability of the award and the manner in which it was brought on the record has been voiced. In these circumstances, it seems somewhat strange that the appellant was allowed to urge the ground that it did to say that the entire proceedings were not maintainable. Having regard to these facts, the court is of the opinion that the reasoning and the observations in *Hazi Rahmetulla's case (supra)* apply squarely to the facts and circumstances of the case. Nevertheless, since the appellant did place reliance upon *V. Harishbabu's case (supra)* as well as the decision in

Koneru's case (supra), this court would deal with the same.

15. In *V. Harishbabu's case (supra)*, the Supreme Court stated that if the Arbitrator himself files an award in court, the latter is bound to give notice to the parties in that regard and no decree can be made unless such notice is served upon the other party and the period of 30 days thereafter has lapsed. In that proceeding, to follow the same trail of thought, the court held as follows :-

"Section 14 (2) of the Act reads :

The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in court, and the court shall thereupon give notice to the parties of the filing of the award."

16. In that reported decision, the successful litigant, that is, the respondent had filed a petition under Section 14 of the Arbitration Act, 1940. The respondent filed a petition under Section 14 of the Arbitration Act seeking for claiming that the award should be made rule of court. Notice of the

petition was issued by the court to the appellant and others on 24.4.1993 and made returnable on 22.6.1993. In the meanwhile, the Arbitrator himself filed the original award before the concerned court along with the proceedings and indicated documents. The Government Pleader, that is, the appellant's representative appears to have made an endorsement and accepted the notice stating "seen, subject to objections". However, formal notice in the proceedings arising out of the award filed by the Arbitrator had not been issued. It was in that context that the court observed that where the court issues notice upon an award filed by the Arbitrator, the question as to expiry of time would not arise until the period of 30 days lapsed. In the facts of the case, the court was of the opinion that since the original award had been filed on the record by the Arbitrator, in the absence of any notice upon it, the period of 30 days could not be said to have commenced.

17. In the present case, however, the facts are entirely different. The original award apparently was made available to both the parties. It is not in dispute that one of those signed awards is a part of the proceedings on record i.e. in Ex. P. No.181/2000. Even though the petitioner withdrew those proceedings, nevertheless the original award is on the record of the court as has been included as a part of Suit No.379-A/2002. Furthermore,

the appellant in this case never objected to taking on record the said award – as is evident in the order of the court in that regard made in I.A. No.1718/2002 on 23.4.2003. Even in the objections, i.e., I.A. No.353/2003, the appellant did not object to the procedure adopted.

18. Having regard to these circumstances, the court is of the opinion that the proceedings in the present case initiated after the withdrawal of Section 36 (of the 1996 Act) on 5.2.2002, were maintainable and in order.

19. As regards the second question, i.e., whether the petitioner had disclosed 'sufficient cause' in approaching the court belatedly, this court is conscious of the circumstances that the primary discretion to decide whether to grant relief under Section 14 or not to grant such a relief, is with the court of first instance. Sans an unreasonable or manifestly erroneous approach, this court sitting in appeal would be circumspect and slow in upsetting such a determination. Furthermore, the decisions cited by the appellant, i.e., *Deena's case (supra)* and *Rabindra Nath's case (supra)* nowhere indicate a proposition contrary to the ultimate decision of the learned Single Judge. The petitioner mistakenly assumed that the award in this case had the force of a decree and sought to have the same executed by initiating execution

proceedings. It is also a matter of common knowledge that at that time, the correct interpretation of Section 85 of the Arbitration & Conciliation Act, 1996 had not been settled.

20. Having regard to these circumstances, the exercise of discretion in condoning the delay under Section 14 by proceeding to hold that the petitioner had been prosecuting its case in a wrong forum by adopting a wrong procedure, *bona fide*, cannot be characterized as manifestly erroneous warranting interference by this court in these proceedings.

21. In view of the above conclusion, this court is of the opinion that the present appeal lacks in merits and is accordingly dismissed.


S. RAVINDRA BHAT
[JUDGE]


NAJMI WAZIRI
[JUDGE]

MAY 15, 2013
'AA'