

Court No. - 19

Case :- MATTERS UNDER ARTICLE 227 No. - 1963 of 2024

Petitioner :- Anoop Kumar Modi

Respondent :- Bharat Petroleum Corporation Limited Thru. M.D.
And Anr.

Counsel for Petitioner :- Girish Chandra Sinha, Mayank Sinha

Counsel for Respondent :- Mohammad Ehtesham Khan

Hon'ble Subhash Vidyarthi, J.

1. Heard Sri Girish Chandra Sinha, the learned counsel for the petitioner, Sri Surya Mani Singh Royekwar, the learned counsel for the respondents/opposite parties.

2. By means of the instant writ petition filed under Article 227 of the Constitution of India, the petitioner has challenged the validity of an order dated 06.03.2023 passed by the Commercial Court at Lucknow in Arbitration Case No. 129 of 2023 (Bharat Petroleum Corporation Limited and Another Vs. Anoop Kumar Modi), which had been filed for recalling of an order dated 28.11.2023 passed in the aforesaid case, whereby the Commercial Court has granted benefit of Section 14 of the Limitation Act to the opposite parties.

3. When this case was taken up on 23.04.2024, the learned counsel for the opposite parties had sought three days' time for filing a short counter affidavit and, accordingly, the case was ordered to be listed today as a fresh case. Today, Sri Royekwar, requested for grant of two weeks' further time for filing a short counter affidavit. As the hearing was adjourned on 23.04.2024 on his request for grant of three days', it is not proper to grant two weeks' further time when as against the prayer made for adjournment of three days, the case has been listed after six days. Accordingly, the court proceeds to hear the learned counsel for the parties to pass appropriate orders in the matter.

4. Briefly stated, facts of the case are that the petitioner's agreement for running a dealership of petroleum products was terminated by the opposite parties and the matter was referred to arbitration, which was decided by means of an award dated 04.04.2020. The opposite parties challenged the validity of the award by filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 before the District Judge, Deoria on 26.08.2020. On 22.09.2024, the petitioner filed objections stating that after establishment of the Commercial

Courts vide a Notification dated 31.10.2017, the application under Section 34 of the Arbitration and Conciliation Act, 1996 was not maintainable before the District Judge. The opposite parties contested the petitioner's objections and kept on insisting that the application had rightly been filed in the Court of the District Judge. After about 20 dates had been fixed in the matter, the opposite parties requested for transfer of the application to the Commercial Court, which was allowed by the District Judge, Deoria by means of an order passed in the month of May, 2023. The application under Section 34 of the Arbitration and Conciliation Act was accordingly transferred to Commercial Court, Gorakhpur, where the petitioner filed an objections that the Commercial Court, Gorakhpur had no jurisdiction to entertain the application under Section 34 of the Arbitration and Conciliation Act, 1996. Without dealing with the petitioner's objections regarding lack of jurisdiction, the Commercial Court, Gorakhpur passed an order condoning delay of three years in presentation of the application under Section 34 of the Arbitration and Conciliation Act, 1996.

5. Subsequently, on 09.11.2023, the Commercial Court, Gorakhpur passed an order holding that it had no jurisdiction to entertain the matter and it returned the paper book to the opposite parties. The opposite parties presented the application under Section 34 of the Arbitration and Conciliation Act, 1996, before the Commercial Court, Court No. 1, Lucknow on 28.11.2023. The Commercial Court passed an order that the file has been presented by way of transfer and it is time barred. The case was ordered to be registered as a miscellaneous case and was ordered to be put up for hearing on Applications No. C-4 and C-6 after lunch recess. After lunch, the Commercial Court passed another order on the same date stating that by means of an order dated 07.07.2023, the Presiding Officer of the Commercial Court, Gorakhpur had treated the application to have been filed within the prescribed period of limitation and thereafter the matter has been returned as the Commercial Court, Gorakhpur had no jurisdiction in the matter. As the delay had already been condoned by the Presiding Officer of the previous court, the opposite parties were granted benefit of the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 and Section 14 of the Limitation Act and the matter was ordered to be registered as an arbitration case.

6. The petitioner filed an application for recall of the aforesaid order dated 28.11.2023, whereby the Commercial Court had condoned delay in filing the application under Section 34 of the Arbitration and

Conciliation Act, without granting an opportunity to file any objections against it. That application has been rejected by means of the impugned order dated 06.03.2024, wherein the Commercial Court has held that the impugned order was passed on 28.11.2023 whereas the recall application has been filed on 29.01.2024 i.e beyond the prescribed period of 30 days and without assigning any sufficient reason for the delay. The Commercial Court further held that the application had been presented before him within 14 days of passing of the order dated 09.11.2023 by the Commercial Court, Gorakhpur and, therefore, the recall application was liable to be rejected.

7. The learned counsel for the petitioner has submitted that the impugned order dated 28.11.2023 has been passed condoning the delay in filing the application under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside an arbitration award dated 04.04.2020, which was presented before the Commercial Court, Lucknow on 28.11.2023, without granting any opportunity to the petitioner to file objections against it, although this order affects valuable rights of the petitioner and, therefore, the order having been passed in violation of the principle of natural justice, was liable to be recalled. The recall application of the petitioner has been rejected wrongly on the ground that it had been filed beyond the prescribed period and keeping in view the previous order passed by the Commercial Court at Gorakhpur. He further submitted that when the Commercial Court, Gorakhpur itself held that it had no jurisdiction over the matter, the order condoning delay in filing the application passed by the Commercial Court, Gorakhpur, was also passed without jurisdiction and it confers no rights on the opposite parties.

8. Opposing the application, Sri S.M. Royekwar, the learned counsel for the opposite parties has submitted that the opposite parties had earlier filed a petition under Article 227 No. 2704 of 2023 and another petition No. 2703 of 2023, challenging orders dated 24.04.2023 passed by the Presiding Officer, Commercial Court, Court No.2, Lucknow, whereby objections filed by the corporation against the execution application filed by the petitioner came to be dismissed. That petition was dismissed by means of an order dated 18.10.2023. The corporation has filed another petition under Article 227 No. 6196 of 2023, challenging the validity of the order dated 28.11.2023 passed by the Commercial Court, Lucknow issuing notice on the stay application filed by the corporation, without granting any ex-parte order of stay. That petition was disposed of by means of an order dated 12.12.2023 with the following observations:-

"The petitioner therein shall deposit an amount of Rs.35 Lacs (Rs.35,00,000/-) with the Commercial Court No. 2, Lucknow, where the execution applications are pending at the instance of the respondent within a period of four weeks from today. The amount so deposited by the petitioner shall be paid to the respondent on his executing a bond before the Commercial Court No. 2, Lucknow and undertaking to the effect that the amount received by the respondent shall be subject to the outcome of the final litigation in between the parties. The respondent would be at liberty to move an appropriate application for recall of the order dated 28.11.2023 passed on the application no. C-4 and shall be entitled to take such steps as may be advised under law. The Commercial Court No. 1, Lucknow, subject to the arguments raised by the parties endeavour to decide the entire petition with all expedition without granting any unnecessary adjournments to either of the parties preferably within a period of four months from the date of production of certified copy of this order in accordance with law. "

9. The learned counsel for the opposite parties has submitted that when a coordinate bench of this Court issued a direction to the Commercial Court for deciding the petition with all expedition within a period of four months, passing of any order on this petition filed by the petitioner would run contrary to the order dated 12.12.2023 and, therefore, this court should refrain from passing any order which may run contrary to the order dated 12.12.2023. He has further submitted that the corporation has filed another petition Under Article 227 No. 1019 of 2024. That petition arises out of the direction issued by this Court in the aforesaid order dated 12.12.2023 for deposition of Rs. 35 lacks by the corporation and released thereof in favour of the petitioner on executing a bond. The corporation had filed objections before the Commercial Court challenging validity of the bond submitted by the petitioner. That objections was rejected against which the petitioner has filed a petition under Article 227 which is still pending consideration before this Court. Therefore, this Court should not pass any orders in this petition and this petition ought to be heard along with that pending petition.

10. The learned counsel for the opposite parties next submitted that in spite of a direction issued by this Court in the order dated 12.12.2023 passed in petition under Article 227 No. 6196 of 2023 for final disposal of the matter within four months, the petitioner mischievously allowed that period to elapse and has filed an application for recall of the order belatedly, which conduct of the petitioner disentitles him for grant of any discretionary relief by this Court. He further submitted that the Commercial Court has no jurisdiction to entertain an application for recall of the order as proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 are not a "Suit". The applicability of the provisions of Code of

Civil Procedure is only in respect of suits, subject to amendments given in the schedule appended to the Commercial Courts Act, as provided in Section 16 of the Commercial Courts Act.

11. Therefore, the provisions contained in the Code of Civil Procedure are not applicable to the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 and to the application for recall of the order filed by the petitioner. All the proceedings of judicial or quasi judicial nature are required to be conducted in accordance with the principles of natural justice where no orders can be passed against any person, who would be adversely affected by the order without giving him an appropriate opportunity of hearing. The arbitration award in favour of the petitioner was passed in the present case on 04.04.2020. **Section 34(3) of the Arbitration and Conciliation Act, 1996** provides that:-

"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 under section 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."

12. Therefore, an application under Section 34 of Arbitration and Conciliation Act is required to be filed within a period of three months and the Court has no power to condoned any delay in filing the application, beyond the period of 30 days. After establishment of the Commercial Courts, the application for setting aside the award dated 04.04.2020 ought to have been filed before the Commercial Court but the opposite parties filed it before the District Judge, Deoria. The petitioner raised objection against the maintainability of the application before District Judge, Deoria on 22.09.2020 but the opposite parties opposed this objection of the petitioner and kept on insisting that the petition has rightly been filed before the District Judge, Deoria. However, after the case having remain pending for about three years and more than 20 dates having been fixed in it, the District Judge, Deoria passed an order for transfer of the petition to Commercial Court, Gorakhpur. The District Judge had no authority under any provision of law to transfer an application under Section 34 of the Arbitration and Conciliation Act to the Commercial Court.

13. Although the Commercial Court had condoned the delay of about three years by means of an order dated 07.07.2023, by means of its subsequent order dated 09.11.2023, the Commercial Court held that it had no jurisdiction in respect of the matter. When the Commercial Court, Gorakhpur has itself held that it had no jurisdiction over the matter, the earlier order passed by it condoning the delay in filing the application, also becomes an order passed without jurisdiction. The application was filed before the Commercial Court, Lucknow on 28.11.2023 and although the Commercial Court issued notice on the application for execution of stay of the award, it passed an order that as the delay in presentation of the application has already been condoned by the Presiding Officer of the previous Court and has ordered the application to be presented before the Competent Court, the opposite parties were entitled to the benefit of Section 34(3) of the Arbitration and Conciliation Act and Section 14 of the Limitation Act and, accordingly, it treated the application to be within time. The aforesaid order undisputedly affects valuable rights of the petitioner and it has been passed without giving an opportunity of hearing to the petitioner.

14. So far as the question that this application has been filed after a considerable delay and it would adversely affect compliance of the order dated 12.12.2023 passed by this Court in petition under Article 227 of the Constitution of India being Writ Petition No.6196 of 2023 is concerned, the aforesaid order merely directs the Commercial Courts to endeavor to decide the petition with all expedition, subject to the arguments raised by the parties, preferably within a period of four months. It does not create an estoppel against the rights of the parties to raise all the points which they are entitled to raise as per the provisions of law. The petitioner is certainly entitled to raise the point of an order having been passed without giving an opportunity of hearing to him, which order affects his valuable rights adversely. Therefore, the petitioner is not stopped from raising this plea because of the order dated 12.12.2023.

15. So far as the objection of the learned counsel for the opposite parties, that there is no provision for recall of the order is concerned, it is settled law that whenever a judicial or quasi judicial authority passes an order without giving an opportunity of hearing, that order is bad in law and the aggrieved party can seek its recall/review.

16. The Commercial Court has rejected the application on the ground that it has been filed beyond the prescribed period of 30 days. When

there is no provision for filing a recall application, there can be no question of any period of limitation having prescribed for filing an application. Therefore, the Commercial Court has erred in holding that the recall application is time barred. This approach of the Commercial Court in rejecting the petitioner's application for recall as time barred while condoning the delay of more than 3 years in filing an application under Section 34 of the Arbitration and Conciliation Act in spite of a specific bar contained in the proviso appended to Section 34 (3) of the Arbitration and Conciliation Act, is self contradictory and cannot be appreciated.

17. In view of the aforesaid discussion, I am of the considered view that the order dated 06.03.2024 passed by the Commercial, Court No.1, Arbitration Case No.129 of 2023 is unsustainable in law.

18. Accordingly, the writ petition is ***allowed*** and the orders dated 06.03.2023 passed by the Commercial Court at Lucknow in Arbitration Case No. 129 of 2023 (Bharat Petroleum Corporation Limited and Another Vs. Anoop Kumar Modi) and a recall order dated 28.11.2023 are hereby ***quashed***.

19. The Commercial Court is directed to decide the application for recall of the order filed by the petitioner afresh from the date of production of a certified copy of this order within a period of two weeks' keeping in view the observations made in this order and the Commercial Court shall proceed with the case expeditiously, without giving any unnecessary adjournment to any of the parties.

(Subhash Vidyarthi,J.)

Order Date :- 29.4.2024
Preeti.