

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.356 of 2013

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The State of Bihar Through The Secretary Department of Science &
Technology & Ors.

.... Appellant/s

Versus

Rastriya Priyojna Nirman Nigam Limited & Anr.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. D. K.Sinha, Sr. Advocate
Mr. Shailendra Kumar Singh, Advocate
For the Respondent/s : Mr. Nand Kishore Singh, Advocate
Mr. Dharmendra Kumar, Advocate

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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO**

CAV ORDER

- 7 13-01-2015 **1.** I have heard the learned senior counsel, Mr. D. K. Sinha, on behalf of the appellant and the learned counsel, Mr. Nand Kishore Singh, on behalf of the respondent under Order 41 Rule 11 of the Code of Civil Procedure.
- 2.** The application being I.A. No.7803 of 2014 has been filed by the appellant praying for stay of execution case during the pendency of this Misc. Appeal. It was directed that the I.A. shall be considered at the time of hearing under Order 41 Rule 11 C.P.C., therefore, I heard the parties on this I.A. also.
- 3.** This Misc. Appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 by the State of Bihar and the authorities against the order dated 7th March, 2013 passed

by the learned Sub Judge Ist, Gopalganj in Misc. Case No.16(A) of 2012 whereby the learned Sub Judge dismissed the Misc. case on the ground of limitation.

4. It appears that the Misc. case No.35 of 2006 was filed by the appellants under Section 34 of the Arbitration Act, 1996 for setting aside the Award dated 26th February, 2006 passed by the sole arbitrator, Mr. Justice. R. N. Lal (retired). This Misc. case was filed at Patna on 27th October, 2006. The *Shrestedar* gave report to the effect that the Misc. case is barred by 243 days. However, notices were issued by the Sub Judge Ist, Patna to the respondents directing that the limitation petition shall be considered at the time of hearing of the Misc. case. It appears that subsequently this Misc. case filed at Patna was transferred to Gopalganj by the order of the High Court passed in MJC No.439 of 2012 and then at Gopalganj, the Misc. case No.35 of 2006 was renumbered as Misc. case No.16(A) of 2012.

5. The respondents herein appeared in the Misc. case and filed show cause to the limitation application filed by the appellant and prayed that the Misc. case is hopelessly barred by law of limitation, therefore, the limitation matter may be decided as preliminary issue. After hearing the parties, thereafter the

impugned order has been passed by the Court below dismissing the Misc. case itself on the question of limitation.

6. The learned counsel, Mr. Nand Kishore Singh appearing on behalf of the respondent raised the preliminary issue about the maintainability of this Misc. appeal. According to the learned counsel, the Court below has not decided the Misc. case on merit and has dismissed the case on the ground of limitation only, therefore, appeal is not maintainable rather civil revision will lie. On the contrary, the learned senior counsel, Mr. D. K. Sinha, submitted that the Court below by the impugned order has dismissed the Misc. case, thereby he refused indirectly to set aside the Award under Section 34 of the Arbitration and Conciliation Act, 1996. In such circumstances, when the Award has been confirmed, appeal is maintainable under Section 37.

7. So far merit is concerned, the learned senior counsel, Mr. Sinha, for the appellant submitted that in fact the Award was communicated to the appellants on 8.8.2006 and within 90 days, the Misc. case was filed and according to Section 34 sub Section 3, the limitation is 90 days + 30 days. Therefore, within 90 days from the date of communication of the Award, the Misc. Case was filed which was not at all time barred but since the *Shrestedar*



gave a report that it is time barred, a separate application under Section 34 sub Section 3 was filed by the appellant explaining the matter that in fact on 8.8.2006, the Award was communicated to the appellants and the Misc. Case has been filed on 27th October, 2006, therefore, prayed for condoning the delay but the learned Court below without considering this aspect of the matter and without recording as to whether it was communicated to the appellants on 8.8.2006 or not and when the limitation started running dismissed the Misc. case only on the ground that Section 5 of the Limitation Act is not applicable. While recording this finding, the learned Court below did not even care to look into the application filed by the appellant that the application was filed by the appellant under Section 34 sub Section 3 of the Arbitration and Conciliation Act, 1996 wherein there is provision for condoning the delay. Therefore, the learned Court below misdirected itself by saying that Section 5 of the Limitation Act is not applicable, therefore, the Misc. Case is dismissed. The Court below has not at all applied his mind with respect to the provision under Section 34 Sub Section 3.

8. On the other hand, the learned counsel for the respondent submitted that in support of the fact that the Award was communicated to the petitioner on 8.8.2006, nothing was



brought on record by the appellant. Admittedly, the Award is dated 26th February, 2006, therefore, according to Section 34 Sub Section 3, the Misc. case could have been filed within 90 days + 30 days, i.e., total 120 days and not beyond that. Mere saying that Award was communicated on 8.8.2006 will not do, therefore, the learned Court below has rightly held that the Misc. case is time barred. The learned counsel further submitted that the appellant never challenged the report of the *Shrestedar*, nor the appellants explained that the report of *Shrestedar* is wrong. It is admitted fact that the Misc. case have been filed after 243 days. Therefore, the learned Court below has rightly held that it is hopelessly barred by law of limitation. Moreover, since this is the appeal, therefore, this Court can look into the matter as to whether the Award can be set aside or not on the ground enumerated in Section 34 of the Arbitration and Conciliation Act, 1996. According to the learned counsel, instead of referring the matter again to the trial Court, the matter may be examined by this Court. On this ground, the learned counsel submitted that the appeal be dismissed.

9. So far stay application is concerned, the learned senior counsel for the appellant submitted that the Award amount of Rs.43,74,142/- has already been paid to the respondent, therefore,

during the pendency of the appeal, the further proceeding in execution case be stayed.

10. On the contrary, the learned counsel for the respondent submitted that the amount paid is to be adjusted towards the interest only and now the total claim including interest according to Award will be Rs.1,07,07,294/-, and out of that the payment of Rs.43,74,142/- shall be adjusted towards the interest only. In reply to this, the learned senior counsel for the appellant submitted that the execution case have been filed for realization of Rs.43,74,142/- only with interest as provided under the law since the amount has been paid, the further proceeding be stayed.

11. So far the maintainability of this Misc. Appeal is concerned, Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act of 1996) reads as follows :-

“37. Appealable orders :- (1) An appeal shall lie from the following orders (and from no others) to the court authorities by law to hear appeals from original decrees of the Court passing the order, namely :-

(a) granting or refusing not grant any measure under Section 9;

(b) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal –

(a) accepting the plea referred to in sub-Section (2)

or sub- Section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

12. In view of this provision, an order refusing to set aside an arbitral award under Section 34 is appealable. There is nothing in this provision that if the Court refused to set aside on particular ground then only Appeal will lie and if the Court refused to set aside on the ground of limitation then Appeal will not lie. It is admitted fact that Misc. case was filed under Section 34 praying for setting aside the Arbitral Award. This Misc. case has been dismissed by the Court, therefore, on what ground, it has been dismissed is not material but the fact is that the prayer for setting aside arbitral Award has been refused. There is also no provision that if the Misc. case is decided on merit then only Appeal will be maintainable. I, therefore, find no force in the preliminary objection raised by the respondent. Accordingly, it is held that this Misc. Appeal is maintainable.

13. Now, let us consider on merit. Admittedly, the Award was made on 26.02.2006. The Misc. case was filed on 27th October, 2006 by the appellant. Section 34 sub Section 3 of

Arbitration and Conciliation Act, 1996 reads as follows :-

34. Application for setting aside arbitral award –

(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 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.

14. According to this provision, three months period will be counted from the date on which the appellant had received the arbitral Award because admittedly, no request had been made by either party under Section 33 of the said Act. The appellant filed an application under this provision and prayed for condoning the delay, if any, alleging that the Award was received by the appellants on 08.08.2006 and the application has been filed on 27th October, 2006 within three months. In other words, according to the appellants, the Misc. case has been filed within 90 days from the date of receipt of the Award as provided under Section 34 sub Section 3 of the Arbitration Act, 1996. So, it is within time. In this way, the appellant had explained the limitation which was pointed out by the *Shrestedar*.

15. From perusal of the impugned order passed by the Court



below, it appears that the Court below did not apply his mind to these facts and proceeded to decide as to whether Limitation Act will apply or not and recorded a finding that Limitation Act has got no application and even if there is an application under Section 5 of the Limitation Act, it is out and out redundant as it has got no meaning in the eye of law. It may be mentioned here that it was not the case of the appellant that any application under Section 5 was filed and they never prayed for condoning the delay in exercise of jurisdiction under Section 5 of the Limitation Act. In fact the application was filed under Section 34 sub Section 3 of the Arbitration Act, 1996. While observing regarding as to whether Limitation Act is applicable or not, the Court below did not even go through the application filed by the appellant nor even discussed the provision of Section 34 sub Section 3 of the Arbitration Act, 1996. Nowhere the Court below recorded any finding as to from which date, the limitation will start running for filing Misc. case.

16. So far the submission of learned counsel for the respondent that nothing was filed in support of the case that Award was received by the appellants on 08.08.2006 is concerned, it may be mentioned here that on this ground, the Court below has not dismissed the Misc. case. It is not the case of the respondent



also that any opportunity was granted to the appellant to produce evidence in support of the fact. On the contrary, from perusal of the show cause filed by the respondent to the application of the appellant, it appears that the respondent nowhere denied the fact of receipt of copy of Award by the appellant on 8.8.2006. Therefore, in the Court below this fact was not disputed by the respondent. It was not the case of the respondent that Award was not received by the appellant on 8.8.2006.

17. The submission of the learned counsel for the respondent that the appellants were present or that they had knowledge of passing of Award or that notices were issued by registered post by the Arbitrator is concerned, also it may be stated that these are not the facts alleged before the Court below by the respondent. The Court below has also not examined in this manner nor those have been made any ground for dismissal of the Misc. case.

18. So far stay application is concerned, since I am disposing of the Misc. appeal itself at the stage of admission after hearing both the parties, no separate order on stay application is passed. Moreover, it is admitted fact that the Awarded amount for which the execution case has been filed has already been paid by

the appellants to the respondents. Whether it will be adjusted towards interest or not that is a matter to be considered at the time of final hearing in the Misc. Case.

19. So far the submission of the learned counsel for the respondent to the effect that this Court being the appellate Court can decide as to whether on the grounds alleged by the appellant, the arbitral Award be set aside or not under Section 34 is concerned, it will not be out of place to mention here that the Misc. case has been dismissed on the ground of limitation. In the Misc. Appeal, we are examining the legality or otherwise of the impugned order regarding as to whether the Court below could have refused to set aside the arbitral Award. Therefore, the order passed by the Court below cannot be said to be legal or illegal order after examining the merit of the Misc. case. In other words, the legality or otherwise of the impugned order is not dependent on the merit of this Misc. case. I, therefore find no force in the submission of the learned counsel for the respondent.

20. In view of the aforesaid discussion, I find that the Court below has misdirected itself in approaching the case and dismissing the Misc. case recording a finding that Limitation Act is not applicable without considering the relevant provisions of

law and without considering the grounds raised by the appellant. I, therefore find that the impugned order is unsustainable in the eye of law.

21. In the result, this Misc. Appeal is allowed. The matter is remitted back to the Court below to pass a fresh reasoned order after considering the relevant provisions of law and meeting the points that is raised by the appellant.

(Mungeshwar Sahoo, J)

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