

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.540 of 2011

- =====
1. The General Manager East Central Railway Vaisali
 2. The Divisional Engineer-1 East Central Railway Sonepur Saran

.... Appellant/s

Versus

1. Alishan Construction Through Proprietor Amitesh Kumar Roy C/O Bindeshwar Roy Vill Sokhara Po Barauni Ps Phulwaria Begusarai
2. Mr Justice R.N.Lal

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. ANIL KUMAR SINHA

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 27.10.2015

Heard the parties.

2. In the present appeal the appellant is challenging the order dated 23.10.2010 passed by Sub-Judge I, Patna in Misc. Case No.2 of 2008 by which the court below has dismissed the application filed by the appellant.

3. This Court vide order dated 29.9.2015 has already held that the Railway Administration has rightly filed an appeal in the present case against the order of the court below refusing to set aside the order passed by the Arbitrator. Both the parties have argued the case on merit of the case. It will be proper to advert essential fact for deciding the case on merit.

4. It appears from the record that Hon'ble Mr. Justice R.N.



Lal retired Judge of this Court was appointed as a sole Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act, 1996). The question was posed to give answer with regard to enhancement of the amount in relation to the execution of the work. The Arbitral Tribunal rejected the objection of the Railway Administration and passed the award dated 15.4.2007 in favour of respondent in the present case. It will be relevant to mention that the award was passed and published on 31.3.2007. Thereafter the respondent has filed a correction petition on 2.4.2007 for making some necessary correction in the award. As per the appellant the second award corrected copy was never served and could not know about the correction made in the award when the Railway Administration has received summon in Execution Case No.25 of 2007, thereafter he applied for certified copy which was made available and just after few days on 4.1.2008 challenged the award under Section 34 of the Act, 1996 vide Misc. Case No.2 of 2008 on 11.1.2008.

5. Other side has raised the objection about the maintainability of the application of Section 34 of the Act, 1996 on the ground of delay as application under Section 34 of the Act, 1996 was filed beyond the maximum period provided



under Section 34 of the Act, 1996. The court below has accepted the plea of the respondent refused to interfere and rejected the miscellaneous application on the ground that objection was filed much beyond the statutory period of limitation provided under the Act. In paragraph 9 of the judgment Tribunal has recorded that admittedly the award was passed on 31.3.2007 and the same was known to the petitioner on 30.4.2007 and it may be presumed that he received the award on 30.4.2007. Rectification petition was filed before the Tribunal on 2.4.2007 which was disposed on 15.4.2007. The first date of receipt of award i.e. 30.4.2007 was taken for reckoning the period of Limitation matter will be considered at the time of admission and another day he has taken is the day when correction petition was disposed of on 15.4.2007.

6. As per learned counsel for the appellant for the purposes of calculating the period of limitation the receipt of award before correction will not be the date for calculating the period of limitation. It will be taken when he could know about the date through the execution proceeding and filed an application for certified copy which was made available on 4.1.2008.

7. For arriving to the correct position in law with respect to the present case, it will be relevant to examine the relevant

provision of the Act, 1996. First is Section 31 of the Act, 1996 where section mandates that parties will be given the signed copy of the arbitral award. It will be relevant to quote Sub (1) and (5) of Section 31 of the Act, 1996.

“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.
(5) After the arbitral award is made, a signed copy shall be delivered to each party.”

Section 33 of the Act, 1996 shall apply for correction in the arbitral award or to additional award made under this section. It will be relevant to quote Section 33 of the Act, 1996:

“33. Correction and interpretation of award; additional award.- (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties-
(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.
(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, given an interpretation or make an additional arbitral award under sub-section (2) of Sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.”

8. Section 33 of the Act, 1996 empowers the party to the arbitration within thirty days from the receipt of the arbitral award unless another period of time has been agreed upon by the parties, a party may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award. Sub-section (4) also provides that unless otherwise agreed by the parties, a party with notice to the other party may request within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. The Arbitral Tribunal otherwise extended the

time would within 60 days make a correction and give an interpretation or make an additional arbitral award under sub-section (2) of sub-section(5).

9. Then next Section is 34 of the Act, 1996 which provides that the person who is aggrieved by the arbitral award may file an application for setting aside the said award in accordance with sub-section (2) and sub-section (3) of Section 34 of the Act, 1996. Sub-section (3) of Section 34 of the Act, 1996 provides that award can be challenged within three months and that can be extended further for the period of thirty days but not thereafter. It will be relevant to quote sub-section (3) of Section 34 of the Act, 1996:

Xxx

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“(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.”

10. On perusal of the aforesaid three sections it appears



that Section 31(5) of the Act, 1996 mandates that arbitral tribunal will deliver the signed copy of arbitral award to each party. Section 33 sub-section (6) provides that arbitral award may extend, if necessary, the period of time within which it shall make a correction, given an interpretation or make an additional arbitral award under sub-section (2) of sub-section (5). Sub-section (7) further mandates in terms of Section 31, the Tribunal is required to serve signed copy of the award to the parties. The aforesaid sections show that different limitation period has been provided for different purposes. Section 34 of the Act, 1996 provides the period for challenge the award, Section 33 of Act, 1996 provides the time for correction of the award. So the question in the present case which date will be taken for counting the period of limitation, will it be counted from the service of the first award or the period of limitation to be counted from the day when he received the notice from the executing court. Section 33 of the Act, 1996 provides guideline for resolution of the present dispute. It is well known principle of law that when a thing has to be done in particular manner it should be done in that matter alone, not otherwise. The Arbitrator, as per mandate of law, is required to supply the signed copy of the award.

11. Admittedly in the present case arbitral tribunal did not serve the signed copy of corrected award to the appellant but could know about correction of award when received notice of executing court. For better appreciation it will be proper to consider certain judgments of the Hon'ble Supreme Court.

12. In that context it will be relevant to rely upon the judgment in the case of Union of India v. M/S Popular Construction Co., reported in AIR 2001 SC 4010 where the question arose the applicability of Limitation Act with respect to arbitration proceeding as Section 34 of the Act, 1996 provides the period under which the award has to be challenged, there absolute fixed period has been given for challenging the same. The Court has said that when Section 34 of Act, 1996 provides a specific period for challenge then that there is no question of applicability of the Limitation Act of Section 5 or Section 29(2) of the Act. It has been held that the Court could entertain an application to set aside the award under period provided thereunder "but not thereafter" otherwise fixed period provided rendered otiose, no principle of interpretation would justify such a result. It will be relevant to quote paragraph nos. 12, 13, 14 and 16 of the aforesaid judgment:

"12. 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 that Act. Parliament did not need to go further. To hold that the Court could 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.

13. Apart from the language, “express exclusion” may follow from the scheme and object of the special or local law. “Even in a case where the special law does not exclude the provisions of Section 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation”.

14. Here the history and scheme of the 1996 Act support the conclusion that the time limit prescribed under Section 34 to challenge and Award is absolute and un-extendable by Court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need “to minimize the supervisory role of courts in the arbitral process”. This objective has found expression in section 5 of the Act which prescribes the extent of Judicial intervention in no uncertain terms:

“5. Extent of Judicial intervention.

Notwithstanding anything contained in any other law for the time being in force. In matters governed by this Part, no judicial authority shall intervene except where so provided in this part.”

16. Furthermore, section 34(1) itself 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 grounds for setting aside an award and is not



relevant for our purposes. But an application filed beyond the period mentioned in section 34, sub section (3) would not be an application “in accordance with” that sub section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasized by the provisions of Section 36 which provide that “where the time for making an application to set aside the arbitral award under Section 34 has expired..... the award shall be enforced and the Code of Civil Procedure, 1908 in the same manner as if it were a decree of a court”. This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to ‘proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow’. Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the Court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the Court’s powers by the exclusion of the operation of section 5 of the Limitation Act”.

13. Another judgment deals with the issue is in the case of Union of India V. Tecco Trichy Engineers & Contractors, reported in 2005(2) PLJR 170 (SC). There the Hon’ble Supreme Court has interpreted Section 31(5), Section 33 (1) and (5) and Section 34 of the Act, 1996. The Court has held that delivery of an award under sub-section (5) of section 31 is not a matter of mere formality but it is a matter of substance. It is only after, the



stage of 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 when 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). There the Court has held that the period of limitation will initiate only after service of signed award to the party concerned. In that case the award was served in the office of the General Manager whereas the Chief Engineer was party to the agreement and there the Court said that on the day the Chief Engineers received signed copy of arbitral award will the starting point for counting the period of limitation, not from the day when signed award was served upon the office of the General Manager of the Railway. It will be relevant to quote paragraph nos. 8 and 9 of the aforesaid judgment:

“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 period 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 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.

9. In the context of a huge organization like Railways, the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving an application under sub-section (1) or (5) of Section 33 or under sub-section (1) of Section 34.”

14. In the case of State of Maharashtra & Ors. V. M/S Ark Builders Pvt. Ltd., reported in AIR 2011 SC 1374 the question came into consideration for starting the period of limitation for the purpose of filing the objection. The Hon’ble Supreme Court has said that limitation will start running from the date of signed copy of award is delivered to party making application for setting it aside. It will be relevant to quote paragraph nos. 10, 11

and 13 of the aforesaid judgment:

“10. The applicants 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) xxxxxxxxxxxx

(3) xxxxxxxxxxxx

(4) xxxxxxxxxxxx

(5) After the arbitral award is made, a signed copy shall be delivered to each party

(6), (7), (8) xxxxxxxxxxxx (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.

11. Section 34 of the Act then provides for filing an application for setting aside an arbitral award and sub-section (3) of that section lays down the period of limitation for making the application in the following terms:

“34. Application for setting aside arbitral award.- (1) 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).

(2) xxxxxxxxxxxx

(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.”

4. xxxxxxxxxxxx

The expression “.... party making that application had received the arbitral award...” cannot be read in isolation and it must be understood in light of what is said earlier in section 31(5) that requires a signed copy of the award to be delivered to each party. Reading the two provisions together it is quite clear that the limitation prescribed under Section 34(3) would commence only from the date a signed copy of the award is delivered to the party making the application for setting it aside.

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 prescribed 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.”

15. On conspectus of the aforesaid provisions of the Act as



well as judgments of the Hon'ble Supreme Court this Court is of the view that if the award is prepared it is required by the Arbitral Tribunal to serve the signed copy of the arbitral award to the party to the lis. It is not a matter of formality but it is a matter of substance. After service of copy of the award if the party finds some error has crept in the award or some item of claim has been left out, he has liberty to file an application for correction within the period of thirty days. Section 33(7) of the Act, 1996 mentions the applicability of Section 31 whereas Section 33 of the Act, 1996 provides that copy of the award has to be served upon the parties meaning thereby in terms of Section 34 of the Act, 1996 arbitrator is required to serve the signed copy of the award to the party unless the copy of modified award is served, it is very difficult to accept, the period of limitation would start after service of signed copy of award for the first time but the period of limitation will start running from the day modified award is served upon the parties. In the present case though there is no dispute for first award was served upon the Railway Administration but later on, after notice an application was filed for correction by the respondent, the corrected copy of award was not served upon Railway and the Railway could know about the correction in the award when

it has received the notice from the executing court.

17. In view of the aforesaid discussion, this Court is of the view that the period will start not from service of the first award but will start running from the date when the Railway has received the copy of the award on 4.1.2008. Accordingly appeal was filed on 11.1.2008.

18. This Court feels that objection filed by Railway administration is not barred by limitation and the court below has wrongly taken into consideration the service of first award to the Railway Administration. Accordingly the impugned order dated 23.10.2010 passed in Misc. Case No.2 of 2008 is set aside and the matter is remanded back to the court below to decide the case on its own merit.

19. Accordingly this appeal is allowed.

Vinay/-

(Shivaji Pandey, J)

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