

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.691 OF 2014**

M/S. DDL EXCAVATION PVT. LTD., THR.
ITS PROPRIETOR SHRI. ANUPAM KAPUR. ... Petitioner

Versus

UNION OF INDIA, BY ITS CHIEF
ENGINEER (PROJECT) ... Respondent

Mr. J.E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar,
Advocate for the Petitioner.

Mr. M. Amonkar, Advocate for the Respondent.

Coram:- M. S. SANKLECHA, J.

Date:- 23rd March, 2015

ORAL ORDER :

At the request of the Counsel, the petition is being disposed of finally at the stage of admission.

2. This petition under Article 226 & 227 of the Constitution of India challenges the order dated 8/07/2014 passed by the District Judge, South Goa at Margao. By the impugned order the application for condonation of delay made by the respondent under the proviso to Section 34(3) of the Arbitration and Conciliation Act, 1996 (the Act) was allowed.

3. Briefly the facts leading to this petition are as under:

(a) The petitioner was awarded a contract by the respondent in the year 2000. Thereafter disputes arose between the parties and one retired Chief Engineer was appointed as an Arbitrator who rendered an award on 7/04/2004.

(b) The arbitration award dated 7/04/2004 was challenged by the respondent under Section 34 of the Act before the Principal District Judge at Bikaner, while the petitioner challenged the same before the Principal District Judge at Margao. The issue with regard to which of the two Courts had jurisdiction went up to the Supreme Court and by an order dated 1/12/2006, the Hon'ble Supreme Court transferred the application of the respondent under Section 34 of the Act from the Court of Principal District Judge, Bikaner to the Court of Principal District Judge at Margao.

(c) By consent of the parties the Principal District Judge, Margao set aside the award dated 7/04/2004 and granted liberty to the parties to apply for appointment of a fresh Arbitrator. Consequently, Mr. Justice G.D. Kamat (retired Hon'ble Chief Justice of Gujarat High Court) was appointed as a sole Arbitrator by order dated 18/12/2009 of this Court.

(d) On 29/08/2011 Mr. Justice G.D. Kamat, the sole Arbitrator, passed an award in favour of the petitioner directing the respondent to pay a sum of Rs.30.08 lakhs along with interest thereon and costs of Rs.2.50 lakhs.

(e) On 24/10/2011, the respondent challenged the award of Mr. Justice G.D. Kamat dated 29/08/2011 in the Court of Principal District Court at Bikaner. On 18/01/2012, the petitioner objected to the filing of the application under Section 34 of the Act by the respondent in the Bikaner Court as being without jurisdiction in view of Section 42 of the Act. On 17/08/2012 the petitioner's objection dated 18/01/2012 under Section 42 of the Act was allowed by the Principal District Judge at Bikaner, who held that he had no jurisdiction to decide the application of the respondent filed under Section 34 of the Act.

(f) On receipt of the order dated 17/08/2012 the respondent approached its advocate in Goa and after obtaining fresh documents filed its application under Section 34 of the said Act in March 2013 along with an application seeking condonation of 467 days delay in

filing the same to challenge the award dated 29/08/2011. The respondent filed a reply to the petitioner's application inter alia contending that the delay was inordinate and it did not arise on account of good faith but was malafide and entirely attributable to the negligence on the part of the respondent. In the aforesaid circumstances, it was prayed that the application filed for condonation of delay be dismissed.

(g) The impugned order allowed the application filed by the respondent on application of Section 14 of the Limitation Act inter alia holding that the proceedings prosecuted by the respondent and in the Court at Bikaner were done in good faith and the time spent has to be excluded.

4. Mr. J.E. Coelho Pereira, learned Senior Counsel on behalf of the petitioner submits that the application filed by the respondent under Section 34(3) of the Act is not maintainable as it is in effect an application to condone delay on application of Section 5 of the Limitation Act and not an application to exclude time under Section 14 of the Limitation Act. Thus the impugned order allowing the application for condonation of delay is without jurisdiction as it

condones delay though it invokes Section 14 of the Limitation Act. Besides, it is submitted that the impugned order is perverse as it allows the application for condonation of delay even though the respondent had not spent time before the District Court at Bikaner prosecuting its challenge to the award in good faith as the same was in the face of Section 42 of the Act which in view of the earlier proceedings between the parties clearly bestowed jurisdiction under Section 34 of the Act only on the Court at Goa. It is lastly submitted that in any view of the matter, the test applied by the impugned order to allow the application of the respondent viz. that being Union of India, it must follow that its acts are bonafide unlike a party in person. This distinction between a private person and the Union of India before the Court of law is not permitted by law. Thus this Court must exercise its extra ordinary writ jurisdiction and set aside the impugned order.

5. On the other hand, Mr. M. Amonkar, learned Counsel appearing for the respondent submits that this Court should not exercise its extra ordinary writ jurisdiction as the learned District Judge at Margao had undisputedly jurisdiction to entertain an application seeking exclusion of time/condonation of delay. Thus

even if it is assumed that an error was committed while examining an issue with regard its jurisdiction the same could be corrected by filing an appeal under Section 37 of the Act from the final order of the District Judge on the challenge to the award. It is submitted that the impugned order is unexceptional as it was passed after appreciating the facts warranting the condonation of the delay in filing an application under Section 34 of the Act. The respondent had acted in good faith and in support it is submitted that the advise received by the respondent from its advocate at Bikaner was a bonafide advise bearing in mind the fact that earlier the respondent had moved the Bikaner Court under Section 34 of the Act while challenging the earlier award dated 7/04/2004.

6. The Apex Court in the case of *Surya Dev Rai V/s. Ram Chander Rai & Ors.* reported in (2003) 6 SCC 675 while dealing with the jurisdiction of the Court while exercising powers under Section 226 and 227 observed as under:

“38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil

Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of

law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those

calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.”

(emphasis supplied)

7. From the above observations of the Apex Court it is clear that care, caution and circumspection need to be exercised, when writ jurisdiction is sought to be invoked during the pendency of any suit or proceedings in a subordinate Court. Thus an error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred therein then in such cases the Court must be slow to interfere. The only exception being when an error becomes incapable of corrections at a later stage and refusal would result in prolonging the proceedings. Besides the Supreme Court has observed that the Court while exercising its

jurisdiction of judicial review under Article 226 and also its supervisory jurisdiction under Article 227 would not convert itself into an appeal Court and reappreciate/reevaluate the evidences and interferences drawn in the impugned order to reach a particular conclusion. It is a settled position in law that while exercising jurisdiction of judicial review what is subject to scrutiny is whether the exercise of power is without jurisdiction and the decision making process and not the merits of the decision per se unless it is faulted in the process i.e. breach of natural justice, perverse etc. The writ Court would also exercise jurisdiction if the order is ex facie illegal.

8. In the present facts, the application of the respondent for condonation of delay/exclusion of time in filing an application under Section 34 of the Act has been allowed by the District Court. Now, the award dated 29/08/2011 passed by Mr. Justice G.D. Kamat itself would be a subject matter of consideration by the District Court and the order passed by it thereon would be subject to appeal under Section 37 of the Act. Thus, keeping in view point (7) set out in the case of *Surya Dev Rai* (supra) this Court should not interfere with the impugned order. At this stage, Mr. Pereira, learned Senior Counsel for the petitioner invited my attention to the decision of the Division

Bench of this Court in the case of ***State of Maharashtra V/s. Ramadas Construction Co. & Ors.*** reported in ***2007 (Supp.) Bom.C.R. 675***, wherein an application for condonation of delay in filing an application under Section 34 was rejected by the subordinate Court. A petition under Article 226 was entertained by this Court rejecting the contentions of the respondent that an appeal would lie under Section 37 of the Act. This on the ground that once an application for condonation of delay is rejected then the Court has no occasion to examine the merits of the case and therefore in such circumstances the order passed by the Court rejecting an application for condonation of delay cannot be said to be an order passed under Section 34 of the Act amenable to an appeal under Section 37 of the Act. The distinguishing feature in the present facts is that the application for condonation of delay/exclusion of time has been allowed by the District Court. Therefore the entire award dated 29/08/2011 would be the subject matter of consideration by the District Court and the order passed thereon under Section 34 of the Act would also be a subject matter of challenge, if so desired by the petitioner under Section 37 of the Act.

9. Mr. Pereira, learned Senior Counsel then emphasized the fact

that the application seeks condonation of delay which itself would imply that the petitioners have not sought to apply Section 14 of the Limitation Act. On the aforesaid ground it is submitted that the District Court had no jurisdiction. The submission is that if the application had been made under Section 14 of the Limitation Act, respondent would have sought exclusion of time spent bonafide in proceeding the Principal District Court at Bikaner, this is not so as what was sought is condonation of delay. The impugned order is therefore without jurisdiction. To my mind this is hairsplitting to make distinctions where none exists in substance. Making an application for condonation of delay is a genus of which exclusion of time spent bonafide in proceeding before another Court is a specie. The mere use of the word “the delay be condoned” in the application would not take away such an application out of ambit of Section 14 of the Limitation Act. The exercise of filing an appeal under Section 37 of the Act may itself not arise for the petitioner, if the applications of the respondent under Section 34 of the Act is rejected by the District Court. Therefore, in the above facts I am not inclined to exercise jurisdiction under Article 226 of the Constitution of India.

10. However, in the facts of the present case the reasoning in the

impugned order allowing the application filed by the respondent reads as under:

"14. The respondents all along have been harping on the malafides of the applicants, the alleged false affidavit filed by their Officer and the knowledge which they had about the earlier proceedings. It cannot at all be overlooked that it is not a party in person who is a litigant before the Court but the Union of India which acts through the instrumentalities of its various Officers and in all probability one would not keep track of what transpired on an earlier or previous occasions. The Officer who had sworn the affidavit would also not run the risk of making the statements on oath which to his knowledge as alleged were false as he would understand the implication of making false statements on oath. Moreover, Ld. Adv. M. Amonkar had clearly spelt out that the applicants would not stand to benefit by not assailing the Award in which crores of rupees had been awarded in the respondents' favour.

Therefore to allege that the applicants had not at all been diligent to pursue the proceedings is by far not tenable on any legal premise."

(emphasis supplied)

It would therefore be seen that the impugned order has allowed the application on the premise that as the respondent is Union of India and not a party in person its officers are not required to keep track on what transpired on earlier occasions. It also proceeds on the basis that an officer of Union of India would not make a statement which is false as he would understand the implication of making false

statement on oath. Therefore, the impugned order has created a different law applicable to Union of India viz. Officers of Union of India are not supposed to keep track of what happened in previous occasion and the affidavits filed by Officers of Union of India should be accepted, as Officers would not make false statement on oath.

11. This classification of Union of India and its officers as a different class from other parties is not permitted by law. In fact the Apex Court in the case of ***Postmaster General & Ors. V/s. Living Media India Limited & Ors.*** reported in ***2012 (3) SCC 563*** has at paragraph 29 observed as under:

“(29) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.” (emphasis supplied)

12. In fact it would be destructive of the Rule of Law if in the absence of legislative sanction, the procedure adopted by Court is loaded in favour of one of the two parties. Equality before law is a basic element of Rule of Law.

13. The Apex Court in the case of *Shalini Shyam Shetty & Anr. V/s. Rajendra Shankar Patil* reported in (2010) 8 SCC 329 has formulated the principles for exercise of High Court's jurisdiction under Article 227 of the Constitution. It has inter alia held that this supervisory jurisdiction has to be exercised sparingly to keep the authorities within the bounds of their authority so as to prevent manifest failure of justice. In this case, I am of the view for the reasons indicated above in para 10 above the District Court went beyond the bounds of its jurisdiction by applying a different yardsticks to evaluate the evidence of the Union of India, when not so provided by the legislature. This does lead to manifest injustice.

14. Therefore, in exercise of my supervisory jurisdiction under Article 227 of the Constitution of India the impugned order is set aside to the extent it has applied different procedural rules for evaluating the evidence of the Officers of Union of India then

normally applicable. As the aforesaid classification is the basis of the decision, the impugned order dated 8/07/2014 is set aside in its entirety as the District Court has exercised its jurisdiction in a manner not permitted by law. The learned District Judge at Margao would consider the application for condonation of delay/exclusion of time afresh keeping in mind the above observations.

15. Petition allowed in above terms. No order as to costs.

M.S. SANKLECHA, J.

NH/-