IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.6734 of 2014 (O&M)
Date of decision: 21.4.2015

M/s M.G. Contractors Pvt. Ltd.

..... Petitioner

Versus

State of Haryana and another

......Respondents

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Vivek Khatri, Advocate for the petitioner.

Mr. Raj Kumar Makkad, Deputy Advocate General, Haryana with Mr. Ashwinie Kumar Bansal, Advocate for respondent No.1.

RAJESH BINDAL, J

1. Challenge in the present petition is to the order dated 10.9.2014 passed by the learned court below, whereby, the learned court below dismissed the objections raised by the petitioner regarding maintainability of the application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") and further permitted the respondent-State to lead evidence.

2. Learned counsel for the petitioner submitted that in the case in hand, an agreement was executed between the petitioner and the State regarding construction of road. As there were certain disputes, vide order dated 24.5.2010 passed by this Court in Arbitration Case No.112 of 2008, Arbitrator was appointed, who passed the award dated 21.12.2010. Copy thereof was received by the respondent-State on 27.12.2010. An application for recalling the award was filed by the State before the Arbitrator on 23.8.2011, which was dismissed on 8.10.2011. Thereafter, the State filed application under Section 34 of the Arbitration Act before the court on 12.11.2011. In terms of Section 34 of the Arbitration Act, the application could be filed within a period of three months from the date of receipt of the copy of the award and delay in filing the application upto the period of 30

days only could be condoned on being shown sufficient reasons. In the case in hand, copy of the award was received by the State on 27.12.2010, the application having been filed before the court on 12.11.2011, was beyond the period prescribed in the Arbitration Act for filing the application, hence, the same was not maintainable. In support of the arguments that the delay beyond the period prescribed in the Arbitration Act cannot be condoned, as the provisions of the Limitation Act, 1963 (for short "the Limitation Act") are not applicable for proceedings under the Arbitration Act, reliance was placed upon the judgments of Hon'ble the Supreme Court in Assam Urban Water Supply & Sew. Board v. M/s Subash Projects & Marketing Ltd., 2012 (2) SCC 624, M/s Consolidated Engg. Enterprises v. Principal Secy. Irrigation Deptt. and others, 2008 (7) SCC 169, State of Arunachal Pradesh v. M/s Damani Construction, 2007 (2) RCR (Civil) 367, Delhi High Court in Competent Placement Services (Regd.) v. Delhi Transport Corporation, 2011 (2) RAJ, 347 and this Court in Union of India and another v. Mis V.X.L. Technologies Ltd. and another, 2009 (1) PLR 662.

3. On the other hand, learned counsel for the State submitted that the contention raised by learned counsel for the petitioner that all the provisions of the Limitation Act are not applicable to the arbitration proceedings, is totally mis-conceived. In fact, it is only Section 5 of the Limitation Act, which is not applicable, all other provisions are applicable. It has been so provided in Section 43 of the Arbitration Act. He further submitted that it is a case of fraud, which vitiate everything. The petitioner had submitted the tender mentioning the rate of tax on bitumen @ 10%. The contract was taken by him accordingly. Even Prior to the award of the Arbitrator, the assessment of the petitioner under the Haryana Value Added Tax Act, 2003 (for short "the VAT Act") had already been framed on 28.4.2009 assessing the tax on bitumen @ 4%, but still the petitioner did not bring this fact to the notice of the Arbitrator and got the amount of tax calculated @ 10%. It came to the notice of the State only when copy of assessment order under the VAT Act was submitted by the petitioner to the Department vide communication dated 17.3.2011 after which, legal opinion was sought. Immediately on receipt of the opinion dated 18.8.2011, application was filed before the Arbitrator for recalling of the award on 23.8.2011 only pertaining to the rate of tax on bitumen. The State otherwise is not aggrieved against

the award. The application was dismissed by the Arbitrator on 8.10.2011. Immediately thereafter, the application was filed before the court under Section 34 of the Act on 12.11.2011. While referring to the following judgments of Hon'ble the Supreme Court, learned counsel for the State submitted that it has been opined therein that only Section 5 of the Limitation Act is not applicable in the proceedings under the Arbitration Act as specific period for filing the application and limited period for which delay could be condoned has been provided under Section 34 of the Arbitration Act, otherwise, all other provisions are applicable:-

1. United India Insurance Co. Ltd. v. Rajender Singh and others, 2000 (3) SCC 581.
2. Pallav Sheth v. Custodian, 2001 (7) SCC 549.
3. M/s Consolidated Engg. Enterprises v. Principal Secy. Irrigation Deptt. and others, 2008 (7) SCC 169.
4. State of Goa v. M/s Western Builders, 2006 (6) SCC 239..
5. Gulbarga University v. Mallikarjun S. Kodagali and another, 2008 (13) SCC 539.
6. Coal India Limited and another v. Ujjal Transport Agency and others, 2011(1) SCC 117.

4. Section 14 of the Limitation Act, which provides for exclusion of certain period for the purpose of limitation, has been specifically held to be applicable. Once that is so, even the provisions of Section 17 of the Limitation Act would also be applicable. As it is a case of fraud, limitation commences only after the fraud comes to the notice of the party concerned. The court merely permitted the parties to lead evidence on the issues including that issue of limitation. No prejudice as such has been caused to the petitioner at this stage. Fraud can be proved only by leading evidence. In the case in hand, the State is not seeking extension of time for filing the application beyond the period prescribed under Section 34 of the Arbitration Act rather the starting point of limitation to file application will be when the fraud was detected. The same in the case in hand was, when legal opinion dated 18.8.2011 was received by the Department. Thereafter no time was wasted, as firstly application under Section 33 of the Act was filed before the Arbitrator on 23.8.2011. After dismissal thereof on 8.10.2011, the application was filed before the court on 12.11.2011.

5. In response to the contention raised by learned counsel for the State, learned counsel for the petitioner submitted that no fraud was committed by the petitioner. The Excise and Taxation Department is also of the State of Haryana. Another Department of the State cannot deny knowledge about framing of assessment under the VAT Act. None of the cases referred to by counsel for the State deals with applicability of Section 17 of the Limitation Act to the arbitration proceedings.

6. Heard learned counsel for the parties and perused the paper book.

7. The undisputed facts on record are that the work for widening and strengthening of Mohindergarh-Dadri-Bhiwani road from kms 30 to 66 was awarded to the petitioner. Formal agreement was executed on 17.9.2003. The total cost was ₹ 8,60,72,590/-. The work was to be completed by 16.7.2004, however, it was completed by the petitioner much before the scheduled date and as a consequence it earned bonus in terms of the agreement. Though the payment of the bills was made, however, security was yet to be refunded. The petitioner filed petition before this Court vide Arbitration Case No.112 of 2008 for appointment of the Arbitrator. Hon'ble the Chief Justice of this Court vide order dated 24.5.2010 appointed the Arbitrator, who awarded the petitioner a sum of ₹ 20,40,810/-, which was deducted/adjusted from the security deposit. The other claims made by the petitioner were rejected. The amount awarded was on account of difference in rate of tax. The definite stand of the petitioner was that when the rates were quoted at the time of submission of tender, rate of tax on bitumen was calculated @ 10%. As the State had deducted only 4% as advance tax and there may be liability of the petitioner to pay the balance 6%, the Arbitrator vide award dated 21.12.2010, directed that the amount of ₹ 20,40,810/- deducted/adjusted from the security amount be paid to the petitioner, which shall be retained by it in fiduciary capacity. Prior to that assessment of the petitioner for the assessment year 2003-2004 had been framed on 28.4.2009 assessing the tax @ 4%, which fact was not brought to the notice of the Arbitrator by it.

8. The issue, which requires consideration by this Court in the present petition is as to whether the provisions of Section 17 of the Limitation Act are applicable in proceedings under the Arbitration Act.

9. Hon'ble the Supreme Court in M/s Consolidated Engg. Enterprises' s case (supra) considered the issue as to whether the provisions of Section 14 of the Limitation Act are applicable for the purpose of filing of objections under Section 34 of the Arbitration Act. While considering earlier judgments on the issue especially in case of Union of India v. M/s Popular Constructions Company, 2002 (1) RCR (Civil) 124, Hon'ble the Supreme Court opined that merely because it has been held in the earlier judgments that Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Arbitration Act for setting aside the award, it cannot be opined that the provisions of Section 14 of the Limitation Act would also not be applicable. As Section 14 of the Limitation Act does not extend the period of limitation, rather it talks about exclusion of period for the purpose of limitation, the plea that in terms of judgment of Hon'ble the Supreme Court in M/s Popular Constructions Company' s case (supra) even Section 14 of the Limitation should also be held inapplicable to the proceedings under Section 34 of the Arbitration Act, was rejected. It was noticed that in the Act there is no express provision excluding provision of Section 14 of the Limitation Act to an application filed under Section 34 of the Arbitration Act for challenging the award. Power to condone delay and grant extension of time under Section 5 of the Limitation Act is discretionary whereas exclusion of time under Section 14 the Limitation Act is mandatory, if the requisite conditions are satisfied. Both the Sections operate in different circumstances. Relevant paras thereof are extracted below:-

> "10. A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the Court. Section 29(2) of the Limitation Act,

inter alia provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period of limitation prescribed by the schedule, the provisions of Section 3 shall apply as if such period was the period prescribed by the schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 shall apply only insofar as, and to the extent, they are not expressly excluded by such special or local law. When any special statute prescribes certain period of limitation as well as provision for extension upto specified time limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act.

11. However, merely because it is held that Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Act for setting aside an award, one need not conclude that provisions of Section 14 of the Limitation Act would also not be applicable to an application submitted under Section 34 of the Act of 1996.

12. X X X X X

13. At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court

<u>finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings.</u>

14. & 15. X X X X

16. T<u>he contention that in view of the decision of Division Bench of this Court in Union of India vs. Popular Constructions Co. 2002 (1) RCR (Civil) 124: 2001 (8) SCC 470 the Court should hold that the provisions of Section 14 of the Limitation Act would not apply to an application filed under Section 34 of the Act, is devoid of substance</u>. In the said decision what is held is that Section 5 of the Limitation Act is not applicable to an application challenging an award under Section 34 of the Act. Section 29(2) of the Limitation Act inter-alia provides that where any special or local law prescribes, for any application, a period of limitation different from the period prescribed by the schedule, the provisions contained in Sections 4 to 24 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. On introspection, the Division Bench of this Court held that the provisions of Section 5 of the Limitation Act are not applicable to an application challenging an award. This decision cannot be construed to mean as ruling that the provisions of Section 14 of the Limitation Act are also not applicable to an application challenging an award under Section 34 of the Act. As noticed earlier, in the Act of 1996, there is no express provision excluding application of the provisions of Section 14 of the Limitation Act to an application filed under Section 34 of the Act for challenging an award. Further, there is fundamental distinction between the discretion to be exercised under Section 5 of the Limitation Act and exclusion of the time provided in Section 14 of the said Act. The power to excuse delay and grant an extension of time

under Section 5 is discretionary whereas under Section 14, exclusion of time is mandatory, if the requisite conditions are satisfied. Section 5 is broader in its sweep, than Section 14 in the sense that a number of widely different reasons can be advanced and established to show that there was sufficient cause in not filing the appeal or the application within time. The ingredients in respect of Section 5 and 14 are different. The effect of Section 14 is that in order to ascertain what is the date of expiration of the prescribed period, the days excluded from operating by way of limitation, have to be added to what is primarily the period of limitation prescribed. Having regard to all these principles, it is difficult to hold that the decision in Popular Construction Co. (supra) rules that the provisions of Section 14 of the Limitation Act would not apply to an application challenging an award under Section 34 of the Act.

17 to 32 X X X X

33. On the other hand, Section 14 contained in Part III of Limitation Act does not relate to extension of the period of limitation, but relates to exclusion of certain period while computing the period of limitation. Neither Sub-section (3) of Section 34 of the AC Act nor any other provision of the AC Act exclude the applicability of Section 14 of the Limitation Act to applications under Section 34(1) of the AC Act. Nor will the proviso to Section 34(3) exclude the application of Section 14, as Section 14 is not a provision for extension of period of limitation, but for exclusion of certain period while computing the period of limitation. Having regard to Section 29(2) of Limitation Act, Section 14 of that Act will be applicable to an application under Section 34(1) of the AC Act. Even when there is cause to apply Section 14, the limitation period continues to be three months and not more, but in computing the limitation period of three months for the application under Section 34(1) of the AC Act, the time during which the applicant was prosecuting such application before the wrong court is excluded, provided the proceeding in the wrong court

was prosecuted *bona fide*, with due diligence. Western Builders therefore lays down the correct legal position.

34 X X X X

35. The decision in Popular Construction is also of no assistance. That decision makes it clear that AC Act, 1996 being a special law, and Section 34 thereof prescribing a period of limitation different from that prescribed under the Limitation Act and providing a ceiling on the period by which the period of limitation could be extended, the corresponding provisions in the Limitation Act prescribing the period of limitation for filing an application for setting aside an award [Article 119(b) of the Schedule to Limitation Act] and for extending the period of limitation for sufficient cause (Section 5 of the Limitation Act), were inapplicable. It did not relate to applicability of Section 14(2) of Limitation Act. Nor did this Court consider the applicability of Section 14(2). Therefore, the decision in Popular Construction will not apply. Fairgrowth merely reiterates the principle in Popular Construction in regard to the exclusion of Section 5 of Limitation Act, as is evident from the following observations :

> "...... the general rule as far as special and local Acts are concerned is that the specified provisions including Section 5 of the Limitation Act will apply provided the special or local Act provides a period of limitation different from that prescribed under the Limitation Act. There is an additional requirement viz. that the special local Act does not expressly exclude the application of the Limitation Act."

Therefore it has to be held that Section 14(2) of the Limitation Act, 1963 is applicable to proceedings under Section 34(1) of the AC Act." (emphasis supplied)

10. Similar view was expressed in Gulbarga University v. Mallikarjun S. Kodagali and another's case (supra).

11. The judgments referred to by learned counsel for the petitioner are not relevant for the issue under consideration except Consolidated Engg. Enterprises' s case (supra), as in none of them, question being considered

was regarding applicability of provisions of the Limitation Act to the proceedings under the Arbitration Act except Section 5 thereof. The view expressed by Hon'ble the Supreme Court in Consolidated Engg. Enterprises's case (supra) has already been referred to above, which answers the question involved in the present petition against the petitioner.

12. From the enunciation of law as referred to above, it can be opined that Section 34 of the Arbitration Act only excludes application of Section 5 of the Limitation Act for proceedings under the Arbitration Act, as specific period of limitation and the period for which the delay can be condoned, has been provided. There is no other provision under the Arbitration Act, which provides for exclusion of any other provisions of the Limitation Act to the proceedings under the Arbitration Act rather Section 43 of the Arbitration Act makes the provisions of the Limitation Act applicable.

13. Once the consistent opinion of Hon'ble the Supreme Court is that the provisions of Section 14 of the Limitation Act apply for the purpose of proceedings under Section 34 of the Arbitration Act, I do not find any good reason to exclude the application of provisions of Section 17 of the Limitation Act. Hence, the application filed by the State cannot be dismissed at threshold only because this is beyond the period prescribed under Section 34 (3) of the Arbitration Act, as the State is seeking to invoke jurisdiction of the court referring to Section 17 of the Limitation Act.

14. For the reasons mentioned above, I do not find any merit in the present petition. The same is accordingly dismissed.

(RAJESH BINDAL)
JUDGE

21.4.2015
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(Refer to Reporter)