IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.3126 of 2012 (O&M)
Date of Decision:21.02.2015

NHPC Ltd.

….Appellant

Versus

M/s Patel Engineering Ltd. and others

….Respondents

CORAM: HON'BLE MS. JUSTICE NAVITA SINGH

Present: Mr. Ajit Pudussery, Advocate with
Mr. Gaurav Chopra, Advocate for the appellant.

Mr. Rajiv Atma Ram, Senior Advocate with
Mr. A.P.S. Bhinder, Advocate and
Mr. Sube Sharma, Advocate for the respondents.

NAVITA SINGH, J.

1. This appeal is preferred against the order dated 6.3.2012 passed by Additional District Judge, Faridabad, whereby objections filed by the appellant under Section 34 of the Arbitration and Conciliation Act (Act for short) were dismissed.

2. The backdrop of the matter was that the parties entered into an agreement dated 21.11.2003 regarding construction work and the said agreement contained a clause regarding arbitration. Dispute had arisen between the parties and invoking the arbitration clause, the matter was referred to arbitration. The respondents nominated one Arbitrator while one was nominated by the appellant. Those two Arbitrators unanimously chose the third Arbitrator and award dated 26.8.2009 was passed.

3. After receiving copy of the award on the date on which it was passed, the appellant moved an application under Section 33 of the Act, within

the period of 30 days as prescribed. The request in the application was to correct a computation error in the award but vide order dated 26.10.2009, the application was dismissed by the Arbitrators. The objection petition under Section 34 of the Act was filed on 2.12.2009. Counsel for the appellant referred to certain dates, to which reference was also made by counsel for the respondents. The award was passed on 26.8.2009, copy was received by the appellant on the same day, application under Section 33 of the Act was filed on 23.9.2009 which was dismissed on 26.10.2009. The order passed under Section 33 of the Act as also the award were both challenged by the appellant vide petition under Section 34 of the Act on 2.12.2009.

4. The court below dismissed the objections primarily on the ground of limitation. It was held that the petition was to be filed within 90 days from the date of award holding that limitation would not run from the date when the application under Section 33 of the Act was disposed of. This was done because of the reason that such an application could have been filed only for correction of any computation, clerical or typographical error or other errors of similar nature or for interpretation of the award or for making additional award regarding claims presented in the arbitral proceedings which would be omitted from the arbitral award. The error pointed out by the appellant in the application under Section 33 of the Act was held to be not an error envisaged by the said provision of law. Un-understandably, the court after holding that the objection petition was barred by limitation went on to delve on the merits, as if the court was not sure of the legal sanctity of its order and fell that the order may be set aside.

5. The court observed that it was alive to the predicament of the appellant (petitioner before it) that the Company was pursuing, what in its opinion, was a legitimate remedy but since the plea raised in the application

under Section 33 of the Act was not justifiable, time was not on the side of the present appellant.

6. Counsel for the appellant argued that Section 33 of the Act did not anywhere contemplate the filing of a valid application and since the applicant had sought correction of a computation error but the plea did not find favour with the Arbitrators, it would not mean that the period taken for deciding the application would not be excluded for computing the limitation.

7. Counsel for the respondents, per contra, relied on State of Arunachal Pradesh Vs. M/s Damani Construction 2007 (1) Recent Apex Judgments (RAJ) 981 wherein it was held by the Supreme Court that the letter sent to the Arbitrator by the party concerned as an application under Section 33 of the Act was misconceived as the request made in the same amounted to review of the award. It was held that the application did not fall within any of the criteria under Section 33 (1) of the Act and rather it was designed as though the appellant was seeking review of the award. The prayer was with regard to mode of payment. In the given facts, it was held that because clarification or alteration of the mode of payment was not contemplated under Section 33 of the Act, limitation to file the objections under Section 34 of the Act would be 90 days or within the extended period of 30 days.

8. Counsel for the appellant relying on the same authority pointed out that in that case, the request made in the application amounted to review of the award and not correction of an error and further copy of award was received by the party on 23.10.2003 and even the letter by way of an application under Section 33 of the Act was sent to the Arbitrator on 2.4.2004 i.e. much beyond the period of limitation prescribed for such an application and prescribed even for challenging the award under Section 34 (3) of the Act.

9. The facts of the reported case are entirely different. It cannot be made a rule that where the application under Section 33 of the Act was for correction of error as given in sub section 1 (a) of the Act but the application was not allowed by the Arbitrator, the period for disposing of the application would not be excluded. In the present case, the application under Section 33 of the Act was filed within the period prescribed for filing it and after passing of the order on that, the objection petition was filed on 2.12.2009 which would be within the limitation.

10. Counsel for the respondents contended that Section 34 (3) of the Act lays down in the proviso that the application for setting aside an award could be filed within the period of three months or within the extended period of thirty days but not thereafter. Even if this argument is accepted, the objections were within limitation as those were filed within the extended period. However, the satisfaction to be recorded would be that the applicant was prevented by sufficient cause within the period of three months. Here the error was for computation as the plea taken by the appellant was that the rate for item B.2.2 for the work to be done under the agreement, was Rs.218/- per cubic meter whereas the same had been revised to Rs.230.37 per cubic meter and the Arbitrators made the calculations on the basis of the one sided revised rate. The appellant, therefore, applied under Section 33 of the Act for correction of the computation error. The Arbitrators themselves admitted the rate because in the order passed in the application, it was mentioned that they had suggested to both the parties to agree upon a consent order so that the amount paid in excess of Rs.218/- per cubic meter be reduced. However, no such consent order could be passed. It was also mentioned that the Arbitral Tribunal was not informed of the rate and the amount paid in excess. It is, therefore, not understandable as to

why the Arbitrators dismissed the applications. In any case, the appellant had come forward for correction of computing error.

11. Since valid application of the appellant was dismissed on 26.10.2009 after filing it on 23.9.2009 that period would be excluded. The objection petition, therefore, was filed within limitation.

12. So far as the misconceived application under Section 33 of the Act is concerned, if any court held that time taken for deciding such application would not be excluded, it would be to discourage the parties from moving frivolous application to gain time or for other extraneous reasons. In any case in the instant matter, the plea taken by the appellant fell within the purview of Section 33 of the Act and, therefore, the objections under Section 34 of the Act could not have been dismissed on the point of limitation. Since the main thrust of the impugned order was qua limitation and only a small discussion on merit was made probably with a view to avoid remand of the case, it is felt that the matter should be remanded for decision on merits in accordance with law, as the petition was filed within the period of limitation.

13. The appeal is allowed. Impugned order passed by Additional District Judge, Faridabad is set aside with a direction to decide the matter on merits according to law.

14. Parties/counsel to appear before that court on 20.3.2015.

(NAVITA SINGH)
JUDGE

21.02.2015
Ishwar

Whether to be referred to reporter: Yes