

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No.112/2014 and IA No.1787/2014**

% Judgement reserved on: 24.11.2014  
Judgement pronounced on: 12.01.2015

SAPNA TUTEJA AND ANR. .... Petitioners

Through: Mr.Savita Malhotra and Ms Suman  
Malhotra, Advs.

versus

L&T FINANCE LTD. .... Respondent

Through: Mr.Amit Bajaj, Adv.

**CORAM:**

**HON'BLE MS. JUSTICE DEEPA SHARMA**

**JUDGMENT**

1. Vide this present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), the petitioners have challenged the *ex parte* award dated 22.06.2011, passed by respondent No.2, the Arbitrator, in Arbitration Proceedings No. 243/2011, titled as L&T Finance Ltd. vs. Spark Engineers & Contractors and Ors.

2. The case of the petitioners is that the petitioner No.1 had taken a loan of Rs.30,00,000/- from respondent No.1 for purchase of machine, namely, Horizontal Directional Drilling Machine with the brand name of Horizon, Model No. RT00 valuing Rs.40,00,000/-. The loan amount was repayable in 35 equal instalments of Rs.1,10,800/-. Petitioner No. 2 was the guarantor of the said loan agreement. The petitioner No.1 had paid the instalments from

time to time and till October, 2010.

3. It is submitted that petitioners were always ready and willing to repay the loan amount and also handed over the machinery on 16.03.2011 and shown the willingness to pay the balance amount. The award had been challenged being contrary to provision of Section 24(2) of the Act and also on the ground that at no stage of arbitral proceedings, the petitioners were served and they were not aware of the proceedings till receiving the notice of Execution Petition No.297/2012, titled as L&T Finance vs. M/s Spark Engineers and Contractors and Anr. The first notice was first received on 21.09.2013 and thereafter on 03.10.2013

4. Along with the said petition, the petitioner has also filed an application bearing IA No. 1787/2014 under Section 34(3) of the Act for condoning the delay in filing the petition under Section 34 of the Act. In this application, the petitioners have submitted that the petitioners had become aware of passing of the award ultimately/lastly on 03.10.2013 upon receiving the summons of execution of award from this Court in Execution Petition No.297/2012, which was listed for hearing 09.10.2013. He engaged a counsel, namely, Surender Kumar Gupta, but the counsel did not do the needful and thereafter, the petitioners engaged another advocate Savita

Malhotra on 02.01.2014 and signed an attorney in her favour. The said counsel applied for inspection of execution petition on 03.01.2014 for 06.01.2014. However, the file was not made available and thereafter the said counsel again made an application for file inspection on 09.01.2014 and the file was made available to her on 10.01.2014. It is submitted that since the father of the counsel got admitted for spinal injury in hospital on 04.01.2014 and was discharged from the hospital on 09.01.2014, she could not inspect the record of execution. It is submitted that petition was required to be filed on 03.01.2013, i.e., within three months of service and thus the delay of 11 days occurred in filing the present petition. Vide this application, the petitioner has prayed for condoning the delay of 11 days in filing the present petition.

5. In the reply to the petition under Section 34 of the Act, the respondents has raised the preliminary objection that the present petition is barred by limitation. It is submitted that the award was passed on 22.06.2011 and the petition has been filed on 15.01.2014, almost after 3½ years and thus liable to be dismissed. It is contended that vide IA No.1787/2014, the petitioner has sought the condonation of delay of 11 days, while the delay of is of 1245. It is submitted that in **Union of India vs. Popular Construction**

2001(8) SCC 470, the Court has clearly held that the time limit prescribed under Section 34 of the Act to challenge the award is absolute and that cannot be extended under Section 5 of the Limitation Act and this view was affirmed by this Court in Union of India vs. Uttam Singh Duggal 198 (2013) DLT 62A(CN). It is further submitted that the notice of execution petition was served upon the petitioners on 03.09.2013 and affidavit of service was also filed in this regard. The petitioners have falsely stated the date of service of notice of execution petition as 17.09.2013, 21.09.2013 and 03.10.2013. It is further submitted that the petitioners had due knowledge of the arbitral proceedings and of passing of the award. The Arbitrator had duly sent the copy of the award by registered post to the petitioners. It is submitted that the petitioners had given their address in the agreement as 324, West Vardhman Plaza, Near Peera Ghari National Market, New Delhi and all the notices were served at this address by registered post. It is submitted that the Arbitrator vide its communication dated 16.03.2011 accepted the reference of dispute and issued notice for 20.04.2011 with further directions and the said communication was sent vide registered post on 18.03.2011 and the acknowledgement card received back. The respondents filed the statement of claim and sent the copy to the petitioners

on 25.03.2011 by post. Despite that, the petitioners failed to enter appearance and the Arbitrator had fixed the matter for 17.06.2011. The said communication was sent to the petitioners on 20.05.2011, which was duly received by the petitioners and the acknowledgment cards have been duly received back. It is submitted that under Section 27 of the General Clauses Act, 1897, the petitioners are deemed to have been served since the communication has been sent at the address provided by them. It is submitted that in these circumstances, the Arbitrator had proceeded *ex parte* against the petitioners. It is further contended that the award dated 22.06.2011 was dispatched to both the petitioners by registered post on 21.7.2011, which was duly received by the petitioners and the acknowledgment cards have been received back. It is submitted that the award was duly served upon the petitioners and the petitioners have taken a false plea that they became aware of the passing of the award only on filing of the execution petition by the respondent. It is submitted that the petition being barred by limitation, provided under Section 34(3), is liable to be dismissed.

6. Reply has also been filed by respondent No.1 to the application bearing IA No. 1787/2014 for condonation of delay. In this reply also, the

stand of respondent No.1 is that the petitioners had been aware of the arbitral proceedings. It is further submitted that the contention of the petitioners that the notice of the execution petition was received by them on 03.10.2013 is also contrary to the records as the notice of the said execution petition was duly served upon the respondent on 03.09.2013. It is submitted that since the present petition has been filed beyond the period of limitation, prescribed under Section 34(3) of the Act, the petition is liable to be dismissed.

7. The petitioners have filed the rejoinder. In rejoinder, the petitioners have specifically denied that the award dated 22.06.2011 was dispatched to them. It is submitted that perusal of AD card clearly shows that the complete address of the petitioners have not been mentioned on the AD cards.

8. Rejoinder has also been filed by the petitioners to the reply of their application for condonation of delay of 11 days, wherein they have reiterated their contentions in the petition as well as in their application. It is further reiterated that the petitioners have come to know of the passing of the award only on receiving the notice of the execution petition on 03.10.2013. It has further been alleged that there is a typographical error in para 2 of the main petition, wherein the petitioners had stated the date of

knowledge to be dated 17.09.2013 while in para 3(viii), it is stated to be dated 21.09.2013. It is submitted that correct date of knowledge of passing of the award is 03.10.2013. It is submitted that delay in filing of 11 days be condoned.

9. I have heard the arguments and have perused the relevant record.

10. Admittedly, in the present case, an *ex parte* award has been passed against the petitioners and the Execution Petition No. 297/2012 had been filed by respondent No.1. The notice of the said execution petition was issued to the petitioners. The petitioners have alleged in the petition under Section 34 that they received the copy of the said execution petition on 17.09.2013 in para 2 and on 21.09.2013 in para 3(viii). However, in their application for condonation of delay of 11 days, the petitioners have contended that they received the summons of the execution petition only on 03.10.2013 and it is thus the date on which they came to know of the passing of the award against them. In the rejoinder to their application, the petitioners have stated that there is a typographical error in para 2 of the main petition and in para 3(viii) of the main petition, wherein they have given the date of knowledge to be as 17.09.2013 and 21.09.2013 and the correct date is 03.10.2013.

11. The date of filing of the present petition as per the official record is 15.01.2014 and there is no dispute to this fact. The period of limitation for filing the petition under Section 34 has been prescribed under Section 34(3) of the Act. The proviso reads as under:-

“34(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.”

12. From the bare reading of this provision, it is apparent that the period of limitation of filing the petition under Section 34 of the Act is 90 days. The proviso to the above-said section provides that the time for filing of the petition under Section 34 can be extended further only by 30 days if the Court is satisfied that the applicants were prevented by sufficient cause from making the application within the said period of three months.

13. The Supreme Court in **Popular Construction** (*supra*), has clearly held as under:-

*“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.*

*14. Here by history and scheme of the 1996 Act support the conclusion that the time limit prescribed under Section 34 to challenge an Award is absolute and unextendable 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 minimise 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 emphasised 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 under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the 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" (Section 17). 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.*

Therefore, it is a settled law that the provisions of Section 5 of Limitation Act are not applicable to the petition filed under Section 34 of the Act, while calculating the period of filing of the petition.

The Supreme Court in the case supra has made it abundantly clear that the period of limitation prescribed under Section 34 of the Act cannot be extended beyond 120 days.

14. The contention of the petitioner is that the period of limitation under Section 34(3) is to be reckoned from 03.10.2013. The 90 days, as prescribed under Section 34(3), expired on 03.01.2014 and since the petition was filed on 15.01.2014, there is only a delay of only 11 days. The petition is filed within 120 days, the period prescribed in Section 34(3) of the Act, therefore,

the delay of 11 days be condoned.

15. The crucial question, therefore, is whether the period of limitation for filing the petition under Section 34(3) is to be reckoned from 03.10.2013, the date on which the petitioners were allegedly became aware of the award dated 22.06.2011 on receipt of notice in execution petition No.297/2012. The petitioners have not brought on record any document to show that the notice of the petition bearing Execution Petition No.297/2012 was received by them on 03.10.2013. This Court had summoned for the record of the Execution Petition No.297/2012, titled as L&T Finance Ltd. vs. M/s Spark Engineers & Contractors and Anr and gone through the same. The record of this case clearly shows that the Court had issued notices of the execution petition on several dates, but the notices remained unserved, mainly because the house was found locked and the servant of addressee refused to receive the process. The Court record shows that the Court summons issued to petitioner for appearance on 09.10.2013, at 10.30 AM was personally received by petitioner No.2 along with copy under his signatures on 03.09.2013. He also received the court summon on behalf of respondent No.1, i.e., M/s Spark Engineers and Contractors, under his signatures along with copy. The petitioner No.2 is the guarantor, petitioner No.1 is the

proprietor of M/s Spark Engineers and Contractors. Petitioner No.1, who is the proprietor of M/s Spark Engineers and Contractors, is also the wife of petitioner No.2, and both are residing together at 324, West Vardhman Plaza, Near Peera Ghari National Market, New Delhi, which is also the address of M/s Spark Engineers and Contractors. The judicial record, therefore, shows that both the petitioners were duly served of the execution petition on 03.09.2013 along with the copy. The contention of the petitioner that they had become aware of award only on 03.10.2013 in execution petition does not find support from record. The period of limitation, prescribed under Section 34, therefore, started running against them from the date 03.09.2013. The period of limitation of 90 days for filing of the present petition expired on 03.12.2013. This period of limitation under the proviso of Section 34(3) was extendable for another 30 days which came to end on 03.01.2014. The present petition has been filed on 15.01.2014, i.e., beyond the period of limitation, prescribed under Section 34(3), for filing a petition under Section 34 of the Act. Besides this, the perusal of arbitral record, summoned by this Court, clearly shows that the Arbitrator sent the copy of the award vide its order dated 22.06.2011 vide registered post to both the parties and the Acknowledgement Cards were received back by the

Arbitrator, bearing signatures of recipient. The contention of the petitioner that A.D. card does not bear complete address has no bearing in view of the postal practice, which is—the postman gets the A.D. card signed on handing over the registered post to the addressee. Therefore, the A.D card would have been signed by the addressees only on receipt of registered post. Therefore, if the A.D. card bears the signatures, the registered post must have been received by the recipient. As per the A.D. card, recipients are petitioner No. 1 and petitioner No.2. This, further shows that award was received by parties in July, 2011 itself and the period of limitation for filing the present petition from that date expired in 2011 itself.

16. From whatever angle we consider, the present petition, since has been filed on expiry of 120 days, prescribed under Section 34(3), is hopelessly barred and the delay cannot be condoned for any reason, in view of finding of Supreme Court in **Popular Construction** (*supra*).

17. Since the present petition has been filed beyond the period of limitation, the same is thus not maintainable.

The petition stands dismissed.

**DEEPA SHARMA  
(JUDGE)**

**JANUARY 12, 2015**  
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