

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

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Judgment Reserved on: 06th May 2015
Judgment Delivered on: 01st September 2015

+ **FAO(OS) 87/2015 & CM Nos. 3072-3073/2015**

NUGENT ESTATES LTD

..... Appellant

versus

M/S MS SHOES EAST LTD

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Jayant K. Mehta with Mr Saurabh D. Karan S.
and Mr Kunal Singh, Advocates.

For the Respondent : Mr Pavan Sachdeva (CMD of Respondent in
person).

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. By this appeal, the appellant has impugned the order dated 08.01.2015 whereby the application of the appellant under Section 5 of the Limitation Act, 1963 seeking condonation of delay in filing objections under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as the said Act) to the Award dated 23.05.2012 were dismissed. By the impugned order, the learned Single Judge held

that the delay in filing the objections by the appellant was 'voluminous' and a sufficient explanation had not been given for the delay. The impugned order notices the averments made by the appellant in the application seeking condonation of delay to the effect that the appellant was not served either in the suit for appointment of the Arbitrator or in the arbitration proceedings and became aware of the arbitration proceedings when it received a notice dated 02.06.2012 from the Arbitrator and became aware that an Award had been passed on 23.05.2012.

2. It is contended that the appellant became aware of the Award dated 23.05.2012 having been filed in the Court when it received notice from the Registry on 15.01.2013. On an inspection of the record conducted on 31.01.2013 and 07.02.2013, it was discovered that the arbitration record had not been filed and consequently an application was filed on 16.02.2013 (IA No. 3088/2002) for a direction to the plaintiff to provide the entire record of the arbitration proceedings and for granting an extension of time of 30 days for filing of the objections to the Award. The said application was disposed of on 10.07.2013 as the arbitral record stood filed and 3 weeks' time was given to the appellant to file objections to the Award. The appellant, on inspection, discovered that the arbitral record comprised of approximately 2000 pages. Thereafter an application was filed for grant of further 4 weeks to inspect the arbitral record and file

objections. The said application was allowed on 07.08.2013. The objection, thereafter, was filed on 21.08.2013 with a delay of 186 days. The contention of the appellant was that the delay between the periods 16.02.2013 to 10.07.2013 was because of non-availability of the record and the delay between 11.07.2013 to 21.08.2013 was because of the vastness of the record. On these grounds, the delay in filing the objections was sought to be explained.

3. The respondents refuted the contentions of the appellant contending that the appellant was aware of the proceedings and the Award and even a copy of the Award was received. It is contended that the delay was intentional, deliberate and the explanation lacked bonafides.

4. By the impugned order, the learned Judge recorded that the appellant was aware at least of the Award having been passed in June 2012 on receipt of notice dated 02.06.2012. It is noted that the arbitral award was received by the Registry on 16.04.2013 and the record thereafter was inspected on several dates. The learned Single Judge found that the explanation rendered by the appellant did not explain the delay sufficiently and on these grounds, the learned Single Judge held that the delay between 16.04.2013 and 10.07.2013 was not sufficiently explained.

5. In the above circumstances, the learned Single Judge found that

the plea of the appellant lacked bonafides and as such the application seeking condonation of delay has been dismissed.

6. The learned counsel for the appellant before us has raised a new plea, which it is submitted is a plea purely in law and a plea that goes to the very root of the matter. It is contended that even assuming all the facts as alleged by the respondent to be correct, the objections of the appellant were not beyond time and in fact were filed even before the cause of action to file the same arose.

7. It is contended that the Award was not made within the prescribed period of 4 months and the Arbitrator had permitted the time to elapse. The award was thus not an award in law until the time for making the award was enlarged by the court under section 28 of the Act. An application under Section 28 seeking enlargement of time for making of the award was also filed by the respondents along with the petition under section 14 & 17 of the Act seeking the making of the award rule of the court. The said application was allowed after the objections had already been filed and as such when the objections had been filed, there was no award in law. It is thus contended that the objections were within time.

8. The respondent who appears in person has admitted that the time for making the award had elapsed before the award was made. An application under Section 28 seeking enlargement of time was

filed and the same was disposed of on 14.10.2014 granting extension of time.

9. Normally, a new plea requiring fresh investigation into facts would not be permitted to be raised for the first time in appeal, however, the appellate court is empowered to entertain a pure question of law or a legal plea that goes to the very root of the matter on admitted facts.

10. Section 3 of the Act reads:

“3. Provisions implied in arbitrations agreement – An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.”

11. In terms of Section 3, unless a different intention is expressed between the parties, the provisions set out in the First Schedule in so far as they are applicable, would be the implied conditions of the arbitration agreement.

12. Clause 3 of First Schedule reads:

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

13. Under Clause 3 of the First Schedule, it is mandatory for the

Arbitrator to make the award within 4 months after entering on reference. The period of four months can be extended with the consent of the parties or by way of an application under Section 28 of the Act which stipulates as under:-

Section 28. – Power to Court only to enlarge time for making award – (1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

14. Section 28 empowers the court to enlarge the time for making an award. The power can be exercised irrespective of the fact whether the time has already expired or not or whether the award has been made or not. Section 28 (2) lays down that any provision empowering the Arbitrator to enlarge the time except with the consent of all the parties shall be void and of no effect.

15. On 14.03.2007, an order appointing the present Arbitrator was passed. The appellant contends that the appellant was not served prior to the passing of the said order. However, the said plea is of no relevance for the present appeal. On 21.04.2007, the arbitration proceedings commenced. On 20.03.2007, four months period for making the award, as mandated by Clause 3 of the First Schedule read

with Section 3, expired. On 23.05.2012 after 4 years and 9 months of the expiry of the stipulated period, the exparte 'award' was passed. On 02.06.2012, the appellant is alleged to have received notice of passing of the award. On 28.06.2012, the suit under Section 14 and 17 of the Act was filed by the respondents seeking to make the 'award' dated 23.05.2012 a rule of the court. Along with the suit, an application was filed (IA No. 12772/2012) under Section 28 of the said Act seeking enlargement of time from 20.08.2007 till 23.05.2012. On 21.08.2013, the objections were filed by the appellant along with the subject application under section 5 of the Limitation Act, 1963 seeking condonation of delay. On 14.10.2014, the arguments on the Section 5 application seeking condonation of delay were heard and judgment reserved. On the same date, the application under Section 28 seeking enlargement of time was allowed. By the impugned judgment, the application seeking condonation of delay has been dismissed as mentioned herein above.

16. The chronology of the facts as enumerated above reveals that the time for publishing the award expired on 20.08.2007. Thereafter, without enlargement of time, either with the consent of the parties or by leave of the court under Section 28, the award was published on 23.05.2012.

17. The award given by an arbitrator after four months is not binding on the parties. Such an award is vitiated, as the arbitrator has

no power to make an award after four months.¹ If time to make the award is not extended by court, the document described as an award would be treated as non est.²

18. The award that is published beyond the time prescribed by the Statute would be no award in the eyes of law until the time is enlarged by the court under Section 28. The language of the Section 28 clearly shows that even an ex-post facto enlargement of time can be granted by the court. The court has the power to extend time even after the award has been given or after expiry of the period prescribed for the award. This power can be exercised even by the appellate court.³

19. The award in the present case, which was made after 4 years and 9 months, would not be an award which could be made a rule of court or which could be enforceable until the time for making the award is enlarged by the court under section 28. So, technically speaking, as the so-called award was not an award till the time was enlarged, the limitation for filing objections to the same would not commence till the time delay is condoned and the time for making the award is enlarged. The objections were filed on 21.08.2013 before the time for making the award was enlarged under Section 28 on 14.10.2014.

¹ *Jatinder Nath Versus Chopra Land Developers (P) Ltd* (2007) 11 SCC 453

² *Hari Shanker Lal Versus Shambhu Nath* AIR 1962 SC 78

³ *State of Punjab Versus Hardyal* (1985) 2 SCC 629

20. Since the objections were filed prior to the date on which the award became an award in law, the objections cannot be said to be barred by limitation. In the present case, since the objections have been filed prior to the award becoming an award in law, we are of the view that the objections are not beyond time and as such, there was no necessity of even filing an application seeking condonation of delay.

21. The judgment relied upon by the Respondent of the Andhra Pradesh High Court in the case of ***Chairman of the Board of Trustees of the Port, Visakhapatnam Port Trust Versus Sri Gurucharan Singh 2004 (1) Arb L R 319 (AP)*** is not applicable in the facts of the present case as the said judgment is on the question of commencement of limitation from the date of service of notice issued by the court upon the parties regarding the filing of the award in court. The said judgment does not deal with the question of commencement of limitation to challenge an award published beyond the stipulated time.

22. The judgments relied upon by the Respondent in the cases of ***Indian Oil Corporation Limited Versus Construction Enterprises (2010) 4 CAL L T 252 (HC): MANU/WB/1031/2010*** and ***Surendra Ramnarayan Shivhare Versus CMD Western Coalfields Ltd 2009 (111) Bom L R 4465 : MANU/MH/1096/2009*** are also not applicable in the facts of the present case as they are on the proposition that time for making the award can be enlarged even after the period has expired and even where the award has already been published. They

do not deal with the question of the period of limitation.

23. The judgments relied upon by the Respondents in the cases of *Madan Lal Versus Sunder Lal AIR 1967 SC 1233 and Raj Kumari Versus Krishna Kumari 2014 (6) Mh Lj 702 : MANU/MH/2350/2014* are not applicable as the said judgments deal with the scope of exercise of *suo motu* powers of the court to set aside the award on grounds that fall under section 30 of the Act, which clearly is not the case at hand.

24. In view of the above, the impugned order is set aside. The application seeking condonation of delay in filing the objections is disposed of as infructuous. The objections of the appellant under Section 30 and 33 of the Act are liable to be considered on merits. It is directed accordingly.

25. In view of the above, the appeal is accordingly allowed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

September 01, 2015
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