IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 165 OF 2017.

M/s DDL Excavation Pvt. Ltd.
M-1, Gurudatta Complex,
M. G./ Road, Panaji -Goa.
403001, represented by its
Director Shri Mr. Anupam
Kapur r/o. M-1, Gurudatt
Complex, M. G. Road,
Panaji, Goa. .....Petitioners.

Versus

Union of India,
by its Chief Engineer(Project)
Chetek, C/o 56 APO, Bikaner,
State of Rajasthan. .....Respondent.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. S. Karpe, Advocate for the petitioner.
Mr. M. Amonkar, Central Government Standing Counsel for the respondent.

CORAM: M. S. SONAK, J.
Date:24th April, 2017.

ORAL JUDGMENT:

Heard Mr. J. E. Coelho Pereira, learned Senior Counsel for the petitioner and Mr. M. Amonkar, learned Central Government Standing Counsel for the respondent.

2. Rule. With the consent of and at the request of the learned Counsel for the parties, Rule is made returnable forthwith.

3. This petition challenges the order dated 17.12.2016 made by the learned District Judge, South Goa, Margao permitting the

respondent/Union of India(UOI) benefit of Section 14 of the Limitation Act, 1963 and thereby, excluding the period of 467 days in computing the period of limitation for instituting an application under Section 34 of the Arbitration and Conciliation Act, 1996, ("Arbitration Act") to challenge the arbitral award dated 29.8.2011.

4. The circumstances in which challenge arises are few:-

The petitioner and the UOI entered into an agreement at Bikaner for execution of some works in Goa. The dispute arose between the parties, which was referred to an arbitrator Mr. T. P. Vetayudhan, who submitted his award dated 7.4.2004. Since, both the parties were dissatisfied with the award, UOI challenged the same before the Bikaner Court and the petitioner challenged the same before Margao Court. Perhaps realising that there would be possibility of conflicting decision, both, UOI as well as the petitioner took out transfer petitions before the Hon'ble Supreme Court. There, by consent of the parties, petition before the Bikaner Court was transferred to the Margao Court since, it was noted that proceedings before the Margao Court were instituted, prior in point of time. Before the Margao Court, once again, by consent, arbitral award dated 7.4.2004 was set aside. The parties applied for appointment of new arbitrator, who, upon appointment made an award dated 29.8.2011. UOI, on the basis that agreement was entered into at Bikaner, instituted a petition under Section 34 of the Arbitration Act to question the award dated 29.8.2011, before the Bikaner Court within the prescribed period of limitation. The petitioner objected to the proceedings in Bikaner by invoking the provisions in Section 42 of the Act. The Bikaner Court, vide order dated 17.8.2012 upheld such objection. UOI thereafter instituted a petition under Section 34 of the Act before the Margao Court and applied for exclusion of the period spent by them before the Bikaner Court in terms of Section 14 of the Limitation Act. By the impugned order dated 17.12.2016, Margao Court accepted the case of UOI and has permitted exclusion of period spent before the Bikaner Court. Aggrieved by the impugned order dated 17.12.2016, the petitioner has instituted the present petition.

5. Mr. Pereira, learned Senior Counsel for the petitioner has made the following submissions in support of this petition:-

(a) The applicant, who seeks benefit of Section 14 of the Limitation Act is required to plead and establish that it had instituted and was perusing the proceedings in the wrong Court with due diligence and in utmost good faith. The burden of establishing these twin predicates is upon the applicant who seeks for exclusion of period. In the present case, the applicant-UOI has neither pleaded nor established such twin predicates;

(b) In the earlier round of challenge to the arbitral award dated 7.4.2004, the Honble Supreme Court deemed it appropriate to transfer the proceedings from the Bikaner Court to the Margao Court. In such circumstances, very institution of the petition under Section 34 of the Arbitration Act before the Bikaner Court in order to challenge the Second arbitral award dated 29.8.2011, could never be regarded as some act of due diligence or for that matter, good faith. The vague plea that the petition was instituted before the Bikaner Court on the basis of legal advice, is neither sufficient nor has such pleas has been substantiated by stating the name of the advocate or filing of an affidavit by the said Advocate;

(c). The burden of establishing the existence of twin predicates of due diligence and good faith is upon the applicant-UOI who seeks exclusion of period. The applicant, if it chooses could have even lead evidence to establish these predicates. In the present case, UOI has neither pleaded nor proved the existence of twin predicates. In such facts and circumstances, the learned District Judge exceeded jurisdiction in extending the benefit of Section 14 of the Limitation Act to the UOI.

6. Mr. Pereira, places reliance upon the decisions of this Court in the case of ***Foreshore Co-operative Housing Society Ltd, 2006(6) Bom. C. R. 230*** and ***M/s Shriram Insight Share Brokers Limited Vs. Mr. Antonio F. X. Pereira, in Appeal Under Arbitration No.9/2016 decided on 15.2.2017*** in support of his submissions.

7. Mr. Amonkar, learned Central Government Standing Counsel submits that satisfaction of twin predicates referred to by Mr. Periera is writ large upon the record. He submits that original agreement between the parties which contained arbitration clause, was entered into at Bikaner. Therefore, Bikaner Court, obviously had territorial jurisdiction to entertain the petition under Section 34 of the Arbitration Act. He submits that the Bikaner Court, by its order dated 17.8.2012 did not non-suit UOI on the ground that it lacked territorial jurisdiction, but petition was dismissed by resort to the provisions of Section 42 of the Arbitration Act. He submits that even the Hon'ble Supreme Court, in the challenge to the first award, nowhere held that the Bikaner Court lacked territorial jurisdiction. Rather, the transfer of the petitioner from Bikaner Court to the Margao Court, was by consent. Mr. Amonkar, submits that there is absolutely nothing on record which militate against lack of due diligence or good faith on the part of UOI. Mr. Amonkar submits that provisions of Section 14 of the Limitation Act are to be liberally construed and the same have been reasonably construed by the learned District Judge. Therefore, he submits that this Court may not interfere with the impugned order dated 17.12.2016 in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

8. Mr. Amonkar, has relied upon the decision in the case of ***Consolidated Engineering Enterprises Vs Principal Secretary, Irrigation Department and others, (2008) 7 SCC 169.***

9. The rival contentions now fall for my determination.

10. There is no dispute that the agreement between the parties which contained arbitration clause was entered into at Bikaner. Section 2(1)(e) of the Arbitration Act defines “Court” to mean the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

11. On this basis, it cannot be said that the Bikaner Court, where admittedly, part of the cause action had arisen, completely lacked territorial jurisdiction to entertain a petition under Section 34 of the Arbitration Act, questioning the arbitral award.

12. In the first round of litigation between the parties i.e challenge to the Mr. T. P. Vetayudhan's award dated 7.4.2004, it does not even appear to have been the case of the petitioner that the Bikaner Court lacked territorial jurisdiction. In fact, both the parties instituted transfer petitions before the Hon'ble Supreme Court and further, proceedings at the Bikaner Court were transferred to Margao Court after UOI consented to such transfer and after it was noted that

the proceedings before the Margao Court were filed prior in point of time. Upon reading of the order dated 1.12.2016, by which the Hon'ble Supreme Court disposed of transfer petitions instituted by Union of India and the petitioner, it cannot be said that the Hon'ble Supreme Court adjudicated upon and upheld the alleged objection raised by the petitioner of the territorial jurisdiction of the Bikaner Court.

13. The order dated 1.12.2016 made by the Hon'ble Supreme Court disposing of the two transfer petitions reads thus:-

> *"T.P.(C) No.856 of 2006*
>
> *Heard Learned Counsel for the parties.*
>
> *In the facts and circumstances of the case, Arbitration Application No. 206 of 2006, title Union of India and ors. Vs. M/s DDL Excavations Pvt. Ltd. And anr. Filed before the District Judge, Bikaner, is transferred to the Court of District Judge at Margao, Goa, as the same was filed prior in point of time.*
>
> *The transfer petition is accordingly, allowed.*
>
> *T.P.(C) No.232 of 2006:*
>
> *Heard learned Counsel for the parties.*
>
> *In view of the statement made on behalf of the learned Counsel for the respondent, as the proceeding before the Goa Court was prior in point of time, this petition has become infructuous and the same is, accordingly, dismissed."*

14. In the aforesaid circumstances, it is not possible to accept Mr. Pereira's contention that the Hon'ble Apex Court in its order dated

1.12.2016 had already ruled that Bikaner Court lacked territorial jurisdiction in the matter of challenge to arbitral award under Section 34 of the Arbitration Act. If the Bikaner Court had lacked territorial jurisdiction, then possibly, there was no question of any transfer. The proceedings before the Bikaner Court would have to be dismissed for want of territorial jurisdiction. It is also not clear as to whether the petitioner had objected to the territorial jurisdiction of the Bikaner Court entertaining petition under Section 34 of the Arbitration Act for want of territorial jurisdiction or whether the petitioner merely wanted the transfer of proceedings from the Bikaner Court to the Margao Court so as to avoid conflicting decisions and further, since, the petition instituted by the petitioner before the Margao Court was prior in point of time. Even assuming that such objection was raised by the petitioner, upon reading of the aforesaid order dated 1.12.2016, it cannot be said that such objection was sustained by the Hon'ble Supreme Court. This is relevant because Mr. Pereira contends that there was lack of due diligence and good faith on the part of the UOI in instituting proceedings before the Bikaner Court, after Hon'ble Supreme Court in its order dated 1.12.2016 had upheld the petitioner's claim that the Bikaner Court lacked territorial jurisdiction in the matter. Since this does not appear to be correct position, it is not possible to accept the contention of Mr. Pereira that there was lack of due diligence or want of good faith on the part of the UOI.

15. In the second round of litigation, where, UOI instituted a

petition before the Bikaner Court to question arbitral award dated 29.8.2011, the petitioner, again, does not appear to have seriously questioned the territorial jurisdiction of the Bikaner Court but objection was mainly upon reference to the provisions contained in Section 42 of the Arbitration Act. Section 42 of the Arbitration Act provides that notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. The petitioner, even styled its application before the Bikaner Court as *"Application under Section 42 of the Arbitration and Conciliation Act, 1996"*. By order dated 17.8.2012, Bikaner Court, has basically upheld the objection under Section 42 of the Arbitration Act. But the Bikaner Court, has not held that it was not the appropriate Court in terms of Section 2 (1)(e) of the Arbitration Act or that it lacked territorial jurisdiction in the matter.

16. The UOI in its application seeking exclusion of time has explained the circumstances in which proceedings were instituted and pursued before the Bikaner Court and on the said basis applied for exclusion of time. No doubt, the application made by the UOI makes reference to Section 5 of the Limitation Act and there is also a prayer for condonation of delay. However, from the tenor and the contents of

the application it is very clear that UOI had invoked the provisions of Section 14 of the Limitation Act and had applied for exclusion of time spend by it before the Bikaner Court. From the averments in the petition it is very clear that UOI has asserted that there was due diligence on its part and further, its author was absolutely bonafide. The learned District Judge has also construed the application made by the UOI in its correct perspective by focusing upon the substance rather than form.

17. In ***M. P. Steel Corporation Vs Commissioner of Central Excise, (2015)7 SCC 58***, the application made had invoked Section 5 of the Limitation Act and what was applied was not exclusion of time but condonation of delay. The Hon'ble Supreme Court ruled that this way by no means fatal and that the substance of the application and not the form which had to be considered. At paragraph 7, this is what the Hon'ble Supreme Court has held:-

> *"Technically speaking, Shri A.K. Sanghi, may be correct. However, in an application for condonation of delay the appellant pointed out that they were pursuing a remedy before another appellate forum which ought to be excluded. We deem this averment sufficient for the appellant to contend that Section 14 of the Limitation Act or principles laid down under it would be attracted to the facts of this case."*

18. Upon due satisfaction of existence of twin predicates prescribed under Section 14 of the Limitation Act, the learned District Judge has exercised discretion in the positive manner and allowed the exclusion of the time spent before the Bikaner Court. There is no unreasonableness or perversity in the exercise of such discretion, which warrants interference in exercise of the supervisory jurisdiction.

19. In this case, since, part of the cause of action, had arisen at Bikaner Court, it cannot be said that there was any lack of due diligence or want of good faith in instituting the proceedings before the Bikaner Court. UOI, in a sense, is an impersonnel agency and has to rely upon its officers and legal advice, in such matters. Mere circumstance that name of the Advocate who is stated to have advised the UOI was not stated or that the affidavit of such Advocate was not filed are not the grounds which suggests any lack of due diligence or want of good faith. The provisions of Section 14 of the Limitation Act are to be construed liberally. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by reasonable and prudent person under particular circumstances. Similarly, insofar as good faith is concerned, there cannot be any hard and fast Rule and matter has to be decided on facts of each case.

20. In this case, as noted earlier, it is not as if, the Hon'ble Supreme Court in its order dated 1.12.2016 has held that the Bikaner Court lacked territorial jurisdiction in the matter. The transfer of the

proceedings from the Bikaner Court to Margao Court were on the basis of the consent and also on the basis that the proceedings in the Margao Court had been instituted prior in point of time. It is true that UOI or its advisors lost sight of the provisions contained in Section 42 of the Arbitration Act. However, this is hardly a circumstance not to extend the benefit of Section 14 of the Limitation Act to the UOI.

21. Mr. Pereira, at one stage, submitted that after the Bikaner Court made its order dated 17.8.2012, UOI did not pursue the matter any further and insist that proceedings were correctly instituted in Bikaner Court. Mr. Periera, submits that this is indicative of bad faith. The UOI not insisting upon proceeding in the Bikaner Court after the order dated 17.8.2012, is certainly, not a circumstance to suggest any lack of good faith on the part of the UOI. Rather, this is a circumstance which points out the bonafides on the part of the UOI. As noted earlier, UOI is impersonnel agency which has to essentially function through its officer and on the basis of legal advice which it receives in the matter. Even the Bikaner Court order dated 17.8.2012 is not based upon lack of territorial jurisdiction in the Bikaner Court. The order only applies the principle in Section 42 of the Arbitration Act. In such circumstances, if UOI accepts the order dated 17.8.2012 and thereafter institutes a petition under Section 34 of the Arbitration Act before the Margao Court, it can hardly be indicative of any lack of due diligence or lack of good faith on the part of UOI.

22. In ***Consolidated Engineering Enterprises,*** (supra) the scope of the provisions in Section 14 of the Limitation Act has been considered. It is held that as long as the record does not indicate that there was pretended mistake intentionally made by the appellant with a view to delaying the proceeding or harassing the respondent. The benefit under Section 14 of the Limitation Act must be extended to the applicant. In this case, there was an honest doubt about the court competent to entertain the application for setting aside the award made by the arbitrator. The mere fact that the question of jurisdiction was an arguable one would not negative good faith because the appellant believed bonafide that the court in which it had instituted the proceeding had jurisdiction in the matter. By filing the application in the courts which had no jurisdiction to entertain the same, the appellant did not achieve anything more particularly when the lis was never given up. The policy of the Section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. The principle is clearly applicable not only to a case in which a

litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bonafide mistake or law or defect of procedure. Having regard to the intention of the legislature the Hon'ble Supreme Court expressed the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong Court, be excluded.

23. In ***Consolidated Engineering Enterprises****(supra),* it is further held that the following five conditions have to be satisfied before the provisions in which Section 14 can be invoked. Section 14 of the Limitation Act deals with exclusion of time of proceeding bonafide in a court without jurisdiction. On analysis of the said Section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court.

24. In the present case, there is no dispute that conditions

no.1, 3, 4 and 5 stand complied with. However, Mr. Pereira, submits that in this case there was lack of due diligence and want of good faith on the part of the UOI. There is no reason to accept this contention, in the facts and circumstances adverted to earlier.

25. In ***Consolidated Engineering Enterprises****(supra),* it is held that there is no manner of doubt that provisions in Section 14 of the Limitation Act deserve to be construed liberally. Due diligence and caution are essentially per-requisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie

show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. Applying these principles to the facts and circumstances of the present case, there is really no case made out to interfere with the impugned order.

26. In ***Deputy Collector Northern Sub-Division, Panaji, 1995(5) SCC 333,*** appeal was instituted on 25.8.1967 which was well within the period of limitation prescribed under the Portuguese Code. However, as the mater progressed, Government Pleader realised that the correct remedy did not lay under the Portuguese Code but under the Civil Procedure Code(CPC). To that effect, a memo was filed seeking leave to pursue the appeal under the CPC. Judicial Commissioner came to the conclusion that the CPC was extended to Goa, an appeal lay under Section 54 of the Act but held that the appeal was not instituted within the prescribed period of limitation under the Indian law(CPC) and dismissed the appeal as barred. The Hon'ble Supreme Court applying principles of Section 14 of the Limitation Act, reversed Judicial Commissioner by observing thus:-

> *"The crucial question is whether the appeal was presented bonafide within limitation. It is true that if the appeal is filed under "Recurso de Apelacao" it is well within time. If appeal is entertained under Section 96 of CPC read with Section 54 of the Act, it is beyond limitation. The question is whether the*

appellant was pursuing the remedy bonafide. It is contended for the respondent that there are no bonafides on the part of the State and, therefore, Section 14 of the Limitation Act cannot be applied to the facts in this appeal. We are unable to agree with the counsel. The State is acting through its authorised representative and the counsel was in two minds, as to whether the appeal should be pursued under the Portuguese Code or under C.P.C. Since C.P.C. stood extended to G.D.D. on September 15, 1966 by which date there was a decree passed by the Reference Court, obviously the proceedings should be pursued under C.P.C. as per Section 53 of the Act. Therefore, the counsel was pursuing the remedy wrongly under the Portuguese Code. In consequence, the appeal came to be filed beyond limitation. Accordingly, there are bonafides in pursuing the remedy. The State was represented by the counsel and the counsel was in two minds as to whether the appeal should be pursued under the Portuguese Code or under the Code of Civil procedure, There is a bonafide mistake on the part of the counsel in pursuing the remedy. Since the State acts through the counsel for the State and he is entitled to represent the State in all the *proceedings initiated in the Court, there was no need to file Vakalatnama but memo of appearance would be sufficient. Accordingly the order of the Judicial Commissioner is set aside."*

27. In ***Foreshore Co-operative Housing Society Ltd*** (supra) this court has held that the burden of establishing the twin preconditions of Section 14 of the Limitation Act is upon the applicants. In the present case, UOI has discharged the burden of establishing the twin predicates of Section 14 of the Limitation Act. The decision in ***M/s Sriram Insight Sahre Broker Limited*** (supra) is clearly distinguishable. In the said case, Calcutta Court had categorically ruled that District Court at Barasat lacked the territorial jurisdiction in the matter. Despite such categorical ruling which had attained finality, the appellants in the said appeal insisted upon taking out proceedings before the District Court at Barasat. It is in these circumstances, that the District Judge had refused to exercise discretion and granted exclusion for period under Section 14 of the Limitation Act. In fact, the appellants in the said case had not even applied for exclusion under Section 14 of the Limitation Act but proceeded on the basis that petition was within the prescribed period of limitation. The exercise of such discretion was therefore, not interfered with by this Court.

28. In the present case, as noted earlier, the learned District

Judge has exercised discretion in positive manner by adverting to the twin predicates of Section 14 of the Limitation Act and taking into consideration the facts and circumstances on record. The exercise of **discretion**, in the facts and circumstances of this case, cannot be said to be unreasonable or perverse. In such a situation, this court in its supervisory jurisdiction would not interfere.

29. In ***N. Balakrishnan Vs. M. Kishnamurthy, (1998)7 SCC 123***, the Hon'ble Supreme Court has held that condonation of delay is a matter of discretion of the Court. Once, the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less, in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. The Hon'ble Supreme Court went on to observe that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides or it is not put forth with as part of dilatory strategy, the Court must show utmost consideration to the suitor. However, while condoning the delay the Court should not forget the opposite party altogether. It must be born in mine that he is a losser and he too could have incurred quite large litigation expenses. It would therefore be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant, the Court shall compensate the opposite party for his loss.

30. In the case, although, the learned District Judge has exercised of its discretion reasonably in extending the benefit of Section 14 of the Limitation Act to the UOI, the learned District Judge has failed to award any costs in favour of the petitioner. On this count the some interference is warranted with the impugned order. The costs in the facts of the present case, are computed at₹25,000/-.(Rupees twenty five thousand only)

31. This petition is accordingly disposed of with following order:-

(a) The challenge to the impugned order, in so far as it excluded time spent by Union of India in Bikaner Court is dismissed.

(b) The respondent/Union of India is however, directed to pay costs at ₹25,000/- (Rupees twenty five thousand only) to the petitioner within a period of six weeks from today.

(c) Rule is made partly absolute to the aforesaid extent with costs.

M. S. SONAK , J.

vn*