

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL UNDER ARBITRATION NO. 9 OF 2016**

M/s Shriram Insight Share Brokers Limited, a Company duly incorporated under the Companies Act, 1956 and having its Registered Office at Mookambika Complex, 4th Floor, 4, Lady Desikachary Road, Maylapore, Chennai-600 004, Tamil Nadu and inter alia, Head Office at CK-15, Sector-II, Salt Lake, Kolkata-700 091, through its General Manager, Mr. Sankar Roy, 185, Shrirampur, Purba, Para RD, Kolkata-700 094.

.... Appellant

Versus

Mr. Antonio F.X. Pereira, residing at House No.61, Waddy, Mercas, Bernard Caineiro, P.O. St.Cruz, Ilhas-Goa-403 005.

.... Respondent

Shri Devidas J. Pangam with Shri Narayan Govekar and Shri Luis Fernandes, Advocates for the Appellant.

Shri R.G. Ramani with Shri Ulhas Raikar, Advocates for the Respondent.

CORAM:- C. V. BHADANG, J.**DATE:- 15th FEBRUARY, 2017****ORAL JUDGMENT:**

Admit. The learned Counsel for the respondent, waives service. Heard finally by consent of parties.

2. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (Act, for short), challenging the order dated 29.08.2016, by which the learned District Judge has rejected the application under Section 34 of the Act, filed by the appellant, as being barred by limitation.

3. The brief facts are that an agreement between the parties, containing an arbitration clause, was executed in Goa. The arbitration was to be conducted at Mumbai, as per the Rules, Bye-laws and Regulations of the Bombay Stock Exchange Regulations (Regulations, for short). As disputes and differences arose between the parties, the matter was referred to a panel of three Arbitrators, who rejected the claim of the appellant by an award dated 18.10.2010.

4. The appellant challenged the said award by filing an application under Section 34 of the Act before the learned District Judge at Barasat, West Bengal. That application was filed on 20.12.2010. On 09.12.2013, the District Court at Barasat directed return of the application for presentation to the proper Court. This order was passed in the absence of the appellant. On 01.03.2014, the appellant filed an application for

recall of the said order, however, during the pendency of the application for recall, the appellant filed Miscellaneous Case No. 04/2014, with a prayer to return the application under Section 34 of the Act. The District Court Barasat (West Bengal), by an order dated 10.05.2016, returned the application for presentation to the proper Court. This order was passed by consent of the parties. Eventually, the appellant filed the application before the learned District Judge at Panaji on 17.05.2016, which was accordingly registered as Arbitration Petition No. 7/2016.

5. The respondent raised a ground of limitation. It was contended that the application was barred by limitation. According to the appellant, they were entitled to the exclusion of time, which was spent in prosecuting the application before the District Court at Barasat, West Bengal. In short, the exclusion was sought under Section 14 of the Limitation Act, on the ground that the appellant was bonafidely prosecuting the application before a wrong forum.

6. The learned District Judge has upheld the objection raised on behalf of the appellant, thereby dismissing the

application, which order is subject matter of challenge in this appeal.

7. I have heard Shri Pangam, the learned Counsel for the appellant and Shri Ramani, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned order passed.

8. It is submitted by Shri Pangam, the learned Counsel for the appellant that the appellant was bonafide prosecuting the application under Section 34 of the Act and for the matter of that, the subsequent application for recall, in a Court having no jurisdiction and as such, the time spent requires to be excluded. The learned Counsel has referred to the observations in para 17 of the impugned order, in which, the learned District Judge has observed that there is no explanation forthcoming from the appellant as to what the appellant was doing from 09.12.2013 till 19.08.2015, when the application being Miscellaneous Case No. 4/2014, for return of the application under Section 34 of the Act, was filed. It is submitted that during this period, the appellant was prosecuting the application for recall. It is thus

submitted that the observations in para 17 are incorrect and on the basis of the same, the learned District Judge could not have held that the appellant has not exercised due diligence.

9. It is next submitted that if, the party acts on an advise of the Counsel, it cannot be made to suffer for any such wrong advise being tendered. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of **Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department & Others, (2008) 7 SCC 169, Deputy Collector, Northern Sub-Division, Panaji Vs. Comunidade of Bambolim, (1995) 5 SCC 333** and **J. Kumaradasan Nair & Another Vs. Iric Sohan & Others, (2009) 12 SCC 175**. It is submitted that the relevant date would be the date of actual return, which in this case is 10.05.2016. It is submitted that the application is filed before the District Judge, Panaji within a week thereof i.e. on 17.05.2016 and thus, there is no lack of due diligence or bonafides, on the part of the appellant.

The learned Counsel has placed reliance on the decision of this Court in the case of **Smt. Latadevi Amiya**

Kumar Bhattacharya Vs. Ramnath Babulal Chaurasia & Others, 1987(2) Bom.C.R. 268, in order to submit that it is the date of actual return, which is material.

10. On the contrary, it is submitted by Shri Ramani, the learned Counsel for the respondent that in an identical matter, between the appellant and one Liguori Menezes also, the appellant had approached the District Court at Barasat by filing an application under Section 34 of the Act being Miscellaneous Case No. 166/2010. It is pointed out that a similar objection about maintainability was raised, which was overruled by the learned District Judge, which was challenged by Shri Liguori Menezes, before the Calcutta High Court in C.O. No. 1918/2012. It is submitted that the Calcutta High Court by a judgment and order dated 21.08.2013, has categorically held that the application was not maintainable, directing its return for presentation to the proper Court. It is submitted that the Calcutta High Court had placed reliance on the decision of the Hon'ble Supreme Court in the case of **Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Incorporated, (2012) 9 SCC 552**. It is submitted that after the judgment of the Calcutta High Court, the appellant could not

have filed application for recall of the order dated 09/12/2013. It is submitted that filing of the initial application under Section 34 of the Act and the subsequent application for recall, cannot be said to be bonafide, so as to entitle the appellant to take the benefit of Section 14 of the Limitation Act. It is submitted that the appellant had not made out the case of mistaken advise, as a ground for claiming exclusion of time under Section 14 of the Limitation Act. This case is being tried to be made out for the first time before this Court.

11. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. At the outset, it may be mentioned that the appellant had not claimed exclusion of time under Section 14 of the Limitation Act, in the application before the learned District Judge at Panaji. It was on the basis of the objection raised by the respondent that the learned District Judge heard the parties on the point of limitation when a claim for exclusion of time based on Section 14 of the Limitation Act, was made. Section 14 of the Limitation Act to the extent relevant reads thus:

14. Exclusion of time of proceeding bona fide in

Court without jurisdiction. —

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

It can thus be seen that prosecution of the prior proceedings has to be attended with due diligence and in good faith, which is sine qua non, for entitling a party to claim exclusion of time under Section 14 of the Limitation Act. The policy underlying the said Section, as held by the Hon'ble Apex Court in the case of **Consolidated Engineering Enterprises** (supra), is to provide 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. (See para 12 of the judgment.) The Hon'ble Apex Court has inter alia held that 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 has been held that an element of mistake is inherent in invocation of Section 14, where the parties mistakenly avails a remedy or selects a wrong forum and the section has to be construed liberally. However, at the same time, due diligence and caution are essential prerequisites for attracting Section 14 of the Limitation Act. There must be no pretended mistake intentionally made to delay the proceedings or harass the opposite party. It would be apposite to reproduce the observations in para 31 of the judgment as under:

"To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this Judgment have to co-exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essentially pre-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. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith.

(Emphasis Supplied)

It can thus be seen that although, the section is to be liberally construed, the provisions of the section can be attracted only where the condition precedent, as set out in the section are satisfied. The exercise of due diligence and good faith in prosecuting the prior proceedings is the essence of the section.

The question of existence of due diligence and bonafides, or their absence would depend upon facts and circumstances of each case. It has to be decided on the basis of the conduct of the parties, in the context of the overall circumstances.

12. In the present case, the agreement was executed at Goa, where the appellant has a Branch office and the arbitration was conducted at Mumbai. In view of the decision of the Hon'ble Apex Court in the case of **Balko** (supra), it is evident that the Court at Mumbai or Goa, would have jurisdiction. The appellant chose to challenge the award before the District Court at Barasat, West Bengal. The question has to be examined not only from the point whether, the application for recall was filed bonafide, but whether the filing of the initial application under Section 34 of the Act, was by way of due diligence exhibiting bonafides. Assuming for a moment that the Act of filing an application under Section 34 of the Act was out of due diligence and was a bonafide act, the fact remains that in an identical matter, the Calcutta High Court found that the District Court at Barasat, West Bengal, lacked territorial jurisdiction. Even after this judgment came on 21.08.2013, the appellant filed an application for recall on 01.03.2014 and ultimately, decided to

abide by the original order of the return of the application, (when the appellant filed Miscellaneous Case No.4/2014) and obtained the return of the application on 10.05.2016. The question is whether considering the overall circumstances, it can be said that the appellant was bonafide prosecuting the remedy before the wrong Forum. The answer in my considered view has to be in the negative.

13. It is true that the learned District Judge has observed that there is no explanation from the appellant, as to what it did from 09.12.2013 to 19.08.2015. The observation is not correct, in as much as, the appellant had filed and was prosecuting the application for recall during this period. However, this in my considered view would be inconsequential for more reasons than one. Firstly, because as noticed earlier, due diligence and good faith have to be shown in relation to the initial application under Section 34 of the Act. Secondly, the application for recall was filed in the face of the judgment of the Calcutta High Court in an identical case, wherein it was held that the District Court at Barasat, West Bengal, had no territorial jurisdiction. Thirdly, the application for recall was not carried to its logical end, when the appellant filed Miscellaneous Case No. 4/2014 and chose to

abide by the original order of return. The fact that the order dated 10.05.2016, ultimately returning the application, was passed by the consent of the parties, would also be inconsequential. This is because, there is can be no estoppel against law. In other words, only because the respondent had consented for the application being returned, would not preclude them from raising an objection on the ground of limitation. Secondly, the Court would not be precluded from examining whether, the application is filed within limitation because the parties had consented for the return of the application. That apart, the order dated 10.05.2016 records that the application is returned in terms of original order dated 09.12.2013. It was on account of the act of the appellant in filing the application for recall, which led to the application being actually returned only on 10.05.2016. Thus, the appellant cannot take the benefit of the said date in claiming exclusion of time under Section 14 of the Limitation Act. In the case of **Comunidade of Bambolim** (supra), there was a bonafide mistake in pursuing the remedy under a wrong forum. In that case, the appeal was filed under the Portuguese Code by the Government Pleader, which was well within time. Subsequently, the Government filed a memo that it was pursuing the matter under the Civil Procedure Code, 1908

(CPC, for short), without giving up the remedy under the Portuguese Code. The appeal under the CPC was filed beyond limitation. Thus, the question was whether, a case for exclusion of time under Section 14 of the Limitation Act was made out. In that case, there was a doubt as to whether, the appeal has to be prosecuted under the CPC or the Portuguese Code and it was in these circumstances found that there was a bonafide mistake on the part of the Government pleader, in pursuing the remedy under the Portuguese Code.

14. Although, a case of mistaken legal advice is tried to be made out, a perusal of the judgment of the District Court, does not show that such a ground was raised before the District Court.

15. In any event, in my considered view, the appellant has failed to establish that the prosecution of the application before the District Court at Barasat and the subsequent application for recall was attended with due diligence and was a bonafide exercise. I find that the appellant has failed to satisfy the requirements of Section 14 of the Limitation Act.

16. I have carefully gone through the impugned order and it does not suffers from any infirmity.

In the result, the appeal is hereby dismissed, with no order as to costs.

17. The amount of Rs.13,04,763.92 along with interest, if any, lying with the BSE, shall be paid to the respondent, after a period of eight weeks from today.

C. V. BHADANG, J.

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