IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	*Orders pronounced on*
27.6.2017	09.8.2017

CORAM

THE HON'BLE MR.JUSTICE **D.KRISHNAKUMAR**

C.R.P. (NPD) No.1955 of 2017

Dr.M.Kumaresan ... Petitioner

Vs.

1. The Arbitrator/District Collector
Salem District,
Salem.

2. The Authorisied Officer/Special District
Revenue Officer,
Land Acquisition (National Highways No.68)
3D/8, Ram Nagar, Swarnapuri 2nd Gate,
Salem.

3 The District Revenue Officer,
Collectorate,
Salem.

4 The Project Director,
NHAI - NH - 68,
Sri Nagar Colony,
Narasothipatty,
Opp. to ANS Dhivyam Jewellary,
Salem.

5 The Special Tahsildar (Land Acquisition),
National Highway No.68,
Salem Unit,
Salem District. ... Respondents

Civil Revision petition is filed under Section 115 of the Civil Procedure Code against the orders, dated 21.4.2017 passed in unnumbered I.A. in unnumbered A.O.P. in S.R.No.11404 on the file of the Principal District Judge, Salem.

For Appellant : Mr.S.Sairam

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JUDGMENT

The brief facts of the case as follows:

According to the petitioner, petitioner's lands in survey No.24/1B1 in Chinnagoundapuram village and survey No.130/2B2 in Ayothiapattinam Village were acquired by the National Highways Department for the purpose of laying National Highways road at Chinnagoundapuram Village and Ayothiapattinam Village, Vazhappadi Taluk, Salem District. The petitioner was summoned by the first respondent for enquiry on 1.9.2014 and he appeared before him and made statement on that day. An award was passed on 8.11.2014. The petitioner has filed Review on 12.1.2016 and the same was dismissed stating that final award was passed in Arb.No.316/RB, dated 30.1.2016. According to the petitioner, said order copy was received on 3.2.2016. The last date for filing A.O.P. expires on 2.6.2016 as per the Arbitration and Conciliation Act. Due to the reasons stated in the affidavit, the petitioner has filed an application under Section 5 of the Limitation Act to condone the delay of 175 days in preferring the O.P. The Court below without appreciating the fact, erroneously dismissed the application. Thus, the petitioner has filed the present Civil Revision petition before this Court.

2 The learned counsel for the petitioner would submit that the petitioner has challenged the land acquisition notification before this Court in W.P.15846 of 2012 and after dismissal of the writ petition, the petitioner has preferred Writ Appeal in W.A.SR No.4429 of 2016. Therefore, Section 14 of the Limitation Act would apply to the present case. In support of his submission, petitioner has relied upon the decision of the Hon'ble Supreme Court reported in **Gulbarga University vs. Mallikarjun S.Kodagali and another (2008(4) CTC 531)** wherein the Hon'ble Supreme Court held as under:

> *"6. There cannot be any doubt whatsoever that in terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. Sub-section (3) of Section 34 provides for the period of limitation within which an application under Section 34 of the Act is to be filed. The proviso appended thereto empowers the court to entertain an application despite expiry of the period of limitation specified therein, namely, three months. No provision, however, exists as regards application of Section 14 of the Limitation Act. This Court, as noticed hereinbefore in Western Builders opined that sub-*

section (2) of Section 29 thereof would apply to an arbitration proceedings and consequently Section 14 of the Limitation Act would also be applicable. We are bound by the said decision. Once it is held that the provisions of Section 14 of the Limitation Act, 1963 would apply, it must be held that the learned Trial Judge as also the High Court has committed an error in not applying the said provisions.

7. The question, however, as to whether the period spent by the appellant in prosecuting the aforementioned proceedings should be excluded or not is a matter which must fall for decision before the Principal Civil Court. The necessary corollary of the aforementioned finding is that as to whether the appellant had been prosecuting, with due diligence another proceeding or not would fall for consideration before the Principal Civil Court.

8. The impugned judgment of the High Court, therefore, cannot be sustained. It is set aside accordingly. The matter is remitted to the Principal Civil Court for consideration of the matter afresh in the light of observations made hereinbefore. The appeal is allowed accordingly. However, in the facts and circumstances of this case, there shall be no order as to costs."

3 In the above said case, award copy was not supplied to the respondent and the respondent filed writ petition before the High Court of Karnataka. Pursuant to the direction given by the Karnataka High Court, copy of the award was furnished to the respondent. Therefore, treating the said award to be one made under the Act as also on the premise that no objection thereto was filed by the appellants therein under Section 47 of C.P.C. the said objection was dismissed. A Revision Application was filed against the Judgment, dated 30.11.2001, it was held by the Karnataka High Court that the said clause does not constitute an arbitration agreement. Therefore, the said contention of the appellants therein was not accepted by the Karnataka High Court. Therefore, the Hon'ble Supreme Court has considered the issue and held that Section 14 of the Limitation Act is applicable to the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996.

4 The petitioner filed O.P. with condone delay petition stating that due to abstaining Court by advocates for two months, the petitioner could not file O.P. within the prescribed time under the Arbitration and Conciliation Act. The petitioner has not disclosed the correct facts before the Court below in the instant application. A perusal of the letter, dated 30.1.2016 would show that the petitioner was summoned by the first respondent to appear before him on 1.9.2014 for enquiry. After the enquiry, final award was passed on 8.11.2014.

Thereafter, petitioner filed review petition on 12.1.2016. It is seen from the records that the said application has been filed after 13 months. The said application was dismissed by the first respondent stating that final award has been passed and it is open to the petitioner to approach before the Civil Court. Thereafter, petitioner has filed the instant application to condone the delay. The Court below has returned the said application stating that the same was not maintainable under Arbitration and Conciliation Act. Counsel for the petitioner re-presented the said application citing the decision of the Hon'ble Supreme Court reported in **Gulbarga University vs. Mallikarjun S.Kodagali and another (supra)** and submitted that the said application is maintainable. Further, it has been argued that the petitioner filed writ appeal pursuant to the dismissal of W.P.15846 of 2012 filed by him challenging the land acquisition notification and the same is pending before this Court. Therefore, according to the petitioner, Section 14 of the Limitation Act would apply to the facts of the present case.

5. It is seen from the records that the petitioner has challenged the land acquisition proceedings before the High Court in W.P.15846 of 2012 and after dismissal of the writ petition, the petitioner filed writ appeal in W.A.SR.No.4429 of 2016 and the same is pending before this court. The said fact has not been disclosed in the affidavit and the same was orally explained by the counsel at the time of re-presenting the

application. Further, the petitioner has appeared for enquiry and thereafter only an award was passed. The contention of the petitioner that the petitioner has approached wrong forum cannot be accepted on the facts and circumstances of the present case. Therefore, the decision relied upon by the petitioner is not applicable to the facts of the present case.

6. In the **Superintending Engineer vs. Er.Sundharam in C.R.P.(PD)(MD)No.138 of 2010 dated 17.3.2010** this Court held as under:

> *"13.In this case, as stated supra, under Section 34(3) of the Arbitration & Conciliation Act, it has been specifically stated that the Court can entertain the application beyond the period of 90 days, if the applicant is able to satisfy the Court that he was prevented from sufficient cause from making application within the said period of 3 months and in that case, the Court can entertain the application within a further period of 30 days, but not thereafter. Therefore, the Act contains a prohibition that the Court cannot entertain the application beyond the period 90 days from the date of the award and if the applicant satisfies the Court that he was prevented by sufficient cause, the Court can entertain the application after the expiry of 90 days, if the same is filed within 30 days and not thereafter. Therefore, the provisions of Limitation Act, has been expressly excluded by*

the Arbitration and Conciliation Act and hence, Section 5 of the Limitation Act cannot be made applicable."

7 14. In a recent Judgment, the Supreme Court of India, in **Union of India v. M/s.Popular Construction Co. reported in 2001 (4) CTC 213**, considered Section 34 of Arbitration and Conciliation Act, 1996 and ruled that when the statue positively prescribes 90 days as time limit for the purpose of filing an application under Arbitration Act, that provision is to condone the delay for a further period of 30 days only and Section 5 of the Limitation Act does not apply in view of express exclusion and scheme of the Act and delay beyond a period of 30 days after expiry of the original period of limitation cannot be condoned. It will be useful to quote in verbatim, the exact wordings employed by the Supreme Court, which reads as follows:

" As far the language of Section 34 of 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. "

8. *In* ***Singh Enterprises v. Commissioner of Central Excise, Jamshedpur reported in 2008 (221)*** **E.L.T. 163 (SC),** the Hon'ble Apex Court considered a case, where the Commissioner dismissed the appeal on the grounds that it was time barred and beyond the period of 30 days from the expiry of period of 60 days, prescribed for filing the statutory appeal. The High Court dismissed the writ petition. Before the Supreme Court, arguments were advanced that even though the Commissioner has no power to condone the delay, yet in exercise of the powers, under Article 226 of the Constitution of India, the High Court can condone the delay and such power is untrammeled by any statutory provision. Rejecting the above contention, at Paragraph 8, the Apex Court held as follows:

8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the Limitation Act) can be availed for condonation of delay. The first proviso to

Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period."

9 Following the decisions cited supra, the Division Bench of

this Court in which I was a member, in ***R.Gowrishankar vs. The Commissioner of Service Tax (Appeals)-I, and another (W.A.No.589 of 2016, dated 13.6.2016)*** held as under:

> *"As pointed out earlier, the language used in Section 35, 35B, 35EE, 35G and 35H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to*

avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.

*36. It is now well settled by the Hon'ble Supreme Court in **Singh Enterprises v. CCE, Jamshedpur** reported in **2008 (221) ELT 163 (SC)**, **Commissioner of Customs & Central Excise v. Hongo India (P) Ltd.**, reported in **2009 (236) ELT 417 (SC)**, **Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission** reported in **2010 (5) SCC 23**, Section 5 of the Limitation Act cannot be applied, beyond the condonable period. 37. Section 85 of the Finance Act, is similar to Section 128 of the Customs Act, 1962; Section 34(3) of the Arbitration and Conciliation Act, 1996; Section 125 of the Electricity Act, 2003; Section 35-G of the Central Excise Act, 1944 and the statutes referred to above, are self contained Acts and codes by themselves. The High Court or the Supreme Court, as the case may be, cannot direct the appellate authority to condone the delay, beyond the extended period of limitation. Courts have also interpreted that when the legislative intent is reflected in the provisions of the special laws, excluding the provisions of Limitation Act, then the authorities under the statute, cannot exercise powers to* *condone the delay. On the aspect of the Court, exercising powers under Article 226 of the Constitution of India, to condone the delay, we are of the view that the decision of this Court in Indian Coffee Worker's Co-operative Society Ltd.,'s case, squarely applies to the case on hand, wherein, a Hon'ble Division Bench held as follows: (c) While the High Court exercising the jurisdiction under Article 226 of Constitution of India, approves the correctness of the order of the appellate authority, it has no power to direct the appellate authority to consider the appeal on merits as otherwise it would be nothing but Court extending the period of limitation.*

(d) Even if the High Court accepts the explanation given by the assessee for not filing the appeal within the period prescribed under the Act, it cannot direct the appellate authority to consider the matter on merits as the High Court exercising jurisdiction under Article 226 of Constitution of India, cannot re-write the provisions of the Act.

38. In the light of the above discussion and decisions, we are not inclined to interfere with the order of the Writ Court. Hence, Writ Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed."

10. In the light of the above, the Court has no power to entertain the application to condone the delay beyond the prescribed period to decide the OP on merits by exercising jurisdiction under Article 227 of Constitution of India. Therefore, there is no error or illegality in the order passed by the Court below. In view of the above facts and the decisions cited supra, the Civil Revision petition is dismissed. No order as to costs.

09.8.2017

Speaking/Non Speaking Order
Index : Yes
Internet : Yes
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To
The Principal District Judge, Salem.

D.KRISHNAKUMAR, J.

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