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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 16.05.2017

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Pronounced on: May 30, 2017

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FAO (OS) COMM 22/2017

NATIONAL HIGHWAYS AUTHORITY
OF INDIA

..... Appellant

Through: Ms. Gunjan Sinha Jain, Advocate

Versus

HINDUSTAN STEEL WORKS CONSTRUCTION
LTD. + SIPL

..... Respondent

Through: Mr. P.S. Patwalia, ASG with Mr. G.
Umapathy, Mr. Deo D. Rozanio and
Mr. Aditya Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

1. The present appeal is directed against the order dated 19th October, 2016 passed by the learned single Judge in OMP (Comm.) No. 94/2016, whilst dismissing the appellant's application being IA No. 4908/2016 seeking condonation of delay in filing the said petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') by invoking the provisions of Section 14 of the Limitation Act, 1963.
2. A brief outlay of the facts necessary for the purpose of adjudication of the present appeal are given below.

3. A contract agreement was executed between the parties, *inter alia*, for construction of a four-lane Highway from KM 94.000 to KM 123.00 of Nagpur- Hyderabad Section of NH-7 in the State of Maharashtra. Certain disputes arose between the parties and the respondent herein approached the High Court of Kolkata by filing a petition under Section 9 of the Act being T. No. 10/2009. The said petition was opposed by the appellant herein *inter alia*, on the ground of lack of jurisdiction. The High Court of Kolkata vide its order dated 10th August, 2010 passed in AP No. 118/2009 held that it has no jurisdiction and dismissed the above said application filed by the respondent.

4. Thereafter, the respondent preferred an application under Section 9 of the Act before this Court being OMP No. 530/2010. The learned single Judge of this Court, vide order dated 15th September, 2010, appointed an arbitrator to adjudicate upon the disputes arose between the parties and the said petition was disposed of. Finally, an award dated 24th February, 2015 was passed by the learned sole arbitrator. It is pertinent to note here that the Award was passed at Delhi.

5. The appellant claimed that they received a copy of the Award only on 27th February, 2015 and only thereafter, they proceeded to challenge the same before the District Court of Yavatmal, Maharashtra by way of filing a petition under Section 34 of the Act, being Misc. Civil Application 56/2015, on 8th June, 2015.

6. The appellant relies upon Sub-Clause 67.3 of the contract agreement for invoking the jurisdiction of the District Judge, Yavatmal, Maharashtra. The said clause is reproduced as under:-

“Sub-Clause 67.3: Arbitration

(vi) Arbitration proceedings shall be held at Delhi or at the place near to the project site. The language of the arbitration proceedings and that of all the documents and communications arising between the parties shall be English.”

7. The respondent challenged the jurisdiction of Yavatmal District Court by placing reliance on Section 42 of the Act.

8. The respondent further filed a transfer petition before the Supreme Court being TP (Civil) No. 521/2015, again relying on Section 42 of the Act. The Supreme Court, by an order dated 9th October, 2015, issued notice on the transfer petition.

9. Whilst the above said transfer petition was pending adjudication before the Supreme Court, the Principal District Judge, Yavatmal, Maharashtra, by an order dated 11th March, 2016 passed in MJC No. 56/2015, held that the Yavatmal Court had no jurisdiction to entertain the application filed by the appellant and returned the same back to it for presenting the same in proper Court, keeping open the point of limitation.

10. Thereafter, the appellant filed OMP (Comm.) No. 94/2016 before this Court along with IA No. 4908/2016 seeking condonation of delay in filing the petition under Section 34 of the Act while invoking the provisions of Section 14 of the Limitation Act seeking exclusion of time spent before the Court of District Judge at Yavatmal, Maharashtra.

11. The said application was dismissed by the learned single Judge vide impugned order dated 19th October, 2016. The relevant portion of the impugned order is reproduced hereinbelow:-

“11. The Court is unable to agree with the submissions of

Mr. Tripathi and is of the view that the present application requires to be dismissed for the following reasons:

i. NHAI was conscious, in the present case, that it is the Delhi High Court, which has jurisdiction to entertain the petition arising under the Act as a result of the arbitration clause between the parties. It is for this reason the NHAI opposed jurisdiction of the Calcutta High Court to entertain the Respondent's application under Section 9 of the Act. Orders dismissing that petition were passed by the Calcutta High Court in the presence of NHAI permitting the Respondent to approach the court of appropriate jurisdiction, which was this Court.

ii. Pursuant to the order dated 10th August, 2010 of the Calcutta High Court, the Respondent filed the Section 9 petition in this Court. In the presence of NHAI orders were passed in the said petition as well as in the subsequent petition under Section 11 of the Act filed by the Respondent.

iii. The mere fact that the PIU was in Nagpur does not appear to be a convincing reason why the NHAI would have gone before the District Court at Yavatmal for filing the Section 34 petition. What requires to be noticed at this stage is that NHAI files numerous petitions on a constant basis in this Court under Section 34 of the Act challenging the Awards passed by various ATs in the disputes involving NHAI. This is irrespective of the place in India where the project is implemented. It is indeed difficult to accept the plea of NHAI that given its track record of approaching this Court time and again with petitions under Section 34 of the Act.

iv. It cannot be a mere co-incidence that on the date i.e., 29th June, 2015 the limitation for filing the petition under Section 34(3) of the Act, even according to the date of receipt of the Award, as claimed by NHAI expired. Clearly NHAI was not ready with the petition on that date. It cannot

also be a co-incidence that summer vacations of the Yavatmal District Court was still continuing as of that date and went on till 7th June, 2015. There is merit in the contention of the Respondent that in the above circumstances, NHAI could not be said to have acted bona fide in approaching the District Court at Yavatmal under Section 34 of the Act.

v. The contention of Mr. Tripathi that the Petitioner could have well filed the petition on 10th July, 2016 in this court instead of Yavatmal District Court along with an application for condonation of delay cannot be accepted for the simple reason that this question is purely hypothetical. The fact remains that NHAI did not file the petition in this Court on 10th July 2016 or prior thereto along with an application for condonation of delay. The explanation offered for not so doing, which in any event are not convincing, has been rejected for the reasons already noted.

vi. The reliance placed by NHAI on the decision in Coal India Limited(supra) is to no avail for the simple reason in the said decision there is no reference made at all to Section 42 of the Act, which reads as under:—

“42. Jurisdiction.—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.”

12. The statutory mandate, therefore, is that once the parties have approached a certain court for relief under the Act at the earlier stages of the disputes then it is the same court that the parties must return to for all other subsequent proceedings. The intention was to avoid multifarious litigations in different courts and to avoid the possibility of

inconsistent orders passed by different courts. The language of Section 42 of the Act is categorical and brooks no exception. In fact, the language used has the effect of jurisdiction of all courts since it states that once an application has been made in Part I of the Act then —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.” In view of the categorical mandate of Section 42 of the Act, which was not noticed in Coal India Limited (supra), the Court declines to accept the plea of Mr. Tripathi that notwithstanding Section 42 of the Act the Court should consider for the purposes of Section 14 of the Limitation Act, 1963 filing of the petition under Section 34 of the Act by NHAI in the District Court at Yavatmal to be bona fide.”

12. Learned counsel for the appellant contends that as the contract itself gave liberty to the parties to approach the Court either at Delhi or at the place near the project site, the appellant had filed the petition under Section 34 of the Act at Yavatmal *bona fide*, believing that it had jurisdiction to entertain the same.

13. It was further contended that the officer of the appellant may not have been aware of the earlier proceedings before this Court and/or the mandate of Section 42 of the Act and therefore, may have proceeded to file the said application before the District Judge, Yavatmat, Maharashtra, in such ignorance.

14. Reliance has been placed on the judgment of the Apex Court in ***Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and Ors.*** reported at (2008) 7 SCC 169, wherein the Hon’ble Supreme Court held that Section 14 of the Limitation Act would be

applicable even to the petition filed under Section 34 of the Act.

15. We have considered the submissions made by learned counsel for the appellant and not persuaded by the same.

16. It is pertinent to mention that not only the learned sole Arbitrator had been appointed by this Court on an application filed by the respondent, but also the Award had been passed at Delhi. The mandate of Section 42 of the Act is clear in this regard. It creates an exclusive jurisdiction in the Court where an earlier application under Part-I of the Act has been made.

17. In the light of clear mandate of Section 42 of the Act, it cannot be stated that the appellant acted with due diligence when it filed its application under Section 34 of the Act before the Yavatmal District Court, Maharashtra.

18. Section 14 of the Limitation Act, 1963 is reproduced hereinbelow:-

“14 Exclusion of time of proceeding bona fide in court without jurisdiction. —

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and 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.

(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.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.”

19. While application of Section 14 of the Limitation Act to the application under Section 34 of the Act cannot be disputed, each case has to be decided on its own factual matrix.

20. The Supreme Court in the case of ***Consolidated Engineering Enterprises (supra)*** in paragraph 21 of the report, held as under:-

“21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide 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 proceedings 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.”*

21. Though it is true that the provisions of Section 14 of the Limitation Act have to be interpreted liberally so as to advance the cause of justice rather than to abort the proceedings, what is necessary is the absence of

negligence or inaction as held by the Supreme Court in *M.P. Steel Corporation vs. Commissioner of Central Excise* reported at (2015) 7 SCC 58.

22. In the present case, as stated above, by the filing of the petition under Section 34 of the Act before the Yavatmal District Court, Maharashtra, the appellant cannot be said to be “prosecuting with due diligence” the said application.

23. The learned single Judge, in the impugned order, has also found merit in the contention of the respondent that the appellant could not be stated to have acted *bona fide* in approaching the District Court at Yavatmal, Maharashtra. We find no reason to disagree with the said finding of the learned single Judge.

24. We, therefore, hold that the appellant has not made out any case for exclusion of the time spent in prosecuting the proceedings before the Yavatmal District Court, Maharashtra.

25. In the light of the above, the present appeal is dismissed with no costs.

NAVIN CHAWLA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

MAY 30, 2017
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