

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

% Judgment Reserved on: 07.02.2017
Judgment delivered on: 09.03.2017

+ FAO(OS) 263/2016

**JAMMU & KASHMIR STATE POWER
DEVELOPMENT CORPORATION**

..... Appellant

versus

K J M C GLOBAL MARKET (INDIA) LIMITED..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Shashank Garg with Mr Zaid Ali.
For the Respondent : Mr Bishwajit Bhattacharya, Sr.Adv. with Mr
Chandrachur Bhattacharya.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

FAO(OS) 263/2016 & CM 3942/2017

1. The appeal namely FAO(OS) No.263/2016 has been filed under Section 37 of the Arbitration and Conciliation Act, 1996, challenging the judgment dated 09.05.2016 passed by a learned single Judge of this court in OMP No. 1159/2012 whereby the arbitral award dated 03.07.2012 passed by the learned sole arbitrator was upheld. Along with the said appeal, an application for condonation of delay of 35 days (CM No.33535/2016) for re-filing the appeal was filed. When the matter came up for consideration on 16.09.2016, it was pointed out by the counsel

appearing for the respondent that the date of filing of the appeal itself under Section 34 of the Act was wrongly stated and in fact even the filing of the appeal was delayed by several days. Thus on 16.09.2016, the appellant was directed to file an additional affidavit explaining the circumstances for delay in filing/re-filing of the appeal.

2. The CM No.33535/2016 was consequently withdrawn in order to enable the appellant/petitioner to file a fresh and proper application giving plausible reasons for delay in filing the appeal.

3. The appellant, thereafter filed an affidavit on 23.09.2016, reiterating the same cause of delay in re-filing i.e. continuing unrest in the state of Jammu & Kashmir which prevented the appellant/petitioner from getting the defects rectified within the prescribed period. In the aforesaid affidavit the date of filing the appeal was stated to be 08.07.2016 and the delay in re-filing the appeal was calculated at 30 days. Because of the dispute raised by the counsel for the respondent with regard to the date of filing of the appeal, a report was called for from the Registry, detailing the complete case history of the appeal from the date of the first filing, which report was filed in the Court on 19.01.2017.

4. The report of the Registry reveals that the appeal had been filed on 08.07.2016 vide diary No. 169376/2016 but because the appeal was incorrectly classified as FAO [in place of FAO(OS)], the paper book was returned on 15.07.2017 with the aforesaid objections:-

"1. Rest of the objections will be raised later on (after modification)/according to correct classification/nomenclature of the case.

2. Petition/application/Appeal be properly filed for scrutiny"

5. The report further states that the appeal was never re-filed and another appeal was filed on 02.09.2016 with the correct nomenclature vide fresh diary No.195318/2016. On this occasion also, the paper book was returned under certain objections on 07.09.2016. The appeal was filed after remedying all objections on 09.09.2016. In the opinion of the Registry, the appeal filed on 02.09.2016 i.e the later filing was a separate and distinct appeal and was not in continuation of the earlier filing dated 08.07.2016. Because of this reason, the date of filing of the appeal, for the purposes of limitation, was taken as 02.09.2016 and not 08.07.2016. If the date had to be taken as 02.09.2016, there would be a delay of 86 days in filing the appeal.

6. After the aforesaid report, the appellant/petitioner sought and was granted another opportunity to file an application seeking condonation of delay when the present application namely CM No.3942/2017 was filed. The submission of the counsel for the appellant/petitioner is that the appellant proceeded on a bonafide presumption that the appeal had been filed on 08.07.2016 with a specific diary number and on re-filing of the appeal, a separate diary number was given. What the appellant/petitioner meant was that there was a bonafide belief that the defect regarding classification of the appeal which was raised on 15.07.2016 stood cured when a fresh diary number was given on re-filing. The application also ascribes misconception as regards the date of filing.

7. The learned counsel for the respondent, on the other hand, has seriously opposed the condonation of delay and has submitted that three different affidavits have been filed seeking condonation of different periods of delay in re-filing and lastly of filing the appeal. He argues that this is clearly reflective of malafide intentions and the appellant/petitioner has not come with clean facts entitling him for any concession. He has also submitted that the appellant/petitioner obtained the certified copy of the impugned order on 03.11.2016 i.e. after the lapse of 178 days and that also when it was pointed out, during the course of hearing, that an application for obtaining a certified copy had not yet been moved.

8. We have heard the counsel for the parties.

9. We do not feel inclined to agree with the submission of the appellant/petitioner that there was a bonafide presumption regarding fresh diary number being the proof of acceptance of the re-filing after the defect was first pointed out on 15.07.2016. In terms of Rule 5(1) Chapter-I A(a) Volume 5 of the Delhi High Court Rules & Orders, the time period for curing the defect is of 30 days. Since the wrong classification of the appeal was pointed out on 15.07.2016, the defect could have been remedied only by 14.08.2016. The appeal was next filed on 02.09.2016 which is beyond the period for re-filing. According to Rule 4, Chapter -I A(a), Volume 5 of the Delhi High Court Rules & Orders, if the Memorandum of Appeal is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, incharge of the filing counter, the same is considered to be a fresh institution.

10. The appeal filed on 02.09.2016 vide diary No.195318/2016 therefore is a fresh filing and limitation has to be computed with reference to that date.

11. The submission of the counsel on behalf of the appellant/petitioner that because of unrest in Jammu & Kashmir, the defect could not be remedied in time, does not appear to be tenable. In the affidavit dated 23.09.2016, the representative of the appellant has stated that requisite affidavits had been attested by the competent authority on 26.07.2016 which was forwarded to the lawyer of the petitioner on the same date through speed post which was delivered after 8 days in transit. Even if we overlook that there were no delivery reports to substantiate the aforesaid ground, no reason appears to have been given to justify the filing of appeal on 02.09.2016 when the same was admittedly received on 03.08.2016.

12. The affidavit as well as the application for condonation filed on behalf of the appellant clearly shows a lax approach on part of the appellants which in fact militates against the bonafides of the petitioner entitling it for condonation of delay. Even the appeal filed on 08.07.2016 was filed belatedly when no agitation was ongoing. If the appellant was serious in proceeding with the matter, the appeal should have been filed on the date of reopening of the Court. However, the same was not done and no sufficient reasons also have been provided for the same. It is important to reproduce certain averments in the affidavit dated 23.09.2016:-

“3. That the copy of single Judge Bench judgment dated 09.05.2016 announced at New Delhi by the Hon’ble Delhi High Court in the matter of JKSPDC vs. KJMC Global (India) Ltd was received in the Corporate Office (JKSPDC) Srinagar (J&K) through mail on 26.05.2016.

4. That the judgment/order of single Bench dated 09.05.2016 was examined in the Corporate Office (JKSPDC) and was deliberate upon in a meeting held on 27th and 28th of May, 2016 in the Corporate Office Srinagar, where it was decided to go for 2nd appeal against the said judgment/order.

5. That the law firm representing the JKSPDC was accordingly requested to obtain certified copy of judgment from the Hon’ble Delhi High Court and prepare memo of appeal for perusal/approval of the competent authority of JKSPDC at Srinagar (J&K).

6. That the memo of appeal was received from the law firm on 30th June, 2016 and on the same day the memo of appeal was put on record and processed for perusal, amendment if any, and final approval of the competent authority in JKSPDC.”

13. Despite the aforementioned, the counsel for the appellant did not apply for the certified copy of the impugned order till it was mentioned in the course of hearing in the present appeal. This suggests blatant disregard for the procedure of the Court. Additionally, it is apparent that the appellant was not pursuing the matter diligently with its counsel, since the first draft of the appeal was prepared only on 30.06.2016, when the limitation itself expired on 08.06.2016.

14. It is now well settled that the provisions of the Limitation Act, 1963 apply to all proceedings under the Arbitration and Conciliation Act,

1996, including both in court and arbitration proceedings except to the extent expressly excluded by the provisions of the Arbitration Act, 1996. This issue fell for consideration before the Supreme Court in **Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department**, (2008) 7 SCC 169. Justice R.V. Raveendran, in a concurring judgment, observed that Section 37 does not prescribe any period of limitation for filing appeals. With regard to the question whether the Limitation Act, 1963 applies to a proceeding in court under the Arbitration Act, 1996, it was observed as follows:

"42. The AC Act is no doubt, a special law, consolidating and amending the law relating to arbitration and matters connected therewith or incidental thereto. The AC Act does not prescribe the period of limitation, for various proceedings under that Act, except where it intends to prescribe a period different from what is prescribed in the Limitation Act. On the other hand, Section 43 makes the provisions of the Limitation Act, 1963 applicable to proceedings—both in court and in arbitration—under the AC Act. There is also no express exclusion of application of any provision of the Limitation Act to proceedings under the AC Act, but there are some specific departures from the general provisions of the Limitation Act, as for example, the proviso to Section 34(3) and sub-sections (2) to (4) of Section 43 of the AC Act.

43. Where the Schedule to the Limitation Act prescribes a period of limitation for appeals or applications to any court, and the special or local law provides for filing of appeals and applications to the court, but does not prescribe any period of limitation in regard to such appeals or applications, the period of limitation prescribed in the Schedule to the Limitation Act will apply to such appeals or applications and consequently, the provisions of Sections 4 to 24 will also apply. Where the special or local law prescribes for any appeal or application, a

period of limitation different from the period prescribed by the Schedule to the Limitation Act, then the provisions of Section 29(2) will be attracted. In that event, the provisions of Section 3 of the Limitation Act will apply, as if the period of limitation prescribed under the special law was the period prescribed by the Schedule to the Limitation Act, and for the purpose of determining any period of limitation prescribed for the appeal or application by the special law, the provisions contained in Sections 4 to 24 will apply to the extent to which they are not expressly excluded by such special law. The object of Section 29(2) is to ensure that the principles contained in Sections 4 to 24 of the Limitation Act apply to suits, appeals and applications filed in a court under special or local laws also, even if it prescribes a period of limitation different from what is prescribed in the Limitation Act, except to the extent of express exclusion of the application of any or all of those provisions."

15. In view of the aforementioned, the limitation period for appeals under section 37 of the Act shall be computed in terms of article 117 of the Limitation Act, 1963, which provides that when a decree or order is of the High Court and an appeal is to be filed in the same court, the period of limitation is of 30 days from the date of the decree or order.

16. The present appeal was filed on 02.09.2016 and therefore there is delay of 86 days. No sufficient cause for such delay is forthcoming.

17. In view of the same we are not inclined to condone to the delay in filing the present appeal.

18. For the aforesaid reasons the application is rejected.

19. In view of the same the appeal is dismissed being barred by limitation.

CM 33533/2016

1. This is an application seeking ad-interim ex parte stay of impugned judgment and order dated 09.05.2016.
2. In view of the appeal having been dismissed, the application has become infructuous.
3. The application is disposed of accordingly.

CM 46684/2016

1. This is an application under Section 151 CPC for outright dismissal of the FAO for filing false affidavit and supporting documents.
2. Since the application seeking condonation of delay has been dismissed and the FAO consequently has also been dismissed, there does not appear to be any reason for adjudicating this application.
3. Dismissed.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

MARCH 09, 2017

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