

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

+ **FAO No. 399/2017**

% **16th October, 2017**

SHAYAM SUNDER Appellant

Through: Mr. Manohar Lal, Advocate.

versus

KOTAK SECURITIES LTD. Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 37308/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

FAO No. 399/2017

1. This first appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugns the judgment of the court below dated 18.7.2017 which has dismissed the objections filed by the appellant under Section 34 of the Act. Objections have been dismissed not only on the ground that they were time barred but also on merits.

2. In my opinion, once the objections are filed beyond limitation, then the Court cannot go into the merits of the matter and objections which are time barred have to be dismissed in view of the judgment of the Supreme Court in the case of *Union of India Vs. M/s Popular Construction Company, (2001) 8 SCC 470*.

3. In the present case, the admitted facts are that the arbitration Award dated 7.4.2010 was received by the appellant/objector on 4.5.2010 and the objections under Section 34 of the Act have been filed on 8.8.2013, i.e after more than three years. It is argued on behalf of the appellant that there is no delay in filing of the objections because the appellant had filed an application under Section 33 of the Act, and once an application under Section 33 of the Act remained pending, then for the period for which application under Section 33 of the Act remained pending, this period had to be extended for computing the period of limitation for filing objections being 90 days plus 30 days. Reliance is also placed upon the judgment passed by a Learned Single Judge of this Court in the same case between the parties on 14.8.2015 in FAO No. 76/2015 and in which judgment the Learned Single Judge of this Court held that the court below could not have dismissed the subject objections filed by

the appellant under Section 34 of the Act as the application under Section 33 of the Act was still pending when the objections of the appellant were dismissed. The relevant paras of the judgment dated 14.8.2015 reads as under:-

“9. It is clear thus, that pursuant to passing of the award (a copy of which was received within 10 days), the appellant filed an application under Section 33 of the 1996 Act. This application had not been adjudicated by the learned Arbitrator, at least, not by the time the impugned judgment was passed by the learned Additional District Judge. If that be so, quite logically, the limitation against the appellant would start running only after the application under Section 33 of the 1996 Act, is disposed of.

10. Mr. David, however, contends that the application filed is beyond the scope of the provisions contained in Section 33 of the 1996 Act.

11. In my view, this submission is completely misconceived. It is for the arbitrator to decide one way or the other as to whether the application filed under Section 33 of the 1996 Act is tenable or not. This is not a decision, which either trial court or this Court can make, at this stage.

11.1 The issue which presently arises for consideration, concerns only limitation, i.e. as to whether or not the petition filed by the appellant under Section 34 of the 1996 Act was within limitation. For this purpose, the provisions of Section 34(3) of the Act are referred to. The relevant portion of Section 34 reads as follows:-

“34. Application for setting aside arbitral award –

1. -----

2. -----

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of 30 days, but not thereafter.

4. -----

(emphasis is mine)

12. A bare perusal of sub-section 3 of Section 34 shows that if a request is made under Section 33, then the limitation for filing a petition under Section 34 of the 1996 Act will commence only upon such a request being disposed of by arbitral tribunal. In this case, on the date when the judgment was pronounced by the trial court, the request under Section 33 was pending before the arbitral tribunal. Accordingly, in my

view, the appellant's petition under Section 34 of the 1996 Act could not have been rejected on the ground of limitation.

12.1. In that view of the matter, the impugned judgment is set aside. The petition filed by the appellant before the learned arbitrator is restored to its original position. The trial court will re-examine the petition under Section 34 of the 1996 Act, on merits.

12.2 If in the meanwhile, the learned arbitrator has disposed of the application under Section 33 of the 1996 Act that order will be placed before the trial court. In case, the learned Arbitrator has not adjusted upon the application under Section 33 of the 1996 Act, then the learned arbitrator shall dispose of the same though, no later than two (2) weeks from receipt of this order. In such eventuality, parties will ensure service of the order passed today on the learned arbitrator.

12.3 Any order passed by the arbitrator, thereafter, will be placed before the trial court.

12.4 If the appellant is desirous of amending his petition on account of disposal of his application under Section 33 of the 1996 Act by the learned Arbitrator, due opportunity in that regard would be given to the appellant.

12.5 It is made clear that the appellant will do the needful expeditiously so that the petition can be disposed of on merits.

13. The appeal is disposed of, in the aforesaid terms."

4. In my opinion, appellant can place no reliance and take any benefit of the judgment dated 14.8.2015 because that judgment only holds that during the pendency of the application under Section 33 of the Act, the limitation period of filing of objection to the Award does not commence, and it is not decided however by the said judgment that if the application which is though titled as under Section 33 of the Act is not really under Section 33 of the Act for correction of an administrative error etc, but is for review of a judgment, then pendency of such application will extend limitation or the limitation commences only on disposal of the application under Section 33 of the Act. It has been held by the Supreme Court in the judgment in the case of *State of Arunachal*

Pradesh Vs. Damani Construction Company, (2007) 10 SCC 742 that even if an application is titled as under Section 33 of the Act but the same is beyond the scope of Section 33 of the Act, and is in fact a review application, then the period spent of pendency of the application under Section 33 of the Act will not be excluded for determining the limitation period for filing of objections under Section 34 of the Act. The relevant paras of the judgment are paras 8 and 9 and these paras read as under:-

“8. Firstly, the letter had been designed not strictly under Section 33 of the Act because under Section 33 of the Act a party can seek certain correction in computation of errors, or clerical or typographical errors or any other errors of a similar nature occurring in the award with notice to the other party or if agreed between the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the award. This application which was moved by the appellant does not come within any of the criteria falling under Section 33(1) of the Act. It was designed as if the appellant was seeking review of the award. Since the Tribunal had no power of review on merit, therefore, the application moved by the appellant was wholly misconceived. Secondly, it was prayed whether the payment was to be made directly to the respondent or through the Court or that the respondent might be asked to furnish Bank guarantee from a nationalized Bank as it was an interim award, till final verdict was awaited. Both these prayers in this case were not within the scope of Section 33. Neither review was maintainable nor the prayer which had been made in the application had anything to do with Section 33 of the Act. The prayer was with regard to the mode of payment. When this application does not come within the purview of Section 33 of the Act, the application was totally misconceived and accordingly the arbitrator by communication dated 10.4.2004 replied to the following effect:

“However, for your benefit I may mention here that as per the scheme of the Act of 1996, the issues/ claims that have been adjudicated by the interim award dated 12.10.2003 are final and the same issues cannot be gone into once again at the time of passing the final award.”

9. Therefore, the reply given by the arbitrator does not give any fresh cause of action to the appellant so as to move an application under Section 34(3) of the Act. In fact, when the award dated 12.10.2003 was passed the only option with the appellant was either to have moved an application under Section 34 within three months as required under Sub-section (3) of Section 34 or within the extended period of another 30 days. But instead of

that a totally misconceived application was filed and there too the prayer was for review and with regard to mode of payment. The question of review was totally misconceived as there is no such provision in the Act for review of the award by the arbitrator and the clarification sought for as to the mode of payment is not contemplated under Section 33 of the Act. Therefore, in this background, the application was totally misconceived and the reply sent by the arbitrator does not entitle the appellant a fresh cause of action so as to file an application under Section 34(3) of the Act, taking it as the starting point of limitation from the date of reply given by the arbitrator i.e. 10.4.2004.” (underlining added)

5. In the present case the court below in the impugned order dated 18.7.2014 notes that the Arbitrator has dismissed the application filed under Section 33 of the Act on the ground that it was not maintainable under Section 33 of the Act because the same was in fact for seeking review of the Award on merits of the case, and this was not permissible as the Arbitrator has no powers of review.

6. Accordingly, in view of the ratio of the judgment of the Supreme Court in the case of *Damani Construction Company (supra)*, and since the application under Section 33 of the Act filed by the appellant was dismissed as being not maintainable as it was in the nature of a review application, hence, the objections filed by the appellant under Section 34 of the Act were clearly barred by limitation as it was filed after more than three years of receiving the copy of the Award.

7. Dismissed.

OCTOBER 16, 2017/ AK

VALMIKI J. MEHTA, J