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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.695 OF 2013

United India Insurance Company Ltd.

....Petitioner

vs

Kalyani Avinash Gokhale

...Respondent

.....

Mr. V.Y. Sanglikar, for the Petitioner.

Ms. Varada A. Gokhale, for the Respondent.

.....

CORAM : S.C. GUPTA, J.

DATED: 27 NOVEMBER, 2018

ORAL JUDGMENT:

. Heard learned Counsel for the parties.

2. This arbitration petition challenges an arbitration award passed by a sole arbitrator in a reference arising out of a contract of insurance. In pursuance of a contract between the Petitioner and Bank of Maharashtra for group mediclaim insurance providing medical insurance coverage to persons opening or having any type of account with the bank, the Respondent herein took a policy for Rs.5 lakhs covering self, husband and daughter. The policy was renewed for a further period and was subsisting at the relevant point of time. A claim under that policy was submitted by the Respondent for a sum of Rs.5 lakhs towards the expenses of treatment of her husband Avinash Gokhale, who was suffering from cancer. The claim was allowed to the

extent of Rs.1.5 lakhs under the original policy but rejected to the extent of Rs.3.5 lakhs under the renewed policy on the ground that the renewal was made on 18 April 2009 after detection of cancer and the claim was, accordingly, not payable. This dispute was referred to arbitration. The learned arbitrator, by his impugned award, directed the Petitioner to release all outstanding claims, which remained unsettled due to restriction of sum insured on account of the alleged pre-existing ailment. The learned arbitrator directed the Petitioner not to repudiate or restrict any reimbursement claim. This award was initially challenged by the Petitioner before the District Court at Pune under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"). The challenge was rejected by the District Court on two grounds. It was firstly held that the District Court had no jurisdiction to entertain the challenge to the award. The Court secondly held that the Petitioner had failed to make out any case for setting aside the impugned award. One of the grounds urged before the District Court in the challenge petition was that the Respondent had no right to appoint an arbitrator. The District Court held that the record of the case indicated that the Respondent had issued letters from time to time for appointment of arbitrator, and since no arbitrator was appointed bilaterally, the Respondent had proceeded to appoint an arbitrator; that notice of appointment of the arbitrator as well as hearing of the matter and of adjournment of the hearing were all duly served by the Respondent on the Petitioner; and that, in spite of such service, the Petitioner had failed to appear before the arbitrator and, in the circumstances, the award came to be passed ex-parte. The District Court held that there was no explanation on the part of the Petitioner as to why it had failed to appear before the arbitrator and that whatever

award was passed was passed by following due procedure and there was no case for setting aside the same. This order was challenged by the Petitioner before a learned Single Judge of this Court in an appeal under Section 37 of the Act. The learned Single Judge, by his order dated 7 February 2013, held that the Pune Court had no jurisdiction to entertain any challenge to the impugned award in the present case under Section 34. The learned Judge held that a material part of cause of action in the present matter had arisen in Mumbai and a suit for recovery of any amount under the subject insurance policy (issued to the Respondent at Mumbai) would have to be filed at Mumbai and, thus, a petition under Section 34 of the Act for challenging the award could only be filed before a Court at Mumbai. The learned Judge, accordingly, upheld the order of the learned District Judge to the extent that it held that the Pune Court had no jurisdiction to entertain the petition and dismissed the appeal. This order has since been clarified by the learned Judge upon an application for speaking to the minutes by providing that “the Petitioner herein (Appellant before the Court) was free to adopt appropriate proceedings in appropriate Court”. The Petitioner has, thereupon, approached this Court under Section 34 of the Act challenging the impugned award. The petition is filed on 17 April 2013.

3. The first and the foremost question that arises for the consideration of this Court in the present arbitration petition is whether or not the petition is within time. Under sub-section (3) of Section 34, an application for setting aside an award has to be made within three months from the date on which the party making such application receives the arbitral award. Sub-section (3), however, has a proviso,

which provides that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within such period of three months, it may entertain the application within a further period of thirty days, but not thereafter. It is a settled position of law that Section 5 of the Limitation Act, 1963, which provides for extension of the prescribed period of limitation in certain cases, where the applicant satisfies the court that he had sufficient cause for not making the application within the prescribed period, is not applicable to an application made under Section 34 of the Act by virtue of sub-section (3) thereof. The intention of the legislature in enacting sub-section (3) of Section 34 being to provide for a period of three months for application for setting aside an award and extension of such period on sufficient cause being shown by another period of thirty days but not thereafter, the provision of Section 5 of the Limitation Act would not apply. The applicability of Section 5 has been excluded by reason of the provisions of Section 29(2) of the Limitation Act, which provides that where any special or local law prescribes for any application a period of limitation different from the period prescribed by the Schedule to the Limitation Act, the provisions of Section 3 of Limitation Act shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for such application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. Our courts have held that sub-section (3) of Section 34 expressly excludes any extension of limitation period, for any sufficient cause, beyond 30 days after the originally fixed period of three months, and hence, Section 5 does not

apply. The Supreme Court in the case of **Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department**¹, has, however, held that merely because Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Act for setting aside an award, it need not be concluded that the provisions of Section 14 of the Limitation Act would also be inapplicable to such application. The Court held (Per Raveendran, J. concurring with the majority view) that Section 14 contained in Part III of the Limitation Act did not relate to extension of the period of limitation, but to exclusion of certain period while computing the period of limitation, and that there was nothing in sub-section (3) of Section 34 of the Act or any other provision in the Act to exclude the applicability of Section 14 of the Limitation Act to applications under Section 34 of the Act. It is, thus, a settled position in law now that though extension of the period of limitation for a sufficient clause within the meaning of Section 5 of the Limitation Act, 1963 cannot be made in an application under Section 34, (the only extension permissible on such sufficient clause being upto a period of thirty days after expiry of the original period of three months), Section 14 of the Limitation Act, which excludes the time during which the applicant has been prosecuting with due diligence another proceeding, whether in a court of first instance or an appeal or revision, in respect of the same subject matter against the respondent should be excluded, where such proceeding is prosecuted in good faith in a court, which, from the defect of jurisdiction or other cause of a like nature, is unable to entertain it, applies to the application under Section 34 of the Act.

¹ (2008) 7 Supreme Court Cases 169

4. The question now before the Court is whether after excluding the period spent for bonafide prosecution of the challenge petition, assuming it to be so, before the Pune Court and the appeal therefrom before this Court, whether the Petitioner is within the statutory period of limitation of three months or alternatively, is entitled to extension of that period. It is not disputed that the original award, which was passed by the arbitral tribunal on 31 March 2011, was received by the Petitioner on 8 April 2011. The period of limitation, thus, begins to run with effect from 8 April 2011. The challenge petition before the District Court at Pune was filed by the Petitioner on 6 July 2011, that is to say, well within the original period of limitation. Even if we exclude the period spent during the prosecution of the challenge petition before the Pune Court and the appeal before this Court, that is to say, the period between 6 July 2011 and 7 February 2013, when this Court held that the Pune Court had no jurisdiction and dismissed the Petitioner's appeal, one would have to take into account the period from 7 February 2013 till the filing of the present petition under Section 34 for the purposes of arriving at the limitation period for the present petition. The present petition is filed on 17 April 2013, that is to say, after sixty eight days from 7 February 2013. If the period of 89 days between the receipt of the copy of the petition (i.e. 8 April 2011) and filing of the challenge petition before the Pune Court, (i.e. 6 July 2011) is considered and the period after the appeal was dismissed by this Court (i.e. 7 February 2013) and the filing of the present petition (i.e. 17 April 2013) is added to it, it is beyond doubt that the limitation period goes well over 120 days. If that is so, there is no way this Court could condone the delay and entertain the arbitration petition.

5. Learned Counsel for the Petitioner submits that, firstly, the original order passed by this Court dismissing the Petitioner's appeal on 7 February 2013 did not contain a clarification on the Petitioner's liberty to adopt appropriate proceedings in appropriate court. Learned Counsel submits that this clarification was made on 11 March 2013 on the Petitioner's application for speaking to the minutes of the order dated 7 February 2013 and that, therefore, the period post disposal of the Petitioner's appeal before this Court should be revoked from 11 March 2013, and not from 7 February 2013. There is no merit in the submission. The period between 7 February 2013, when the Petitioner's appeal was dismissed by this Court, and 11 March 2013, when on its application for speaking to the minutes, the sentence concerning liberty to adopt further proceedings was added in the order, cannot be said to be a period, during which the Petitioner's appeal was pending before this Court. It cannot be said that during this period, the Petitioner was prosecuting with due diligence his remedy in good faith before the Court of appeal.

6. Alternatively, learned Counsel submits that the impugned award is passed by a tribunal, which patently lacks jurisdiction and in as much as the order is passed without jurisdiction, it is a nullity and it could be challenged at any stage. The argument is only required to be stated to be rejected. One of the express grounds of challenge to an award under Section 34 being want of jurisdiction on the part of the arbitrator, it is impermissible to argue that when the ground of challenge pertains to want of such jurisdiction, the limitation period prescribed

under sub-section (3) of Section 34 does not apply. That would be a bizarre conclusion to draw.

7. Looked at whichever way, there is no answer to the bar of limitation for presentation of the petition herein. The petition is clearly beyond time and it is impermissible to condone the delay over and above 30 days provided under the proviso to sub-section (3) of Section 34 in accordance with the settled law noted as above. The petition is accordingly dismissed.

8. Learned Counsel for the Petitioner requests for a stay of this order. When a petition challenging an award is comprehensively heard and rejected, there is no question of granting any stay of the award, particularly in the context of Sections 34, 35 and 36 of the Arbitration and Conciliation Act, 1996. The application is rejected.

(S.C. GUPTE, J.)