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

\+ OMP(COMM) 405/2018

Reserved on: 12.11.2018
Date of Decision : 12.04.2019

U.P. JAL VIDYUT NIGAM LTD. ..... Petitioner
Through: Mr.Ajit Rajput, Ms.Sakshi Sharma, Advs. along with Mr.Abhishek Chauhan, AR of petitioner company.

versus

C.G. POWER AND INDUSTRIAL SOLUTION LIMITED ..... Respondent
Through: Mr.Ramesh Singh, Ms.Monisha Handa, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

I.A. No.13088/2018

1. This application has been filed by the petitioner under Section 14 of the Limitation Act, 1963 (the Limitation Act) praying for exclusion of time spent by the petitioner in pursuing its earlier application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') before the District Courts at Saharanpur for the purpose of computing the limitation for filing of the present petition. The total period of time sought to be excluded is 6263 days.

2. The present petition has been filed by the petitioner challenging the Arbitral Award dated 15.03.2001 passed by the Arbitral Tribunal consisting of three Arbitrators. The said Award adjudicated the disputes that had arisen between the parties in relation to the work of construction and maintenance of Babail Power House at Village Babail in District Saharanpur awarded by the petitioner to the respondent.

3. The petitioner challenged the above Award by way of a petition under Section 34 of the Act before the Court of Civil Judge, Saharanpur. As far as the territorial jurisdiction is concerned, the petitioner made the following submission:

> *"The agreement was made at Lucknow but the working site was at village Babail in District Saharanpur. The entire work was done and executed, measured and cause of action arose within the jurisdiction of this Court. Hence this Court has the jurisdiction."*

4. As far as the pecuniary jurisdiction is concerned, the same was valued at Rs.3,83,41,431/-.

5. The Civil Judge, Saharanpur vide order dated 26.08.2003 held that the Court lacked pecuniary jurisdiction to entertain the said petition.

6. Upon presenting the petition before the Court of District Judge, Saharanpur, the District Judge extended the benefit of Section 14 of the Limitation Act to the petitioner vide his order dated 13.02.2004.

7. The said petition was thereafter transferred from the Court of District Judge, Saharanpur to the Court of Additional District Judge,

Saharanpur on 11.04.2011. The reason for such transfer is not evident from the record.

8. The petition was, however, dismissed for non prosecution on 15.07.2013 as none appeared before the Court on behalf of the petitioner.

9. The petition was thereafter restored for hearing vide order dated 05.09.2014.

10. Learned counsel for the respondent submits that the petition was thereafter transferred to the Court of District Judge, Saharanpur on 03.09.2015. It was again dismissed for non prosecution on 22.11.2016.

11. On 08.12.2016, the petitioner filed application seeking restoration of the petition. Notice on such application was issued to the respondent, however, the order dated 10.01.2017 and 28.04.2017 reflects that the same was not served. In the meantime, the respondent filed an execution petition, being Execution Petition no.63/2017, before the Court of District Judge, Saharanpur seeking enforcement of the Impugned Award.

12. The petitioner filed an application seeking stay of the execution proceedings, however, the same was dismissed by the District Judge, Saharanpur vide order dated 06.01.2018.

13. The petitioner thereafter filed Misc. Petition No.775/2018 before the High Court of Allahabad praying for direction to the Additional District Judge, Saharanpur, for early disposal of petitioner's application seeking restoration of the petition filed under Section 34 of the Act.

14. The petitioner also filed another petition, being Misc. Petition No.744/2018, before the High Court of Allahabad praying for a direction against the District Judge from proceeding further with the Execution Petition.

15. The above Writ Petitions were disposed of by the High Court of Allahabad vide its order dated 19.02.2018 directing as under:

> *"After some argument, learned counsel for the parties agree for disposal of the instant petition in the following terms :-*
> *(a) The impugned order dated 6.1.2018 be set aside and the restoration application be directed to be decided within two weeks from the date of production of certified copy of this order.*
> *(b) The parties will not seek any adjournment.*
> *(c) In case restoration application is allowed, the main petition, i.e., Misc. Case No. 2 of 2004, under Section 34, shall be decided within 3 months, without granting unnecessary adjournments.*
> *(d) Till the restoration application is decided or in case the matter is restored, till the objections under Section 34 are decided, the proceedings before the executing court, shall remain in abeyance."*

16. The Additional District Judge, Saharanpur, vide his order dated 14.03.2018 was pleased to restore the petition filed under Section 34 of the Act by the petitioner for hearing.

17. As noted above, the High Court by its order dated 19.02.2018 had directed that incase restoration is allowed, the petition shall be decided within three months without granting any adjournment. However, the petitioner, on 02.05.2018 filed an application seeking withdrawal of the

petition stating that it has received legal advice that the Court at Saharanpur shall have no jurisdiction to entertain the petition as the Award had been passed at Delhi.

18. Learned counsel for the respondent submits that this application was filed with *malafid*e intent to further delay the adjudication of the petition. He submits that the respondent has never challenged the jurisdiction of the Courts at Saharanpur to entertain the petition and in fact, the Courts at Saharanpur had territorial jurisdiction to adjudicate the said petition as the Contract was performed within its jurisdiction. He submits that the respondent also sought to file a reply to the said application and a copy thereof was duly served on the petitioner, however, the same was not taken on record and instead, the learned Additional District Judge by his order dated 03.05.2018 allowed the application of the petitioner.

19. The petitioner thereafter filed the petition under Section 34 of the Act before the Court of District Judge, Patiala House Courts, New Delhi. In the said petition, the respondent filed an application under Order VII Rule 10 of the Code of Civil Procedure, 1908 (CPC) on the ground of lack of pecuniary jurisdiction of the Court.

20. During the pendency of the said application, petitioner filed an application under Order VII Rule 10A of the CPC for return of the petition for filing before this Court and for fixing a date for hearing. The said application was allowed by the Additional District Judge vide his order dated 04.08.2018.

21. The present petition has thereafter been filed by the petitioner before this Court praying for exclusion of 6263 days for the purpose of calculating the limitation.

22. Learned counsel for the petitioner submits that the petitioner is entitled to the exclusion of the period during which it was prosecuting the petition before the Courts at Saharanpur and thereafter before the Court of Additional District Judge, Patiala House Courts, New Delhi. Relying upon the judgment of the Supreme Court in ***Consolidated Engineering Enterprises v. Principal Secrertary, Irrigation Department & Ors,.*** (2008) 7 SCC 169, he submits that Section 14 of the Limitation Act is not excluded under Section 34(3) of the Act. He further submits that Section 14 of the Limitation Act has to be interpreted and has to be adopted more liberally so as to advance the cause of justice.

23. On the other hand, the learned counsel for the respondent relying upon the judgment of the Supreme Court in ***Madhavrao Narayanrao Patwardhan v. Ramkrishna govind Bhanu and Ors.,*** (1959) SCR 564; ***Deena (Dead) Through LRs v. Bharat Singh (Dead) Through Lrs. & Ors***., (2002) 6 SCC 336; and of this Court in ***M/s K.G. Khosla & Co. v. The Trustees of the Port of Bombay,*** ILR (1970) 2 Delhi 60, submits that the petitioner has been unable to show that it was prosecuting the earlier petition at Saharanpur and Patiala House Courts with due diligence and in good faith. He submits that in the first instance the petitioner had filed the petition before the Court of Civil Judge, Saharanpur knowing fully well that the said Court did not have the pecuniary jurisdiction to entertain the petition. Thereafter the petition was dismissed twice due to

non-prosecution. Even after withdrawing the same from the Court of Additional District Judge at Saharanpur, the petitioner filed the petition before the Court of Additional District Judge, Patiala House Courts, New Delhi again knowing fully well that the said Court lacked pecuniary jurisdiction to entertain the said petition. He submits that, therefore, the petitioner is not entitled to claim the benefit of Section 14 of the Limitation Act.

24. I have considered the submissions made by the learned counsels for the parties and find merit in the submissions made by the counsel for the respondent. Section 14 of the Limitation Act is reproduced hereinunder;

> *"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.*
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> *(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.

Explanation: For the purposes of this sections-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

25. The Supreme Court in ***Madhavrao Narayanrao*** (supra) laid down the following pre-conditions for invocation of Section 14 of the Limitation Act as under:

"In order to bring his case within the section quoted above, the plaintiff has to show affirmatively:

(1) that he had been prosecuting with due diligence the previous suit in the court of the Munsif at Miraj,

(2) that the previous suit was founded upon the same cause of action,

> *(3) that it had been prosecuted in good faith in that court, and*
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> *(4) that that court was unable to entertain that suit on account of defect of jurisdiction or other cause of a like nature."*

26. In the said judgment, the Supreme Court further clarifies that as the Limitation Act contains its own definition of "Good Faith", the definition of "Good Faith" as contained in the General Clauses Act, 1897 would not be applicable. I quote from the judgment as under:

> *"Both the courts below have viewed the controversy under S. 14 of the Limitation Act, as if it was for the defendant to show mala fides on the part of the plaintiff when he instituted the previous suit and was carrying on the proceedings in that court. In our opinion, both the courts below have misdirected themselves on this question. Though they do not say so in terms, they appear to have applied the definition of "good faith" as contained in the General Clauses Act, to the effect that "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not". But the Indian Limitation Act contains its own definition of good faith to the effect that "nothing shall be deemed to be done in good faith which is not done with due care and attention" — [Section 2(7)]……."*

27. The Court further held that when the plaintiff has not satisfied the initial burden which lay upon him to bring his case within Section 14, the burden would not shift to the defendant to show the contrary.

28. In ***Deena (Dead) through Lrs.*** (supra), the Court further clarified the interplay between Order 23 Rule 2 of CPC and Section 14 of the Limitation Act in the following words:

> ***13.*** *From the provisions it is clear that it is in the nature of a proviso to Order 23 Rule 2. The non obstante clause provides that notwithstanding anything contained in Rule 2 of Order 23 of the Code of Civil Procedure the provisions of sub-section (1) of Section 14 shall apply in relation to a fresh suit instituted on permission granted by the court under Rule 1 of Order 23. For applicability of the provision in sub-section (3) of Section 14 certain conditions are to be satisfied. Before Section 14 can be pressed into service the conditions to be satisfied are: (1) both the prior and subsequent proceedings are civil proceedings prosecuted by the same party; (2) the prior proceeding had been prosecuted with due diligence and 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 later proceeding must relate to the same matter in issue; and (5) both the proceedings are in a court.*
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> ***14.*** *The main factor which would influence the court in extending the benefit of Section 14 to a litigant is whether the prior proceeding had been prosecuted with due diligence and good faith. The party prosecuting the suit in good faith in the court having no jurisdiction is entitled to exclusion of that period. The expression "good faith" as used in Section 14 means "exercise of due care and attention". In the context of Section 14 the expression "good faith" qualifies prosecuting the proceeding in the court which ultimately is found to have no jurisdiction. The finding as to good faith or the absence of it is a finding of fact………..*
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> *15. …….. It is to be kept in mind that there is a distinction between granting permission to the plaintiff to withdraw the*

suit with leave to file a fresh suit for the same relief under Order 23 Rule 1 and exclusion of the period of pendency of that suit for the purpose of computation of limitation in the subsequent suit under Section 14 of the Limitation Act. The words "or other cause of a like nature" are to be construed ejusdem generis with the words "defect of jurisdiction", that is to say, the defect must be of such a character as to make it impossible for the court to entertain the suit or application and to decide it on merits. Obviously Section 14 will have no application in a case where the suit is dismissed after adjudication on its merits and not because the court was unable to entertain it."

29. In ***Consolidated Engg Enterprises*** (supra), the Supreme Court again clarified as under:

> *"31. .... The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principals, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith."*

30. A reading of the above judgments clearly shows that one of the conditions for extending the benefit of Section 14 of the Limitation Act to the petitioner is that the petitioner must have been prosecuting the earlier proceedings in good faith and with due diligence. The onus of proving the same also lies upon the petitioner.

31. In the present case, as noted hereinabove, the petitioner had earlier filed a petition under Section 34 of the Act before the Court of Civil Judge, Saharanpur. The said Court admittedly lacked pecuniary jurisdiction to entertain the said petition. Though, upon filing of the petition before the District Judge, Saharanpur, the petitioner was extended the benefit of Section 14 of the Limitation Act, in my opinion, the same would again become relevant to test whether the petitioner was prosecuting the earlier petition with due diligence and in 'good-faith'.

32. The petition was dismissed twice before the Saharanpur District Court due to non appearance of the petitioner and thereafter, the petitioner again filed the petition before the Patiala House Courts, which lacked pecuniary jurisdiction to entertain the same. The conduct of the proceedings by the petitioner clearly establish lack of due care and attention.

33. It is also relevant to note that the High Court of Allahabad in its order dated 19.02.2018 had directed the petition under Section 34 of the Act to be decided within three months on its restoration. The said petition was restored on 14.03.2018. The petitioner on 02.05.2018, filed the cryptic application seeking withdrawal of the said petition on the ground

of alleged lack of territorial jurisdiction. The contents of the application, as given in the translated copy filed by the respondent, are as under:

> *"It is submitted that the plaintiff had filed aforesaid suit for setting aside the Award dated 15.03.2001 passed by the Arbitrator under Section 34 of the Arbitration and Conciliation Act. In the above case the question of jurisdiction lies. At the time of filing the case the plaintiff was given legal advice of filing the same and at that time as per the legal advice the aforesaid case was filed before the this on Hon'ble Court the further proceedings in the matter was going on. Recently, the plaintiff received a legal advice that this Hon'ble Court has no jurisdiction to entertain the said suit rather that the same court has the jurisdiction to hear from where the Arbitrator Award has been passed. The award should have been presented in the jurisdiction of the same court for its cancellation. In the interest of justice in light of the aforesaid facts and on the basis of the legal advice plaintiff be permitted to withdraw the aforesaid case so the plaintiff can file the same before the Competent Court.*
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> *Hence it is humbly prayed to this Hon'ble Court in the light of the aforesaid facts plaintiff be permitted to withdraw the aforesaid case so the plaintiff can file the same before the Competent Court. Prayed accordingly."*

34. A reading of the above would show that the application itself has not disclosed any reason on which it is claimed that the Courts at Saharanpur lack territorial jurisdiction to entertain the said petition. The counsel for the petitioner has relied upon the judgment of the Supreme Court in ***M/s Bhandari Udyog Ltd. v. Industrial Facilitation Council and Another***, AIR 2015 SC 1320 to contend that as the arbitration proceedings were held at Delhi, only Courts at Delhi would have the jurisdiction to entertain the petition under Section 34 of the Act.

However, what has not been explained is how this sudden advice was obtained, afterall the petitioner had been prosecuting the petition not only before the Saharanpur District Court, but also before the Allahabad High Court. The petition at Saharanpur remained pending from 2001 to 2018, that is, almost a period of 17 years.

35. Equally, it has not been explained why the petition was filed before the Patiala House District Courts when it clearly lacked pecuniary jurisdiction to entertain the said petition on the valuation given by the petitioner in its original petition filed before the Civil Judge, Saharanpur.

36. In such circumstances, the petitioner certainly is not entitled to seek the benefit of Section 14 of the Limitation Act.

37. In view of the above, the application lacks merit and is dismissed.

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As the application seeking exclusion of time has been dismissed, the petition filed by the petitioner is barred by limitation and the delay, being beyond the period of 30 days from the expiry of three months from the date of the receipt of the Award, cannot be condoned under Section 34(3) of the Act.

The petition and the application are therefore dismissed. There shall be no order as to cost.

NAVIN CHAWLA, J

APRIL 12, 2019/vp