IN THE HIGH COURT OF SIKKIM : GANGTOK

Arb. A. No. 01 of 2019

Mrs. V. Vijaya Lakshmi,
Daughter of Dr. R. Vijayarangam,
Proprietor of
M/s. Kadorganjans Engineering Consultants,
No. 30 (Old No. 18), Second Cross Street,
West C.I.T. Nagar, Chennai-600035.
Through her constituted attorney
Mr. V.V.K. Gajan,
Son of Mr. M. Venkatesan,
Resident of No. 30 (Old No. 18)
Second Cross Street,
West C.I.T. Nagar, Chennai-600035.

... Appellant

Versus

The Additional Chief Engineer (S/W),
Roads and Bridges Department
Government of Sikkim,
Nirman Bhavan,
Gangtok, East Sikkim

... Respondent

BEFORE

HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

For the appellant : Ms. Sangita Agarwal, Advocate.

For the respondent : Mr. Vivek Kohli, Advocate General, Sikkim.

Date of hearing : 19.11.2020

Date of judgment : 19.11.2020

JUDGMENT (ORAL)

(*Arup Kumar Goswami, CJ*)

Heard Ms. Sangita Agarwal, learned counsel for the appellant. Also heard Mr. Vivek Kohli, learned Advocate General, Sikkim appearing for the respondent.

2. This appeal under Section 37 (1) (c) of the Arbitration and Conciliation Act, 1996, for short "the Arbitration Act", is preferred against the judgment dated 25.10.2018 passed by the learned District Judge, Special Division-II, Sikkim at Gangtok in Arbitration Case No. 4 of 2017, dismissing the petition filed by the appellant under Section 34 of the Arbitration Act not only by holding that the same is time-barred but also recording a finding that the appellant had failed to make out any ground for interfering with the Award.

3. At the very outset, Mr. Kohli submits that in view of the judgment of the Hon'ble Supreme Court in the case of ***P. Radha Bai and Ors. vs. P. Ashok Kumar and Anr.***, **(Civil Appeal Nos. 7710-7713 of 2013)**, reported in ***2018 SCC Online SC 1620***, there is no escape from the conclusion that the application of the appellant was time-barred.

4. Ms. Sangita Agarwal, learned counsel for the appellant submits that she is aware of the aforesaid judgment and contends that in the fact situation obtaining in the present case, the judgment would not be applicable and therefore, it cannot be said that application of the appellant is required to be dismissed as time-barred. She has drawn the attention of this Court to paragraph 46 of ***Radha Bai*** (supra) and contends that the antecedent facts necessary to pursue a legal proceeding was suppressed by the respondent from the appellant and the appellant came to learn about the fraud played by the respondent only on 04.05.2017 and thus, the application filed by the appellant was within the period of limitation. Learned counsel for the appellant also drew the attention of the Court to Section 36 of the Arbitration Act as amended by the Arbitration and Conciliation (Amendment) Ordinance, 2020, which came into effect from 04.11.2020.

5. The appellant offers Engineering Consultancy Service by way of designing bridges and roads, providing services in the field of topographic and engineering service, geo-tech investigation, etc. Pursuant to an Expression of Interest invited by the respondent for carrying out geo-technical investigation, hydrological survey, design and preparation of detailed estimate for construction of double length bridges along with L.D. Kazi Bridge, Yangyang University Road, South Sikkim, the appellant had submitted bid which was accepted by the respondent and accordingly, a work order dated 29.06.2009 was issued to the appellant. An agreement dated 10.07.2009 was also executed in between the parties.

6. The appellant had prepared Detailed Project Report (DPR) for 13 bridges, which were then sent by the respondent to North Eastern Council (NEC).

7. A dispute had arisen between the parties with regard to non-payment by the respondent for the work carried out by the appellant and accordingly, a legal notice dated 03.09.2014 was issued by the appellant demanding a sum of Rs.3,52,55,860/-. The notice having failed to elicit any response, the arbitration clause reserved in the agreement dated 10.07.2009 was invoked by the appellant. Subsequently, on an application filed by the appellant under Section 11 of the Arbitration Act for appointment of an Arbitrator, this Court, in Arbitration Petition No. 02 of 2014, vide order dated 17.3.2015, had appointed Hon'ble Mr. Justice A.K. Patnaik, a former Hon'ble Judge of Supreme Court of India as the Sole Arbitrator to adjudicate the disputes.

8. The Sole Arbitrator passed an Award on 27.05.2016 awarding a sum of Rs.65,43,468/- along with interest calculated @ 18% per annum from the date of Award.

9. The appellant had filed an application under Section 34 of the Arbitration Act on 25.07.2017 in the Court of the learned District Judge, East Sikkim at Gangtok. Subsequently, the same was transferred to the Court of learned District Judge, Special Division-II.

10. Learned District Judge held that in absence of any affidavit and as the probative value of documents relied on by the appellant was not proved, therefore, the case of the appellant that the respondent had obtained the arbitral award by way of fraud is not proved.

11. On the basis of Section 34 (3) of the Arbitration Act, it was held that the application for setting aside the Award was time-barred. It was also held that in view of Section 29 (2) of the Limitation Act, 1963, for short, the Limitation Act, provisions of Limitation Act shall not apply to the Arbitration Act, the same being a special law.

12. Against the statement of facts and claims made by the appellant before the Sole Arbitrator, in the reply filed by the respondent on 17.06.2015, amongst others, it was stated that out of 13 number of bridges for which DPR was prepared by the appellant, only 6 number of bridges were sanctioned by the NEC. It was only after the award was passed on 27.05.2016, the appellant had taken recourse to Right to Information Act, 2005, for short, the RTI Act, seeking information from the Public Information Officer of NEC Secretariat as to why sanction was granted only in respect of 6 number of bridges. After submitting a number of applications under RTI Act, it was learnt by the appellant that the respondent had dropped 7 DPRs without furnishing any clarification or justification which was sought for by the Ministry of Roads Transport.

13. It is the case of the appellant that the said information was fraudulently withheld by the respondent from the Sole Arbitrator. It was also pleaded that the limitation period will begin to run from 04.05.2017 as the appellant came to learn about the fraud played by the respondent only on 04.05.2017.

14. It will be relevant to record at this stage that Section 36 of the Arbitration Act as amended by the Arbitration and Conciliation (Amendment) Ordinance, 2020, relating to enforcement of award is not applicable to the facts and circumstances of the case.

15. Section 34 (3) of the Arbitration Act reads as under:

> "34. Application for setting aside arbitral award:
> ……
> (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 thirty days, but not thereafter."

16. The question that had fallen for consideration in ***P. Radha Bai*** (supra) was whether Section 17 of the Limitation Act is applicable while determining the limitation period under Section 34(3) of the Arbitration Act. Relevant part of Section 17 of the Limitation Act reads as under:

"17. Effect of fraud or mistake.— (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him,

the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

17. It was held that Section 17 of Limitation Act does not defer the starting point of the limitation period merely because fraud was committed and that Section 17 does not encompass all kinds of frauds and mistakes. In paragraph 46 of ***P. Radha Bai*** (supra) it was pointed out that Section 17 (1) (b) and (d) only encompasses those fraudulent conduct or act of concealment of documents which have the effect of suppressing the knowledge entitling a party to pursue its legal remedy. Once a party becomes aware of the antecedent facts necessary to pursue a legal proceeding, the limitation period commences. Submission of Ms. Agarwal

that the respondent suppressed antecedent facts necessary to pursue a legal proceeding is without any merit. As noticed earlier, in the reply to the statement of facts and claims made by the appellant, respondent had stated that out of 13 number of bridges for which DPRs were prepared by the appellant, only 6 number of bridges were sanctioned by the NEC and therefore, it cannot be said that there was any concealment of material and relevant facts by the respondent which prevented the appellant from pursuing legal proceeding.

18. Section 29(2) of the Limitation Act reads as follows:

> "29. Savings.- (1) .....
>
> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 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 any suit, appeal or 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."

19. The Hon'ble Supreme Court observed that Section 29 of the Limitation Act has two parts. First part stipulates that the limitation period prescribed by the special law or local law will prevail over the limitation period prescribed in the Schedule of the Limitation Act. The Arbitration Act is a special law which prescribes a specific period of limitation in Section 34(3) for filing objections to an arbitral award passed under the Arbitration Act and therefore, the provisions of Arbitration Act would apply. It was also noticed that there is no provision under the Limitation Act dealing with

challenging of an award passed under the Arbitration Act. The second part mandates that Sections 4 to 24 of the Limitation Act will apply for determining the period of limitation only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. Hon'ble Supreme Court held that the phrase "expressly excluded" under Section 29 (2) of the Limitation Act can be inferred from the language of the special law or it can be necessarily implied from the scheme and object of the special law.

20. Hon'ble Supreme Court at paragraph 36 of ***P. Radha Bai*** (supra) noted the consequences that will follow if Section 17 of the Limitation Act were to be applied to determine the limitation period under Section 34 (3) of the Arbitration Act. Paragraph 36 reads as follows:

> *"**36.** If Section 17 of the Limitation Act were to be applied to determining the limitation period under Section 34(3), it would have the following consequences:*
>
> *(a) In Section 34(3), the commencement period for computing limitation is the date of receipt of award or the date of disposal of request under Section 33 (i.e. correction/additional award). If Section 17 were to be applied for computing the limitation period under Section 34(3), the starting period of limitation would be the date of discovery of the alleged fraud or mistake. The starting point for limitation under Section 34(3) would be different from the Limitation Act.*
>
> *(b) The proviso to Section 34(3) enables a court to entertain an application to challenge an award after the three months' period is expired, but only within an additional period of thirty dates, "but not thereafter". The use of the phrase "but not thereafter" shows that the 120 days' period is the outer*

boundary for challenging an award. If Section 17 were to be applied, the outer boundary for challenging an award could go beyond 120 days. The phrase "but not thereafter" would be rendered redundant and otiose. This Court has consistently taken this view that the words "but not thereafter" in the proviso of Section 34(3) of the Arbitration Act are of a mandatory nature, and couched in negative terms, which leaves no room for doubt. (State of Himachal Pradesh v. Himachal Techno Engineers, (2010) 12 SCC 210, Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd. , (2012) 2 SCC 624 and Anilkumar Jinabhai Patel (D) through LRs v. Pravinchandra Jinabhai, (2018) SCC Online 276).

21. It will be also relevant to take note of paragraphs 37, 38, 39 and 40 which read as follows:

*"**37.** In our view, the aforesaid inconsistencies with the language of Section 34(3) of the Arbitration Act tantamount to an "express exclusion" of Section 17 of the Limitation Act.*

***38.** This Court in Popular Construction case [Union of India v. Popular Construction Co., (2001) 8 SCC 470] followed the same approach when it relied on the phrase "but not thereafter" to hold that Section 5 of the Limitation Act was expressly excluded.*

***39.** As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court*

could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result." (emphasis added)

40. *Further,the exclusion of Section 17 is necessarily implied when one looks at the scheme and object of the Arbitration Act."*

22. Thus, the Hon'ble Supreme Court on a scrutiny and analysis of Section 34 (3) of the Arbitration Act held that the language of Section 34(3) of Arbitration Act amounts to an "express exclusion" of Section 17 of the Limitation Act. It was further held that the exclusion of Section 17 of the Limitation Act was also necessarily implied when one looks at the scheme and object of the Arbitration Act.

23. In paragraphs 49 and 51 of ***P. Radha Bai*** (supra), the Hon'ble Supreme Court has laid down as follows:

*"**49.** In the context of Section 34, a party can challenge an award as soon as it receives the award. Once an award is received, a party has knowledge of the award and the limitation period commences. The objecting party is therefore precluded from invoking Sections 17(1)(b) and (d) once it has knowledge of the award. Sections 17(1)(a) and (c) of the Limitation Act may not even apply, if they are extended to Section 34, since they deal with a scenario where the application is "based upon" the fraud of the respondent or if the application is for "relief from the consequences of a mistake". Section 34 application is based on the award and not on the fraud of the respondent and does not seek the relief of consequence of a mistake.*

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51. *In view of the above, we hold that once the party has received the Award, the limitation period under Section 34(3) of the Arbitration Act commences. Section 17 of the Limitation Act would not come to the rescue of such objecting party."*

24. In view of the above position in law, there is no escape from the conclusion that application of the appellant under Section 34 of the Arbitration Act was barred by law.

25. Accordingly, the appeal is dismissed. No order as to costs.

(Chief Justice)

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