

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.421 OF 2020
IN
ARBITRATION APPEAL (STAMP) NO.36068 OF 2019

Government of Maharashtra & others
(Water Resources Department),
represented by Executive Engineer,
Dhule Irrigation Division,
Sinchan Bhavan, Dhule,
District Dhule

APPLICANT

VERSUS

1. M/s Borse Brothers Engineers
& Contractors Pvt. Ltd.,
23, Anand Nagar, Deopur, Dhule

2. Shri P.V. Patil
(Deceased)

RESPONDENTS

Mr. R.N. Dhorde, Senior Advocate instructed by Mr. Suresh D.
Dhongade, Advocate for the applicant
Mr. Vijay B. Patil, Advocate for respondent No.1

CORAM : MANGESH S. PATIL, J.

DATE : 17.12.2020

ORDER :

This is an application seeking condonation of delay, stated to be of 103 days, in preferring an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ("Act", for short).

2. Mr. R.N. Dhorde, learned Senior Advocate for the applicant submits that the arbitration award was passed on 05.04.2016. It was challenged under Section 34 of the Act. The decision was rendered on 23.04.2019 whereby the challenge was dismissed. However, it is only in the month of July, 2019, the concerned Advocate representing the applicant had intimated the Executive Engineer about the decision. It is thereafter that a certified copy was applied for on 08.07.2019. It was obtained on 24.07.2019. Some time thereafter was lost in having legal opinion from the concerned Advocate and in taking a decision for challenging the impugned order under Section 37 of the Act. All these, cumulatively led in causing the delay. There was no intention to cause delay. The applicant was not to gain anything by causing delay, rather a heavy burden of interest would be carried by the applicant. He would, therefore, submit that there was sufficient and genuine cause for which the delay be condoned.

3. The learned Senior Advocate would further submit that unlike Section 34, no separate limitation is provided for preferring an appeal under Section 37 of the Act. By virtue of Section 43 of that Act, the provisions of the Limitation Act, 1963 would be applicable and consequently, this Court has the power under Section 5 of that Act to condone the delay for sufficient cause. Since it is a matter involving the Government office, it is not unusual that some time is lost in taking necessary steps before filing a proceeding in the Court by law. He would, therefore, submit that the cause being put forth

by the applicant is sufficient and the delay deserves to be condoned. The learned Senior Advocate would rely on the decisions in the following cases:-

- (i) ***Union of India Vs. M/s Varindera Const. Ltd.;***
SLP(C) No.23155/2013 decided on 17.09.2018
- (ii) ***Ganesan represented by its Power Agent G. Rukmani Ganesan***
Vs. Commissioner, Tamil Nadu Hindu Religious and Charitable
Endowments Board and others;
(2019) 7 Supreme Court Cases 108
- (iii) ***State of Madhya Pradesh and another Vs. Anshuman Shukla;***
(2014) 10 Supreme Court Cases 814
- (iv) ***Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker;***
(1995) 5 Supreme Court Cases 5

4. Per contra, Mr. V.B. Patil, learned Advocate for respondent No.1 strenuously submits that the issue is no more *res integra*. The Supreme Court has now consistently laid down and in the latest judgment in the case of ***M/s N.V International Vs. the State of Assam & Ors.; Civil Appeal No.9244 of 2019***, arising out of ***SLP (C) No.23808/2019***, decided on ***06.12.2019***, has emphatically laid down that any delay beyond 120 days in preferring appeal under Section 37 of the Act cannot be condoned.

5. Mr. Patil, learned Advocate would further submit that even on facts, the applicant has not come to the Court with clean hands. He would point out from the certified copy obtained from the District Court, Dhule (Exhibit-R1), that the application for obtaining the certified copy was, in fact, filed on 14.05.2019 and not in the month of July 2019. He further

points out that even in this very application filed by the Advocate representing the applicant, he had specifically indicated that the certified copy was to be handed over to Mr. A.D. Patil from the Irrigation Department, Dhule. He would further point out that from the endorsement on this application put by the concerned staff of the District Court, Dhule, a specific date was given for delivery of the copy as 27.05.2019. It will have to be assumed that it is pursuant to such endorsement, Mr. A.D. Patil of the Irrigation Department in all probability must have received the certified copy on 27.05.2019. Learned Advocate Mr. Patil would, therefore, submit that there is no whisper in the form of rejoinder to this specific evidence put forth by the respondent. He would, therefore, submit that it is only to suit the purpose, Mr. A.D. Patil was again asked to submit an application for obtaining certified copy, which he accordingly filed on 18.07.2019 and it is on the basis of the certified copy obtained pursuant thereto that now the limitation is being sought to be extended. He would, therefore, submit that since the cause being put forth by the applicant is not sufficient and when even it has not come with clean hands the discretion cannot be exercised in its favour.

6. The learned Advocate Mr. Patil would further submit that though it is now being projected by the applicant that its Advocate did not intimate the decision promptly, it is a convenient plea. No affidavit of the learned Advocate has been filed to substantiate it. Therefore, it is liable to be

discarded.

7. I have carefully gone through the papers. There can be no doubt in view of the documentary evidence in the form of copy of the application tendered by the Advocate representing the applicant for obtaining a certified copy (Exhibit-R1) that in fact, after pronouncement of the judgment and order in the proceeding under Section 34 of the Act, the concerned Advocate had applied for certified copy on 14.05.2019. The endorsement further reads that it was to be handed over to Mr. A.D. Patil of the Irrigation Department, Dhule, who is a staff from the office of the applicant. The further endorsements also clearly show that the certified copy was ready and was to be delivered on 27.05.2019. In spite of such a stand and document, the applicant has not controverted this or has not come up with any other stand touching this aspect. It is therefore apparent that the applicant is not coming to the Court with clean hands even while seeking the discretionary relief of condonation of delay.

8. It is precisely for this reason, one will have to proceed by assuming that it is pursuant to the first application dated 14.05.2019 that the applicant must have obtained a certified copy and the limitation will have to be calculated accordingly. Going by such calculation, certainly there is a delay of more than 120 days and not 103 days as is being claimed by the applicant.

9. In view of the observations and conclusion of the Supreme Court in the case of ***M/s N.V. International*** (supra) and particularly the observations in paragraph No.5, the question of condonation of delay of more than 120 days does not survive. The observations read thus :-

“We may only add that what we have done in the aforesaid judgment is to add to the period of 90 days, which is provided by statute for filing of appeals under Section 37 of the Arbitration Act, a grace period of 30 days under Section 5 of the Limitation Act by following Lachmeshwar Prasad Shukul and others (supra), as also having regard to the object of speedy resolution of all arbitral disputes which was uppermost in the minds of the framers of the 1996 Act, and which has been strengthened from time to time by amendments made thereto. The present delay being beyond 120 days is not liable, therefore, to be condoned.”

10. Therefore, apart from the facts and circumstances discussed hereinabove, even in view of this emphatic observations of the Supreme Court, the delay being beyond 120 days cannot be condoned.

11. Mr. Dhorde, learned Senior Advocate would strenuously submit that since Section 43 of the Arbitration and Conciliation Act, 1996 specifically lays down that the provisions of Limitation Act would be applicable and Section 5 of that Act gives power to condone the delay on sufficient cause being shown, the period of delay is inconsequential. He would submit that there is no reference to this provision of Section 43 in the judgment of the Supreme Court in the case of ***M/s N.V. International*** (supra).

12. With respect, one will have to proceed with the assumption that the Supreme Court was alive to the existence of such a provision in the Statute and still, has proceeded to make these observations.

13. So far as the decisions cited by the learned Senior Advocate on behalf of the applicant, in the case of *Union of India Vs. M/s Varindera Const. Ltd.*, (supra), it has been referred to by the Supreme Court in the case of *M/s N.V International* (supra) and one need not decipher it and suffice to say that referring to this decision, it has now been laid down by the Supreme Court in the case of *M/s N.V International* (supra) as mentioned hereinabove in paragraph No.5 quoted from that judgment (supra).

14. In the case of *Ganesan* (supra), it has been laid down that if any special or local law specifically provides for applicability of provisions of Limitation Act in deciding the appeal by statutory authority, quasi-judicial authority or Tribunal, the provisions of Section 5 of the Limitation Act would apply. Since the Act contains a specific provision under Section 43, obviously even Section 5 of the Limitation Act would be applicable in the matter in hand. However, the point is, when the Supreme Court in the case of *M/s N.V International* (Supra), has emphatically laid down the outer limit beyond which the delay cannot be condoned in respect of appeals under Section 37 of the Act, the applicant is not entitled to derive any benefit from the decision in the case of *Ganesan* (supra).

15. In the case of *State of Madhya Pradesh and another* (supra), the Supreme Court held that Section 5 of the Limitation Act is applicable to the Revisions preferred under Section 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983. Obviously the decision would not have any bearing on the fact situation of the matter in hand.

16. In the case of *Mukri Gopalan* (supra), it was held that Section 5 of the Limitation Act would be applicable for preferring the appeals under the Kerala Buildings (Lease and Rent Control) Act, 1965.

17. In view of such state-of-affairs, there is no sufficient cause and even power to condone the delay which is of more than 120 days. The application is rejected.

[MANGESH S. PATIL]
JUDGE