

OD – 7 & 8

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

AP/207/2017
SURESH KUMAR AGARWAL
Versus
L & T FINANCE LTD

AP/214/2017
SURESH KUMAR AGARWAL
Versus
L & T FINANCE LTD

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA
Date : 6th January, 2021.

[Via Video Conference]

Appearance:
Mr. Shyamal Chakrabarty, Adv.
... for the petitioner

Mr. Rohit Banerjee, Adv.
Ms. Shrayashee Das, Adv.
Mr. Jishnujit Roy, Adv.
... for the respondent

The Court : This application has been filed by the petitioner/award-debtor in a petition for setting aside of an Award dated 6th March, 2010. The petition for setting aside of the impugned Award was filed in this Court on 23rd March, 2017, which was beyond the timelines provided under section 34(3) of The Arbitration and Conciliation Act, 1996. The petitioner hence prays for

excluding the period from 21st May, 2010 to 4th March, 2017 which, according to the petitioner, was spent in pursuing proceedings filed before the learned City Civil Court, Calcutta for setting aside of the Award dated 6th March, 2010. The petitioner seeks to take recourse to section 14 of The Limitation Act, 1963 for the said purpose.

The brief facts leading to the present application are as follows : The respondent/award-holder, financed the purchase of two vehicles by the petitioner under a loan agreement executed between the parties on 26th October, 2006. The respondent invoked the arbitration clause in the Agreement on 12th November, 2008 and took possession of the vehicles on 10th December, 2008. The petitioner filed a Title Suit being T.S. No. 2005 of 2008 for declaration and injunction in the learned City Civil Court, Calcutta which was subsequently converted to an application under section 9 of The Arbitration and Conciliation Act, 1996 in January, 2009. The impugned Award was passed on 6th March, 2010. By the said Award, the respondent financier (claimant before the Arbitrator) was awarded a sum of Rs.10,49,284/- towards the instalments due, future loan instalments, compensation etc. The petitioner challenged the Award by way of an application under section 34 of the 1996 Act on 21st May, 2010 before the City Civil Court within the period of limitation provided under section 34 (3) of the Act. The case of the petitioner is that the impugned Award was served on the petitioner on 29th March, 2010.

Mr. Shyamal Chakraborty learned counsel appearing for the petitioner/award-debtor, places certain facts to urge that the petitioner should

be given the benefit of section 14 of The Limitation Act by reason of the petitioner having pursued the section 34 proceedings in the City Civil Court from 21st May, 2010 to 4th March, 2017. According to counsel, the section 34 application was filed in this Court pursuant to a judgment passed by a Division Bench of this Court in *Sri Sushanta Malik vs. Srei Equipment Finance Limited* : AIR 2015 CAL 335; pronounced on 8th September, 2015. Counsel submits that by this decision, the Division Bench held that if the value of the subject matter of the dispute in arbitration does not exceed Rs.10 lakhs, an application under the 1996 Act can only be entertained by the City Civil Court at Calcutta and not the High Court exercising Original Jurisdiction. Counsel submits that the petitioner filed the said application soon after before this Court on 21st March, 2017 following an order dated 4th March, 2017 passed by the City Civil Court by which the City Civil Court declined to entertain the application under section 34 of the Act. Counsel seeks to take the benefit of exclusion for the period from 21st May, 2010 to 4th March, 2017 on the ground that the petitioner had pursued the proceedings before the City Civil Court in good faith.

Mr. Rohit Banerjee, learned counsel appearing for the respondent/award-holder, opposes the application by relying on section 5 of The City Civil Court Act, 1953 which provides in sub-section 2 thereof that the City Civil Court shall have jurisdiction and the High Court shall not have jurisdiction to try suits and proceedings of a civil nature not exceeding Rs.10 lakhs in value. Counsel submits that the claim in the Award exceeds Rs.10

lakhs and that the petitioner was aware of the limits of the pecuniary jurisdiction of the City Civil Court on the date of filing of the section 34 application. Counsel places section 2 of The City Civil Court (Amendment) Act, 2013 which raised the pecuniary limit of the jurisdiction of the City Civil Court from Rs.10 lakhs to Rs.1 crore. Counsel submits that the judgment of the Division Bench in *Sushanta Malik* would have no relevance to the point urged by the petitioner namely that the petitioner should be given the benefit of excluding the period from 21st May, 2010 to 4th March, 2017 on the ground as stated in the application. It is also submitted that section 14(2) of the Limitation Act requires an applicant to show that the applicant had been prosecuting another civil proceeding in a court of first instance or otherwise with due diligence and in good faith for the purpose of computing the period of limitation and relies on *Ghasi Ram and Ors. Vs. Chait Ram Saini*: (1998) 6 SCC 200 in that regard.

In deciding whether the petitioner was proceeding bona fide before the City Civil Court and would therefore come within the cover of section 14 of The Limitation Act, certain facts would be relevant which are reiterated in brief. The impugned Award dated 6th March, 2010 was served on the petitioner on 29th March, 2010 and the application under section 34 of the Act for setting aside the impugned Award was filed before the City Civil Court on 21st May, 2010. The petitioner pursued this proceeding before the City Civil Court from 21st May, 2010 to 4th March, 2017 when the City Civil Court declined to

entertain the petitioner's application for setting aside of the impugned Award on the ground of pecuniary jurisdiction.

Section 14 of The Limitation Act deals with exclusion of time of proceeding *bona fide* in a court without jurisdiction. Sub-section (2) of section 14 deals with computation of the period of limitation for any application where the applicant has been prosecuting another civil proceeding in a court of first instance etc. against the same party and for the same relief. The window given to an applicant for taking the benefit of computation of the period is circumscribed by the following requirements:

- a. The applicant had been prosecuting the other civil proceeding with due diligence;
- b. The proceeding is between the same parties and for the same relief
- c. The proceeding is prosecuted in good faith; and
- d. The Court is unable to entertain the proceeding for want of jurisdiction.

Black's Law Dictionary, Eighth edition defines "due diligence" as the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. The definition portion further explains that a failure to exercise due diligence may sometimes result in liability and gives the example of a broker recommending a security without first sufficiently investigating it. In *Ghasi Ram*, the Supreme Court expanded on the expression good faith into an act done with due care and attention. "Due care", in turn was explained as sufficient care being taken

so that there was an absence of negligence. On a conjoint reading of the expressions “good faith”, “diligence” and “due care”, all appearing in sections 14 and 2(h) of The Limitation Act, it may be said that an applicant who seeks to take the benefit of the extended window for filing an application must show that the applicant was engaged in the other civil proceeding in good faith and had exercised due care in prosecuting such proceeding. In other words, the applicant had no knowledge of the defect of jurisdiction of the Court in which the proceedings were being continued. Doubtless, when a litigant proceeds contrary to a clearly-expressed enactment or a provision thereof, it can hardly be said that the litigant had proceeded in good faith or had exercised due diligence. In fact, an action taken in patent disregard of an existing law would amount to downright recklessness, or negligence: Ref *Ghasi Ram vs Chait Ram Saini*.

Permitting a litigant to seek the window of a Court with a ‘defect of jurisdiction’ in matters of the pecuniary or territorial jurisdiction of a receiving Court has been fixed would result in an unmanageable trend of cases being filed in Courts regardless of the express bar. This cannot be the objective of enactments fixing the parameters of filing of matters; and opening the gates would lead to indiscriminate filings with scant regard to the law. The benchmark of sufficient care is that of a reasonable man; not a person who either overshoots the benchmark by way of knowledge/expertise or falls short of the basics of what a reasonable man would have done under the circumstances. An illiterate litigant who has no means of ascertaining the

position of law or one who being wholly dependent on legal advice has been wrongly directed by his lawyers, would fall outside the “reasonable man” template. In fact, the Supreme Court in *Ghasi Ram* allowed the benefit of section 14 to the petitioner on account of the negligence on the part of the lawyer whose advice had persuaded the petitioner to take an erroneous course of action. On these facts, the Supreme Court opined that an illiterate litigant cannot be made to suffer when he has been ill-advised by his counsel.

On the date of filing of the application under section 34 of the 1996 Act in the City Civil Court i.e. on 21st May, 2010, the City Civil Court’s pecuniary jurisdiction was limited to Rs.10 lakhs under the 1953 Act. The amount awarded by the learned Arbitrator in the present case being Rs.10,49,284/-, on the date of filing of the application under section 34, the City Civil Court lacked the pecuniary jurisdiction to entertain the application.

In the present case, it cannot be said on any count that the petitioner was unaware of the pecuniary limits of the City Civil Court on the date of filing of the application for setting aside of the Award. As on 21st May, 2010, since there was a clear enactment containing a bar on the City Civil Court from trying suits and proceedings of a civil nature exceeding Rs.10 Lakhs. The position of law was unambiguous and there was no scope of any doubt or possibility of interpretation in that regard.

“Good faith” has been defined in section 2(h) of The Limitation Act as;

“2(h) good faith:- Nothing shall be deemed to be done in good faith which is not done with due care and attention.”

With regard to the “good faith” requirement, it should also be pointed out that the order dated 31st March, 2010 passed by a learned Judge in an application of the petitioner under section 11 of the 1996 Act makes certain relevant observations. The Court noted that the petitioner came to know of the reference upon the receipt of a letter dated 9th April, 2009 and that the reference had already been concluded and the award passed when the application under section 11 was taken up. The order of the learned single Judge further records that a copy of the award has been appended to the affidavit-in-opposition of the respondent and that clause 17.2 of the loan-cum-hypothecation agreement executed between the parties provides that the venue of the arbitration shall be Mumbai. Significantly, the learned Judge also notes that the petitioner was aware of the reference and that the petitioner should hence take the recourse available in law for assailing the award. The learned Judge proceeded to reject the application of the petitioner under section 11 of the Act on the ground that the petitioner was aware of the reference. This order remains unchallenged till date.

Lastly, the judgment of the Division Bench in *Sushanta Malik* was in answer to a reference resulting from two conflicting decisions on the issue whether the City Civil Court had jurisdiction to entertain proceedings under the 1996 Act where the pecuniary value of the subject matter of arbitration is less than Rs.10 lakhs and second, whether the High Court in exercise of its Ordinary Original Civil Jurisdiction has exclusive jurisdiction to entertain all proceedings under the 1996 Act, irrespective of the pecuniary value thereof.

Answering the reference, the Division Bench opined that if the value of the subject matter of the disputed arbitration does not exceed Rs.10 lakhs, an application under the 1996 Act can only be entertained by the City Civil Court and not the High Court exercising Original Jurisdiction; but where the value of the subject matter of the disputed arbitration exceeds Rs.10 lakhs, it is the Original Side of the High Court which would have jurisdiction to entertain an application under the 1996 Act. The judgment of the Division Bench was delivered on 8th September, 2015. The petitioner seeks to rely on this decision as the primary plank which would entitle the petitioner to seek refuge in section 14 of The Limitation Act, the issue regarding the jurisdiction of the City Civil Court being finally decided by the Division Bench. The question however remains whether the Division Bench judgment would serve the purpose of including 2010 to 2017 within the framework of section 14. The answer to this question must be in the negative since the order dated 4th March, 2017 of the City Civil Court declined to entertain the section 34 application filed by the petitioner on 21st May, 2010 on the ground that the City Civil Court lacked the pecuniary jurisdiction to do so, the Award being in excess of Rs.10 lakhs. The order has no nexus with the judgment of the Division Bench in *Sushanta Malik* nor does the order record any such reason. Hence, the mainstay of the petitioner's case that the petitioner should be allowed to take the benefit of the Division Bench judgment as a culmination of the ongoing proceedings, fails.

For the above reasons, this Court is of the view that the present application under section 34 of the 1996 Act which was filed in this Court on

23rd March, 2017 is barred under the timelines contemplated under section 34(3) of the Act and the petitioner cannot be permitted to take recourse the benefit of section 14 of The Limitation Act.

AP No. 214 of 2017 is accordingly dismissed without any order as to costs.

Since it has been held that the petitioner is not entitled to the exclusion of the period claimed in the application as stated above, AP No.207 of 2017 for setting aside of the impugned Award dated 6th March, 2010 is also dismissed without any order as to costs.

(MOUSHUMI BHATTACHARYA, J.)