

\$~7(2021)

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

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Date of decision:02.12.2021

+ **FAO (COMM) 115/2021& CM APPL. 21216/2021**

**SOUTH DELHI MUNICIPAL
CORPORATION & ANR**

..... Appellants

Through : Mr. Kunal Vajani, Standing Counsel
for SDMC with Mr. Kunal Mimani,
Mr. Varun Ahuja and Mr. Shubhang
Tandon. Advs.

versus

PURNANAND

..... Respondent

Through : Mr. Rajeev Kumar with Mr. Sarfaraz
Ansari, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE TALWANT SINGH

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.(ORAL):-

Preface:-

1. This is an appeal directed against the order of the learned Single Judge dated 04.03.2021, passed in an application preferred by the appellants under Section 36(2) of the Arbitration and Conciliation Act, 1996 [in short 'the 1996 Act'].

1.1. The said application was preferred by the appellants for staying the execution of the award dated 27.02.2019, passed by the arbitral tribunal.

1.2. The Learned District Judge (Commercial Court-02), West District, Tis Hazari Courts, Delhi [in short "the Learned District Judge"], while dealing

with the aforementioned application, concluded that the main proceedings preferred by the appellants i.e., in the form of Section 34 petition was beyond limitation, and, therefore, both, the Section 36(2) application and the Section 34 petition, instituted under the 1996 Act, were not maintainable. This resulted in the dismissal of not only the Section 36(2) application but also the petition filed by the appellants under Section 34 of the 1996 Act.

1.3. It is against this order, as noticed above, that the appellants have preferred the present appeal.

2. Before we proceed further, there are two fundamental legal markers that need to be reiterated and concerning these markers, there can hardly be any doubt.

2.1 First, that Section 5 of the Limitation Act, 1963 is not applicable to the Section 34 proceedings filed under the 1996 Act. [See *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470 and *Simplex Infrastructure Ltd. v. Union of India*, (2019) 2 SCC 455.]

2.1(a) This position obtains on account of various courts including the Supreme Court in the aforementioned judgments holding that the 1996 Act is a special Act, and, therefore, the language of sub-section (3) of Section 34 of the 1996 Act does not permit condonation of delay in filing a petition under Section 34 of the very same Act, beyond the prescribed period of three months and thirty [30] days from the date of receipt of the arbitral award.

2.1(b) The Supreme Court has, in the aforementioned judgements, in this behalf, laid emphasis on the expression “but not thereafter” found in the proviso to sub-Section (3) of Section 34 of the 1996 Act. The Supreme Court, in this context, has also referred to Section 29(2) of the Limitation

Act, 1963 [in short ‘the 1963 Act’], which, *inter alia*, excludes the provisions of Sections 4 to 24 of the 1963 Act, where special acts or local laws, such as the 1996 Act, provide for specific period of limitation.

2.2. Second, although the provisions of Section 5 of the 1963 Act are not applicable to the petition filed under Section 34 of the 1996 Act, Section 14 of 1963 Act is applicable. [See *Consolidated Engg. Enterprises v. Irrigation Deptt.*, (2008) 7 SCC 169 and *M.P. Housing Board v. Mohanlal & Co.*, (2016) 14 SCC 199.]

Backdrop:-

3. With this preface, what is required to be noticed for adjudicating the present appeal is the following dates and events, which are not, in dispute.

3.1. As noticed above, the award was rendered by the arbitral tribunal on 27.02.2019. It was received by the appellants, admittedly, on the same date i.e., 27.02.2019.

3.2. Evidently, the respondent had moved an application under Section 33(4) of the 1996 Act. The arbitral tribunal disposed of the said application, on 08.08.2019. It is, once again, not disputed by the appellants that the order concerning the disposal of this application was received by them on 08.08.2019.

3.3. The appellants lodged a petition with the Registry of this Court under Section 34 of the 1996 Act, on 07.11.2019. Upon scrutiny by the Registry, the Registry pointed out thirty four (34) defects in the Section 34 petition lodged by the appellants on 11.11.2019.

3.3(a) Crucially, one of the defects pertained to the aspect concerning pecuniary jurisdiction. The Registry pointed out to the appellants that the petition filed under Section 34 of the 1996 Act did not contain an assertion

with regard to pecuniary jurisdiction.

3.3(b) Although, the defects were pointed out by the Registry, the appellants slept over the matter for nearly three months, and re-lodged the petition under Section 34 of the 1996 Act only, on 28.02.2020.

3.3(c) We may note, at this juncture, that according to the respondent, out of the 34 defects pointed out by the Registry of this Court, only 12 defects were removed. It is, however, the case of the appellants that some defects overlapped, and, therefore, this figure i.e., the number of defects is inaccurate. However, the fact remains, and something which is not disputed by the appellants, is that the defect concerning pecuniary jurisdiction was not addressed by the appellants.

3.3(d) The appellants, instead of retrieving the petition from the Registry of this Court, proceeded to lodge a fresh petition under Section 34 of the 1996 Act, along with an application under Section 36(2) of the very same Act, with the concerned district court, on 15.12.2020.

3.4. The situation which obtained, after the appellants had lodged a fresh Section 34 petition along with an application, as noticed above, was that there were two actions pending in two different courts concerning the same arbitral award.

3.5. It is in this background that the Learned District Judge passed the impugned order.

Submissions of the counsel for the parties:-

4. Mr Kunal Vajani, who appears on behalf of the appellants, says that since a petition had been lodged in this Court, which had not been retrieved, there were no abatement of the proceedings, and, therefore, the period between 07.11.2019 i.e., when the Section 34 petition was first instituted in

this Court, and 15.12.2020 i.e., when a fresh petition was filed under Section 34 of the 1996 Act with the concerned district court, should be excluded, in view of the principles set forth under Section 14 of the 1963 Act.

4.1. Furthermore, Mr. Vajani says that since the clerk engaged by him had resigned sometime in November, 2019, there was a delay in lodging a fresh petition with the concerned district court.

4.2. In sum, it is Mr. Vajani's submission that the appellants employed due diligence, and prosecuted their action in good faith, albeit, in the Court which lacked the pecuniary jurisdiction to entertain the action.

5. Mr. Rajiv Kumar, who appears on behalf of the respondent, contends otherwise. It is his submission that the appellants, even in their fresh Section 34 petition filed before the district court, continued to aver that the said petition has been filed, within the prescribed period. For this purpose, our attention has been drawn to paragraphs 6 and 10 of the petition filed under Section 34 by the appellants, with the concerned district court.

5.1 Furthermore, it is pointed out by Mr. Kumar that, although, several opportunities were given to the appellants to explain the delay, no explanation was rendered by the appellants.

5.2 It is Mr. Kumar's submission that the appellants conduct, in this context, can be appreciated by having regard to the fact that no steps were taken to file an application under Section 14 of the 1963 Act, before the Learned District Judge.

5.3. It is also Mr. Kumar's contention that insofar as Mr Vajani's submission is concerned that because his clerk had resigned at the relevant point in time, and, therefore some leeway should be given, is not an excuse which this court should entertain, as this submission/assertion was not made

before the Learned District Judge.

6. In rejoinder, Mr. Vajani adverted to the fact that it is not mandatory for a litigant to file an application under Section 14 of the 1963 Act, and that since the facts were not in dispute, this is an aspect which can be appreciated by the Court, based on what is on record- as it, then, morphs into a question of law rather than a mixed question of law and fact.

6.1. It is also Mr. Vajani's submission that the delay in re-filing does not comport with the provisions of Section 34(3) of the 1996 Act. In support of this plea, Mr. Vajani has placed reliance on the judgment of the Supreme Court rendered in *Northern Railways vs. Pioneer Publicity Corporation Private Limited*. (2017) 11 SCC 234.

Analysis and Reasons:-

7. We have heard the learned counsel for the parties and perused the record.

8. As indicated above, the dates and events are not in dispute, and, therefore, what has emerged based on appreciation of facts and events is as follows:

8.1. Although, the initial petition filed before this Court was within time i.e., within a period of three months as provided under Section 34 of the 1996 Act, the delay which occurred, thereafter, is what is in issue before us.

8.2. As noted hereinabove, while narrating the facts obtaining in the present case, the Registry of this Court, on 11.11.2019, had drawn the appellants' attention to the absence of an assertion [in the Section 34 petition filed in this Court], concerning pecuniary jurisdiction.

8.3. However, the appellants chose not to take corrective measures. The appellants, instead, relodged the Section 34 petition in this Court by seeking

to cure some defects, even while failing to cure the principal defect, which concerned pecuniary jurisdiction.

8.4. Therefore, the act of re-filing the Section 34 petition, on 28.02.2020, in the Registry of this Court, even according to the appellants, was act carried out to pursue action in a court which had no jurisdiction.

9. Hence, the first time around, corrective measures were taken was, when a fresh petition under Section 34, along with an application under Section 36(2) of the 1996 Act was lodged in the concerned district court i.e., on 15.12.2020.

9.1. If one were to apply the provisions of sub-section (2) of Section 14 of the 1963 Act, [which will be applicable in this case, as against sub-section (1) as this is not a suit but a petition], it is clear that the exclusion of time, which is what the said provision of 1963 Act provides for, can only take place, if the concerned court concludes that the party seeking such leeway was prosecuting another civil proceedings with due diligence in the court of first instance [in this case, before this Court], and that such proceeding is prosecuted in good faith.

10. Having regard to the events that we have noticed above, it is quite evident that there was neither due diligence nor was the prosecution of the action in this Court, being carried out in good faith.

10.1. The appellants continued to take an obdurate position, as it were, that the action lodged in this Court was, tenable in law. This position, as noticed above, was corrected only when a fresh petition was filed on 15.12.2020, with the concerned district court.

11. Therefore, having regard to the aforesaid, we are of the view that the conclusion reached by the Learned District Judge, cannot be found fault

with.

11.1. As noticed above, the fresh petition under Section 34 of the 1996 Act was filed with the concerned district court only, on 15.12.2020.

12. The argument advanced by Mr. Vajani that because the Section 34 petition filed in this Court was not retrieved, and, therefore, the action had not aborted, giving room to file the petition as late as on 15.12.2020 is completely misconceived.

12.1. Once the Registry of this Court had indicated that there was a defect in the section 34 petition which concerned pecuniary jurisdiction, the onus was on the appellants to cure the defect and take corrective measures, in that behalf. The fact that corrective measures were taken [albeit, after almost one year] only shows that the objection raised by the Registry had weight, and could not be brushed aside. If we were to accept Mr Vajani's submission it would result in an absurd situation, which is, even if the appellants filed the fresh petition after several years as long as the petition filed in this court was not retrieved, the entire period would stand excluded.

13. Before we conclude, we may only advert to the observations made by the Supreme Court in the judgment rendered in *Simplex Infrastructure Ltd.* Case, as it sums up the legal position qua limitation in the context of a Section 34 action, under the 1996 Act:

“...18. A plain reading of sub-section (3) along with the proviso to Section 34 of the 1996 Act, shows that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 could be made within three months and the period can only be extended for a further period of thirty days on showing sufficient cause and not thereafter. The use of the words “but not thereafter” in the proviso makes it clear that the extension cannot be beyond thirty days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent,

there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section (3) read along with the proviso to Section 34 of the 1996 Act. The delay of 131 days cannot be condoned. To do so, as the High Court did, is to breach a clear statutory mandate.

19. The respondent received the arbitral award on 31-10-2014. Exactly ninety days after the receipt of the award, the respondent filed an application under Section 34 of the 1996 Act before the District Judge, Port Blair on 30-1-2015. On 12-2-2016, the District Judge dismissed the application for want of jurisdiction and on 28-3-2016, the respondent filed an application before the High Court under Section 34 of the 1996 Act for setting aside the arbitral award. After the order of dismissal of the application by the District Judge, the respondent took almost 44 days (excluding the date of dismissal of the application by the District Judge and the date of filing of application before the High Court) in filing the application before the High Court. Hence, even if the respondent is given the benefit of the provision of Section 14 of the Limitation Act in respect of the period spent in pursuing the proceedings before the District Judge, Port Blair, the petition under Section 34 was filed much beyond the outer period of ninety days...”

14. Thus, for the following reasons, we find no merit in the appeal, save and except the direction issued concerning payment of costs by the appellants.

15. The Registry will, thus, remit the money deposited in this Court to the concerned executing Court, which is seized of the Execution Petition no. 102/2020.

15.1. The concerned District Judge will ensure that the money remains invested in an interest-bearing security, till such time, appropriate orders are passed either in the execution petition or by any other Court with regard to the fate of the money deposited against the award by the appellants.

16. However, having regard to the fact that the appellants are strapped for

cash, the direction contained in the impugned order dated 04.03.2021 passed by the Learned District Judge with regard to costs, shall stand excised.

16.1. For the record, we may note, Mr. Kumar says that he has no objection to such a direction being issued by us.

17. The appeal is disposed of in the aforesaid terms. Consequently, pending application shall also stand closed.

(RAJIV SHAKDHER)
JUDGE

(TALWANT SINGH)
JUDGE

DECEMBER 02, 2021
rb/dss

Click here to check corrigendum, if any