

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

AP 486 of 2022

UNION OF INDIA & ANR.

VERSUS

M/S PREMCO-GPT JV

For the Petitioner : Mr. Indrajeet Das Gupta, Adv.
Ms. Sanchita Barman, Adv.

For the Respondent : Mr. Anuj Kr Mishra, Adv.
Mr. Shahrukh Raja, Adv.

Last Heard On: February 20th, 2023

Judgement On: March 20th, 2023

Shekhar B. Saraf, J.:

1. The instant application by the petitioner Union of India (hereinafter referred to as the 'award debtor') under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') arises out of an arbitral award dated June 18, 2021 passed by the Arbitral Tribunal of Mr. Arunendra Kumar, Mr. Shahzad Shah and Mr. Mahesh Gupta

(hereinafter referred to as the 'impugned award'). The respondent is Premco-GPT (JV).

2. The petitioner also seeks the leave of this Court to condone the delay in filing the instant application.

Facts

3. I have mapped out the factual matrix of the present application below:
 - a. The petitioner invited open tender for "Earth work in cutting and embankment with mechanical compaction, supplying, spreading & compaction of stone dust blanketing, extension of existing Major and Minor bridges, construction of new P.F., P.F. Shed, FOB etc. in connection with doubling between station Dakshin Barasat (Km 41.78) and Lakshmikantapur (Km 61.46)". The petitioner issued a letter of acceptance in relation to the said tender to the respondent on January 15, 2010. The original completion date for the said project was July 14, 2011, which was extended from time to time, with the last extension being up to April 15, 2015.
 - b. The petitioner short-closed the contract on July 9, 2015, by invoking Clause 61 of the General Conditions of Contract as the petitioner failed to provide land for the platform at Madhabpur station. Subsequently, disputes arose between the parties, and the

respondent invoked arbitration on September 17, 2019, and sought for appointment of a departmental arbitrator. The General Manager of Eastern Railway referred the dispute to the arbitral tribunal vide its letter dated October 14, 2020.

- c. The arbitral tribunal published an Award on June 18, 2021. It made an award for INR 1,35,66,116/- (One Crore Thirty-Five Lakhs Sixty Six Thousand One Hundred Sixteen Rupees Only) in favor of the respondent along with simple interest of 9% on the unpaid amount of the award.
- d. The petitioner filed the instant application under Section 34 of the Act on June 30, 2022, after a delay of nearly 377 (Three Hundred Seventy-Seven) days.

Contentions

- 4. Mr. Indrajeet Dasgupta, counsel appearing on behalf of the petitioner, has made the following averments in support of the maintainability of the instant application on grounds of limitation:

- a. The counsel submits that in light of the Order of the Supreme Court in **Suo Motu Writ Petition (C) No. 3 of 2020** passed on January 10, 2022, in **Re: Cognizance For Extension of Limitation**, the prescribed period of limitation for filing an

application under Section 34 of the Act will begin from March 1, 2022.

b. The counsel submits that the delay in filing the instant application happened because the same was referred to the superior authorities for sanction of filing after the publication of the award. As per the counsel, after the sanction was accorded in April 2022, the matter was referred to the Ministry of Law and Justice. The counsel further submits that the Ministry of Law & Justice appointed him on April 27, 2022, and after such appointment, several meetings were held. As a result of the same, he submits that there is a delay of thirty days which needs to be condoned.

c. The counsel submits the following calculation of the limitation period: -

- *Date of Award: June 18, 2021*
- *Date of Filing: June 30, 2022*
- *Total number of days (delay): 377*
- *Period to be excluded as per Judgment of Supreme Court*
Suo Moto Writ Petition (C) No. 3 of 2020 (March 15, 2020, to February 28, 2022) (June 18, 2021, to February 28, 2022, here):
256 Days
- *The limitation period for filing Section 34 Application is 3 months.*
In the present case, Months of March, April and May 2022 (31 + 30 + 31): 92 Days

- *Therefore, there is a delay of 29 (378-256-92) days which the Court can condone under proviso of Section 34 (3).*

d. The counsel, in support of his contentions, cited the judgment of the Supreme Court in ***State of H.P. -v- Himachal Techno Engineers*** reported in **(2010) 12 SCC 210**. He cited the following paragraphs:

“Re: Question (ii)

14. The High Court has held that “three months” mentioned in Section 34(3) of the Act refers to a period of 90 days. This is erroneous. A “month” does not refer to a period of thirty days, but refers to the actual period of a calendar month. If the month is April, June, September or November, the period of the month will be thirty days. If the month is January, March, May, July, August, October or December, the period of the month will be thirty-one days. If the month is February, the period will be twenty-nine days or twenty-eight days depending upon whether it is a leap year or not.

15. Sub-section (3) of Section 34 of the Act and the proviso thereto significantly, do not express the periods of time mentioned therein in the same units. Sub-section (3) uses the words “three months” while prescribing the period of limitation and the proviso uses the words “thirty days” while referring to the outside limit of condonable delay. The legislature had the choice of describing the periods of time in the

same units, that is, to describe the periods as “three months” and “one month” respectively or by describing the periods as “ninety days” and “thirty days” respectively. It did not do so. Therefore, the legislature did not intend that the period of three months used in sub-section (3) to be equated to 90 days, nor intended that the period of thirty days to be taken as one month.

16. Section 3(35) of the General Clauses Act, 1897 defines a “month” as meaning a month reckoned according to the British calendar.

17. In *Dodds v. Walker* [(1981) 1 WLR 1027 : (1981) 2 All ER 609 (HL)] the House of Lords held that in calculating the period of a month or a specified number of months that had elapsed after the occurrence of a specified event, such as the giving of a notice, the general rule is that the period ends on the corresponding date in the appropriate subsequent month irrespective of whether some months are longer than others. To the same effect is the decision of this Court in *Bibi Salma Khatoon v. State of Bihar* [(2001) 7 SCC 197] .

18. Therefore when the period prescribed is three months (as contrasted from 90 days) from a specified date, the said period would expire in the third month on the date corresponding to the date upon which the period starts. As a result, depending upon the months, it may mean 90 days or 91 days or 92 days or 89 days.”

e. The counsel also submitted that alternatively, from March 1st, 2022, the petitioner had 90 days to file the application. The counsel further submits that the 90th day from March 1, 2022, expired on May 30, 2022, a day on which the Court was closed. The counsel prays that as such when the period of limitation expires on a date when the Court is closed, the application may be preferred, instituted or made on the day when the Court reopens according to Section 4 of the Limitation Act. As such, according to the Counsel, the application ought to have been filed on June 6, 2022. The instant application, counsel submits was filed on June 30th, 2022, and there is a delay of 24 days which the Court can condone under proviso of Section 34(3) of the Act.

5. Mr. Anuj Kr Mishra, counsel appearing for the respondent, has made the following submissions on the issue of limitation:

- a. The counsel submits that the period of limitation as prescribed by the Supreme Court, vide its order in **Suo Motu Writ Petition (C) No. 3 of 2020** came to an end on June 1, 2022, and as such, no further extension can be granted.
- b. The counsel submits that the proviso to Section 34(3) of the Act entails a situation only where the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the period of three months, that the court “may

entertain” the application within a further period of 30 days but not thereafter. The counsel further submits that the said proviso would not apply in the instant case since, as per the counsel, the petitioners have sought to rely on the Supreme Court judgment and the explanation which is sought to be made by the petitioner cannot fulfil the ingredients of the proviso under Section 34(3) of the Act.

- c. The counsel additionally submits that no explanation has been submitted by the petitioner for the period of April 2022 and June 2022, and mere explanation of delay caused by red-tapeism cannot and should not be construed as “sufficient cause” which purportedly prevented the petitioner from preferring the instant petition before this Court.
- d. The counsel in support of his contentions put forward the judgment of the Supreme Court in ***State of H.P. -v- Himachal Techno Engineers*** reported in **(2010) 12 SCC 210**. He draws the attention of this Court to following paragraph:

“6. This leads us to the question whether the petition was filed beyond three months plus thirty days. There is no dispute that if the petition had been filed within a period of three months plus thirty days, the delay has to be condoned as sufficient cause was shown by the appellant for condonation of the delay. But the High Court

has accepted the contention of the respondent that the period of three months plus thirty days expired on 10-3-2008 and, therefore, the petition filed on 11-3-2008 was barred. Therefore, the following questions arise for our consideration:

(i) What is the date of commencement of limitation?

(ii) Whether the period of three months can be counted as 90 days?

(iii) Whether only three months plus twenty-eight days had expired when the petition was filed as contended by the appellant, or whether petition was filed beyond three months plus thirty days, as contended by the respondent?”

Observations

6. I have heard the counsel appearing on behalf of the parties and perused the available material.
7. At the very outset, I would like to point out that while courts must have due regard for limitation while entertaining any application, they must also consider the power and the intent behind the power to extend that limitation. The purpose of limitation is not to act as a barrier in the flow of justice, but to effectuate and regulate that flow. While a particular statute fixes a lifespan of limitation for a particular legal application, it also provides a limited way out of it. And that in my opinion, that is

because, life is not simple. No one knows what will happen the next moment. Practicalities of life lie beyond the black and white letter of law.

8. Keeping in mind that the issue of limitation hangs over the instant challenge under Section 34 of the Act, I will deal with the issue of condoning of delay first before proceeding to hear the challenge on its merits. Since, Section 34 (3) of Arbitration & Conciliation Act, 1996 Act bears relevance here it would be prudent to reproduce that provision here –

“34(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.”

The Arbitration and Conciliation Act, 1996 has been framed in a way to grant relief to the litigants in an expeditious manner and Section 34(3) was framed along the same lines. However, as discussed earlier, one cannot ignore the practicalities of life and the issues that one might

face. Minor issues that occur during the normal course of business should not prevent a litigant from knocking at the doors of the Court. In my opinion, that would go against the very essence of the provision and go against the principle of ensuring effective justice. And to prevent that, proviso to Section 34(3) allows the Court to condone the delay up to thirty days beyond the statutory mandated limit of three months.

9. But, the matrix of the present controversy lies in determining whether such extendable period exists in the present case or not. It is not disputed that the award was published on June 18, 2021. The counsel, appearing for the award debtor argued that in light of Supreme Court's Judgment in **Cognizance For Extension of Limitation, In Re** reported in **(2022) 3 SCC 117**, the period between **March 15, 2020** till **February 28, 2022** will not be included while computing the limitation period. It will be cogent to reproduce the relevant portions of the said judgment below:

“5.1. The order dated 23-3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 is restored and in continuation of the subsequent orders dated 8-3-2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452 , 27-4-2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231, and 23-9-2021 [Cognizance for Extension of Limitation, In re, 2021 SCC OnLine SC 947] , it is directed that the period from 15-3-2020 till 28-2-2022 shall stand

excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

5.2. Consequently, the balance period of limitation remaining as on 3-10-2021, if any, shall become available with effect from 1-3-2022.

5.3. In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall apply.

5.4. It is further clarified that the period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

10. Since, in the present case the award was passed on June 18, 2021, which is covered by the order of the Supreme Court in aforesaid case, the period of three months, which is the prescribed period of limitation for filing a challenge under Section 34 of the Act, will only start running from March 1, 2022, in accordance with the said order. However, the same will end on May 31st, 2022. The present application was filed by the award debtor 30 days thereafter, on June 30, 2022. Since, the proviso to Section 34(3) as discussed earlier, bestows this Court with a power to condone a delay of upto 30 days, I am of the view that the same shall be allowed.
11. In light of the aforesaid findings and discussion, the delay of 30 days in filing the instant application is condoned. Accordingly, the present application is admitted, and challenge on maintainability is dismissed. The same shall be adjudicated on merits, in accordance with the law.
12. There shall be no order as to costs.
13. The respondent is directed to file their affidavit-in-opposition within 5 weeks from the date of this judgment. Reply, if any, to be filed within 3 weeks thereafter.

14. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)