

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
(COMMERCIAL DIVISION)**

Present:

The Hon'ble Justice Shekhar B. Saraf

AP 737 of 2022

STATE OF WEST BENGAL AND ORS.

VERSUS

RAJPATH CONTRACTORS AND ENGINEERS LIMITED

For the Petitioners : Mr. S.N. Mookherjee, Ld. Advocate General
Mr. Samrat Sen, Sr. Adv.
Mr. Paritosh Sinha, Ld. AOR
Mr. Shourya Samanta, Adv.

For the Respondent : Mr. Priyankar Saha, Adv.
Ms. Srijani Mukherjee, Adv.

Last Heard On: April 20, 2023

Judgement On: May 04, 2023

Shekhar B. Saraf, J.:

1. The instant application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') by the petitioners, State of West Bengal through the Secretary, Public Works

Department, Kolkata (hereinafter referred to as the 'award debtor') arises out of an arbitral award dated June 30, 2022 passed by Shri Bibek Raha, Sole Arbitrator. The respondent in the instant application is Rajpath Contractors and Engineers Ltd. (hereinafter referred to as the 'award holder').

2. The award holder has raised a challenge on the grounds of maintainability wherein it has argued that the instant application has been filed beyond the period of limitation as provided under the Act. The said challenge was vehemently opposed by the petitioners, and hence, in this judgment, I have only dealt with the point of maintainability of the Section 34 application.

Facts

3. I have mapped out the factual matrix of the instant *lis* below:
 - a. In 1996, the award debtor invited tenders for "Construction of Prestressed Concrete Bridge on Well Foundation over River Tangon at 16 K.M. Gazole-Bamangola Road in the District of Malda". The award holder submitted its tender on January 29, 1996 wherein the letter of intent was issued on October 9, 1996 and the work order was issued on November 12, 1996 by the award debtor. The project was completed by the award holder on January 5, 2006.

- b. On September 11, 2009, the award holder sent a letter to the award debtor raising several claims. By another letter dated October 15, 2009, the award holder invoked the arbitration clause. In terms of the arbitration clause incorporated in the tender conditions, arbitration was first referred to Shri Santanu Basu Rai Choudhury, Chief Engineer, Public Works (Roads) Department. Being unable to undertake the reference himself, Shri Santanu Basu Rai Choudhury appointed Shri Bibek Raha as the Sole Arbitrator. The said arbitrator entered reference on November 19, 2009.
- c. An award was passed on June 30, 2022 directing the award debtor to pay a sum of INR 2,11,67,054.00 (Two Crores Eleven Lakhs Sixty Seven Thousand Fifty Four Rupees Only) including INR 5 Lakhs costs along with interest at 15% per annum after expiry of 90 days from the date of award till the date of payment. The copy of the arbitral award was received by the parties on June 30, 2022 itself.
- d. On October 31, 2022, the award debtor filed the instant application praying for setting aside of the said arbitral award.

Contentions

4. Mr. S.N. Mookherjee, learned Advocate General, appearing on behalf of the award debtor has made following submissions on the point of maintainability –
 - a. The learned Advocate General relied upon Sections 3(35) and 9 of the General Clauses Act, 1897 to submit that the prescribed period of limitation that is three months from the date of receipt of the arbitral award started on July 01, 2022. The learned Advocate General contended that the said period would expire on the corresponding date after three calendar months, that is, on October 01, 2022 which happened to be the first day of the Puja Vacations.
 - b. He argued that as the last day of filing the instant application fell on October 01, 2022 that is the day the Court was closed, the benefit of Section 4 of the Limitation Act, 1963, read with Section 12 of the Limitation Act, 1963, must be extended to the award debtor. Consequently, the three months period expired on October 31, 2022 that is the day this Court reopened after the Puja Vacations. The learned Advocate General contended that as the instant application was filed on October 31, 2022, the same falls within the prescribed

period that is three months as provided under Section 34(3) of the Act.

- c. Not forgoing the above, the learned Advocate General proceeded to further argue that proviso to Section 34(3) of the Act shall become completely otiose if the Court holds that the prescribed period for filing the instant Section 34 challenge expired on September 30, 2022. Elaborating the aforesaid argument, he submitted that apart from the prescribed period the proviso to Section 34(3) of the Act grants the award debtor with a further period of thirty days to challenge an arbitral award provided sufficient cause is shown to the Court to explain the delay in filing the said challenge. As September 30, 2022 happened to be the last working day before the Court closed for Puja Vacations, the entire extendable period of thirty days fell within the holidays which thereby compelled the award debtor to file the instant Section 34 application on October 31, 2022 that is the day when the Court reopened after Puja Vacations. Therefore, the learned Advocate General contended that, given the facts and circumstances of the instant case, the award debtor be permitted the relief under Section 4 of the Limitation Act, 1963.

5. Mr. Priyankar Saha, counsel for the award holder has made the following submissions on the point of maintainability –

- a. The counsel submitted that the prescribed period of three months for challenging the award under Section 34(3) of the Act started on July 1, 2022 and lapsed on September 30, 2022. The counsel further submitted that the extendable period of thirty days would end on October 30, 2022 and as this application was filed on October 31, 2022, the same should be dismissed.
- b. The counsel cited the judgment of the Supreme Court in ***State of Himachal Pradesh and Another -v- Himachal Techno Engineers and Another*** reported in **(2010) 12 SCC 210** to argue that the prescribed period of limitation expired on September 30, 2022 and not on October 01, 2022.
- c. The learned counsel then relied upon the judgment of the Supreme Court in ***Assam Urban Water Supply & Sewerage Board -v- Subash Projects & Mktg. Ltd.*** reported in **(2012) 2 SCC 624** to argue that the benefit of Section 4, Limitation Act, 1963 is applicable only where the prescribed period expires on a day when the Court is closed. Therefore, the counsel contended that the benefit of the aforesaid section must not be extended to the award debtor.

- d. The learned counsel also placed reliance on the judgment of the Supreme Court in ***Bhimashankar Sahakari Sakkare Karkhane Niyamita -v- Walchandnagar Industries Ltd. (WIL)*** reported in **2023 SCC OnLine SC 382** which reaffirmed the decision in ***Assam Urban (supra)***.

Observations and Analysis

6. I have heard the learned counsel appearing on behalf of the respective parties and perused the materials on record.
7. Since the question of limitation is at the centre point of the present application, I will proceed to deal with the same without any ado. I have always believed that limitation or procedural hurdles should not act as barriers on the carriageway to justice. But that does not indicate that the flow of traffic must not be regulated to ensure orderly movement and prevent frequent accidents. Therefore, the Limitation Act, 1963 is not an obstacle per se, but rather aids in effectuating the flow of justice. I am of the firm opinion that legal remedies should not be available endlessly or else the very purpose for which they exist will be defeated.

8. In the instant case, the limitation period for filing a challenge to an arbitral award is governed by Section 34(3) of the Act. It will be prudent on my part to reproduce the provision below :-

“34. Application for setting aside arbitral awards.

- (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.”

Hence, the party which seeks to challenge an arbitral award has to file its Section 34 application within three months from the date of receipt of the arbitral award. The proviso that follows sub-section (3) of Section 34 provides that, on sufficient cause being shown, the Court may entertain the said application after the period of three months and within a further period of 30 days but not thereafter.

9. In the present case, the arbitral award was passed on June 30, 2022 and was received by the parties on the same day itself. It is not in dispute

that the limitation clock will start ticking on July 1, 2022 because in terms of Section 9 of the General Clauses Act, 1897, when the word 'from' is used in reference to commencement of time, the first of the days in the period of time shall be excluded. The said section has been reproduced below for ease of reference :-

"9. Commencement and termination of time.—(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to"."

10. Moving on, the learned Advocate General submitted that the three months period for filing the present Section 34 application expired on October 1, 2022, whereas Mr. Saha argued that the said period lapsed on September 30, 2022. It is the case of the award holder that as the three months period expired on October 1, 2022 that is the day when the Court was closed for Puja Vacations, the benefit of Section 4 of the Limitation Act, 1963 shall apply to the present factual situation.

11. Before proceeding ahead to adjudicate the aforesaid contention, it would be prudent on my part to reproduce Section 4 of the Limitation Act, 1963 as follows :-

4. Expiry of prescribed period when court is closed.—Where the prescribed period for any suit, appeal or application expires on a

day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens. Explanation.— A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day”

The words ‘prescribed period’ has been defined in Section 2(j) of the Limitation Act, 1963 as follows:-

“2. (j) ‘period of limitation’ which means the period of limitation prescribed for any suit, appeal or application by the Schedule, and ‘prescribed period’ means the period of limitation computed in accordance with the provisions of this Act;”

12. It has conclusively held by the Supreme Court in **Assam Urban (supra)** that the three months period to challenge an arbitral award as provided in Section 34(3) of the Act shall be considered as the prescribed period for the purposes of Limitation Act, 1963. Further, Section 4 will only apply in cases where the ‘prescribed period’ ends on a day when the court is closed. The relevant paragraph has been extracted below :-

“13. The crucial words in Section 4 of the 1963 Act are “prescribed period”. What is the meaning of these words?

14. Section 2(j) of the 1963 Act defines:

“2. (j) ‘period of limitation’ [which] means the period of limitation prescribed for any suit, appeal or application by the Schedule, and ‘prescribed period’ means the period of limitation computed in accordance with the provisions of this Act;”

Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for

making an application for setting aside an arbitral award is three months. The period of 30 days mentioned in the proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the “period of limitation” and, therefore, not the “prescribed period” for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the “period of limitation” or, in other words, the “prescribed period”, in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case.”

(emphasis added)

Furthermore, by relying upon **Assam Urban (supra)**, the apex court in the case of **Bhimashankar (supra)** reaffirmed that where the prescribed period for filing an application ends on a day when the court is closed, Section 4 of the Limitation Act, 1963, will apply and that the period of thirty days as mentioned in the proviso to Section 34(3) of the Act is not a prescribed period to attract the relief under Section 4 of the Limitation Act, 1963.

13. It is palpably evident from the aforesaid provisions and case laws that when Sections 2(j) and 4 of the Limitation Act, 1963 are read in context of Section 34(3) of the Act, the three months period for making an application for setting aside an arbitral award is to be considered as the ‘prescribed period’. Whereas, the period of 30 days beyond three months which has been given in the proviso to Section 34(3) of the Act shall be the

extendable period. The benefit of extension under Section 4 of the Limitation Act, 1963, is applicable only where the 'prescribed period' ends on a day when the Court is closed. This brings me to the question as to when does the prescribed period in the instant case lapse.

14. An analysis of the apex court's reasoning in ***State of Himachal Pradesh –v- Himachal Techno (supra)*** clearly indicates that the three months period for filing Section 34 application in the instant case must have lapsed on September 30, 2022. The relevant paragraphs have been reproduced as follows :-

“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?

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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.
19. As the award was received by the Executive Engineer on 12-11-2007, for the purpose of calculating the three months period, the said date shall have to be excluded having regard to Section 12(1) of the Limitation Act, 1963 and Section 9 of the General Clauses Act, 1897. Consequently, the three months should be calculated from 13-11-2007 and would expire on 12-2-2008. Thirty days from 12-2-2008 under the proviso should be calculated from 13-2-2008 and, having regard to the number of days in February, would expire on 13-3-2008. Therefore the petition filed on 11-3-2008 was well in time and was not barred by limitation."

(emphasis added)

15. Further reliance can also be placed on a latest judgment by the Delhi High Court in **NDMC -v- Shree Construction Company** reported in **2023 SCC OnLine Del 813**. I have extracted the relevant portions below –

- "13. In the present case, the respondent has denied the appellant's submission that a copy of the Award was received by it on 28.02.2017. However, no material in support of the same has been placed on record by the respondent. On the contrary, the appellant has placed on record a copy of its register, showing an entry to the effect that the Award was received in its office on 28.02.2017. As such, the appellant's claim of 28.02.2017 being the date of receipt of Award is accepted.
14. In view of the foregoing, the period of three months is to be reckoned from 01.03.2017 after excluding 28.02.2017, i.e. the

date on which the appellant claims to have received a copy of the Award. Beginning 01.03.2017, the period of three months for filing of objections under Section 34 of the Act would end on 31.05.2017. Indisputably, the objections were filed by the appellant on 29.05.2017. Thus, the objections filed under Section 34 of the Act were well within time. The impugned order suffers from the vice of non-application of mind and deserves to be set aside.”

(emphasis added)

16. The argument put forth by the learned Advocate General that the prescribed period of three months ended on October 01, 2022 is rejected, as beginning on July 01, 2022, the three full calendar months of July, August and September ends on the last day of September month and that the last day of the three months herein could never be the first day of the fourth month that is October 01, 2022. In fact, on October 01, 2022, the prescribed period of three months stood expired and for any application to be covered by the said prescribed period should have been filed on or before September 30, 2022.
17. For the sake of clarity, the three months’ calculation is absolutely distinct from the 90 days period which would have otherwise, if applicable in the instant case, lapsed on September 29, 2022 after having included 31 days, 30 days and 29 days of July, August and September months respectively.

18. Basis the aforesaid findings, I hold that the three months period for filing the present challenge under Section 34(3) of the Act, that is, the prescribed period ended on September 30, 2022. The extendable period of thirty days provided for under the proviso to Section 34(3) will begin the next day that is on October 01, 2022 and end after thirty days that is on October 30, 2022. It has already been established above that only the prescribed period can be considered for any relief under Section 4 of the Limitation Act, 1963.
19. As the prescribed period in the instant case ended on September 30, 2022 that is on a day when the Court was open and working¹, Section 4 of the Limitation Act, 1963, will not save the instant Section 34 application from being barred by limitation. Hence, the petitioner is not entitled to extension of time as prayed for under Section 4 of the Limitation Act, 1963.
20. At this stage, I am constrained to observe that when the limitation could boil to a matter of one day, the petitioners ought to have filed the instant Section 34 application within the Puja Vacations. The Court conducted proceedings on several days during the vacation break, and given the urgency, leave of the Court could have been sought to file the present

¹ The Puja Vacations began on October 1, 2022 (Saturday) and continued till October 30, 2022 (Sunday), thereafter the Court re-opened on October 31, 2022 (Monday).

Section 34 application. At the same time, I am also conscious of the practical reality that the peculiar facts in the instant case have rendered the extendable period wholly otiose whereby strict limitation timelines of the Act proscribes any exercise of judicial discretion by this Court beyond what has been prescribed in the Act. In none of the afore cited judgments of **Assam Urban (supra)**, **Himachal Techno (supra)** and **Shree Construction Company (supra)** was the entire extendable period not available to the party who failed to file the Section 34 application within the prescribed period. Therefore, this case is unique in the sense that the entire thirty days, inclusive of the first day and thirtieth day, coincided with the Puja Vacations and hence, the extendable period stood expired when the Court reopened on October 31, 2022.

21. In light of the above observations and analysis, the instant application being AP 737/2022 is dismissed on grounds of maintainability along with connected applications, if any. There shall be no order as to the costs.
22. However, keeping in mind the peculiar facts and circumstances of the present case wherein the benefit of the extendable period could not be made available to the petitioner and the proviso, in effect, has become otiose, I stay the operation of my judgment for a period of 60 days to allow the petitioner to file appeal against my judgment.

23. Given the lacuna in law which may not have been foreseen by the legislature, the instant case now involves a question of law of general importance which, in the considered opinion of this Court, needs to be decided by the Supreme Court. Therefore, by exercising this Court's suo moto powers under Article 133(1) read with Article 134A(a) of the Constitution of India, I grant petitioner the certificate to prefer an appeal before the Supreme Court against my judgment in the instant matter.
24. For the sake of clarity, I make it clear that the aforesaid certificate for appeal to the Supreme Court will not preclude the parties from exercising their appellate rights under Clause XV of the Letters Patent and/or under Section 37 of the Arbitration and Conciliation Act, 1996.
25. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)