

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

ARBITRATION APPEAL NO. 06 OF 2023

The State of Maharashtra
Food, Civil Supplies and Consumer
Protection Department, Mantralaya,
Mumbai – 32.
Through District Supply Officer,
Collector Office, Aurangabad.

...APPELLANT

VERSUS

Shri Ganesh Foods Transport
Company, Aurangabad,
Through its Director
Ajay Gulabrao Pawar,
Age; 44 years, Occ; Transport
Contractor,
R/o; Shankar Nagar, Aurangabad.

...RESPONDENT

...
Special AGP for Appellant/State : Mr. S.S. Thombre (Special Counsel)
Advocate for Respondent : Mr. Girish K. Naik (Thigle)

...

WITH

**CIVIL APPLICATION NO. 5609 OF 2023
IN
ARBITRATION APPEAL NO. 6/2023.**

CORAM : KISHORE C. SANT, J.

**Date of Reservation : 10.07.2023.
Date of Pronouncement : 11.08.2023.**

JUDGMENT :

1. This appeal is challenged against the order passed by the learned Principal District Judge, Aurangabad dated 01.12.2022 rejecting an application for condonation of delay of 99 days i.e. caused in filing application under Section 34 (1) of the Arbitration and Conciliation Act, 1996 (in short “the Act”).

2. A very short question arises in this appeal is as to whether the delay of more than 30 days as provided in Section 34 (3) of the Act can be condoned in filing an application under Section 34 (1) of the Arbitration Act by challenging award of the Arbitrator.

3. Brief facts are that the parties approached to the Arbitrator for resolving the dispute. The District Collector, Aurangabad has acted as an Arbitrator as per the agreement between the parties. A contract was given by the State of Maharashtra to the Respondent for transportation of Oil under the Public Distribution System in Aurangabad District. The Respondent was one of the contractors, who was permitted to do the work as per the policy of the Government Resolution

dated 29.03.2001. A contract was entered into between the parties close to 31.05.2001. Clause 27 of the agreement is an arbitration clause. A dispute arose between the parties. The Contractor, therefore, approached to this Court by filing an Arbitration Application No. 15 of 2019. This Court in the said application by order dated 16.07.2021 appointed an Arbitrator. Thereafter, an arbitral award came to be passed on 07.03.2022, pursuant to an award, an execution came to be filed by Respondent Contractor for recovery of Rs. 50,61,31,958/-. Thereafter the Judgment Debtor also filed an application under Section 47 of the Act for determining the correctness of the award. That application under Section 47 of the Act was rejected and it was directed to proceed further with execution by order dated 01.12.2022. Thereafter, the Respondent filed an application for issuance of attachment of warrant against the present appellant. By order dated 19.12.2022 the Court allowed the application and directed to issue attachment warrant against the Judgment Debtor for Rs. 53,56,63,220/- in the name of District Supply Officer, Aurangabad. The appellant thereafter filed Civil Writ Petition No. 487 of 2023 for quashing and setting aside order dated 01.12.2022 in Regular Darkhast

and also for issuing attachment warrant, which is also to be decided along with this Writ Petition.

4. So far as, this application is concerned, it is the case of the applicant that the applicant approached to the District Court for setting aside award. Since there was delay of 99 days, an application was filed before the learned Principal District Judge. The said application came to be rejected by order dated 01.12.2022 and thus, the appellant is before this Court by way of this appeal.

5. It is the case of the appellant that looking to the facts of the matter the learned Principle District Judge ought to have allowed the application. The delay is only of 99 days. Considering the length of the delay it cannot be said to be unreasonable. The Court has not gone into the facts of the case and reasons for causing delay and simply dismissed the same. The submissions are made that by virtue of agreement it was only the Commissioner who has power to nominate the Collecotor as an Arbitrator in Arbitration Proceedings, however, the Collector has acted as an Arbitrator, which is against the Clause 27 of the agreement.

6. Thus, the award itself is illegal. In an Arbitration Application 15 of 2019, an objection was raised before the Collector that he does not have jurisdiction, however, the Collector proceeded inspite of that objection. The award of the Collector, is, thus, non-est, this fact is not considered by the learned Principal District Judge. It is submitted that if delay is not condoned, the appellant would be deprived of contesting the Arbitration Application on merits. It was thus, necessary to allow the application and condone the delay.

7. The learned Special Counsel for the applicant/ State submits that though under Section 34 (3) of the Limitation Act, the limitation period is provided and the word is used as “may”, therefore, there is no bar to condone the delay. He submits that Section 5 and 40 of the Limitation Act are applicable even to the proceedings under Section 34 under the Arbitration Act. He relied upon the judgment in the case of MANU/SC/0195/2021 – Government of Maharashtra (Water Resources Department) vs. Borse Brothers Engineers & Contractors Pvt. Ltd., In support of this submission by relying on paragraph No. 61 of the said judgment he submits that though in an exceptional circumstances the delay can be condoned. His further

submission is that when the award itself is obtained by playing fraud, an application under section 34 of the Arbitration Act ought to have been entertained. Even otherwise, Section 43 of the Arbitration Act, provides that the Limitation Act is applicable. On going through Section 43 the wording would show that the Limitation Act is applicable and in that view he submits that the delay can certainly be condoned in filing of the application.

8. The learned Advocate for the respondent vehemently opposes the same and submits that Section 43 of the Act shows that the Limitation Act shall apply to the Arbitration Proceedings in the Court. The learned Advocate submits that by virtue of Section 37 of the Arbitration Act, Appeal is provided only against the Order provided therein.

9. He thus, submits that the present appeal is not maintainable and needs to be dismissed on that ground alone as the order under challenge is the order only passed on the application for condonation of delay. He submits that the award was refused by the party on 29.07.2022, whereas an application was presented on 07.10.2022 and thus, it was beyond the

limitation. From the record he submits that on 03.08.2022 the applicant has instructed the District Supply Officer, Aurangabad to initiate necessary steps for filing application for setting aside the arbitral award. It is thereafter, the Deputy Secretary, Law and Judiciary Department, directed the DGP, for filing an application to take necessary steps and that communication was received on 03.10.2022. He thus, submits that even on merits, there is no justification for such delay. On merits he submits that on going through Clause 27, it is seen that the wording would show that an arbitration is to be done by the Commissioner or any other Officer authorized by him in rank. Thus, the Collector has decided the proceedings as he was an officer authorized by the Commissioner. He further points out that the respondent had approached this Court by filing an Arbitration Application No. 15 of 2019, in which there is specific reference to the Collector and it was the Collector who was directed to decide the grievances of the respondent within a reasonable period. Even the appellant was aware that it was the Collector who was appointed as an Arbitrator and the appellant very much participated in the said proceedings when the order dated 16.07.2021 was passed. He further points out that the

Civil Application No. 9185 of 2021 was moved for speaking to minutes, in which again this Court has clarified that the Commissioner has nominated the Collector and the wording is as, “Applicant is permitted to approach the Collector”. Thus, it is clear that the Collector was authorized by the Commissioner and in view of Clause 27 of the Act the Collector had the powers to act as an Arbitrator and there is no illegal act found in the said.

10. In rebuttal, the learned Advocate for the applicant/State submits that the wording of Section 34 (3) of the Act is not considered in the judgment. He submits that no issue was raised as per Section 43 of the Act. He further submits that as the applicant is coming with the case of fraud is played by the respondent and this Court needs to consider that the fraud vitiates everything and by applying this principle the Court need to interfere with the order of condonation of delay. He relied upon the following judgments :

- 1) **AIR 2005 SC 3330** - Bhaurao Dagdu Paralkar Vs. State of Maharashtra and Ors.
- 2) **(2022) 4 SCC 162** – Mahindra and Mahindra Financial Services Limited Vs. Maheshbhai Tinabhai Rathod and Others.

3) (2019) 13 SCC 445 – P. Radha Bai and Others Vs. P. Ashok Kumar and another.

11. This Court finds that the judgment in the case of **Bhaurao** (supra) is not applicable to the present case in hand as herein the question is only whether the Court has power to condone the delay, beyond 30 days under the Arbitration Act.

12. In the case of **Mahindra and Mahindra** (supra) it is specifically held that it is clear that the delay beyond the period of three months plus 30 days cannot be condoned, therefore, Section 5 of the Limitation Act is not applicable in the case, under the Arbitration Act. It is considered In the case of **Mahindra and Mahindra** (supra) in paragraph No. 12, which reads as under :

“In contradistinction, a perusal of the order passed by the learned Division Bench ex facie indicates that it has proceeded at a tangent. On referring to the contention that the respondent was a farmer and that no amount is due, has relied on the decision of this Court in LAO vs. Katiji out of context and has made the same as the basis to allow the appeal. No doubt the delay of 197 days may not seem to inordinate. In appropriate cases, the delay is to be condoned so as not to defeat the meritorious case. However, that would arise only when the power under Section 5 of the Limitation Act is available to be exercised. The case of Katiji is one where such power was available to be exercised as it was not

excluded.”

13. Thus, considering the ratio of this judgment it is clear that the provisions of Section 5 of the Limitation Act are not applicable to the case in hand. The Court has considered that the delay is to be condoned in appropriate cases, however that can be done where the Court has power to condone the delay under Section 5 of the Limitation act. It is further considered that Section 34 (3) of the Act clearly provides that the delay cannot be condoned beyond certain period. In this case the delay was condoned by the Division Bench of the High Court, however, the same was quashed and set aside. In the case of P. Radha Bai (supra) it is already considered in the judgment Mahindra and Mahindra (supra), it is also held that “the Hon’ble Apex Court has considered Section 34 (3) which provides limitation holding that this limitation is inbuilt in the provisions. One does not have a look at the Limitation Act or any other provisions for adding limitation period.

14. Since both sides have argued on Clause 27 of the Agreement, this Court has to discuss the same. Clause 27 reads as under :

“27. Any dispute arising under this Agreement or in relation thereto including the interpretation of this Agreement either during the continuance thereof thereafter shall be referred to the arbitration of the Commissioner of the provision where the transport work is to be carried out or any other officer Authorized by him in writing in that behalf within Six Months of the expiry of agreement and every such reference will be governed by the provisions of Arbitration Act, 1940 or any modification thereof for the time being in force. The decision of such arbitrator shall be final and binding on the parties, to this agreement.”

Considering this Clause 27 it is clear that the arbitration proceedings were either before Commissioner or any other authorized officer. This Court does not find any substance in the submission of the petitioner that the Collector had no authority to act as Arbitrator.

15. Considering all aspects, this Court finds that no case is made out to entertain this Arbitration Appeal. In view of Section 34 (3) Court has no power to condone the delay beyond 30 days after the limitation period is over. With this, it is clear that the maximum period of which delay can be condoned is also exceeded and therefore, same cannot be condoned. The learned Principal District Judge has rightly considered all the aspects and has passed the impugned order. This Court finds that no interference is called for in the impugned order. The

present appeal therefore, is dismissed on the ground that, no ground is made out to interfere with the impugned judgment and order by this Court and secondly on the ground no appeal is maintainable since no appeal against such order is provided under Section 37 of the Arbitration Act.

(KISHORE C. SANT)
JUDGE

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