

20.03.2024
Item No.07
RP
Ct. No.1

MAT 2317 of 2023
With
IA No.CAN 2 of 2024

Baid Power Services Private Limited
Vs.
The Bihar Medical Services and Infrastructure
Corporation Limited & Ors.

Mr. Pranit Bag
Mr. Anuj Mishra
Mr. R.R. Modi

.....for Appellant

Mr. Umesh Prasad Singh
Mr. Kumar Manish
Mr. Surendra Kumar
Ms. Amrita Pandey
Mr. Ghanshyam Pandey

.....for Respondent No.1

Mr. Tapan Kumar Mukherjee

.....for State

1. This intra-Court appeal by the respondent no.3 in WPA 6191 of 2022 is directed against the order dated 6th October, 2023. The respondent/petitioner, being Bihar Medical Services and Infrastructure Corporation Limited, filed the said writ petition challenging the award dated 12th May, 2021 passed by the West Bengal Micro Small Facilitation Council (in short "Facilitation Council") and challenge to the said award was rejected by the learned Single Bench and against that portion of the order passed by the learned Single Bench the writ petitioner has not been preferred any appeal. The claimant

before the Facilitation Council, namely, Baid Power Services Private Limited, is aggrieved by few portions of the order passed by the learned Single Bench and the present appeal has been preferred.

2. The first ground canvassed in this appeal is that the learned Single bench in paragraph 7 of the impugned order has recorded that the service copy of the award was obtained by the respondent/writ petitioner on September 12, 2023. This, according to the appellant, is incorrect as the certified copy of the award was despatched by the Facilitation Council under the cover letter dated 21st September, 2021 by speed post. The second and more serious contention raised in this appeal is with regard to the observation/findings recorded by the learned Single Bench in paragraph nos.18 and 19 of the impugned order. The learned Single Bench in the said paragraphs accepted the contention of the learned counsel appearing for the writ petitioner for a lenient view ought to have been taken on the issue of limitation since the Supreme Court in several orders have extended the moratorium regarding limitation during COVID-19 period and also in view of the pendency of the writ petition before this Court for some time, the time limit

prescribed under the MSME Act, 2006 for the purpose of preferring a challenge is required to be looked into leniently. Therefore, this observation/finding of the learned Single Bench in the opinion of the appellant is incorrect. In this regard, the learned advocate appearing for the appellant places reliance on the decisions of the Hon'ble Supreme Court in connection with extension of limitation in **Cognizance For Extension of Limitation IN RE Suo Motu Writ Petition (C) No.3 of 2020**, order dated March 23, 2020, **Sagufa Ahmed & Ors. vs. Upper Assam Polywood Products Primate Limited & Ors.** reported in **(2021) 2 SCC 317**. It is submitted that in Sagufa Ahmed case the Hon'ble Supreme Court has explained the earlier decision and held that the said judgment extended only the period of limitation and not to the period to which delay can be condoned in exercise of discretion conferred by the statute. Furthermore, it is pointed out that the Hon'ble Supreme Court has further observed that the law will assist only those who are vigilant about their rights and not those who sleep over them. It is the submission of the learned advocate for the appellant that the question of condonation of delay does not arise as the statute does not provide for such power. In

support of such contention reliance has been placed on the decision of the Hon'ble Supreme Court in the cases of **State of Himachal Pradesh & Anr. vs. Himachal Techno Engineers & Anr.** reported in (2010) 12 SCC 210, **Basawaraj & Anr. vs. Special Land Acquisition Officer** reported in (2013) 14 SCC 81 and **BBM enterprises vs. Sate of West Bengal & Anr.** reported in (2020) 9 SCC 448. Further, the learned advocate appearing for the appellant after referring to a decision of the High Court of Bombay in the case of **Bharat Electronics Limited vs. IBEX Integrated Business Express Pvt. Ltd.** reported in 2023 SCC OnLine 2776 submitted that the factual position in that case is identical to the case on hand and the learned Single Bench of the High Court of Bombay held that in the event the arbitration petition has been preferred beyond the permissible period of 120 days under Section 34 of the Arbitration Act such a petition is not maintainable and the question of applying the principles under section 14 of the Limitation Act would not arise. Further, it is contended that the writ petitioner cannot take shelter under Section 14 of the Limitation act on account of their conduct since in the writ petition they sought for waiver of pre-deposit, which was

mandatory as per 2006 Act. Apart from that, the writ petition was filed well beyond the period of 120 days prescribed for challenging an award passed under the provisions of MSME Act. Furthermore, it is submitted that in the application filed under Section 34 of the Arbitration Act before this Court the writ petitioner has once again prayed for wavier of pre-deposit. Thus, it is contended that there is no due diligence on the part of the writ petitioner while resorting to file a writ petition is not a bonafide prosecution as they chose the said remedy in spite of being aware that the only remedy available is under Section 34 of the Arbitration and Conciliation Act, 1996.

3. Learned senior advocate appearing for the respondent/writ petitioner submitted that in the light of the decision of the Hon'ble Supreme Court in **Cognizance For Extension of Limitation In Re. Suo Motu Writ Petition (C) No.3 of 2020, order dated March 23, 2020** the period of limitation stood extended and the challenge in the writ petition was well within the said period and, therefore, the learned Single Bench was fully justified in granting the liberty to file an application under Section 34 of the Arbitration and Conciliation Act, 1996 which liberty has been

availed of by the writ petitioner and the matter is pending before this Court. Further, reliance has been placed on the decision of the Hon'ble Supreme Court in the case of **Kalpraj Dharamshi & Ors. vs. Kotak Investment Advisors Ltd. & Ors.** reported in **(2021) 10 SCC 401**.

4. After we have elaborately heard the learned advocates for the parties, we are of the view that the learned Single Bench has committed an error in issuing a positive direction stating that if the writ petitioner prefers challenge under Section 34 of the Arbitration and Conciliation Act, 1996 to the award passed by the Facilitation Council within a week from the date of the order passed in the writ petition, it will be deemed that the said challenge is within the period of limitation as stipulated in the statute. We find from the impugned order that rival contentions appear to have not been adjudicated, more particularly, the contentions which were advanced before us by the learned advocate for the appellant as regards whether the challenge to the award by filing a writ petition beyond the period of 120 days was a bonafide exercise or was it an exercise with due diligence. Admittedly, the writ Court does not have a power to extend the period of limitation prescribed under the statute as the MSME Act,

2006 has been held to be a code by itself and the period of limitation has been prescribed. Such prescription has not been put to challenge by the writ petitioner nor the mandatory pre-deposit, which was required to be complied with while making a challenge to the award passed by the Facilitation Council. That apart, the question of limitation is not a pure question of law rather it is a mixed question on fact and law. Therefore, whether the challenge to the award under Section 34 of the Arbitration and Conciliation Act, 1996 was within the period of limitation or whether the writ petitioner was entitled to the protection granted by the Hon'ble Supreme Court in various decisions by which the Hon'ble Supreme Court extended the period of limitation during COVID-19 pandemic and what would be the date on which the certified copy of the award was received by the respondent/writ petitioner are all factual matters which are largely disputed before this Court and the same cannot be adjudicated in a writ petition based on affidavits. Therefore, we are inclined to interfere with that portion of the order passed by the learned Single Bench with regard to the observations contained in paragraph 18 as well as the findings rendered in paragraph 19 of the impugned order. Apart from that there

is also a dispute raised as regards the finding rendered by the learned Single Bench in paragraph 7 of the order stating that the certified copy of the award was obtained by the writ petitioner only on September 12, 2023. This is seriously disputed by the appellant by pointing out that the certified copy of the award was communicated by the Facilitation Council under the cover of a letter dated 21st September, 2021 and this is a wrong recording of the factual position and, therefore, this issue is also required to be left open. Such observation contained in paragraph 7 has to be set aside.

5. For all the reasons, the appeal and the connected application are **allowed**. The observation and finding recorded in paragraph nos.18 and 19 of the impugned order are set aside and also the finding recorded in paragraph 7 with regard to the date on which the certified copy of the award was received by the appellant is also set aside and all issues are left open. The appellant is entitled to raise contention with regard to maintainability of the application under Section 34 of the Arbitration and Conciliation Act, 1996 on the question of fact and law and in the event if such contention is raised the respondent/writ petitioner will be entitled to put in their objections

which will be adjudicated by the learned Single Bench dealing with the application under Section 34 of the Arbitration and Conciliation Act, 1996.

6. It is made clear that this Court has not gone into the merits of the award which obviously cannot be adjudicated in a writ petition as rightly held by the learned Single Bench and such finding has attained finality as the learned writ Court has dismissed the challenge to the award on merits at the instance of the respondent/writ petitioner and no appeal has been preferred by the writ petitioner against such order.

7. We also take note of the submission made by the learned advocate for the appellant that the appellant has raised an issue as regards the entertainability of the application under Section 34 of the Arbitration and Conciliation Act, 1996, we grant liberty to the appellant to raise this issue before the learned Court dealing with the application under Section 34 of the Arbitration and Conciliation Act, 1996.

(T. S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)