

OCD 3 to 6

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

AP-COM/398/2024
[Old case no. AP/809/2023]
MARG LIMITED
VS
SREI EQUIPMENT FINANCE LIMITED

AP-COM/399/2024
[Old case no. AP/810/2023]
NEW CHENNAI TOWNSHIP PRIVATE LIMITED
VS
SREI EQUIPMENT FINANCE LIMITED

AP-COM/400/2024
[Old case no. AP/811/2023]
MARG LIMITED
VS
SREI EQUIPMENT FINANCE LIMITED

AP-COM/401/2024
[Old case no. AP/812/2023]
LOGICAL LOGISTICS PRIVATE LIMITED
VS
SREI EQUIPMENT FINANCE LIMITED

BEFORE :
THE HON'BLE JUSTICE SABYASACHI BHATTACHARYYA
Date : 20th August, 2024

Appearance:

Mr. Rohit Das, Adv.
Ms. Kishwar Rahman, Adv.
Ms. Divya Tekriwal, Adv.
Mr. Preetam Majumdar, Adv.
Ms. Sristi Roy, Adv.
...for the petitioner.

Mr. Swatarup Banerjee, Adv.
Mr. Sariful Haque, Adv.
Mr. Saubhick Choudhury, Adv.

*Ms. Tapasika Bose, Adv.
...for the respondent.*

In Re: AP-COM No. 401 of 2024 (Old case no. AP/812/2023)

The Court: The brief point which has arisen at this juncture in the present case is whether the present application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) is barred by limitation.

Learned counsel for the respondent argues that Section 34 (3) of the 1996, Act stipulates that an application for setting aside of an award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award. The proviso thereto states 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.

Thus, the statute specifically debars an application from being entertained after three months. The thirty days’ grace period given thereafter is subject to the discretion of the Court and, thus, cannot be said to come within the ambit of the ‘limitation period’.

In the present case, even if the admitted case of the petitioner is taken, the impugned award was received by the petitioner on November 30, 2019 whereas the present challenge has been filed under Section 34 on November 16, 2023,

much after the expiry of the period of three months as well as thirty days thereafter.

It is argued that in the judgments of the Supreme Court referred to by the petitioner in the context of the Pandemic relaxation, the outer limit of expiry of the limitation period was February 28, 2022. Even if the best case of the petitioner is taken, the extended period was over after ninety days therefrom, that is, in the month of May, 2022.

On the other hand, if the period during which the respondent-company was in moratorium due to pendency of the CIRP procedure is taken into account, the said procedure culminated on August 11, 2023 by approval of the Resolution Plan by the National Company Law Tribunal (NCLT). Seen from such perspective as well, the application under Section 34 was palpably barred by limitation. Condonation cannot be afforded under Section 34(3) of the 1996 Act, as the timeline prescribed therein is mandatory.

In re: Cognizance for Extension of Limitation, in paragraph 5.2, 5.3 and 5.4 thereof, makes it absolutely clear that unless the period of limitation, that is, three months under Section 34(3) of the 1996 Act, ends in between March 15, 2022 and February 28, 2022, the delay does not automatically stand condoned.

The petitioner, on the other hand, relies on the judgments of *Prakash Corporates v. Dee Vee Projects Ltd* reported at (2022) 5 SCC 112 and *COGNIZANCE FOR EXTENSION OF LIMITATION, In re* reported at (2022) 3 SCC 117 in support of the contention that the limitation period stood automatically

extended till ninety days on and from March 1, 2022 due to the pandemic relaxation granted by the Supreme Court in the said judgment.

Again, relying on the judgment of *P. Mohanraj and others v. Shah Brothers. Ispat Private Limited*, reported at (2021) 6 SCC 258, it is argued that the Supreme Court distinguished the judgment of the Delhi High Court in *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*, reported at (2017) SCC OnLine Del 12189 and held that a proceeding under Section 34 of the 1996 Act is a proceeding against the corporate debtor in a court of law pertaining to a challenge to an arbitral award and would be covered, just as an appellate proceeding in a decree from a suit, by the moratorium stipulated in Section 14 of the Insolvency and Bankruptcy Code (IBC).

Again, in *New Delhi Municipal Council v. Minosha (India) Ltd.*, reported at (2022) 8 SCC 384, the Supreme Court held that the words “for which an order of moratorium has been made under this Part” is intended to be the point of reference or the premise for exclusion of time for the purpose of computing the period of limitation. Besides being the point of reference and the *sine qua non* for applying Section 16(6) of the IBC, it also specified the period of time which will be excluded in computing the period of limitation.

Section 60(6), read conjointly with Section 14 of the IBC indicates that the entire period of the moratorium under Section 14 is liable to be excluded in computing the period of limitation even in a suit or an application by or against a corporate debtor which is not barred by Section 14 of the Act.

Coming to the timelines in the present case, the petitioner contends that the impugned award was received by the petitioner by speed post on November 30, 2019 and the period of three months stipulated in Section 34(3) of the 1996 Act expired on February 28, 2020. Thereafter, a further period of thirty days was available to the petitioner to prefer the challenge under Section 34, but the Pandemic lockdown intervened on and from March 15, 2020. As per the judgments of the Supreme Court, the entire period from March 15, 2020 till February 28, 2022 was excluded from limitation. However, at the time of expiry of such ninety days from March 1, 2022, the respondent/corporate debtor was still undergoing a Corporate Insolvency Resolution Process (CIRP).

On August 11, 2023, an order was passed in CP (IB) No. 295/KB/2021 by the NCLT, Kolkata approving the Resolution Plan. Thus, the period of relaxation of ninety days due to the Pandemic would come into effect on and from August 12, 2023, since the entire Pandemic period would be excluded from the limitation. As such, the limitation expired finally on November 11, 2023, which fell during the Annual Puja Vacation of this Court. The present application under Section 34 was filed on November 16, 2023, that is, on the reopening date immediately after the said vacation ended. It is argued that the vacation period would also be excluded and, as such, the present application under Section 34 is within time.

To consider the question of limitation, certain relevant dates are to be looked into. Even proceeding on the admitted case of the petitioner, the award was received by the petitioner by speed post on November 30, 2019, thus

commencing the period of limitation as envisaged under Section 34(3) of the 1996 Act. The three months contemplated in the said sub-section expired on February 28, 2020. The further period of thirty days, within which the court, in its discretion, may allow condonation of the delay, expired on March 30, 2020. In the meantime, however, the Pandemic period set in from March 15, 2020.

A careful reading of *Prakash Corporates limited (supra)* reiterates the view taken by the Supreme Court in the matter of *in re: Cognizance For Extension Of Limitation (supra)*, in which matter the Supreme Court has passed several orders, the last reported at *(2022) 3 SCC 117*, which was an order dated January 10, 2022, where the Supreme Court categorically observed that notwithstanding the actual balance period of limitation remaining, all persons shall have the limitation period of ninety days from March 1, 2022. Only in the event the actual balance period of limitation remaining exceeded ninety days, the longer period would apply. Thus, by default, the limitation period for filing a legal action, including an application under Section 34 of the 1996 Act, would stand extended for a period of ninety days from March 1, 2022, which expired on May 29, 2022.

However, in the meantime, a parallel proceeding was going on under the IBC, being a Corporate Insolvency Resolution Process with regard to the respondent-company. It commenced from October 8, 2021 and culminated in final approval of the Resolution Plan on August 11, 2023.

The petitioner seeks to take advantage of both periods and argues that ninety days given by way of relaxation for the Pandemic by the Supreme Court

would commence from expiry of the CIRP on August 11, 2023 and, thus, would end on November 11, 2023, which fell during the Annual Puja Vacation of this court. Since the vacation period is automatically excluded, according to the petitioner the application was not hit by limitation as it was filed on the reopening date immediately after the end of the vacation period.

Upon considering the submissions of parties, however, this Court is of the clear opinion that the petitioner cannot claim the best of both worlds, simultaneously claiming the Pandemic relaxation afforded by the Supreme Court and taking advantage of the moratorium under Section 14 of the IBC due to the pending CIRP in respect of the respondent-company.

As discussed above, the outer limit till which time would be excluded, as per the judgment in *Cognizance for Extension of Limitation (supra)*, would be ninety days starting from March 1, 2020. The same would, thus, end on May 29, 2023.

What the petitioner seeks to do is to take the ninety days as some sort of an accrued entitlement and seeks a deferred invocation of the same according to its own choice, from after the end of the moratorium on August 11, 2023. However, the said argument is in stark contrast with the grain of the Pandemic relaxation granted by the Supreme Court in the *Cognizance For Extension of Limitation case* as well as in *Prakash Corporates (supra)*. However, in *Prakash Corporates (supra)* the Supreme Court recorded a note of caution that the order of extension of the period of limitation was passed by the Supreme Court with the intention to benefit vigilant litigants who were prevented due to the

Pandemic and the lockdown from initiating proceedings within the period of limitation prescribed by general or special law. It was further observed that it is needless to point out that the law of limitation finds its root in two Latin maxims, one of which is *vigilantibus et non dormientibus jura subveniunt*, which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.

Thus, the petitioner, taking a cue from the above observation of the Supreme Court, ought to have been vigilant and file the application under Section 34 within May 29, 2022, when the Pandemic period was over. By the logic of the petitioner, if the Pandemic relaxation is to be applied in the petitioners' case, the petitioner cannot, in the same breath, take shelter under the moratorium under Section 14 of the IBC, since, in order to get advantage of the Pandemic, the petitioner had to be prevented in the first place due to the Pandemic from filing the application in time.

However, the three months contemplated in Section 34(3) of the 1996 Act, which stipulates the limitation period in otherwise negative language, ended on February 28, 2020. Section 34(3) provides that an application for setting aside *may not be made* after three months. The proviso thereto carves out an exception by leaving it to the discretion of the Court, subject to satisfaction in respect of sufficient cause for the delay, to accept the application for a further period of thirty days, but not thereafter.

Hence, if the petitioner seeks to take advantage of the Pandemic relaxation, the petitioner had to show that it was prevented from filing the

application entirely due to the Pandemic. For taking advantage of such relaxation, the limitation period itself had to end between March 15, 2020 and February 28, 2020, which is the Pandemic relaxation period granted by the Supreme Court. However, as on March 15, 2020, the petitioner had already exhausted the three months plus a further fifteen days out of the total thirty days of life given to the limitation period. Hence, even as on March 15, 2020, the petitioner had only fifteen days of limitation left to file the application under Section 34.

If the petitioner seeks to take advantage of Pandemic relaxation, such relaxation ended on February 28, 2020 and limitation again begun to run from March 1, 2022. Giving the fullest and most liberal interpretation to the Supreme Court Pandemic judgments, the petitioner would have further ninety days for filing of the application.

Such ninety days period also expired on May 29, 2022. Thus, from May 30, 2022 onwards, the petitioner could not have taken advantage of the Pandemic relaxation.

What the present petitioner seeks to do is to defer the ninety days' relaxation to a future period of its own choice according to its whims and fancies and seeks to invoke such relaxation on and from August 11, 2023. However, fact remains that from May 30, 2022 till August 11, 2023, the petitioner was not prevented by the Pandemic but by the IBC moratorium and, as such, the ninety days' Pandemic relaxation would not any longer to be available to the petitioner even as per the Supreme Court judgments.

Hence, the entire reliance of the petitioner on the Pandemic relaxation is misplaced, since the said relaxation ended on May 29, 2022 and could not be stretched further. The post-Pandemic relaxation was available only to those who were held up for the entire period due to the Pandemic. As discussed above, after May 29, 2022, it could not be said that the petitioner was held up for the Pandemic and hence, the ninety days' relaxation is not attracted to the present case at all.

To fall back upon, the petitioner has also invoked the moratorium period during the CIRP in respect of respondent-company. Undoubtedly, between October 8, 2021, when the CIRP process started, and August 11, 2023, when it culminated in the approval of the Resolution Plan, no application under Section 34 could be filed, as elaborated in *P. Mohanraj (supra)* and *New Delhi Municipal Council (supra)*. Thus, what can be invoked by the petitioner is the moratorium period under the IBC, in order to argue that the limitation period stood suspended during the said period.

Approaching from such perspective, the three months stipulated in Section 34(3) of the 1996 Act expired on February 28, 2020 and on March 15, 2020, a further period of fifteen days out of the additional thirty days contemplated in the proviso to Section 34 (3) had been exhausted. What remained was a further period of fifteen days for the petitioner to file its application under Section 34.

Taking the most lenient view in favour of the petitioner, the petitioner could not file the same from March 15, 2020 till October 8, 2021 (when the IBC

moratorium commenced) due to the Pandemic. Even proceeding of such premise, the moratorium started on October 8, 2021 and ended on August 11, 2023.

Hence, as on August 12, 2023, the petitioner still had fifteen days to go for the Court to exercise its jurisdiction in accepting the belated filing of the Section 34 application upon being satisfied with sufficient cause. Let us suppose that the Court would be satisfied that there was sufficient cause due to the Pandemic restrictions from March 15, 2022 till October 8, 2021 and, thereafter, due to the CIRP moratorium till August 11, 2023. The position then would be that till March 15, 2020, three months plus fifteen days had already elapsed and the petitioner would have a further fifteen days left from August 12, 2023 for filing the Section 34 application, although subject to the discretion of the Court.

Such period also ended on August 26, 2023, when there was no Pandemic, nor was there any moratorium. On the said date, there was no annual vacation or other vacation of the Court to prevent the petitioner from filing the application. The petitioner, however, chose not to do so.

The law prevents not only the petitioner from filing the application thereafter but also denudes the Court itself from condoning the delay in accepting such application after the said period. As such, on and from August 27, 2023, the application of the petitioner under Section 34, 1996 Act stood permanently time-barred, without there being power vested even in the Court to condone the delay in filing the same further. However, the application has

actually been filed much thereafter on November 16, 2023 and, such, was palpably barred by limitation.

The argument of the petitioner, seeking to club the benefits and relaxations of both the Pandemic period and the CIRP moratorium, although specious, cannot be accepted in view of the above discussion.

Accordingly, AP-COM No. 401 of 2024 (Old Case No. AP/812/2023) is dismissed as time-barred.

There will be no order as to costs.

Insofar as the other applications under Section 34 of the 1996 Act are concerned, since learned counsel for the respondent has waived the objection as to limitation, the other issues, including the maintainability of the said applications otherwise, are now to be taken up.

(SABYASACHI BHATTACHARYYA, J.)