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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 11.12.2024

+ **FAO(OS) (COMM) 261/2024 & CM Nos.67258/2024 & 67261/2024**

THE CHIEF EXECUTIVE OFFICER J&K ERAAppellant

Through: Mr. Praveen Chauhan, Mr. Sarthak,
Ms.Malvica and Mr. Parth Awsthi,
Advocates

Versus

M/S ABHIRAM INFRA PROJECTS PVT LTDRespondent

Through: Mr. Aditya Sikka, Ms. Orshi Kahhar
and Mr. Digvijay Singh, Advocates

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

VIBHU BAKHRU, ACJ. (ORAL)

The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration & Conciliation Act, 1996 (hereafter *the A&C Act*) impugning the judgment dated 31.07.2024 (hereafter *the impugned judgment*) delivered by the learned Single Judge in O.M.P(COMM) 25/2023 captioned *The Chief Executive Officer J and K ERA Srinagar Kashmir v. Abhiram Infra Projects Pvt. Ltd.*

The appellant had preferred the aforementioned application for setting aside an arbitral award dated 18.05.2022 (hereafter *the impugned award*) rendered by an Arbitral Tribunal comprising of three members. The learned Single Judge dismissed the said application as barred by limitation.

As noted above, the impugned award was rendered on 18.05.2022 and

the appellant had filed the petition after 30.11.2022. Concededly, the petition had been filed beyond the period of three months from the date of receipt of the impugned award and the delay exceeded the maximum period of thirty days that could be condoned by virtue of proviso to Section 34(3) of the A&C Act.

Undisputedly, the question whether the court can condone the delay beyond thirty days in filing a petition under Section 34 of the A&C Act to set aside an arbitral award is no longer *res integra*. The Supreme Court in ***Union of India v. Popular Construction Co.: (2001) 8 SCC 470*** authoritatively held that delay beyond the stipulated period of thirty days cannot be condoned.

It is the appellant's contention that the A&C Act is not applicable as the disputes had arisen in respect of a contract that was required to be performed in the State of Jammu & Kashmir. The learned counsel for the appellant contends that the Jammu & Kashmir Arbitration & Conciliation Act, 1997 (hereafter *the J&K Act*) is applicable and the period of limitation for filing an application to set aside the arbitral award is required to be considered in reference to the J&K Act.

The learned Single Judge found that the said contention was misdirected and rejected the same. The impugned award was rendered under the A&C Act and the application for setting aside the same was filed under Section 34 of the A&C Act. In the said backdrop, the learned Single Judge observed that whilst it may have been open for the appellant to contend that the arbitration ought to have proceeded under the J&K Act, the appellant had not done so. The learned Single Judge held that since the application to

set aside the impugned award had been filed under Section 34 of the A&C Act, the same could be entertained only if it was filed within the time as prescribed for filing such an application. The relevant extracts of the impugned judgment noting the appellants contentions as well as the reasoning for rejecting the same are set out below:

“4. Mr. Chauhan, learned Counsel for the petitioner, seeks to contend, *per contra*, that his basic case is that the Arbitral Tribunal erred in proceeding in terms of the 1996 Act and that, according to him, the J&K Act was applicable. He submits that the challenge to the present award would be within the time provided for challenging an arbitral award under the J&K Act. Without examining which Act applies, therefore, Mr Chauhan would seek to submit that this petition cannot be dismissed as time-barred.

5 The contention, in my opinion, is misdirected.

6. The arbitral award has, rightly or wrongly, been passed under the 1996 Act. That is a fact which cannot be wished away. The present petition has also, therefore, been correctly filed under Section 34 of the 1996 Act. It is open to the petitioner to argue that the Arbitral Tribunal ought to have proceeded to arbitrate on the dispute under the J&K Act, but the fact is that it has not done so. The Arbitral Tribunal having arbitrated on the dispute – as already noted, wrongly or rightly – under the 1996 Act and the present petition, challenging the arbitral award having also been preferred under Section 34 of the 1996 Act, the petition can be entertained only if it subscribes to the time discipline envisaged by Section 34.

7. The question of examining whether the Arbitral Tribunal was correct in arbitrating on the dispute in terms of the 1996 Act instead of the J&K Act would arise only if this Court has the jurisdiction to hear the matter.

8. A Section 34 petition which is filed beyond 120 days from receipt of the arbitral award cannot be entertained by the Court in view of the *terminus ad quem* of 120 days envisaged by the proviso to Section 34(3) of the 1996 Act.

9. Qua a Section 34 petition filed beyond 120 days from the date of receipt of the award under challenge, therefore, the Court is *coram non judice*.

Mr. Praveen Chauhan, the learned counsel appearing for the appellant had advanced contentions, similar to those advanced before the learned Single Judge. He submitted that the time period under the J&K Act to file an application to set aside an arbitral award is six months and therefore, the appellant's application under Section 34 of the A&C Act is required to be construed within time. He also earnestly contended that the appellant had no option but to file an application under Section 34 of the A&C Act and not under Section 34 of the J&K Act as the arbitration was conducted under the A&C Act and the impugned award was also rendered under the A&C Act.

Reasons and Conclusion

At the outset, this court noticed that Section 34 of the J&K Act also prescribes the period of three months for filing a petition to set aside an arbitral award. Thus, the appellant's contention that the time available under the J&K Act to file an application to set aside an arbitral award is greater than that as available under the A&C Act, is ill founded.

On a pointed query from the court as to which provision provided for a period of six months to file an application to set aside the award, Mr. Chauhan, submitted that the state amendment to the A&C Act provided an extended period of six months instead of three months to file an application to set aside an arbitral award.

It is thus apparent that the reliance placed by the appellant on the provisions of the J&K Act are misconceived. The J&K Act does not provide for the period of six months to file a petition to set aside the arbitral

award. The language of Section 34(3) of the J&K Act is similar to the language of Section 34(3) of the A&C Act. It is also apparent from the impugned judgment that the learned counsel for the appellant had not advanced any submission to the effect that the period of limitation under the A&C Act was extended to six months by virtue of the amendments made to the A&C Act as applicable to the Union territory of Jammu and Kashmir.

Notwithstanding the same, we consider it apposite to consider the merits of the contention that its petition to set aside the impugned award was within the period as stipulated under Section 34(3) of the A&C Act as applicable to the Union Territory of Jammu and Kashmir.

By virtue of the Jammu & Kashmir Reorganisation (Adaptation of Central Laws) Order, 2020 as notified on 18.03.2020 certain provisions of the central statutes as applicable to Union Territory of Jammu & Kashmir, were amended. The same also included certain provisions of the A&C Act. The time period of three months as stipulated under Section 34(3) of the A&C Act was amended to six months, as applicable to Union Territory of Jammu & Kashmir by virtue of the said order.

In view of the above, the only question to be addressed is whether the A&C Act, as applicable to Union Territory of Jammu & Kashmir, is applicable in the present case.

At this stage, it is necessary to briefly note the context in which the impugned award was rendered.

The respondent, a company with its registered office in the state of Karnataka, had entered into a contract with Jammu & Kashmir Economic Reconstruction Agency (the appellant) for construction of surface water

drainage system in Athwajan catchment on National Highway Bypass at Srinagar (Contract Package No. JKUSDIP Srinagar/SWD/01). The parties had executed the Contract Agreement dated 02.08.2013. The said agreement included an arbitration clause which is set out below:

“20.6 Arbitration

“Any dispute between the Parties arising out of or in connection with the Contract not settled amicably in accordance with Sub-Clause 20.5 above and in respect of which the DB’s decision (if any) has not become final and binding shall be finally settled by arbitration. Arbitration shall be conducted as follows:

b) if the contract is with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer’s country.

The place of arbitration shall be neutral location specified in the Contract Data; and the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language]”

The disputes had arisen in respect of the said contract, which were referred to arbitration in terms of the arbitration clause. Both the parties nominated their respective arbitrators and the said arbitrators nominated the presiding arbitrator, thus constituting the Arbitral Tribunal.

The Arbitral Tribunal examined the rival contention and concluded that the place of arbitration was New Delhi. It is material to note that in the first procedural order (procedural order No.1 dated 24.12.2018), the Arbitral Tribunal, *inter alia*, recorded as under:

“V. PLACE OF ARBITRATION AND LOCATION OF HEARINGS

The legal place (seat) of this arbitration shall be New Delhi.”

In addition, the Arbitral Tribunal noted that the parties had also resolved that the arbitration proceedings be conducted within the statutory timeline as provided under Section 29A of the A&C Act, as amended in the year 2015. This also indicated that the parties were fully conscious that arbitration was required to be conducted under the A&C Act.

The Arbitral Tribunal examined the arbitration clause as well as the rival contentions and has concluded as under:

“4.10 On examination of the Sub-Clause 20.6 of GCC, this tribunal notes the expression in GCC i.e. “*The place of arbitration shall be the neutral location specified in the Contract Data...*”. The use of the word “*Neutral Location*” is referring to the physical location where the arbitration proceeding shall be conducted, which was decided by the parties to be “*New Delhi*” vide Procedural Order No.1 dated 24.12.2018. Therefore, the “*New Delhi*” as venue will become the “seat” of the arbitration in light of the law laid down by the Hon’ble Supreme Court of India in ***BGS Soma JV vs NHPC (supra)*** as there is no significant contrary indicia. It is also important to note that the finding of the BGS Soma JV vs. NHPC has been recently affirmed in ***M/s Inox Renewables Limited vs. Jayesh Electricals Ltd. 2021 SCC OnLine SC 448.***

Since the place of arbitration was determined as New Delhi, the A&C Act as applicable to the National Capital Territory of Delhi and not the Union Territory of Jammu & Kashmir is applicable.

In view of the above, the appellant’s contention that the period of limitation for filing an application for setting aside an award in New Delhi is required to be construed with reference to the A&C Act as applicable in the Union Territory of Jammu & Kashmir, is unmerited. The application filed by the petitioner for setting aside the impugned award [OMP (COMM)

No.25/2023] is clearly beyond the period of limitation as prescribed under Section 34(3) of the A&C Act and the delay being beyond the period of thirty days cannot be condoned.

The appeal is, accordingly, dismissed. All pending applications are also dismissed.

VIBHU BAKHRU, ACJ

TUSHAR RAO GEDELA, J

DECEMBER 11, 2024

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Click here to check corrigendum, if any