

Calcutta High Court

Union Of India vs Rahee Allied (Jv) And Ors on 8 March, 2022

OD-1

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APO 49 of 2021
IA No.GA 2 of 2021

UNION OF INDIA
VERSUS
RAHEE ALLIED (JV) AND ORS.

BEFORE :

THE HON'BLE JUSTICE SOUMEN SEN

And

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

Date : 8th March, 2022

Appearance:
Mr.R.N. Bag, Adv.
Ms. Aparna Banerjee, Adv.
...for the appellant.
Mr. Samrat Sen, Sr. Adv.
Mr. Nirmalya Dasgupta, Adv.
Mr.R.L. Mitra, Adv.
Ms. Priyanka Dhar, Adv.
...for the respondents/applicants.

The Court: This appeal is directed against an order dated 11th March, 2021 by which a learned Single Judge dismissed the application filed by the appellant for setting aside of the impugned award dated 23rd November, 2019 along with a prayer for stay of operation of the said award on the ground of limitation.

The learned Single Judge refused to condone the delay on the ground that the appellant has failed to offer any satisfactory explanation for not being able to file the application for setting aside of the award within the period of limitation or within the extended period as provided under the proviso to Section 34(3) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act'). The learned Single Judge has also refused to accept the submission made on behalf of the appellant that the benefit of Section 14 of the Limitation Act, 1963 as extended to the appellant on 18th February, 2021, by which the application for stay of operation of the award together with the arbitration petitions were directed to be filed afresh before the Commercial Division of this Court is also not acceptable as the ground for delay of about 4 days in filing the application before the Commercial Division could not be sufficiently explained. The inter departmental procedure for causing a delay of 4 days between the order of rejection of the earlier application for setting aside of the award and the date of presentation of the application for setting aside of the award before the Commercial Division

was not sufficiently explained. The learned Single Judge was of the view that the relief for condonation of delay cannot be claimed as a matter of right and unless a satisfactory explanation is offered for not approaching the Court beyond time the appellant cannot take the shelter of being the Government or a wing of the Government to defeat the legitimate right of the award-holder as all the litigants are to be treated equally and not discriminatorily.

Initially, when this appeal was moved, Mr. Samrat Sen, learned Senior Counsel appearing on behalf of the respondents/applicants has raised the issue of maintainability of the appeal on the ground that an Order refusing to condone delay in filing the application for setting aside of the award is not appealable under Sec. 37(1)(C) of the Arbitration and Conciliation Act, 1996. Mr. Sen had also relied upon quite a few judgments of the Hon'ble Supreme Court in support of his submission.

On the prayer of Mr. Bag, learned Counsel representing the appellant, the matter was adjourned to enable to Mr. Bag to respond to the submissions made by Mr. Sen. However, today Mr. Sen, in all fairness, has submitted at the very beginning that in view of the latest pronouncement of the Hon'ble Supreme Court in *Chintels India Limited*

-versus- *Bhayana Builders Pvt. Ltd.*, reported in 2021 (4) SCC 602, the appeal is maintainable. In fact, on the earlier occasion, at the time of hearing of the appeal, we also observed that it could be an appealable order as the effect of the dismissal of the application for condonation of delay is a deemed affirmation of the award.

Mr. Bag has also relied upon the aforesaid decision today to argue that the appeal is maintainable.

Chintels India (supra) has clearly stated that an order refusing to condone the delay in filing application under Section 34 of the Act is maintainable under Section 37(1) (C) of the Act as such order amounts to an order refusing to set aside an award.

The next question which arises for consideration is whether, in the facts and circumstances of this case, the appellant is able to make out a case for condonation of delay. The written notes of argument filed by Mr. Sen is quite helpful on this point. It appears from the record that the Arbitral Tribunal made and published an award on 23rd November, 2019. Thereafter, a corrigendum correcting the amount awarded in the said award was issued on 29th November, 2019. The time to challenge the said award expired on 28th February, 2020. The appellant had filed an application on 20th March, 2020, that is, twenty days beyond the period prescribed under Section 34 of the Act, but was within the extended period of thirty days as provided by the proviso to Section 34(3) of the said Act. The said proviso, however, states that if the court is satisfied that the appellant 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 30 days but not thereafter. However, the said application was taken up for consideration on 18th February, 2021 when the learned Single Judge dismissed the said application for want of jurisdiction as the said application was required to be filed before the Commercial Division with an observation made in the said order that Section 14 of the Limitation Act 1963 would apply if the applications is filed afresh before the Commercial Division. At the relevant time, the learned Court was both having the determination to deal with

matter in the Original Side as well as in the Commercial Division.

The second application was filed on 23rd February, 2021 under Section 34 of the Act before the learned Commercial Division challenging the said award dated 23rd November, 2019. The said application was dismissed on 11th March, 2021 on the grounds as we have indicated hereinabove.

The point that is to be considered whether the appellant was prevented by sufficient cause by making the application beyond three months but within the extended period of thirty days as provided under the Proviso to Section 34(3) of the said Act.

There is a consensus at the Bar that there is a total delay of 24 days in filing the application for setting aside of the award, that is to say, 20 days at the time of filing the first application and three days in filing the second application.

Mr. Bag has fairly submitted that the explanation offered in the present petition filed before the trial judge for setting aside of the award was that due to an inter-departmental procedure the application for setting aside of the award could not be filed in time which is a fact without giving details of the procedure. The paragraphs dealing with the explanation for delay is satisfactorily drafted.

Hence one cannot lost sight of the fact that the wing of the appellant is a large organization and the explanation offered for not being able to file the application for setting aside of the award due to lack of synergy or inter-departmental procedure cannot be easily overlooked and/or ignored. There may be a lethargy on the part of the persons responsible for instructing the advocate to prepare and file the application for setting aside of the award. The decision to file an application may not rest on an individual and since it has to pass through various tiers, the delay in filing the application may not be deliberate.

The question whether a Government should be treated differently and should form a distinct and separate class while considering an application for condonation of delay has been considered in State of West Bengal vs. West Bengal Judicial Service Association reported at 1990(2) CLJ 73 and the State of West Bengal vs. Nipendra Nath Banerjee & Ors. reported at AIR 1992 Cal 179. The said two decisions have addressed the reasons why the Government should not suffer due to delay or latches which may not be deliberate. Ordinarily a litigant does not stand to benefit by lodging an application late. When substantial justice and technical considerations are pitted against each other cause of substantial justice discerns to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. If a proceeding initiated by the Government is nipped in the bud due to delay no person is individually affected. In the ultimate analysis the public interest is affected. It cannot be overlooked that the decisions of the Government are collective and institutional decisions and do not share the characteristics of decisions of private individuals. Government decisions are proverbially slow, incumbent, as they are, by a considerable degree of procedural red tape in the process of their making which may include preparing notes, file pushing and shifting the responsibility on others. The bureaucratic decision making process sometimes becomes too fatal for the Government. The relief under Section 5 of the Limitation Act is discretionary.

The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words "sufficient cause" in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the Appellant. (See. *Brahampal & Ors. vs. National Insurance Company* reported at 2021 (6) SCC 512 paragraph 16) Unless there has been a culpable negligence or mala fide the court is expected to take a liberal view keeping in the mind the aforesaid considerations.

In the instant case no doubt the initial application was filed on the 110th day but within the outer limit of 120 days and the court is required to find out if there has been a culpable negligence on the part of the appellant to file the application for condonation of delay. In *The State of Nagaland vs. Lipok AO and Ors.* reported at 2005 (3) SCC 752 the Hon'ble Supreme Court has stated:

"The court must always take a justice oriented approach while considering an application for condonation of delay. If the court is convinced that there had been an attempt on the part of the government officials or public servants to defeat justice by causing delay, the court, in view of the larger public interest, should take a lenient view in such situations, condone the delay, howsoever huge may be the delay, and have the matter decided on merits."

We do not find in the instant case that there has been a deliberate attempt to defeat justice. Moreover, in the earlier proceeding leave was given to the appellant to file the application for setting aside of the award afresh by taking recourse to Section 14 of the Limitation Act as it was filed in the Original Ordinary Jurisdiction and not in the Commercial Division. When the matter was being heard by the learned Court having both the jurisdiction it could have been transferred to Commercial Division without requiring the appellant to file the application afresh. Section 14 of the Limitation Act does not provide for a period of limitation but only provides for the exclusion of a certain period and it was held in *Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and Ors.* reported at 2008 (7) SCC 169 that:

"Having regard to the legislative intent, it will have to be held that the provisions of Section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award".

The learned trial Judge in dismissing the first application was aware of the law laid down by the Hon'ble Supreme Court and granted leave to the appellant to file an application afresh in the Commercial Division. The appellant is not going to gain by filing the application belatedly. It runs the risk of losing its rights to challenge the said award. The extinguishment of the right to challenge the award would severely and seriously prejudice the appellant.

In the instant case, it cannot be said that there has been a culpable negligence on the part of the appellant in not preferring the application within the period of 90 days or within the extended period of 30 days. Moreover, it needs to be remembered that the Government deals with public

money and the consequence of not allowing the application for condonation of delay would result in drain from such public exchequer without an opportunity being given to the appellant to contest the award on merits. The co-ordinate Bench has already admitted the appeal on 7th April, 2021. While admitting the appeal the co-ordinate Bench directed the appellant to deposit Rs.3 Crores 80 Lakhs with the learned Registrar, Original Side, High Court at Calcutta by 23rd April, 2021 as a condition precedent for the award-holder not to proceed with the execution of the award. This amount has since been deposited by the appellant with the learned Registrar, Original Side, High Court at Calcutta. The interest of the award holder is fully secured.

In view of the submission made by Mr. Bag that the appellant is likely to file an application for stay of operation of the award, the learned Registrar, Original Side, High Court at Calcutta shall for the time being retain the said amount to the credit of the AP No.107 of 2021, subject to any order that may be passed in the application to be filed by the applicants/respondents for withdrawal of the said amount.

The award-holder has filed an application being IA No.GA 2 of 2021 praying, inter alia, for withdrawal of the said sum. We are not deciding the said application at this stage as the said issue is required to be decided by the learned Single Judge in the event any application for stay of operation of the award is filed by the appellant or by the executing court in the event of non filing of such an application.

We make it clear that we have not gone into the merits of the application being GA No.2 of 2021 and if any such application is filed on the selfsame cause of action, the learned Single Judge is requested to consider such prayer on merits being uninfluenced by any observations made by us in this order.

Thus, APO 49 of 2021 is allowed and IA No. GA 2 of 2021 is disposed of.

(SOUMEN SEN, J.) (AJAY KUMAR MUKHERJEE, J.)