# M/S Essar Constructions vs N.P. Rama Krishna Reddy on 3 May, 2000

## Equivalent citations: AIRONLINE 2000 SC 553

## Author: Ruma Pal

## Bench: D.P.Wadhwa, Ruma Pal

PETITIONER:
M/S ESSAR CONSTRUCTIONS

Vs.

RESPONDENT:
N.P. RAMA KRISHNA REDDY

DATE OF JUDGMENT: 03/05/2000

BENCH:
D.P.Wadhwa, Ruma Pal

JUDGMENT:

RUMA PAL, J Leave granted.

The litigants, in this case, have traversed unknown procedural paths crossing legal barriers to present us with a case which has no simple solution. The cause for complaint before us is an order passed by the High Court of Andhra Pradesh under Section 115 of the Code of Civil Procedure condoning the delay in filing an application under Section 30 of the Arbitration Act, 1940 and remanding the matter to the Trial Court for a decision on merits. According to the petitioners the High Court had wrongly interfered with the order dated 28th April, 1999 by which the Principal Senior Civil Judge Kakinada had dismissed the respondents application under Section 5 of the Limitation Act, 1963 on the ground that the cause shown for the delay was insufficiently explained. Had the issue been so straightforward, unquestionably the High Courts order would have had to be set aside, because it had re-appraised the cause shown by the respondent and condoned the delay under Section 5 of the 1963 Act. There is ample authority to hold that this could not be done under Section 115 of the Code [See: D.L.F. Housing & Construction Company Private Ltd., New Delhi vs. Sarup Singh & Others 1970 (2) SCR 368 Manindra Land and Building Corporation Ltd. vs. Bhutnath Banerjee and Others 1964 (3) SCR 495 and Pandurang Dhoni Chougule vs. Maruti Hari Jadhav 1966 (1) SCR 102.] But was the Civil Judges order dismissing the respondents application under Section 5 at all revisable under Section 115 of the Code or did an appeal lie from it under Section 39 of the Arbitration Act, 1940? The answer is of moment as the powers of an appellate Court are wider than

those available under Section 115. Section 39 (1) (vi) of the Arbitration Act, 1940 says that an appeal shall lie inter alia from an order refusing to set aside an award. To arrive at a conclusion as to whether the order passed by the Senior Civil Judge, Kakinada was an order refusing to set aside the award, we have to consider the facts. Disputes between the parties were referred to three arbitrators in terms of an arbitration agreement. There was no unanimity among the Arbitrators. Two arbitrators passed an award in favour of the appellant before us and the third decided in favour of the respondent. The respondent made an abortive attempt to set aside the award and to have the minority award made a rule of Court before the award was filed. The award was filed on 27.8.97. Notice under Section 14(2) of the Act was issued to the respondent on the same date. According to the respondent, it never received the notice. The appellant filed a suit to make the majority award a rule of Court under Section 17 of the Act. The respondent has filed a written statement in the suit. In addition, the respondent filed two suits one for making the minority award a rule of Court and another for setting aside the majority award. Along with the second suit (OSSR 3098/98), the respondent filed an application under Section 5 of the Limitation Act (I.A No. 1394/98). A few days later, the respondent filed a second application (I.A. No. 1395/98) in which it was contended that the second suit was not a suit at all but an application which had been wrongly numbered as a suit. It was, therefore, prayed that the Court should convert the said application i.e. petition to set aside the Award as OP. The Principal Senior Civil Judge by his order dated 28th April 1999 disposed of the application under Section 5 treating OSS 3098/98 as an application for setting aside the award. This is what he said: 13. Now coming to the explanation of petitioner for condonation of delay of 331 days in filing application to set aside Award, the petitioner states that as notice was sent by Court to Bombay Port Trust even though it is addressed to Kakinada Port under Dis. No. 8994, Dt. 30.8.1997 and actually the said notice was despatched by Court on 1.9.1997, therefore the petitioner states that after excluding 30 days time from 1.9.1997 the delay in filing application for setting aside Award is 331 days i.e. from 1.10.1997 to 2.9.1998.

14. In the affidavit of the petitioner, petitioner only refers to their filing a suit which was rejected on 21.3.1997 and did not refer to respondent herein filing O.S. 445/97 against petitioner herein and petitioner herein receiving summons in that suit on 19.1.1998 and thereafter petitioner herein entering appearance through A.G.P. on 1.2.1998 and filing written statement in O.S. 445/97 on 17.7.1998. The above circumstances go to show that petitioner is not willing to state that particulars referred to above, as the same will go against the petitioner and it will amount to service of notice of Arbitrators filing Award into Court. In the present circumstances of the case and as the explanation of petitioner is not sufficient explanation, I am of the view that delay as claimed by petitioner cannot be condoned. Accordingly, this petition is dismissed, but under the circumstances of the case no costs.

The outcome of the order in effect was that the prayer for setting aside the award was refused on the ground of delay.

The effect-test was applied by the High Court of Andhra Pradesh in Babumian & Mastan and Anr. V. Smt. K. Seethayamma and Others AIR 1985 AP 135 which said: In the light of the rulings in Gopalaswamy v. Navalgaria (AIR 1967 Mad 403) (supra) and the decision of the Bench in CMA No. 612 of 1977 dated 3.4.1978, the legal position may be enunciated as follows: The order refusing to

condone the delay in filing the claim petition has the effect of finally disposing of the original petition. Such an order can, therefore, be treated as an award and hence it is appealable.

Again a Division Bench of the Assam High Court in Mafizuddin v. Alimuddin AIR 1950 Ass 191 has said:

> Whether objections to an award are dismissed on the merits or they are dismissed on the ground that they are filed beyond time, the Court by dismissing them in effect refuses to set aside the award, and an order refusing to set aside is clearly appealable under S. 30.
>
> In some High Courts, no separate application is filed under Section 5 of the Limitation Act and the prayer for condonation of delay is included along with the prayers made for substantive relief. Courts have entertained appeals from an order dismissing an application on the ground of limitation. Thus, in State of West Bengal V. M/s A. Mondal AIR 1985 Cal 12 DB where an application under Section 30 of the Arbitration Act was dismissed on the ground of limitation, an appeal was entertained. [See also Damodaran V. Bhaskaran 1988 (2) KLT 753] The procedure appears to have been approved by the Supreme Court in the case of Union of India V. Union Building AIR 1985 Cal 337 (DB), where on an appeal to the Supreme Court from an order dismissing an application under Section 30 on the ground of delay, the appeal was remanded to the High Court to be disposed of.

The position should be no different in Courts where a separate application under Section 5 of the Limitation Act is required to be filed. If the various High Courts decisions noted earlier are correct, then the application under Section 5 being dismissed, the application under Section 30 would consequently also have to be dismissed although this might be a mere formality. The end result would be the same. None of the High Courts in the decisions noted, have spelt out the underlying reasons why an order rejecting an application on the ground of limitation tantamounts to a rejection of the application itself. In our view, the unspoken major premise is based on the Limitation Act. As observed by the Privy Council in Harinath Chatterjee vs. Mathurmohan Goswami ( 1894) ILR 21 Cal. 18, the statute of limitations assumes the existence of a cause of action and does not define or create one. The cause of action in this case is the alleged impropriety of the award. The application to set aside the award may be and was resisted by the defence of limitation. This is not a technical plea but one that is given by Section 3 of the Limitation Act, 1963 which inter alia provides that:

> Subject to the provisions of Sections 4 to 24 of the Act every suit instituted, appeal preferred, and application made, after the prescribed period shall be dismissed, although limitation has not been set up as a defence The section makes it clear that limitation may be a ground for rejecting a suit already instituted, an appeal preferred and, in the context of this case, most importantly, an application already made. What is before the Court is the substantive application when the question of limitation is decided. Limitation, like the question of jurisdiction may be provided for in a separate statute but it is a defence available in the suit, appeal or application. When

the defence is upheld it is the suit or the appeal or the application itself which is dismissed. Of course, the question as far as appeals are concerned may be debatable having regard to the provisions of Order 41 of the Code of Civil Procedure relating to admission of appeals as an appeal may not be admitted at all because it is barred by limitation. We express no final view in the matter. But there is no corresponding requirement for admission of applications or suits after overcoming the barriers of limitation. A suit which is dismissed on the ground of limitation may be appealed against as a decree. By the same token an application under Section 30 which is dismissed on the ground of limitation is a refusal to set aside the award. Section 39 (1)(vi) of the Arbitration Act, 1940 does not indicate the grounds on which the court may refuse to set aside the award. There is nothing in its language to exclude a refusal to set aside the award because the application to set aside the award is barred by limitation. By dismissing the application albeit under Section 5, the assailability of the award is concluded as far as the Court rejecting the application is concerned. Ultimately therefore, it is an order passed under Section 30 of the Arbitration Act though by applying the provisions of the Limitation Act. Section 17 of the Arbitration Act, 1940 provides: Judgment in terms of award.- Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground it is in excess of, or not otherwise in accordance with, the award.

The Court can pronounce judgment according to the award (1) if the time for making an application to set aside the award has expired or (2) such application having been made, after refusing it. Because of the applicability of Section 5 of the Limitation Act, 1963, if the Court has not pronounced judgment for whatever reason, although the time prescribed for making the application has expired and an application for setting aside the award is made with a prayer for condonation of delay, the Court cannot pronounce judgment until the application is rejected. Even after a decree is passed under Section 17 an application under Section 30 can be entertained provided sufficient cause is established. In either case the rejection of the application would be a refusal to set aside the award. It is to be emphasized that under Section 17 the grounds of refusal are not specified nor is there any limitation on the word refusal to mean only a refusal on merits. Reading Section 39 (1)(vi) and Section 17 together, it would therefore follow that an application to set aside an award which is rejected on the ground that it is delayed and that no sufficient cause has been made out under Section 5 of the Limitation Act would be an appealable order. This brings us to the decisions of this Court relied on by the appellant to contend that the order of the Principal Senior Civil Judge was not an appealable one and could only be revised under Section 115 of the Code of Civil Procedure. The first decision cited is Nilkantha Shidramappa Ningashetti versus Kashinath Somanna Ningashetti : 1962 (2) SCR 551. In that case there was no application to set aside the award at all and no question of

rejection of such an application arose. After the award was filed, the defendant No.1 filed his say about the arbitrators award. He subsequently withdrew his say. Later, a guardian of a party who was a minor, filed a written statement claiming that the award was null and void on the ground that the award was without jurisdiction. This objection was not pressed before the Trial Court. The Trial Court, therefore, passed a decree in terms of the award. The appeal to the High Court was dismissed as not maintainable. The further appeal to this Court was dismissed saying: When no party filed an objection praying for the setting aside of the award, no question of refusing to set it aside can arise and therefore no appeal was maintainable under Section 39(1)(vi) of the Arbitration Act which allows an appeal against an order refusing to set aside an award."

The case is not an authority for the proposition that where an application under Section 30 is made and is rejected, no appeal is maintainable. It does not apply to the facts of this case. The second decision cited was Madan Lal versus Sunderlal 1967 (3) SCR 147. In that case the question of appealability of an order rejecting an application under Section 30 of the Arbitration Act, 1940 was neither raised nor decided. On the contrary, the High Court in Madanlals case had dismissed the appeal from the order of the Trial Court which had held that the application under Section 30 was barred by limitation, not on the ground that the appeal was not maintainable but because it upheld the Trial Courts decision. The Supreme Court affirmed the High Courts order. On facts therefore, the decision really supports our conclusions. The editorial comment in Justice Bachawats Law of Arbitration & Conciliation (3rd edn.) at p.902 that Mafizuddins case (supra) has been overruled by the decisions of Nilkantha vs. Kashinath (supra) and Madan Lal vs. Sunder Lal (supra) is, for the reasons stated, erroneous. Besides Madanlals case was decided in the context of the Indian Limitation Act, 1908 when the provisions of Section 5 were inapplicable to applications under Section 30 of the Arbitration Act. The period prescribed under Article 158 of the 1908 Act for challenging an award was absolute. It was therefore held that an objection filed more than 30 days after the notice could not be treated as an application for setting (aside?) the award (sic) for it would be then barred by limitation. The position thus is that in the present case there was no application to set aside the award as grounds mentioned in Section 30 within the period of limitation. It was also observed that even the Court could not set aside an award suo motu under Section 30 beyond the period of limitation for if that were so the limitation provided under Article 158 of the Limitation Act would be completely negatived.

Apart from the decision not being relevant to the issue before us, it is entirely distinguishable in law. Section 5 of the Limitation Act, 1963 is now applicable to all applications under the Arbitration Act. Provided that the delay is sufficiently explained, there is no such compulsion on the Court to reject an application filed beyond the prescribed period of limitation nor is there any question of the prescribed period of limitation being negatived by entertaining an application under Section 30 beyond the period of limitation. We therefore conclude that the order of the Senior Civil Judge rejecting the application of the respondent under Section 5 was appealable under the 1940 Act. The

application under Section 115 of the Code therefore did not lie. Despite the fact that this issue was neither raised before nor considered by the High Court, we cannot take a blinkered view of the situation in law. Had the issue been raised, it would have been open to the High Court to have converted the revision petition into an appeal. To set aside the order of the High Court on this technical ground and to remand it for a reconsideration of the sufficiency of the cause shown by the respondent, would be an unnecessary exercise. In the view we have taken, the High Court had the jurisdiction to reappraise the evidence and condone the delay. It has given its reasons for doing so. It cannot, in the circumstances, take a different view on the merits of the respondents case on the question of delay if the matter were to be remanded. In our opinion, this would be an appropriate case for us to exercise our powers under Article 142 of the Constitution and decide on the merits of the sufficiency cause shown. The High Court gave three reasons for setting aside the order of the Trial Court after considering several decisions cited before it. The first, to use its own words, that there was a total negligence and it is on the part of the counsel who appeared for the State in the Trial Court. The second reason was that high-stakes were involved in the matter. The third reason was that no prejudice would be caused to the Contractor because the issue of the validity of the award was yet to be decided in its suit. It is a moot point whether the second and third reasons are relevant. Nevertheless, the first ground should have been and, in our opinion, was sufficient to excuse the delay and to remand the matter back to the Trial Court for a decision on the merits of the application under Section 30. It would be an euphemism to describe the ineptitude of the advocates advice to the respondent in connection with the proceedings before the Trial Court as negligence. As he holds the post of Govt. Pleader it could reasonably be assumed by the respondent that he possessed the required legal expertise to advise them correctly. His lack of this is borne out by the several wholly misconceived proceedings filed by the respondent before the Senior Civil Judge on his advice. That the respondents objection to the award is not the laggardly response of a frivolous litigant appears from the fact that an objection to the award was made even before the award was filed.

The appeal is accordingly dismissed. There will be no order as to costs.