

A MAHINDRA AND MAHINDRA FINANCIAL SERVICES LTD.

v.

MAHESHBHAI TINABHAI RATHOD & ORS.

(Civil Appeal No. 11477 of 2014)

B DECEMBER 16, 2021

[N. V. RAMANA, CJI , A. S. BOPANNA AND
HIMA KOHLI, JJ.]

C *Arbitration and Conciliation Act, 1996 – s.34 – Power of Court to condone the delay for setting aside an Award – In the instant case, Arbitral award passed on 28.02.2011 in favour of appellant and copy of the award dispatched to both the parties – Thereafter appellant filed execution petition on 27.06.2011 to recover amount due from the respondent – Respondent on 04.01.2012 assailed the arbitral award by filing the petition under s.34 of the Act 1996*
D *along with the notice of motion under s.5 of Limitation Act seeking condonation of delay of 185 days which is beyond the time limit prescribed under s.34(3) of the Act 1996 – Single Judge while considering the notice of motion noted that respondent refused to accept the registered post containing the award and in that view,*
E *declined to condone the delay – However, Division Bench of High Court condoned the delay – On appeal, held: Limitation period to set aside an award is prescribed under s.34 of the Act 1996 – Extent to which the delay in setting aside an award can be condoned is circumscribed under proviso s.34(3) of the Act 1996 – s.5 of Limitation Act is not applicable to condone the delay beyond the*
F *period prescribed under s.34 of the Act 1996 – Division Bench was not justified in condoning the delay in a casual manner – Order of Single Judge restored.*

Allowing the appeals, the Court

G **HELD: 1. A perusal of the order passed by the Single Judge indicates that as per the explanation put forth by the respondent, it was their case that the Arbitration Petition under Section 34 of Act 1996 filed on 04.01.2012 was on having knowledge of the award, which according to the respondent was on 15.11.2011 when notice in the execution petition was received. The affidavit in**

H

reply was noted by the Single Judge, as per which it was brought on record that the Arbitrator had dispatched the award dated 28.02.2011 on 15.03.2011 by making an inscription, 'AWARD', on the envelope, by Regd. Post Acknowledgment due. The refusal to receive was endorsed by the postal authority on 23.03.2011. In appropriate cases the delay is to be condoned so as not to defeat the meritorious case. However, that would arise only when the power under Section 5 of Limitation Act is available to be exercised. The case of *Katiji* is one where such power was available to be exercised as it was not excluded. In the instant case where limitation is prescribed, the extent to which it can be condoned is circumscribed and it has been held by this Court that Section 5 of Limitation Act is not applicable to condone the delay beyond the period prescribed under Section 34(3) of Act 1996, the Division Bench was not justified in condoning the delay in a casual manner. [Paras 8, 10][101-A-C; 102-B-D]

Union of India v. Popular Construction Co. (2001) 8 SCC 470 : [2001] 3 Suppl. SCR 619; State of Himachal Pradesh & Anr. vs. Himachal Techno Engineers & Anr. (2010) 12 SCC 210 : [2010] 8 SCR 1025; P. Radha Bai v. P. Ashok Kumar (2019) 13 SCC 445 : [2018] 12 SCR 143; Chintels India Limited v. Bhayana Builders Private Limited (2021) 4 SCC 602 – relied on.

Collector, Land Acquisition, Anantnag and Another v. Mst. Katiji and Others AIR 1987 SC 1353 : [1987] 2 SCR 387 – held inapplicable.

Case Law Reference

[2001] 3 Suppl. SCR 619	relied on	Para 7	
[2010] 8 SCR 1025	relied on	Para 7.1	
[2018] 12 SCR 143	relied on	Para 7.2	
(2021) 4 SCC 602	relied on	Para 7.3	G
[1987] 2 SCR 387	held inapplicable	Para 10	

H

A CIVIL APPELLATE JURISDICTION: Civil Appeal No.11477 of 2014.

From the Judgment and Order dated 24.09.2012 of the High Court of Judicature at Bombay in Appeal No.526 of 2012 in Notice of Motion No.925 of 2012 in Arbitration Petition No.209 of 2012.

B With

Civil Appeal No.11478 of 2014.

Prashant Kumar, Amit Singh, Merusagar Samantaray, Advs. for the Appellant.

C V. N. Raghupathy, Adv. for the Respondents.

The Judgment of the Court was delivered by

A. S. BOPANNA, J.

D 1. The appellant in these appeals is assailing the order dated 24.09.2012 passed by the learned Division Bench of the High Court of Judicature at Bombay in Appeal Nos.526 and 525 of 2012 in NM No.925/2012, NM No. 923/2012 in AP No.209/2012 and APNo.212 of 2012 respectively. By the said order the learned Division Bench has allowed the appeals, condoned the delay and directed to place the Arbitration
E Petition No.209 of 2012 and 212 of 2012 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (“Act 1996” for short) for admission hearing before the learned Single Judge for consideration on merits.

2. The brief facts leading to the above appeals is that the respondent availed loan facility for purchase of tractors and an agreement
F No. 366533 dated 24.10.2005 was entered into between the parties in respect of the transaction. The further details relating to the transaction on merit is unnecessary to be adverted for the purpose of disposal of these appeals. However, it is noted that due to non-adherence to the terms of contract, dispute arose between the parties and the same was referred to arbitration by invoking the arbitration clause contained in the
G agreement. The learned Arbitrator passed the award dated 28.02.2011 and allowed the claim made by the appellant. The learned Arbitrator is stated to have dispatched the copy of the award to both the parties through Registered Post acknowledgment due. The appellant herein thereafter filed an execution petition on 27.06.2011 to execute the award
H

and recover the amount due and payable by the respondent. The notice of execution petition from the court of the Civil Judge, District Court, Bhavnagar was issued to the respondent. A

3. The respondent, at that stage, on 04.01.2012 assailed the arbitral award dated 28.02.2011 by filing the petition under Section 34 of the Act 1996. By such time there was delay of 185 days beyond the time period allowed under Section 34 (3) of the Act 1996. Hence along with the petition, the respondent moved Notice of Motion No.925 of 2012 in Arbitration Petition No.209 and Notice of Motion No.923 of 2012 in Arbitration Petition No.212 of 2012 under Section 5 of the Limitation Act seeking condonation of delay contending that the respondent had knowledge of the proceedings only when summons was received from the execution court on 15.11.2011. The appellant herein filed their objection to the Notice of Motion. The learned Single Judge while considering the Notice of Motion in the petition under Section 34 of Act 1996 noted that the respondent refused to accept the registered post containing the award and, in that view, declined to condone the delay. The respondent therefore filed an appeal before the learned Division Bench, which has by a cryptic order condoned the delay against the statutory provision and the law enunciated by this Court. The appellant is therefore aggrieved and is seeking that the order passed by the learned Division Bench be set aside, consequently the petition filed by the respondent under Section 34 of Act 1996 be dismissed as barred by time. B C D E

4. We have heard Mr. Prashant Kumar, learned counsel for the appellant, Mr. V.N. Raghupathy, learned counsel for the respondents and perused the material available on record.

5. Having noted the sequence, the only aspect which arises for consideration in these appeals is as to whether the petition filed under Section 34 of the Act 1996 was within the period of limitation provided therein. If not, whether the delay is condonable by exercise of power under Section 5 of Limitation Act? In that regard whether the action of the learned Division Bench in condoning the delay by applying Section 5 of Limitation Act to a proceeding under Section 34(3) of Act 1996 in the manner it has done in the instant case justified? F G

6. To appreciate the matter in its correct perspective it is necessary at the threshold to take note of Section 34 (3) of Act 1996 providing for the period of limitation, which is as hereunder: - H

A “Section 34 (3):- An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

B Provided 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.”

C 7. The scope available for condonation of delay being self-contained in the proviso to Section 34(3) and Section 5 of Limitation Act not being applicable has been taken note by this Court in its earlier decisions, which we may note. In *Union of India vs. Popular Construction Co.* (2001) 8 SCC 470 it has been held as hereunder: -

D “12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are “but not thereafter” used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase “but not thereafter” wholly otiose. No principle of interpretation would justify such a result.

E 14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need “to minimise the supervisory role of courts in the arbitral process” This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

F “5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

H

16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award “in accordance with” sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application “in accordance with” that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

“where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court”.

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to “proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow” (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court’s powers by the exclusion of the operation of Section 5 of the Limitation Act.

7.1 Further, in State of *Himachal Pradesh & Anr. vs. Himachal Techno Engineers & Anr.* (2010) 12 SCC 210 it was noted and held as hereunder: -

“2. A petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“the Act”, for short) was filed by the appellant on 11-3-2008, challenging the arbitral award. The petition was accompanied by an application under sub-section (3) of Section 34 of the Act, for condonation of delay of 28 days in filing the petition. The respondent resisted the application contending that

A the petition under Section 34 was filed beyond the period of 3 months plus 30 days and therefore, was liable to be rejected.

5. Having regard to the proviso to Section 34(3) of the Act, the provisions of Section 5 of the Limitation Act, 1963 will not apply in regard to petitions under Section 34 of the Act. While Section 5 of the Limitation Act does not place any outer limit in regard to the period of delay that could be condoned, the proviso to sub-section (3) of Section 34 of the Act places a limit on the period of condonable delay by using the words “may entertain the application within a further period of thirty days, but not thereafter”. Therefore, if a petition is filed beyond the prescribed period of three months, the court has the discretion to condone the delay only to an extent of thirty days, provided sufficient cause is shown. Where a petition is filed beyond three months plus thirty days, even if sufficient cause is made out, the delay cannot be condoned.”

D 7.2 The same view was taken by this Court in ***P. Radha Bai vs. P. Ashok Kumar*** (2019) 13 SCC 445 wherein this Court held as follows-

“33.2. The proviso to Section 34 (3) enables a court to entertain an application to challenge an award after the three months’ period is expired, but only within an additional period of thirty dates, “but not thereafter”. The use of the phrase “but not thereafter” shows that the 120 days’ period is the outer boundary for challenging an award. If Section 17 were to be applied, the outer boundary for challenging an award could go beyond 120 days. This Court has consistently taken this view that the words “but not thereafter” in the proviso of Section 34 (3) of the Arbitration Act are of a mandatory nature, and couched in negative terms, which leaves no room for doubt. [*State of H.P. vs. Himachal Techno Engineers* (2010) 12 SCC 210], *Assam Urban Water Supply & Sewerage Board vs. Subash Projects & Mktg. Ltd.* (2012) 2 SCC 624 and *Anil Kumar Jinabhai Patel vs. Pravinchandra Jinabhai Patel* (2018) 15 SCC 178]”

G 7.3 The observations of this Court in different decisions relating to non-applicability of Section 5 of the Limitation Act in condoning the delay and extending the limitation prescribed under Section 34 (3) of Act 1996 was taken note of by a bench of three Hon’ble Judges of this Court with approval, in *Chintels India Limited vs. Bhayana Builders Private Limited* (2021) 4 SCC 602.

8. In the above backdrop, a perusal of the order passed by the learned Single Judge indicates that as per the explanation put-forth by the respondent herein, it was their case that the Arbitration Petition under Section 34 of Act 1996 filed on 04.01.2012 was on having knowledge of the award, which according to the respondent was on 15.11.2011 when notice in the execution petition was received. The affidavit in reply was noted by the learned Single Judge, as per which it was brought on record that the learned Arbitrator had dispatched the award dated 28.02.2011 on 15.03.2011 by making an inscription, 'AWARD', on the envelope, by Regd. Post Acknowledgment due. The refusal to receive was endorsed by the postal authority on 23.03.2011. The postal remark in Gujarati "Lenavi Na Pade Che" (refused to accept) was noted by the learned Single Judge. In para 9 and 10 of the order, the learned Single Judge has ascertained the factual position of the refusal made by the respondent and there being no denial on that front. In that light, the learned Single Judge concluded as hereunder: -

"The envelopes forwarded by the learned Arbitrator to the Petitioners, which are returned by the postal authorities to the Arbitrator on the ground that the Petitioners have refused to accept service of the same, are opened in Court and it is noted that the learned Arbitrator had forwarded signed copies of the award to the Petitioners. As stated hereinabove, the Petitioners have admitted the fact that they have refused to accept service of the envelopes containing copies of the Arbitral Award. Refusal of service is good service in law. In view thereof, the Petitioners are deemed to have been served with the signed copy of the award on 23rd March, 2011. The Petitioners have filed the Petition only on 02-04 January, 2012 i.e. after delay of about 197 days. The issue as to whether the provision of Section 34(3) of the Act, has the effect of excluding Section 5 of the Limitation Act, 1963, came up for consideration before the Hon'ble Supreme Court in the case of Consolidated Engineering Enterprises Versus Principal Secretary, Irrigation Department and Ors. wherein the Hon'ble Supreme Court has in paragraph 53 of its decision, categorically held that the provisions of Section 34(3) of the Act, has the effect of excluding Section 5 of the Limitation Act, 1963."

9. The learned Single Judge in that view took note of the legal position and declined to condone the delay. The Notice of Motion was accordingly dismissed.

- A 10. In contradistinction, a perusal of the order passed by the learned Division Bench *ex-facie* indicates that it has proceeded at a tangent. On referring to the contention that the respondent was a farmer and that no amount is due, has relied on the decision of this Court in ***Collector, Land Acquisition, Anantnag and Another vs. Mst. Katiji and Others*** AIR 1987 SC 1353 out of context and has made the same as the basis to
- B allow the appeal. No-doubt the delay of 197 days may not seem too inordinate. In appropriate cases the delay is to be condoned so as not to defeat the meritorious case. However, that would arise only when the power under Section 5 of Limitation Act is available to be exercised. The case of ***Katiji*** (supra) is one where such power was available to be
- C exercised as it was not excluded. In the instant case where limitation is prescribed, the extent to which it can be condoned is circumscribed and it has been held by this Court that Section 5 of Limitation Act is not applicable to condone the delay beyond the period prescribed under Section 34(3) of Act 1996, the learned Division Bench was not justified in condoning the delay in a casual manner. The order dated 24.09.2012
- D is not sustainable, the same is therefore set aside and the order of learned Single Judge is restored.

11. The appeals are accordingly allowed with no order as to costs.

12. All pending applications, if any, shall stand disposed of.