Bharat Heavy Electricals Limited vs Kanohar Electricals Ltd on 20 March, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P. (COMM) 394/2022 & I.A. 15321/2022 (Stay)
BHARAT HEAVY ELECTRICALS LIMITED..... Petitioner
Through: Mr. Rajesh Yadav, Sr. Adv.
with Mr. Arvind Chaudhary,
Ms. Ruchira Arora, Advs.

versus

KANOHAR ELECTRICALS LTD ..... Respondent
Through: Mr. Raman Kapur, Sr. Adv.
with Mr. Varun Kapur, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 20.03.2023 I.A. 15323/2022 (Enlargement of Time)

1. The present application purporting to be under Section 34(3) read with Section 14 of the Limitation Act, 1963 [the 1963 Act] seeks the Court's directions for enlargement of the time spent by the petitioner in filing the accompanying petition under Section 34 of the Arbitration and Conciliation Act, 1996 [the Act] before a court which was ultimately discovered to lack the requisite pecuniary jurisdiction.

2. From the material which has been placed on the record, it is manifest that the Award is dated 29 March 2022. Copies of the Award are stated to have been provided to parties on 31 March 2022. The Section 34 petition thereafter came to be filed before the Saket Court on 09 June 2022. After due examination, it was placed before the competent court on 08 July 2022. On that date, the District Judge after hearing the counsel for the petitioner passed an order directing the filing of a proper Statement of Truth along with an affidavit within a period of one week. The matter was, thereafter, called on 18 July 2022. On the said date, an application is stated to have been moved by the respondent for rejection of the petition for want of jurisdiction. The Court proceeded to grant the petitioner time to file a reply to the said application and the matter was thereafter posted for 02 September 2022. When the matter was taken up on that date, the District Judge recorded that the amount awarded by the Arbitral Tribunal was Rs.1,28,52,206/- as against the claims of the petitioner which stood at Rs.3,81,50,826/-. It consequently proceeded to hold that since the

aggregate value of the claims was more than Rs.2 crores, the petition had been wrongly presented before the said court. The District Judge accordingly permitted the petitioner to withdraw the petition to be filed thereafter before the competent court. Post the passing of the aforesaid order, the instant petition came to be filed before this Court on 06 September 2022.

3. The objections which were taken to the prayers made in the instant application were duly noticed by the Court in its order of 18 January 2023. Insofar as the question of applicability of Section 14 of the 1963 Act is concerned, the same is clearly no longer res integra and stands conclusively settled in terms of the judgment rendered by the Supreme Court in Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and Others, [(2008) 7 SCC 169]. While dealing with this aspect, the Supreme Court in that decision held as follows: -

> "22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.
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> 23. At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will

apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be found in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well to remember that Section 14 of the Limitation Act does not provide for a fresh period of limitation but only provides for the exclusion of a certain period. 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.

24. We may notice that in similar circumstances the Division Bench of this Court in State of Goa v. Western Builders [(2006) 6 SCC 239] has taken a similar view. As observed earlier the intention of the legislature in enacting Section 14 of the Act is to give relief to a litigant who had approached the wrong forum. No canon of construction of a statute is more firmly established than this that the purpose of interpretation is to give effect to the intention underlying the statute. The interpretation of Section 14 has to be liberal. The language of beneficial provision contained in Section 14 of the Limitation Act must be construed liberally so as to suppress the mischief and advance its object. Therefore, it is held that the provisions of Section 14 of the Limitation Act are applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award."

4. Insofar as the objection with respect to the petition under Section 34 as originally filed not being accompanied by an affidavit / Statement of Truth as required, a perusal of the certified copy of the petition as filed establishes that originally it was accompanied by an affidavit dated 27 May 2022.

However, in paragraph 3 thereof the petitioner due to inadvertence appears to have failed to set out the relevant paragraphs of the petition which were sought to be affirmed. The certified copy of the paper book as originally filed before the Saket Court and which has been placed for the perusal of the Court indicates that by another affidavit dated 27 May 2022 and which also stands appended to that petition, the aforesaid error was duly rectified.

5. That leaves the Court to consider the objection that the mistake was neither bona fide nor had the petitioner exercised due diligence while petitioning the Saket Court. It was the submission of Mr. Kapur, learned senior counsel for the respondent, would submit that the petition under Section 34 when ultimately filed before this Court was clearly beyond the maximum period prescribed under Section 34 and must consequently be dismissed at the threshold itself. It was contended by Mr. Kapur that the mistake in filing in any case cannot be termed as bona fide or genuine.

6. The Court notes that the petitioner appears to have petitioned the Saket Court proceeding on the basis of the ultimate claims that were accepted and granted by the Arbitral Tribunal. However, and undisputedly, the claims which were sought in the petition before the Arbitral Tribunal itself exceeded Rs.3 crores. It is thus evident that, in case, the Award itself was being assailed, the petition should have been originally filed before this Court and not before the Saket Court.

7. Be that as it may, the Court finds itself unable to take a narrow or pedantic view in the matter bearing in mind the fact that petition ultimately came to be filed before this Court on the expiry of seventy two days when computed from the time when a copy of the Award had been duly made available to parties.

8. It becomes pertinent to note that while dealing with a mistaken filing, the Supreme Court in Consolidated Engineering itself had made the following pertinent observations: -

> "32. As is evident from the facts of the case, initially the appellant had approached the Court of the learned Civil Judge, Senior Division, Chitradurga for setting aside the award made by the arbitrator. On direction dated 29-10-2002 issued by the learned Civil Judge (Senior Division), Chitradurga, the appellant had presented the application for setting aside the award before the learned District Judge, Chitradurga. Before the learned District Judge, Chitradurga an objection was raised by the respondent that the application was not maintainable before the said court and that the application was maintainable before the learned Judge, City Civil Court, Bangalore. The District Judge, Chitradurga by an order dated 3-2-2003 held that it had no jurisdiction to entertain the application submitted by the applicant and accordingly returned the application for presentation before the appropriate court. The question of jurisdiction was seriously contested between the parties not only before the Court of the learned Civil Judge (Senior Division), Chitradurga but also before the learned District Judge, Chitradurga. The question of jurisdiction had to be considered by the courts below because of establishment of the City Civil Court, Bangalore under a special enactment and in view of the definition of the word "court" as given in Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 which means

> the Principal Civil Court of Original Jurisdiction in a district. The record does not indicate that there was pretended mistake intentionally made by the appellant with a view to delaying the proceeding or harassing the respondent. There was an honest doubt about the court competent to entertain the application for setting aside the award made by the arbitrator. The mere fact that the question of jurisdiction is an arguable one would not negative good faith because the appellant believed bona fide that the court in which it had instituted the proceeding had jurisdiction in the matter. By filing the application in the courts which had no jurisdiction to entertain the same, the appellant did not achieve anything, more particularly when the lis was never given up. Under the circumstances this Court is of the opinion that the Division Bench of the High Court of Karnataka was not justified in concluding that the appellant had not prosecuted the matter in other courts with due diligence and in good faith. The said finding being against the weight of evidence on record, is liable to be set aside and is hereby set aside. We, therefore, hold that the appellant had prosecuted the matter in other courts with due diligence and in good faith and, therefore, is entitled to claim exclusion of time in prosecuting the matter in wrong courts. Therefore, the appeal arising from SLP (C) No. 15619 of 2005 will have to be allowed."

9. The Court is of the considered opinion that the said decision clearly applies to the facts of the present case. The prayers made in the application as made shall consequently stand granted. The application shall stand allowed.

O.M.P. (COMM) 394/2022 & I.A. 15321/2022 (Stay)

11. Let the matter be now called for consideration on 27.07.2023.

YASHWANT VARMA, J.

MARCH 20, 2023 bh