

M/S. Simplex Infrastructure Ltd. vs Union Of India on 5 December, 2018

Equivalent citations: AIR 2019 SUPREME COURT 505, 2019 (2) SCC 455, AIRONLINE 2018 SC 889, (2019) 197 ALLINDCAS 219 (SC), (2018) 15 SCALE 590, (2018) 4 CURCC 572, (2018) 6 ARBILR 344, (2019) 197 ALLINDCAS 219, (2019) 1 CAL HN 297, (2019) 1 JLJR 189, (2019) 1 MAD LJ 838, (2019) 1 PAT LJ 265, (2019) 1 RECCIVR 205, (2019) 2 ANDHLD 129, (2019) 2 CIVLJ 418, (2019) 2 MAD LW 530, (2019) 2 RAJ LW 1018, (2019) 4 MPLJ 1, (2019) 5 MAH LJ 520, AIR 2019 SC (CIV) 2019

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Bench: Vineet Saran, Dhananjaya Y Chandrachud, Uday Umesh Lalit

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.11866 OF 2018
(@ SPECIAL LEAVE PETITION (C) NO 17521 OF 2017)

M/S SIMPLEX INFRASTRUCTURE LTD

..APPELLANT

VERSUS

UNION OF INDIA

..RESPONDENT

JUDGMENT

Dr Dhananjaya Y Chandrachud, J

1. The present appeal arises from the judgment of a learned Single Judge of the High Court of Calcutta by which the respondent's application for condoning a delay of 514 days in filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 ('the 1996 Act') was allowed.¹

2. The appellant, who is a contractor, entered into an agreement for the construction of 821 units of permanent shelters in the tsunami-hit Andaman and Nicobar Islands with the Union of India, represented by the Executive Engineer, Andaman Central Division, Central PWD, Port Blair. 2 The scope of 1 The High Court delivered judgment on 27 April 2016. 2 The date of the agreement is 5 January 2006 work involved the construction of single storied permanent shelters, including internal water supply, sanitary installation and internal electrification. Due to differences with regard to the performance of the construction work, the parties were referred to arbitration. On 27 October 2014, the arbitrator made an award in favour of the appellant and directed the respondent to pay a sum of 9,96,98,355/- with simple interest @ 10% per annum from 1 January 2009 till actual payment. The respondent received the copy of the award on 31 October 2014.

3. Aggrieved by the award, the respondent filed an application 3 under Section 34 of the 1996 Act on 30 January 2015 before the District Judge, Port Blair for setting aside the arbitral award. During the pendency of the arbitration proceedings, the appellant had filed an application 4 under Section 9 of the 1996 Act before the High Court of Calcutta praying for an injunction on encashment of bank guarantee against the respondent and the application was duly contested by the respondent.

4. On 12 February 2016, the District Judge dismissed the respondent's application under Section 34 of the 1996 Act for want of jurisdiction. The District Judge observed:

“...According to the provision of Section 42 of the Arbitration and Conciliation Act, when an application has been made regarding an arbitration agreement before any Court under the same part; that Court shall only have jurisdiction over the arbitration proceedings and all subsequent application arising 4 AP No 91 of 2008 out of that agreement and the arbitral proceedings shall be made in that court and in no other court.

In this case the parties have preferred an application under Section 9 of the Arbitration and Conciliation Act before the Hon'ble High Court of Kolkata... Thus, it is clear to me that this Appellant Court has no jurisdiction to entertain this appeal according to Section 42 of the Arbitration and Conciliation Act.”

5. On 28 March 2016, the respondent filed an application 5 under Section 34 before the High Court of Calcutta for challenging the arbitral award dated 27 October 2014, along with an application 6 for condonation of a delay of 514 days. The respondent justified the delay on ground of there being a bona fide mistake in filing the application before the wrong forum and the respondent's counsel causing delay due to which necessary formalities were not complied with within the prescribed time.

6. On 27 April 2016, the learned Single Judge of the High Court allowed the respondent's application and condoned the delay of 514 days. The High Court held:

“After considering the submissions made by the learned advocate for the applicant/petitioner and upon perusing the application for condonation of delay, it appears that sufficient cause has been shown to explain the delay in filing the

application, being AP No. 224 of 2016 and as such the delay is condoned...”

7. The issue which has been raised before this Court is whether the learned Single Judge was justified in condoning a delay of 514 days by the respondent in filing the application under Section 34. In dealing with this issue, this Court needs to assess whether the benefit of Sections 5 and Section 14 of the Limitation Act can be extended to the respondent, and if so, whether a delay beyond the specific statutory limitation prescribed under Section 34(3) of the 1996 Act could be condoned.

8. Section 34 of the Arbitration and Conciliation Act, 1996 provides thus:

“34. Application for setting aside arbitral award.— (1) 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)... (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:

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.” Section 34 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 the grounds for setting aside an award. An application filed beyond the period mentioned in sub-section 3 of Section 34, would not be an application “in accordance with” that sub-section. By virtue of Section 34(3), recourse to the court against an arbitral award cannot be beyond the period prescribed. Sub-section (3) of Section 34, read with the proviso, makes it abundantly clear that the application for setting aside the award on one of the grounds mentioned in sub-section (2) will have to be made within a period of three months from the date on which the party making that application receives the arbitral award. The proviso allows this period to be further extended by another period of thirty days on sufficient cause being shown by the party for filing an application. The intent of the legislature is evinced by the use of the words “but not thereafter” in the proviso. These words make it abundantly clear that as far as the limitation for filing an application for setting aside an arbitral award is concerned, the statutory period prescribed is three months which is extendable by another period of upto thirty days (and no more) subject to the satisfaction of the court that sufficient reasons were provided for the delay.

9. Section 5 of the Limitation Act, 1963 provides thus:

“5. Extension of prescribed period in certain cases. —Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. —The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.” Section 5 of the Limitation Act, 1963 deals with the extension of the prescribed period for any appeal or application subject to the satisfaction of the court that the appellant or applicant had sufficient cause for not preferring the appeal or making the application within the prescribed period. Section 5 of the Limitation Act, 1963 has no application to an application challenging an arbitral award under Section 34 of the 1996 Act. This has been settled by this Court in its decision in Union of India v Popular Construction Company⁷, where it held as follows – “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.

...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...”

10 Section 14 of the Limitation Act, 1963 provides thus:

“14. Exclusion of time of proceeding bona fide in court without jurisdiction. — (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of 7 (2001) 8 SCC 470 at para 12 and 14 first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation. —For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.” Section 14 of the Limitation Act deals with the “exclusion of time of proceeding bona fide” in a court without jurisdiction, subject to satisfaction of certain conditions. The question whether Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the 1996 Act has been answered by this Court in Consolidated Engineering Enterprises v Principal Secretary, Irrigation Department⁸. This court observed thus:

“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 8 (2008) 7 SCC 169 at para 23 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 aside an arbitral award, has to be made is not unusually long. 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.” The position of law is well settled with respect to the applicability of Section 14 of the Limitation Act to an application filed under Section 34 of the 1996 Act. By applying the facts of the present case to the well settled position of law, we need to assess whether the learned Single Judge of the High Court was justified in condoning the delay for filing an application under Section 34 of the 1996 Act.

11 The respondent submitted an application under Section 34 of the 1996 Act on 30 January 2015 before the District Judge, Port Blair for setting aside the arbitral award dated 27 October 2014. On 12 February 2016, the District Judge dismissed the respondent’s application for want of jurisdiction. It was only on 28 March 2016, that the respondent filed an application under Section 34 of the 1996 Act before the High Court of Calcutta challenging the arbitral award, along with an application for condonation of delay of 514 days. 12 The contention of Mr Aryama Sundaram, learned senior counsel for the appellant is that even if the benefit of Section 14 of the Limitation Act is extended to the respondent in filing the application under Section 34 of the 1996 Act, there would still be a delay of 131 days which could not be condoned in view of the specific statutory limitation prescribed under Section 34(3) of the 1996 Act. The learned senior counsel has tendered the following tabulated chart:

DELAY CHART

Particulars	No. of Days
A. Award received on 31 October 2014	
B. Application under Section 34 filed in the Calcutta High Court on 28 March 2016	
Less: Period between the date of filing application under Section 34 in District Court, Port Blair on 30 January 2015 on 12 February 2016 [Applying Section 14 of the Limitation Act]	
C. Less: Period between the application for certified copy of the order dated 12 February 2016 filed on 29 February the order on 3 March 2016 [Applying Section 12 of the Limitation Act]	

The appellant has, in this connection, relied on Union of India v Popular Construction Company (supra) and Consolidated Engineering Enterprises v Principal Secretary, Irrigation Department (supra) to support its case. On the other hand, it is the respondent’s contention that there were no willful laches on its part and the delay was caused due to inevitable administrative difficulties of obtaining directions from higher officials.

13 A plain reading of sub-section (3) along with the proviso to Section 34 of the 1996 Act, shows that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 could be made within three months and the period can only be extended for a further period of

thirty days on showing sufficient cause and not thereafter. The use of the words “but not thereafter” in the proviso makes it clear that the extension cannot be beyond thirty days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent, there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section (3) read along with the proviso to Section 34 of the 1996 Act. The delay of 131 days cannot be condoned. To do so, as the High Court did, is to breach a clear statutory mandate.

14 The respondent received the arbitral award on 31 October 2014. Exactly ninety days after the receipt of the award, the respondent filed an application under Section 34 of the 1996 Act before the District Judge, Port Blair on 30 January 2015. On 12 February 2016, the District Judge dismissed the application for want of jurisdiction and on 28 March 2016, the respondent filed an application before the High Court under Section 34 of the 1996 Act for setting aside the arbitral award. After the order of dismissal of the application by the District Judge, the respondent took almost 44 days (excluding the date of dismissal of the application by the District Judge and the date of filing of application before the High Court) in filing the application before the High Court. Hence, even if the respondent is given the benefit of the provision of Section 14 of the Limitation Act in respect of the period spent in pursuing the proceedings before the District Judge, Port Blair, the petition under Section 34 was filed much beyond the outer period of ninety days. 15 The respondent has relied on the decision of this Court in *Union of India v Tecco Trichy Engineers & Contractors*⁹, where this Court had to decide the effective date from which the limitation within the meaning of sub-section (3) of Section 34 of the Act shall be calculated. The Chief Project Manager on behalf of the Southern Railway had entered into a contract with a contractor for construction of a railway bridge. Disputes between the parties were referred to arbitration and an award was delivered in the office of the General Manager, Southern Railway. The Chief Engineer preferred an application against the award under Section 34 of the 1996 Act before the High Court. The learned Single Judge and the Division Bench of the High Court rejected the application holding it as barred by limitation. This Court reversed the order of the High Court and condoned the application for delay. This Court observed that in huge organisations like the Railways having different divisional heads and various departments within the division, the copy of the award had to be received by the person who had knowledge of the proceedings and who would be the best person to understand and appreciate the award and grounds for challenge. This Court found that all arbitral proceedings for the Railways were being represented by the Chief Engineer ⁹ (2005) 4 SCC 239 and the General Manager had simply referred the matter for arbitration as required under the contract. While condoning the delay of three months and 27 days, this Court found that the service of the arbitral award on the General Manager could not be taken to be sufficient notice to constitute the starting point of limitation for the purpose of Section 34(3) of the 1996 Act. The decision in this case has no applicability to the facts of the present case as there is no dispute with respect to the party who received the arbitral award. It is an admitted position that on 27 October 2014, the arbitrator made an award in favour of the appellant and on 31 October 2014, the Union of India received a copy of the award. One of the reasons stated by the respondent for delay in filing an application under Section 34 of the 1996 Act was that the departmental office was located at Port Blair, Andaman and it was a time-consuming process for obtaining permission from the circle office at Chennai. Administrative difficulties would not be a valid reason to condone a delay above and beyond the statutory prescribed period under Section 34 of the 1996 Act.

16 Under the circumstances, we are of the considered opinion that in view of the period of limitation prescribed in Section 34(3), the learned Single Judge of the High Court was not justified in condoning the respondent's delay of 514 days in filing the application. The judgment rendered by the learned Single Judge of the High Court of Calcutta on 27 April 2016, in GA No. 958 of 2016 is set aside and the appeal is allowed. The petition under Section 34 stands dismissed on the ground that it is barred by limitation. There shall be no order as to costs.

.....J [Dr Dhananjaya Y Chandrachud]
.....J [Vineet Saran] New Delhi;

December 05, 2018