IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.20046 of 2019
(Through Hybrid mode)

Faridabad Gurgaon Minerals .... ***Petitioner***

Mr. Satyasmruti Mohanty, Advocate

-versus-

Orissa Mining Corporation Ltd. .... ***Opposite Party***

Mr. B. S. Tripathy-1, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
03.08.2022

Order No.

06. **1.** Mr. Mohanty, learned advocate appears on behalf of petitioner and submits, his client made demurrer application in the Court below on maintainability of challenge to the award passed. He demonstrates from impugned order dated 7th September, 2019 that the award was published on 7th December, 2015 and obtained by petitioner on 9th December, 2015. The arbitration petition was filed on 8th April, 2016, without compliance with requirement under sub-section (5) in section 34, Arbitration and Conciliation Act, 1996.

2. He hands up certified copy of the original petition, registered and numbered as ARBP no.12 of 2016 in the Court of District Judge, Khurda at Bhubaneswar to submit, there was no application made under section 5 in Limitation Act, 1963 seeking condonation of the delay beyond three months.

He relies on judgment of the Supreme Court in **Simplex Infrastructure Limited v. Union of India**, reported in **(2019) 2 SCC 455**, paragraph 18, reproduced below.

> *"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."*
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> (emphasis supplied)

He also relies on **judgment dated 25th February, 2022** of the Supreme Court in **Special Leave to Appeal (C) nos.2054-2055 of 2022 (Lingeswaran and others v. Thirunagalingam**), paragraph 5, reproduced below.

> *"5. We are in complete agreement with the view taken by the High Court. Once it was found even by the learned trial Court that delay has not been properly explained and even there are no merits in the application for condonation of delay, thereafter, the matter should rest there and the condonation of delay application was required to be dismissed.* ***The approach adopted by the learned trial Court that, even after finding that, in absence of any material evidence it cannot be said that the delay has been explained and that there***

> ***are no merits in the application, still to condone the delay would be giving a premium to a person who fails to explain the delay and who is guilty of delay and laches.*** *At this stage, the decision of this Court in the case of Popat Bahiru Goverdhane v. Land Acquisition Officer reported in MANU/SC/0851/2013 : (2013) 10 SCC 765 is required to be referred to. In the said decision, it is observed and held that the law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular/party but the Court has no choice but to enforce it giving full effect to the same."*
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> (emphasis supplied)

3. He submits further, his client's objection on maintainability of the petition as delayed was not decided by impugned order since, opposite party had sought to withdraw the petition on obtaining liberty to file afresh. On calculation of time taken in making the first petition, thereafter withdrawing it and filing afresh on 19th February, 2018, aggregate delay beyond three months was more than 30 days. As such, even the second petition is not maintainable. By entertaining it, the Court below acted illegally and with material irregularity.

4. Mr. Tripathy, learned advocate appears on behalf of opposite party and submits, section 34(3) (in the 1996 Act) does not require making of separate application in respect of the thirty days extended period in the proviso. Since the prescribed and extended periods are both provided under section 34(3), no separate application under section 5 in

Limitation Act, 1963 is to be made. On Mr. Mohanty pointing out that with the second petition filed afresh, it was accompanied by an application made under the Limitation Act, Mr. Tripathy submits, that was for exclusion of the time. The original petition was made within the extended time and carried the explanation for delay beyond three months, in making it.

5. Mr. Tripathy relies on judgment of the Supreme Court in **State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti**, reported in **(2018) 9 SCC 472**, inter alia, paragraph 21 (Law Encyclopedia Premium Edition print). Said paragraph is reproduced below.

> *"21. Section 80, though a procedural provision, has been held to be mandatory as it is conceived in public interest, the public purpose underlying it being the advancement of justice by giving the Government the opportunity to scrutinize and take immediate action to settle a just claim without driving the person who has issued a notice having to institute a suit involving considerable expenditure and delay. This is to be contrasted with Section 34(5), also a procedural provision, the infraction of which leads to no consequence. To construe such a provision as being mandatory would defeat the advancement of justice as it would provide the consequence of dismissing an application filed without adhering to the requirements of Section 34(5), thereby scuttling the process of justice by burying the element of fairness."*

He submits, this judgment obviated necessity for his client to have withdrawn the original petition, to file afresh.

6. He also relies on another judgment of the Supreme Court in **Northern Railway v. Pioneer Publicity Corporation Pvt. Ltd.**, reported in **(2017) 11 SCC 234** for declaration of law thereby that sub-section (3) in section 34 in the 1996 Act is not applicable on re-filing the petition. Relied upon paragraph 2 (Manupatra print) is reproduced below.

> *"2. We find that said Section has no Application in re-filing the Petition but only applies to the initial filing of the objections Under Section 34 of the act. It was submitted on behalf of the Respondent that Rule 5(3) of the Delhi High Court Rules states that if the Memorandum of Appeal is filed and particular time is granted by the Deputy Registrar, it shall be considered as fresh institution. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing."*

7. Law stands declared in **State of Bihar** (supra) that sub-section (5) in section 34 is directory and not mandatory. The judgment was delivered on 30th July, 2018, i.e. after opposite party had withdrawn the original arbitration petition. Hence, there was the initial objection on maintainability, filing afresh and further objection of petitioner on the maintainability question. The original petition was filed beyond three months but before expiry of thirty days thereafter.

8. Mr. Tripathy's submission on there being no requirement under section 34(3) in the 1996 Act, to file separate application for condonation of delay is accepted since, the prescribed and extended periods are both provided

thereunder. Section 5 or for that matter any other provision of Limitation Act, 1963 does not apply to the periods prescribed in applying for setting aside award and the outer limit of the extension period is saved by section 29 in the 1963 Act, made applicable to rest of the 1996 Act by section 43 therein.

9. The arbitration petition, when presented afresh, was accompanied by an application to exclude the time. Petitioner has contended that this petition presented afresh is not the same as re-filing upon removal of defects and **Northern Railway** (supra) has no application. This distinction on facts is a good distinction. The petition on having been filed afresh has to be dealt with by applying the prescribed period and extension provided under sub-section (3) in section 34. Provision in section 14, of the 1963 Act can have no application to the periods prescribed and extended by sub-section (3) in section 34.

10. It is to be seen first, whether explanation for delay beyond 3 months given in the original petition filed, merited extension of the time allowable under proviso in sub-section (3) of section 34. The explanation is given in paragraph 13 and its sub-paragraphs. It is that opposite party being a Government of Odisha undertaking, decision to challenge the award had to be upon consideration of overall view of different authorities and upon consultation of senior counsel. The Supreme Court in **Collector, Land Acquisition, Anantnag v. Mst. Katiji**, reported in **AIR 1987 SC 1353** considered, whether or not to apply the same standard in applying the 'sufficient cause' test to all the litigants

regardless of their personality. The appeal was preferred by State of Jammu and Kashmir against a decision enhancing compensation in respect of acquisition of lands for a public purpose. The appeal was dismissed as time barred, being 4 days out of time. Hence, appeal by Special Leave. The Supreme Court said that a liberal approach to condonation of delay is adopted on principle, as it is realized, inter alia, there is no presumption the delay is occasioned deliberately, on account of culpable negligence or on account of mala fide. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. A passage from paragraph 3 in the judgment regarding 'sufficient cause' is extracted and reproduced below.

> *"xx xx xx There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinary (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant non grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on mertis in*

preference to the approach which scuttles a decision on merits. xx xx xx"

11. In **Simplex Infrastructure Limited** (supra), it appears from relied upon paragraph extracted above, law declared was application for setting aside award 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. On perusal of explanation given in paragraph 13 in the original petition and in context of interpretation of the phrase 'sufficient cause' in **Collector, Land Acquisition, Anantnag** (supra) this Court finds, explanation given in said petition, is acceptable. Moving on to **judgment dated 25th February, 2022** (supra), it appears therefrom, the Supreme Court found approach adopted by the learned trial Court was that even after finding absence of any material evidence it had still condoned the delay. The judgment is inapplicable on facts.

12. As aforesaid, declaration of law in **State of Bihar** (supra) makes it clear that sub-section (5) in section 34 is directory. Opposite party had proceeded on the provision as being mandatory, to seek withdrawal of the petition with liberty to file afresh, when faced with the maintainability question raised by petitioner. Hence, the writ petition made under article 227 in the Constitution for interference with allowing the petition presented afresh on delay beyond the time prescribed in sub-section (3) of section 34. In view of **State of Bihar** (supra) having declared the law on interpretation of sub-section (5) in section 34 (1996 Act) being directory, the law thus stated acts retrospectively. The

declaration was on discovery of the correct principle [see **CIT v. Saurashtra Kutch Stock Exchange Ltd.**, reported in **(2008) 14 SCC 171**]. Thus retrospective application of the law declared would mean that the maintainability challenge was unlikely to succeed or there was no necessity for opposite party to have withdrawn the original petition. Sub-section (5) in section 34 is provision requiring notice of the petition. Petitioner, obviously on notice of it, though subsequent to filing, raised the question on its maintainability.

13. In the peculiar facts and circumstances, this Court in exercise of its extraordinary power directs that impugned order stands recalled and the original petition in ARBP no. 12 of 2016 restored to the Court below, on the delay beyond three months condoned, for proceeding to dispose of it expeditiously.

14. The writ petition is disposed of.

(Arindam Sinha)
Judge

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