

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 16.11.2022

+ **O.M.P. (COMM) 436/2020 & IA Nos.6549/2021 & 7266/2021**

VIDHUR BHARDWAJ

..... Petitioner

Versus

HORIZON CREST INDIA REAL ESTATE & ORS.... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Vivek Sibal, Sr. Adv. with Mr. Anshdeep Singh Khurana, Mr. Dhananjay Jain, Mr. Shreedhar Kale & Mr. Harsh Srivastava, Advs.

For the Respondents : Mr Sudipto Sarkar, Sr. Adv. With Mr. Saurav Agrawal, Mr. Savrajay Nanda, Mr. Vinay Kumar Misra, Ms. Vani Sharma & Mr. Ribhu Garg Advs.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an arbitral award dated 02.07.2019 rendered by an Arbitral Tribunal comprising of three arbitrators (hereafter '**the Arbitral Tribunal**').

2. The disputes between the parties, essentially, arise from the Binding Settlement Agreement dated 05.04.2016 (hereafter '**the BSA**'). By the impugned award, the Arbitral Tribunal has awarded damages quantified at ₹4,795,079,144/-; costs quantified at ₹59,829,209/-; and interest on the awarded amounts at the rate of 8% per annum from the date of the award till the date of payment, in favour of respondent nos. 1 to 6.

3. The petitioner claims that the impugned award to the extent it makes him liable to pay the awarded amount is, *ex facie*, erroneous and contrary to the provisions of the BSA. It is his case that the BSA expressly provides that certain other individuals and him, shall not be personally liable for the obligations stipulated under the BSA. Therefore, in terms of the BSA, he could not be made liable for any monetary damages awarded against other corporate entities. More so, as respondent nos. 1 to 6 (the claimants before the Arbitral Tribunal) had specifically given up their claim to lift the corporate veil and impute the corporate liability on the shareholders/promoters of the corporate entities.

4. The preliminary question to be addressed is whether the present petition is barred by limitation. There are several parts to this issue. First, relates to the time available for filing the petition. Second, relates to whether in the facts of this case, time available for filing the petition is to be computed from disposal of the application filed by the petitioner under Section 33 of the A&C Act. The third aspect to be considered is

whether the delay, if any, can be condoned by this Court and, if so, whether there are sufficient reasons to do so.

RE: THE PERIOD OF LIMITATION:

5. In terms of Section 34(3) of the A&C Act, an application under Section 34 of the A&C Act is required to be filed within a period of three months from the date of the receipt of the arbitral award. In terms of the proviso to Section 34(3) of the A&C Act, the court may entertain an application within a period of further thirty days subject to it being satisfied that the applicant was prevented by sufficient cause from making an application within a period of three months from the date of the receipt of the arbitral award.

6. In the present case, the impugned award was made on 02.07.2019 and the petitioner claims that he received it on 11.07.2019. Thus, the present petition could be filed within a period of three months from the said date, that is, on or before 11.10.2019.

7. However, on 01.08.2019, Mr Nirmal Singh (arrayed as respondent no. 35 before the Arbitral Tribunal) filed an application under Section 33 of the A&C Act before the Arbitral Tribunal, *inter alia*, claiming as under:-

“The applicant submits and prays that the aforesaid errors in paras 74 & 141 of the Arbitral Award dated 02.07.2019 be corrected holding that the reference to the respondents in paras 74 & 141 excludes Respondent No.35 Mr. Nirmal Singh along with LG Respondents.”

8. The said applicant (Mr Nirmal Singh) claimed that in terms of Clause 21 of the BSA, he could not be made personally liable for failure to perform any obligations under the BSA. According to him, his position was similar to respondent nos. 16, 22, 23, 24, and 38 before the Arbitral Tribunal (referred to as '**LG respondents**' in the impugned award) as they too were not personally liable in terms of Clause 21 of the BSA. Whilst the impugned award granted the benefit of the said clause to the LG respondents, it failed to specifically include him even though he was covered under the said clause. The said applicant (Mr Nirmal Singh) also contended that there was no specific finding against him. It is relevant to note that it is also the petitioner's case that he is similarly placed as Mr. Nirmal Singh and covered under Clause 21 of the BSA, which expressly provides that he would not be personally liable for any obligations arising out of the BSA.

9. Concededly, Mr. Nirmal Singh had filed the application under Section 33 of the A&C Act before the Arbitral Tribunal within a period of thirty days from the receipt of the impugned award, as stipulated under Section 33(1) of the A&C Act.

10. On 29.08.2019, the Arbitral Tribunal issued a procedural order directing the parties to file a response to the application preferred by Mr. Nirmal Singh, within a period of three weeks.

11. Thereafter, on 14.10.2019, the petitioner filed a similar application under Section 33 of the A&C Act. Admittedly, the said application was beyond the period of thirty days as stipulated under Section 33(1) of the A&C Act; it was also beyond the period of three

months within which a petition under Section 34 of the A&C Act could be filed.

12. Clearly, the period of limitation for filing an application under Section 34 of the A&C Act would not stand extended on account of the petitioner filing the said application under Section 33 of the A&C Act.

13. Undisputedly, filing of an application under Section 33 of the A&C Act, which is incompetent on account of being beyond the period of limitation, would not automatically result in extending the period of limitation for filing the petition under Section 34 of the A&C Act.

14. Mr. Sibal, learned senior counsel appearing for the petitioner, also fairly conceded that the petitioner could not derive any benefit from his application under Section 33 of the A&C Act, which was filed on 14.10.2019. He, however, contended that by virtue of the application filed by Mr. Nirmal Singh (arrayed as respondent no.35) – which was filed within the prescribed time – the period of limitation for filing an application under Section 34 of the A&C Act would commence from the date of the decision of the Arbitral Tribunal in regard to the said application and not from the date of receipt of the impugned award.

15. This contention was stoutly contested by Mr. Sudipto Sarkar, learned senior counsel who appeared for respondent nos. 1-6. He contended that the benefit of extension of limitation on account of filing of an application under Section 33 of the A&C Act would extend only to the party preferring the said application. Therefore, irrespective of the outcome of the application under Section 33 of the A&C Act

preferred by Mr Nirmal Singh, the time available to the petitioner to file a petition under Section 34 of the A&C Act, would not extend beyond a period of three months (and possibly a further period of thirty days) from the date he received the impugned award. He contended that if Mr. Nirmal Singh's application under Section 33 of the A&C Act was allowed, he would be excluded from paragraph nos. 74 and 141 of the impugned award but the petitioner would continue to be liable to pay the awarded amount.

16. Before proceeding further, it is relevant to refer to Section 34(3) of the A&C Act, which reads as under:-

“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”

17. It is clear from a plain reading of Section 34(3) of the A&C Act that an application for setting aside of an arbitral award may not be made after a period of three months either from the receipt of the arbitral award or, in case, where a request has been made under Section 33 of the A&C Act, within a period of three months from the date on which the said request is disposed of.

18. The plain language of Section 34(3) of the A&C Act does not permit the interpretation as sought to be canvassed on behalf of Mr. Sarkar. Section 34(3) of the A&C Act expressly provides that if a request is made under Section 33 of the A&C Act, the period of three

months available for filing a petition under Section 34 of the A&C Act would commence from the date when the said request is disposed of by the arbitral tribunal; it does not mention that the period of limitation would be extended only in respect of the parties making the request under Section 33 of the A&C Act.

19. There is no ambiguity in the language of Section 34(3) of the A&C Act. Even if a request for correction under Section 33 of the A&C Act is made by a party before an arbitral tribunal, the period for the counter parties to make an application under Section 34 of the A&C Act would also commence when the party's request under Section 33 of the A&C Act is disposed of.

20. As stated above, the time for filing a petition under Section 34 of the A&C Act is required to be computed from the date on which an application under Section 33 of the A&C Act is disposed of by an arbitral tribunal. However, the same is subject to the said application being filed within the time prescribed under the A&C Act and being maintainable.

21. The petitioner's application under Section 33 of the A&C Act was filed beyond the period so prescribed under the A&C Act. Concededly, the same was not maintainable and therefore, filing of the said application does not enure to the benefit of the petitioner. The petitioner claims that the period of limitation would commence from the date of disposal of Mr. Nirmal Singh's application under Section 33 of the A&C Act.

22. On 01.08.2019, Mr. Nirmal Singh had filed an application under Section 33 of the A&C Act seeking correction of the impugned award. According to him, an error had crept in paragraphs 74 and 141 of the impugned award by “*accidental slip or omission*” as his name was not referred to in the said paragraphs, which expressly excluded other parties mentioned under Clause 21 of the BSA. Paragraph 5 of the said application is relevant and set out below:

“In the respectful submission of the Applicant herein, an error has crept in the aforesaid paras 74 & 141 of the award by accidental slip or omission. It is submitted that the Learned Arbitral Tribunal, while recording that the relief of lifting of the corporate veil between 3C Group and the LG Respondents is not being pressed by the Claimants and accordingly in view of clause 21 of the Binding Settlement Agreement the reference to the Respondents in this section excludes the LG Respondents, has by clerical/accidental slip or omission or typographical error or error of a similar nature, left out that the reference to the Respondents in this section referred in paras 74 & 141 also excludes other parties mentioned in the said clause 21, in particular the applicant herein.”

23. Similar applications were also filed by three other individuals including the petitioner, who were arrayed as respondent nos. 34, 36 and 37 before the Arbitral Tribunal.

24. The Arbitral Tribunal issued notice on the application filed by Mr. Nirmal Singh (arrayed a respondent no. 35) as well as on the other applications. Thereafter, the Arbitral Tribunal heard the concerned parties and passed an order dated 20.11.2019 rejecting the said applications. The Arbitral Tribunal was of the view that allowing the

said applications would entail “*substantial change in the findings recorded and the relief granted in the Final Award*” and Section 33(1) of the A&C Act does not permit the Arbitral Tribunal to alter its findings and “*exclude any particular party / parties from the Award already made against him/them*”. It is material to note that the Arbitral Tribunal also observed that the only remedy available to the applicants was to challenge the award under Section 34 of the A&C Act or to “*resist the Award at the time the Claimants seek the enforcement of the Award.*”

25. Insofar as the petitioner and other applicants are concerned, the Arbitral Tribunal also found that the applications were barred by limitation as the same were filed beyond the prescribed period of thirty days.

26. The petitioner filed a petition under Section 34 of the A&C Act on 02.11.2019. Concededly, the said filing was of only twelve pages and comprised only of ‘Memo of Parties’. The said filing was considered as *non-est* and is thus, liable to be ignored. The petitioner filed the present petition on 03.03.2020 and this date is required to be considered as the date of filing of the petition. However, the said filing was defective and the petition was returned under objections on 17.03.2020. Thereafter, the petition was re-filed on 07.07.2020, however, there were still certain minor defects and it was returned under objections on 10.07.2020. It was finally re-filed on 13.07.2020.

27. For the purpose of considering whether the present petition is beyond of period of limitation, the date of 03.03.2020 is required to be considered as the date of filing of the present petition.

28. Since Mr. Nirmal Singh's application under Section 33 of the A&C Act was rejected by the Arbitral Tribunal on 20.11.2019, the period of three months (calendar months) available for filing the present petition expired on 20.02.2020. Thus, even if the period of limitation is to be calculated from 20.11.2019, there is a delay of thirteen days in filing the present petition.

29. The question whether this delay is required to be condoned would be considered later.

30. Mr. Sarkar, learned senior counsel appearing for respondent nos. 1-6, contended that the application filed by Mr. Nirmal Singh under Section 33 of the A&C Act was in the nature of review and therefore, cannot be considered as an application under that provision. He argued that, consequently, the period of three months available for filing the present petition has to be computed from 11.07.2019 (that is, the date on which the petitioner claims to have received the impugned award) and not 20.11.2019. He relied on the decision of the Supreme Court in *State of Arunachal Pradesh v. Damani Construction Co.: (2007) 10 SCC 742* and the decision of this Court in *D.M. Jawhar Merican v. Engineers India Ltd.: ILR (2009) IV Delhi 571*. He also referred to the judgment dated 24.07.2020 of a Coordinate Bench of this Court dismissing Mr. Nirmal Singh's petition under Section 34 of the A&C Act [being *OMP (COMM) No.434/2020* captioned *Nirmal Singh v. Horizon Crest India Real Estate & Ors.*] as barred by limitation.

31. The first and foremost question to be addressed is whether the application filed by Mr. Nirmal Singh could not be considered as an application under Section 33 of the A&C Act and therefore, the filing

and disposal of the application is liable to be ignored for the purpose of computing the period of limitation. It will be necessary for this Court to briefly refer to the factual context for the purpose of addressing this question. The same is briefly stated as under:

31.1 Respondent nos. 1 to 6 (hereafter ‘the **Horizon Group**’), the claimants before the Arbitral Tribunal, are subsidiaries of Red Fort India Real Estate Fund LLP and engaged in the business of investing in securities of companies in the real estate construction and development sector in India. Respondent no.1 and 2 are also referred to as the “**Selling Investors**” in the BSA.

31.2 Respondent no. 7 (Granite Gate Properties Pvt Ltd.) is referred to as the “**Company**” in the BSA. Respondent no. 8 (Lotus Green Developers Private Limited) is referred to as “**LG**” in the BSA.

31.3 Respondents nos. 7-44 and the petitioner are a part of or affiliated to the ‘Three C Group of Companies’ (hereafter ‘**the 3C Group**’). Schedule-II to the BSA also refers to the “3C Signatories”, which comprised of thirty-five companies and four individuals including the petitioner. The petitioner is one of the promoters of the 3C Group.

31.4 The Horizon Group and 3C Group entered into various agreements for the development of real estate projects. Horizon Group had agreed to finance, by way of equity and debt, the real estate development projects owned and developed by the 3C Group. Horizon Group claims that it was granted “affirmative consent rights” in respect of the corporate entities comprising the 3C

Group. In terms of the agreements entered into by the parties, the 3C Group could not take any action in relation to certain issues without the consent of the Horizon Group.

31.5 Disputes arose between the parties in respect of the agreements entered into between them. These were settled by the parties in terms of the BSA. Clause 6A of the BSA noted that the ‘Selling Investors’ had made an investment of ₹324,25,85,559/- into the ‘Company’ (respondent no. 7 -Granite Gate Properties Pvt Ltd.) and an amount of ₹155,14,76,666/- had accrued as interest. Further, an amount of ₹713,90,00,000/- was payable to the ‘Selling Investors’, in accordance with Clause 6B of the BSA.

31.6 In terms of the BSA, the parties were also required to sign a Master Restructuring Agreement (hereafter ‘**the MRA**’), which was intended to record the details concerning the rights and liabilities of the parties. The parties agreed that till the time the MRA was signed, the terms and conditions as contained in the BSA would be binding on them.

31.7 The various properties of the 3C Group were categorized into two categories – Annexure 2A Properties and Annexure 2B Properties – and separately set out in the annexures to the BSA. Horizon Group claims that the properties mentioned in Annexure 2A were in an advanced stage of development and construction. Due to the various breaches on the part of 3C Group, the construction of such properties had come to a halt and various homeowners, banks etc. had instituted actions with respect to the said properties. The

properties mentioned in Annexure 2B were land parcels and largely unencumbered and free from any charges and liens etc.

31.8 Clauses 10 and 11 of the BSA stipulate ‘Structure 1’ and ‘Structure 2’. Horizon Group was entitled to recover the said amount through the 3C Group’s and its affiliates’ share of the cash flows (*Distributable Surplus*) generated from the Annexure 2A and 2B Properties. Additionally, the BSA contained various obligations by which Horizon Group would exercise control over the Special Purpose Vehicles developing the Annexure 2B Properties and their finances. Structure 2 stipulated that any and all cash flows from the Annexure 2B properties were to be utilized to repay the amounts due to the Horizon Group. Further, in terms of Clause 11A of the BSA, post fulfilment of certain actions termed as ‘Conditions Precedent’ by the 3C Group, as contained in Annexure 3 to the BSA, Structure 2 would “*immediately and automatically become effective*”.

31.9 Horizon Group claimed that the 3C Group had breached the terms of the BSA as it had intentionally created encumbrances on the projects. They had borrowed additional funds against the properties in breach of the contractually stipulated mechanism. They had siphoned the money to their related entities instead of utilising them towards the development of properties. Horizon Group claimed that the same substantially reduced the Distributable Surplus recoverable from the projects, resulting in a huge monetary loss to it.

31.10 On 10.02.2017, Horizon Group issued a Notice of Default in relation to the BSA and called upon the 3C Group to take immediate steps to remedy the said breaches.

31.11 Thereafter, on 09.10.2017, Horizon Group invoked the agreement to refer the disputes to arbitration, as contained in Clause 16 of the BSA and appointed Justice (Retd.) V.N. Khare as its nominee arbitrator. Horizon Group further gave an alternative to the 3C Group to consent for a three-member arbitral tribunal as opposed to a sole arbitrator prescribed under the BSA.

31.12 By way of a letter dated 08.11.2017, the 3C Group agreed to the appointment of a three-member tribunal instead of a sole arbitrator. Thereafter, the 3C group appointed Mr P.V. Kapur, Senior Advocate, as their nominee arbitrator. The two arbitrators jointly appointed Justice (Retd.) S.S. Nijjar as the presiding arbitrator, and the Arbitral Tribunal entered upon reference on 27.02.2018.

31.13 The Horizon Group (the claimants before the Arbitral Tribunal) sought several reliefs before the Arbitral Tribunal, however, during the final arguments, they restricted their prayer to claiming damages for the diminution in value or losses caused to the Annexure 2B properties by the 3C Group.

31.14 The Arbitral Tribunal found that the BSA was binding on the parties and the 3C Group had fundamentally breached the provisions of the BSA. Thus, the Horizon Group was entitled to seek damages from the 3C Group. The Arbitral Tribunal held that

the Horizon Group was entitled to receive the entire distributable surplus of the assets specified in Annexure 2B of the BSA.

31.15 The Arbitral Tribunal also held that exclusion of the rights of the 3C Group in relation to the Annexure 2B properties is absolute and not conditional upon execution of the MRA

31.16 The Arbitral Tribunal reasoned that since Horizon Group had not pursued its relief of lifting the corporate veil between 3C Group and the LG Respondents, therefore, in view of Clause 21 of the BSA, the LG Respondents were excluded for the purpose of Horizon Group's alternate claim for damages

31.17 The Arbitral Tribunal referred to Sections 73 and 74 of the Contract Act, 1872 and the decisions of the Supreme Court in *McDermott International Inc v. Burn Standard Co. Ltd.: (2006) 11 SCC 181* and *Union of India v. Sugauli Sugar Works: (1976) 3 SCC 32* and held that Horizon Group would be entitled to receive the entire Distributable Surplus of the assets specified in Annexure 2B of the BSA. The Arbitral Tribunal also referred to Clause 10(I) of the BSA and the evidence tendered by CW-1 and accordingly, awarded a sum of ₹4,795,079,144/- on account of damages payable by the 3C Group to Horizon.

31.18 Accordingly, the Arbitral Tribunal awarded a sum of ₹4,795,079,144/- on account of damages and costs quantified at ₹59,829,209/- along with interest at the rate of 8% per annum from the date of the award till the date of payment.

31.19 Aggrieved by the impugned award, the petitioner filed the present petition.

32. Schedule-II to the BSA lists out thirty-nine companies/ individuals, which were referred to as “3C Signatories”. The said Schedule comprises of thirty-five companies and four individuals including the petitioner. It is relevant to note that the same also included Piyush IT Solutions, New Times Outsourcing, Arena Superstructures, Lavender Infra Projects, Xanadu Infratech (referred to as “**LG Respondents**” in the impugned award).

33. The Arbitral Tribunal partly accepted the claims made by Horizon Group and entered an award in its favour. Essentially, the Arbitral Tribunal has awarded damages for breach of the BSA. The Arbitral Tribunal accepted that the 3C Group did not perform the obligations under the BSA inasmuch as the Horizon Group was deprived of the control of the companies in which the projects were housed and therefore, were liable to payment of compensation.

34. The impugned award was made against all respondents except the LG Respondents. The Arbitral Tribunal reasoned that since Horizon Group had not pursued its relief of lifting the corporate veil, therefore, in view of Clause 21 of the BSA, the LG Respondents were excluded for the purpose of Horizon Group’s alternate claim for damages. Paragraph 74 of the impugned award reads as under:

“74) The Tribunal will decide the Issue 5 and Issue 7 together because these overlap and have common points involved. While the Claimant sought several reliefs in the

Statement of Claim it has restricted its prayer to final arguments to claiming damages for the diminution in value or losses caused to the Annexure 2B Properties due to various acts and omissions which has adversely affected the value of the Annexure 2B properties. Claimants have not pursued their relief of lifting the corporate veil between the 3C Group and the LG Respondents (namely Respondent Nos.16,22,23,24 and 38). Accordingly in view of Clause 21 of the Binding Settlement Agreement the reference to the Respondents in this section excludes the LG Respondents.”

35. It is also relevant to refer to Clause 21 of the BSA. The same is set out below:-

“21.	Limitation of Liability	<p>Parties agree that notwithstanding anything 3C and 3Cs Affiliate’s liability to the Investors shall not exceed the Sale Consideration Amount.</p> <p>The Parties agree that LG and / or its director or its nominees or agents shall have no liability towards any other party in relation to the transactions contemplated under this Binding Settlement or in relation to the operation, development, management or completion of the projects set out in <u>Annex 2A</u>.</p> <p>The Parties expressly agree that nothing contained herein or elsewhere shall in any manner or form be construed as creating any personal</p>
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		liability of any of Mr. Nirmal Singh, Mr. Surpreet Singh Suri and / or Mr. Vidur Bhardwaj, each of whom shall have no liabilities or obligations whatsoever to any other Party herein.”
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36. Clause 21 of the BSA expressly limits the liability of the three individuals (namely, Mr. Nirmal Singh, Mr. Surpreet Singh Suri and the petitioner). It is in this context, that the said individuals had filed applications claiming that there was an inadvertent error in paragraph nos. 74 and 141 of the impugned award to the extent that they were not excluded along with the LG Respondents.

37. The application filed by Mr. Nirmal Singh was premised on the basis that there was an inadvertent error in the impugned award, which required correction. It is relevant to note that the impugned award does not include any specific reference to the three individuals (Mr. Nirmal Singh, Mr. Surpreet Singh Suri and the petitioner); damages have been awarded against the respondents before the Arbitral Tribunal (other than LG Respondents). The three individuals have been included as part of the 3C Group. There is no adjudication as to why benefit of Clause 21 of the BSA is not available to the three individuals.

38. The question whether Mr. Nirmal Singh’s application under Section 33 of the A&C Act was wholly misconceived is required to be construed in the aforesaid context.

39. This Court is unable to accept the view that the question whether the limitation would run from the date of disposal of the application under Section 33 of the A&C Act or from the date of receipt of the award is contingent upon the Arbitral Tribunal's decision of the said application. It is only when an application under Section 33 of the A&C Act is disposed of that the parties are finally certain as to the content of the award. It is apparent that the rationale for providing that the limitation would run from the date of disposal of the application is to provide a reasonable time to the parties to take steps for filing the petition under Section 34 of the A&C Act after they are certain as to the final shape and contents of the arbitral award. Clearly, this cannot be contingent on the view that the Arbitral Tribunal may take in respect of the merits of the application under Section 33 of the A&C Act.

40. Having stated above, it is also obvious that filing of an application under Section 33 of the A&C Act, which is wholly incompetent and cannot by any stretch of imagination be considered as a request under Section 33 of the A&C Act, would not extend the period of limitation to file the petition under Section 34 of the A&C Act.

41. The decision of the Supreme Court in *State of Arunachal Pradesh v. Damani Construction Co.* (*supra*) is instructive in the aforesaid regard. In that case, the arbitral award was passed on 12.10.2003 and was communicated to the appellant (State of Arunachal Pradesh) on 23.10.2003. The limitation period for filing a petition under Section 34 of the A&C Act, therefore, commenced from the said date. However, the appellant did not file any petition within the prescribed

period but sent a letter dated 02.04.2004 for review of the award. The arbitral tribunal responded to the same by sending a letter, which was received by the appellant on 10.04.2004 clarifying the same. The Supreme Court examined the arbitral award and found that there was no ambiguity in the arbitral award. In the concluding portion of the same, the arbitral tribunal had clearly quantified the amount payable by the appellant; the time within which the payment was to be made; and the interest that would be payable thereafter. The appellant, in that case, sought a review of the award and also sought further clarification whether in case the payment was made to the respondent, a bank guarantee was required to be obtained from it. It is also important to note that the Supreme Court found the said letter to be wholly incompetent and observed that “*it was absolutely thoughtlessness on the part of the appellant to have written a letter after six months, i.e. on 02.04.2004 seeking review of the interim award...*” The Supreme Court further held that the filing of the said letter would not extend the period of limitation.

42. Some of the relevant reasons as articulated by the Supreme Court for the aforesaid view are set out below:

“8. Firstly, the letter had been designed not strictly under section 33 of the Act because under Section 33 of the Act a party can seek certain correction in computation of errors, or clerical or typographical errors or any other errors of a similar nature occurring in the award with notice to the other party or if agreed between the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the award. This application which was moved by the appellant does not

come within any of the criteria falling under Section 33(1) of the Act. It was designed as if the appellant was seeking review of the award. Since the Tribunal had no power of review on merit, therefore, the application moved by the appellant was wholly misconceived. Secondly, it was prayed whether the payment was to be made directly to the respondent or through the Court or that the respondent might be asked to furnish Bank guarantee from a nationalized Bank as it was an interim award, till final verdict was awaited. Both these prayers in this case were not within the scope of Section 33. Neither review was maintainable nor the prayer which had been made in the application had anything to do with Section 33 of the Act. The prayer was with regard to the mode of payment. When this application does not come within the purview of Section 33 of the Act, the application was totally misconceived and accordingly the arbitrator by communication dated 10-4-2004 replied to the following effect:

“However, for your benefit I may mention here that as per the scheme of the Act of 1996, the issues/claims that have been adjudicated by the interim award dated 12-10-2003 are final and the same issues cannot be gone into once again at the time of passing the final award.””

43. It is also relevant to note that the appellant had sent the letter much after the stipulated period for filing an application under Section 33 of the A&C Act had expired. It is clear from the decision of the Supreme Court that in cases, where any application is filed, which is wholly incompetent, misconceived and there is no doubt that it does not fall within the scope of Section 33 of the A&C Act; the decision on the same would not extend the period of limitation and the Court would disregard the said application.

44. In *D.M. Jawhar Merican v. Engineers India Ltd.* (*supra*), the Division Bench of this Court considered a case where the objector had filed an application seeking enhancement of the compensation awarded by the arbitrator. The Court found that the said application was clearly in the nature of seeking a review and amounted to re-assertion of the claim for higher amount of damages.

45. If a party harbours a *bona fide* belief that there is an apparent inadvertent error in the arbitral award, which requires correction, the application filed by the party under Section 33 of the A&C Act must necessarily be construed as such, notwithstanding the fate of the said application. It is possible that on a detailed examination of the contents of the application, an arbitral tribunal or a court may find that the relief sought cannot be granted under Section 33 of the A&C Act. The arbitral tribunal may find that what is claimed to be an inadvertent error is not so. But that does not mean that the limitation would run from the date of the receipt of the award and not from the date on which an application under Section 33 of the A&C Act is decided. As noted hereinbefore, the period of limitation for filing a petition under Section 34 of the A&C Act runs from the date of the decision under Section 33 of the A&C Act not only for the said applicant but for all other parties to the arbitration as well. It would lead to uncertainty if all parties are required to second guess the outcome of an application under Section 33 of the A&C Act for calculating the period within which they may file the petition under Section 34 of the A&C Act.

46. As stated above, in the facts of this case, the application filed by Mr. Nirmal Singh was for seeking correction of what he understood and described as an “*accidental slip or omission*”. The Arbitral Tribunal did not accept the same. However, in the given facts, the same may not lead to the conclusion that the application was wholly misconceived and by no stretch of imagination could be considered as an application under Section 33 of the A&C Act. It is also material to note that the Arbitral Tribunal did not reject this application outrightly. The Arbitral Tribunal deemed it fit to hear the oral submissions from both the parties before taking a view on the said application. Clearly, the Arbitral Tribunal did consider it apposite to examine the application in some detail before taking a view on the same.

47. Mr. Sarkar also relied on the decision of the Coordinate Bench of this Court in *Nirmal Singh v. Horizon Crest India Real Estate & Ors.* (*supra*). By the said decision, a Coordinate Bench of this Court had dismissed the petition filed under Section 34 of the A&C Act by Mr. Nirmal Singh challenging the impugned award on the ground of limitation. The Court, *inter alia*, rejected the contention that the period of three months was required to be computed from the date of the order of the Arbitral Tribunal rejecting Mr. Nirmal Singh’s application under Section 33 of the A&C Act. The Court was of the view that Mr. Nirmal Singh’s application could not be construed as an application under Section 33 of the A&C Act.

48. As stated above, this Court has some reservations in respect of the said view. However, the said decision being of a Coordinate Bench of

this Court is binding on this Court. In view of the said decision, the present petition is liable to be dismissed for being beyond the period of limitation. This Court is informed that an appeal has been filed before the Division Bench of this Court [being FAO (OS) (COMM) 97/2020]. The decision in that appeal on the question whether Mr Nirmal Singh's petition was filed within the period of limitation would also apply in this case as well.

49. Insofar as the petitioner's application seeking condonation of delay in re-filing the present petition is concerned, the same is liable to be allowed. The petitioner has produced sufficient material on record including his medical documents indicating that he was suffering from medical complications at the material time. The functioning of various offices as well as this Court had come to a standstill on account nationwide lockdown imposed in the month of March, 2020 due to Covid-19.

50. In view of the above, the application [being IA No.5584/2020] seeking condonation of delay in re-filing the petition is allowed.

51. In view of the decision of the Coordinate Bench of this Court in *Nirmal Singh v. Horizon Crest India Real Estate & Ors.* (*supra*), the petitioner's application [being IA No.5582/2020] seeking condonation of delay in filing the objections is rejected. The period of limitation, as reckoned from the date of receipt of the impugned award, is beyond the period of thirty days that can be condoned by this Court.

52. Before concluding, it is also necessary for this Court to observe that the learned counsels for the parties have also advanced contentions on merits. However, in view of aforesaid decision that the present petition is barred by limitation, this Court does not consider it apposite to determine the same, nonetheless, it is suffice to state that the petitioner's challenge on merit is not insubstantial.

53. The petition is, accordingly, dismissed. The pending applications are also disposed of.

VIBHU BAKHRU, J

NOVEMBER 16, 2022

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