

ORDER

1. The appellant has filed the present arbitration appeal being aggrieved by the award dated 23.1.2013 passed by 22nd District Judge, Indore in MJC AV No.14/2018 whereby the application filed u/s. 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act of 1996” for short) has been dismissed as time-barred.

2. Facts of the case, in short, are as under :

2.1 The appellant is a proprietorship firm engaged in the business of supply of cotton bales and other materials having its registered office at 111, Sri Kanyaka Parameswari Enclave, Etukuru Road, Guntur. Respondent No.1 contacted the appellant for the purchase of cotton bales and placed a purchase order dated 30.9.2010 for a supply of 600 cotton bales. The purchase order contains an arbitration clause and according to which, all the disputes will be settled amicably or will be referred to arbitration in accordance with the Rules and By-laws of **the Cotton Association of India** and the contract shall be subject to Indore jurisdiction. Since the specified quantity of cotton bales could not be supplied within the agreed time by the appellant, respondent No.1 issued a debit-note on 8.2.2011 to the appellant but the payment was not made. Respondent No.1 approached the Cotton Association of India for settlement of the dispute by way of arbitration. Shri Pankaj D. Mepani was appointed as a sole Arbitrator who registered the claim of respondent No.1 as Arbitration Case No. 19/2012-13. The appellant did not participate in the arbitration proceedings and proceeded *ex-parte*. The Arbitrator passed the final award dated 24.8.2012 for sum of Rs.18,89,677/- with interest @ 15% per annum.

2.2 The appellant received notice of Execution Case No.128/2014

from the Court of 3rd District & Sessions Judge, District Guntur, Andhra Pradesh. Thereafter, the appellant inquired and came to know that an *ex-parte* award dated 24.8.201 had been passed against it in Arbitration Case No. 19/2012-13. The appellant further came to know that respondent No.1 had approached the High Court of Bombay by filing an application for transfer of the Execution Case from Mumbai to Guntur, Andhra Pradesh as the properties of the appellant are situated there. The said application was allowed vide order dated 19.9.2013.

2.3 The appellant filed Notice of Motion No.254/2015 challenging the *ex-parte* award and also for setting aside the order of transfer of execution case. The High Court of Bombay vide order dated 26.2.2015 held that the appellant should file an arbitration petition u/s. 34 of the Act of 1996 before the Single Judge of the High Court of Bombay. In compliance of the said order, the appellant filed the petition u/s. 34 of the Act challenging award dated 24.8.2012, according the appellant filed and same was registered as Arbitration Petition No.1635/015. Respondent No.1 appeared and opposed the petition on the ground of territorial jurisdiction. The High Court of Bombay vide order dated 20.7.2016 dismissed the said Arbitration Petition on the ground of lack of territorial jurisdiction.

2.4 The appellant challenged the aforesaid order of the learned Single Judge by way of an appeal (Appeal (L) No.402/2016 before the Division Bench of the High Court of Bombay which too was dismissed vide order dated 6.2.017. Thereafter, the appellant approached the apex Court by way of a Special Leave Petition (SLP) which was also dismissed after condoning the delay vide order dated 4.10.2017.

3. According to the appellant, the fact regarding the dismissal of

the SLP came to its knowledge on 28.11.017 when notice of the Execution Case No.153/2017 was received t for appearance. Then, the appellant preferred application 34 of the Act of 1996 before the District Court, Indore challenging the award dated 4.8.2012. Since there was a delay in applying, therefore, an application u/s. 14 of the Limitation Act was also filed . Respondent No.1 opposed the application by submitting that the limitation beyond 120 days cannot be condoned, hence, the application u/s. 34 of the Act of 1996 is not maintainable and liable to be dismissed.

4. Learned District Judge, Indore has held that the limitation for filing an application u/s. 34 of the Act of 1996 started on 4.10.017 i.e. the date of dismissal of the SLP, thus, there is a delay of 4 days in filing the application u/s. 34 of the Act of 1996, which cannot be condoned due to the reger of proviso of section 34 , therefore, dismissed the application u/s. 14 of the Limitation Act as well as the appeal. Hence, the present arbitration appeal before this Court.

5. Shri Jain learned counsel for the appellant submitted that the learned District Judge has wrongly calculated the period of limitation from the date of dismissal of the SLP, whereas the appellant came to know about the dismissal of the SLP on 28.11.2017 and if the period of limitation is counted from the said date, then the application filed u/s. 34 of the Act of 1996 was well within limitation. Learned counsel further submitted that the appellant did not receive any notice from the Arbitrator and an *ex-parte* award had wrongly been obtained by respondent No.1. Even the copy of the *ex-parte* award was not communicated to the appellant immediately after the passing of the award. The appellant was served with the certified copy of the award

by the Arbitrator on 22.1.2018. In support of his contention, learned counsel for the appellant has placed reliance on the decision of the apex Court in the case of *Indus Mobile Distribution Pvt. Ltd. V/s. Datawind Innovations Pvt. Ltd. : (2017) 7 SCC 678*; *Brahmani River Pellets Ltd. V/s. Kamachi Industries Ltd. : AIR 2019 SC 3658*; *Dharma Prathisthanam V/s. Madhok Construction Pvt. Ltd. : AIR 2005 SC 214*; *Sarwan Kumar V/s. Madan Lal Aggarwal : (2003) 4 SCC 147*; *Dakshin Haryana Bijli Vitran Nigam Ltd. V/s. M/s. Navigant Technolgies Pvt. Ltd. : AIR 2021 SC 2493*; *State of Himachal Pradesh V/s. Himachal Techno Engineers : (2010) 12 SCC 210*; *Consolidated Engineering Enterprises V/s. Principal Secretary, Irrigation Department : (2008) 7 SCC 169*; order passed by this Court in the case of *Bennet Pharmaceuticals Ltd. V/s. State of M.P.* (W.P. No.28896/2022 decided on 15.12.2022); order passed by the Gujarat High Court in the case of *GSRTC V/s. Anwar Husain Mamhad Bhai Kadri : 2009 (3) GCD 2143; 2009 (0) Supreme (Guj.) 93*.

6. On the other hand, learned counsel appearing for respondent No.1 contended that the application was filed with the delay of 22 days and in view of the law laid down by the apex Court in the case of *Bhimashankar Sahakari Sakkare Karkhane Niyamita V/s. Walchandnagar Industries Ltd.* reported in **2023 SCC OnLine SC 382**, has held that an application for setting aside an arbitral award under Section 34 of the Arbitration Act has to be made within the time prescribed under sub-section (3) of Section 34 i.e. within three months and a further period of 30 days on sufficient cause being shown and not thereafter. The appellant has also admitted that the application u/s. 34 of the Act of 1996 was barred by 2 days and in view of the above

ruling, even the delay of one day cannot be condoned. Hence, this arbitration appeal is liable to be dismissed without entering into the merits of the case.

I have heard the learned counsel for the parties and perused the material available on record.

7. The dates and events up to the dismissal of the SLP are not in dispute. The only issue for consideration by this Court is, whether the period of limitation is liable to be counted from the date of dismissal of the SLP i.e. 4.10.2017 or the date 28.11.2017 when the appellant came to know about the dismissal of the SLP. The Copy of order dated 4.10.2017 passed in the SLP is on record and according to which, the SLP was dismissed on the very first day of its listing. The apex Court after condoning the delay has declined to grant leave and dismissed the SLP. On the said date, counsel for the appellant Shri Judy James and Mr. Prasad Rao were present. whether the representative of the appellant was present in the court is a matter of the evidence. It is also to be decided whether the learned counsel who appeared in sc informed the appellant about the dismissal of the SLP. In the memo of application u/s. 34 of the Act of 1996 as well as in the application filed u/s. 14 of the Limitation Act, the appellant pleaded that the fact of the dismissal of the SLP came to its knowledge when the notice of the Execution Case was served upon it.

8. The appellant filed an application u/s. 34 of the Act of 1996 on 6.2.2018 along with an application u/s. 14 of the Limitation Act. The learned court below has condoned the period which was spent in filing application 34 of the Act of 1996 and the SLP. In the appeal as well as in an application u/s. 34 of the Act of 1996, the appeal has pleaded that

the fact of dismissal of the SLP came to its knowledge on 28.11.2017. It is settled law that the issue of limitation is a blended question of fact and law. Respondent No.1 filed the reply opposing the issue of limitation, but the learned court below did not frame any issue for adjudication on the disputed date of knowledge of SLP . According to the appellant upon service of notice from the Executing Court they came to know about the dismissal of SLP hence the appellant ought to have been given an opportunity to lead evidence on this limited issue. If it is held that from the date of knowledge, the application under section 34 is not filed within 3 months, then an additional application is also liable to be filed for condonation of delay or to seek leave of the Court to apply within the next 30 days as per proviso.

9. Section 34 of the Act of 1996 is reproduced below :

“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).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the

arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice. *Explanation 2.*—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

(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.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.”

10. As per sub-section (1) of Section 34, the arbitral award is liable to be set aside only by way of an application in accordance with sub-section (2) and sub-section (3) of Section 34. As per sub-section (3), an application for setting aside may not be made after three months (not 90 days) have elapsed from the date on which the party making that application had received the arbitral award. As per Proviso, 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. As per Proviso to sub-section (3), for granting an extension of time for thirty days from three months, an application is liable to be filed. Thus, in the present case, the appellant was required to file two applications, first u/s. 14 of the Limitation Act for exclusion of time spent in the proceedings *bona fide* in the Court without jurisdiction; and another application under the Proviso to sub-section (3) of Section

34 of the Act of 1996 for further extension of one month. The appellant has filed the certified copy of the award which was sent by the Secretary of the Cotton Association of India along with a letter dated 22.1.2018 by speed post. According to the appellant, in this letter, nothing has been disclosed as to whether the copy of the award had earlier been sent to the appellant. Therefore, this issue is also liable to be considered by the learned District Judge while deciding the issue of limitation. In the considered opinion of this Court, the impugned order deserves to be quashed.

11. Accordingly, this arbitration appeal is allowed. The impugned order 23.1.2023 is hereby set aside and the matter is remitted back to the learned District Judge for fresh adjudication of the issue of limitation after recording evidence.

The learned Arbitrator has unnecessarily been made respondent No. 2 in these proceedings, hence the appellant shall pay Rs. 10,000.00 as the cost of litigation to him.

**(VIVEK RUSIA)
JUDGE**

Alok/-