COMMISSIONER, M.P. HOUSING BOARD AND OTHERS A

v.

M/S. MOHANLAL AND COMPANY

(Civil Appeal No. 6573 of 2016)

JULY 19, 2016 B

**[DIPAK MISRA AND ROHINTON FALI NARIMAN, JJ.]**

*Arbitration and Conciliation Act, 1996: s.34(2) – Delay in filing objection u/s.34(2) whether condonable in aid of s.14 of Limitation Act – In the instant case, arbitral award passed on 11.11.2010 – Respondent filed s.11 application for seeking appointment of arbitrator on the ground that there was no arbitration clause in the contract – High Court dismissed the application which order remained unchallenged and attained finality – Thereafter, respondent filed an objection u/s.34(2) on 26.9.2011 to challenge the award – Respondent also filed application u/s.14 seeking exclusion of time consumed in the proceedings u/s.11 asserting that he was bonafidely prosecuting the case in the court having no jurisdiction – Whether s.14 would be applicable – Held: Not applicable – s.14(1) of the Limitation Act lays down that the proceedings must relate to the same matter in issue – Filing of an application u/s.11 for an appointment of arbitrator is totally different from an objection filed u/s.34 – It cannot be said that the proceedings related to "same matter in issue" – Respondent had duly participated in the arbitral proceeding – There was thus absence of diligence and good faith on part of respondent – Time consumed for pursuing remedy u/s.11 not excludible for filing objection – Limitation Act, 1963 – s.14.* C D E F

**Allowing the appeal, the Court**

**HELD: The objection was filed beyond the period prescribed under the 1996 Act. However, the appellants sought exclusion of the time spent in the proceedings in court as envisaged under Section 14 of the Act. It is settled in law that Section 14 of the Act applies to Section 34(3) of the 1996 Act. Section 14 would be applicable in cases of mistaken remedy or selection of a wrong forum. In the case at hand, the respondent appeared before the arbitrator and after the award was passed,** G H

A chose not to file any objection to the award immediately. On the contrary, the respondent filed an application under Section 11 of 1996 Act before the High Court for appointment of an arbitrator. Section 14(1) of the Act lays down that the proceedings must relate to the same matter in issue. It emphasises on due diligence and good faith. Filing of an application under Section 11 of the 1996 Act for an appointment of arbitrator is totally different from an objection to award filed under Section 34 of the 1996 Act. To put it differently, one is at the stage of initiation, and the other at the stage of culmination. By no stretch of imagination, it can be said that the proceedings relate to "same matter in issue". C Additionally, the respondent had participated in the arbitral proceeding and was aware of passing of the award. He, may be, by design, invoked the jurisdiction of the High Court for appointment of an arbitrator. Liberal interpretation should be placed on Section 14 of the Act, but if the fact situation exposits absence of good faith of great magnitude, law should not come to the rescue of such a litigant. This is so because the respondent instead of participating in the arbitration proceedings, could have immediately taken steps for appointment of arbitrator as he thought appropriate or he could have filed his objections under Section 34(2) of the Act within permissible parameters but he E chose a way, an innovative path, possibly harbouring the thought that he could contrive the way where he could alone rule. This is neither diligence nor good faith. On the contrary, it is absence of both. The High Court has fallen into grave error by concurring with the opinion expressed by the Additional District Judge and, therefore, both the orders deserve to be lancinated. [Paras 14, F 17, 18, 19] [364-D-E; 365-G; 366-B, E-H; 367-A-C]

*State of Goa v. Western Builders* (2006) 6 SCC 239: 2006 (3) Suppl. SCR 288; *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others* (2008) 7 SCC 169: 2008 (5) G SCR 1108; *Ramadhar Shrivas v. Bhagwandas* (2005) 13 SCC 1: 2005 (4) Suppl. SCR 808; *Union of India v. Popular Construction Co.* (2001) 8 SCC 470:2001 (3) Suppl. SCR 619 - relied on.

*M.P. Housing Board and Another v. Sohanlal Chourasia* H *and Another* (2008) 2 M.P.L.J. 103 - referred to.

**Case Law Reference**

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| **(2008) 2 M.P.L.J. 103** | **referred to** | **Para 5** |
| **2001 (3) Suppl. SCR 619** | **relied on** | **Para 13** |
| **2006 (3) Suppl. SCR 288** | **relied on** | **Para 14** |
| **2008 (5) SCR 1108** | **relied on** | **Para 14** |
| **2005 (4) Suppl. SCR 808** | **relied on** | **Para 17** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6573 of 2016.

From the Judgment and Order dated 12.08.2013 of the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Civil Revision No. 332 of 2012.

Sushil Dutt Salwan, Pramod Dayal, Nikunj Dayal, Ms. Payal Dayal, Siddharth Vikram, Advs. for the Appellants.

Shekhar Sharma, Ms. Rashmi Singh, Adarsh Upadhyay, Advs. for the Respondent.

The Judgment of the Court was delivered by

**DIPAK MISRA, J.** 1. Leave granted.

2. The present appeal, by special leave, is directed against the order dated 12th August, 2013, passed by the High Court of Madhya Pradesh, Principal Seat at Jabalpur, in Civil Revision No.332 of 2012, whereby the High Court has affirmed the view expressed by the learned Additional District Judge, Bhopal, that the objection preferred by the respondent under Section 34(2) of the Arbitration & Conciliation Act, 1996 (for short, 'the 1996 Act') was condonable in aid of Section 14 of the Limitation Act, 1963 (for brevity, 'the Act').

3. The present litigation has a history. The respondent had entered into a contract for construction of a commercial complex at Bittan Market, E-5, Arera Colony, Bhopal on 29th June, 2009. During the subsistence of the contract, certain disputes arose between the parties and the matter was arbitrated upon. Clause 29 of the contract, on the basis of which the matter was referred to arbitration, reads as follows:

> "29 – Except as otherwise provided in this contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions, herein before mentioned and as to thing whatsoever, in any way,

A arising out of or relating to the contracts, designs, drawings, specifications, estimates, concerning the work, or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the Dy. Housing
B Commissioner in writing for his decision within a period of thirty days of such occurrence. Thereupon, the Dy. Housing shall give his written instructions and/or decision within a period of sixty days of such written request. This period can be extended by mutual consent of the parties. If decided amount is more than Rs.25,000/- the same shall
C be referred to the Housing Commissioner for his perusal.

Upon receipt of written instructions, or decision, the parties shall promptly proceed without delay to comply such decision or instructions. If the Dy. Housing Commissioner fails to give his instructions or decision in writing within a
D period of sixty days or mutually agreed time after being requested, if the parties are aggrieved against the decision of the Dy. Housing Commissioner the parties may within thirty days prefer such dispute/disputes for arbitration to the Addl. Housing Commissioner subject to the jurisdiction and limitations in accordance with the provisions of
E Madhyastham Adhikaran Adhiniyam, 1995. In case the dispute is within the jurisdiction of Addl. Housing Commissioner he shall then act as sole arbitrator, and he shall pass an award after hearing both the parties, strictly in accordance with the provisions of the Arbitration Act,
F 1940 and the rules made thereunder for the time being in force.

If the contractor does not make any demand for arbitration in respect of claim(s) in writing within ninety days on receiving information from the Executive Engineer that the
G final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and shall be absolutely barred and the Board shall be discharged or released of all the liabilities under the contract in respect of such claim(s).

A reference to the Arbitration shall be no ground for not
H continuing the work on the part of the contractor and

payment as per terms and conditions of the agreement shall be continued by the Board." A

4. Relying on the said clause, the matter was referred to the Additional Housing Commissioner, the sole arbitrator, who passed an award on 11th November, 2010. Be it stated, both the parties appeared before the learned arbitrator and on the basis of the materials brought on B record, the learned arbitrator passed the award. As is manifest from record, the arbitrator did not find any justification to allow any of the claims of the respondent-contractor.

5. When the matter stood thus, as it appears, wisdom dawned upon the respondent and he thought that he could take a somersault. C And that propelled him to file an application under Section 11 of the 1996 Act before the High Court of Madhya Pradesh, which formed the subject matter of Arbitration Case No.135 of 2010, for seeking appointment of an arbitrator to adjudicate the disputes. It was contended before the High Court that clause 29 of the contract could not be treated as an arbitration clause and, therefore, the court should appoint an arbitrator. D To bolster the said stand, reliance was placed on ***M.P. Housing Board and Another vs. Sohanlal Chourasia and Another***[1].

6. The learned Single Judge reproduced the relevant passages from the said judgment and came to hold as follows:

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> "From the aforesaid clause, it is seen that if any dispute arises between the parties, the matter has to be resolved by reference to the Dy. Housing Commissioner and, thereafter, to the Addl. Housing Commissioner. The provisions of Arbitration Clause clearly indicates that the Arbitrator appointed under the agreement is a named F arbitration namely the Addl. Housing Commissioner and he has to exercise, powers available under the Arbitration Act of 1940. Available on record is an award passed by the Arbitrator i.e. the Addl. Housing Commissioner vide Annexure P5 and once in terms of clause 29 of the G Agreement, the arbitrator i.e. the Addl. Housing Commissioner has adjudicated the dispute and has passed an award, no further action is to be taken in these proceedings against u/s 11, as the sole arbitrator in

[1] (2008) 2 M.P.L.J. 103

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A accordance with Arbitration Agreement has already adjudicated the dispute between the parties. If the petitioner is aggrieved by the adjudication of the dispute, he can now challenge the award of the Arbitration in accordance with law.

B In the light of the resolution of the dispute by the sole Arbitator in accordance with clause 29 of the agreement, this court does not find any ground to interfere into the matter. The judgment relied upon by Sh. Shashank Shekhar is clearly distinguishable. In that case the question and the power is exercised by the Addl. Housing Commissioner u/ C s 29 of the agreement in question. In the said case, it is only held that a Dy. Housing Commissioner deciding the claim under clause 29 is not an Arbitrator."

7. We must immediately state that the said order was not assailed and, has been allowed to attain finality.

D 8. After facing non-success before the High Court in his effort to get an arbitrator appointed, the respondent thought it appropriate to file an objection under Section 34(2) of the 1996 Act to challenge the award. The said application was filed on 26th September, 2011. It is apt to note here that the award was passed on 11th November, 2010.

E 9. The respondent, along with his objection, filed an application under Section 14 of the Act seeking exclusion of the time consumed in the proceedings asserting that he was bonafidely prosecuting the case in the court having no jurisdiction. The learned Additional District Judge, upon hearing the learned counsel for the parties, allowed the application F on the foundation that the respondent was entitled to exclusion of time under Section 14 of the Act.

10. Being grieved by the aforesaid order, the appellant preferred civil revision before the High Court and, as has been stated earlier, the High Court did not find any infirmity in the order passed by the learned G Additional District Judge and, accordingly, gave the stamp of approval to the same.

11. We have heard Mr. Sushil Dutt Salwan, learned counsel for the appellants and Mr. Shekhar Sharma, learned counsel for the respondent.

H 12. The singular issue that emerges for consideration is whether

in the obtaining factual scenario, Section 14 of the Act would be applicable. To appreciate the controversy, it is necessary to refer to Section 34(3) of the 1996 Act. It reads as follows:

> "34(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."

13. This Court in ***Union of India vs. Popular Construction Co.***[2] interpreting the said provision has held that:-

> "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".
>
> And again:-
>
> "Furthermore, Section 34(1) itself 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 grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section.

[2] (2001) 8 SCC 470

A Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

B "where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court".

This is a significant departure from the provisions of the C Arbitration Act, 1940".

14. The aforesaid authority makes it absolutely clear that that the scheme of limitation provided under the 1996 Act is different than 1940 Act; and, therefore, an application filed beyond the period of limitation under Section 34(3) of 1996 Act would not be an application in D accordance with the said provision. As is evident from factual narration, the application was filed beyond the period prescribed in the said provision. Therefore, it could not have been entertained under the 1996 Act. However, the appellants sought exclusion of the time spent in the proceedings in court as envisaged under Section 14 of the Act. It is settled in law that Section 14 of the Act applies to Section 34(3) of the E 1996 Act. It has been so held in ***State of Goa vs. Western Builders***[3] and ***Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and others***[4].

15. Having stated thus, we are obliged to scrutinise under what situations Section 14 of the Act gets attracted. Section 14(1) of the F Act, which is relevant for the present purpose, reads as follows:

"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, G 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

[3] (2006) 6 SCC 239

H [4] (2008) 7 SCC 169

jurisdiction or other cause of a like nature, is unable to entertain it." A

16. In ***Consolidated Engineering Enterprises*** (supra), the Court, while dealing with the conditions in which Section 14 will be applicable, enumerated five conditions which are as follows:-

"(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party; B

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature; C

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court."

In the said case, it has also been stated that:- D

"... 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 that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. ..." E F

17. From the aforesaid passage, it is clear as noon day that there has to be a liberal interpretation to advance the cause of justice. However, it has also been laid down that it would be applicable in cases of mistaken remedy or selection of a wrong forum. As per the conditions enumerated, the earlier proceeding and the latter proceeding must relate G to the same matter in issue. It is worthy to mention here that the words "matter in issue" are used under Section 11 of the Code of Civil Procedure, 1908. As has been held in ***Ramadhar Shrivas vs. Bhagwandas***[5] the said expression connotes the matter which is directly

[5] (2005) 13 SCC 1 H

A and substantially in issue. We have only referred to the said authority to highlight that despite liberal interpretation placed under Section 14 of the Act, the matter in issue in the earlier proceeding and the latter proceeding has to be conferred requisite importance. That apart, the prosecution of the prior proceeding should also show due diligence and good faith.

B 18. In the case at hand, the respondent appeared before the learned arbitrator and after the award was passed, chose not to file any objection to the award immediately. On the contrary, the respondent filed an application under Section 11 of 1996 Act before the High Court for appointment of an arbitrator. As has been stated earlier, the learned C Single Judge of the High Court distinguished the decision in the case of ***Sohanlal Chourasia and Another*** (supra) and came to hold that the application was not maintainable. However, he granted liberty to the respondent to file an objection in accordance with law. The words "in accordance with law" gain significance. It allows an argument to be canvassed by the respondent that the time spent in earlier proceeding D deserved exclusion while computing the period of limitation. But, an ominous one for the respondent, whether Section 14 is at all attracted? Had the learned Single Judge stated that the period consumed for pursuing the remedy under Section 11 of the 1996 Act, would be excluded for filing objection, possibly the matter would have been different. In any E case, we do not intend to dilate further on that aspect. It is quite clear that the quoted portion herein-above does not so indicate. It only grants liberty to the respondent to file an objection in accordance with law. Section 14(1) of the Act which we have reproduced, lays down that the proceedings must relate to the same matter in issue. It emphasises on due diligence and good faith. Filing of an application under Section 11 of F the 1996 Act for an appointment of arbitrator is totally different than an objection to award filed under Section 34 of the 1996 Act. To put it differently, one is at the stage of initiation, and the other at the stage of culmination. By no stretch of imagination, it can be said that the proceedings relate to "same matter in issue". Additionally, the respondent G had participated in the arbitral proceeding and was aware of passing of the award. He, may be, by design, invoked the jurisdiction of the High Court for appointment of an arbitrator. We are absolutely conscious that liberal interpretation should be placed on Section 14 of the Act, but if the fact situation exposits absence of good faith of great magnitude, law should not come to the rescue of such a litigant. We say so because H the respondent instead of participating in the arbitration proceedings,

could have immediately taken steps for appointment of arbitrator as he thought appropriate or he could have filed his objections under Section34(2) of the Act within permissible parameters but he chose a way, which we are disposed to think, an innovative path, possibly harbouring the thought that he could contrive the way where he could alone rule. Frankly speaking, this is neither diligence nor good faith. On the contrary, it is absence of both.

19. In view of the aforesaid analysis, we find that the High Court has fallen into grave error by concurring with the opinion expressed by the learned Additional District Judge and, therefore, both the orders deserve to be lancinated and, accordingly, we so direct.

20. The appeal is, accordingly, allowed. There shall be no order as to costs.

Devika Gujral

Appeal allowed.