

# Dispute Resolution Hotline

January 09, 2019

## DON'T LOSE THE RIGHT! ARBITRAL AWARDS MUST BE CHALLENGED WITHIN STRICT TIMELINE

- An application to set aside arbitral award must be made within the strict statutory timeline. This time limit cannot be extended thereafter by using the leeway of "sufficient cause" under the Limitation Act, 1963.
- Time spent bona fide in a court without jurisdiction could be excluded while computing the statutory period to challenge an award, subject to conditions under Section 14 of the Limitation Act.
- Administrative difficulties involving construction contracts is not a valid reason to condone delay for challenge to arbitral award.

### INTRODUCTION

The Supreme Court, in its recent judgement in *Simplex Infrastructure v. Union of India*,<sup>1</sup> interpreted the applicability of Section 5 ("extension of prescribed period in certain cases") and Section 14 ("exclusion of time of proceeding bona fide in court without jurisdiction" of the Limitation Act, 1963 ("Limitation Act") to the Arbitration and Conciliation Act, 1996 ("A&C Act"), particularly with respect to challenge to arbitral award under Section 34 of the A&C Act.

The Supreme Court clarified that Section 34 of the A&C Act excludes the application of Section 5 of the Limitation Act, thereby barring an extension beyond the statutory three- month period and the extendable 30-day outer limit. However, it held that Section 34 does not exclude the application of Section 14 of the Limitation Act where time spent bonafide in courts without jurisdiction could be excluded while computing the statutory period for challenge.

### FACTS

Simplex Infrastructure Ltd. (Appellant) entered into a construction contract with Union of India (Respondent) for building 821 permanent shelters in the tsunami-hit Andaman and Nicobar Islands. As differences arose in performance, the parties were referred to arbitration. An award was passed directing the Respondent to pay INR 9,96,98,355 along with interest. The Respondent received the award on October 31, 2014. On January 30, 2015, the Respondent preferred an application to the District Judge, Port Blair, under Section 34 of the A&C Act for setting aside of the arbitral award.

However, during the pendency of the arbitration, the Appellant had filed an application for interim relief under Section 9 before the High Court of Calcutta. On February 12, 2016, the District Judge, Port Blair dismissed the application on the ground of lack of jurisdiction. It held that since an application was filed previously before the High Court of Calcutta, parties should have approached the same court with any subsequent application.<sup>2</sup>

Subsequently, on March 28, 2018, the Respondent filed an application for setting aside the arbitral award before the High Court of Calcutta under Section 34 of the A&C Act. The High Court of Calcutta allowed the application while condoning a delay of 514 days - on the ground that sufficient cause was shown. The order of the High Court of Calcutta was appealed before the Supreme Court.

### ISSUES BEFORE THE SUPREME COURT

Whether the High Court of Calcutta was justified in condoning a delay of 514 days by the Respondent in filing the application for setting aside of the arbitral award under Section 34?

### JUDGMENT

#### Applicability of Section 5 of the Limitation Act

The Supreme Court conducted a careful analysis of the language of Section 34 of the A&C Act providing for a specific time limit for challenge. In conjunction, it analyzed the provisions of the oft-used Section 5 of the Limitation Act, 1963.

Section 5 of the Limitation Act empowers courts to grant an extension of the prescribed period for an appeal or application subject to its satisfaction. The Respondent argued that the alleged delay of 514 days can be condoned pursuant to Section 5 of the Limitation Act as there was sufficient cause for delay.

The Supreme Court interpreted Section 34 of the A&C Act to ascertain its legislative intent. Section 34(3) of the A&C Act prescribes a specific statutory limitation. An application for setting aside of an arbitral award should be made within three months of the date of receipt of arbitral award. The proviso to Section 34(3) allows this period to be further extended thirty days "*but not thereafter*" on sufficient cause being shown by the party filing the application. The Supreme Court held that the words "*but not thereafter*" in Section 34 make it abundantly clear that the timeline cannot be further extended by Courts even if sufficient cause is shown by the parties. In this regard, the Supreme Court relied on its judgment in *Union of India v. Popular Construction Company*.<sup>3</sup> In this judgment, the Supreme Court had held that Section 29(2) of the Limitation Act<sup>4</sup> would apply, which gives primacy to the timeline specified in a special law, such as the A&C Act, over the timeline specified under the Limitation Act. Therefore, Section 5 of the

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Therefore, the Supreme Court held that Section 5 of the Limitation Act does not have any application to proceedings under Section 34 of the A&C Act.

Applicability of Section 14 of the Limitation Act

While application of Section 5 of the Limitation Act could be excluded due to the express language under Section 34 of the A&C Act, the Supreme Court held that the same did not hold for applicability of Section 14 of the Limitation Act. Section 14 provides for the exclusion from statutory timelines of time spent on bona fide litigation before a court without jurisdiction. The Supreme Court reiterated the settled position of law as set out in *Consolidated Engineering Enterprises v Principal Secretary, Irrigation Department*.<sup>5</sup> The Supreme Court had held that, “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.” Further, in this judgement, the Supreme Court had held that Section 14 of the Limitation Act does not provide for a fresh period of limitation, rather it prescribes the *exclusion* of a certain period.

The Supreme Court also relied on provisions of Section 43 of the A&C Act to arrive at the rationale of applicability of Section 14 to the A&C Act. 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 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.

The Supreme Court referred to a simplistic chart computing the delay, reproduced as under:

Computation of Resultant Delay using Section 14 of the Limitation Act

Sr. No.	Particulars	No. of Days	No. of Days
A.	Award received on 31 October 2014. Application under Section 34 filed in the Calcutta High Court on 28 March 2016		
	Total no. of days		514
B.	<b>Less:</b> Period between the date of filing application under Section 34 in District Court, Port Blair on 30 January 2015 and date of dismissal of the application on 12 February 2016 [Applying Section 14 of the Limitation Act]	379	
C.	<b>Less:</b> Period between the application for certified copy of the order dated 12 February 2016 filed on 29 February 2016 and receipt of certified copy of the order on 3 March 2016 [Applying Section 12 of the Limitation Act]	4	
	Total no. of days		383
D.	<b>TOTAL DELAY</b>		131

Applying Section 14, the Supreme Court noted that even if the time before the District Judge, Port Blair were to be excluded from computation, there was in any event a delay of 131 days in filing of the application for setting aside of arbitral award. The Supreme Court dismissed the plea of the Respondent to the effect that administrative difficulties are not a valid reason to condone delay beyond the statutorily prescribed period under Section 34 of the A&C Act.

ANALYSIS

The decision of the Supreme Court is significant on three counts. Firstly, it fortifies the interpretation that the time limit of three-month, extendable by a further 30 days, under Section 34 of the A&C Act is sacrosanct for bringing a challenge to an arbitral award. The oft-used Section 5 of the Limitation Act to extend time limit under the pretext of “sufficient cause” justifying delay has been kept at bay from the express time limit under Section 34 of the A&C Act, taking into account the legislative intent. The Supreme Court’s judgment will compel award-debtors from bringing challenge within the prescribed time limit without delays, and assist courts in filtering challenges that are within the prescribed time period, but not thereafter.

This is in line with courts’ interpretation of the interplay between the Limitation Act and other special statutes containing similar language. For instance, under the Motor Vehicles Act, 1988, courts have held that when the statute provides for an express timeline for condonation of delay, Section 5 of the Limitation Act cannot be used to extend such timeline.<sup>6</sup> However, when statutes do not specifically provide such language, courts may permit the application of Section 5 of the Limitation Act for condonation of delay. For instance, the Supreme Court has held that Section 5 of the Limitation Act may be applicable for applications under the Insolvency and Bankruptcy Code, 2016.<sup>7</sup>

Secondly, the Supreme Court has drawn from the rationale arrived at by the Court in its previous decisions - to fortify the position on applicability of Section 14 of the Limitation Act to the A&C Act. It has re-acknowledged that while respecting the timelines prescribed in the A&C Act itself, due regard must be given to the time spent by the award-debtor on *bona fide* litigation before a forum lacking jurisdiction.

Thirdly, it strengthens the position of the judiciary when faced with construction contracts involving the Central or State Governments. Since such contracts are fraught with administrative hurdles, the Supreme Court has taken a firm stand to the effect that the judiciary ought to entertain no challenge beyond statutory time period under the garb of

“administrative difficulties” running in the Central or State Government. This places the government at an equal pedestal with the other private party in construction contracts involving arbitration. This judgment serves as a cautionary tale, to parties and to Courts alike, to respect statutorily mandated timelines. Further, it serves as significant guidance to formulate and interpret the language of special statutes in order to rule out an all-pervasive application of the Limitation Act to special procedural timelines.

— Bhavana Sunder, Kshama A. Loya & Vyapak Desai

You can direct your queries or comments to the authors

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<sup>1</sup> Civil Leave Appeal No. 1186 of 2018 (SLP (C) No. 17521 of 2017). Decided on December 5, 2018.

<sup>2</sup> “42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

<sup>3</sup> (2001) 8 SCC 470

<sup>4</sup> “29. Savings... (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.”

<sup>5</sup> (2008) 7 SCC 169

<sup>6</sup> *Mer Panda Vejunandbhai v. Hardasbhai Parbatbhai*, AIR 1992 Guj 122; *Mohammad Ashfaq v. State Transport Appellant Tribunal*, 1977 SCR (1) 563.

<sup>7</sup> *B.K. Educational Services Private Limited v. Parag Gupta and Associates*, 2018 SCC OnLine SC 1921.

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