

(4) Where an Appellate Court, not being the High court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment.”

(6) However, the present is not an appeal against an original decree or first appeal where merits might have to be gone into certifying fitness of admission of the appeal. This is an appeal against an appellate decree limited to examination of substantial question of law. The procedure is prescribed in Order 42 CPC. The procedure of Order 41 CPC applies to appeals under Section 100 CPC, as far as may be, by virtue of Rule 1 of Order 42 CPC. Therefore, Order 41 Rule 11 applies. The complexion of the two jurisdictions is vastly different. First appeal is plenary but not second appeal and therefore standards of admission and dismissal are disparate and dissimilar. Looking to the conduct of the appellant she cannot assert an absolute right to hearing on merits. The appeal is accordingly dismissed when no one appears to press the appeal.

(7) A copy of this order be sent by the office to the appellant for her information. The lower appellate court be notified by the office of the dismissal of the appeal.

S. Sandhu

Before K. Kannan, J

KARTAR SINGH CONTRACTOR — *Petitioner*

versus

STATE OF HARYANA — *Respondent*

CR No. 8784 of 2014

April 21, 2015

Arbitration and Conciliation Act, 1996 — Ss. 34 & 43 — Limitation Act, 1963 — Ss.5 & 29 — Limitation period in case of Arbitration — Arbitration award was passed in favour of contractor — State instituted petition under Section 34 of 1996 Act to set aside said award along with an application filed under section 5 to condone delay of 342 days in filing said petition — Held, that a specific period of limitation is prescribed under Section 34 of Arbitration Act by operation of Section 29(3) of Limitation Act — Thus, applicability of Section 5 of Limitation Act, in respect of condonation of delay would

stand excluded by said provision—Petition filed by State to set aside award was liable to be rejected as barred in law.

Held, that in Assam Urban Water Supply & Sew. Board v. Subhash Projects & Marketing Ltd. [2012] 2 SCC 624, the court has held that the period of 30 days mentioned in the proviso, follows subsection 3 of section 34 and not “the prescribed period” for the purposes of making an application for setting aside the arbitral award and hence section 4 of the Limitation Act, 1963 is not attracted. It means the period of limitation computed in accordance with the provisions of Arbitration Act. The Court was holding that there is no scope for extension of time under Section 4 of the Limitation Act. Making reference to section 43 of the Arbitration and Conciliation Act that provided for the applicability of the provisions of Limitation Act, Supreme Court held in Consolidated Engg. Enterprises v. Principal Secretary Irrigation Deptt. [2008] 7 SCC169, that the proceedings, which section 43 contemplates will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. But the proceedings under section 34 for challenging the award will not be taken as being brought under section 43. The Court while making reference to section 29(3) of the Limitation Act, held that the applicability of section 5 of the Act would stand excluded by a specific period of limitation prescribed under section 34 of the Arbitration Act. In other words, Supreme Court held that the specific period of limitation spelt out under section 34(3) proviso will exclude the applicability of section 5 by the operation of section 29(3) of the Limitation Act. This point was reiterated in Union of India v. Popular Construction Co. [2001] 8 SCC 470. It was held that the Court cannot condone the delay in exercise of its discretion under section 5 of the Limitation Act in filing an application under section 34 of the Arbitration Act. The Court observed that section 34 is contained in Part I of the Act and the application for setting aside the award under Arbitration & Conciliation Act under section 43(3) was liable to be rejected. That have also been also decisions of this Court and of Delhi High Court cited by the counsel and are followed in Supreme Court judgments. I do not think it necessary to reproduce them. The petition filed before the Court below by the State was not competent and was liable to be rejected. I order the rejection of the petition filed under Section 34 as barred in law and set aside the order passed by the Court below.

(Para 6)

Vivek Khatri, Advocate, for the *petitioner*.

Gaurav Goel, Assistant Advocate General, Haryana.

K. KANNAN, J. (Oral)

(1) The revision is against the order allowing for the limitation issue to be considered as a preliminary issue, when the contractor objected to the maintainability of the petition itself. Admittedly, the award was passed on 12.02.2013 and the petition was being instituted under Section 34 of the Arbitration & Conciliation Act by the State only on 22.04.2014. The petition had been accompanied by an application under Section 5 to condone the delay of 342 days in filing the same. The court below framed an issue whether the award was liable to be set aside and whether the petition moved under Section 34 of the Act was time barred.

(2) When the objection was that the petition was barred by law, the Court was literally abdicating on its duty to render adjudication on the objection but allowed it to linger to be adjourned to a date on 16.01.2015.

(3) Learned counsel appearing on behalf of the respondents before the Court below challenges the order stating that Section 34(3) of the Act is self-contained in providing for a particular period of limitation and there is no scope for entertaining any application under Section 5. Learned counsel appearing on behalf of the respondents states that after all the issue of limitation has not been considered by the Court below and it could be left to the court below to consider the same at an appropriate time.

(4) If the term of limitation is a mixed question of law and fact and evidence would be necessary, I would have had no problem in acceding to the plea of the State that the matter could go before the lower court for consideration. If, on the other hand, the point is a direct principle of law to be applied, then we need not run it through a needless exercise by putting it before a Judge, who failed to consider what is brought before him at the initial time.

(5) Section 34(3) of the Act reads thus:-

“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.”

(6) This provision has been considered in several judgments of the Hon'ble Supreme Court. In *Assam Urban Water Supply & Sew. Board versus M/s Subhash Projects & Marketing Limited*¹ the court has held that the period of 30 days mentioned in the proviso, follows sub-section 3 of Section 34 and not “the prescribed period” for the purposes of making an application for setting aside the arbitral award and hence Section 4 of the Limitation Act, 1963 is not attracted. It means the period of limitation computed in accordance with the provisions of Arbitration Act. The Court was holding that there is no scope for extension of time under Section 4 of the Limitation Act. Making reference to Section 43 of the Arbitration and Conciliation Act that provided for the applicability of the provisions of Limitation Act, Hon'ble Supreme Court held in *M/s Consolidated Engg. Enterprises versus Principal Secretary Irrigation Deptt. and others*², that the proceedings, which Section 43 contemplates will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. But the proceedings under Section 34 for challenging the award will not be taken as being brought under Section 43. The Court while making reference to Section 29(3) of the Limitation Act, held that the applicability of Section 5 of the Act would stand excluded by a specific period of limitation prescribed under Section 34 of the Arbitration Act. In other words, Hon'ble Supreme Court held that the specific period of limitation spelt out under Section 34(3) proviso will exclude the applicability of Section 5 by the operation of Section 29(3) of the Limitation Act. This point was reiterated in *Union of India versus M/s Popular Construction Co.*³, It was held that the Court cannot condone the delay in exercise of its discretion under Section 5 of the Limitation Act in filing an application under Section 34 of the Arbitration Act. The Court observed that Section 34 is contained in Part I of the Act and the application for setting aside the award under Arbitration & Conciliation Act under Section 43(3) was liable to be rejected. That have also been also decisions of this Court and of Delhi High Court cited by the counsel and are followed in Hon'ble Supreme Court judgments. I do not think it necessary to reproduce them. The

¹ 2012(2) SCC 624

² 2008(7) SCC 169

³ 2001(8) SCC 470

