A STATE OF ARUNACHAL PRADESH

v.

M/S. DAMINI CONSTRUCTION

FEBRUARY 28, 2007

B [A.K. MATHUR AND V.S. SIRPURKAR, JJ.]

Arbitration and Conciliation Act, 1996—ss. 34 & 33:

Arbitral award—Power of arbitrator to review the award—Appellant
C *requested arbitrator in writing to review award and also sought certain clarifications—Request sent after expiry of period of limitation prescribed u/ s.34 for setting aside of award—Arbitrator replied that he had no jurisdiction for review—Held: When award was passed, only option with Appellant was either to move an application under s.34 within three months or within*
D *extended period of another 30 days—Question of review was totally misconceived as there is no such provision in the Act for review of award by the arbitrator—Also clarifications sought not contemplated under s.33—In this background, reply sent by arbitrator does not entitle appellant a fresh cause of action so as to file an application under s.34(3) by taking the starting point of limitation from the date of reply given by the arbitrator—*
E *Limitation Act, 1963—Section 5.*

Respondent raised bill with regard to the contract it had entered into with the Public Works Department in State of Andhra Pradesh for executing work of construction of road bridges. But it was refused payment. The refusal
F **gave rise to disputes which were referred to arbitration. Arbitrator passed an interim award on 12-10-2003. Appellant sent a letter to the arbitrator on 02-04-2004 seeking review of the award. On 10-4-2004, the arbitrator by his letter stated that he had no jurisdiction to entertain the request for review of the award and also informed that the award dated 12-10-2003 was in fact a final award pertaining to the issues involved. On 21-06-2004, Respondent-**
G **petitioner filed an application for execution of the interim award dated 12-10-2003. Thereafter on 6-8-2004, Appellant filed application under s.34 of the Arbitration and Conciliation Act, 1996 for setting aside the award dated 12-10-2003 together with an application under s.5 of the Limitation Act read with s.34(3) of the Act for condonation of delay in filing the application for**

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setting aside the award. Delay was condoned by the Trial Court. That order was set aside by the High Court. A

In appeal to this Court it was submitted by the appellant that the cause of action arose to the appellant on 10.4.2004 when the letter was received from the arbitrator and, hence, the appellant was entitled to count the period of limitation from the date of receipt of such letter from the arbitrator and if the limitation was to start from 10.4.2004 then the appellant has a right to move an application for setting aside of the award under s.34 of the Act within three months and the extended period of one month and the appellant having filed the application on 6.8.2004, it was within time. B

Dismissing the appeals, the Court C

HELD: 1.1. The submission of the appellant is totally misconceived and it cannot be accepted. A perusal of the interim award passed by the arbitrator clearly shows that it was final to the extent of the claims decided therein. This interim award did not mince any word and determined the amount after discussing the claims in detail and finally calculated the amount under each of the claims. Therefore, there was no confusion in this award. [Para 6] D

[421-C, F]

1.2. It was absolutely thoughtlessness on the part of the appellant to have written a letter after six months i.e. on 2.4.2004 seeking review of the interim award. Firstly, the letter had been designed not strictly under s.33 of the Act because under that Section 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 s.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 s.33. Neither review was maintainable nor the prayer which had been made in the application had anything to do with s.33 of the Act. The prayer was with regard to the mode of payment. When this application does not come within E F G H

A **the purview of s.33 of the Act, the application was totally misconceived.**
[Para 6] [421-F, B-E]

1.3. The reply given by the arbitrator does not give any fresh cause of action to the appellant so as to move an application under s.34(3) of the Act. In fact, when the award dated 12.10.2003 was passed the only option with the
B **appellant was either to have moved an application under Section 34 within three months as required under sub-section (3) of Section 34 or within the extended period of another 30 days. But instead of that a totally misconceived application was filed and there too the prayer was for review and with regard to mode of payment. The question of review was totally misconceived as there**
C **is no such provision in the Act for review of the award by the arbitrator and the clarification sought for as to the mode of payment is not contemplated under Section 33 of the Act. Therefore, in this background, the application was totally misconceived and the reply sent by the arbitrator does not entitle the appellant a fresh cause of action so as to file an application under Section 34(3) of the Act, taking it as the starting point of limitation from the date of**
D **reply given by the arbitrator i.e. 10.4.2004. [Para 6] [421-G-H; 422-A, B]**

CIVIL APPEALLATE JURISDICTION : Civil Appeal No. 1099 of 2007.

From the Judgment and final Order dated 7.2.2005 of the Gauhati High Court in Writ Petition (C) No. 408 (AP) of 2004.

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C.A. No. 1100 of 2007.

Anil Shrivastav for the Appellant.

F R. Venkataramani, Rameshwar Prasad Goyal, Manish Goswami (for M/s. Map & Co.) for the Respondent.

The Judgment of the Court was delivered by

A.K. MATHUR, J. 1. Leave granted in both the Special Leave Petitions.

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2. Since the question of law involved in both the appeals is common, they are disposed of by this common judgment. For the sake of convenience, the facts stated in Civil Appeal arising out of S.L.P.(c) No.14804 of 2005 are taken into consideration.

H 3. This appeal is directed against the order passed by learned Single

Judge of the Gauhati High Court, Itanagar Bench in Writ Petition No.408 of 2004 whereby learned Single Judge set aside the order dated 15.9.2004 passed by the Deputy Commissioner cum District Judge, Papum Pare, District, Yupia in Miscellaneous Application No.10 of 2004 condoning the delay in making application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as 'the Act'), being not maintainable. Hence, the order dated 15.9.2004 was set aside and the writ petition was allowed. Aggrieved against this order passed by the High Court of Gauhati, Itanagar Bench, State of Arunachal Pradesh has preferred the present appeal.

4. Brief facts which are necessary for disposal of this appeal are that the respondent herein entered into a contract agreement bearing No.DD/03 of 1992-93 with the State of Arunachal Pradesh in Public Works Department for executing the contractual work of construction of road bridges. The value of the work in question although was initially fixed at Rs.77.43 lakhs but on the basis of the post tender negotiation by and between the parties, the price of the work was re-fixed at Rs.1.15 crores. The work was to be completed within two calendar years from the date of commencement of the work. The work commenced on 10.4.1993 and it was completed in March, 1999. According to the petitioner-respondent herein the delay in execution of the work was due to deviation from the original scope of work and several obstructions and difficulties including delay in approval of the design and drawings and also in making payment against running accounts bills from time to time. The respondent herein raised bill for the contractual work which according to the respondent was refused to be paid due to certain arbitrary and untenable reasons. Such refusal gave rise to a dispute and accordingly, need arose for arbitration. The respondent then approached the Court under section 11(6) of the Act which was numbered and registered as Arbitration Case No.21 of 2000 and the same was disposed of by the High Court appointing an arbitrator to adjudicate the dispute between the parties. One arbitrator was appointed on 18.10.2001 but subsequently that arbitrator was changed by the present arbitrator. On 12.10.2003 the arbitrator passed an interim award awarding Rs.65,52,878/- with simple interest to be calculated if the award amount was not paid within 60 days from the date of the award. However, the period of limitation prescribed under Section 34(3) of the Act for setting aside the award expired in the meantime. The appellant then wrote a letter to the arbitrator for review of the award and also sought clarification in respect of the award on 2.4.2004. On 10.4.2004 the arbitrator by his letter stated that he had no jurisdiction to entertain the request for review of the award and also informed that the award dated 12.10.2003 was in fact a final award pertaining to the

A issues involved. On 21.6.2004 the respondent- petitioner filed an application for execution of the interim award dated 12.10.2003 before the Deputy Commissioner. On 6.8.2004 the appellant filed an application under Section 34 of the Act for setting aside the award dated 12.10.2003 together with an application under Section 5 of the Limitation Act read with Section 34(3) of the Act for condonation of delay in filing the application for setting aside the B award. The said application was entertained and was fixed for hearing on condonation of delay after 15 days. Aggrieved against this order, a writ petition was filed by the respondent herein but the same was disposed of by the High Court with the observation that as the matter was pending before the court below it would not be appropriate to interfere at this stage and left C the Deputy Commissioner to decide the matter. The Deputy Commissioner, Papum Pare, Itanagar by the impugned order dated 15.9.2004 decided the application condoning the delay in preferring the application under Section 34 of the Act by the appellant. Aggrieved against this order, the present writ petition was filed by the respondent herein. It is the legality of this order which was challenged before the High Court. Learned Single Judge of the D High Court after hearing both the parties came to the conclusion that the order passed by the Deputy Commissioner in condoning the delay was not correct and it took the view that under section 34 of the Act, there was a delay of seven months from the date of first order and a delay of six months from the date of second order.

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5. The plea of the appellant- State before the court below was that the award was passed on 12.10.2003 and a copy was received on 23.10.2003. As such, the period of limitation started from 23.10.2003. Since the letter was sent by the appellant to the arbitrator on 2.4.20043 for review of the award and a reply thereof was received on 10.4.2004 whereby the matter was clarified by F the arbitrator, therefore, the cause of action accrued in favour of the appellant on 10.4.2004 and application under Section 34 of the Act was filed on 6.8.2004 i.e. within three months and the extended period of one month, therefore, it was within limitation. Though this contention prevailed before the trial court but the same failed before the High Court on the ground that the cause of G action accrued to the appellant on 23.10.2003 when the appellant received the copy of the award and the letter which was written on 2.4.2004 was totally misconceived. The interim award was final with regard to the claims raised therein, therefore, the whole exercise undertaken by the appellant was totally misconceived. Hence, learned Single Judge allowed the writ petition and set aside the order of the trial court. Aggrieved against this order passed by the H

learned Single Judge, the present appeal was filed. A

6. We have heard learned counsel for the parties and perused the record. Learned counsel for the appellant tried to persuade us that in fact the cause of action has arisen to the appellant on 10.4.2004 when the letter was received from the arbitrator and therefore, the appellant was entitled to count the period of limitation from the date of receipt of the letter from the arbitrator B and if the limitation was to start from 10.4.2004 then the appellant has a right to move an application for setting aside of the award under section 34 of the Act within three months and the extended period of one month and the appellant having filed the application on 6.8.2004, therefore, it was within time. The submission of learned counsel for the appellant is totally misconceived C and it cannot be accepted. A perusal of the interim award passed by the arbitrator clearly shows that it was final to the extent of the claims decided therein and it may be relevant to refer to the concluding portion of the award which reads as under :

> "I further direct that the awarded amount is indicated above along D with the interest, wherever shown till the date of interim award amounting to Rs.65,52,878.00 (Rupees Sixty five lakhs fifty two thousand Eight hundred seventy eight only), shall be paid by the Respondents to the Claimant within 60 days from the date of the award, failing which a simple interest on the unpaid amount @ 18% (Eighteen percent) per annum shall be payable to the Claimant by the E respondents after 60 days of this interim award."

Therefore, this interim award which did not mince any word and determined the amount after discussing the claims in detail and finally calculated the amount under each of the claims. Therefore, there was no confusion in this F award. It was absolutely thoughtlessness on the part of the appellant to have written a letter after six months i.e. on 2.4.2004 seeking review of the interim award to the following effect:

> "While submitting the request for review the case, it is also requested that your honour may kindly consider (sic.) the following G points regarding mode of payments, if at all, the payment is to be made, as the award given by your honour is for the interim payment.
>
> (a) Whether payment is to be made directly to M/s. Damani Construction Co. or through honourable court.

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A (b) In case, the payment is to be made directly to M/s.Damani Construction Co., an equivalent Bank Guarantee Bond from any Nationalized Bank shall be required from the Contractor since it will be an interim payment and final verdict awaited.

Submitted for your kind consideration please."

B 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 C 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 D 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 E 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.

F "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."

G Therefore, the reply given by the arbitrator does not give any fresh cause of action to the appellant so as to move an application under Section 34(3) of the Act. In fact, when the award dated 12.10.2003 was passed the only option with the appellant was either to have moved an application under Section 34 within three months as required under sub-section (3) of Section 34 or within the extended period of another 30 days. But instead of that a totally H misconceived application was filed and there too the prayer was for review

and with regard to mode of payment. The question of review was totally misconceived as there is no such provision in the Act for review of the award by the arbitrator and the clarification sought for as to the mode of payment is not contemplated under Section 33 of the Act. Therefore, in this background, the application was totally misconceived and the reply sent by the arbitrator does not entitle the appellant a fresh cause of action so as to file an application under Section 34(3) of the Act, taking it as the starting point of limitation from the date of reply given by the arbitrator i.e. 10.4.2004.

7. Thus, in this background, the view taken by learned Single Judge appears to be justified and there is no ground to interfere in this appeal. Consequently, there is no merit in both the appeals and the same are dismissed with no order as to costs.

B.B.B. Appeals dismissed.