REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2928 OF 2010
(Arising out of SLP(C) No. 3937 of 2009)

State of Maharashtra …Appellant

Versus

M/s. Hindustan Construction Company Ltd. …Respondent

JUDGEMENT

R.M. Lodha, J.

Leave granted.

2. The question presented in this appeal by special leave is : whether in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') from an order refusing to set aside the award, an amendment

in the memorandum of appeal to raise additional/new grounds can be permitted.

3. M/s. Hindustan Construction Company Limited (respondent) and the State of Maharashtra (Irrigation Department, the Executive Engineer - appellant) entered into a contract on March 14, 1992 being ICB Contract No. II/1992 for the construction of civil work of Pressure Shafts and Power House Complex at Koyana Hydro Electric Project, Stage-IV. The contract work was completed by respondent within the extended period i.e., by March 31, 2000. However, it appears that disputes arose between the parties in respect of the work carried out by respondent in relation to (a) revision of percentages for hidden expenses, over breaks and profit for further additional cases of extract items/rate revision; (b) claim for extended stay at site; (c) revision of rate for Pressure Shaft excavation; (d) fixation of new rate on account of variation in the item of Transformer hall arch concrete; and (e) fixation of new rate on account of variation in the item of Transformer Hall excavation. These disputes were referred to the Arbitral Tribunal. The Arbitral Tribunal made award on June 26, 2003

and a signed copy thereof was forwarded to the appellant along with the letter dated June 30, 2003. By the said award the Arbitral Tribunal awarded an amount of Rs. 17,81,25,152/- to respondent and further directed that if the said amount was not paid by appellant within two months from the date of the award, then the awarded sum shall carry an interest at the rate of 15 per cent per annum from June 27, 2003.

4. Not satisfied with the award dated June 26, 2003, appellant made an arbitration application on August 22, 2003 for setting aside the award. The appellant also relied upon Sections 28, 33 and 16 of 1996 Act in assailing the award being in contravention of the provisions of 1996 Act and set up the grounds viz., (i) waiver (final bill was accepted by respondent without protest and the claims are not arbitrable); (ii) acquiescence (contract ceased to exist after accepting final payment which was made on March 30, 2001 after completion of maintenance period); (iii) delay (claims are time barred under the provisions of the Limitation Act); (iv) laches (respondent's Arbitrator was not appointed before expiry of 30 days from the defect liability and, therefore, the claimant was not entitled to

bring claim Nos. 3, 4 and 5 to arbitration) and (v) *res judicata* (claim No. 1 was referred to the earlier Arbitration Panel in the year 1998 and hence the said claim is barred by principles of r*es judicata*).

5. The District Judge, Ratnagiri vide order dated June 29, 2006 rejected the application for setting aside the award dated June 26, 2003.

6. The appellant aggrieved thereby preferred an appeal under Section 37 of 1996 Act on February 6, 2007 before the High Court of Judicature at Bombay.

7. On June 23, 2008, appellant made an application before the High Court seeking amendment to the memorandum of arbitration appeal by adding additional grounds, namely, that the Arbitral Tribunal exceeded jurisdiction in awarding revision of percentage for hidden expenses over-heads and profits for further additional items (Claim No. 1); that the Arbitral Tribunal acted beyond the scope of arbitration with regard to extended stay charges (Claim No. 2); the Arbitral Tribunal exceeded jurisdiction and, in fact, committed error of jurisdiction in granting claim pertaining to revision of rate for pressure shaft

excavation and mis-conducted themselves in awarding escalation considering March 2000 Indices.

8. The aforesaid application was opposed by respondent on diverse grounds, inter alia, that the additional grounds sought to be incorporated in the memorandum of arbitration appeal can not be allowed at this stage after the expiry of period prescribed in Section 34(3) as that would tantamount to entertaining a challenge after and beyond the period of limitation and that the award has not been challenged by the appellant on any of the grounds sought to be urged/added through the amendment application.

9. On January 9, 2009, learned Single Judge dismissed the application for amendment in the memorandum of arbitration appeal. Learned Single Judge held that the ground not initially raised in a petition for setting aside the arbitral award can not be permitted to be raised beyond the period of limitation prescribed in Section 34(3). It was also observed that the proposed amendments in the memorandum of arbitration appeal are not even sought to the grounds contained in the application under Section 34.

10. Mr. Shekhar Naphade, learned senior counsel for the appellant submitted that there is no nexus between pleadings and limitation and it is the relief that determines the limitation. The grounds/objections in the petition under Section 34 of 1996 Act are in the nature of pleadings and any amendment thereto must be guided by the same principles which govern amendments to the pleadings. He heavily relied upon the decisions of this Court in *L.J. Leach and Company Ltd.,* v. *Jardine Skinner* and *Co.*[1] *and Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil and Others*[2] in support of his contention that delay does not affect the power of the court to order amendments if that is required in the interest of justice. Learned senior counsel also placed reliance upon decision of this Court in *Jai Jai Ram Manohar La*l v. *National Building Material Supply, Gurgaon*[3] and submitted that the Court always grants leave to amend pleadings of a party, unless it is mala fide or that the other side can not be compensated for by an order of costs.

[1] (1957) SCR 438
[2] (1957) SCR 595
[3] (1969) 1 SCC 869

11. Mr. Shekhar Naphade submitted that although the Arbitral Tribunal is bound to decide in accordance with the terms of the contract, as mandated by Section 28 of 1996 Act, in the present case respondent got the relief from the Arbitral Tribunal beyond the terms of contract and, therefore, in the interest of justice, the amendments sought for by the appellant for addition of grounds in the memorandum of arbitration appeal ought to have been granted. He also contended that decision of the Division Bench of Bombay High Court in *Vastu Invest & Holdings Pvt. Ltd., Mumbai v. Gujarat Lease Financing Ltd., Mumbai*[4] does not lay down the correct law.

12. Mr. Ashok Desai, learned senior counsel for the respondent, on the other hand, submitted that recourse to a court against an arbitral award could be made only by way of an application under Section 34 for setting aside such award and sub-section (3) thereof stipulates that such an application may not be made after three months have elapsed from the date on which the party making the application has received

[4] 2001 (2) Arb. LR 315 (Bombay)

the arbitral award. Proviso to Section 34(3) empowers the Court, if satisfied of sufficient cause, to entertain the application for setting aside award within a further period of thirty days but not thereafter. He would submit that the time limit prescribed under Section 34 to challenge an award is absolute and unextendible by Court. He relied upon two decisions of this Court in this regard, namely (i) *Union of India* v. *Popular Construction Co.*[5] and *Consolidated Engineering Enterprises* v. *Principal Secretary, Irrigation Department and Others*[6]. He submitted that Bombay High Court in *Vastu Invest and Holdings Private* Limited[4] has rightly held that new ground/s cannot be permitted to be introduced into an arbitration petition for setting aside of the award beyond the period of four months stipulated in Section 34(3) of the 1996 Act. He also relied upon decisions of this Court in *Madan Lal* v. *Sunder Lal and Another*[7]; *Bijendra Nath Srivastava* v. *Mayank Srivastava and others*[8] and *Dhartipakar Madan Lal Agarwal* v*. Rajiv Gandhi*[9].

[5] (2001) 8 SCC 470
[6] (2008) 7 SCC 169
[7] AIR 1967 SC 1233
[8] (1994) 6 SCC 117
[9] 1987 (Supp.) SCC 93

13. Mr. Ashok Desai submitted that more than five years after the award, the appellant was not entitled to seek amendment in the memorandum of arbitration appeal by adding new grounds which were not taken in the application for setting aside the award. He, thus, submitted that High Court was not unjustified in rejecting the application for amendment in the memorandum of arbitration appeal.

14. Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consistent with settled legal principles. In *Ganesh Trading Co.* v. *Moji Ram*[10], this Court stated :

> "Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleading in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."

[10] (1978) 2 SCR 614

15. Insofar as Code of Civil Procedure, 1908 (for short 'CPC') is concerned, Order VI Rule 17 provides for amendment of pleadings. It says that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The matters relating to amendment of pleadings have come up for consideration before courts from time to time. As far back as in 1884 in *Clarapede & Company* v. *Commercial Union Association*[11] - an appeal that came up before Court of Appeal, Brett M.R. stated :

> "…..The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made….."

16. In *Charan Das and Others* v. *Amir Khan and Others*[12], Privy Council exposited the legal position that

[11] Vol XXXII The Weekly Reporter 262
[12] (1920) LR 47 IA 255

although power of a Court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

17. A four-Judge Bench of this Court in *L.J. Leach and Company Ltd.,* v. *Jardine Skinner and Co.*[1] while dealing with the prayer for amendment of the plaint made before this Court whereby plaintiff sought to raise, in the alternative, a claim for damages for breach of contract for non-delivery of the goods relied upon the decision of Privy Council in *Charan Das & Others*[12]*;* granted leave at that stage and held :

> "It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

18. Again, a three-Judge Bench of this Court in *Pirgonda Hongonda Patil*[2] in the matter of amendment of the

plaint at appellate stage reiterated the legal principles exposited in *L.J. Leach and Company Ltd.*[1] *and Charan Das and others*[12]. This Court observed :

> "Recently, we have had occasion to consider a similar prayer for amendment in *L.J. Leach & Co.* v. *Jardine Skinner & Co., 1957 SCR 438,* where, in allowing an amendment of the plaint in an appeal before us, we said: "It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice." These observations were made in a case where damages were originally claimed on the footing of conversion of goods. We held, in agreement with the learned Judges of the High Court, that on the evidence the claim for damages on the footing of conversion must fail. The plaintiffs then applied to this Court for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract for non-delivery of the goods. The application was resisted by the respondents and one of the grounds of resistance was that the period of limitation had expired. We accepted as correct the decision in *Charan Das* v. *Amir Khan, (1920) LR 47 IA 255* which laid down that "though there was full power to make the amendment, such a power should not as a rule be exercised where the effect was to take away from a defendant a legal right which had accrued to him by lapse of time; yet there were cases where such considerations were outweighed by the special circumstances of the case".
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> As pointed out in *Charan Das case* the power exercised was undoubtedly one within the discretion of the learned Judges. All that can be urged is that the discretion was exercised on a wrong principle. We do not think that it

was so exercised in the present case. The facts of the present case are very similar to those of the case before Their Lordships of the Privy Council. In the latter, the respondents sued for a declaration of their right of pre-emption over certain land, a form of suit which would not lie having regard to the proviso to s.42 of the Specific Relief Act (1 of 1877). The trial Judge and the first appellate court refused to allow the plaint to be amended by claiming possession on pre-emption, since the time had expired for bringing a suit to enforce the right. Upon a second appeal the court allowed the amendment to be made, there being no ground for suspecting that the plaintiffs had not acted in good faith, and the proposed amendment not altering the nature of the relief sought. In the case before us, there was a similar defect in the plaint, and the trial Judge refused to allow the plaint to be amended on the ground that the period of limitation for a suit under O. XXI, r.103 of the Code of Civil Procedure, had expired. The learned Judges of the High Court rightly pointed out that the mistake in the trial Court was more that of the learned pleader and the proposed amendment did not alter the nature of the reliefs sought."

19. In *Jai Jai Ram Manohar Lal*[3], this Court was concerned with a matter wherein amendment in the plaint was refused on the ground that the amendment could not take effect retrospectively and on the date of the amendment the action was barred by the law of limitation. It was held :

"….Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be

> refused just relief merely because of some mistake, negligence, inadvertance or even infraction of the Rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

This Court further stated :

> "…..The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations."

20. Do the principles relating to amendment of pleadings in original proceedings apply to the amendment in the grounds of appeal? Order XLI Rule 2 CPC makes a provision that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal

or taken by leave of the Court. Order XLI Rule 3 CPC provides that where the memorandum of appeal is not drawn up as prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended.

21. The aforesaid provisions in CPC leave no manner of doubt that the appellate court has power to grant leave to amend the memorandum of appeal. As a matter of fact, in *Harcharan* v. *State of Haryana*[13], this Court observed that the memorandum of appeal has same position like the plaint in the suit. This Court said:

> "…..When an appeal is preferred the memorandum of appeal has the same position like the plaint in a suit because plaintiff is held to the case pleaded in the plaint. In the case of memorandum of appeal same situation obtains in view of Order 41, Rule 3. The appellant is confined to and also would be held to the memorandum of appeal. To overcome any contention that such is not the pleading the appellant sought the amendment….."

22. In light of the aforesaid legal position governing the amendment of pleadings in the suit and memorandum of appeal, the immediate question to be considered is : whether

[13] (1982) 3 SCC 408

the same principles must govern the amendment of an application for setting aside the award or for that matter, amendment in an appeal under Section 37 of 1996 Act. In *Madan Lal*[7], this Court with reference to the provisions of the Arbitration Act, 1940 (for short, '1940 Act') stated that under the scheme of 1940 Act there has to be an application to set aside the award; such application has to be made within the period of limitation and any objection to the award after the limitation has elapsed cannot be entertained. This Court observed :

> "**8.** It is clear, therefore, from the scheme of the Act that if a party wants an award to be set aside on any of the grounds mentioned in S. 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Art. 158 of the Limitation Act. If no such application is made the award cannot be set aside on any of the grounds specified in S. 30 of the Act. It may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection of the type made in this case may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation.
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> **9.** It is not in dispute in the present case that the objections raised by the appellant were covered by S. 30 of the Act, and though the appellant did not pray for setting aside the award in his objection that was what he really wanted the court to do after hearing his objection. As in the present case the objection was filed more than 30 days after the notice it could not be treated as an

application for setting the award, for it would then be barred by limitation. The position thus is that in the present case there was no application to set aside the award on grounds mentioned in S. 30 within the period of limitation and therefore the court could not set aside the award on those grounds. There can be no doubt on the scheme of the Act that any objection even in the nature of a written-statement which falls under S. 30 cannot be considered by the court unless such an objection is made within the period of limitation (namely, 30 days), though if such an objection is made within limitation that objection may in appropriate cases be treated as an application for setting aside the award."

23. In *Popular Construction Company*[5] this Court, while considering the question whether the provisions of Section 5 of Limitation Act, 1963 are applicable to an application challenging an award under Section 34 of the 1996 Act, held :

"12. 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.

13. Apart from the language, "express exclusion" may follow from the scheme and object of the special or local law:

> "[E]ven in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process". This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

> "5. *Extent of judicial intervention*.— Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

15. The "Part" referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act."

24. Again in *Consolidated Engineering Enterprises*[6], this Court observed:

> "19. A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court."

25. There is no doubt that application for setting aside an arbitral award under Section 34 of 1996 Act has to be made within time prescribed under sub-section(3) i.e., within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the Court can be added nor existing ground

amended after the prescribed period of limitation has expired although application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of Legislature while enacting Section 34. Moreso, Section 34(2)(b) enables the Court to set aside the arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in Clause (b) “the Court finds that” do enable the Court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice. L.J. Leach and Company Ltd.[1] and Pirgonda Hongonda Patil[2], seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to

order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the Court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment in the grounds of appeal under Section 37 of 1996 Act.

26. It is true that, the Division Bench of Bombay High Court in *Vastu Invest and Holdings Pvt. Ltd.*[4] held that independent ground of challenge to the arbitral award cannot be entertained after the period of three months plus the grace period of thirty days as provided in the proviso of sub-section (3) of Section 34, but, in our view, by 'an independent ground' the Division Bench meant a ground amounting to a fresh application for setting aside an arbitral award. The dictum in the aforesaid decision was not intended to lay down an absolute rule that in no case an amendment in the application for setting aside the arbitral award can be made after expiry of period of limitation provided therein. Insofar as *Bijendra Nath Srivastava*[8] is concerned, this Court did not agree with the view of the High Court that the trial court did not act on any wrong

principle while allowing the amendments to the objections for setting aside award under 1940 Act. This Court highlighted the distinction between 'material facts' and 'material particulars' and observed that amendments sought related to material facts which could not have been allowed after expiry of limitation. Having held so, this Court even then went into the merits of objection introduced by way of amendment. In our view, a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application.

27. In the case of *Dhartipakar Madan Lal Agarwal*[9] this Court held that a new ground cannot be raised or inserted in an election petition by way of an amendment after the expiry of the period of limitation. It may not be proper to extend the principles enunciated in *Dhartipakar Madan Lal Agarwal*[9] in the context of the provisions contained in Section 81 of the Representation of the People Act, 1951 to an application seeking amendment to the application under Section 34 for

setting aside an arbitral award or an appeal under Section 37 of 1996 Act for the reasons we have already indicated above.

28. The question then arises, whether in the facts and circumstances of the present case, the High Court committed any error in rejecting the appellant's application for addition of new grounds in the memorandum of arbitration appeal. As noticed above, in the application for setting aside the award, appellant set up only five grounds viz., waiver, acquiescence, delay, laches and *res judicata.* The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the concerned court or at the appellate stage. As a matter of fact, the learned Single Judge in paragaraph 6 of the impugned order has observed that the

grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by learned Single Judge in refusing to grant leave to appellant to amend the memorandum of arbitration appeal suffers from any illegality.

29. The result is, appeal has no force and is dismissed with no order as to costs.

……..……
……J.
(R.V. Raveendran)

……..……..J
(R. M. Lodha)

New Delhi
April 1, 2010.