Restrictive application of Section 5 of the Limitation Act to arbitration appeals: a small example of Justice Nariman's realism

Blog by
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A. Introduction

The value one attaches to a judgment also depends on the judge's personality. It is difficult to think of another judge in recent times whose opinion is read with the same attention as Justice Rohinton F Nariman.[1] His judgments have, more often than not, illuminated many areas of the Indian arbitration law.

Reading and re-reading Nariman J's decisions on arbitration, one cannot but be struck at how he responded on many occasions to the problems presented by producing a unique result that cannot be cabined within formalistic norms.

In this blog, we examine one facet of the decision in *Borse Brothers*[2] in which writing for a 3-judge bench, Nariman J limited the scope of Section 5 of the Limitation Act, 1963 ("LA") when applied to appeals under Section 37 of the Arbitration and Conciliation Act, 1996 ("ACA"). Section 5 LA gives courts the power to condone any period of delay in filing an application or appeal if sufficient cause is shown. The length of the delay does not matter; the explanation does. But Nariman J evolved a pragmatic approach to arbitration appeals[3] by limiting the boundaries of the open-ended Section 5 and setting standards consistent with the object of the ACA, namely, expeditious disposal. In our view, this could only be done by a realist sitting at the highest body in the hierarchy of the courts, working to shape and reshape the law in line with standards that the arbitration fraternity yearns for.[4]

B. The *Borse Brothers* case

Borse Brothers ruled on the question what is the time limit to file an appeal under Section 37 ACA. The issue was earlier decided in *NV International* v. *State of Assam*[5] by a bench of 2 judges presided by Nariman J himself.

Overlooking Section 13 of the Commercial Courts Act, 2015 ("CCA"),[6] the *NV International* judgment held that the limitation period under Section 37 ACA is 120 days. This was on the logic that since the limitation for filing a set-aside application under Section 34 ACA was 120 days,[7] the appellate proceedings' limitation should follow the same drill.

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[1] Justice Nariman retired on 12 August 2021 from his duties as a judge of the Supreme Court of India.

[2] *Government of Maharashtra* v. *M/s Borse Brothers Engineers & Contractors Pvt. Ltd.* (2021) 6 SCC 460.

[3] While in *Borse Brothers* the court was specifically concerned with the limitation to file an appeal under Section 37 ACA, the ruling would also presumably apply to Section 50 ACA appeals.

[4] We do not propose that Justice Nariman is always a realist. In some situations (though very less) he may be a formalist and, in some others, a unique hybrid.

[5] (2020) 2 SCC 109.

[6] Section 13 of the CCA provides a limitation of 60 days from orders passed by various commercial courts. The subject-matter of most arbitrations is a commercial dispute of specified value within the remit of the CCA. *NV Internati*onal involved such a dispute.

[7] Note that several courts, including the Supreme Court, have often confused the limitation period under Section 34 ACA as 120 days. The period is three months plus thirty days.

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Since *NV International* ruled contrary to statute, it was perceived that the Supreme Court would reconsider this decision. Three such cases were finally heard by the bench presided by Nariman J and were decided by a common judgment in *Borse Brothers*.[8]

Overruling *NV International*, the court in *Borse Brothers* ruled that:-

(a) The limitation period for arbitration appeals under Section 37 ACA to which the CCA applies (i.e., commercial dispute of a Specified Value under Section 10 CCA) would be governed by Section 13 CCA and, thus, would be 60 days.

(b) If the CCA does not apply, the limitation for arbitration appeals would be governed by Article 116 and Article 117 of the Limitation Act, which provide for a limitation period of 90 days and 30 days, respectively, depending upon whether an appeal is from a subordinate court to a High Court or an intra-High Court appeal.

(c) In both types of appeals, however, Section 5 of the Limitation Act would apply, thus, giving the court the power to condone the delay and admit the appeal even after the prescribed period, if the appellant satisfies the court that he had sufficient cause for not preferring the appeal in time.

But *Borse Brothers* does not stop at saying that Section 5 LA applies to arbitration appeals. It goes on to hold that:

(a) In cases: (i) governed by Article 116 LA, a delay beyond 90 days (ii) governed by Article 117 LA, a delay beyond 30 days, and (iii) governed by Section 13 CCA, a delay beyond 60 days, is to be condoned "*by way of exception and not by way of rule*." (emphasis added).

(a) And that too, only if it is a *short delay* and the party has acted in a bonafide and not negligent manner.

C. The text of Section 5 LA gestures in another direction than *Borse Brothers*

Where the Limitation Act applies, Section 3 LA bars proceedings filed after the prescribed period. On its own, this is an "all or nothing approach."[9] This is the structure within which many statutes of limitation operate.

Section 5 LA tempers the "all or nothing approach."[10] It is meant to prevent an unjust result and gives the court the power to condone delay if "sufficient cause" is shown.
It states:

> 5. Extension of prescribed period in certain cases. —Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, ***if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period***.

[8] *Government of Maharashtra* v. *M/s Borse Brothers Engineers & Contractors Pvt. Ltd.*; *M/s Swastik Wires* v. *MP Poorva Kshetra Vidyut Vitran Co. Ltd.*; *Union of India* v. *M/s Associated Construction Co.* Apart from these, the issue has been raised also in *NTPC Ltd.* v *Voith Hydro Joint Limited*, Diary No. 12267 of 2020. *Voith* is yet to be decided.
[9] Andrew J. Wistrick, *Procrastination, Deadlines and Statutes of Limitation*, 50 Wm. & Mary L. Rev. 607 (2008).
[10] Even if the Limitation Act applies to a special statute as a foundational matter, it does not automatically follow that all provisions including Section 5 apply in all cases. They may be excluded by the special statute, and if a specific provision has been excluded or not is a subject of further enquiry.

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The text of Section 5 LA gestures only in one direction. If the court is satisfied that there was sufficient cause, the delay could be condoned for any period at the discretion of the court. This is reaffirmed by the Supreme Court's observation in *N Balakrishnan* v. *M Krishnamurthy*[11]:

> "9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory."

D. Applying Section 5 to arbitration appeals: the "middle course"

Considered one of its fundamental objects, arbitration is wrapped in the discourse of expeditious disposal. Given this object, the tension that the application of Section 5 LA creates is apparent. Nariman J notes the tension:

> "At one extreme, we have the judgment in N.V. International … which does not allow condonation of delay beyond 30 days, and at the other extreme, we have an open-ended provision in which any amount of delay can be condoned, provided sufficient cause is shown. *It is between these two extremes that we have to steer a middle course*." (emphasis added)

Having decided that he will create a middle course, he goes on to justify that choice.

His *first* reasoning is that the Latin maxim "*ut res magis valeat quam pereat*" is a "judicial tool with which to steer this course."

The maxim means: it is better for a thing to have effect than to be made void. This is a principle of document construction, applied when alternative readings are possible: one which (usually the broader reading) would achieve the manifest purpose of the document, and the other which (usually the narrower purpose) would reduce the document's purpose to futility or absurdity. The interpreter chooses the construction that gives greater effect to the document's primary purpose.[12]

Nariman J cites *Hindustan Bulk Carriers*[13] and reproduces several paragraphs from the judgment of Arijit Pasayat J. Those passages repeat the content of the maxim: reconciling inconsistencies within an enactment, avoiding head-on clash, etcetera.

His *second* point, an extension of the first, is that both ACA and the CCA read together provide an objective of speedy disposal of appeals. Therefore, "to read section 5 of the Limitation Act consistently with the aforesaid object, it is necessary to discover as to what the expression "sufficient cause" means in the context of condoning delay in filing appeals under section 37 of the Arbitration Act."

This point sits oddly with the *ut regis magis* principle because he applies the principle, not to different provisions of one enactment but two enactments (ACA and CCA) read with the third (Limitation Act).

He then segues into his *third* point and examines what constitutes "sufficient cause." He begins by saying that it is "elastic enough to yield different results depending upon the object and context of a statute." He cites, inter alia, *Ajmer Kaur*.[14] But *Ajmer Kaur* is on a wholly different point and is a wrong

[11] (1998) 7 SCC 123.
[12] Black's Law Dictionary (Thomson Reuters 9th ed., 2009).
[13] *CIT* v. *Hindustan Bulk Carriers* (2003) 3 SCC 57.
[14] *Ajmer Kaur* v. *State of Punjab* (2004) 7 SCC 381.

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authority to cite. There was no period of limitation for filing the application in question and no provision for condoning delay to file such application on showing sufficient cause.[15]

After this discussion, Nariman J states his *fourth* point (part of his *conclusion)*:

> 57. "Given the object sought to be achieved under both the Arbitration Act and the Commercial Court's Act, that is, speedy resolution of disputes, the expression "sufficient cause" is not elastic enough to cover long delays beyond the period provided by the appeal provision itself."

In the same paragraph, he states his *fifth* point that the expression "sufficient cause" is not itself a loose panacea for the ill of pressing negligent and stale claims."

His *sixth* point is on the government as a litigant. He knows that the court's roster everywhere brims with the application for condonation of delay by the government and government instrumentalities. He refers to some recent decisions where the Supreme Court has taken a tough stand against the usual complaint of impersonal bureaucratic delay. Hence, he cautions that a different yardstick for condonation of delay cannot be applied merely because the government is involved.

Then *lastly*, he states his fuller conclusion:

> 62. Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or section 13(1A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches.

What has been done here?

With his breadth of understanding of the commercial laws as one of the top-class lawyers, his experience on the bench, and his intuition, he shuns being a disinterested applier of the plain text of Section 5 LA. Instead, he labours hard to fashion out legal justifications for the conclusions he pre-determined.

It is very difficult to fault his conclusion. Flexibility is a central feature of arbitration, but legal certainty is also on the rise.[16] For example, the US Supreme Court observed in 1972 in *The Bremen* v. *Zapata Off-Shore Co.*[17]:

> "The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."

In arbitration appeals, the concept of certainty should apply with double force.

Nariman J knows that the problem is "open-ended" provision in appeal, while the limitation to challenge an award does not brook even a day's delay. He also knows that the judicial behaviour is not uniform, and it is impossible to predict how an appellate judge will respond to an application for condonation of

[15] The court was concerned with a provision of the Punjab land reform laws that gave a right to file an application for redetermination of the surplus land (determined earlier by the government). No limitation period was provided for filing the application. The landowner applied 6 years after the determination had become final. The court observed that the right to file the application could not be exercised at any time at the sweet will of the applicant.
[16] Thomas Schultz, *The Oxford Handbook of International Arbitration*, OUP (Chapter 15).
[17] 407 US 1 (1972).

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delay. Motivated by purely practical consideration and with an eye on the consequence, he grounds what he wanted to do into the statute's object. This is characteristic Nariman J—bold, commanding, guided by the purpose, the impact on the future in mind. His conclusions travels much beyond the exercise of discretion sensitive to specific substantive areas and factual contexts.

Now, Section 5 LA should be read by the appellate judge as follows:

> Any [arbitration] appeal … may be admitted after the respective prescribed period [30, 60, or 90 days] only by way of exception, ***if the appellant … satisfies the court that he had sufficient cause for not preferring the appeal …within such period provided however that only a short delay would be condoned.***

The Supreme Court's power to declare the law was thus exercised to curtail the discretion of the appellate judge substantially. This is how the appeals were disposed of:

(a) In Civil Appeal 995 of 2021, to the High Court's finding of State of Maharashtra's conduct not being *bona fide*, Nariman J added that there was a long delay of 131 days beyond the 60 days prescribed period and no explanation worth the name (beyond file pushing and administrative exigency).

(b) Civil Appeal 991 of 2021 was also dismissed because the explanation for the delay was the time taken for approval of the concerned authorities, bulky records of the case, and the appellant being a public entity. This explanation, Nariman J said, "falls woefully short of making out any sufficient cause."

(c) Civil Appeal 996-998 of 2021 was also dismissed, saying that there was a huge delay of 227 days in filing the plea and a 200-day delay in re-filing, and there was "no sufficient cause whatsoever."

E. Conclusion

In his lectures to law students in 1897, Oliver Wendell Holmes famously said: "the life of the law has not been logic: it has been experience." Holmes was a leading exponent of legal realism, a powerful jurisprudential movement of the twentieth century. Not exclusively so, but realism was a response against formalism. In the formalistic account, the law is a body of rules identifiable (mainly) from statutes and precedent. The law already exists, and the judge's task is to deduce it and apply it to the facts before the court. "The lawyer's task is to persuade the judge that, properly interpreted, the authoritative materials yielded the answer that favoured the lawyer's clients to any legal question presented by the case."[18] The realist abhors this notion of law. In the realistic account, the law is not deduced by some syllogistic reasoning.[19] It is always in flux, moving and changing with the external world and the milieu. This is not to say that the realist does not respect precedent. She does, but not blindly as if the facts were mathematical propositions to be fit into an existing formula set by the legislator and the judges. The realist judge is preoccupied with the "actual operation of law in its social context." He is concerned about the effect of the decision in shaping the law and the future.

When Holmes made that catchy statement about the experience, he further said that "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed."

[18] Richard A Posner, *Reflections on Judging*, Harvard University Press, 2013.

[19] "The formalist pattern of deductive reasoning rakes the following syllogistic form: 1. Legal rule (major premise), 2. Relevant facts (minor premise), 3. Judgment." See, Raymond Wacks, *Understanding Jurisprudence: An introduction to legal theory*, OUP, 5th ed., 177.

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Borse illustrates Holmes' statement. First, digging beyond the statute staring in the face, then calling it an "extreme", and then deriving its limits to put it in sync with the purpose of the ACA. This is the simple work of a bold and realist genius.

In many of his judgments, Nariman J refers to the *Lakshman rekha*[20]—the firm line between interpreting the law versus making the law—the judges must not cross. But for him, a creative interpretation that looks at both the text and the statute's purpose is within the *rekha*. In our view, most of the judgments authored by Nariman J that deploy "creative interpretation" are not just moments of vision or freewheeling activism. They are rooted in commonsense, pragmatism, and good purpose. *Borse Brothers* may not be an exception.

But, will the appellate court take note of *Borse*?[21]

[20] *Lakshman Rekha* points to the doctrine of separation of powers. In one of the versions of the revered epic of the Hindu tradition, Ramayan, the demon king Ravan planned to abduct Sita, the wife of Lord Ram. On Ravan's command, his uncle Maarich transfigured to a golden deer whose sight enchanted Sita. She sent Ram after it but, drawn far away by the wily Maarich, did not return for a long time. Worried, Sita asked Lakshman (Ram's brother) to go and check. Before leaving, Lakshman invoked his divine powers and drew a *rekha* (line), an invisible wall of fire that would burn to dust anyone who tried to cross over to Sita's side. Realising this, Ravan, by deceit, lured Sita to cross the line and come over to his side. Nariman J refers to *lakshman rekha* in many of his opinions including *Borse*.

[21] In a decision of 06 September 2021, in *State of West Bengal* v. *Chowdhury Construction* 2021 SCC OnLine Cal 2417, a 2-judge bench of the Calcutta High Court condoned delay of 355 days in filing an appeal under Section 37 ACA against an order dismissing a set-aside petition. West Bengal urged the ground of pandemic, "preparing the briefs and noted … and holding conferences were severely affected …". The court noted the "enormous difficulties that arose and still arise" and found it not "out of place to think that all these difficulties were also faced by the [Government]." In our view, this is, respectfully, totally contrary to *Borse Brothers* in letter and spirit. Yes, everyone faced difficulties, but an appeal by the government that could not be filed in one year is inexcusable even considering the pandemic. It is precisely this kind of approach that the *Brose Brothers* court shrinks from.

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