

IA No.5073/2003 & OMP No.190/2003

Date of decision: 29th July, 2009

Through: Mr. Yakesh Anand, Advocate.

Versus

Through: Mr. Ajit Pudussery, Advocate.

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. Application of the petitioner for condonation of delay in re-filing the petition under Section 34 of the Arbitration & Conciliation Act, 1996 is for consideration.
2. The petition is filed with respect to arbitral award dated 31st July, 2002. The arbitral tribunal comprised of three retired judges of High Court. The majority award has awarded to the respondent Food Corporation of India (FCI) a sum of Rs.2,72,70,671/- together with interest on Rs.2,23,43,405 at 15% per annum from the date of reference till the date of payment besides costs. The minority award also awards a sum of Rs.1,45,67,405/- to the respondent FCI together with interest at 15% per annum from the date of reference. The minority award further observes that Shri Manjeet Singh, sole proprietor of the petitioner herein had died during the course of

arbitration proceedings and his legal representatives have been brought on record and further directs that the legal representatives are not personally liable to pay the awarded amount to the respondent and their liability is only to the extent of the estate of the deceased inherited by them.

3. The arbitration was under the aegis of the Indian Council of Arbitration which vide its letter dated 21st August, 2002 to the parties informed the parties of the publication of the awards aforesaid and it is also stated in the said letter that true copies of each of the awards were being sent therewith to the parties. The petitioner does not dispute receipt of the said letter. The letter is stated to have been received on 26th August, 2002. It is however the case of the petitioner that no copies of the awards were received under cover of the said letter and the petitioner wrote to the Indian Council of Arbitration and the photocopies of the awards were received by it on 3rd September, 2002. Though the petitioner has not filed copy of the letter, if any, written to the Indian Council of Arbitration or proof of having received award on 3rd September, 2002 but in view of what is stated herein below the same is not relevant.

4. The petitioner instituted the OMP first in this court on 21st November, 2002. The said institution was within three months of the date of delivery of the signed copy of the award to the petitioner as aforesaid or even from the letter dated 21st August, 2002 (Supra). However, the record shows that the Registry of this court, finding the OMP filed to be not in order, raised as many as six objections on the same date i.e. 21st November, 2002 and the OMP was ordered to be returned to the petitioner, to be re-filed within a week.

5. Though there is no record of the date when the petitioner collected the OMP with objections from the Registry but the same is again irrelevant in as much as the OMP was scrutinized and the objections put on 21st November, 2002 itself. It was for the petitioner to be vigilant and to collect the returned OMP.

6. The record next shows an endorsement dated 20th December, 2002 of the counsel for the petitioner to the effect that the objections had been removed and the case be listed before the court. Again, though there is no record of the date on which the petitioner re-filed the petition, the same must have been re-filed on 20th December, 2002 or thereafter; the fact remains that the said re-filing was not within seven days but after one month of the date on which the objections were first put.

7. The record shows that the OMP was scrutinized on 2nd January, 2003. This time, there is a notation that the objections earlier put had not been removed and further that the OMP was not accompanied with an application for condonation of delay in re-filing.

8. Again, there is nothing to show on which date the petitioner after 2nd January, 2003 collected the OMP from the filing counter of this court. On record there is only an endorsement dated 2nd May, 2003 of the Registry showing that the petition had again been re-filed but this time around was without the format required to be filed. The presumption in the ordinary course of events is of re-filing of petition on 2nd May, 2003 or a day before that. This time around the petitioner was vigilant. The objections were removed on 2nd May, 2003 itself and the OMP listed before the court on 5th May, 2003.

9. The OMP was accompanied with the application under reply in which it is cursorily stated that the petition was filed in November, 2002; was returned with objections, was re-filed and again returned with objections; that the petition was lying in the office of the counsel and got mixed up with other papers/files during office renovation and could not be traced despite best efforts of the clerk; that during court holidays from 10th to 19th April, 2002, a search was made in the office of the counsel and the said file was discovered; the same was lying wrongly tagged with some other case file in the counsel's file; the petitioner, therefore, immediately filed the petition in the court. The application is accompanied with the affidavit of the clerk of the counsel for the petitioner. It may be noticed that the OMP is accompanied with the affidavit of Ms. Rita Singh on behalf of the petitioner, attested on 1st November, 2002.

10. Though no separate reply has been filed by the respondent to the said application but the respondent has in the reply filed to the OMP taken objection of the OMP having not been instituted within time.

11. The matter came up before the court on 22nd July, 2009 when vide detailed order it was prima-facie observed that the petition was barred by time. On the request of the counsel for the petitioner the matter was adjourned to today. The counsels have been further heard.

12. The counsel for the petitioner has merely reiterated that the petitioner has a very good case on merits and ought not to be deprived of an opportunity of being heard. Per contra, the counsel

for the respondent has contended that in fact the OMP also does not disclose any ground under Section 34 of the Act and huge sums of monies are due from the petitioner even in terms of the minority award.

13. The application being merely for condonation of delay in re-filing, the initial filing being within time, first it has to be examined as to what are the rules and the law applicable thereto.

14. The OMP under Section 34 of the Arbitration Act, 1996 is entertainable by this court by virtue of Section 2(e) of the Act, defining court as the principal court of original jurisdiction, having jurisdiction to decide the questions forming the subject matter of arbitration, if the same had been the subject matter of a suit. This, in my view leads to application of law and principles of a suit, to the OMPs under Section 34 of the Arbitration Act.

15. Order 4 of the CPC provides for institution of a suit by presentation of a plaint to the court or such officer as is appointed in this behalf. Order 4 Rule 1 (3) provides that the plaint shall not be deemed to be duly instituted unless complies with the requirements specified in Sub Rules 1&2. Sub Rule 2 requires the plaint to comply with the provisions of Order 6 and Order 7 of the CPC in so far as they are applicable.

16. The question which arises is, what is the position when a plaint or petition is not found to be in order by the person i.e. the Registry, before whom it is required to be presented. Is the Registry to merely reject/return the same, with right to re-file, if within limitation by then.

17. The Punjab High Court Rules which were made applicable to this High Court on its constitution, did not provide any specific rule for the Original Side as the Punjab High Court had no Original Civil jurisdiction. The rule of Punjab High Court in this regard (Rule 5 of the Chapter I-A of Volume 5) was as under:-

"5.(1) The Deputy Registrar may return for amendment and re-filing within a time not exceeding 10 days at a time and 40 days in the aggregate, to be fixed by him, any memorandum of appeal for the reason specified in Order 41, Rule 3, Civil Procedure Code. (2) If the memorandum of appeal is not amended within the time allowed by the Deputy Registrar under sub-rule (1) it shall be listed for orders before the Court."

18. On an interpretation of the said rule, the judgment of the Division Bench of this court in ***N. K. Private Ltd. Vs. Hotz Hotels (P) Ltd.*** ILR 1974 Delhi 500 came to be pronounced. It was held that if the memorandum of appeal is not amended and re-filed within the time allowed, it does not become liable to dismissal automatically – it has to be listed for order, before the court and which necessarily implies that the court can in its discretion, condone the delay if there is any.

19. I have wondered as to the source of the power of the court to condone such delay. The only basis for the power of the court to condone the delay in re-filing can be found by me in Section 148 of the CPC which is as under:-

"148. Enlargement of time.

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period [not exceeding thirty days in total], even though the period originally fixed or granted may have expired."

20. The Supreme Court in ***Indian Statistical Institute Vs. Associated Builders*** AIR 1971 SC 335 laid down that if the initial institution is within time, the test for condoning the delay in re-presentation/re-filing is not as strict as in Section 5 of the Limitation Act.

21. On the constitution of this High Court, the rules relating to Original Side thereof came into force in 1967 and Rule 2 of Chapter IV of the Original Side Rules is as under:-

“2. Endorsement and scrutiny of documents—(a)

The officer in charge of the filing-counter shall endorse the date of receipt on the plaint, petition, application or proceedings and also on the duplicate copy of the index and return the same to the party. He shall enter the particulars of all such documents in the register of daily filing and thereafter cause it to be sent to the office concerned for examination. If on scrutiny, the document is found to be defective, such document shall, after notice to the party filing the same, be placed before the Registrar. The Registrar may for sufficient cause return the said document for rectification or amendment to the party filing the same, and for this purpose may allow to the party concerned such reasonable time as he may consider necessary.

(b) Where the party fails to take any step for the removal of the defect within the time fixed for the same, the Registrar may, for reasons to be recorded in writing, decline to register the document.

(c) Any party aggrieved by any order made by the Registrar under this rule may, within fifteen days of the making of such order, appeal against it to the Judge in Chambers.”

22. The aforesaid rule was at variance/departure from the rule aforesaid, applicable to Punjab High Court. While under the rule applicable to Punjab, the matter had to be placed before court, which could exercise power under Section 148, in the Original Side rule, the Registrar is required to decline registration if not re-filed within

time allowed. The effect of such refusal to register would be that the instituting party would lose the benefit of that/first institution, though may institute afresh.

23. Another Division Bench of this court in ***D.C. Sankhla Vs. Ashok K. Parmar*** MANU/DE/0741/1995 has held that the date of first institution even if defective in relation to suits shall be the date of institution for the purpose of limitation. However, in that case, neither the provision regarding the Registrar declining registration and of chamber appeal was discussed nor is there any discussion on refilling within time or beyond that.

24. This court in ***DSA Engineers (Bombay) Vs. HUDCO*** 2003 1 AD Delhi 411 has held that the emphasis in the rules is on the nature of the defects. If the defects are of such character as would render a plaint a non-plaint in the eyes of law, then the date of presentation would be the date of re-filing after removal of the defects. However, if the defects are formal or ancillary in nature not affecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation.

25. In ***S.R. Kulkarni Vs. Birla VXL Limited*** MANU/DE/0496/1998, the test of intention was laid down. The Division Bench held that when the negligent/casual approach in re-filing was found to be malafide, with intent to delay the proceedings, the court may reject the prayer for condonation of delay in re-filing.

26. In my view, in accordance with the Original Side rules of this court, as set out above, the occasion for this court to consider

condonation of delay in re-filing will arise only in a chamber appeal, if any, preferred against the order of the Registrar, declining to register the plaint/petition on the date of first institution. Unless, such an appeal is preferred, the order of the Registrar declining registration is final.

27. In the present case, the Registrar, on 2nd May, 2003 declined the registration dating back to the date of first institution by insisting upon the petitioner to file an application for condonation of delay in re-filing. The remedy of the petitioner against such an order was to prefer a chamber appeal which the petitioner did not do. The said order of the Registrar declining registration dating back to the date of first institution has since attained a finality and this court cannot now treat the institution to be as on the date of first institution.

28. Though, as aforesaid, the Original Side Rules are applicable to institution of petitions under Section 34 Arbitration Act, 1996, other rules in this regard may also be noticed. Prior to 1st December, 1988 the relevant rule with respect to other jurisdictions of this court was to be found in Rule 5 of Chapter 1 of Volume 5 of Delhi High Court Rules and was as under:-

“Amendment – the Deputy Registrar may return for amendment within a time to be fixed by him any memorandum of appeal for the reason specified in Order XLI, Rule 3 of the Code of Civil Procedure.”

29. The aforesaid rule was amended w.e.f. 1st December, 1988 and post amendment is as under:-

“**[5. Amendment]**—The Deputy Registrar Assistant Registrar, Incharge of the Filing counter, may

specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order XLI, Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not taken back for amendment within the time allowed by the Deputy Registrar, Asstt. Registrar, in charge of the filing Counter under sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution.

(3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Asstt. Registrar in charge of the Filing Counter, under sub-rule (1) it shall be considered as fresh institution.

Note—The provisions contained in Rule 5(1), 5(2) and 5(3) shall *mutatis mutandis* apply to all matters, whether civil or criminal.]”

30. On a perusal of the aforesaid rules, immediately the distinction between the rules for re-filing on Original Side and in other jurisdictions comes to the fore. While upon delay in re-filing/representation on the Original Side, the Registrar is to decline registration of the document if on the date of such re-presentation it is found to be barred by time, in other jurisdictions such institution is to be merely treated as fresh institution. The reason appears to be that while Section 5 of Limitation Act, is not applicable to suits, as also to OMPs under Section 34, it is, with respect to other jurisdictions.

31. Besides the legalese aforesaid, the petitioner in the present case is not found entitled to condonation of delay in re-filing, for the following reasons;

- A. The objections raised by the Registry on 21st November, 2002 make for an interesting reading. One of the objections is that the affidavit, (apparently accompanying the OMP) is neither signed nor attested. Another objection is that the power of attorney is not signed. As noted by me above, the OMP ultimately filed and on the court record is supported by an affidavit verified and attested on 1st November, 2002. This attestation is contrary to the objection. It is quite clear that the affidavit now on record is not the affidavit filed with the petition initially filed. Else the petitioner appears to have indulged in attestation of affidavit on a back date. The same is also borne out from the fact that the last page of the petition is dated 20th November, 2002. The affidavit verified on 1st November, 2002 seeks to affirm the contents of the petition which is dated 20th November, 2002. The petitioner is thus found to have indulged in substituting what was ultimately filed in May, 2003 for that which was originally filed on 21st November, 2002. Thus the petition filed in May, 2003 cannot be said to be the petition initially filed.
- B. This is also borne out from the overwriting on the index to the petition. From the said overwriting, it is clear that what was filed on 21st November, 2002 was a petition comprising of approximately nine pages while what has been filed in May, 2003 is a petition comprising of 59 pages. Yet another objection raised on 21st November, 2002 was of blanks left on page 9 of the petition. Thus the petition filed in May, 2003 cannot be said to be a case of re-filing and is a case of fresh filing.

- C. There is yet another factor in the present case which goes against the petitioner. Though attention thereto was not drawn by either of the counsels but there is on file a copy of an order dated 20th January, 2003 in OMP No.273/1999 preferred by the respondent, under Section 9 of the Act against the petitioner. It appears that vide order dated 12th August, 2002 in the said OMP the petitioner was restrained from disposing of their assets except in the usual course of business. On 20th January, 2003, it was informed to the court that after the order dated 12th August, 2002 award has been made in favour of the respondent herein and whereunder the respondent was entitled to monies aforesaid from the petitioner. The counsel for the petitioner stated before the court on that date that objections against the award had already been filed and were lying with the Registry. This court disposed of OMP No.273/1999 by making the order dated 12th August, 2002 therein absolute till the disposal of the objections. Thus it was not as if that the matter was not alive in January 2003 when paper are alleged to have been lost. While it was informed on 20th January, 2003 that the objection petition was lying in the Registry, before this court now it is represented that the objections had been misplaced in the office of the counsel. Owing to the statement on 20th January, 2003, the story now set up of the objections having got lost does not inspire confidence.
- D. There is yet another aspect of the matter; even if the file had been lost, nothing prevented the petitioner from filing a fresh petition in this court. It is not as if the award with the original

signatures had been filed in this court and which had got lost and which was required for fresh institution.

E. The conduct of the petitioner in the present case shows total callousness. The application is drafted in a most casual manner without any particulars whatsoever, as to with which file the paper were mixed, what steps/enquiries the petitioner made. Even after the papers are alleged to have been found on 19th April, 2003, the same were filed in this court only on 2nd May, 2003. There is no explanation whatsoever for this delay.

F. The petitioner after having represented to the respondent on 20th January, 2003 that objections had been preferred and secure in the knowledge that till the dismissal of the objections the award was inexecutable, seems to have not bothered at all. The intention of the petitioner appears to be malafide and dilatory.

32. The Supreme Court recently in ***Katari Suryanarayana Vs. Koppiseti Subba Rao*** MANU/SC/0545/2009 has held that the extent or degree of leniency to be shown by a court in condoning delay depends on the nature of application and facts and circumstances of the case. Examples were given of delay in making applications in pending appeal being considered more leniently than delays in institution of an appeal and of delay in filing and re-filing.

33. In the present case, when the legislature has, as interpreted in ***UOI Vs. Popular Construction Co.*** (2001) 8 SCC 470 purported to limit the time within which the petition under Section 34 can be preferred, if such huge delays in re-filing and for which there is no

bonafide diligent explanation are to be condoned, it would run contrary to the mandate of the legislature. The effect is there to see in the present case itself. The award of 2002 remains unenforced till date.

34. In ***Commissioner of Customs & Central Excise Vs. Hongo India (P) Ltd.*** 2009 (5) SCC 791 also it was held that “it is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act”. It was further held that “the applicability of the provisions of the Limitation Act, therefore is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act (with which the court was concerned in that case) relating to filing of reference application to the High Court.” Applying the said ratio to the present case also, it will be found that the law earlier laid down of the court being required to be liberal in condoning the delay in re-filing is found repugnant to the legislative intent of Section 34 (3) and the limitation provided therein cannot be defeated by condoning liberally the delays in re-filing.

35. This court recently in ***Union of India Vs. Ogilvy & Mather Ltd.*** MANU/DE/0311/2009 has also rejected an application for condonation of delay in re-filing the petition under Section 34 of the Act. In that case also the reason cited was of the illness of the advocate and which was not believed.

36. Though earlier, whenever delay on the part of advocate was the reason, the courts were lenient in condoning the same, the trend has changed. The present times are not of illiterate litigants who

were solely dependent upon the advocate and his wisdom. The litigants, such as the petitioner in the present case who transact business of crores of rupees and who are more aware of their rights than an advocate, cannot hide behind the veil of lapse of the advocate. There is not a whisper as to what steps the petitioner took in between November, 2002 and May, 2003. In fact as aforesaid the application for condonation of delay is not even accompanied by any affidavit of the petitioner. Even if the file had got lost in the office of the advocate, there is no averment that the petitioner contacted the advocate during the said period or made attempts for tracing out the file or for filing of another set of papers in the court.

37. Thus no ground is found for condoning the delay. The application is dismissed.

OMP No.190/2003.

Consequent to the dismissal of the application, the OMP is barred by time and is also dismissed. The petitioner to also pay costs of Rs.35,000/- for the present proceedings to the counsel for the respondent.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**July 29th, 2009
PP**