

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of hearing & decision 22.11.2010

+ **FAO(OS) No.571/2010**

DELKON INDIA PVT. LTD. Appellant

.....Through Mr. Sunil K. Pandey, Advocate

Versus

BHARAT HEAVY ELECTRICALS LTD. Respondent

.....Through Mr. J.C. Seth, Advocate

CORAM:

* **HON'BLE MR. JUSTICE VIKRAMAJIT SEN**
HON'BLE MR. JUSTICE G.P.MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Order? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J (ORAL)

CM APPL. 16725/2010 (delay) in FAO (OS) No.571/2010

1. This Appeal assails the Order passed by the learned Single Judge in OMP No.317/2001. The impugned Order dated 15.07.2009 is very short since it relies almost entirely on the judgment and order passed in OMP No.215/2001 which also concerns the conduct of the Arbitral Proceedings by the Sole Arbitrator Mr. C.N. Gard.
2. Mr. J.C. Seth, learned Counsel appearing for BHEL contends that on a reading of Paragraph 2 of the

impugned Order, it is amply clear that the facts of the present case were considered in detail. We are unable to agree with Mr. Seth, since the learned Single Judge has predicated the entire impugned order on the decision rendered in OMP No.215/2001. Mr. Seth is not in a position today to apprise us of the outcome of the Appeal in respect of OMP No.215/2001, beyond stating that it is pending.

3. There is an application for condoning the delay of 37 days in refiling the present Appeal. This statement/computation is not correct. After some hearing, Counsel for the Appellant concedes that the actual period of delay is 327 days in addition to 69 days delay in refiling the Appeal. The impugned Order was passed on 15.07.2009. A Review appears to have been preferred which was eventually dismissed on 24.5.2010. The present Appeal came to be filed on 8.07.2010. It is not in controversy that the Court had closed for the summer vacation on 4.06.2010 and had reopened on 1.07.2010.
4. Despite the pendency of the Appeal against the detailed decision in OMP No.215/2001, the Respondent has appointed a fresh Arbitrator. Those Arbitration proceedings are currently pending. Likewise, even

though in the present Appeal notice was issued on 17.09.2010, Arbitration proceedings before the new Arbitrator are also pending. Counsel for the Appellant states that a letter of protest has been filed with the new Arbitrator drawing his attention to the pendency of the present Appeal.

5. The application sets out that the delay that was caused was attributable to an accident which the Clerk of the Advocate had met with. The Application seeking condonation of delay is hopelessly devoid of any details. Learned counsel for the respondent has pointed out that even the name of the concerned Clerk has changed between the filing of the Application and the filing of the Rejoinder.
6. Learned counsel for the Appellant relies on the decision of the learned Single Judge of this Court in '***Colgate-Palmolive Co. vs. Hindustan Rimmer & Ors., AIR 1995 Delhi 95***'. He contends that the period that has been spent in prosecuting a Review, *bonafide*, must be excluded while computing limitation. The learned Single Judge has infact found in ***Colgate Palmolive (supra)*** that the Review was being prosecuted bonafide and therefore the time spent in that exercise, albeit futile,

should be condoned. We think that the learned Single Judge was not correct in holding that this period is to be “excluded” while computing the period of limitation, on the analogy of Section 14 of the Limitation Act. There is a significant difference between ‘condoning delay’ and ‘excluding time’ spent in prosecuting a particular remedy. Learned Single Judge in ***Colgate-Palmolive (supra)*** has referred to the decision of the Privy Council in ‘***H.H. Brij Indar Singh vs. Lata Kanshi Ram and Ors., AIR 1917 P.C.156***’. We have perused that judgment, the ratio of which is that the time spent in Review is condonable under Section 5 of the Limitation Act. However, after noting Section 14, their Lordships pointedly observed that “This, it will be observed, does not in terms apply, as it deals with suits and not appeals.....”. We are, therefore, unable to subscribe to the conclusion arrived at by the learned Single Judge in ***Colgate-Palmolive (supra)***. Be that as it may, even if we are to accept the flimsy ground on which condonation of delay is prayed for, attributable to the Clerk of the Advocate of the Appellant, the Application seeking condonation of delay does not deserve acceptance since it is barred by time. This is for the reason that the Review was dismissed on

24th May, 2010. The Appellant should obviously have been mindful of the fact that in respect of the delay at every day thereafter a valid explanation should be available for not filing the present Appeal immediately. Even though ten days were available to the Appellant for filing the Appeal before the closure of the High Court for summer vacation, no explanation is forthcoming as to why the Appeal was not filed in this period. Assuming that this may not have been possible, for valid reasons, for the Appellant to prefer his Appeal before the closure of the Court for summer vacation. If the period of recess is to be excluded, filing must be done on the first day of the reopening, that is 1.07.2010 in the present case. The Appeal has been filed, however, on 8.07.2010. It was essential for the Appellant to also seek condonation of delay giving details of why the Appeal could not have been filed on reopening day. This is what has been statutorily ordained by Section 4 of the Limitation Act.

7. There can be no gainsaying that the Alternative Dispute Resolution System in the shape of arbitration, which has now become an integral part of legal remedy, would become sterile, inefficacious and thus meaningless, if the Arbitrator were to be biased in favour of one or the other

party. This is the finding which has been returned by the learned Single Judge. Fresh proceedings are already underway and ongoing in which the Appellant is participating. It is in this respect that we think that it would be a failure of justice if the delay of total 396 days is condoned. The Application is dismissed.

FAO (OS) No.571/2010

In view of the dismissal of condonation of the delay Application, the Appeal stands dismissed.

**(VIKRAMAJIT SEN)
JUDGE**

**(G.P. MITTAL)
JUDGE**

November 22th, 2010
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