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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. 813/2011

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Judgment Delivered on: 17.11.2011

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through: Mr.Buddy Ranganadhan, Mr.Atul Shanker
Mathur, Ms.Shruti Verma and Mr.Aseem
Chaturvedi, Advocates

versus

M/S ORIENTAL STRUCTURAL PROJECT LIMITED
AND M/S GAMMON INDIA LIMITED Respondent
Through: Mr.Anil Airi, Ms.Sadhana Sharma and
Mr.Ravi Krishan Chandna, Advs.

**CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI**

G.S.SISTANI, J. (ORAL)
IA.Nos.17318-19/2011

1. Petitioner has filed two applications under Section 5 of the Limitation Act and under Section 151 CPC seeking condonation of delay in filing and re-filing the objections to the award. Both the applications are being disposed of by a common order.
2. In this case the arbitrator has rendered his award on 11.07.2009. Counsel for the petitioner submits that a copy of the award was received in the office of the petitioner on 14.07.2009 and thereafter the same was forwarded to the legal Cell for taking a decision as to the steps which were required to be taken. At that point of time the

Ministry of Surface Transport was undergoing a change and was headed by a new Minister, who had recently taken charge. Thereafter a new legal cell was created and on account of the above reasons the approval for challenging the award was given in the middle of October, 2009. Thereafter the papers were forwarded to the advocate to prepare the necessary objections. The advocate took steps to engage a counsel to draw the necessary application under Section 34 of the Arbitration & Conciliation Act, 1996. It is submitted that the draft of the petition was forwarded to the advocate on record in the last week of October, 2009 and thereafter the same was forwarded to the petitioner's legal cell for approval along with the application under Section 5 of the Limitation Act, as the three months period had lapsed.

3. Counsel for the petitioner also submitted that there is delay of 22 days initially in filing the objections. The second application (CM.No.17319/2011) filed by the petitioner is for condonation of delay of one year 10 months and twenty days in re-filing the objections which were filed firstly on 07.11.2009 thereafter the same were returned and re-filed on 13.11.2009 and again re-filed on 21.11.2009. After the objections were returned on 21.11.2009, as per these applications the same were misplaced and all efforts made to locate the paper book were in vain and thereafter the counsel sought fresh approval from the higher officials and a fresh petition was filed on 14.05.2011 after a gap of one (1) year ten (10) months and twenty (20) days. Counsel for the petitioner seeks condonation of delay in re-filing on the ground that there has been no carelessness or inaction

on the part of the petitioner and the grounds raised in this application are bona fide as the paper book was inadvertently misplaced and despite diligent efforts to search the paper book, the counsel was unable to locate the paper book. It is contended that since the grounds raised in the present applications are genuine and honest, there is no malafide and thus, it is a fit case for condonation of delay.

4. Mr.Airi, counsel for the respondent has opposed both these applications on the ground that petitioner has been extremely negligent in pursuing the matter. Counsel for the respondent also submits that admittedly the award dated 11.07.2009 was received by the petitioner on 14.07.2009. Counsel submits that the application (I.A. No.17318/2011) under Section 5 of the Limitation Act does not disclose sufficient grounds for condonation of delay. He also submits that it is not the period of delay which is to be taken into consideration, but what is to be taken into consideration is the cause for the delay. Counsel contends that the court must at the very first instance satisfy itself that the petitioner was prevented from sufficient cause in filing and re-filing the objections, however, the grounds raised by the petitioner in these applications are vague and stereotype.
5. It is next contended by counsel for the respondent that the petitioner, National Highways Authority Of India, is supported by an efficient legal department, and the department is expected to know the consequence of delay in filing the objection, and to say that there was a change in the Minister, cannot be a ground for condonation of delay, as neither the objections are to be settled by the Minister nor

the Minister has any direct concern with the day-to-day working of the petitioner. Counsel further submits that even as per the own showing of the petitioner, petitioner had decided to challenge the award and the decision was taken in the month of October, 2009. Counsel also submits that the ground raised that the counsel was preparing the objections and thereafter the draft was sent for approval, is unrealistic, in view of the fact that counsel would be aware that the objections are to be filed within the period of limitation i.e. within 90 days. Counsel contends that the application seeking condonation of delay in re-filing does not disclose any reason much less sufficient reason. It is contended that the application seeking condonation of delay is extremely casual in nature and the only ground taken in the application is that after the objections were returned by the Registry on 21.11.2009, the same were misplaced. There is nothing on record to show that any sincere effort was made by the petitioner for searching the objection or filing a duplicate set of paper book in the registry, as the petitioner would be well aware about the rigors of law with regard to re-filing, especially in cases arising out of the Arbitration Act. In the backdrop of the decision rendered by the Apex Court in the case of **Union of India Vs. M/s. Popular Construction Co.** AIR 2001 SC 4010, wherein the Apex Court has held that having regard to the aim and object of the Arbitration & Conciliation Act, 1996 the delay in filing the objections beyond 120 days cannot be condoned. He submits that what cannot be achieved directly can certainly be not allowed to be achieved indirectly. Counsel for the respondent

submits that while the Supreme Court has held that beyond 120 days there can be no condonation of delay in filing objection, this court cannot condone delay of one year ten months and twenty days in re-filing, in view of the fact that there are no cogent reasons for the same.

6. Counsel for the petitioner submits that petitioner had nothing to gain by not filing the objections within the period of limitation. He also submits that it has been consistently held by the Apex Court that while considering an application under Section 5 of the Limitation Act, courts must take a liberal view and while dealing with the application for condonation of delay in re-filing a more liberal approach should be taken, as the efforts of the court should be to decide the matter on merit rather than dismissing the same on technicalities.
7. I have heard counsel for the parties and also perused the record. Counsel for the petitioner has placed reliance in the case **S.R. Kulkarni Vs. Birla VXL Limited** 1998 Rajdhani Law Reporter page 519, a decision of the Division Bench of this court, wherein the Division Bench has held that delay was caused in re-filing on account of negligent on the part of the counsel, however, there was no *mala fide* intention on the part of the party contesting the matter and accordingly delay in re-filing was condoned. The Division Bench has also held that the delay in re-filing is not subject to rigorous tests which are usually applied in excusing the delay in a petition filed under Section 5 of the Limitation Act. The Division Bench has placed reliance on **Indian Statistical Institute Vs. M/s.**

Associated Builders and Ors. reported at AIR 1978 SC 335. Counsel for the respondent has relied upon a decision rendered in Gautam Associates Vs. Food Corporation of India [O.M.P. No.190/2003], reported at MANU/DE/1750/2009 and has also relied in the case of Executive Engineer Vs. Shree Ram Construction Co. 2010 (120) DRJ at page 615 (a decision of the Division Bench of this court), wherein the Division Bench has observed that there is a pressing need to bring adjudicatory proceedings to a prompt and expeditious conclusion, especially where commercial and business contracts arise. In the case of Executive Engineer (Supra) the Division Bench had an occasion to deal with four petitions [FAO(OS)] which had been filed against different orders of a Single Judge of this Court. The relevant paragraphs 29 and 41 of the Judgment are reproduced below:

“29. Reliance on the decision in Improvement Trust, Ludhiana –vs- Ujagar Singh, (2010) 6 SCC 786 to the effect that “justice can be done only when the matter is fought on merits and in accordance with law rather than to dispose it off on such technicalities and that too at the threshold” is of no avail in the backdrop of the A&C Act which decidedly and calculatedly shuts off curial discretion after the expiry of thirty days beyond three months having elapsed from the date on which a copy of the Award had been received by the appealing party. In the context of the A&C Act, it appears to us that liberality in condoning delay in refiling would run counter to the intention of Parliament which has employed plain language to facially prescribe a cut off date beyond which there is no latitude for condonation of delay. And this is for very good reason. Across the Globe, it has been accepted that there is a pressing need to bring adjudicatory proceedings to a prompt and expeditious conclusion, especially where commercial and

business conflicts arise. We think it wholly impermissible to extend or expand the time for concluding judicial proceedings at the second stage, that is, that of refiling, when this is impermissible at the very initial stage, that is, of filing objections to an award. It will be apposite to immediately recall the dicta of Union of India –vs- **Popular Construction Company**, (2001) 8 SCC 470. We can do no better than reiterate the words therein – “the history and scheme of the 1996 Act supports 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”. This very reasoning has also been clarified and followed in Chief Engineer of BPD/REO, Ranchi –vs- **Scoot Wilson Kirpatrick India (P) Ltd.**, (2006) 13 SCC 622 in these words:-

8. The decision in Union of India -vs- Popular Construction Company, (2001) 8 SCC 470 did not deal with specific issues in this case. In that decision it was held that in respect of “sufficient cause cases” the provisions of Section 34(3) of the Act which are special provisions relating to condonation of delay override the general provisions of Section 5 of the Limitation Act, 1963 (in short “the Limitation Act”). The position was reiterated in State of Goa -vs- Western Builders, (2006) 6 SCC 239 and also in Fairgrowth Investments Ltd. –vs- Custodian, (2004) 11 SCC 472. There can be no quarrel with the proposition that Section 5 of the Limitation Act providing for condonation of delay is excluded by Section 34(3) of the Act.

41. The question, which still requires to be answered, is whether a reasonable explanation has been given with regard to delay of 258 days in the refiling of the Objections. Since this delay crosses the frontier of the statutory limit, that is, three months and thirty days, we need to consider whether sufficient cause had been shown for condoning the delay. The conduct of the party must pass the rigorous test of diligence, else the purpose of prescribing a definite and unelastic period

of limitation is rendered futile. The reason attributed by the Appellant for the delay is the ill health of the Senior Standing Counsel. However, as has been pithily pointed out, the Vakalatnama contains the signatures of Ms Sonia Mathur, Standing Counsel for the Department; in fact, it does not bear the signature of Late Shri R.D.Jolly. Because of the explanation given in the course of hearing, we shall ignore the factum of the Vakalatnama also bearing the signature of another Standing Counsel, namely, Ms Prem Lata Bansal. We have called for the records of OMP No.291/2008 and we find that the Objections have not been signed by Late Shri R.D.Jolly but by Ms Sonia Mathur on 9.8.2007, on which date the supporting Affidavit has also been sworn by the Director of Income Tax. In these circumstances, the illness of Late R.D.Jolly is obviously a smokescreen. No other explanation has been tendered for the delay. The avowed purpose of the A&C Act is to expedite the conclusion of arbitral proceedings. It is with this end in view that substantial and far reaching amendments to the position prevailing under the Arbitration Act 1940 have been carried out and an altogether new statute has been passed. This purpose cannot be emasculated by delays, intentional or gross, in the course of re-filing of the Petition/Objections. The conduct of the Appellant is not venial. We find no error in the conclusion arrived at by the learned Single Judge and accordingly dismiss the Appeal. CM No.5212/2009 is also dismissed.”

8. The facts of the present case are to be considered in the touchstone of the judgments relied upon by counsel for the parties and the law laid down by the Supreme Court. The facts which are not in dispute are that the present petition was re-filed on 04.05.2011 after the same was returned to the petitioner lastly on 30.11.2009 and thereafter re-filed after a gap of one year ten months and twenty days on 04.05.2011. This court has examined the stamp of the filing counter, which shows filing of the petition on 04.05.2011 and thereafter on

22.10.2011. There is no diary number available in this petition to show that the petitioner had first filed the petition on 07.11.2009 and thereafter on 13.11.2009, 21.11.2009 and 30.11.2009. Neither the objections which were raised by the Registry are before this court. A perusal of the petition and the applications filed along with this petition show careless attitude of the petitioner. The Index was prepared on 18.04.2011 and the petition also bears the date of 18.04.2011, however, the affidavit supporting the petition bears the date of 24.03.2011. The application under Section 5 of the Limitation Act shows the date to be 18.04.2011 while the supporting affidavit is dated 24.03.2011. The application seeking condonation of delay in re-filing bears the date of 18.04.2011, whereas the supporting affidavit has been sworn on 22.10.2011. The above dates would show that even after the petitioner realized that the objections have been misplaced, there would be a requirement of re-filing a fresh copy in respect of the affidavit having been sworn on 24.03.2011. The petition was prepared only on 18.04.2011, whereas the application for condonation of delay was supported by an affidavit of October, 2011. Besides there is no explanation, much less a reasonable explanation, as to why the affidavit was sworn in the month of March, whereas the petition was prepared in the month of April and the most crucial affidavit in support of the application seeking condonation of delay in re filing was prepared in the month of October, 2011 and thereafter the petition was filed on 24.05.2011 and re-filed thereafter on 24.10.2011.

9. In the case of **P.K. Ramachandran Vs. State of Kerana & Anr.** (1997) 7 SCC 556, the Supreme Court has held that an essential pre-requisite of exercising discretion to condone the delay is that the Court must record its satisfaction that the explanation for delay was either reasonable or satisfactory. There is no quarrel to the proposition that the Supreme Court had consistently held that while dealing with the application under Section 5 of the Limitation Act the Court must take a liberal approach, and the application for re-filing should not be subjected to rigorous test which are usually applied in cases under Section 5 of the Limitation Act, however, the present case is to be considered in the light of the Arbitration & Conciliation Act, 1996 and the aims and objects of the legislature.
10. Having regard to the facts of this case where the petitioner has been highly careless in pursuing re-filing of objection, the grounds for condonation of delay, any liberal approach would completely run against the intention of Parliament, which has fixed a cut-off date beyond which there can be no condonation of delay. In my view petitioner has not been able to satisfy this court that the delay in re-filing the objection was on account of *bona fide* reasons, but on the contrary the delay was on account of the carelessness, inaction and negligence on the part of the petitioner. Admittedly as a legal department, it is their responsibility to see that the objections are filed within the period of limitation. It is also their responsibility to ensure that half baked objections are not filed and thereafter in case any objection is raised the same is removed within the time allowed and thereafter to ensure that the same is re-filed, as early as possible

to safeguard their own interest.

11. The decisions relied upon by counsel for the petitioner are not applicable to the facts of the present case, and the present case is fully covered against the petitioner by the decision rendered by the Division Bench in the case of *Executive Engineer (Supra)*. Accordingly, both the applications (IA.Nos.17318-19/2011) are without any merit and the same are dismissed.

O.M.P.No.813/2011

12. In view of the fact that the applications (IA.Nos.17318-19/2011) for condonation of delay in filing and re-filing the objections have been dismissed, as being barred by limitation, present O.M.P. also stands dismissed.

G.S.SISTANI,J

NOVEMBER 17, 2011

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