* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 20.12.2013.

\+ **OMP No. 1278/2013**

FOOD CORPORATION OF INDIA ..... Petitioner

Versus

M/S PRATAP RICE & GENERAL MILLS ..... Respondent

Advocates who appeared in this case:
For the Petitioner: Mr S. Kumar Pattjoshi, Sr. Adv. with Mr Manohar Lal Sharma, Advocate.
For the Respondent:

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

IA Nos. 20809/2013 (condonation of delay of 1 day in filing) & 20811/2013 (condonation of delay of 108 days in re-filing)

1. These are two applications which have been filed by the petitioner, i.e., the Food Corporation of India (in short FCI) to seek condonation of delay in filing the petition under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) and thereafter, for re-filing the said petition. According to the FCI there is one day's delay in filing the petition and a delay of 108 days in re-filing the same.

2. The averments made in IA No. 20809/2013 reveal that the impugned award dated 15.03.2013 was received by FCI on 01.04.2013. It is the case

of the FCI that the petition was filed on 01.07.2013.

2.1 In so far as the registry of this court is concerned, they have submitted a report, which establishes the fact that the petition was initially filed on 01.07.2013. The registry, on examination of the petition, recorded its objections on 02.07.2013 and, returned the same to the filing counter for being handed over to the counsel for the FCI on the very same date. There were eight (8) objections listed out by the registry.

2.2 The FCI's counsel re-filed the petition on 26.07.2013. On scrutiny the registry found that none of the objections had been removed and the registry had raised one new objection apart from the objections cited earlier. The scrutiny was carried out on 26.07.2013 itself and the petition was returned to the filing counter on 26.07.2013.

2.3 The counsel for the FCI, thereafter, re-filed the petition on 30.07.2013 and 03.08.2013. The petition was returned to the filing counter on 05.08.2013. It was re-filed on 16.12.2013. After examination, it was cleared for listing on 19.12.2013.

3. The aforesaid would show that in so far as IA No. 20809/2013 is concerned, the same would have to be allowed as the initial filing by FCI appears to be in time, if limitation is counted from the date when it claims it had received the signed copy of the award. The said IA is accordingly, allowed.

3.1 However, in so far as condonation of delay in re-filing is concerned, it is the stand of the FCI that, even according to it, there is a delay of 108 days, however, the registry of this court has stated in its report that the FCI took 168 days in removing the objections and if it is given credit of 30 days, which is the maximum cumulative period permissible for removing the

objections, under Section 5 of Chaper I (Volume V) of the High Court Rules, 1967 (in short the Rules) the net delay in re-filing is of 138 days. To be noted, under the aforementioned Rules, a party is given seven days at a time for removing defects, as pointed out by the registry, after a petition is filed.

3.2 There is no gainsaying that the court is empowered to condone the delay in re-filing, provided there is no neglect and sufficient cause is shown to explain the delay. The sufficiency of cause would depend on the facts and circumstances of the case. [See ***Union of India vs M/s Ravinder Kapoor; decision dated 23.09.2013 in OMP No.477/2013 and IA Nos.7795/2013 & 7796/2013; as affirmed by the order dated 06.11.2013 of the Division Bench in FAO(OS) No.478/2013 titled Union of India vs. M/s. Ravinder Kapoor; The Executive Engineer (Irrigation & Flood Control) vs. Shree Ram Construction Co. 2010 (120) DRJ 615; Delhi Transco Ltd. & Anr. vs. Hythro Engineers (P) Ltd. 2012 (3) Arb.L.R. 349 (Delhi); and Delhi Development Authority vs. M/s. Durga Construction Co.; decision dated 07.11.2013 passed in FAO (OS) Nos.485-86/2011***].

3.3 The expression 'sufficient cause', which is the measure adopted for condonation of delay, itself pre-supposes the absence of negligence or inaction on the part of the applicant seeking condonation. The expression implies presence of 'legal' and 'adequate reasons' and, therefore, it is imperative that besides, the applicant, acting in a bonafide manner, it should be able to demonstrate that it had taken all possible steps within its power and control to approach the court without unnecessary delay. The test articulated by the courts as to whether the cause is sufficient or not is one whereby the party is able to demonstrate that it could not have avoided the

delay despite due care and attention. [See ***Balwant Singh (Dead) vs Jagdish Singh & Ors. (2010) 8 SCC 685***].

4. While examining the issue of condonation of delay in re-filing, the crucial question which the court is often faced with is: what should be the measure for condoning the delay? Should it depend on the span of the period involved? Or the bonafides/ quality of the explanation tendered to seek condonation of delay.

4.1 In my opinion, both factors would be required to be kept in mind, especially in the context of the Act, one is presently dealing with and, the view taken by the Supreme Court, in the case of ***UOI vs. Popular Construction Co. (2001) 8 SCC 470,*** which clearly mandates that once the period provided in Section 34(3) of the Act for instituting a petition under Section 34 is exhausted, the provisions of Section 5 of the Limitation Act, 1963 would have no applicability. In effect the court would have no power to condone the delay in regard to the period provided under Section 34(3) of the Act.

4.2 A large period of time spent in re-filing would itself tend to demonstrate negligence on the part of the party desirous of impugning the award; unless a credible explanation is setforth. This is more so, in view of the fact that once a petition is filed under Section 34 of the Act, the other party to the litigation, which wishes to execute the award is statutorily restrained from doing so by virtue of provisions of Section 36 of the Act. The successful party is thus deprived of the fruits of adjudication.

4.3 There could be another situation where the period of delay in re-filing may not be large, but the explanations given are false and contrived. Even in such cases, a court could come to a conclusion that the delay in re-filing

ought not to be condoned. The reason for this, in my view, is quite simple. The legislature in the Act has provided sufficient bandwidth, in terms of time, to a party, aggrieved by the award of an arbitral tribunal, to institute a petition under Section 34 of the Act. The period of three (3) months and thirty (30) days thereafter, in my view, ordinarily provides enough leeway for the aggrieved party to come to a decision as to whether or not it wishes to impugn the award, with or without the assistance of counsel, and also have the objections removed so that it is ready for listing in court.

5. In the context of the above, let me examine the explanations given for re-filing by FCI in the present case. IA No. 20811/2013 contains one singular paragraph, which articulates that the reason for delay was that the "paper book was inadvertently placed in a file by the clerk of the counsel and was not traceable. The paper book has now been located and is being re-filed".

5.1 From the dates set out hereinabove, it is clear that after the registry had returned the petition with objections for the second time on 26.07.2013, (with all objections remaining unliquidated and one new objection being added), the FCI did not remove the objections cited for a period of almost five (5) months and re-filed the petition only on 16.12.2013. Though IA No. 20811/2013 is accompanied by the affidavit of the counsel, it does not unfortunately inspire confidence. The reason being, that while the blame for delay has been put on the doorstep of the clerk of the counsel for the FCI, the application is not accompanied by the affidavit of the clerk. There is no reference to the date on which the file resurfaced, that is, was traced by the FCI's counsel. The sense one gets is that both FCI and its counsel forgot about the matter once the initial filing had been made. What surprises me, is

as to why the FCI did not seek to know from its counsel as to what was the status of its petition which was filed in July, 2013. IA No. 20811/2013 demonstrates neglect and callousness on the part of the FCI in prosecuting its matters with expedition.

5.2 I am impelled to come to this conclusion, in view of the fact that on my board today there are four other matters filed (apart from the captioned matter), out of which in three matters there are applications seeking condonation of delay in re-filing, where delay ranges from 59 days to 161 days and in one matter, which is, OMP No. 1279/2013, there is a delay of 70 days, in fact, in the initial filing itself and consequently, it had to be dismissed in limine. The reasons advanced for seeking condonation of delay are identical (except in OMP No. 1279/2013), that is, the case file in issue was misplaced by the clerk. In OMP No. 1279/2013, which was dismissed in limine, the reason advanced was that the office of the lawyer remained under lock and key as it was being treated for termites. On the face of it the reasons supplied to explain the delay are perfunctory and that they do not inspire confidence, as indicated above.

5.3 I have, however, passed separate orders in respect of each of the petitions and the accompanying applications as the dates and the periods involved are not the same.

6. In this context, I may only refer to a judgment of a Single Judge of this court, cited on behalf of FCI by Mr Pattjoshi, learned senior counsel, in support of his contention that the delay ought to be condoned as the delay occurred on account of the fault committed by the counsel. Mr Pattjoshi relied upon the judgment in the case of ***Delhi Jal Board vs. Digvijay Sanitations & Anr., 2009 (2) Arb. LR 576 (Delhi).*** The principle echoed in

the judgment of Hon'ble Mr. Justice S.N. Dhingra is no different from, that which has been articulated by this court in judgment after judgment. One cannot quibble with the proposition that the court has the power to condone the delay in re-filing, the decision, however, whether or not to condone the delay would depend on the facts and circumstances of the case. In that case the court found the explanation bonafide, in as much as, the reason given for delay was that the relative of the counsel for the petitioner, i.e., his uncle, had suffered a heart-attack, and there was nothing on record to show that this explanation was incorrect. The fact situation here, is different. The explanation, if it can be labelled as one, is one, which tends to fault the clerk. There is no affidavit of the clerk filed, which would at least prima facie demonstrate that the averments in IA No. 20811/2013 are true. Therefore, in my view, the judgment in the case of ***Delhi Jal Board vs. Digvijay Sanitations & Anr.*** is distinguishable.

7. For the foregoing reasons, I am of the view that the delay in re-filing ought not to be condoned. It is ordered accordingly. IA No. 20811/2013 is dismissed.

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8. In view of the orders passed hereinabove, the petition would have to be dismissed. It is ordered accordingly.

RAJIV SHAKDHER, J.

DECEMBER 20, 2013
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