

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

+ OMP No.209/2013

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Date of decision : 29th July, 2013

UNION OF INDIA

..... Petitioner

Through : Mr. Anuj Aggarwal, Adv.

versus

DELHI PAPER PRODUCTS CO.

PVT. LTD. & ANR.

.... Respondents

Through : Mr. Shashank Garg and Mr.
Apar Gupta, Advs.
Mr. Ruchir Mishra, Adv. for
R-2.

CORAM :-

THE HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT(ORAL)

IA No. 3622/2013 for condonation of delay of 62 days in re-filing the petition under Section 34 of the Arbitration and Conciliation Act, 1996

1. The petitioner awarded a contract dated 27th June, 2000 to the respondent followed by a supply order dated 2nd March, 2001 for supply of tele-printer paper rolls in pursuance to which the respondent claims to have made supplies totalling Rs.14,32,529/- against which the petitioner made payment of Rs.8,90,431/- and withheld the balance payment whereupon the respondent invoked arbitration clause in the contract and raised a claim for Rs.81,17,430/- against the petitioner in the arbitration.

2. The learned Arbitrator passed an award for Rs.15,09,491/- along with interest thereon in favour of the respondent on 28th April, 2012 followed by the corrigendums dated 7th May, 2012 and 28th May, 2012. The corrigendum dated 28th May, 2012 was received by the petitioner on 1st June, 2012.
3. The period of limitation of three months for filing the petition for setting aside of the award under Section 34(3) of the Arbitration and Conciliation Act, 1996 commenced on 1st June, 2012 and it expired on 1st September, 2012.
4. The petitioner filed this petition on 4th September, 2012 which was returned with objections on 5th September, 2012 to be re-filed within one week. As such, there was a delay of three days in the initial filing of objections.
5. The petitioner re-filed the petition after removing the objections on 4th December, 2012. However, the petition was again returned with objections on 6th December, 2012.
6. The petitioner re-filed the petition after removing objections on 27th February, 2013 which was again returned with objections.
7. The petitioner lastly re-filed the petition on 28th February, 2013 and it was listed before this Court on 4th March, 2013.
8. As such, there is a delay of 3 days in the initial filing and delay of 177 days in re-filing of the petition. The petitioner has not sought the condonation of delay of initial 3 days in filing. Against 177 days in re-filing, the petitioner has sought condonation of delay of only 62 days in re-filing the petition.

9. In I.A.No.3622/2013, the petitioner is seeking condonation of delay of 62 days on the ground that upon return of the petition filed on 4th September, 2012, the learned counsel for the petitioner intimated the petitioner about the objections and sought their comments for preparation of the application in pursuance to which the authorized representatives of the petitioner contacted the petitioner on 8th October, 2012. The learned counsel for the petitioner sent the final draft to the petitioner on 15th October, 2012 which was returned back on 1st November, 2012 after getting the same vetted from the competent authority. The paper book was thereafter misplaced in the office of the counsel for the petitioner due to shifting of the office.

10. The respondent is contesting the application for condonation of delay on the ground under Section 34(3) of the Arbitration and Conciliation Act, 1996, the delay beyond 30 days cannot be condoned. It is further submitted that the delay in re-filing beyond 30 days is considered as fresh institution under Rule 5, Chapter 1, Part-A, Volume V of Delhi High Court Rules and Orders and the petitioner cannot get the benefit of initial filing on 4th September, 2012. It is further submitted that the respondent has given the explanation of only 62 days and has not even sought/explained the remaining delay of 150 days. It is further submitted that the grounds pleaded by the petitioner demonstrate wilful negligence in removing the objections. The petitioner did not even communicate the corrigendum dated 7th May, 2012 to its counsel as late as on 8th October, 2012. Further, as late as on 1st November, 2012 i.e.

almost three months after the period of expiry of the limitation, the petitioner was still finalizing the contents of the petition.

11. The petitioner has not filed any rejoinder to the reply dated 5th March, 2013 although on 13th March, 2013, the petitioner sought time to file the rejoinder to the reply filed by the respondents whereupon three weeks time was granted to the petitioner.

12. Section 34(3) of Arbitration and Conciliation Act, 1996

12.1 The law with respect to condonation of delay in filing the petition under Section 34(3) of the Arbitration and Conciliation Act is well settled. Section 34(3) of the Arbitration and Conciliation Act provides for a period of limitation of three months to file the petition. Sub-section (3) along with the proviso of Section 34 makes it clear in absolute terms that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 has to be made within 3 months and the period can be further extended on sufficient cause by another period of 30 days and not thereafter. The words ‘but not thereafter’ in the proviso to Section 34(3) makes it further clear that the delay beyond 30 days cannot be condoned by the Court. Section 34(3) reads as under:

“34. Application for setting aside arbitral award.—

(1)***

(2) ***

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under

Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) ***”

13. Section 34(3) of the Arbitration & Conciliation Act being a special law, Section 5 of the Limitation Act would not have any application

13.1 Since special period of limitation has been prescribed under Section 34(3) of Arbitration and Conciliation Act for making application for any condonation of delay, period of limitation prescribed under the special law shall prevail and to that extent the applicability of Section 5 of the Limitation Act stands excluded and the application for condonation of delay up to a period of 30 days can be made by the Court and not beyond that. Reference may be made to the following judgments:-

13.1.1. In *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470, the Supreme Court held that the Arbitration & Conciliation Act, 1996 is a special law and that Section 34 provides for a limitation period different from that under the Limitation Act. The relevant portion of the judgment is reproduced hereunder:

“7. There is no dispute that the 1996 Act is a “special law” and that Section 34 provides for a

period of limitation different from that prescribed under the Limitation Act....”

“12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are ‘but not thereafter’ used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase ‘but not thereafter’ wholly otiose. No principle of interpretation would justify such a result.

13.1.2 In *State of H.P. v. Himachal Techno Engineers*, (2010) 12 SCC 210, the Supreme Court held that even if sufficient cause is made out, the delay beyond 30 days cannot be condoned. The observations of Supreme Court are reproduced hereunder:

“5. Having regard to the proviso to Section 34(3) of the Act, the provisions of Section 5 of the Limitation Act, 1963 will not apply in regard to petitions under Section 34 of the Act. While Section 5 of the Limitation Act does not place any outer limit in regard to the period of delay that could be condoned, the proviso to sub-section (3) of Section 34 of the Act places a limit on the period of condonable delay by using the words “may entertain the application within a further period of thirty days, but not thereafter”. Therefore, if a petition is filed beyond the prescribed period of three months, the court has the discretion to condone the delay only to an extent of thirty days, provided sufficient cause is shown.

Where a petition is filed beyond three months plus thirty days, even if sufficient cause is made out, the delay cannot be condoned.”

13.1.3 The Supreme Court re-affirmed *Union of India v. Popular Construction* (supra) subsequently in *Consolidated Engg. Enterprises v. Irrigation Deptt.*, (2008) 7 SCC 169, *Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission*, (2010) 5 SCC 23 and *Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd.*, (2012) 2 SCC 624 and this Court followed the same in *National Projects Const. Corp. Ltd. v. M/S Bundelabandhu Const. Company*, ILR (2007) II Delhi 59, *Union of India v. Ogilvy & Mather Ltd.*, AIR 2009 Del 179, and *Union of India v. M/s. Hindustan Oil Exploration*, 198 (2013) DLT 229.

14. Section 29(2) and 43 of the Limitation Act, 1963

14.1. Although the Limitation Act, 1963 in general applies to the Arbitration and Conciliation Act, 1996 by virtue of Section 43 of the Limitation Act, 1963, but, the period of limitation for setting aside of an arbitration award shall be governed by Section 34(3) of the Arbitration and Conciliation Act and not by the Schedule of the Limitation Act, 1963 because of Section 29(2) of the Limitation Act, 1963.

14.2. In *State of Goa v. Western Builders*, (2006) 6 SCC 239, the Supreme Court held that the applicability of Section 5 of the Limitation Act stands excluded and the Court can condone the

delay up to a period of 30 days but not beyond that. The relevant portion of the judgment is reproduced hereunder:

“10. We are primarily concerned with sub-section (3) of Section 34 read with the proviso. Reading of sub-section (3) along with the proviso of Section 34, it clearly transpires that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 should be made within 3 months and the period can be further extended on sufficient cause by another period of 30 days and not thereafter that means so far as application for making or setting aside the award is concerned the period of limitation has been prescribed in sub-section (3) i.e. 3 months but it can be extended for another period of 30 days on sufficient cause being shown to the satisfaction of the court. **Therefore, the applicability of Section 5 of the Limitation Act stands excluded and the application for condonation of delay up to a period of 30 days can be made by the court and not beyond that. Therefore, it was submitted that there is no scope for applicability of Section 14 of the Limitation Act in these proceedings by virtue of sub-section (2) of Section 29 of the Limitation Act.**

11. Sub-section (2) of Section 29 of the Limitation Act reads as under:

“29. (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law.”

12. That means if special period of limitation has been prescribed for making application for any condonation of delay or for any other purpose then that period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. To this extent there is no dispute. But the question is whether there is any provision to cater for the present controversy or not. The Limitation Act applies to the arbitral provisions because of Section 43 of the Arbitration and Conciliation Act, 1996. Section 43 reads as under:

“43. *Limitations*.—(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.”

15. Therefore, general proposition is by virtue of Section 43 of the Act of 1996 the Limitation Act, 1963 applies to the Act of 1996 but by virtue of sub-section (2) of Section 29 of the Limitation Act, if any other period has been prescribed under the special enactment for moving the application or otherwise then that period of limitation will govern the proceedings under that Act, and not the provisions of the Limitation Act. In the present case under the Act of 1996 for setting aside the award on any of the grounds mentioned in sub-section (2) of Section 34 the period of limitation has been prescribed and that will govern. Likewise, the period of condonation of delay i.e. 30 days in the proviso.

16. ... As per the provision, sub-section (3) of Section 34 which prescribes the period of limitation (3 months) for moving the application for setting aside the award before the court then that period of limitation will be applicable and not the period of limitation prescribed in the Schedule under Section 3 of the Limitation Act, 1963. **Thus, the provision of moving the application prescribed in the Limitation Act, shall stand excluded by virtue of sub-section (2) of Section 29 as under this special enactment the period of limitation has already been prescribed. Likewise the period of condonation of delay i.e. 30 days by virtue of the proviso.**

17. Therefore, by virtue of sub-section (2) of Section 29 of the Limitation Act what is excluded is the applicability of Section 5 of the Limitation Act and under Section 3 read with the Schedule which prescribes the period for moving application.”

15. Rule 5, Chapter 1, Part-A, Volume V of Delhi High Court Rules and Orders

15.1. The law with respect to the delay in re-filing beyond 30 days is also well settled. Rule 5, Chapter 1, part-A, Volume V of Delhi High Court Rules and Orders provides that the delay beyond 30

days in re-filing the objections is considered as fresh filing. Section 34 of the 1996 Act has to be applied strictly in order to maintain the entire of scheme of the Act. The Court has time and again reiterated that in case the petition is filed beyond the time allowed by the Delhi High Court Rules and Orders, it should be considered as fresh institution as under Rule 5, Chapter 1, part-A, Volume V of Delhi High Court Rules and Orders. The reference may be made to the following judgments in this regard:-

15.2. In *Delhi Transco Ltd. v. Hythro Engineers Pvt. Ltd*, 2012(3) ArbLR 349 (Delhi), the Division Bench of this Court held that filing has to be considered as fresh institution where the petition is filed beyond the time allowed under Rule 5, Chapter 1, part-A, Volume V of Delhi High Court Rules and Orders. The relevant portion of the judgment is reproduced hereunder:

“9. It is in *Shree Ram Construction Co. (supra)* that the Court actually examined as to what is the magnitude of delay in re-filing, which the Court may tolerate and permit to be condoned in a given case. ...However, what is to be borne in mind by the Court is that the limitation period is limited by the Act to three months, which is extendable, at the most, by another thirty days, subject to sufficient cause being disclosed by the petitioner to explain the delay beyond the period of three months. Therefore, it cannot be that a petitioner by causing delay in re-filing of the objection petition, delays the re-filing to an extent which goes well beyond even the period of three months & thirty days from the date when the limitation for filing the objections begins to run. If the delay in re-filing is such as to go well and substantially beyond the period of three months and thirty days, the matter would require a closer scrutiny and adoption of more stringent norms while

considering the application for condonation of delay in re-filing, and the Court would conduct a deeper scrutiny in the matter. The leniency shown and the liberal approach adopted, otherwise, by the Courts in matter of condonation of delay in other cases would, in such cases, not be adopted, as the adoption of such an approach by the Court would defeat the statutory scheme contained in the Act which prescribes an outer limit of time within which the objections could be preferred”

“11. ...It is rightly held that condonation of delay in re-filing the objection petition in these facts would run against the intention of the Parliament and the statutory scheme under the Act. Moreover, there is no answer with the appellant to the reliance placed by the learned Single Judge on Rule 5, Chapter "I", Part A of Vol. 5 of High Court Rules and Orders, according to which, the objections should have been re-filed within a time not exceeding 7 days at a time, and 30 days in aggregate to be fixed by the Deputy Registrar/ Assistant Registrar, Incharge of Filing Counter. Rule 5 (3) read with the note also makes it abundantly clear that in case the petition is filed beyond the time allowed by the Deputy Registrar/ Assistant Registrar, Incharge of Filing Counter under Sub-Rule 1, it shall be considered as a fresh institution. For all the aforesaid reasons, we do not find any merit in this appeal and dismiss the same.”

15.3. This Court re-affirmed *Delhi Transco Ltd. v. Hythro Engineers* (supra) in *Mahanagar Telephone Nigam Ltd., Delhi v. M/s. Prakash & Co. Construction Company*, MANU/DE/0199/2013, *Food Corporation of India v. Guru Ram Das Rice & Oil & Partners*, OMP No. 225/2013, decided on March 6, 2013.

16. **Findings**

16.1 In the present case, there is a delay of 180 days in filing the petition (3 days in filing and 177 days in re-filing) out of which the delay up to 30 days can be condoned by this Court under the proviso to Section 34(3) of the Arbitration and Conciliation Act, and the delay beyond 30 days i.e. 150 days cannot be condoned.

16.2 The petitioner has sought condonation of delay of only 62 days in re-filing i.e. from 14th September, 2012 to 27th November, 2012. The petitioner has not even sought the condonation of delay of remaining 150 days. In the absence of any application having been filed, the petitioner cannot even claim condonation of the initial delay of three days and remaining 150 days in re-filing.

16.3 Despite the respondent taking a specific objection of delay of 177 days in re-filing in the reply dated 5th March, 2013, the petitioner chose not to file any rejoinder to the reply dated 5th March, 2013 or to even seek the condonation of delay of the complete period of delay.

16.4 Even with respect to the delay of 62 days in re-filing the petition, the petitioner is unable to show the sufficient cause. The period of limitation for filing the petition under Section 34 expired on 1st September, 2012 and the period of 30 days, for which condonation can be sought, expired on 1st October, 2012. However, the petitioner finalized the petition as late as on 1st November, 2012. The Petitioner has not given the date when the file was misplaced and traced back by its counsel. In any case, since this application for condonation of delay is dated 27th

November, 2012, the file must have been traced by then. If that is so, there is no explanation from 27th November, 2012 to 28th February, 2013. As such, the petitioner has not acted with due diligence and therefore, no sufficient cause is shown even with respect to the 62 days delay sought by the petitioner.

16.5 This Court is of the view that no case for condonation of delay is made out by the petitioner and the petition under Section 34 of the Arbitration and Conciliation Act is liable to be dismissed as barred by limitation and therefore, the petitioner's contentions on merits cannot be looked into. However, considering the high rate of interest awarded by the learned Arbitrator under *Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993* and *Micro Small and Medium Enterprises Development Act, 2006*, this Court called upon both the parties to make submissions on justification of the high rate of interest awarded by the learned Arbitrator.

16.6 The learned counsel for the respondent, at the outset, submits that since the petition is barred by limitation, this Court has no jurisdiction to examine this issue. It is further submitted that the petitioner did not dispute the respondent's claim of interest before the Arbitration. Without prejudice to the above objections, the learned counsel for the respondent has made following submissions:-

16.6.1. The respondent is a small scale industry. The learned Arbitrator has awarded compound interest under *Interest on Delayed Payments to Small Scale and Ancillary Industrial*

Undertakings Act, 1993 from 7th June, 2002 to 15th June, 2006 under *Micro Small and Medium Enterprises Development Act, 2006* from 10th June, 2006 to 31st November, 2012. The learned Arbitrator has referred to *Renu Sagar Power Comp. Ltd. v. General Electric* (supra) and *Central Bank of India v. Ravindra* (supra).

16.6.2. The learned counsel for the respondent referred to *Decor India Pvt. Ltd. v. Ministry of External Affairs*, MANU/DE/3033/2009, *Kannai Engineering (Towers) Pvt. Ltd. v. Telecom Consultants India Ltd.*, MANU/DE/8304/2007, *Samrat Press v. Union of India*, MANU/DE/1503/2009 in which this Court has applied *Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993*. The learned counsel also referred to *JMC Projects India Ltd. v. Mechtech Engineers*, MANU/GJ/0642/2011, *Union of India v. Ekta Telecommunications System*, MANU/JH/0356/2013, in which the award of interest under *Micro Small and Medium Enterprises Development Act, 2006* has been upheld. It is submitted that under Section 31(7) of the Arbitration and Conciliation Act, the interest can be awarded under the special enactments referred to hereinabove. Learned Counsel referred to *Renusagar Power v. General Electric*, (1994) SCC Supp. (1) 664, *Central Bank of India v. Ravindra*, 2002 (1) SCC 367 and *State of Haryana v. S.L. Arora*, MANU/SC/0131/2010 with respect to applicability of the above enactments to the Arbitration and Conciliation Act, 1996.

16.7 In *Snehadeep Structures (P) Ltd. v. Maharashtra Small-Scale Industries Development Corpn. Ltd.*, (2010) 3 SCC 34,

Supreme Court has held that the *Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993* is a beneficial legislation and that the very object of the Act is to provide for and regulate the payments of interest on delayed payments to small-scale and ancillary industrial undertakings and is intended to help expedite timely payment of money owed to small-scale industries.

16.8 The learned counsel for the respondent could not dispute the applicability of the above enactments and judgments to the present case. The learned counsel for the petitioner also could not point out any judgment in which a contrary view has been taken.

Conclusion

For the reasons stated above, no case for condonation of delay in filing the petition is made out. The application seeking condonation of delay is, therefore, dismissed.

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Dismissed as barred by limitation.

J.R. MIDHA, J

JULY 29, 2013

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