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

+ O.M.P. 1142/2013

% **Date of decision: 10.09.2014**

THE NEW INDIA ASSURANCE CO LTD Petitioner

Through: Mr.P.K.Seth, Advocate

versus

KRISHNA INDUSTRIES & ANR. Respondents

Through: Mr.Virender Kumar Sharma, Adv.

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT (ORAL)

I.A.No.18833/2013 (delay in re-filing)

1. The petitioner has challenged the award dated 15.01.2013 by way of this petition under Section 34 of the Arbitration and Conciliation Act. It is submitted that the petition was initially filed within time but was returned with objection and the objections could be removed by the petitioner only after 130 days.

2. It is submitted that the delay in re-filing had occurred on account of the fact that the clerk of the advocate had gone to his home town on receiving the urgent message about serious illness in his family. At the time of leaving, he had instructed the associate of the counsel to place the file

before the advocate for removal of the objections and for re-filing. However, the said associate forgot to place the file before the counsel for removing the objection. It was only on return of the clerk of the advocate from his home town that the advocate came to know the status of the case and thereafter immediately the objections were removed and the petition was re-filed. It is submitted that the delay was neither intentional nor deliberate but due to this bonafide reason. In view of all these facts, it is prayed that the delay of 130 days in re-filing may be condoned. The affidavit of Mr.Showmik Mazumdar s/o Sh.S.Mazumdar, associate of the advocate has been filed. Later additional affidavit of Mr.Dalip Singh, clerk of the advocate was also filed.

3. The application is contested by the respondent. It is submitted that the application is vague and no sufficient reason for delay has been made out in the application. It is submitted that name of the family member of the clerk who had suffered with serious illness had not been mentioned in the application. The date on which the clerk had returned from home town and joined the office is also not mentioned. It is submitted that the application is vague and there are no reasonable grounds shown for condoning the delay of 130 days in re-filing the petition and the same is therefore liable to be

dismissed. It is further submitted that the reasons given in the affidavit which was subsequently filed by the petitioner somewhere around 18.2.2014, also does not inspire any confidence. It is submitted that in the affidavit the clerk has stated that the petition was filed on 11.4.2013 but does not disclose the date on which it was returned and re-filed. Although it is stated that the petition was re-filed on 13.05.2013 but it is not disclosed when was it returned again. The period between 11.04.2013 to 13.5.2013 is more than 30 days which had elapsed making re-filing defective even on 13.05.2013. It is further submitted that the clerk has stated by his affidavit that on 18.5.2013 he received a message of illness of his mother in Uttrakhand without specifying which is the town or city in Uttrakhand and it is surprising that after reaching his home town he did not try to contact his counsel during this period despite the fact that in today's time everybody carries mobile. It is further submitted that the clerk has stated that he returned for duty on 02.08.2013 is also not believable because court re-opens on 1st July every year. It is submitted that affidavit is not supported by any document. It is submitted that the contention in the affidavit are false and unbelievable. It is argued that the petitioner also did not make any effort to follow his case and he is equally liable for the negligence and the

delay cannot be condoned.

4. I have heard the arguments and perused the relevant record.

5. In this case the award is dated 15.01.2013. The petition was first filed on 11.04.2013. The period of limitation prescribed for filing petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') is 90 days. The proviso to the said section provides that the period of filing of petition under Section 34 can be extended upto a further period of 30 days, if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months. The Supreme Court in the case (2001) 8 SCC 470 titled as ***Union of India vs. Popular Construction Co.*** has clearly held as under :

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.

6. It therefore is a settled principle of law that provisions of Section 5 of the Limitation Act are not applicable to the petition filed under Section 34 of

the Act, while calculating the period of limitation for filing of the petition. There is no dispute to the fact that in the present case, the petition was filed within 90 days of period of limitation prescribed under Section 34 (3) of the Act. The award in this case was passed on 15.01.2013 and the petition was filed on 11.04.2013. The petition so filed suffered with defects and registry returned it for removal of defects on 11.04.2013. What happened thereafter, adds to the delay. The sequence of events shows that the petition, which was filed on 11.04.2013, was found not being filed as per the proper format and it was returned on 11.04.2013 with direction to file the same as per new format. The petition was shown as refiled on 13.05.2013 on removal of objections and it was returned on 13.5.2914 to file properly. Again the petition was filed on 27.9.2013 and registry raised objections on refiling which are enumerated as under:

1. Awarded amount should be mentioned in the plaint and the court fee shall be paid accordingly.
2. Please file a soft copy of complete petition in compact disc (CD). A certificate to the effect that , the soft copy filed herewith is a replica of the hard copy filed, be given.
3. Caveat report be obtained and at the time of each subsequent refiling and proof of service be filed.
4. Affidavit be filed in support of petition/appeal/application and attested/identified. Parental details/age/complete address be given. Necessary averments be given since the affidavit has been signed in Venacular. No modification is allowed. It should be re-typed and attested.

5. Rest of the objections will be raised later on (after modification) according to correct classification/nomenclature of the case.
6. Fair typed copy of dim/illegible and hand written annexures be filed.
7. Annexures be made true copy (at the bottom of each page) and signed. Annexure number should be marked properly in the index as well as on top of the annexure filed with the petition.
8. Page numbering be done properly and it should be done numerically as alpha-numeric page numbers are not allowed/Double page numbering be deleted by proper fluiding.
9. Corrections are not allowed in cause title, Index and Memo of Parties. All other corrections/addition should be legible and initialised by the Counsel/filing person.
10. Petition/application/appeal be properly filed for scrutiny.
11. Please insert a para of pecuniary and territorial jurisdiction.
12. Fresh first typed copy of petition be filed.

7. In the case 166 (2010) DLT 537 titled as ***Brij Mohan vs. Sunita***, this court while dealing with contention of delay in refiling and discussing the expression “sufficient cause” has clearly held that the court cannot mechanically condone the delay in refiling the appeal if no reasonable ground is shown at all. In the case 162 (2009) DLT 542 (DB) titled as ***Asha Sharma & Ors. vs. Sanimiya Vanijiya P.Ltd. & Ors.***, the division bench of this court has discussed the situation where the appeal was refiled after expiry of 30 days and has observed as under:

“9. It is quite clear from a bare perusal of the above Rule that the Deputy Registrar cannot grant time of more than 30

days in aggregate for re-filing of a Memorandum of Appeal, for the reasons specified in Order 41 Rule 3 of the Code of Civil Procedure. If the Memorandum of Appeal, after removing the defects notified by the registry, is filed after more than 30 days, it shall be considered as a fresh appeal, filed on the date on which it is presented after removal of the defects.”

8. In *Asha Sharma’s* case (supra), this court has further observed as under:

“23. It is trite law that Rules of Procedure being hand-mades of justice, a party should not be refused relief merely because of some mistakes, negligence or inadvertence. Rules of Procedure are designed to facilitate justice and further its ends.

But, even if we take a rather liberal approach in this matter, we are unable to find any good ground for condonation of delay in filing this appeal. None of the reasons given in the application is convincing or logical. The impression we gather is that the appellants deliberately delayed filing of the appeal so as to prolong the litigation. It cannot be said that even if the appellants were totally negligent and careless and have not come forward with any worthwhile explanation for the delay, the court ought to condone the delay in re-filing. The Rules framed by the High Court cannot be allowed to be taken so casually and there will be no sanctity behind the rules if every delay in re-filing, is to be condoned irrespective of howsoever unreasonably long and unexplained it be, and howsoever mandatory be the nature of the documents, non-filing of which renders the Appeal defective.

We cannot condone the delay merely because an application for condonation of delay has been filed. No court would not like to reject an appeal as time-barred unless there are strong reasons, which compel the court to take such a view. Some indulgence and a liberal view in such matters is well-accepted but to say that the court has no option in the matter and must

accept the Memorandum of Appeal irrespective of the nature of the objections and delay in re-filing, even where there is no reasonable explanation to justify the delay, would only be travesty of justice and will be as good as removing the relevant Rule in High Court Rules and Orders, from the Statute Book.

24. These days we find a growing tendency to file an incomplete Memorandum of Appeal and then take unreasonably long time to remove the defects, even where such defects can be cured within a very short time. Such a practice cannot be said to be conducive to be fair and reasonable and therefore needs to be curbed. An unduly liberal and benevolent approach will only give encouragement to such unfair practices and therefore is not called for. When an Appeal comes up for hearing long after expiry of the prescribed period of limitation, it springs surprise on opposite party, which assumes finality in his favour on account of non-filing of Appeal within a reasonable period.”

9. The division bench of this court in case 2010 (120) DRJ 615 (DB) titled as ***Executive Engineer vs. Shree Ram Construction Co.*** (which judgment has been upheld by the Supreme Court with the dismissal of SLP) in paras 29 and 41 has observed as under:

29. Reliance on the decision in Improvement Trust, Ludhiana -vs- Ujagar Singh, [MANU/SC/0417/2010](#) : (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, [MANU/SC/0613/2001](#) : (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 inextensible 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., [MANU/SC/8646/2006](#) : (2006) 13 SCC 622 in these words:-

8. The decision in Union of India -vs- Popular Construction Company, [MANU/SC/0613/2001](#) : (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) FAO (OS) 665 : 2009 6 SCC 239 and also in Fairgrowth Investments Ltd. -vs- Custodian, [MANU/SC/0898/2004](#) : (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 refiling 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.

10. Relying on the findings in ***Shree Ram Construction Co.***' case (supra), the division bench of this court in case 2012 (3) ARBLR349 (Delhi) titled as ***Delhi Transco Ltd. & Anr. Vs. Hythro Engineers Pvt.Ltd.*** has observed as under:

9. 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. It cannot be that what a petitioner is not entitled to do in the first instance, i.e. to file objection to an award beyond the period of three months & thirty days under any circumstance, he can be permitted to do merely because he may have filed the objections initially within the period of three months, or within a period of three months plus thirty days, and where the re-filing takes place much after the expiry of the period of three months & thirty days and, that too, without any real justifiable cause or reason.

11. From the above discussed case laws, it is apparent that it is incumbent upon the petitioner to explain the reasons of delay in refiling. A casual approach is certainly not tolerable especially when the petitioner is having

the advantage of a legal cell to advise him on the legal positions. There is no dispute to the fact that the petitioner is maintaining a legal cell wherein several intelligent minds in this field, renders and provides the expert opinions to petitioner. It is not expected from such a petitioner to commit absurd mistakes like not filing the petition in its proper format at the first instance and then filing a petition full of defects (mentioned above). It is not expected that petition be filed without an affidavit and will have no mention of the pecuniary jurisdiction. It is also not expected that petition would be filed without mentioning the awarded amount and payment of requisite court fee and without mentioning the relevant provisions of the law on the interim application. All this shows the casual approach of the petitioner in preparation of a petition under Section 34 of the Act especially when they are supposed to know the outer limit of prescribed period of limitation under Section 34 (3) of the Act. It is certainly not expected from the petitioner to file the illegible documents without being properly numbered and indexed. The affidavit was also not found in proper format. The petitioner also took unduly long time in removing these objections. The only explanation forthcoming is that the documents were lengthy and huge. This certainly cannot be said to be a reasonable explanation for delay in refiling.

12. From the perusal of contentions in the affidavit and the application as well as from the affidavit it is apparent that the petitioner and his counsel had adopted very casual approach while dealing with their case.

13. It is unbelievable that removal of the abovementioned objection took about more than four months to the petitioner. It is also unbelievable that during the absence of the clerk of the counsel in the period which is mentioned in the affidavit by him, no activity had taken place in the chamber of the learned counsel or that no case had been perused or filed by the counsel. There is no such contention that the work of the office of the learned counsel had become stand still due to absence of the clerk. When other works including filing of fresh cases, affixing court fee on these, including removing of objections raised by the registry in other cases could be done why this pathetic approach in the present case.

14. In these circumstances, the explanation which has come forward is certainly not sufficient.

15. The question that arises is if a party does not file the petition in proper format and objections were raised regarding improper format of petition, and the objections were not removed within the given time by registry, but is done beyond the period of 30 days of raising the objections in such situation

should this refiling be considered first filing? The answer lies in Part G of Delhi High Court Rules which relates to the proceedings in the High Court of Delhi and Chapter I, Part A (a) deals with Judicial business relating to presentation and reception of Appeals, Petitions etc. and Rule 5 reads 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.]....

16. It thus empowers the Deputy Registrar, Assistant Registrar, Incharge of the Filing Counter to return the appeal, petition etc. with objections requiring refiling within a time not exceeding 7 days at a time and 30 days in the aggregate. Sub rule (3) specifically and categorically stipulates that if

the refiling is done beyond the time allowed under Sub rule 1, it “Shall be considered as fresh institution”. The expression used is ‘Shall’.

17. This court in ***Delhi Transco Ltd.***’s case (supra) has clearly held that such filing shall be considered first filing. Court has observed as under:

11. 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.

18. As discussed above, although the petition was initially filed on 11.04.2013, it was not as per format and was returned under objections, for refiling within seven days after removing of the objections. The petitioner filed it only on 13.05.2013 i.e. beyond the period of 30 days and the registry had considered it as a fresh filing. A petition which is not in a proper format, actually is no petition. For all practical purposes, therefore, the petition was filed only on 21.11.2013. The award is dated 15.01.2013. The petition was filed much beyond the period of limitation of 90 days plus 30

days prescribed under Section 34 (3) of the Act and which is non extendable. What cannot be done directly cannot be allowed to be done indirectly.

19. As discussed above, no reasonable grounds have been shown for not being able to re-file the petition in the proper format within the prescribed time given by the registry after it was returned on 11.04.2013.

20. For the reasons discussed above, application for condonation of delay is hereby dismissed.

O.M.P. 1142/2013 & I.A.No.18832/2013 (for stay)

21. In view of the fact that the petition is barred by limitation, the petition and the pending application are hereby dismissed.

DEEPA SHARMA, J

SEPTEMBER 10, 2014

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