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

+ **O.M.P. 17/2014**

Judgment reserved on 12.11.2014

Judgment pronounced on 17.11.2014

M/S MAGNUM BUILDERS & DEVELOPERS Petitioner

Through: Mr.Arun Kumar Varma, Mr.Rahul
Sharma, Ms.Sahiti Kachroo and
Mr.Mayank Sapra, Advocates

versus

UNION OF INDIA THROUGH IRCON INTERNATIONAL LTD

..... Respondent

Through: Mr.K.R.Gupta and Mr.Chandra Nand
Jha, Advocates

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

I.A.No.178/2014 (for delay in re-filing)

1. The present application has been filed for condonation of delay in re-filing the petition under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act') for setting aside the arbitral award dated 07.06.2013 passed by the sole arbitrator.

2. It is contended in the application by the petitioner that the captioned petition was filed on 09.09.2013. Certain defects were found and the said petition was to be re-filed after removal of the

objections. It is submitted that on 04.10.2013, it was discovered that the said file was missing from the office and the staff was unable to recover the file. On 01.12.2013, it was discovered that the file had been mistakenly mixed up with another set of files of a different forum, resulting in this confusion. It is submitted that there has been inadvertent delay which is not intentional or deliberate in nature. It is submitted that there exists sufficient cause for condonation of delay of 60 days in re-filing the petition and therefore, the delay be condoned.

3. The application is contested by the respondent. It is submitted that petitioner has filed objections under Section 34 of the Act on 09.09.2013 against an award passed on 07.06.2013 on the premise that they had received copy of the award on 12.06.2013. It is submitted that the period of limitation for filing the objections under Section 34 of the Act had expired on 12.09.2013. The registry raised objection on the petition and returned the same on 10.09.2013 for filing it within a week. The petitioner re-filed the petition on 10.12.2013 and it was again returned on 12.12.2013 and was re-filed on 13.12.2013. It is submitted that there was a delay of 92 days from 13.09.2013 to 13.12.2013 and not of 60 days. It is further submitted

that although it is alleged by the petitioner that the missing file was discovered on 04.10.2013, no explanation has been given as to why the objections of the Registry could not be removed within a period of 25 days between 10.09.2013 to 04.10.2013. It is submitted that this itself shows the negligent, casual and indifferent approach on the part of the petitioner. It is further submitted that the contention of the petitioner that the file was missing from 04.10.2013 and resurfaced only on 01.12.2013 appears to be untrue as the advance notice by the petitioner addressed to the respondent of the date of hearing bears the date 26.10.2013 which clearly shows that the file was available with the petitioner on that day and thus falsifies the contention that it was discovered on 01.12.2013. It is submitted that the delay of 92 days in re-filing the petition cannot be condoned as the petitioner's approach was reckless and indifferent. In support of their contention the respondent has relied upon the findings in case of ***Delhi Transco Ltd. and Another vs. Hythro Engineers Pvt. Ltd.*** reported in **212 (3) Arb.LR 349 (Delhi) (DB)**.

4. The rejoinder to the reply has also been filed wherein it is submitted that the contention of the respondent that the file was very

much available with the petitioner and that is why the advance notice sent to them bears the date 26.10.2013 is misconceived because all the other documents accompanying the advance notice like index, urgent application and Memo of Parties bear the date 02.12.2013 and there appears to be a typing mistake of date 26.10.2013. It is further contended that the plea of respondent that the petitioner had to re-file the petition within 30 days after the lapse of limitation of 90 days is incorrect in view of the findings of Division Bench of this Court in ***Delhi Development Authority vs. M/s Durga Construction Co.*** FAO (OS) 485-86/2011 wherein it has been clearly held that there is no restriction with regard to the jurisdiction of the Court in condoning the delay in re-filing the petition. In case of ***Executive Engineer vs. Shree Ram Construction Co.***, reported in **2011 (2) R.A.J.152 (Del)**, the Division Bench of this court has held that delay in re-filing of the petition can be condoned if the same is for a period of 120 days and only if the delay is beyond this period, the matter would require a closer scrutiny and adoption of more stringent norms while considering the application for condonation of delay in re-filing. It is prayed that the delay in re-filing be condoned.

5. I have heard arguments and have given careful consideration to rival contentions of the parties.

6. Under Section 34 (3) of the Act, the period of limitation for filing the objections is 90 days.

7. In this case as per admitted facts, the award was passed on 07.06.2013. The petitioner received the copy of the award on 12.06.2013 and filed the objections on 09.09.2013 i.e. within 90 days of receipt of award. The objections were returned to them on 10.09.2013 with directions to re-file the same within a week. The petitioner re-filed the objections only on 10.12.2013 i.e. after about 90 days of delay. The petitioner vide this application seeks the condonation of delay of 60 days in re-filing but the delay is of 90 days. Learned counsel for the petitioner while relying on the findings in *Delhi Development Authority's* case (supra) has argued that this court retains the power and authority to condone the delay in re-filing even if the date of re-filing goes beyond the period of limitation provided under Section 34 (3) of the Act which is three months extendable to 30 days. There is no dispute to the principle of law established in *Delhi Development Authority's* case (supra) wherein

this court has clearly held that the courts have the jurisdiction to condone the delay in refiling even if the period exceeds the time specified under Section 34 (3) of the Act.

8. However, in catena of judgments, the Courts have held that where delay in re-filing exceeds 120 days prescribed under Section 34 (3) of the Act, the Courts have to exercise its jurisdiction stringently and not liberally and the petitioner has to satisfy the court that it has pursued the matter diligently and delay was unavoidable and beyond its control.

9. This court in the case of ***The Executive Engineer (Irrigation and Flood Control) vs. Shree Ram Construction Co.*** reported in **2010 (120) DRJ 615 (DB)** (The findings in this case has been upheld by the Supreme Court with the dismissal of the SLPs) has observed as under:

"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 BPDP/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=2001 (3) Arb.LR 345 SC 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=2006 SCACTC 353 (SC)=2006(3) Arb.LR 1 (SC) 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".

10. This court in ***Delhi Transco Ltd.'s case*** (supra) while relying on the findings in case of ***Shree Ram Construction Co.'case*** (supra) has observed as under:

"10. 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. Obviously, there cannot be any hard & fast rule in that respect, and the Court would have to examine each case on its own facts & merits and to take a call whether, or not, to condone the delay in re-filing the objection petition, when the initial filing of the petition is within the period of limitation. 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. 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. The position of law, therefore, is very clear that where the re-filing has been done beyond the period of 120 days of receipt of award, the courts are required to conduct a deeper scrutiny in the matter to see if the petitioner was prevented due to sufficient reasons and causes from re-filing the petition. Liberal approach in such cases is deprecated since such a approach would defeat the statutory scheme contained in the Act.

12. In the present case although the petitioner had filed the petition

within 90 days, their petition was returned for removing the objections on 10.09.2013. It was re-filed only on 10.12.2013. The reason given for delay is that on 04.10.2013 the file was found missing and could be recovered only on 1.12.2013. An affidavit of learned counsel has also been filed in support of this contention. Admitted facts are that when the file was returned on 10.09.2013 by the Registry for removing the objections the petitioner was required to re-file it within a week after removing those objections. Obviously, the directions of the registry were not complied with by the petitioner and the objections were not removed within a week from 10.09.2013 and re-filing was not done. No reasons have been given for such a default on the part of the petitioner. It is pertinent to mention here that the file was noticed as missing only on 04.10.2013 and this shows that from 10.09.2013 to 04.10.2013 (for 25 days) no attempts were made to remove the objections and re-file the petition. No reasons for such a laxity on the part of the petitioner have also been shown in the application. In order to be entitled for discretionary relief for condonation of delay, the petitioner has to show his bona fide and also to show that it has taken all the requisite steps but was prevented due

to some unforeseen reason which was beyond his control to comply with the directions. In ***Delhi Transco Ltd.***’ case (supra) the condonation of delay was sought on the similar grounds and therein the delay was of 72 days and the court had rejected the application for condonation of delay. In that case the learned Single Judge has also observed as under:

“12. 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.”

13. In ***Delhi Development Authority’s*** case (supra) there was a delay exceeding 166 days in re-filing and the court while observing that courts have the jurisdiction to condone the delay in re-filing, reached to the conclusion that since the appellant had not been able to offer any satisfactory explanation, delay could not be condoned. The court has held that a liberal approach in condoning the delay in re-filing an application under Section 34 of the Act is not called for as

such an approach would defeat the purpose of specifying an inelastic period of time within which an application, for setting aside an award, under Section 34 of the Act must be preferred. In that case the reason for condonation of delay was that in the process of fulfilling the legal requirements in the department and due to retirement of concerned Executive, delay had occurred.

14. It is clear from the above discussed case laws that in all those cases the court has taken a strict view while dealing with the applications for condonation of delay and where the petitioner had failed to satisfactorily explain the reasons for delay, the delay in re-filing was not condoned.

15. In this case, as discussed above, the petitioner has not even whispered about his inability to remove the objections within a period of seven days given to them by the registry on 10.09.2013 and no reason why he slept over the file till 04.10.2013 is shown.

16. In view of the above, I hold that petitioner has failed to satisfactorily explain the delay in re-filing the petition. Therefore, the application for condonation of delay in re-filing the petition is dismissed.

O.M.P. 17/2014

17. In view of the fact that the petition is barred by limitation, the petition is hereby dismissed.

(DEEPA SHARMA)
JUDGE

NOVEMBER 17, 2014
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