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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM) 49/2016

INDIA CARRIERS PVT. LTD.

..... Petitioner

Through: Mr. Anup Banerjee, Advocate.

versus

INDIAN OIL CORPORATION LTD. & ANR.

..... Respondents

Through: Mr. Anirudh Wadhwa and Mr. Vipul Kumar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

17.01.2017

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IA No. 2479 of 2016 (for condonation of delay in re-filing the petition)

1. This is an application seeking condonation of delay of 125 days in re-filing the petition.
2. The Award under challenge is dated 24th July, 2015. According to the Petitioner, the signed copy of the Award was received in the Chamber of learned counsel for the Petitioner on 28th July, 2015.
3. In the present application, it is stated that the petition was filed on 22nd September, 2015 within the prescribed time under Section 34(3) of the Arbitration and Conciliation Act, 1996 ('Act').
4. In order to ascertain the dates on which the case papers were returned to the counsel for the Petitioner for re-filing after removal of the defects

pointed out, this Court by an order dated 27th October, 2016 called for a report from the Registry. The report furnished by the Registry indicates that on 23rd September, 2015 i.e., the very same day when the petition was first filed, the petition was checked and the following defects were pointed out:

- “6. List of Dates be filed.
- 13. Plaint be filed accordance to new format in four.
- 14. Master Index be filed. Index and list of documents be paginated.
- 16. Authorization letter/Board of Resolution/Power of Attorney be filed.
- 17. Please insert the para of pecuniary and territorial jurisdiction.
- 20. Separate pagination for each part be done.
- 28. Service be made to the all respondent and proof of service be filed.
- 101. Caveat report be obtained and at the time of each subsequent filing and proof of service be filed.
- 111. Left side margin 4 cm. be maintained.
- 112. 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 vernacular. No modification is allowed. It should be retyped and attested.
- 124. Tribunal should not be made a party.
- 127. Petition/Application be properly classified/correct nomenclature be given.
- 137. Vakalatnama be filed/date and signed by the counsel and all petitioner. Each advocate must mention their name/address/enrolment number & phone number in Vakalatnama. Title on the Vakalatnama be checked. Welfare stamp be affixed Signature of the client be identified.
- 107. Bookmarking not done. Total only 156 pages filed. Category be given as OMP. Value of pecuniary jurisdiction be given. Affidavit not attested.”

5. The next date of re-filing was 22nd December 2015, which is three months after the defects were first pointed out. It is seen that under Rule V in Chapter 1A(a) of Volume V of the Delhi High Court Rules, the objections should have been removed and the petition be re-filed within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by the Deputy Registrar/Assistant Registrar, In-charge of the filing counter. Rule 5(3) makes it clear that if the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar in charge of the Filing Counter under sub-rule (1), it shall be considered as fresh institution. In other words, a maximum period of 30 days is provided for removing objections by filing the petition.

6.1 The above provision was examined in light of Section 34(3) of the Act and explained in para 17 of the decision of the Division Bench (DB) of this Court in *Delhi Development Authority v. M/s. Durga Construction Co. (2013) 139 DRJ 133* as under:

"17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing. A similar view in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in *Ashok Kumar*

Parmar v. D.C. Sankhla: 1995 RLR 85, whereby a Single Judge of this Court held as under:- “Looking to the language of the Rules framed by Delhi High Court, it appears that the emphasis is on the nature of defects found in the plaint. If the defects are of such character as would render a plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit.” A Division Bench of this Court upheld the aforesaid view in *D.C. Sankhla v. Ashok Kumar Parmar*: 1995 (1) AD (Delhi) 753 and while dismissing the appeal preferred against decision of the Single Judge observed as under:-

“5. In fact, that is so elementary to admit of any doubt. Rules 1 and 2 of (O.S.) Rules, 1967, extracted above, do not even remotely suggest that the re-filing of the plaint after removal of the defects as the effective date of the filing of the plaint for purposes of limitation. The date on which the plaint is presented, even with defects, would, therefore, have to be the date for the purpose of the limitation act.”

6.2 It was thereafter explained in para 18 of the decision in *Delhi Development Authority v. M/s. Durga Construction Co.*(*supra*) that “the question whether the Court should, in a given circumstance, exercise its discretion to condone the delay in re-filing would depend on the facts of each case and whether sufficient cause has been shown which prevent re-filing the petition/application within time.”

6.3 Ultimately, the legal position was explained in para 25 of the decision in *Delhi Development Authority v. M/s. Durga Construction Co.*(*supra*) as under:

“25. Thus, in our view a Court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in section 34(3) of the Act. However, this jurisdiction is not to be exercised liberally, in view of the object of the Arbitration and Conciliation Act to ensure that arbitration proceedings are concluded expeditiously. The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the Court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable. In the present case, there has been an inordinate delay of 166 days and in our view the appellant has not been able to offer any satisfactory explanation with regard to the same. A liberal approach in condoning the delay in re-filing an application under section 34 of the Act is not called for as it 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.

6.4 On the facts of the case in ***Delhi Development Authority v. M/s. Durga Construction Co.*** (*supra*), the Court was of the view that the exercise of jurisdiction to condone the delay in re-filing in favour of the Appellant therein was not warranted.

7.1 The above order was followed in ***Yash Promoters & Builders Pvt. Ltd. v. Satyawati Sharma*** 2016 SCC OnLine Del 4320 where the Court was considering the question of condoning the delay of 169 days in re-filing the petition. It was emphasised that as per the scheme of the Act “sufficient cause has to be shown and each day delay has to be explained.” It was further pointed out that “a stricter scrutiny, both for the reasons that prevented the party as also the number of days, is to be adopted to give effect to statutory provisions of Section 34.”

7.2 In that case, the explanation offered not being satisfactory, the Court was not inclined to condone the delay.

8. In the above background, it has to be examined in the resent case whether there is any valid explanation for the initial delay of nearly 83 days in first re-filing the petition. When one turns to the application, it is seen that the explanation offered is that there was a new e-filing process that was started in the High Court and with the counsel not being computer savvy, he required some training/help. It is then stated that some original documents had to be obtained from Indian Oil Corporation which had been deposited with the Arbitrator and he was waiting for the said documents to arrive. It is then stated that there were vacations for Durga Puja and Diwali and that between the said vacations the counsel had to argue several cases in various courts/tribunals. It is then stated that when the matter was ready with the scanned CD etc., again there was confusion whether the High Court would itself send cases with pecuniary jurisdiction less than Rs.1 crore to the lower Courts or whether they would be returned and, therefore, it was necessary to "wait and watch the situation". It is then stated that ultimately it was orally told at the Counter that the diary number was a sufficient proof that the case had been filed and the same could be presented in the lower Courts. Then it is stated that the counsel for the Petitioner had some medical problem and in the meanwhile, he was also arguing cases in different courts and thus offered the reasons why there was a delay of 125 days in re-filing the matter.

9. The above long winded explanation does not satisfactorily explain the failure to re-file the petition within seven days from the date of return of the

petition in the first instance i.e., by 30th September, 2015 and, in any event, within 30 days from the date of the return of the papers i.e. by 22nd October, 2015. None of the reasons pointed out could have justified a long wait off over 80 days to rectify the defects. These were not matters beyond the control of the Petitioner making it impossible of compliance.

10. The explanation offered being unsatisfactory is made explicit by the further fact that the office report, as sought by this Court, indicates that even after the first re-filing on 22nd December, 2015, there were defects found and these defects were notified by the Registry on 31st December, 2015 and returned to the Counter on 2nd January, 2016. These defects read as under:

- “8. It should be stated how the OMP is maintainable.
- 17. Please insert the para of pecuniary and territorial jurisdiction.
- 28. Service be made to the all respondent and proof of service be filed.
- 101. Caveat report be obtained and at the time of each subsequent filing and proof of service be filed.
- 110. Petition/Application/MOP/Index/Power of attorney be signed and dated.
- 111. Left side margin 4 cm. be maintained.
- 112. 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 vernacular. No modification is allowed. It should be retyped and attested.
- 127. Petition/Application be properly classified/correct nomenclature be given.
- 135. No. of days be given in the prayer of the delay application.
- 137. Vakalatnama be filed/date and signed by the counsel and all petitioner. Each advocate must mention their name/address/enrolment number & phone number in Vakalatnama. Title on the Vakalatnama be checked. Welfare

stamp be affixed Signature of the client be identified.

107. It should be stated whether the Petition is Commercial matter of more than 1 crore pecuniary value if so please file as per the provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, and practice directions dated=17/11/2015 . Statement of truth be given in the form of affidavit and every page of pleading be signed by the petitioner.

Certificate for electronic records be given as per the provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.”

11. Thereafter, the petition was re-filed for a second time on 12th January, 2016. This was again beyond the period of seven days after the date of return of papers. The petition was again returned on the very next date i.e., 13th January, 2016 and again the very same defects which were pointed out by the Registry on the previous occasion on 31st December, 2015 were found not to have been cured by the Petitioner. This only means that even on the second occasion, the Petitioner did not bother to remove the defects but simply re-filed the petition.

12. Ultimately, for a third time on 1st February, 2016 the petition was re-filed. It was checked and on the next day i.e., 2nd February, 2016 and again, the following defects were pointed out:

“101. Caveat report be obtained and at the time of each subsequent filing and proof of service be filed.

102. Fresh Notice of Motion upon Counsel for concerned respondent be filed if 3 days have elapsed since the date of last service.

110. Petition/Applications/MOP/index/ power of attorney be signed and dated.

112. 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 vernacular.

No modification is allowed. It should be retyped and attested.

120. 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.

123. Correct Provision of law be given in the heading of the Petition/appeal/application.

TYPED INDEX BE FILED. IT SHOULD BE STATED HOW THE APPLICATION FOR SUBSTITUTION IS MAINTAINABLE WHEREAS SEPARATE PROVISION IS GIVEN.”

13. For the fourth time, the petition was re-filed on 16th February, 2016. It was checked on the same date and again the defects pointed out were identical to the defects pointed out on 2nd February, 2016. This again shows that the same petition with all the defects was re-filed on 16th February, 2016. No further steps were taken to remove the defects. For the fifth time when the petition was filed on 16th February, 2016, it was found that the defects had been removed and the file was cleared for registration on 22nd February, 2016.

14. Learned counsel for the Petitioner urged that fresh defects were pointed out on each occasion by the Registry making it impossible for the Petitioner to comply with the requirements. As is evident from the report submitted by the Registry, this grievance is not justified. The defects pointed out on 22nd December, 2015 were not removed by the counsel for the Petitioner and the petition was simply re-filed on 12th January, 2016 which led to the same

defects being pointed out again. Likewise, the defects pointed out on the third re-filing on 1st February, 2016 were not removed and when the petition was filed on 16th February, 2016, the same defects were again notified.

15. Learned counsel for the Petitioner referred to the decisions in ***Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy VIII (2013) SLT 95*** to urge that the Court should adopt a justice oriented approach and "technical considerations should not be given undue and uncalled for emphasis". He also relied on the decisions in ***Executive Officer, Antiyur Town Panchayat v. C. Arumugam (D) II (2015) SLT 13***; ***Royal Orchid Hotels Ltd. v. G Jayarama Reddy VII (2011) SLT 615***; ***Kumar v. Karnataka Industrial Co-op Bank Ltd. I (2013) SLT 21***; ***Dayal Singh v. Ranjit Singh V (2005) SLT 603*** and ***K.A. Grace v. M.S. Lakshmipathi Naidu IV (2005) SLT 559*** to plead for a lenient approach to the question of condonation of delay in re-filing the petition.

16. It requires to be observed that none of the aforementioned decisions arose in the context of the delay in filing or re-filing of a petition under Section 34 of the Act. The question of condonation of delay under the Act merits a stricter scrutiny in light of the time bound scheme of the provision. Even the discretion of the Court to condone delay is hemmed in by the proviso thereto which sets an outer limit of 30 days beyond the initial limitation period of three months. The Court is precluded from condoning a delay beyond 120 days in the aggregate. The decision of the DB in ***Delhi Development Authority v. M/s. Durga Construction Co.(supra)*** is specific to the issue; is still good law and binding on this Court. As explained

therein: "The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the Court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable."

17. The Court is satisfied that in the present case the Petitioner has been unable to show that it was diligent in pursuing the petition after it was first filed or that the extraordinary delay of 125 days in re-filing the petition was beyond its control.

18. The application is, accordingly, dismissed.

O.M.P. (COMM) 49/2016 & IA Nos. 2477/2016 & 2478/2016

19. Consequently, OMP (Comm.) No. 49 of 2016 and IA Nos. 2477 of 2016 and 2478 of 2016 are also dismissed.

JANUARY 17, 2017
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S. MURALIDHAR, J