HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

C.R.P. Nos.3811, 3816, 3817 AND 3812 OF 2013

COMMON ORDER:(Per Hon'ble Sri Justice A. Shankar Narayana)

All these Civil Revision Petitions are preferred by the petitioner in I.A. Nos.3937, 3938, 3948 and 3950 of 2012, who is also the petitioner in A.O.P. Nos.780 and 1338 of 2010, aggrieved by the orders, dated 25-03-2013 passed by the Chairman, Land Reforms Appellate Tribunal - cum - II Additional District Judge, Ranga Reddy District (for short, 'Court below'), rejecting its request in
I.A. Nos.3937 of 2012 and 3938 of 2012 filed under Section 5 of the Limitation Act, 1963 (for short 'the Act 1963'), to condone the delay of 248 days caused in filing the petitions in I.A. Nos.3948 of 2012 and 3950 of 2012 under Order IX Rule 4 of Code of Civil Procedure, 1908 (for short 'CPC') to set aside the dismissal order, dated 21.03.2012, passed against respondent Nos.2 to 4 in A.O.P. Nos.780 of 2010 and 1338 of 2010 respectively.

2. A.O.P. No.780 of 2010 is filed by the revision petitioner to set aside the award, dated 20-04-2010, in the matter of Arbitration No.81224 between the revision petitioner and respondent No.1 passed by the Arbitral Tribunal, London Court of International Arbitration, whereas A.O.P. No.1338 of 2010 is filed to set aside the award, dated 31-08-2010, in the same matter.

3. Since a common question is involved in resolving the controversy

in these revision petitions, they are taken up for disposal by a common order.

4. Turning to the fact-situation, the petitioner and respondent No.1 herein entered into an engagement agreement dated 21.06.2007 which obligates respondent No.1 to render services for achieving transactions relating to the acquisition of land and development thereon. In fact, the petitioner is limited company, registered under the provisions of Companies Act, 1956, with its head office at Hyderabad and engaged in the infrastructure development, construction of power projects, roads, integrated townships; whereas, respondent No.1 is a limited liability firm, registered under the laws of the United States of America with its office at New York, United States of America and it is an investment banking firm engaged in private advisory placement services. Pursuant to the said agreement, Credit Suisse, an investor was introduced by respondent No.1 in respect of real estate investments. Subsequently, the petitioner entered into an agreement on 16.04.2008 with Avendus Capital Private Limited, who negotiated, structured and clinched the deal with Credit Suisse in August, 2008 involving an entity level investment as well as purchase of shares in the petitioner's company belonging to Walden Properties Private Limited, a share holder. When respondent No.1 sought for payment of fee in line with the engagement agreement, the petitioner declined the request on the ground that respondent No.1 was unconnected with the transaction dated 16.04.2008. Thus, when a dispute arose, Clause - 9 contained in engagement agreement dated 21.06.2007 was invoked for reference to arbitration. Subsequently, the award was passed and respondent Nos.2 to 4 acted as arbitrators in the dispute resolution. Aggrieved by the arbitral award, the petitioner invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), challenging the award on various grounds and arrayed even the arbitrators as respondent Nos.2 to 4 respectively.

5. The facts that lead to passing the order under challenge are, the notices ordered in the A.O.P. were effected on respondent No.1, but not effected on respondent Nos.2 to 4, who all belong to United Kingdom. Thus, when service was not effected on respondent Nos.2 to 4, the Court below ordered notices by substitute service on 07.07.2011. Having taken certain adjournments to file the petition under Order V Rule 20 CPC, the petitioner filed I.A. No.2043 of 2011 on 22.07.2011, requesting the Court to order substitute service on respondent Nos.2 to 4. The Court below ordered to take out publication in “Financial Times” English Daily Edition, London, and posted to 30.12.2011 for filing publication.

6. It is clear from the order that on 30.12.2011, the petitioner failed to obey the order of the Court, but, however, filed I.A. No.3775 of 2011 seeking enlargement of time and the same was allowed posting the case to 29.02.2012. Even on 29.02.2012, the petitioner failed to file the proof of service by publication, however, filed an application in I.A. No.711 of 2012 requesting the Court to change the publication from “Financial Times” English Daily Edition, London, to any other paper. The Court below looking at the conduct of the petitioner as having got the time extended for taking out substitute service has come up with that application, dismissed the said
I.A. No.711 of 2012 and adjourned the matter. When the application in I.A. No.711 of 2012 was dismissed, it appears the petitioner obtained certified copy of the docket order also. The Court below, while dismissing I.A. No.711 of 2012, however, granted time for filing the publication in the same paper till 21.03.2012. On 21.03.2012, since the petitioner failed to take out publication, even the application in I.A. No.2043 of 2011 made under Order V Rule 20 CPC was dismissed. As a consequence, even the A.O.Ps. to the extent of respondent Nos.2 to 4 were dismissed on 21.03.2012. Subsequently, the petitioner has filed I.A. Nos.3937 and 3938 of 2012, from which the orders under challenge arise, requesting to condone the delay of 248 days in making the applications in

I.A. Nos.3948 and 3950 of 2012 under Order IX Rule 4 CPC to set aside the dismissal order dated 21.03.2012 passed against respondent Nos.2 to 4 in A.O.P. Nos.780 and 1338 of 2010 respectively. The Court below has dismissed I.A. Nos.3937 and 3938 of 2012 refusing to condone the delay, and as a consequence, the Court below has also dismissed I.A. Nos.3948 and 3950 of 2012.

7. Aggrieved by the aforesaid orders, the revision petitioner preferred these revisions agitating identical grounds. It would be suffice if grounds raised in C.R.P. No.3811 of 2013 are adverted to for determination of controversy in all these revision petitions.

8 . The revision petitioner submits that the Court below ordered notices on respondent Nos.2 to 4 in the main A.O.Ps., and since notices were not served, the Court below has ordered Newspaper Publication and immediately the revision petitioner learnt the correct addresses of respondent Nos.3 and 4 and filed a memo on 04-10-2012 bringing the same to the notice of the Court below and that the said memo was awaiting orders.

i) It is stated that in the Second Week of December, 2012, the revision petitioner came to know that respondent No.2 has expired and they made further enquiries and got confirmed the message that respondent No.2 expired on 06-08-2011 and, as such, steps were required to be taken. It is stated that the revision petitioner has made serious allegation of bias against the arbitrators - respondent Nos.2 to 4, more particularly, respondent No.3, and even demonstrated the same and, therefore, it is just and necessary to call for the original records pertaining to the award, dated 28-04-2010, in the matter of arbitration No.81224 between the revision petitioner and respondent No.1.

ii) In ground No.5, the revision petitioner states that only on 21-03-2012 it came to know the dismissal of above A.O.Ps. by the Court below against respondent Nos.2 to 4 - Arbitrators, and immediately thereupon it filed applications for condoning the delay in making petitions to set aside the dismissal orders.

iii) It is stated that since to take out publication in 'Financial Times' it was costing Rs.10.00 lakhs, it sought to change the paper, but the same was not permitted by the Court below, and meanwhile, it could secure the addresses of respondent Nos.3 and 4 - Arbitrators and, accordingly, prayed the Court below to take out personal notices, and the repeated observation of the Court below as regards the 'intelligence' of the revision petitioner and also the observation that the revision petitioner is procrastinating the matter is patently erroneous.

iv) It is stated that the Court below ought to have seen the revision petitioner's *bona fides* in filing the memo for sending notices to respondent Nos.3 and 4, and when the said memo was pending, it was under the *bona fide* impression that the same would be allowed to send notices to respondent Nos.3 and 4 and though, no orders have been passed on the said memo, the Court below observed in the impugned orders that passing order on the memo does not arise and that the revision petitioner is playing with the procedures. The observation of the Court below that respondent Nos.2 to 4 are only formal parties, is improper.

v) It is stated that the Court below committed manifest error in holding that in the proceedings under Section 34 of the Act, question of hearing the arbitrators does not arises and, that was the case, question of arraying them as parties would not have arisen and, therefore, sought to set aside the impugned orders of the Court below.

9. Heard Sri V.R.N. Prashanth, M/s. Indus Law Firm, learned counsel for the revision petitioner, and Sri R. Yella Reddy, learned counsel for respondent No.1.

10. Though, we are required to adjudicate upon a short controversy as to whether the cause shown by the revision petitioner in the affidavits filed in support of I.A. Nos.3937 and 3938 of 2012 in A.O.P. Nos.780 and 1338 of 2010, respectively, filed under Section 5 of the Act 1963 is sufficient to condone the delay of 248 days in making the applications i.e., I.A. Nos.3948 and 3950 of 2012 in A.O.P. Nos.780 and 1338 of 2010, respectively, to set aside the dismissal order, dated 21-03-2012, against respondent Nos.2 to 4, we are opined that it is imperative upon us to refer to certain relevant facts in relation to the awards questioned before the Court below.

11. The revision petitioner is a Company engaged in infrastructure, construction and the development of variety of projects in India with its offices at Hyderabad. Respondent No.1 is an investment banking firm with offices at New York, United States of America. Both had entered into an agreement on 21-06-2007. As per the agreement, respondent No.1 shall render services for achieving transactions relating to acquisition of land and development thereon, and in that connection, Credit Suisse was introduced by respondent No.1 in respect of real-estate investments. Subsequently, when the revision petitioner entered into an agreement with Avendus Capital Private Limited alleged to have negotiated, structured and clinched the deal with Credit Suisse in August, 2008, involving an entity level investment as well as purchase of shares in the revision petitioner's company belonging to Walden Properties Private Limited, a shareholder.

i) Respondent No.1 claiming that it was instrumental in closing the said transaction, sought for payment of fee at 2.5% of the amounts received from Credit Suisse. The revision petitioner declined the request on the premise that respondent No.1 was unconnected with the said transaction. Thus, a dispute arose between the revision petitioner and respondent No.1 which culminated into respondent No.1 invoking Clause (9), Governing Law of engagement agreement, dated 21-06-2007, dealing with ‘arbitration’. Thus, it is clear that the award relates to the services rendered by respondent No.1, which the revision petitioner omitted to pay the requisite fee as contemplated by the engagement agreement only.

12. As seen from the record, it appears that the London Court of International Arbitration (LCIA), by its letter, dated 20-02-2009, informed the revision petitioner and respondent No.1 that pursuant to Articles ‘5.4’ and ‘5.5’ of the LCIA Rules, it has appointed
Mr. Stephen York, Mr. Jeffry Gruder QC., and Mr. Guy Pendell, respondent Nos.2 to 4 herein, to be the Members of the Arbitral Tribunal in the said arbitration presided over by respondent No.2. The Arbitral Tribunal has passed partial award, holding that respondent No.1 is entitled to fee of 2.5% of the amount received from Credit Suisse in August, 2008 agreed to be $77,321,428.57.
It has worked out the fee at USD $1,933,035.71 stating that respondent No.1 must give credit for the sum of $ 25,000 already received from the revision petitioner in accordance with clause 2 (b) of the engagement agreement, leaving a balance due of $1,908,035.71, and further directing the revision petitioner to pay the said amount within fourteen(14) days. The said awards have been under challenge in A.O.P.Nos.780 and 1338 of 2010.

13. Learned counsel for the revision petitioner would submit that the revision petitioner was under the impression that the memo showing the addresses of respondent Nos.3 and 4 filed before the Court below was awaiting orders, and that it only came to know about passing of dismissal order against respondent Nos.2 to 4 just before filing the petitions for condonation of delay and setting aside the dismissal order and, in fact, the Court below ought to have passed orders on the memo filed by the revision petitioner and issued notices to respondent Nos.3 and 4.

i) He would also submit that the Court below ordered for taking out publication in ‘Financial Times’ Daily Newspaper, London Edition, and since it required Rs.10.00 lakh to take out the said publication, the revision petitioner made a separate application for change of Newspaper to take out publication, but it ended in dismissal and, thus, the delay was neither willful nor deliberate and, therefore, urges to allow the revision petitions.

ii) Yet another submission made by the learned counsel is, that the revision petitioner learnt about death of respondent No.2 and was making efforts to take steps, and that was yet another reason for the delay that occasioned.

iii) Learned counsel also submits that presence of the arbitrators is absolutely necessary and in support thereof, he placed reliance on a decision of the Hon'ble Supreme Court in **Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another**, as the petitioner attributed bias to one of the arbitrators in passing the award, which is sought to be set aside by filing A.O.P. before the Court below.

14. On the other hand, the learned counsel for respondent No.1 would submit that after dismissal of the application filed for change of publication, the Court below has given time by adjourning the main application opining that the revision petitioner would take out the publication in 'Financial Times' by way of substitute service to respondent Nos.2 to 4, but since on the next date of hearing also, publication was not taken out in 'Financial Times', A.O.Ps. were dismissed against respondent Nos.2 to 4 for default.

i) It is his submission that mere filing of a memo providing the addresses of respondent Nos.3 and 4 would not assist the revision petitioner in obviating necessity for taking out steps to get the dismissal order set aside against respondent Nos.2 to 4. It is also his submission that the proceedings in A.O.Ps. were continued, even both sides advanced their arguments and when the matter was reserved for pronouncing judgment by the Court below, the revision petitioner having kept these revision petitions pending for more than two (02) years before this Court, later obtained stay of pronouncing judgment on 05-08-2015, though, when these revisions were filed in 2013 and came up before the Bench for admission on 06-09-2013, no attempt at all was made for getting the proceedings stayed before the Court below and, thus, these events would reflect the conduct of the revision petitioner in protracting and delaying the disposal of A.O.Ps.

ii) It is his further submission that when the application for change of newspaper was dismissed and I.A. No.2043 of 2011 was adjourned to another date for taking out publication in ‘Financial Times’ itself, the failure of the revision petitioner in taking out publication in ‘Financial Times’ and maintaining silence till December, 2012 from the month of March, 2012 though, the proceedings in original arbitration petition were being taken up during the interregnum is sufficient enough to cull out that the delay was wanton and deliberate, hence, sought to dismiss the revision petitions.

15. C.R.P. No.3811 of 2013 is filed assailing the order, dated 25-03-2013, in I.A.No.3937 of 2012 in A.O.P. No.780 of 2010, which application was filed to condone the delay of 248 days in making the application in I.A. No.3948 of 2012 filed under IX Rule 4 read with Section 151 CPC. Thus, C.R.P. No.3817 of 2013 is preferred assailing that order in I.A.No.3948 of 2012. Whereas, C.R.P. No.3816 of 2013 is filed assailing the order, dated 25-03-2013, in I.A.No.3938 of 2012 in A.O.P. No.1338 of 2010 filed under Section 5 of the Act 1963 to condone the delay of 248 days in making the application in I.A.No.3950 of 2012 filed under Order IX, Rule 4 read with section 151 CPC, and the petitions filed under Section 5 of the Act 1963 were dismissed on 25-03-2013 by pronouncing the orders on merits and passed the consequential orders in the applications filed under Order IX, Rule 4 read with Section 151 CPC.

16. In the backdrop of above fact-situation, in our view, the point that would arise for determination is:

Whether the reasons assigned by the revision petitioner would account for sufficient cause to condone the delay of 248 days in making the petitions under Order IX Rule 4 read with Section 151 CPC to set aside the dismissal order in A.O.Ps. against respondent Nos.2 to 4?

17. At the outset, we would like to advert to an omission in filing these revision petitions by the petitioner. Even according to the petitioner, respondent No.2 Mr. Stephen York had expired and his death took place on 06-08-2011. Though, the revision petitioner is harping on that the arbitrators are necessary parties, he has not taken any pursuant steps even after noticing that the death of respondent No.2 had taken place on 06-08-2011. When viewed in that direction, these revisions filed by him have to be construed as having been filed against a dead person also. In that view of the matter, we are of the view, that the very revision petitions may not be maintainable. However, we intend to proceed to decide the question on merits.

18. In assessing the stand taken by the revision petitioner, narration of sequence of events that transpired till the orders impugned are passed is absolutely indispensable.

i) After both the A.O.Ps. were filed before the Court below, since notices were not effected on respondent Nos.2 to 4, the Court below ordered notices to respondent Nos.2 to 4 by way of substitute service on 07-07-2011. Abiding by the said orders, the revision petitioner filed I.A. No.2043 and 2042 of 2011 in A.O.P. Nos.780 and 1338 of 2010, respectively, on 22-07-2011 under Order V,
Rule 20 CPC. The Court below ordered publication in ‘Financial Times’ English Daily Newspaper, London Edition and posted the matter to 30-12-2011 for filing publication. On 30-12-2011, no publication was filed, but petitions were filed to enlarge the time in I.A. Nos.3775 and 3766 of 2011. The said applications were allowed by the Court below by granting almost two (02) months time, adjourning the cases to 29-02-2012. On 29-02-2012, again no publication was taken out, but the revision petitioner filed

I.A. Nos.711 and 712 of 2012 praying the Court to change publication from 'Financial Times' to any other paper, but the applications were dismissed on the same day on the ground that such applications were not filed on earlier occasion when enlargement of time was sought by filing I.A. Nos.3775 and 3766 of 2011. On 21-03-2012, since publication was not taken out in 'Financial Times' English Newspaper, as ordered earlier, both A.O.Ps. were dismissed against respondent Nos.2 to 4 for default.

19. Turning to the present controversy, we would like to initially deal with the submissions made by the learned counsel for the revision petitioner touching the memo filed before the Court below. The submission of the learned counsel has been that the revision petitioner filed memos on 04-10-2012 in S.R. Nos.7248 and 7246 of 2012 supplying the addresses of respondent Nos.3 and 4 and the petitioner was under the impression that the Court below would pass orders on the said memos. We would like to mention the purport of filing a memo by a party to the proceedings pending before the Court is to intimate a particular fact or to bring it to the notice of the Court. Thus, only to that extent memos are being filed, but not seeking any relief through the memos. If a party intends to seek relief, he is obligated with the duty of filing an interlocutory application seeking appropriate temporary relief in a proceeding pending before the Court. Thus, the very purpose of filing the memos in the Court below was to bring to the notice of the Court that the addresses of respondent Nos.3 and 4 were traced out and were being intimated to the Court. But, unfortunately, by then the applications for substitute service filed under Order V Rule 20 CPC in I.A. Nos.2043 and 2042 of 2011 were already disposed of. Thus, the said submission is without any substance and does not deserve any consideration at all, more particularly, in the direction of substantiating the sufficient cause for condonation of delay in making the applications to set aside the dismissal orders.

20. There is concrete material on record to show that the revision petitioner has knowledge of dismissal of A.O.Ps. against respondent Nos.2 to 4 on 21-03-2012. The following circumstances would completely condemn his stand that he gained knowledge after he secured the addresses of respondent Nos.3 and 4.

i) The very filing of memos on 04-10-2012, as mentioned in the above, would clearly evidence that the revision petitioner was absolutely aware of dismissal order passed by the Court below on 21-03-2012 against respondent Nos.2 to 4.

ii) As seen from the very order itself, the revision petitioner has obtained certified copies of docket orders in I.A. Nos.711 and 712 of 2012, which were dismissed, as mentioned in the above. The said interlocutory applications were filed requesting the Court to change the Daily Newspaper from 'Financial Times' to any other paper on the ground that it was expensive. The circumstance that the certified copies of the orders in I.A. Nos.711 and 712 of 2012 were obtained soon after the orders were passed, would give an inescapable inference that the revision petitioner was, in fact, intending to carry the matter to this Court, but, somehow, the same appears to have not been done. Even otherwise, it amply proves that the revision petitioner was perfectly aware of not only the dismissal orders in I.A. Nos.711 and 712 of 2012, but also the dismissal orders, which are now sought to be set aside along with condonation of delay in filing the appropriate petitions.

iii) It is not as though, that both A.O.Ps. were dismissed against all the respondents, resulting in dismissal of the very A.O.Ps. In fact, the proceedings were being conducted between 21-03-2012 and 04-10-2012, on which date, the aforesaid memos were filed and even when I.A. Nos.3937 & 3938 of 2012 and 3948 & 3950 were filed on 22-12-2012 and 24-12-2012, respectively. Thus, it definitely indicates that the revision petitioner was prosecuting the A.O.Ps. against respondent No.1, who is the contesting respondent and must have been appearing the Court below through its counsel on record on the dates of adjournments between 21-03-2012 and 24-12-2012. Thus, it is difficult to construe that the revision petitioner was not aware of the dismissal of A.O.Ps. against respondent Nos.2 to 4 till it made the aforesaid applications on 22-12-2012 and 24-12-2012, respectively.

21. Concerning yet another submission made by the learned counsel for the revision petitioner that the petitioner learnt the death of respondent No.2 that occurred on 06-08-2011, only in the Second Week of December, 2012, and they were awaiting correct information and made further enquiries and got confirmed the message as to the death of respondent No.2 occurring on 06-08-2011 and, thus, since steps were required to be taken, the delay occasioned in making the applications to set aside the dismissal orders. The said aspect has nothing to do with the moving applications to set aside the *ex parte* dismissal orders against respondent Nos.2 to 4 soon after the same were passed on 21-03-2012, as the death of respondent No.2 had taken place on 06-08-2011. The said cause shown by the revision petitioner appears to be only a lame excuse with an intention to explain away the gross negligence accounting for the delay being wanton and deliberate.

22. In the same context, the Court below has made an observation that in an application under Section 34 of the Act, what all the petitioner has to establish is that his case falls within the mischief of Section 34 of the Act and the question of hearing the arbitrator by serving notice on him does not arise and if the petitioner has any grievance against the arbitrator that the award passed by him is biased, it is open for him to bring it to the notice of the Court by making necessary exercise in showing that the award passed by the arbitrator is biased. We are of the view, that there is no need to decide anything on the said observation made by the Court below, at this stage.

23. We would like to state that in normal course, petition to condone the delay of 248 days would have been allowed in case sufficient cause is substantiated in the absence of deliberate negligence on the part of a party moving such an application. But, as seen from the circumstances, narrated in the above, we find gross negligence on the part of the revision petitioner in moving applications under Section 5 of the Act 1963 for condonation of the delay in making applications to set aside the dismissal orders under Order IX, Rule 4 CPC. When the material on record reflects gross negligence, by no stretch of imagination, it can be said that the delay was not wanton or deliberate. We, thus, find absolutely no merit in C.R.P. Nos.3811 and 3816 of 2013 filed to set aside the dismissal orders, 25-03-2013, passed in I.A. Nos.3937 and 3938 of 2012 in A.O.P. Nos.780 and 1338 of 2010, respectively, filed to condone the delay of 248 days. Consequently, the other two C.R.P. Nos.3817 and 3812 of 2013 filed to set aside the dismissal orders, dated 25-03-2013, passed in I.A.Nos.3948 and 3950 of 2012 in A.O.P. Nos.780 and 1338 of 2010, respectively, filed under Order IX Rule 4 CPC to set aside the dismissal order, dated 21-03-2012, passed by the Court below dismissing both A.O.Ps. against respondent Nos.2 to 4, would also fail, and accordingly, dismissed holding that the orders passed by the Court below in I.A. Nos.3937 and 3938 of 2012, and the consequential orders passed in I.A. Nos.3948 and 3950 of 2012 to set aside dismissal orders, respectively, do not suffer from any legal infirmity or tainted with any illegality. Therefore, we confirm the said orders passed by the Court below.

24. At this stage, it is submitted by the learned counsel for the revision petitioner that arguments could not be advanced on behalf of the revision petitioner in both the A.O.Ps., and the matters are reserved by the Court below, as such, he urges to afford an opportunity to advance his arguments. In view of the same, the Court below is directed to afford an opportunity to the learned counsel for the revision petitioner and also to the learned counsel

for respondent No.1. Since the A.O.Ps. were filed in the year 2010 and are still pending, the Court below is directed to dispose of the same within two (2) months from the date of receipt of the order.

25. With the directions as above, these Civil Revision Petitions are dismissed. No order as to costs.

26. As a sequel thereto, miscellaneous petitions, if any, pending in these revision petitions, stand disposed of.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

October 07, 2015.

Siva/Mgr