

\$~11

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

+ **FAO 76/2015**

SHYAM SUNDER (CONSTITUENT) Appellant

Through: Mr.Manohar Lal, Advocate.

versus

**M/S KOTAK SECURITIES LTD (TRADING
MEMBER)**

..... Respondent

Through: Mr.Robin R. David, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

%

14.08.2015

CM No.4697/2015 (for condonation of delay of 95 days in re-filing the appeal)

1. This is an application seeking condonation of delay in re-filing the appeal. The delay is of 95 days.

1.1 The reason given in the application is that the counsel for the appellant/applicant had misplaced his file and, therefore, he could not trace the same. This application is supported by an affidavit of Mr.Manohra Lal, Advocate.

2. There is no reply filed to the application.

3. Notice in the application and the accompanying appeal was issued on 13.03.2015.

4. In these circumstances, having regard to the fact that the delay in removing the objections was occasioned on account of the advocate having misplaced his case file, I am inclined to allow the application and condone

the delay. This especially so as the application is supported by an affidavit of the advocate, to which no response has been filed on behalf of the respondent.

FAO 76/2015

5. This appeal is directed against the judgment dated 13.08.2014, passed by learned Additional District Judge (West District, Tis Hazari, Delhi). By virtue of the impugned judgment, the learned Additional District Judge has rejected the appellant's petition under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the 1996 Act). The sole ground, on which the appellant's petition under Section 34 of the 1996 Act, was dismissed, is that, the, said petition, according to the trial court, was beyond the limitation period prescribed under Section 34 (3) of the 1996 Act.

6. Counsel for the appellant submits that the petition filed under Section 34 of the 1996 Act, could not have been rejected on the ground of limitation as the appellant's application filed under Section 33 of the 1996 Act, with the learned Arbitrator, was pending adjudication at the time when the impugned judgment was passed, and has, as a matter of fact, still not been disposed of by the learned Arbitrator.

6.1 The former part is not disputed by counsel for the respondent. As regards, the latter part, which is, as to whether the application under Section 33 of the 1996 Act is still pending, Mr.David submits that this aspect is not in the knowledge of the respondent.

6.2 Mr David submits that respondent to his knowledge has not received any intimation from the learned Arbitrator about the result of the appellant's application under Section 33 of 1996 the Act.

7. Upon perusal of the record, what clearly emerges is that, at least,

when the impugned judgment was passed, the application under Section 33 was pending adjudication with the learned Arbitrator.

7.1 Therefore, in my view, for adjudication of the present appeal, only three dates are relevant: (i) the date of the award, which is, 07.04.2010; (ii) the date when the award was received by the appellant, which is 04.05.2010; and (iii) lastly, the date on which the application under Section 33 of the 1996 Act was filed by the appellant with the learned Arbitrator, which is 14.05.2010.

8. These dates are not disputed by the counsel for the respondent.

9. It is clear thus, that pursuant to passing of the award (a copy of which was received within 10 days), the appellant filed an application under Section 33 of the 1996 Act. This application had not been adjudicated by the learned Arbitrator, at least, not by the time the impugned judgment was passed by the learned Additional District Judge. If that be so, quite logically, the limitation against the appellant would start running only after the application under Section 33 of the 1996 Act, is disposed of.

10. Mr. David, however, contends that the application filed is beyond the scope of the provisions contained in Section 33 of the 1996 Act.

11. In my view, this submission is completely misconceived. It is for the arbitrator to decide one way or the other as to whether the application filed under Section 33 of the 1996 Act is tenable or not. This is not a decision, which either trial court or this Court can make, at this stage.

11.1 The issue which presently arises for consideration, concerns only limitation, i.e. as to whether or not the petition filed by the appellant under Section 34 of the 1996 Act was within limitation. For this purpose, the provisions of Section 34 (3) of the Act are referred to. The relevant portion

of Section 34 reads as follows :-

“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 30 days, but not thereafter.

(4).....”

(emphasis is mine)

12. A bare perusal of sub-section 3 of Section 34 shows that if a request is made under Section 33, then the limitation for filing a petition under Section 34 of the 1996 Act will commence only upon such a request being disposed of by arbitral tribunal. In this case, on the date when the judgment was pronounced by the trial court, the request under Section 33 was pending before the arbitral tribunal. Accordingly, in my view, the appellant’s petition under Section 34 of the 1996 Act could not have been rejected on the ground of limitation.

12.1 In that view of the matter, the impugned judgment is set aside. The petition filed by the appellant before the learned arbitrator is restored to its original position. The trial court will re-examine the petition under Section 34 of the 1996 Act, on merits.

12.2 If in the meanwhile, the learned arbitrator has disposed of the application under Section 33 of the 1996 Act that order will be placed before the trial court. In case, the learned Arbitrator has not adjudicated upon the application under Section 33 of the 1996 Act, then the learned arbitrator shall dispose of the same though, no later than two (2) weeks from receipt of this order. In such eventuality, parties will ensure service of the order passed today on the learned arbitrator.

12.3 Any order passed by the arbitrator, thereafter, will be placed before the trial court.

12.4 If the appellant is desirous of amending his petition on account of disposal of his application under Section 33 of the 1996 Act by the learned Arbitrator, due opportunity in that regard would be given to the appellant.

12.5 It is made clear that the appellant will do the needful expeditiously so that the petition can be disposed of on merits.

13. The appeal is disposed of, in the aforesaid terms.

14. For the aforesaid purpose, learned counsel for both the parties, along with the parties, will appear before trial court on 31st August, 2015.

15. The Registry is directed to despatch the order passed today to the trial court, at the earliest.

RAJIV SHAKDHER, J

AUGUST 14, 2015
neelam