

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN IT'S COMMERCIAL APPELLATE DIVISION**

**NOTICE OF MOTION (L.) NO. 10 OF 2016
IN
COMMERCIAL ARBITRATION APPEAL (L.) NO.12 OF 2016
IN
ARBITRATION PETITION NO. 1621 OF 2014
WITH
COMMERCIAL ARBITRATION APPEAL (L.) NO. 12 OF 2016**

Nirved Traders Pvt. Ltd.. ... Applicant.

In the matter between :

Nirved Traders Pvt. Ltd.. ... Appellant.

V/s.
Karvy Financial Services Limited. ... Respondent.

Mr. Ashish Kamath a/w. Himank Singh & Sakshi Ahuja i/by
Vidhii Partners for the Applicant/ Appellant.

Mr. Omar Khaiyam Shaikh a/w. Ms.Madhavi Jadhav i/by Vikas
Salvi & Associates for the Respondent.

**CORAM : ANOOP V. MOHTA AND
P. R. BORA, JJ.**

DATE : 31st JANUARY, 2017

ORDER :

1 The applicant/appellant has filed an arbitration appeal under section 37 of the Arbitration and Conciliation Act, 1996, thereby challenged order dated 6th April, 2015 passed by the learned single Judge, under section 34 of the Act,

in Arbitration Petition No. 1621 of 2014. However, since there is a delay of 419 days, this Notice of Motion is taken out for condonation of the same in filing the appeal.

2 There is no issue that the Award is ex-parte. The parties therefore, preferred applications under section 34 of the Arbitration Act. Those applications were also disposed of as the parties to it were common and so also the properties. One of the appeals was preferred under section 37 of the Arbitration Act by one of the parties and by order dated 14th January, 2016 the same was dismissed. The Supreme Court by order dated 3rd January, 2017 in Special Leave to Appeal issued a notice against the Respondent therein, who is the Respondent in this matter. There is no issue that the said company i.e. the Birla Power Solutions Pvt.Ltd. is in liquidation now. The affidavit in support of the notice of motion is filed by the applicant/appellant and para nos. 17, 18, 34 and 35 read as under :

“17. I state that sometime around February, 2014, the bank accounts of Appellant as well as Birla Power Solutions Pvt. Ltd. were frozen by the Economic Offences Wing, Mumbai as a result of which the Appellant was further incapacitated from repaying the amounts as per the MoU. I state that the Appellant filed Misc. Application in Crime E.O.W. No. 168 of

2013 before the MIPD Special Court of Greater Bombay for requesting the Economic Offence Wing, Mumbai to defreeze the bank accounts of the Appellant. The Appellant crave leave to refer to and rely upon the pleadings and order passed in MPID Court and EOW as well as before this Hon'ble Court with respect to de-freezing of the bank account of the Appellant.

18. I state that the Appellant did not have sufficient staff to attend the day to day matters and therefore, do not have any record of having received any letter dated 27th February, 2014 from the Ld. Arbitrator at their correspondence address at 101, 1st Floor, Dalamal House, Jamnalal Bajaj Marg, Nariman Point, Mumbai 400 021. Since no such letter was received, the Appellant could not remain present on March 19, 2014 before the Ld. Arbitrator where the ex-parte Award under challenge was passed.

34. Further I state that the Appellant was under a bonafide belief that since Birla Power solutions Pvt. Ltd., the principle borrower under the Loan Agreement was wound up, the Official Liquidator appointed to take charge and control of the assets and liabilities of Birla Power Solutions Pvt. Ltd. would

step in for discharging the liability under the Arbitration Award.

35. Further, with the financial constraints faced by the Appellant during the relevant time, the staff of the Appellant kept rotating and shuffling, making it difficult for the Appellant to keep a track of the pending litigation concerning the Appellant. I state that the delay in filing the present appeal was not deliberate or intentional and the same has been caused due to the unavoidable situation beyond the control of the Appellant.”

3 Even otherwise, in the facts and circumstances of this matter, we are not inclined to accept the case of the Respondents that there was intentional delay in filing the appeal in time. Considering the nature of dispute between the parties and, admittedly, as the Birla Power Solutions Pvt. Ltd., alongwith the Appellant availed the loan facilities and as the challenge was already raised against the same Award under section 34 of Arbitration Act and the same was pending, therefore, the execution could not have proceeded further. However, as the said company was liquidated now, the steps taken in the background so referred above, cannot be said to be malafide or intended to delay the proceedings.

4 Against the Award, section 34 application is the remedy. Section 37 is available if section 34 application is rejected. Therefore, in the interest of justice and in order to give one more chance to the Applicant/ Appellant to contest the matter on merits and as admittedly, the basic Award was passed ex-parte, a sufficient case is made out for condonation of delay. We are inclined to allow the motion and condone the delay, however, subject to cost of Rs. 50,000/- to be paid within four weeks.

5 The Notice of Motion is allowed in terms of prayer clause (a) subject to the above condition precedent.

6 Notice of Motion is disposed of accordingly. So far as other prayers i.e. prayers (b), (c) , (d), and (e) are concerned, a liberty is granted to the appellant to take out separate motion in Appeal, if so instructed.

7 Appeal to be listed for admission after four weeks.

(P. R. BORA,J.)

(ANOOP V. MOHTA J.)

.....