

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 30.01.2017

+ **FAO(OS) (COMM) 25/2017**

GOVERNMENT OF NCT OF DELHI

... Appellant

versus

M/S Y D BUILDERS & HOTELS PVT LTD

... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr Rahul Sharma with Mr C. K. Bhatt

For the Respondent : Mr M. K. Ghosh with Ms Tina Garg

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE JAYANT NATH

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM 3631/2017

Allowed subject to all just exceptions.

FAO(OS) (COMM) 25/2017 & CM 3630/2017 (stay)

1. This appeal is directed against the order dated 19.10.2016, whereby the learned Single Judge declined to condone the delay of 110 days in re-filing the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act'), being OMP (COMM) 338/2016.

2. The facts are that the Arbitral Award was made on 22.10.2015 and the same was received by the appellant herein on 27.10.2015. The petition under Section 34 of the said Act was filed by the appellant before this Court on 23.01.2016 which was within the period of three months as stipulated under Section 34(3) of the said Act. But the petition was not signed nor did it contain a statement of truth. There were other objections also and accordingly, the same was returned to the appellant for removing the objections and for being re-filed. The petition was filed, once again, on 03.02.2016, but as the objections had not been removed, it was returned yet again. It was filed again on 08.02.2016, but without removal of all the objections. This was repeated once more by the petition being re-filed on 19.02.2016, which, again, was filed without removing all the objections. The petition ultimately came to be filed on 26.05.2016, that is, approximately 210 days from the date of receipt of the award.

3. The learned Single Judge noted the purported reasons for the delay in re-filing. Paragraphs 4 and 5 are instructive and they are reproduced hereinbelow:-

“4. In the present case, the petitioner has sought to explain the delay in re-filing in the following manner: The petitioner states that although the petition was filed in January, 2016, the Department had asked the learned counsel for the petitioner to

engage a senior advocate and after consultations, the name of a senior advocate was sent to the Government of NCT of Delhi and the Office of the Chief Minister. It is stated that the Competent Authority took “considerable time due to administrative reasons” and communicated its approval only by end of March 2016. Subsequently, it transpired that certain documents were not available and copies thereof were obtained from the arbitrator on 26.04.2016. The petitioner thereafter took steps for having the documents typed and the typed documents were received by 20.05.2016.

4. The petition was re-filed on 19.7.2016 and there is no explanation as to why it took further two months for re-filing the petition after curing the defects.”

4. The learned Single Judge, noting the Division Bench decision in **Delhi Development Authority vs. M/s Durga Construction Co: 2013 (139) DRJ 133**, observed that although the Court had the jurisdiction to condone the delay in re-filing, the power could not be exercised liberally in view of the provisions of the said Act and the legislative intent to ensure that all the proceedings are concluded expeditiously. The relevant passage from the Division Bench decision, which was referred to by the learned Single Judge, is set out below:-

“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.”

5. The learned Single Judge further held that the legislative object of Section 34(3) of the said Act was to ensure that the petitions for setting aside the award are taken up expeditiously and that this object could not be allowed to be frustrated by condoning inordinate delays in re-filing as in the present case. It was noted that the delay in re-filing itself exceeded three months which was the initial period granted for filing of the petition.

6. As would be seen from the extracts of paragraphs 4 and 5 of the impugned judgment, the pedantic approach of the appellant cannot be taken as a ground for explaining the delay. Reliance was placed on the Supreme Court decision in the case of **Office Of The Chief Post Master v. Living Media India Ltd.& Another**: (2012) 3 SCC 563, wherein the Supreme Court had observed that it was the right time to inform all the government bodies, their agencies and instrumentalities that unless they had reasonable

and acceptable explanations for the delays and there were *bona fide* efforts, there was no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The present case falls within such a category.

7. In view of the above, we are in complete agreement with the observations and findings of the learned Single Judge that there is no ground to condone the inordinate delay in re-filing the petition.

8. There is yet another aspect of the matter. The learned counsel for the appellant drew our attention to a decision of the Division Bench of this Court in **S. R. Kulkarni v. Birla VXL Limited: 1998 V AD (Delhi) 634**. He placed reliance on paragraph 8 of the said decision which reads as under:-

“8. Notwithstanding which of the aforesaid Rules are applicable, the question of condensation of delay in refiling of an application has to be considered from a different angle and viewpoint as compared to consideration of condensation of delay in initial filing. The delay in refiling is not subject to the rigorous tests which are usually applied in excusing the delay in a petition filed under Section 5 of the Limitation Act (See Indian Statistical Institute Vs. M/s. Associated Builders and others AIR 1978 Supreme Court 335). In the present case, the initial delay of 7 days in filing the application for leave to defend stood condoned and that has not been challenged by any of the parties. It is no doubt true that the counsel for the appellant had not been very diligent after filing of application for leave to defend on 19th August, 1995 as counsel did not

check whether the application was lying in the Registry with any objection or not. Considering, however, the nature of the objections, it was a matter of removal of the objections by the counsel and on the facts of the present case, it is difficult in this case to attribute any negligence to the party. On the facts of the case, the effect of negligence or 'casual approach', which would be appropriate term to be used here, of the counsel on his client, does not deserve to be so rigorous so as to deny condensation of delay in refiling the application. The casual approach of the counsel is evident as no timely efforts were made firstly to find out after filing application on 19th August, 1995 as to whether the Registry had raised any objection or not. Secondly, despite order of the Joint Registrar dated 9th January, 1996, the objection was removed only on 4th March, 1996 i.e. after the date which the Joint Registrar had fixed for the application being posted for hearing before the Court. When the application was refiled on 4th March, 1996, one would expect the person filing to be more careful thereby not giving an opportunity to the Registry to raise any other objection. But that was not so. The result was that the second objection was raised which, as noticed above, was removed on 21st March, 1996 but application was refiled only on 27th March, 1996. Apart from this casual approach, we do not find any mala fide intention on the part of the appellant to delay the proceedings. When there is negligence or causal approach in a matter like this in refiling of an application, though the court may not be powerless to reject an application seeking condensation and may decline to condone the delay but at the same time, passing of any other appropriate order including imposition of cost can be considered by the court to compensate the other party from delay which may occur on account of refiling of the application.”

However, the appellant cannot draw any support from the said decision inasmuch as it was not a decision in the context of the Arbitration and

Conciliation Act, 1996 and, in particular, Section 34(3) thereof, which is a limiting provision.

9. Furthermore, we notice from the said decision itself that Rule 5 of Chapter I of Volume V of the Delhi High Court Rules and Orders had been referred to in paragraph 5 of the said decision. The said Rule 5 reads as under:-

“Rule - 5. Amendment - The Deputy Registrar, Assistant Registrar, Incharge of the Filing counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order XLI, Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not taken back for amendment within the time allowed by the Deputy Registrar, Assistant Registrar, in charge of the filing Counter under sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution.

(3) 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.

Note - The provisions contained in Rule 5(1), 5(2) and 5(3) shall *mutatis mutandis* apply to all matters, whether civil or criminal.”

10. Upon reading Rule 5(3), which would apply *mutatis mutandis* to all matters, whether civil or criminal, and would, therefore, apply to a petition under Section 34 of the Arbitration and Conciliation Act, it is evident that in case such a petition is re-filed beyond the time allowed by the Registry under sub-Rule (1), the filing shall be considered as a fresh institution. Since the ultimate filing was done on 26.05.2016 and was well beyond the period permitted by the Registry, the filing of the petition under Section 34 would have to be construed as a fresh filing on 26.05.2016. This would mean that not only there was a delay in re-filing but there was a delay in filing of the petition itself which ought to have happened within three months and at the latest within a period of 30 days thereafter, subject to the fulfilment of the conditions laid down under the proviso to Section 34(3) of the said Act. Clearly, the petition, on this ground also, was time barred.

11. There is no infirmity in the impugned order passed by the learned Single Judge. The appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

JAYANT NATH, J

JANUARY 30, 2017/SR