

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

+ **FAO No. 495/2016**

% **24th August, 2017**

AAKASH EDUCATIONAL SERVICES LTD. Appellant
Through: Mr. Himanshu Pathak, Adv.

versus

CHIRAG KOTHARI Respondent
Through: Mr. Mayank Jain, Mr. P.Singh
and Ms. Madhu Jain,
Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 37802/2016 (Delay of 503 days in filing the appeal)

1. By this application delay of 503 days is sought to be condoned in filing of this first appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') against the judgment of the trial court dated 24.1.2015. The trial court by the impugned judgment allowed the objections filed by the respondent herein under Section 34 of the Act and set aside the Award

dated 7.2.2014 by holding that the respondent herein was not served in the arbitration proceedings.

2. It has been explained in the subject application for condonation of delay that the appellant had applied for review of the impugned order dated 24.1.2015 because it was understood between the parties during the course of hearing that since respondent is not served in the arbitration proceedings therefore after the Award is set aside the matter would be remanded to the Arbitrator for a fresh decision, however by the impugned order after setting aside the Award on the ground of non-service of the respondent the court below did not remand the matter for fresh decision in the arbitration proceedings.

3. In the present application for condonation of delay, it is further stated that if limitation is counted from the date of the disposal of the review application by the court below as per its order dated 15.7.2016 then the present appeal is within limitation.

4. Learned counsel for the respondent has argued that delay be not condoned because provisions for condonation of delay are not applicable to arbitration proceedings.

5. The law with respect to condonation of delay is now well settled. The important judgment of the Supreme Court in this regard is the judgment in the case of *N. Bala Krishnan Vs. M. Krishnamurthy AIR 1998 SC 3222* and which holds that once there is delay there is bound to be some sort of oversight and negligence, however, unless delay is deliberately and *malafidely* caused to take unfair advantage or otherwise there is gross negligence, delay must ordinarily be condoned depending on facts of each case.

6. In the present case, it is seen that the delay is essentially on account of appellant pursuing its review petition before the court below, and after disposal of which the present appeal has been filed within limitation period of the order dated 15.7.2016 deciding the review petition.

7. The contention of the respondent that the provisions with regard to condonation of delay do not apply to arbitration proceedings is a misconceived argument because appellant is not seeking condonation of delay in filing of objections under Section 34 of the Act but is only seeking condonation of delay in filing of an appeal under Section 37 of the Act. With respect to filing of the first appeal

under Section 37 the judgment of the Supreme Court in the case of *Union of India Vs. M/s Popular Construction Company (2001) 8 SCC 470* will not apply because that judgment states that delay is not to be condoned with respect to filing of objections under Section 34 of the Act, and the ratio of which judgment will not apply to filing of the first appeal under Section 37 of the Act.

8. In view of the above, this application is allowed and delay in filing of the appeal is condoned.

CM stands disposed of.

FAO No. 495/2016

9. The limited argument which is urged in the present appeal is that no doubt the impugned Award dated 7.2.2014 had to be set aside on account of the respondent being not served in the arbitration proceedings as a wrong address of the respondent was given by the Arbitrator, however, it is argued that after the Award was set aside on account of non-service, the court below should have directed the parties to recommence the arbitration proceedings and should have directed the respondent to appear in the arbitration proceedings.

10. In my opinion, there cannot be any quarrel to this proposition because the effect of allowing objections under Section 34 of the Act, respondent in a case like this is akin to allowing an application under Order IX Rule 13 CPC and once such objections, for setting aside the Award on the ground of non-service are allowed, then, arbitration proceedings have to revive to decide the same on merits.

11. In view of the above, this appeal is allowed. The impugned judgment of the court below dated 24.1.2015 is sustained by directing the parties to appear before the Arbitrator in the arbitration proceedings on 26.9.2017. Arbitration record lying in this Court be given to the counsel for the appellant for being given to the Arbitrator, and who will now commence the arbitration proceedings from the stage of opportunity being given to the respondent for filing of the written statement.

12. The appeal is accordingly allowed in terms of the aforesaid observations.

AUGUST 24, 2017/ib

VALMIKI J. MEHTA, J