

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.03.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE ABDUL QUDDHOSE

O.S.A.Nos.220, 221, 254 and 255 of 2017
and C.M.P.No15057 of 2017 in O.S.A.No.221 of 2017

1.Dr.R.Krishnamurthy
2.Dr.R.Lakshmipathy

.. Appellants in all the
appeals.

-vs-

1.Dr.R.Venkitapathy

.. R1 in OSAs. 220 &
254/17 & R2 in OSAs
221 & 255/17

2.R.Sathyamurthy

.. R2 in OSAs 220 &
254/17 & R1 in OSAs
221 & 255/17

3.R.Raghavan (Deceased)
4.R.Subbulakshmi
5.R.Ramasubbu
6.R.Gopalji

.. Respondents 3 to 6
in all appeals.

(RR4 to 6 impleaded as LRS of
the deceased R3, vide order
of Court dt.7.12.2017, made in
CMP.Nos.20144 ,20145/2017, 20147 & 20148/17
in OSA.NO.220/17,221/17,254/17 & 255/17)

Appeals filed under Order 36 Rules 1 and 9 of O.S.Rules read
with Clause 15 of the Letters Patent against the Judgment and
Decree dated 04.08.2017 passed in O.P.No.350 of 2017 and
Appl.No.3513 of 2017 in O.P.No.350 of 2017 and against the
Judgment and Decree dated 16.08.2017 passed in O.P.No.391 of
2017 and Appl.No.4451 of 2017 in O.P.No.391 of 2017, on the file
of original side of this Court.

OP.NO.350/17 (OSA.NO.2017)

Petition filed under section 34 of the Arbitration & Conciliation Act, 1996 to set aside the Arbitration Common Award dated 28.11.2013 insofar as the claim filed by the Petitioners passed by the Arbitrators.

Appl.No.3513/2017 in O.P.NO.350/2017 (OSA.NO.221/2017) filed praying to dismiss the O.P.NO.350/2017.

O.P.NO.391/2017 (OSA.NO.254/2017)

Petition filed under section 34 of the Arbitration & Conciliation Act, 1996 to set aside the interim order dated 15.03.2014.

Appl.No.4451/2017 in O.P.NO.391/2017 (OSA.NO.255/2017) filed praying to reject the O.P.NO.391/2017.

For Appellants
in all OSAs. : Mr.T.V.Ramanujam, Sr. Counsel
for M/s.S.Elambharathi

For Respondents :
For R-1 in OSA 220 &
254/17 & R-2 in OSA
221 & 255/17 : Mr.P.H.Aravindh Pandian,
Sr.Counsel, for Mr.Prasad
Vijayakumar

For R-2 in OSA 220 &
254/17 & R-1 in OSA
221 & 255/17 : Mr.P.S.Raman, Sr. Counsel
for Mr.P.Giridharan

For R-3 : Died
For RR 4 to 6 : Mr.T.S.Baskaran

* * * * *

COMMON JUDGMENT

(Delivered by Ms.Indira Banerjee, Chief Justice)

These appeals are directed against orders dated 04.08.2017 and 16.08.2017 passed by a learned Single Bench allowing Application Nos.3513 of 2017 and 4451 of 2017 filed by one of the respondents, R.Sathyamurthy and dismissing the Original Petitions in O.P.Nos.350 of 2017 and 391 of 2017 filed by the appellants for setting aside of arbitral awards dated 28.11.2013 and 15.03.2014.

2. The original petitions for setting aside of the arbitral award have not been dismissed on merits or on the ground of any bar in law, but on the ground of delay of 1090 days and 1040 days in re-presentation of the said applications. From the facts as recorded in the orders under appeal, it appears that the original petitions were filed in the Registry within the time prescribed under Section 34(3) of the Arbitration and Conciliation Act, 1996 (in short 'the 1996 Act'). The petitions were, however, returned on 03.03.2014 and 25.06.2014 respectively. In the order dated 04.08.2017 passed in O.P.No.350 of 2017, the defects pointed out by the Registry were (i) deficit court fee of Rs.90/-, (ii) non-filing of typed set, (iii) an explanation as to how the petition was maintainable in terms of Section 34 of the 1996 Act, and (iv) absence of signature of one of the three counsel engaged by the petitioners.

3. It ex facie appears that the return of the petitions was in itself not proper. It is not for the Registry to question the maintainability of a petition under Section 34 of the 1996 Act and even if the petition for setting aside did not contain the signature of one of the counsel, that could not have been a reason for return, since two others appearing in the matter had signed the petition. It is not mandatory that three counsel should be engaged to appear in a matter. Even one counsel might appear. Want of signature of one of the counsel could, at the highest, have led to disallowance of the said counsel from representing the party in the matter.

4. The only defect appears to have been the deficit in deposit of court fees, which could have been rectified across the counter. Moreover, it is well settled that deficit court fees can be paid even after the filing of the petition with the leave of Court. Similarly, second typed set could also have been filed across the counter, for which return of the petition was not necessary.

5. From the order under appeal in O.S.A.No.220 and 221 of 2017, it appears that the petition was re-presented on 05.06.2014, but without the defects being rectified. The petition was again presented on 20.03.2017, but returned again with the endorsement that the deficiencies pointed out earlier remained. The petition was ultimately re-filed on 20.04.2017, after rectification of all the defects. The original petition in respect of O.S.A.No.254 and 255 of 2017 was re-filed on 01.06.2017.

6. Applications were filed before the Master for condonation of delay of 1090 days and 1040 days in re-presentation of the applications. By ex parte orders dated 21.04.2017 and 12.06.2017, the Master condoned the delay in re-presentation

awarding cost of Rs.1,200/- and Rs.1,500/- respectively to be paid to the Chief Justices' Relief Fund on or before 26.04.2017 and 13.06.2017. The aforesaid conditions were complied with. The petitions were numbered. After notice was issued to the respondents, one of the respondents took out applications for dismissal of the original petitions on the ground that the delay had been condoned without notice to the respondents.

7. There can be no doubt that delay in re-presentation also has to be explained. In the instant cases, there was an explanation. The explanation was that the bundle had been misplaced by the lawyer representing the appellants, who had shifted his office from one floor to another. The short question before us is "whether the original petitions under Section 34 of the 1996 Act ought to have been dismissed?".

8. Rule 12 of Order XIV of the Madras High Court Original Side Rules and related Rules provides that any person affected by an order or decision of the Master (except on a question of Court fees) or of the Registrar, in respect of all matters judicially dealt with in the exercise of the powers delegated to him by the Chief Justice from time to time may appeal therefrom to a Judge. The appeal shall be by Judge's summons filed within eight clear days of the date of the order or decision or within such further time as the Judge might allow and shall briefly set out the grounds of appeal. The appeal may be filed without a copy of the order or decision appealed against within a period of eight clear days of the date of the order or decision or within such further time as the Judge might allow.

9. In the instant case, the respondents did not file any appeal. It is submitted that the order of the Master was passed ex parte without notice to the respondents. However, that, in itself, could not have been a ground for dispensing with the requirement to file an appeal. An appeal could have been filed with an application for condonation of delay and want of knowledge would certainly have been a ground for condonation of the delay in filing the appeal. Instead, the respondents took out an application for dismissal of the Original Petition under Section 34 of the 1996 Act under Order XIV Rule 8 of the Original Side Rules. Order XIV Rule 8 provides that all applications other than those mentioned in Rule 10 are to be disposed of by a Judge, provided that a Judge might refer any matter brought before him under the rule to a Division Bench. In our view, Rule 8 of Order XIV is not an alternative to an appeal from an order passed by the Master, for which there is a specific provision as observed above.

10. The learned Single Bench, in effect and substance, condoned the delay and sat in appeal over the decision of the Master. Without going into the technicalities or the

appropriateness in doing so, we deem it appropriate to consider the orders under appeal on merits.

11. It is true that Section 34 (3) puts an upper limit to file an application challenging an award, which is three months and 30 days. An application is required to be filed within three months and if sufficient cause is shown, the Court may allow such an application to file within one month, but not thereafter. The words 'not thereafter' make it amply clear that in no circumstances, can an application for condonation of delay be entertained after expiry of three months plus 30 days. However, as held by the learned Single Bench and as held in all the judgments referred to by the learned Single Bench, Section 34 (3) does not apply to re-filing. At the cost of repetition, it is reiterated that there is no limitation for re-filing. The delay in re-filing would be condonable subject to the applicant for condonation of delay being able to satisfy the Court that there was sufficient cause.

12. While Section 5 of the Limitation Act would not apply to an application under Section 34 (3) of the 1996 Act, the said Section would apply to an application for condonation of delay in re-filing. However, as rightly observed in the judgments of this Court in *Union of India vs. M/s.Cavalier Shipping Company, Madras* and another (AIR 1990 Mad. 312) and *M/s.Indus Bank Ltd. vs. Joseph Rajan Fernandes and Others* (OSA Nos.420-425/2011), and of Delhi High Court in *DDA vs. Durga Construction Company* (ILR (2014) I Delhi 153) and in *Executive Engineer (Irrigation and Flood Control) vs. Shree Ram Construction Company*, in cases under the Arbitration Act, delay cannot liberally be condoned. The principle of expedition, which led to incorporation of Section 28(3) providing for special limitation would have to be kept in mind.

13. However, each case has to be decided as per its own merits. In the instant case, the cause shown was, in effect, fault or may be even negligence on the part of the advocate. The petitions were filed within time.

14. So far as the appellants were concerned, there was nothing to be done on their part. The only lacuna seemed to be deficit court fee of paltry Rs.90/-. As discussed above, it is amply clear that the appellants suffered by reason of acts or omissions on the part of their advocate, including omission to advice on the appropriate court fees. Considering the aforesaid facts, the Master condoned the delay.

15. It is well settled that an appeal does not ordinarily lie against an order condoning the delay in filing an application or appeal. However, an order rejecting an application for condonation of delay is appealable. None of the

judgments referred to by Mr.Raman and Mr.Pandian pertain to an appeal from an order of a Master. These are not cases where the delay had been condoned by the Master, but the decision of the Master reversed either in appeal or by making an application in lieu of an appeal. The only exception is the single Bench judgment in Union of India vs. M/s.Cavalier Shipping Company, Madras and another, reported in AIR 1990 Mad. 312, in which case, delay of 17 years in re-representation had been condoned without any notice. The learned Single Bench, inter alia, found,

"12. In the present case, it is stated in the affidavit filed by the manager of the second defendant that the important papers like charter Party. Bill of Lading and other documents were destroyed long ago and the second defendant is not aware whether the first defendant is carrying on business or not Hence, it is clear that it is impossible to have a fair trial in this proceedings. The defendants will be put to irreparable hardship and serious prejudice if trial goes on."

16. The judgment in M/s.Indus Bank Ltd. vs. Joseph Rajan Fernandes and Others (OSA Nos.420-425/2011) dated 20.09.2016 pertained to a delay in filing an application for setting aside of an award under Section 34 of the 1996 Act. It was not a case of re-filing and thus, distinguishable.

17. Since no appeal ordinarily lies from an order condoning the delay in filing an appeal, an order setting aside the condonation of delay cannot be obtained by filing an application in lieu of an appeal. The application may be treated as an appeal. If treated as an appeal, the principle that no appeal ordinarily lies from an order of condonation of delay would be attracted.

The Original Side Appeals are, therefore, allowed. The orders of the learned Single Bench are set aside. The learned Single Bench designated to take up the original petitions/applications as per roster is requested to decide the applications as expeditiously as possible, preferably within thirty (30) days from date of communication of this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

sra

To

1.The Sub Assistant Registrar,
Original Side,
Madras High Court, Chennai.

2.The Posting Clerk/Original Side(OP)
High Court, Madras-104(to comply order operative portion)

+4cc to M/s.S.Elambharathi, Advocate sr.no.21683 to 21686
+4cc to M/s.T.S.Baskaran, Advocate sr.no.22092 & 22093
+2cc to Mr.Prasad Vijayakumar, Advocate sr.no.22188
+4cc to M/s.P.Giridharan, Advocate sr.no.22274

O.S.A.Nos.220, 221, 254 and
255 of 2017

rsk(co)
nr 14/06/2018



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