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

Date of judgement: 14th March, 2018

+ **FAO(OS) 86/2017 & CM No. 11185/2017**

SHREEJI OVERSEAS INDIA PVT LTD Appellant

Through: Mr. Darpan Wadhwa, Sr. Adv.
with Mr. Aseem Chaturvedi
with Ms. Chandni Anand, Adv.

versus

PEC LTD Respondent

Through: Mr. Sanjeev Narula, CGSC
with Ms. Anumit Chandra,
Adv.

CORAM:-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR JUSTICE C. HARI SHANKAR

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(JUDGMENT)

C. HARI SHANKAR, J.

1. We had, on 14th March, 2018, dismissed this appeal, stating that the reasons for the decision would follow. This judgement proceeds to record the reasons for dismissing the appeal.

2. The order, dated 4th October, 2013, which this appeal impugns, dismisses an application, filed by the appellant, in OMP 375/2013,

under Order XXXIII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the CPC”), for being exempted from the requirement of payment of court fee, and also peremptorily dismisses the OMP itself, in the event of default, on the part of the petitioner, in depositing the court fee within two weeks of the order. The said period having expired, without deposit, by the appellant, of court fee, OMP 375/2013 itself stands dismissed.

3. A prefatory recitation of facts would be apposite, the outset. On 1st July, 2008, an agreement was entered into, between the Emirates Trading Agency, LLC, UAE and the respondent, for sale of 45,000 Metric Tons (MT) of steaming non-coking coal, for a total price of \$ 4,922,738.15. Pursuant thereto, a High Seas Sale agreement, dated 7th July, 2008, was entered into, between the appellant and respondent, whereby and whereunder the appellant agreed to pay, to the respondent, \$ 5,167,696.67, representing 100% of the value of the documents and 1% trading margin thereon, whereagainst the respondent agreed to transfer, to the appellant, the goods, by endorsing a set of negotiable instruments. Pursuant thereto, the respondent, *vide* letter dated 2nd July, 2008, forwarded, to the appellant, all documents relating to import and purchase of the goods. Bill of Lading was also issued to the respondent, and endorsed to the appellant. The agreement between the appellant and respondent required the appellant to file the Bills of Entry in its own name, and

arrange for clearance of the cargo, including payment of Customs duty, port charges, demurrage, etc. It appears that, on 17th July, 2008, Letter of Credit was established, by the appellant, in favour of the foreign supplier, in accordance with the agreement between the appellant and the respondent, and payment, thereunder, was made on 27th October, 2008. The original Bills of Entry, filed by the appellant in its own name with the Customs authorities, were provided, by the appellant to the respondent, under cover of letter dated 26th November, 2009. The total quantity of goods, as per the said letter, was 46,801.216 MT. In terms of the agreement between them, the appellant and respondent also entered into a Deed of Pledge, dated 26th July, 2008, whereby the goods sold to the appellant were pledged in favour of the respondent; custody of the goods, however, was to continue to remain with the appellant.

4. On 12th January, 2009, the appellant sent an e-mail, to the respondent, submitting a proposal for taking delivery of the coal and requesting for permission to sell it, and arrange to make payment of the amount received from third parties thereagainst. Despite certain relaxations given by the respondent, the appellant failed to lift the entire quantity of goods. The appellant, thereafter, issued post-dated cheques, to the respondent, against which de-pledge orders, for part quantity, were issued. All the cheques, issued by the appellant, however, were dishonoured, resulting in the respondent initiating,

against the appellant, proceedings under Section 138 of the Negotiable Instruments Act, 1881. The said proceedings continue to remain pending, as on date.

5. The goods were discharged, by the appellant, by filing Bills of Entry in its name, and were stored at the port area at Kandla. On 5th September, 2009, the appellant again approached the respondent for de-pledging of the goods with a proposal for settlement of the outstanding liability. However, vide subsequent letter dated 19th November, 2009, the appellant informed the respondent that the goods had been destroyed in fire, for which they had filed a claim with New India Assurance Company Ltd. Consequently, the respondent was requested to write the Insurance Company for recovery of the outstanding payments.

6. The respondent, vide a letter dated 15th February, 2010, categorically informed the appellant that, in the event of failure, on the part of the appellant, to clear the outstanding dues by 28th February, 2010, the respondent reserved the right to present, for encashment, the post-dated cheques for Rs.23 crores, lying with them, which stood renewed from time to time. This prompted the appellant to file a petition, under Section 9 of the Arbitration and Conciliation Act, 1996 (OMP No.133/2010), in this court, wherein, vide order dated 8th March, 2010, the respondent was restrained from presenting

the post-dated cheques. The insurance claim was ultimately allowed only to the extent of Rs.87 Lacs.

7. It was in these circumstances, that the respondent initiated arbitration proceedings, against the appellant, which were referred, by an order dated 11th February, 2011, passed by a Division Bench of this Court, to Hon'ble Mr. Justice Mukul Mudgal, Retired Chief Justice of High Court of Punjab & Haryana and a former Judge of this Court, for arbitration. Inasmuch as the merits of the case are not relevant for the purposes of the present judgment, it is not necessary to enter into the specifics of the award passed by the learned Arbitrator. Suffice it to state that, on the basis of admission, by the appellant, of its liability, towards the respondent, of Rs. 19,41,91,636.50, the learned Arbitrator awarded, to the respondent and against the appellant, a total amount of Rs. 25,64,03,448.50, vide his Award dated 11th January, 2013.

8. The aforementioned award dated 11th January, 2013, of the learned Arbitrator was challenged, by the respondent, before this Court by way of OMP 375/2013. IA No. 7137/2013, under Order XXXIII Rule 1 of the Code of Civil Procedure, for waiver of the requirement of payment of court fees, on the ground that the appellant was an "indigent person", was filed with the appeal. The impugned order, as noted in para 1 (*supra*) dismisses the said IA 7137/2013.

9. On 9th January, 2015, i.e., a year and three months after the passing of the impugned order, the appellant preferred Review Petition 19/2015, for review thereof. The said Review Petition was dismissed, as withdrawn, *vide* order dated 30th October, 2015, which reads as under:

“Review Petition 19/2015 & IA No. 953/2015

After some arguments, Mr Uppal, learned senior counsel for the petitioner, on instructions seeks to withdraw the review petition as well as the accompanying application, with liberty to take recourse to an appropriate remedy.

Since the petitioner had approached this court by way of a review petition, though after some delay, I am sure the appropriate forum will take into account the said circumstances, albeit after hearing the counsel for the respondent.

Review petition and the application are, accordingly, dismissed as withdrawn, with liberty as prayed for.”

10. It is purportedly on the basis of the liberty granted by this court, *vide* the above extracted order dated 30th October, 2015, that the present appeal came to be filed, by the appellant, on 21st October, 2017.

11. Admitting the fact that there has been a total delay of 3 years and 192 days in filing the present appeal, challenging the order dated 4th October, 2013 *supra*, CM 11185/2017, for condonation thereof,

has been filed along with the present appeal, seeking to asseverate that the said delay was occasioned “due to unavoidable circumstances”, which have been “explained” to be the following:

(i) Though the impugned order was passed on 4th October, 2013, “*subsequent events in the life of the Directors of the Appellant-Company, namely Mr Mohit Sharma and Mr K. B. Sharma made it impossible for them to avail of their remedies under Section 37 of the Act, in a time-bound manner.*” Mr Mohit Sharma and Mr K. B. Sharma, it is asserted, were the only Directors of the appellant-Company, and the only persons responsible for its conduct and affairs.

(ii) The appellant filed Review Petition No 19/2015 which, as already noted hereinabove, was dismissed as withdrawn on 30th October, 2015. It is significant that nowhere, in the entire record of pleadings in the present petition, including CM 11185/2017, has any attempt been made, to explain the delay of over a year in filing Review Petition 19/2015. Apparently, the appellant is proceeding on the premise that the liberty granted, by the learned Single Judge, by his order dated 30th October, 2015 (extraced hereinabove), impliedly condoned the past delay in filing the Review Petition. This is surprising, given the fact that the appellant has rightly worked out the total delay, in filing the present appeal, as 3 years and 192 days, by deducting, from the total delay in filing the present appeal reckoned vis-a-

vis the date of passing of the impugned order, i.e. 4th October, 2013, only the period during which the Review Petition remained pending before this Court.

(iii) On 2nd November, 2015, Mr Mohit Sharma and Mr K. B. Sharma were convicted, under Section 138 of the Negotiable Instruments Act, 1881, and, *vide* order dated 17th November, 2015, sentenced to 6 months' imprisonment. The appeal, preferred thereagainst, by Mr Mohit Sharma and Mr K. B. Sharma, was dismissed, by the learned Additional Sessions Judge, on 28th March, 2016, on which date they were taken into custody.

(iv) Mr Mohit Sharma and Mr K. B. Sharma were released, from jail, only on 19th September, 2016.

(v) Even thereafter, Mr Mohit Sharma and Mr K. B. Sharma *“continued to remain embroiled in several other pending cases instituted against them ... wherein hearings took place at very short intervals”*.

(vii) Mr Mohit Sharma and Mr K. B. Sharma were again convicted, in two of the said “pending cases”, on 21st December, 2016, and sentenced, consequently, to 3 months' imprisonment, *vide* order dated 22nd December, 2016.

These, the appellant would contend, constitute “sufficient cause” to justify condonation, of the delay in filing the present appeal, and the entertainment, thereof, on merits.

12. This Court, on 28th April, 2017, issued notice only on the application filed by the appellant for condonation of delay (CM 11185/2017). Consequent thereupon, a response, to the said application, was filed by the respondent, in which, apart from pointing out that the delay in filing Review Petition 19/2015 remained unexplained, it was further submitted that, during the period in which the appellant had, by virtue of the litigations pending against it, and the orders passed thereon, been purportedly incapacitated from filing the present appeal, it had, in fact, been prosecuting other legal proceedings, viz. Execution Petition 289/2014, EFA (OS) 5/2015 and EFA (OS) 41/2015, with full vim and vigour. Orders passed, by this Court, in EFA (OS) 5/2015 and EFA (OS) 41/2015, on 6th April, 2015, and 5th November, 2015 respectively, have been filed, in support thereof, with the reply of the respondent. Mr Sanjeev Narula, learned Counsel for the respondent, has, additionally, during hearing, handed over, across the bar, the copy of an order, dated 21st April, 2015, in Ex P 289/2014, in all of which the appellant, before us, has been represented, and has prosecuted the proceedings. These proceedings, it may be noted, were also between the appellant and respondent, and were, in essence, cognate proceedings, to the one

before us. Significantly, the counter-affidavit also asserts that the order, dated 22nd December, 2016 *supra*, sentencing Mr Mohit Sharma and Mr K. B. Sharma to 3 months' imprisonment, stands suspended by this Court – a fact which, clearly, has been concealed by the appellant. To a pointed query, by us, in this regard, Mr. Darpan Wadhwa, learned Senior Counsel appearing for the appellant, clarifies that Mr Mohit Sharma and Mr K. B. Sharma remained in custody from 28th March, 2016 to 19th September, 2016.

13. We heard, at length, Mr. Darpan Wadhwa, learned Senior Counsel, for the appellant and Mr. Sanjeev Narula, learned counsel for the respondent. Both counsel essentially reiterated the contents of their respective pleadings in CM 11185/2017. Mr. Wadhwa further submitted that it would be a travesty of justice, if the impugned order, dated 4th October, 2013, were to be upheld, as the said order resulted in dismissal of the appellant's petition on the ground of non-payment of court fee in accordance with the Court Fees (Delhi Amendment) Act, 2012, which was itself struck down, by this Court, on 9th October, 2013. Mr. Wadhwa emphasises that it was for this reason that his client moved the learned Single Judge in review, and submitted that, in all fairness, the review petition ought to have been allowed, the very basis of the order dated 4th October, 2013, having ceased to exist, with the striking down of the Court Fees (Delhi Amendment) Act, 2012. Mr. Wadhwa also relies on the oft quoted

decision of M.P. Thakkar, J (speaking for B.C. Ray, J and himself) in *Collector, Land Acquisition vs Mst Katiji*, (1987) 2 SCC 107.

14. Our brief, in the present appeal, is limited, at this stage, to deciding whether the delay of 3 years and 192 days, in filing the appeal, ought to be condoned, or not. The question of proceeding further, to decide whether the impugned order, dated 4th October, 2013, ought, or ought not, to be sustained, would arise only if this preliminary issue is answered in favour of the appellant.

15. Not for nothing is the statute of limitation referred to as a statute of repose. Limitation, it is trite, does not eviscerate the right; it merely extinguishes the remedy. It serves to sheath the sword of Damocles and is, as such, imperative and unrelenting. Subject to the relaxations statutorily provided, periods of limitation cannot be ignored, thereby revitalising claims which have been put to sleep with the passage of time. Jurisprudentially, the concept of limitation “*is founded on public policy that an unlimited and perpetual threat of litigation leads to disorder and confusion and creates insecurity and uncertainty.*” [V. M. Salgaocar & Bros vs Board of Trustees of Court of Mormugao, (2005) 4 SCC 613]

16. As already noted hereinabove, the total delay on the part of the appellant, in preferring the present appeal, is 3 years and 192 days,

which stands candidly admitted, by the appellant itself, in the present Miscellaneous Petition, filed by it for condonation thereof. That this delay is exorbitant, goes without saying. There is no explanation proffered, whatsoever, for the delay in filing Review Petition 19/2015, which cannot be said to be condoned, expressly or by necessary implication, by the order, dated 30th October, 2015, passed by the learned Single Judge while allowing the withdrawal thereof. Even before us, no explanation for the said delay is forthcoming, Mr. Wadhwa limiting his submission, on the issue, to reiterating that, *de hors* the said delay, the Review Petition ought to have been allowed, in view of the striking down, by this Court, of the Court Fees (Delhi Amendment) Act, 2007. Needless to say, the argument does not even merit consideration, as the appellant, of its own will and volition, withdrew the Review Petition filed by it. At best, therefore, the allowance, to which the appellant may plead entitlement, could only be for the period during which the said Review Petition remained pending before this Court – which allowance stands granted, while computing the period of 3 years and 192 days. Even for the period after the withdrawal of the said Review Petition, the explanation, for the delay in approaching this court by means of the present appeal, is far from satisfying, given the fact, as rightly pointed out by Mr. Narula, that the appellant was, during the same period, defending the execution proceedings, both original as well as appellate, laid by the respondent, before this Court without any default. ***Mst Katiji (supra)***,

on which Mr. Wadhwa places reliance, essentially iterated the principle that greater latitude was available, to the Government, where the issue of limitation was concerned – which principle, itself, stands progressively diluted with the passage of time. The said decision cannot, therefore, be of any use to the appellant in the present case. We are constrained to observe, therefore, that there is no justification or explanation advanced, which could convince us that, in the interests of justice, the delay of 3 years and 192 days, on the appellant's part, deserves to be condoned.

17. Mr. Narula also impresses, on us, the fact that the appellant had, in his letter dated 9th December, 2009, admitted its liability, towards the respondent, of approximately ₹ 19 crores, and that the amount of ₹ 25,64,03,448.50, to which the learned Sole Arbitrator had held the respondent entitled, was worked out on the basis of this amount, by adding interest thereto. Mr. Narula, therefore, ventilates a grievance – which, we are convinced, is justifiable – that, despite the passage of over 5 years since the passing of the said award, the respondent is still to reap the fruits thereof.

18. In order to balance equities, therefore, we queried, of Mr. Wadhwa, whether his client would be willing to deposit the awarded amount in this court, so as to secure its liability qua the respondent. Mr. Wadhwa, however, candidly stated that he could not offer any

such concession and that, in fact, it was the financial incapacity of his client, to meet the said liability, that has resulted in his client having to suffer proceedings under Section 138 of the Negotiable Instruments Act, 1881, consequent upon the cheques offered by his client having been dishonoured.

In such a scenario, we are unable to help the appellant.

19. We, therefore, hold that no ground, whatsoever, justifying condonation of the inordinate delay of 3 years and 192 days, on the part of the appellant, in preferring the present appeal, is made out. CM 11185 of 2017, for condonation thereof, is, therefore, dismissed. Resultantly, the present appeal would also not survive for consideration, and is dismissed on the ground of delay, without returning any findings on the merits of the controversy between the parties.

20. There shall be no order as to costs.

C.HARI SHANKAR, J

ACTING CHIEF JUSTICE

MARCH 14, 2018

HJ