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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision : May 09, 2018

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FAO (OS) (COMM) 74/2018 & CM APPL. 16208-10/2018

UNION OF INDIA

..... Appellant

Through Mr. Ruchir Mishra, Adv. with
Mr. Mukesh Tiwari and
Mr. Abhishek Rana, Adv.

versus

**M/S NETHERLANDS INDIA COMMUNICATIONS
ENTERPRISES LTD.**

..... Respondent

Through Mr. D. Moitra, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

1. This is an appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (“the Commercial Courts Act”) read with Section 37 of the Arbitration and Conciliation Act 1996 (hereafter the “Act”). It challenges an order dated 01.03.2018 of the learned Single Judge dismissing the applicant’s application under Section 5 of the Limitation Act, 1963 (hereafter, “the subject application”) seeking condonation of delay of 2335 days in filing/re-filing of a petition under Section 34 of the Act.

2. Succinctly, the facts are that for a work relating to Radio Paging Service awarded to the respondent by the appellant (hereafter 'UOI') in May, 1995, a dispute arose between the parties, which was subject matter of arbitration proceedings. That resulted in passing of an arbitral award in June, 2011 (hereafter 'the arbitral award') by an arbitral tribunal. The UOI filed a petition under Section 34 of the Act objecting to the tribunal's award. The petition (filed on 15.09.2011), was returned with objections. Thereafter, it was re-filed on 19.11.2012, but was again returned with objections in November, 2012. It was thereafter that OMP(Comm) 101/2018 under Section 34 of the Act accompanied by the subject application seeking condonation of delay of 2335 days was filed. The subject application was dismissed by the impugned order. Aggrieved by this order dismissing its Section 34 application, the appellant has preferred the appeal in hand.

3. The subject application filed by the appellant-UOI proceeded on the premise that the petition initially filed on 15.09.2011, on being returned with objections, was re-filed after removing objections except for those documents, which were awaited from the department and certain delay occurred on account of a new provision/legislation requiring payment of court fees on the objections filed under Section 34 of the Act. It was further contended that the concerned nominated counsel did not act further and eventually, stopped appearing in the case. It was further averred that delay also occurred due to change of the

officer dealing with the case and the fact that UOI had also challenged the award and few other OMPs were pending in this Court, relating to similar subject matters. Thus, according to UOI, the present case continued to escape its attention till the receipt of the notice of execution/enforcement of the arbitral award. Immediately thereafter, the concerned officer contacted the nominated counsel, requesting him to challenge the arbitral award by filing the objection petition at the earliest (for the grounds urged in the petition earlier approved by the department) as the official records of the said earlier petition were being traced and were yet to be located. Based on these averments, the UOI sought condonation of delay of 2335 days in filing OMP No.101/2018, which was dismissed by the impugned order.

4. The appellant argues that after the passing of the award dated 17.06.2011, a petition was filed within the time prescribed for filing the objections under Section 34 of the Act. However, the record is unclear as to whether such a petition was an application (objection) as contemplated under Section 34 of the Act. This is also the case with respect to the appellant's submission regarding the purported re-filing of the petition in November, 2012. Neither the subject application nor any material in that regard appears to be on record. What is, however, clear from the UOI's averments in the subject application is that OMP (Comm) 101/2018, which has accompanied the subject application seeking condonation of delay, is a fresh petition and not the petition that was filed on 15.09.2011 or re-filed on

19.11.2012. This is clear from the UOI's averments in the subject application:

"4. Accordingly, the concerned officer got in touch with the counsel. The officer was informed about the above noted facts where upon the concerned officer requested the counsel to take up the case again and challenge the award dated 17.06.2011 by filing this objection petition at the earliest on the basis of the stand and statements made in the objection petition earlier approved by the department and reply filed in OMP No.738/2011 as the office records are being traced and are yet to be located. It is submitted that the earlier OMP was filed vide diary No.136840/2011 on 15.09.2011 within limitation period as prescribed under the Arbitration Act, however, as the records are yet to be traced, therefore, this OMP is being filed with prayer to condone delay in re-filing."

The foregoing facts leave no doubt that this is not a case of re-filing, but filing of a fresh petition under Section 34 of the Act. Furthermore, none of the rules for re-filing, whether applicable to appeals or the other proceedings under the original jurisdiction of this court, can help the appellant inasmuch as the rules in any case do not provide more than 30 days in aggregate for re-filing a petition. Therefore, the petition OMP(Comm) 101/2018 accompanying the subject application has to be treated to be a fresh filing and seen in context of the date of the receipt of the arbitral award by the appellant. Though the date of the receipt of the arbitral award by the appellant does not emerge from the record to ascertain the exact delay in filing the application/objections under Section 34 of the Act, yet, for the

purposes of the present appeal, the court takes it that the delay is of 2335 days as pleaded by the appellant UOI.

5. The provision for condoning delay in filing an application/objection under the Act is Section 34(3). The subject application has however come to be filed under Section 5 of the Limitation Act read with Section 151 CPC. In view of the specific provision and the scheme of the Act, the Limitation Act in this case would not be applicable. This aspect of the matter has been well considered by the Hon'ble Supreme Court in *Union of India v. Popular Construction*, (2001) 8 SCC 470 when it held as under :

“..... As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result”

6. It is thus clear that the subject application was not maintainable. Even if it is treated to be an application under Section 34(3) of the Act, we find that for an inordinate delay of more than 2335 days there is hardly any good explanation. Assuming that the petition originally filed on 15.09.2011 was a

validly filed under Section 34 of the Act, on its return on 16.09.2011, it had to be re-filed within 30 days. Its re-filing, is however said to have been only on 19.11.2012. The appellant's plea that in the meantime there was an amendment to the Court Fees Act and that called for affixation of higher court fee and for that the instructions were awaited by the counsel, is wholly devoid of any merit. In the said context, it is seen that the provisions of the Court Fees(Delhi Amendment) Act, 2012 came into effect only w.e.f. 01.08.2012 and therefore, the re-filing was much beyond the prescribed time. Even otherwise, the application mentions no date of receipt of the notice of the execution/enforcement of the arbitral award or the date on which the concerned officer of the appellant got in touch with the counsel and made enquiries relating to the petition initially filed or re-filed. In our considered opinion, the application was wholly devoid of any merit and the impugned order rightly dismissed it.

7. The court, for the foregoing reasons, is of opinion that there is no merit in the appeal which is therefore, dismissed. No costs.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

MAY 09, 2018

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