

\$~36

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 192/2018 and IA Nos. 6100/2018, 6101/2018, 6102/2018 & 6103/2018**

INDIA TOURISM DEVELOPMENT
CORPORATION LTD

..... Petitioner

Through: Mr Ujjawal K. Jha, Advocate.

versus

RAJIV KUMAR SAXENA

..... Respondent

Through: Mr Sanyat Lodha, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

04.05.2018

VIBHU BAKHRU, J

1. The petitioner (hereafter 'ITDC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 25.07.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of a sole arbitrator (hereafter 'the Arbitral Tribunal'). The impugned award was delivered in the context of the disputes that have arisen between the parties in relation to a contract (Work Order dated 19.02.2010) for supply of furniture for DDA Mega Housing Project, behind Pocket-D-6 and Pocket D-6, Vasant Kunj, New Delhi for Common Wealth Games (CWG), 2010 (Tender no.1) LIG Flats. The impugned award was delivered on 25.07.2017 partially accepting the claims raised by the

respondent.

2. The present petition was filed on 30.11.2017, which is beyond the period as specified under Section 34 (3) of the Act. The filing of the present petition would also be beyond a further period of thirty days from the expiry of the said period if the time is reckoned from the date of the award. However, ITDC claims that it received the said award “*on or about 01.08.2017*” and the present petition was filed on the 30th day after expiry of the period of three months as specified under Section 34 (3) of the Act. ITDC has also filed an application (I.A. No. 6101/2018) seeking condonation of the said delay in filing the petition. However, ITDC has not provided any evidence to substantiate its claim that it received the impugned award on 01.08.2017. Plainly, if ITDC had received the impugned award two days earlier – the possibility of which cannot be ruled out as ITDC has not indicated a specific date on which the impugned award was received – the present petition would not be maintainable in view of the express language of the proviso to Section 34(3) of the Act as explained by the Supreme Court in ***Union of India v. Popular Construction: (2001) 8 SCC 470.***

3. In terms of proviso to Section 34(3) of the Act, the court may entertain an application under Section 34 of the Act within a further period of thirty days from the expiry of three months of the receipt of the award if the court is satisfied that the applicant was prevented by sufficient cause from making the petition within the said period of three months. The petitioner has filed an application (IA No. 6101/2018) explaining that the impugned award was received on 01.08.2017 and the

concerned officers of ITDC had reviewed the entire file and thereafter taken the decision to accept the award on certain points but to challenge it partially. It is stated that, thereafter, the matter was entrusted to the counsel to challenge the award in accordance with law. The said application is bereft of any particulars; the application does not disclose as to when the concerned officers had taken the decision and when it was handed over to the counsel to file the petition. However, it is stated that the petition was prepared on 30.11.2017. It was, thereafter, sent for final approval to the concerned Legal Cell of ITDC to enable the same to be filed before this Court and the said process had taken some time. However, it is seen that the petition was filed for the first time on 30.11.2017, which was on the 30th day after expiry of the period of three months from the receipt of the impugned award. The petition was in a skeletal form. The petition was not paginated, it was neither accompanied by a list of dates nor supported by an attested affidavit. Only a memo of parties, petitions and applications were filed with unattested affidavits. No documents were filed along with the petition. The copy of the impugned award was also not filed along with the petition. Further, the petition was not accompanied by a Vaklatnama either. In this view, it is difficult to accept that what was filed before this Court could be considered as a petition under Section 34 of the Act.

4. In *Ashok Kumar Parmar v. B.D.C. Sankiila & Ors: 1995 RLR 85*, this Court had, in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967, observed as under:

“If the defects are of such character as would render a

plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit.”

5. The aforesaid view would also be applicable in case of a petition under Section 34 of the Act. In ***Delhi Development Authority v. Durga Construction Co: 2013 (139) DRJ 133***, a Division Bench of this Court had observed as under:

“..in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing.”

6. This Court is of the view that considering the defects as noticed above, what was filed in this Court on 30.11.2017 cannot be construed as an application/petition under section 34 of the Act. Therefore, the present petition is not only beyond the period of three months as specified under Section 34 (3) of the Act but also beyond the period of 30 days after the expiry of the three month period as specified under section 34(3) of the Act.

7. Even if it is assumed that the petition was filed within the further

period of thirty days from the expiry of the three months from receipt of the impugned award, this Court is not persuaded to accept that the petitioner was prevented from sufficient cause for filing the said petition. This is so because the explanation provided for the delay is wholly insufficient to establish the same. Merely stating that the concerned officers took time to consider whether to file the petition is plainly insufficient to establish that ITDC was prevented from filing the petition within time.

8. It is also interesting to note that even after the petition was filed, the defects were not cured. It was returned under objections on 01.12.2017 and was re-filed by the petitioner on 13.04.2018, that is, four-and-a-half (4-1/2) months after the petition had been returned as defective for curing the defects. The petition continued to have defects and was returned on three occasions thereafter – on 18.04.2018, 21.04.2018 and on 27.04.2018. It was finally re-filed on 01.05.2018 and was listed before this Court. It is, thus, seen that the time taken by ITDC to re-file the petition exceeded the time provided under Section 34 (3) of the Act for filing the petition.

9. ITDC has filed an application (IA No. 6103/2018) seeking condonation of delay in re-filing the said petition. The reasons cited by ITDC, in its application seeking condonation of the delay for re-filing, are set out below:

“4. That the matter was filed on 30.11.2017 and thereafter the mail was notified by the registry of the Hon'ble High Court pointing out that the petition was

without annexures. Since the annexures were in volume and it is very complex one thus the tracing of the file has taken time from the office of the respondent and the tracing of the file could be done in the second week of January 2018.

5. That thereafter the file was given to the clerk in the office of the Advocate for getting the documents typed but the court clerk after receiving the file kept the file in the office, which was mixed up with some other file and the counsel could not trace the file in the chamber.

6. That the mother of the Clerk of the counsel was sick and he went to his home town in Sultanpur, Uttar Pradesh to see his mother and there he also feel sick and due to this reason he could not returned and resumed office in the last week of January 2018. It was only thereafter, and upon enquiry made by the counsel that he made an earnest effort and locate the file. Thereafter, the counsel of the appellant immediately took necessary steps and called the Officer concerned Shri Afzal Ahmad, Senior Manager (Civil) since suspended, to remove the defects.

7. That Shri Afzal Ahmad was arrested by CBI in one of the matters and took time to have another officer to look into the file and also to sign the necessary documents and applications. Shri V.S. Antil, Dy General Manager has assumed the charge by Office Order dated 28.02.2018 and thereafter he was delegated the powers to sign the documents.”

10. It is interesting to read the aforesaid reasons indicated for explaining the delay in re-filing the petition. First the annexures went missing; once they were found, the file got mixed up with other files; thereafter, the clerk who could find the file took leave to look after his ailing mother; he also fell ill; and thereafter, the concerned officer was

suspended and arrested; and finally another officer, who could sign the documents, took charge on 28.02.2018 and the present petition was filed. There is no explanation as to why it took almost a month and a half to re-file the petition after 28.02.2018.

11. In *Delhi Development Authority v. Durga Construction Co* (*supra*), a Division Bench of this Court has held that this Court has the jurisdiction to condone the delay in re-filing a petition under Section 34 of the Act even if the cumulative period of delay (in filing and re-filing) exceeds the period specified in section 34(3) of the Act and the proviso thereto; however, given the legislative intent, a liberal approach to condone such delay would not be warranted. In the present case, the explanation given for the inordinate delay in re-filing is sketchy, bereft of particulars and, further, there is no explanation for the delay after 28.02.2018. In the circumstances, the applications filed by ITDC for condonation of delay in filing and re-filing (IA Nos. 6101/2018 and 6103/2018) are rejected.

12. Having stated above, this Court also considers it apposite to examine the petition on merits as well.

13. Mr Jha, the learned counsel appearing for ITDC has restricted the challenge to the impugned award only to the award of ₹23,77,858/- in respect of the cost of material, which was lying outside the custody of ITDC. He submits that since the said material was not supplied to ITDC the respondent's claim in regard to the said material could not be allowed.

14. The contract awarded to ITDC relates to furniture that was required

to be supplied to furnish the flats required for hosting guests for the Common Wealth Games, 2010, which were being organized in New Delhi at the material time. For procuring the furniture required, ITDC issued a Notice Inviting Tenders (NIT) for “Supplying Furniture for DDA Mega Housing Project, Behind Pocket D-6 and Pocket – D6 Vasant Kunj, New Delhi (For Commonwealth Games 2010)”.

15. In terms of the aforesaid NIT, tenders were invited for LIG Flats, MIG Flats and HIG (referred to as Tender No.I, Tender No.II and Tender No.III respectively). The petitioner submitted its bids pursuant to the aforesaid NIT. The controversy involved in the present case relates to the tender for supply of furniture to LIG Flats. It was the respondent’s case that it had taken steps for ensuring that the supply was within the time specified and it was ready to make the supplies by the end of May, 2010. However, the furniture could not be installed as contracted for, as ITDC failed to provide the LIG Flats for the reason that the Delhi Development Authority (DDA) had failed to complete the construction of the said flats within the specified time.

16. The Arbitral Tribunal, after examining the material and evidence on record, accepted that the respondent was ready with the supplies and had tendered the same to ITDC. However, ITDC had defaulted in taking delivery as the flats, in which the furniture was to be installed, were not ready. The Arbitral Tribunal also found that the respondent had repeatedly requested ITDC to depute a team to carry out the pre-inspection. It had further informed ITDC on 14.06.2010 that containers/shipment for flats at Vasant Kunj had started arriving at site and had called upon the Manager,

ITDC (Civil) to allocate exact location of flats/towers/floor. But ITDC had failed to respond to the same and allocate any earmarked flats. The Arbitral Tribunal also found that there was shortage of storage space and, therefore, the respondent was constrained to hire warehousing facilities in the vicinity of the site. The Arbitral Tribunal also found that ITDC had asked the suppliers to hold supplies because DDA was not in a position to handover the flats. ITDC had also communicated with DDA requiring them to make arrangements to take over the items supplied as well as items that were lying with the vendors. Thereafter, ITDC had fixed a cut off date of 15.09.2010 and had not accepted any supplies after the said date. After examining the evidence, the Arbitral Tribunal concluded that although the respondent was ready with its supply and had offered the same, the furniture could not be installed on account of failure on the part of ITDC to accept the same.

17. The relevant extract of the impugned award indicating the findings/ conclusions of the Arbitral Tribunal is set out below:

“(i) The 12 containers of knockdown furniture dispatched from China from 01.08.2010 to 10.08.2010 could be received in Delhi from 23.08.2010 to 31.08.2010 due the closure of Mumbai Port from 07.08.2010 to 12.08.2010 on account of the collusion of vessels in Arabian Sea and due to the diversion of vessels to the other ports & then to reach Delhi from 23.08.2010 to 31.08.2010. Therefore it is established beyond doubt that this furniture kept in two warehouses at Nangal Dewat was received well before the cutoff date i.e. 15.09.2010 fixed by DDA unilaterally to receive the furniture to Delhi from vendors of ITDC (the Respondent): Even inspite of collusion of vessels in

Arabian Sea, closure of Mumbai Port from 07.08.2010 to 12.08.2010 & diversion of vessels to the other ports the Claimant brought the last consignment of knock down furniture to Delhi by 31.08.2010.

(ii) The details of expenditure being done by IET on storage of furniture and its watch & ward intimated by Claimant vide its letter dated 20.09.2010 was reasonable & justified. This expenditure being done by the Claimant as rent of the warehouses and its watch & ward was also intimated by ITDC to DDA through various letters. In these letters it was also clarified by ITDC to DDA that this expenditure being done is reasonable & justified. The importance document in this regard is letter no.ITDC/CWG/VK/2011/330 dated 13.07.2011 written to DDA in reply to their letter no.F9(29)/10/SE/CC-15/2842-46 dated 23.07.2011 (Exh. C-199 page 1059 point no.1 & page 1061 point no.3 Vol.VI) (ND-124 to ND-128).

(iii) Inspite of the efforts made by Respondent (ITDC) with DDA to provide space at site i.e. DDA Housing Project behind Pocket D-6 & D-6 Vasant Kunj New Delhi for storage of furniture kept in warehouses at Nangal Dewat and its installation in the finished LIG flats, DDA neither allowed ITDC to shift the furniture from the two warehouses at Nangal Dewat to the site nor intimated any justification/reasons for not allowing the furniture kept in warehouses at Nangal Dewat, to be brought to the Vasant Kunj site. This adamant attitude adopted by DDA, after knowing all the facts of the case and its implications was very unfortunate.

(iv) There is no letter from the Respondent (ITDC) to the Claimant intimating that the furniture kept in warehouses at Nangal Dewat cannot be accepted/allowed at Vasant Kunj site because the same was received after the cutoff date i.e. 15.09.2010 in fact the Respondent (ITDC) took up the matter with DDA vide several letters and established that the furniture

kept in warehouses at Nangal Dewat was received well before the cutoff date i.e. 15.09.2010.

(v) This chaos & unfortunate situation arose because that DDA miserably failed to provide 2709 flats at Vasant Kunj Complex which were to be given to ITDC to provide furniture through its vendors for Common Wealth Games 2010. In fact as per the initial promise/commitment made by DDA to ITDC, these 2709 flats (HIG – 1008 nos., MIG – 416 nos. & LIG – 1285 nos.) were to be handed to ITDC for installation of furniture from March, 2010 to May, 2010. But unfortunately up to Common Wealth Games 2010 the DDA could provide only 987 flats (MIG – 182, LIG – 805) to ITDC and that too also not in complete stage fit for installation of furniture. DDA could not hand over 1722 flats to ITDC even for storage of furniture whereas ITDC had placed work orders for supply & installation of furniture for all the 2709 flats in DDA Mega Housing Project behind D-6 & D-6 Vasant Kunj New Delhi.

(vi) In view of the facts & circumstances mentioned above the Claimant cannot be blamed and made a scape-goat to suffer the consequences of non-handling over of flats before Common Wealth Games, 2010 by DDA. IN fact in the entire correspondence from award of work orders to the Claimant till date there is not even a single reference from the Respondent i.e. ITDC or from DDA to ITDC where the Claimant has been blamed for late delivery of furniture kept in two warehouses at Nangal Dewat (C-34 & D-60) after the cutoff date 15.09.2010, and claiming exorbitant rental and watch & ward expenses from the Respondent (ITDC). In fact from the documents referred it is established that the furniture was supplied by the Claimant well before the cutoff date i.e. 15.09.2010 and the rental of the warehouses including security being demanded by the Claimant are reasonable & justified.

(vii) It is an admitted position of the Respondent that the details of furniture which is lying in the two warehouses at Nangal Dewat is as under:-

The details of Material not taken over by ITDC & lying outside the Vasant Kunj site i.e. at Nangal Dewat

(a) Material of M/s IET lying outside the Vasant Kunj site

S.no.	Items	Nos.	Amount
1.	Sofa cum bed (LIG)	73	Rs.7,82,560.00
2.	Dinning Chair (LIG)	772	Rs.20,14,920.00
3.	Dinning Chair (MIG)	134	Rs.2,85,420.00
4.	Dinning Chair (HIG)	186	Rs.22,31,580.00
	Dinning Chair (HIG Addl.)	594	
5.	Bed (HIG Addl.)	352	Rs.29,84,608.00
6.	Study Chair (HIG)	131	Rs.6,16,286.00
7.	Study Chair (HIG Addl.)	87	
	Total Cost	-	Rs.89,15,374.00

(b) Material of M/s IET brought on behalf of M/s CP & A and lying outside the Vasant Kunj site.

S.no.	Items	Nos.	Amount
1.	Bed (MIG)	900	Rs.67,34,700.00
2.	Bed Side Table (MIG)	450	Rs.13,91,850.00
3.	Bed (HIG)	900	Rs.76,31,100.00
4.	Bed Side Table (HIG)	450	Rs.15,77,250.00
	Total Cost	-	Rs.1,73,34,900.00

Therefore the total cost of material of IET lying outside Vasant Kunj site = Rs.2,62,50,274.00 (Rs.89,15,374.00 + Rs.1,73,34,900.00)”

18. In view of the conclusion that the respondent had offered the supplies but was constrained to store the same in two warehouses because ITDC was not in a position to receive the said supplies, the Arbitral Tribunal held that the furniture brought by the respondent in a knockdown condition from China upto 31.08.2010 and stored in the warehouse at Nangal Dewat was the property of ITDC. Para 109 of the impugned award indicating the above decision is set out below:-

“109. I therefore consider and decide that furniture brought by the Claimant in knockdown condition from China upto 31.08.2010 and stored in the warehouses at Nangal Dewat under its watch & ward is the property of the Respondent ITDC. Further, the Respondent is liable to pay the cost of the furniture stored at Nangal Dewat as per the terms and conditions of the work orders. The Respondent is also liable to pay the rent of the two warehouses along with the expenditure being done by the Claimant on its watch & ward and insurance against fire and theft of the material lying in the warehouses, at Nangal Dewat, Vasant Kunj, New Delhi. Further, the Respondent is also liable to pay the rent of the warehouses and the expenditure being done on watch & ward and insurance upto the date the material stored in the warehouses is taken over by the Respondent and shifted to the location to be decided by them.”

19. In view of the above conclusion, the Arbitral Tribunal accepted the

respondent's claim that the amount of work done, as indicated by ITDC, did not include the value of the furniture that was lying in the warehouses in the knockdown condition. The said items included 73 pieces of sofa cum bed and 772 dining chairs. The aggregate value of the said items was ₹27,97,480/-. However, the Arbitral Tribunal found that the respondent was only entitled to 85% of the said value as the remaining 15% would be payable only on instalment of the furniture at the request of ITDC. Accordingly, 85% of the aforesaid amount being ₹23,77,858/- was awarded in favour of the respondent.

20. As noticed above, the petitioner has limited its challenge to the impugned award only to the award of the aforesaid sum on the ground that it had not received the material. The said contention cannot be accepted, as the Arbitral Tribunal had held that the respondent had brought the material within the time and offered the same to ITDC. The said material remained with the respondent since ITDC was not in a position to accept the supplies. The respondent had also stated that it was holding the material for ITDC and had also made a claim for the cost of storing the said material. The Arbitral Tribunal had concluded that the material, although stored at the warehouses, belonged to ITDC.

21. The aforesaid findings are based on the cogent material and evidence produced before the Arbitral Tribunal and, thus, warrants no interference by this Court.

22. The decision of the Arbitral Tribunal to award a sum of ₹23,77,858/- in favour of the respondent calls for no interference under

Section 34 of the Act.

23. In view of the above, the petition is dismissed on the ground of delay as well as on merits. All pending applications are also dismissed.

MAY 04, 2018
pkv/MK

VIBHU BAKHRU, J

