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

\+ **O.M.P. (COMM) 193/2018 and IA Nos. 6104/2018, 6105/2018, 6106/2018 & 6107/2018**

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

O R D E R

% 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 03.08.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of a Sole Arbitrator. The impugned award was delivered in the context of the disputes that have arisen between the parties in relation to a contract (work order) for supply of furniture for DDA Mega Housing Project, Behind Pocket D-6 and Pocket D-6, Vasant Kunj, New Delhi (For Commonwealth Games 2010 (Tender no.III) (Work Order No.(GM Engg./CWG/VK-HIG/10) dated 19.02.2010). The impugned award was delivered on 03.08.2017, partially accepting the claims raised by the respondent.

2. ITDC claims that it had received the said award *"on or about 08.08.2017."* The petition was filed on 06.12.2017, which was beyond the time as prescribed under Section 34(3) of the Act. ITDC has not placed any evidence of having received the arbitral award on 08.08.2017. If the time is reckoned from the date of the award, the filing of the present petition is not only beyond the period of three months as prescribed under Section 34(3) of the Act but also beyond a further period of thirty days within which this Court can entertain the petition.

3. ITDC has filed the application seeking condonation of delay of 29 days in filing the aforesaid petition. The only explanation provided for the delay is that the entire file was voluminous and after it was reviewed, the concerned officer took a decision as to the points on which the impugned award was to be admitted and on the points on which it was to be challenged. It is claimed that the matter was, thereafter, entrusted to the counsel who had prepared the petition on 30.11.2017.

4. 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 it is satisfied that the applicant was prevented by sufficient cause from making the application within the period of three months as prescribed under Section 34(3) of the Act. In view of the explanations provided by the ITDC (in IA No. 6105/2018), it is not possible to accept that the ITDC was precluded by sufficient cause from filing the present petition under Section 34 of the Act within the time prescribed. A mere bald statement – that the concerned officers of ITDC took time to review the award as it was

voluminous – is clearly not persuasive for this Court to accept as a sufficient cause preventing the petitioner from filing the petition within time. Further, the application for condonation of delay is also bereft of any particulars. However, the matter does not end there as the petition, as filed, was defective.

5. The petition filed on 06.12.2017 was neither signed by the advocate nor supported by an attested affidavit. In addition, there were several other defects. Accordingly, the petition was returned on 07.12.2017. It was, thereafter, re- filed on 13.04.2018, that is, after a delay of over four months. The petition continued to have defects and was returned on four occasions thereafter – 18.04.2018, 21.04.2018, 27.04.2018 and 01.05.2018 – on account of certain defects. It was finally re-filed on 02.05.2018.

6. The explanations provided for the delay in re-filing, in the application seeking condonation of such delay, are fourfold. First, it is stated that the annexures were voluminous and, consequently, took time to trace the file which could be done only in the second week of January, 2018. Thus, ITDC took more than one month to trace the annexures after the petition was filed. Second, it is stated that the clerk at the office of the advocate had kept the file which got mixed up with some other file and the counsel could not trace the same in the chamber. Third, it is stated that the mother of the clerk of the counsel had become sick so he had to go Sultanpur (Uttar Pradesh) where he also fell sick and resumed only in the last week of January, 2018 and it is only, thereafter, efforts to locate the file were undertaken. Lastly, it is stated that the concerned officer of ITDC was suspended and was arrested by CBI and, therefore, was not available to

look into the file and to sign the necessary documents. The Deputy Manager took charge on 28.02.2018 and, therefore, the petition was re-filed, thereafter.

7. This explanation has also been provided in respect of three other petitions which have been filed by ITDC and listed today. As is noticed above, there is no explanation as to the delay in re-filing after 28.02.2018. The aforesaid explanation has been rejected by this court in order passed today in ***Indian Tourism Development Corporation Ltd. V. Rajiv Kumar Saxena: O.M.P. (Comm) 192/2018***. For the reasons stated therein, this Court is not persuaded to accept the aforesaid explanations.

8. In ***Delhi Development Authority v. Durga Construction Co.: 2013 (139) DRJ 133***, this Court had held that it has jurisdiction to condone the delay in re-filing even though it is re-filed after the expiry of the period of three months and a further period of thirty days; however, given the legislative intent, a liberal approach in condoning such delay could not be warranted. The legislative intent of fixing a time span of three months (and a further period of thirty days) would be frustrated if such inordinate delays are condoned. In the present case, the delay in re-filing itself exceeds the maximum period available for filing of the petition.

9. In ***Govt. of NCT of Delhi & Ors. v. YD Builders & Hotels Pvt. Ltd: (2017) 186 PLR 45***, this Court had also held that in terms of Rule 5(3) of Chapter I of Volume V of the Delhi High Court Rules, the filing beyond the period specified would be considered as a fresh filing. Although, this Rule has not been strictly applied as noticed by the Supreme Court in

Northern Railway v. M/s Pioneer Publicity Corp. Pvt. Ltd: (2017) 11 SCC 234, the observations made by the Court in this regard are relevant:-

> "…….. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing."

10. In the present case, the first re-filing was done, as defective, more than four months after the petition was returned and there was no extension granted for such re-filing. Even if it is accepted that the said Rule is not to be strictly applied, as noticed above, this Court is unable to countenance the delay of almost five months in re-filing the petition. In view of the above, the applications for condonation of delay in filing and re-filing (IA Nos. 6105/2018 & 6107/2018) are, accordingly, rejected.

11. Having stated above, this Court is also of the view that it would be apposite to consider the petitioner's challenge on merits as well. The learned counsel for the petitioner has restricted the challenge to the impugned award only on two grounds: (i) award of a sum of ₹3,14,788/- on account of furniture lying outside in two warehouses, and (ii) the award of ₹22,73,880/- on account of testing charges recovered from the respondent.

12. The disputes between the parties relate to the tender of supply of furniture for DDA Mega Housing Project, Behind Pocket D-6 and Pocket D-6, Vasant Kunj, New Delhi (For Commonwealth Games 2010). 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 HIG 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 and ITDC failed to provide the HIG Flats for the reason that the DDA had failed to complete the construction of the said flats within the specified time.

13. Insofar as the award of a sum of ₹3,14,786/- in respect of furniture lying in warehouses is concerned, ITDC's challenge to a similar award has been considered by this Court in OMP (COMM.) 192/2018 and rejected. The learned counsel appearing for the petitioner concurs that the order passed today in that case would be determinative of the issue in this matter as well. Thus, for the reasons stated in the order passed today in OMP (Comm) 192/2016, ITDC's challenge to the award in respect to furniture lying outside is rejected.

14. The next contention to be considered is whether the Arbitral Tribunal had erred in awarding ₹22,73,880/- in favour of the respondent, which was recovered as testing charges.

15. The learned counsel appearing for the petitioner submits that in view of the Clause 31 of the contract, the testing charges were to be borne by the respondent and, therefore, the award is contrary to the terms of the contract. This contention is also unmerited. The Arbitral Tribunal had found that although the respondent was obliged to bear the testing charges, however, such charges would necessarily pertain to testing done as per the

specification provided in the NIT. The Arbitral Tribunal found that the testing done by ITDC on finished furniture was not as per the specification under the agreement. The Tribunal found that the ITDC had not followed the prescribed procedure of sampling. Such samples were not taken in the presence of the affected parties (the respondent); in fact, ITDC had collected samples without informing the respondent. It was also not clear as to from which consignments the samples had been drawn. The Arbitral Tribunal also held that the testing done by ITDC from Sri Ram Institute of Industrial Research was technically incorrect. Having found that the testing done by ITDC was beyond the contractual terms, the question of permitting ITDC to retain such charges from the amounts due to the respondent does not arise.

16. This Court is not persuaded to accept that the Arbitral Tribunal's reasoning is flawed or the impugned award warrants any interference by this Court under Section 34 of the Act.

17. The petition is, accordingly, dismissed both on the ground of delay as well as on the ground of merits. All the pending applications are also disposed of.

VIBHU BAKHRU, J

MAY 04, 2018
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