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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 06th February, 2018

Pronounced on: 23th March, 2018

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O.M.P. (COMM) 35/2018 and IA Nos.1200, 1202, 1203/2018

UNION OF INDIA

..... Petitioner

Through : Mr.N Prashant Kumar Nair,
Advocate.

versus

NATIONAL PROJECT CONSTRUCTION CORP. LTD.

..... Respondent

Through : Mr.Sanjay Bhaumik, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is under Section 34 of the Arbitration and Conciliation Act 1996 challenging the award dated 11.05.2015. The brief facts as alleged by the petitioner are :

- a)* "Balance work of construction of 10 Nos. Major Bridges on Broad Gauge Railway Line across river of spans 9.15 Meter, 12.20 Meter and 30.50 Meter of PSC Girders on well foundations/open foundations with RCC abutments, Piers and other allied works like protection works from KM 72.400 to 113.750 in between Chakki Bank and Mukerian (including yards) in connection with doubling on Jalandhar Cant.-

Pathankot-Jammu Section" was awarded to the respondent for execution of the same subject to applicability of General Condition of Contract, 1999, Standard Specification of Northern Railway, 1987, Northern Railway Standard Schedule of Rates, 1996, The conditions regarding site data and specifications.

- b)* The agreement was executed between the parties on 20.11.2002 vide agreement bearing No.74-W/1/1/294/WA/JUC which were signed by both the parties, as such, the terms and conditions mentioned therein are binding upon both the parties. The cost of the work was Rs.10,35,94,810.74 including as per addendum cum corrigendum. The date of starting of the work is 18.12.2002 and the completion date is 19.11.2004. On 04.01.2005 the petitioner issued a letter and the contract was terminated.
- c)* On 30.05.2007 the respondent approached this Court by way of filing a petition u/Sec. 11(6) of Arbitration & Conciliation Act, 1996 vide petition No.112/2006 for the appointment of an Arbitrator. This Court passed an Order and had appointed Hon'ble Mr.Justice R.C. Chopra (Retd.) as the Sole Arbitrator to adjudicate the disputes between the parties and on 11.05.2015 the impugned award was passed by the Ld. Arbitrator, allowing claims No.2, 3, 11 & 12 of the respondent which award is under challenge for the grounds stated herein as the impugned award is in conflict with the fundamental policy of Indian law and is also patently illegal.

It is alleged the Ld. Arbitrator had completely ignored the settled principles of law, the statutes and most notably the Indian Evidence Act, Contract Act and the Civil Procedure including the principles therein, principles of common law, natural justice and also common sense and reason and most basic notions of morality and justice and is prima facie patently illegal and had passed the Award with a predetermined and biased mind set completely ignoring the facts, law and precedents of the Apex Court and High Courts in this regard.

- d)* On 19.05.2015 the impugned award dated 11.05.2015 was received by the petitioner so the Petitioner was supposed to file the objection petition within three months from the date of receiving of impugned award that is up to 17.08.2015. On 09.09.2015 the objection petition was filed through e-filing before this Court vide diary No.455341/15, along with an application under Section 34(3) read with Section 5 of Limitation Act for condoning the delay of 22 days by the petitioner.
- e)* On 13.10.2015 the objection was raised on the petition by the registry of this Court and the petition was received back by the previous railway advocate Sh. V.S.R. Krishna. In between due to change of pecuniary jurisdiction w.e.f. 23.10.2015, the present petition was supposed to be filed before the District & Sessions Judge, but the previous railway advocate Sh. V.S.R. Krishna kept the file with him

and did not file it before the competent Court of Law nor returned the case file to the concerned officer of the petitioner/Railway. It was only upon receipt of the complete case file from Sh. V.S.R. Krishna, Advocate, the case was assigned to the present counsel for filing objections which was allegedly filed without further loss of time. The present case comes under the category of re-filing before the competent Court of Law, i.e. before the District Courts.

2. Admittedly the award was passed on 11.05.2015 and was received by the petitioner on 19.05.2015. The three months, per Section 34(3) of the Act expired on 18.08.2015. On 09.09.2015 the petitioner filed an application under Section 34 alongwith an application for condonation of 23 days delay. However the petition was returned with objections on 13.10.2015. Various reminders were given on 16.03.2016, 19.04.2016, 05.05.2016 to the counsel for the petitioner and only thereafter on 14.12.2016 the file was obtained by the present counsel for the petitioner and he filed objections in the District Court with 438 days delay in refilling and total of 495 days delay in filing the objections after the award was received on 19.05.2015. The said objections were dismissed on 11.09.2016 due to pecuniary jurisdiction.

3. On 13.09.2017 the petitioner applied for certified copy which was received on 31.10.2017 and thereafter on 08.12.2017 he filed the petition again after delay of 37 days from the date of the receipt of certified copies.

4. The petition is hopelessly bared by time as even the filing on 08.12.2017 was delayed for 37 days from the receipt of the certified copies.

5. Though the learned counsel for the petitioner argued the delay be condoned and relied upon *State of Haryana vs. Chandra Mani and others* 1996 SCC (3) 132 which is as under:

“...when the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost of such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression “sufficient cause” should, therefore, be considered with pragmatism in justice-oriented approach every day’s delay. The factors which are peculiar to and characteristic of the functioning of the Governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process.”

6. However the circumstance on record show the gross-negligence on the part of the Union of India as there was delay not only in filing objections under Section 34 of the Act, but also in refiling the petition;

and yet again filing it before this Court with a delay of 37 days of dismissing of the petition by the District Court.

7. In *M/s. Gautam Associates vs. Food Corporation of India* (2010) 2 R.A.J. 595 (Delhi) it was held:

"28. Though, as aforesaid, the Original Side Rules are applicable to institution of petitions under Section 34 Arbitration Act, 1996, other rules in this regard may also be noticed. Prior to 1st December, 1988 the relevant rule with respect to other jurisdictions of this court was to be found in Rule 5 of Chapter 1 of Volume 5 of Delhi High Court Rules and was as under:-
—Amendment – the Deputy Registrar may return for amendment within a time to be fixed by him any memorandum of appeal for the reason specified in Order XLI, Rule 3 of the Code of Civil Procedure."

29. The aforesaid rule was amended w.e.f. 1st December, 1988 and post amendment is as under:-

—[5. Amendment—The Deputy Registrar Assistant Registrar, Incharge of the Filing counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order XLI, Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not taken back for amendment within the time allowed by the Deputy Registrar, Asstt. Registrar, in charge of the filing Counter under sub-rule (1), it shall be registered and

listed before the Court for its dismissal for non-prosecution.

(3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Asstt. Registrar in charge of the Filing Counter, under sub-rule (1) it shall be considered as fresh institution.

Note—The provisions contained in Rule 5(1), 5(2) and 5(3) shall mutatis mutandis apply to all matters, whether civil or criminal.]”

8. In *Union of India vs. Sunrise Enterprises, Panipat ILR (2012) II Delhi 763* the following was held:

“13. It appears that the Court has, in the matter of condonation of delay in re-filing the petitions under Section 34 of the Act, adopted a stricter scrutiny than it does while considering an application for condonation of delay filed under Section 5 of the Limitation Act. What weighs with the Court is the express legislative intent in Section 34 (3) of the Act, that the total permissible period within which an application can be permitted to be filed under Section 34 of the Act, is 90 days plus an additional 30 days. If the delay in re-filing the petition exceeds the above period, then the scrutiny becomes rigorous. Unless there is a satisfactory and credible explanation for the delay, the Court would be reluctant to condone it. Otherwise, the legislative object of not permitting the delay in the original filing beyond 30 days would get defeated.

14. In the present case, no attempt has been made to explain even a single day’s delay. A delay of 75 days becomes fatal when the

Petitioner does not care to offer any explanation whatsoever. The Court ought not to be taken for granted.”

9. In *M/s. Competent Placement Services through its director/partner vs. Delhi Transport Corporation through its chairman* 2011 (2) R.A.J. 347 (Delhi):

“10. In Gautam Associates vs. Food Corporation of India MANU/DE/1750/2009 this court took the view and held: “30. On a perusal of the aforesaid rules, immediately the distinction between the rules for re-filing on Original Side and in other jurisdictions comes to the fore. While upon delay in refiling/representation on the Original Side, the Registrar is to decline registration of the document if on the date of such representation it is found to be barred by time, in other jurisdictions such institution is to be merely treated as fresh institution. The reason appears to be that while Section 5 of Limitation Act, is not applicable to suits, as also to OMPs under Section 34, it is, with respect to other jurisdictions.”

11. In UOI v. Harbhagwan Harbhajan Lal & Arun Constructions Co. FAO (OS) No. 259/2010 we have already affirmed the decision rendered in Gautam Associates (Supra). Applying the principles laid down we find that when the first filing was done it was a proper filing in as much that the only objection raised by the Registry on 2nd September, 2008 was for obtaining the caveat clearance. The delay was thereafter in first obtaining the caveat clearance and then in filing an application for condonation of delay in refiling.

12. The Courts are liberal in condoning delay specially in refiling as the rigors of Section 5 of the Limitation Act do not apply to representation/refiling and surgery of the husband of the counsel would though be a sufficient cause, but the same would not permit the party condonation of an inordinate, unexplained delay. The affidavit is silent as regards the period beyond the six months required for the surgeries.”

10. Further in *North Municipal Corporation of Delhi vs. Harcharan Dass Gupta Const. Pvt. Ltd.* 2014 SCC Online Del 1590 the following was held:

“12. The question that arises is if a party does not file the petition in proper format and objections were raised regarding improper format of petition, and the objections were not removed within the given time by registry, but is done beyond the period of 30 days of raising the objections in such situation should this refiling be considered first filing? The answer lies in Part G of Delhi High Court Rules which relates to the proceedings in the High Court of Delhi and Chapter I, Part A (a) deals with Judicial business relating to presentation and reception of Appeals, Petitions etc. and Rule 5 reads as under:

5. Amendment—The Deputy Registrar Assistant Registrar, Incharge of the Filing counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and refiling within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the

reason specified in Order XLI, Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not taken back for amendment within the time allowed by the Deputy Registrar, Asstt. Registrar, in charge of the filing Counter under sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution. (3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Asstt. Registrar in charge of the Filing Counter, under subrule (1) it shall be considered as fresh institution. Note—The provisions contained in Rule 5(1), 5(2) and 5(3) shall mutatis mutandis apply to all matters, whether civil or criminal.]....

13. It thus empowers the Deputy Registrar, Assistant Registrar, Incharge of the Filing Counter to return the appeal, petition etc. with objections requiring refiling within a time not exceeding 7 days at a time and 30 days in the aggregate. Sub rule (3) specifically and categorically stipulates that if the refiling is done beyond the time allowed under Sub rule 1, it “Shall be considered as fresh institution”. The expression used is ‘Shall’

14. This court in Delhi Transco Ltd.’s case (supra) has clearly held that such refiling shall be considered first filing. Court has observed as under:

11. Moreover, there is no answer with the appellant to the reliance placed by the learned Single Judge on Rule 5, Chapter “I”, Part A of Vol.5 of High Court Rules and Orders, according to which, the objections should have been re-filed within a

time not exceeding 7 days at a time, and 30 days in aggregate to be fixed by the Deputy Registrar/Assistant Registrar, Incharge of Filing Counter. Rule 5 (3) read with the note also makes it abundantly clear that in case the petition is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, Incharge of Filing Counter under Sub-Rule 1, it shall be considered as a fresh institution.”

11. Similar are the facts of this case. Admittedly there was a delay of 22 days initially in filing petition under Section 34 of the Act. It was lying under objections for more than 400 days, hence was a fresh filing as per rules/law discussed above and lastly even the objections were filed in this Court after 37 days delay from the date of receipt of certified copy of the order of the learned District Court. The petitioner has tried to casually prove the cause of delay and no attempt is made to explain each day's delay on all occasions aforesaid.

12. As delay has not been properly explained either for filing or for refiling, the petition is hopelessly barred by time and is accordingly dismissed. Pending application is also dismissed. No order as to costs.

YOGESH KHANNA, J

MARCH 23, 2018

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