

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**COMMERCIAL NOTICE OF MOTION NO.647 OF 2017
WITH
COMMERCIAL NOTICE OF MOTION (L) NO.688 OF 2017
IN**

COMMERCIAL ARBITRATION PETITION (L) NO.454 OF 2017

M/s. Obulapuram Mining Company Pvt. Ltd.Applicant/Petitioner

Vs.

M/s. JSW Steel LimitedRespondent

Shri Mayank Jain a/w. Shri Pravin Singh i/b. Shri Ashok Singh for applicant/petitioner.

Shri Naushad Engineer a/w. Ms. Meenakshi Iyer and Ms. Rashmi Shah i/b. Advaya Legal for respondent.

**CORAM : K.R.SHRIRAM, J.
RESERVED ON : 19.03.2019
PRONOUNCED ON : 01.04.2019**

P.C.:

COMMERCIAL NOTICE OF MOTION NO.647 OF 2017

1 This is a notice of motion for condoning the delay in filing the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act). According to applicant, the delay is about 26 days, whereas it is respondent's case that the delay is in excess of 2 ½ years. After the notice of motion was heard and reserved for orders, parties also filed brief submissions.

2 Shri Jain, counsel for applicant submitted as under :

(a) Applicant became aware about the Arbitral Proceedings in the month of May, 2017 when it learnt from one of the ex-employee of

applicant about the present award. The Director of applicant immediately instructed the counsel to find out about the status of the Arbitral Proceeding. The counsel, who is based out of Delhi, on checking from the website of Bombay High Court could make out about the Arbitral Proceeding and wrote an e-mail to the learned Sole Arbitrator vide e-mail dated 19.05.2017 and sought inspection of record of Arbitral proceeding. The learned Arbitrator vide mail dated 19.05.2017 informed the counsel that he was on leave till 18.06.2017 and thereafter, the counsel visited the office of the learned Sole Arbitrator on 22.06.2017 and inspected the records of Arbitral Proceeding and received a signed copy of the Arbitration Award and subsequently sent the same to his client (i.e., G. Janardhana Reddy), which was received by him on next day. The office of applicant was non-functional/non-operational since 2009-10 due to suspension of mining operation by the Ministry of Environment of Forest, thereafter by the Government of Andhra Pradesh and under various orders of Hon'ble Supreme Court of India.

(b) Applicant is a private limited company and its both Directors - Shri Gali Janardhan Reddy and Shri B.V. Srinivasa Reddy were arrested on 05.11.2011. Shri Gali Janardhan Reddy was released on bail on 20.01.2015 and Shri B.S.Srinivasa Reddy was granted bail on 22.01.2015 with the condition that they shall not visit Bellary where their office is

situated. The reason for not being able to file the application within the statutory period after receipt of order by the counsel of applicant was that the office was non operational and the records were old and unavailable. Further, most of the employee of the company had already left the company and those who are there are insignificant for the purpose of this arbitration. This is also evident from the fact that the company did not file any returns during the said period. The Counsel for applicant received the impugned order on 22.06.2017 and appeal was filed on 23.10.2017. The appeal was filed after 3 months but within and condonable period of 30 days. Applicant submits that applicant have just and reasonable ground for condonation of delay of 30 days in filing the appeal.

3 In the affidavit in support, I have to note, there is nothing mentioned about the two Directors of applicant being in jail or their entire office was shut down. There is nothing in the affidavit in support to state that the counsel checked the website of Bombay High Court and then wrote a letter to the Sole Arbitrator. These are all statements made across the bar. If these were to be accepted, I would have expected applicant to mention all of this in the affidavit in support.

4 Shri Jain also stated that in the statement of claim filed, respondent have admitted that the Directors were in jail. This is incorrect because in the statement of claim there is only mention of one of the

Director being in jail. Still that will not excuse applicant from stating everything on oath.

5 Shri Jain submitted, relying on the judgment of the Apex Court in *Union of India V/s. Tecco Trichy Engineers & Contractors*¹ that the delivery of an arbitral award under sub-Section (5) of [Section 31](#) is not a matter of mere formality and it is a matter of substance. Shri Jain also submitted that the delivery of arbitral award to the party, to be effective, has to be received by the party, who had knowledge of the arbitral proceedings. In the present case, the arbitration award was collected by the counsel on 22.06.2017 and therefore, it cannot be deemed to have been served on the party concerned and requirement of Section 31(5) of the said Act has not been complied with.

6 Shri Jain also submitted that the copy of the award was received from the Arbitrator on 22.06.2017, the three months period under Section 34 (5) expired on 22.09.2017 and 30 days period would expire on 22.10.2017 and as 22.10.2017 was a Sunday, the petition was filed on 23.10.2017, which was the next working day. For this, counsel relied upon Section 5 of the Limitation Act. Shri Jain also relied upon the judgment of the Apex Court in *State of Himachal Pradesh & Ors. V/s. Himachal Techno Engineers & Ors.*² to submit that Section 12 of the Limitation Act

1. AIR 2005 SC 1832

2. 2010 (12) SCC 210

will apply to a proceeding under Section 34 and therefore, Sections 4 to 25 of the Limitation Act are also applicable.

7 Shri Engineer, counsel for respondent, in reply submitted, relying upon the judgment of the Hon'ble Delhi High Court in the case of ***A. G. Aerovision Electronics Private Limited and Ors. V/s. Tata Capital Financial Services Limited***³, that the word "delivery" used in Section 31(5) of the Act cannot be interpreted in a pedantic manner as to defeat the quintessential feature of the enactment, which is speedy and time bound disposal of arbitration related cases. Shri Engineer submitted that as per the said judgment, Section 3 of the said Act prescribes that any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address. Once the signed copy of the award was dispatched by the learned Arbitrator to the parties at their last known place of business/habitual residence/ mailing address, which can be demonstrated by providing a record of the attempt to deliver it, the same would be sufficient to draw an inference that they are deemed to have been served. Shri Engineer also relied upon the forwarding letter of the Arbitrator addressed to applicant with copy of the receipt issued by the postal authorities.

3. FFA (O.S.) (COMM) 7/2018 and (M. Appl.30358-59/2018 dated 27.08.2018

8 It was also submitted by Shri Engineer that even assuming that the award was received by applicant only on 22.06.2017, even then the petition is barred and not maintainable as it is beyond the period of three months and 30 days. Shri Engineer submitted, relying on the judgment of the Apex Court in *Assam Urban Water Supply and Sewerage Board V/s. Subash Projects and Marketing Limited*⁴, that the Court may entertain the application for setting aside the award within a further period of 30 days but not thereafter and Section 4 of the Limitation Act, 1963 is excluded when it comes to a petition filed under Section 34.

9 Shri Engineer submitted that under Section 4 of the Limitation Act, it is provided that where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens. When the Apex Court in *Assam Urban (supra)* has expressly held that the period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the 'period of limitation' or, in other words, 'prescribed period', Section 4 of the Limitation Act is not at all attracted. Shri Engineer also submitted, relying upon the judgment of the Division Bench of this Court in *H.M.P. Engineers Limited and Ors. V/s.*

4. 2012 (2) SCC 624

Ralies India Limited and Ors.⁵, that the provisions of Section 4 to 24 of the Limitation Act cannot apply to an application under Section 34(3) inasmuch as the provision of Section 34(3) is a complete and self contained code, which does not admit introduction or application of provisions of law contained in Sections 4 to 24 of the Limitation Act. That being so, Shri Engineer states that even if one accepts the dates given by the counsel for applicant and counsel for applicant admitted that 30 days period expired on 22.10.2017, the petition being lodged on 23.10.2017 is clearly time barred.

10 Shri Engineer also submitted, without prejudice to the aforesaid, no sufficient cause has been shown for condoning the delay. Shri Engineer submitted that applicant has been willfully evading the entire arbitral process. Despite being served with a petition filed under Section 9 of the Act, applicant failed to appear before the Court. Applicant also did not appear at the hearing of petition filed under Section 11 of the Act. Shri Engineer, relied upon the order dated 06.03.2012 passed by the learned Single Judge of this Court in Arbitration Petition No.963 of 2011 under Section 9 and order dated 05.04.2013 passed in Arbitration Application No.184 of 2012 (Section 11).

11 In rejoinder, Shri Jain, counsel for applicant submitted that even if one considers clause 10 of General Clauses Act, 22.10.2017, which

5. 2003 (4) Mh.L.J. 931

was a Sunday, has to be excluded. Shri Jain, in the written submissions relied upon the judgment of the Delhi High Court in *Union of India (UOI) V/s. Microwave Communication Limited*⁶ to submit that the period during which the Court is closed shall be excluded while calculating the period of 30 days.

12 The Award is admittedly dated 09.05.2014. On 15.5.2014, learned Arbitrator Shri Justice F.I. Rebello (Retired) had sent by post the Award to applicant. There is a record of the attempt to deliver it since the learned Arbitrator had dispatched the Award to the registered office address of applicant which is admittedly the address of applicant even today. Applicant has specifically stated in paragraph 6 of the application that he had visited the office of the learned Arbitrator and inspected the arbitration records. Applicant has produced with the petition, photocopies of the unserved postal receipts and envelopes/packets that had been returned to the Arbitrator. These were of 25.06.2013. There is no photocopy of the envelope which contains the Award which had been returned to the learned Arbitrator. Therefore, considering Section 3(1)(b) of the Arbitration and Conciliation Act read with Section 27 of the General Clauses Act and Section 114 of the Evidence Act, there is a presumption that the Award has been served.

6. 2011 (1) Comp LJ 452 (Del)

13 In this regard, the decision of the Hon'ble Delhi High Court in the case of *A G Aerovision Electronics (Supra)* is required to be noted. The said judgment is on similar facts, viz., that the original respondent did not appear before the Tribunal after initially appearing and an ex parte Award was passed by the Arbitrator. Original respondent thereafter, filed a petition under Section 34 in which they alleged that they had not received signed copy of the Arbitral Award, as contemplated in Section 31(5) of the Act and, therefore, the timeline for filing an application had not even commenced. It was noted by the Court that the attempts had been made to serve, however, the envelopes were returned with the remarks "locked", "unclaimed" and "closed premises". In paragraph 24 the Hon'ble Delhi High Court, held :

"24. In a case like the present one, where an ex-parte award was published by the Arbitral Tribunal on conclusion of the arbitral proceedings, the only manner in which the signed copy of the same could have been delivered/served on the appellants, was through post/courier. For the purpose of service, Section 3 of the Act prescribes that any written communication is deemed to have been received if it is delivered to the addressee at the place of business/habitual residence/ mailing address. Once the signed copy of the award was dispatched by the learned Arbitrator to the parties at their last known place of business/habitual residence/ mailing address, which can be demonstrated by providing "a record of the attempt to deliver it", the same would be sufficient to draw an inference that they are deemed to have been served. It is not as if the Arbitral Tribunal was expected to physically serve/deliver the arbitral award on the appellants, particularly, when they elected to keep away from the arbitral proceedings, resulting in passing of an ex-parte award.

The Hon'ble Delhi High Court further held in paragraphs 26 and 27 as under :

26. In our view, if the submission made by learned counsel for the

appellants No.2 to 4 that till a signed copy of the arbitral award is delivered on a party, the limitation period prescribed under Section 34(3) of the Act of 1996 does not commence for making an application under Section 34(1) for setting aside the award, is accepted without looking at the fact situation in a given case, it will give a licence to dishonest litigants to adopt all kinds of devious tactics to evade receiving a signed copy of the award and then claiming that the same was not "delivered" and therefore, the period of limitation cannot commence for filing a petition under Section 34(3) of the Act. We find merit in the submission made by learned counsel for the respondent that if such a plea is accepted, then no beneficiary under an award would ever be able to reap its fruits by applying for its execution and enforcement.

27. A party in whose favour an award has been passed, cannot be divested of its precious rights on a dishonest plea taken by the opponent that he could not take recourse to Section 34(1) of the Act due to non-delivery of a signed copy of the award, when there is sufficient material on the record to demonstrate deliberate attempts to evade receipt of the same. One would be loath to give such a literal interpretation to the word, "delivery" used in Section 31(5) of the Act, as it would result in nullifying the limitation period prescribed under Section 34(3) of the Act and thereby frustrate the very object sought to be achieved by the enactment, whose *lieu motif* is expeditious disposal. The primary object of the said provision is to fast track the legal process and ensure that the parties desirous of filing objections against an arbitral award, move with alacrity to approach a judicial forum and not that they resort to deceitful means to evade service and then take a plea of non-delivery of a signed copy of the award to urge that the period of limitation prescribed under Section 34 of the Act for setting aside the award, had not commenced.

14 From a plain reading of the application, it is seen that the same is completely vague. It only states that in May 2017, applicant had learnt from an ex-employee that an Award had been passed. If applicant did not know about the Award, then it would have never known (a) who the Claimant was; (b) who the Arbitrator was; (c) in which State proceedings were conducted; or (d) in which High Court any proceedings were filed. On the contrary, petitioner's advocate has addressed an email to the Arbitrator dated 19.05.2017 in which the advocate has stated that "*On inspection and*

on authority of my client” it has been learnt that pursuant to the ex-parte arbitration proceedings an Award might have been passed Your Goodself.” That being so, even before writing to the Arbitrator, the advocate has inspected some record which obviously has to be the record of his own client and, therefore, it is clear that applicant had the Award even before May 2017. Lot is required to be said on the conduct of applicant right from beginning. Applicant has evaded appearing in the arbitration proceedings and has adopted dilatory tactics, as can be seen from the following :

(a) The order dated 14.11.2011 of this Court records that though served with the Section 9 petition, respondent (applicant herein) chose to remain absent.

(b) 06.03.2012 is the order of this Court in which this Court has expressly stated in paragraph 4 that “The Respondent one way or the other, avoiding service. The Petitioner has already published notice. There is no response till this date. The Respondent’s conduct and the situation so referred in the Petition as well as in all the Affidavits filed on record, shows that they are not responding even to the notices issued by the Court apart from private notice and/or demand made by the Petitioner from time to time.”

(c) On 05.04.2013 an order passed under Section 11 on which again respondent (applicant herein) though served did not appear.

(d) As can be seen from the affidavits of service/substituted service dated 03.08.2013, 24.02.2014, 10.03.2015, 27.03.2014 and 09.04.2014, respondent had repeatedly attempted to serve applicant and had effected substituted service as per the directions of the Tribunal.

15 Even in paragraph 7 of the application for condonation of delay, applicant has stated that they could not file the petition since record was old. If applicant's case is to be believed, then they would not have record of these proceedings. However, clearly, a record is available which they have characterized as being old. It also belies their case that they were unaware of the arbitral proceedings. It is also imperative to note that the address at which the Award was served is the same address mentioned even in the present application. It is not as if there is any change of address. Clearly, applicant has adopted dilatory tactics inasmuch as even though the present petition itself had been filed on 23.10.2017, office objections had not been removed till 13.03.2018 and the petition was served on respondent only on 18.02.2019, i.e, after nearly 18 months of receipt of the Award. Therefore, from a conspectus of all the facts, it is clear that :

(a) The Arbitrator had posted the Award at the registered office of applicant;

(b) Registered office of applicant is yet the same;

(c) It is applicant's case that most of the employees had left. Nowhere it is stated that the entire office was shut down;

(d) Clearly, some employees/ex-employees were aware of the proceedings who informed the Director;

(e) The present advocates had taken inspection, presumably from their client's record before even writing to the Arbitrator. It is only because of this inspection being taken that the advocates knew, who the claimant was and who the Arbitrator was;

(f) There is nothing to show that the envelope delivering the Award has been returned to the Arbitrator. Even though petitioner took inspection of the record, they have produced some envelopes and there is no envelope showing that the award was returned to the Arbitrator. No such averments are there in their application.

16 In any way, in *A G Aerovision Electronics (Supra)*, the Hon'ble Delhi High Court has made it clear that if the Arbitrator has addressed and posted the Award at the last known address and even if the remark is "Door locked", it is deemed as a good service. That being so, applicant has been aware of the present proceedings and has been aware of the Award since May 2014 and, therefore, the delay is not 26 days but nearly 3 & ½ years or approximately 1250 days and hence, the present application deserves to be dismissed.

17 Even if I take that applicant's case is correct that it received the Award on 22.06.2017, even then the present petition is barred and not maintainable as it is beyond the period of 3 months and 30 days. Section 34(3) of the Arbitration and Conciliation Act sets out that the prescribed period for challenging an Arbitral Award shall be 3 months from the date on which the party had received the Arbitral Award. The proviso to Section 34(3) lays down that if the Court is satisfied that applicant was prevented by sufficient cause from making the application within the period of 3 months, it may entertain an application within a further period of

30 days, but not thereafter. The Hon'ble Supreme Court of India in the case of *Assam Urban Water Supply (Supra)* in paragraphs 6 to 8 has held that the prescribed period for challenging the Award is 3 months and the Court may entertain an application for setting aside the Award within a further period of 30 days, but not thereafter and accordingly, Section 5 of the Limitation Act is excluded when it comes to Section 34 petitions.

18 Applicant has stated that it received the Award on 22.06.2017. That being so, the period of 3 months would expire on 22.09.2017. The additional period of 30 days would expire on 22.10.2017. The petition was filed on 23.10.2017, which is clearly beyond the period of limitation. Applicant has contended that 22.10.2017 was Sunday and, therefore, the petition was filed on the very next day, i.e., 23.10.2017. In this regard, the Hon'ble Supreme Court in the case of *Assam Urban Water Supply (Supra)* has held that Section 4 of the Limitation Act would not be applicable to the said period of 30 days beyond 3 months. This is because Section 4 of the Limitation Act lays down that “*where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted on the day when the court reopens*”. The Hon'ble Supreme Court held that the period of limitation or the “prescribed period” under Section 34 of the Act is the period of 3 months. The Hon'ble Supreme Court held in paragraph 14 that “...*The period of 30 days beyond*

three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the “period of limitation” or, in other words, the “prescribed period”, in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case.”

That being so, even in the facts of the present case, 22.10.2017 is not part of the prescribed period of limitation, i.e., 3 months’ period, but 22.10.2017 is within 30 days period after the prescribed period and hence, as held by the Hon’ble Supreme Court, the benefits of Section 4 of the Limitation Act would not be applicable.

19 Shri Jain sought to rely on Section 10 of the General Clauses Act. He submitted that Section 10 also is *para materia* with Section 4 of the Limitation Act and it also contemplates that where the “prescribed period falls on a holiday”, the application could be filed on the next day. By parity of reasoning, even Section 10 of the General Clauses Act cannot assist applicant and the judgment of the Hon’ble Supreme Court would squarely apply and, therefore, the present petition is barred under Section 34(3) of the Act. Even a Division Bench of this Court in the case of *H.M.P Engineers Ltd. (Supra)* has held in paragraphs 10 to 12, that the provisions of Sections 4 to 24 of the Limitation Act cannot apply to an application under Section 34(3) as Section 34(3) is a complete and self-contained code, which does

not admit introduction or application of provisions of law contained in Sections 4 to 24 of the Limitation Act. Paragraphs 10 to 12 of the said judgment read as under :

10. It is true that the decision of the Supreme Court relates to the applicability of Section 5 of the Limitation Act but the Court has pointed out that Section 34(1) itself provides that the recourse to a Court against an arbitral award can be made only by an application for setting aside such an award in accordance with Sub-section (2) and Sub-section (3). Any application filed beyond the period mentioned in Section 34, Sub-section (3) would not be an application in accordance with that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. It was observed that to hold that the Court would entertain an application to set aside an award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. The court has also considered the history and the scheme of the 1996 Act and came to the conclusion that the time limit prescribed under Section 34 to challenge the award is absolute and unextendable by court under Section 5 of the Limitation Act. The Court has also pointed out that by enacting Section 36 the Legislature has made a significant departure from the provisions of the Arbitration Act, 1940, inasmuch as consequent to the time expiring under Section 34 of the 1996 Act, the award becomes immediately enforceable without any further act of the court.

11. The Limitation Act, 1963 does not in terms prescribe any limitation for an application to set aside an award. Section 34 itself has prescribed the limitation in Sub-section (3), the limitation being a period of three months from the date on which the party making that application had received the arbitral award, or if a request has been made under Section 33, from the date on which such a request has been disposed of by the arbitral tribunal. Section 34(3) clearly provides that no application can be made after the expiry of three months. Proviso to Sub-section (3) enables the court to entertain such an application if satisfied that the applicant was prevented by sufficient cause from making the application, but provides that such an application can be entertained only within a further period of 30 days but not thereafter. If the view taken by the learned Judge is to be accepted it would render the words "but not thereafter" occurring in the proviso of Section 34(3) completely nugatory. The Legislature has provided in clear terms that after the period of 3 months and 30 days, the court has no power to condone the delay in the presentation of the application. In our view the provisions of Sections 4 to 24 of the Limitation Act, cannot apply to an application under Section 34(3) inasmuch as the provision of Section 34(3) is a complete and self contained code, which does not admit introduction or application of provisions of law contained in Sections 4 to 24 of the

Limitation Act and there is clear indication of the intention of the Legislature to exclude the provisions of Sections 4 to 24 of the Limitation Act.

12. In the light of the above discussion we are of the view that the learned single Judge was not right in holding that the provisions of Section 14 which provide for exclusion of the period are not excluded by the scheme of the 1996 Act. In Pushpa P. Mulchandani v. Admiral Radhakrishin Tahilani upon examination of the decisions in the filed Srikrishna, J. has clearly held that notwithstanding that the 1996 Act contains no specific words of exclusion, an examination of the scheme of the Act would suggest that the intention is to exclude the application of the provisions of Sections 4 to 24 of the Limitation Act. We are in respectful agreement with the view expressed in the case of Pushpa P. Mulchandani. We may also mention that though the decision in Popular Construction Company is rendered after the decision in Pushpa P. Mulchandani's case, the conclusions in Pushpa P. Mulchandani's case are fully supported by the decision in Popular Construction Company's case. It is impossible to subscribe to the view taken by the learned single Judge that the law laid down in Pushpa P. Mulchandani's case is no longer a good law in view of the decision in the case of Popular Construction Company.

That being so, the present petition is clearly barred under the provisions of Section 34(3) of the Act.

20 Applicant alongwith their written submissions relied upon and tendered the decision in *Union of India V/s. Microwave Communications Ltd. (Supra)*, which was not submitted at the time of arguments, to submit that Section 4 of the Limitation Act would apply to Section 34(3) of the Act including the extension of 30 days and therefore, the present petition is within time. It is accepted by applicant that they had received the Award on 22.06.2017 and that the 3 months and 30 days period lapsed on 22.10.2017. Admittedly, the petition has been filed on 23.10.2017. The said

judgment is not good law *inter alia* for the following reasons :

(a) During the course of arguments, respondent had relied on the decision of the Hon'ble Supreme Court in *Assam Urban Water Supply (Supra)*. The said judgment has categorically come to the conclusion that Section 4 of the Limitation Act would not apply to the 30 days period beyond the 3 months. That being so, the decision of the Hon'ble Delhi High Court that is sought to be relied on is contrary to the decision of the Hon'ble Supreme Court and is therefore, not good law. As per the law of precedent under Article 141 of the Constitution, this Court should follow the law laid down by the Supreme Court in preference to the Delhi High Court.

(b) The Hon'ble Delhi High Court has not considered the language of Section 4 of the Limitation Act. Section 4 expressly states that "Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens". As can be seen, what needs to be ascertained is what is the 'prescribed period'. It has been held by the Hon'ble Supreme Court in the *Assam Urban Water Supply (Supra)*, speaking through Lodha J., that the 'prescribed period' is 3 months. The Hon'ble Supreme Court has specifically held in paragraph 14 "*the period of 30 days mentioned in the proviso that follows sub-section(3) of Section 34 of the 1996 Act is not the period of Limitation and therefore not the prescribed period for the purpose of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the "period of limitation" or, in other words, the "prescribed period", in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case*". Therefore, the decision of the Hon'ble Delhi High Court is contrary to the language of Section 4 and contrary to the law laid down by the Supreme Court and is therefore, not good law.

(c) From a reading of the facts contained in paragraph 4 of the Hon'ble Delhi High Court's judgment rendered by a Division Bench, it is clear that the Single Judge of the Delhi High Court in the decision impugned before the Division Bench considered and accepted the ratio laid down by the Hon'ble Gauhati High Court in the *Assam Urban Water Supply (Supra)* which ultimately went to the Supreme Court in appeal and which has been relied upon by respondent hereinabove, i.e., the decision reported in (2012) 2 SCC 624. The Single Judge of the Delhi High Court had also relied on the decision of the Bombay High Court in *H.M.P. Engineers Ltd. (Supra)* also relied upon by respondent herein. The Division Bench of the Delhi High Court reversed the Single Judge's view and did not agree with the Hon'ble Bombay High Court and the Hon'ble Gauhati High Court's view. However, as stated above, the Gauhati High Court view has subsequently been held to be the correct view by the Hon'ble Supreme Court in the *Assam Water Case*. Therefore, the view of the Division Bench of the Delhi High Court is not good law.

21 Applicant has relied upon the decision of *State of Maharashtra V/s. Hindustan Construction*⁷ to contend that the judgment holds that the 'prescribed period' of limitation includes 3 months and the 30 days, and not only the 3 month period. Reliance on the said judgment is wholly misplaced, *inter alia*, for the following reasons :

(a) The judgment was not considering a case of the applicability of Section 4 of the Limitation Act to a petition under Section 34(3) at all. As set out in paragraph 2 of the judgment, the issue that was being considered was "*whether in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') from an order refusing to set aside the award, an amendment in the memorandum of appeal to raise additional/new grounds can be permitted*". There is no submission and/or discussion and/or finding as to what constitutes the period of

7. (2010) 4 SCC 518

limitation/prescribed period under Section 34(3) of the Act.

(b) Applicant's reliance is on a mere line in the judgment in paragraph 29 which states that an application for setting aside an award has to be made within the time prescribed under sub-section (3), i.e., within three months and a further period of 30 days on sufficient cause being shown and not thereafter. Applicant is completely misreading the said judgment to somehow try and show that the Hon'ble Supreme Court has held the 'prescribed period' for the purposes of Section 34(3) to include the 30 day period as well. The Hon'ble Supreme Court, however, did not render any such finding in paragraph 29. The Court merely stated the period within which an application for setting aside an arbitral award can be filed, without ruling, expressly or impliedly, that 'prescribed period' includes the 30-day period.

(c) The said judgment in the case of *State of Maharashtra (Supra)* was considered by the Hon'ble Supreme Court in the case of *Assam Urban Water Supply (Supra)*. Therefore, after even considering the said judgment in *State of Maharashtra (Supra)*, the Supreme Court in *Assam Urban Water Supply (Supra)* has held that Section 4 of the Limitation Act does not apply to the 30 days extension period. That being so, reliance on the judgment in the case of *State of Maharashtra (Supra)* is wholly misplaced.

22 Applicant in the written submissions has also relied on the judgment of the Supreme Court in *State of Himachal Pradesh (Supra)*. It is contended by applicant that in view of the said judgment, Sections 4 to 24 of the Limitation Act would apply to Section 34(3). As set out earlier, the judgment lays down the 3 months limitation period is not to be counted as 90 days but is to be counted as 3 months. The judgment further in paragraph 12 only sets out that the applicability of Section 12 of the

Limitation Act would not be excluded qua Section 34 petitions. The judgment does not lay down anywhere that Sections 4 to 24 of the Limitation Act would apply. As more particularly stated earlier, even considering Section 12 of the Limitation Act, the period of limitation of 3 months expired on 22.09.2017 and the 30 day extension expired on 22.10.2017. Therefore, even considering Section 12 of the Limitation Act, the petition is time barred. Therefore, the said judgment is wholly irrelevant and does not assist applicant's case.

23 Shri Jain has also sought to rely on the decision of the Hon'ble Supreme Court in the case of *Union of India V/s. Techo Trichy Engineers (Supra)* to contend that the Arbitral Award must be served on the party. In the said judgment, the word "party" has been defined as the party to the Arbitration Agreement. This judgment does not assist petitioner's case at all. As set out above, the Award was posted to applicant on 15.5.2014 at the correct address. There is nothing to show that the said letter was not delivered. There is a legal presumption that it is delivered. Moreover, the said judgment has been considered by the Hon'ble Delhi High Court in the case of *A G Aerovision Electronics Pvt. Ltd. (Supra)*. As held by the Hon'ble Delhi High Court, the said provisions are not intended to assist a litigant from evading service and attempting to defeat the lawful Award that has been passed. It was held that "*Once the signed copy of the Award was*

dispatched by the learned Arbitrator to the parties at their last known place of business/habitual residence/mailing address, which can be demonstrated by providing “a record of the attempt to deliver it”, the same would be sufficient to draw an inference that they are deemed to have been served”.

24 In my view, moreover, no sufficient cause is shown for condoning the delay. As can be seen from what is set out hereinabove, applicant has willfully evaded the entire arbitral process. Despite being served with the petition filed under Section 9, applicant failed to appear before the Court. Applicant failed to appear at the hearing of petition filed under Section 11. Applicant did not appear in the arbitral proceedings, even though service had been effected. The Award was posted to the registered office of applicant, which continues to be the office of applicant even as on date. Applicant has only vaguely stated that they came to learn from an ex-employee that an Award had been passed against applicant. There are no particulars as to who is the employee, or how he came to learn or how that ex-employee also would have known of the arbitral proceedings. The application then merely states that the advocate addressed an email on 19.05.2017 and as set out above, the advocate himself has stated even before writing to the Arbitrator that he had taken inspection and was authorized by applicant to write to the Arbitrator. Clearly, applicant's advocate had not taken inspection of the Arbitrator's record at that point of

time nor had he taken inspection of respondent's record and, therefore, it is clear that the record was available with applicant themselves and the emails had all been ruse to try and overcome the gross delay.

25 It is further relevant to note that if genuinely applicant did not have the record and was unaware, then surely, applicant would have written at least one letter to respondent or their advocates, but no such letter has even been written, which clearly belies the conduct of a genuine and bona fide litigant. Further, only explanation as to why they could not file the petition within 90 days is that it was difficult to arrange the relevant papers and the Company and its Directors were facing a lot of litigations. No details whatsoever had been given and it is clear that applicant had merely taken advantage of their own misdeeds and their own wrongs as justification which cannot be permitted. No particulars have been given in the application and the same is devoid of merits. Argument of applicant that the Directors were arrested and that respondent knew about the same, as can be seen from the statement of claim, is not correct. In the statement of claim, it is only stated in paragraph 15 that respondent was aware that there were various proceedings initiated and one of the Directors had been arrested. In any case, party to the proceedings is the Company and not the individual/promoters/directors and, therefore, the fact that individuals may have been arrested is not of legal consequence to the merits of the present

petition.

26 The Hon'ble Supreme Court in the case of *D. Gopinath Pillai V/s. State of Kerala and Anr.*⁸ in paragraph 5 has clearly held that "When a mandatory provision is not complied with and when the delay is not properly, satisfactorily and convincingly explained, the Court cannot condone the delay only on the sympathetic ground."

27 Clearly, there are no reasons let alone convincing reasons and, therefore, no sufficient cause has been made out for condoning the delay. Notice of motion dismissed. Petition consequently also dismissed as time barred with costs in the sum of Rs.1,00,000/- to be paid within four weeks. Consequently, notice of motion (lodging) no.688 of 2017 also stands dismissed.

(K.R. SHRIRAM, J.)

8. (2007) 2 SCC 322