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

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Date of decision: 1st November, 2019

+ O.M.P. (COMM) 460/2019

SH. TARSEM JAIN

..... Petitioner

Through Mr. Biju Shankar, Advocate.

versus

BHARAT FORGE LIMITED & ANR.

..... Respondents

Through Mr. A.S. Chandhiok, Sr. Advocate
with Mr. Parag Khandhar, Mr. Ritesh
Kumar and Ms. Simran Kohli,
Advocates for R-1 and 2.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

I.A. 15026/2019 (Exemption)

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

I.A. 15025/2019 (Delay in filing)

1. This is an application under Section 34(3) of the Arbitration & Conciliation Act, 1996 ('Act') seeking condonation of delay of 28 days in filing the petition under Section 34 of the Act.

2. The petitioner has averred in the application that the Award dated 10.05.2019 was received by the petitioner on the same day. Prescribed period of limitation under Section 34(3) of the Act is three months which expired on 10.08.2019. The petition has been filed on 07.09.2019 vide Diary No. 955724 and thus there is a delay of 28 days in filing the petition.

3. It is further averred in the application that the delay was occasioned on account of reasons beyond the control of the applicant as due to intervening vacations of the Courts, the petitioner was prevented from availing opinion on the remedies available against the Award. After the vacations, the petitioner, who was suffering from frozen shoulder, spent time upto 29.07.2019 taking voluminous sets of the Award and the documents for opinion to the Advocate. The opinion was received on 13.08.2019 and thereafter, the petition was filed on 07.09.2019.

4. Learned counsel for the petitioner contends that the delay of 28 days is for reasons beyond the control of the petitioner and since the delay is only for a short period of 28 days, the same be condoned.

5. Mr. A.S. Chandhiok, learned Senior Advocate on behalf of the respondents has opposed the condonation of delay on the ground that the delay is not for a period of 28 days but far more and certainly beyond the limitation period of three months as well as the extended period of 30 days under the proviso to Section 34(3) of the Act. It is contended that this Court has no power to condone the delay of even 1 day beyond the outer limit of 120 days.

6. Learned senior counsel for the respondents also contends that the initial filing of the petition as on 07.09.2019 would be of no avail to the petitioner inasmuch as while the said petition was filed on the said date, but subsequently, the filing was abandoned. New counsel was thereafter engaged by the petitioner and a fresh petition was filed vide a separate Diary number. The said filing was done on 18.10.2019 vide filing No. 18092003.

7. I have heard the learned counsel for the petitioner and learned senior counsel for the respondents.

8. Under Section 34(3) of the Act, the limitation period for filing objections against the Award is three months. Under proviso to Section 34(3) of the Act, an extended period of 30 days is provided and if the petition is filed within this period, the Court has the discretion to condone the delay provided the petitioner is able to satisfy the Court that it was prevented by a sufficient cause from filing the petition within the three months period of limitation.

9. However, if the petition is filed even 1 day beyond the outer limit of 120 days, the Court has no discretion to condone the delay. This is now a settled law as held by the Apex Court and several Benches of this Court. In the case of ***Simplex Infrastructure Ltd. V. Union of India (UOI), 2019 (2) SCC 455***, the Apex Court has held as under:

“18. A plain reading of sub-section (3) along with the proviso to Section 34 of the 1996 Act, shows that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 could be made within three months and the period can only be extended for a further period of thirty days on showing sufficient cause and not thereafter. The use of the words “but not thereafter” in the proviso makes it clear that the extension cannot be beyond thirty days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent, there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section (3) read along with the proviso to Section 34 of the 1996 Act. The delay of 131 days cannot be condoned. To do so, as the High Court did, is to breach a clear statutory mandate.”

10. A Coordinate Bench of this Court in ***Ministry of Health and Family Welfare & Ors. Vs. Hosmac Projects Division of Hosmac India Pvt. Ltd.*** in OMP (COMM) 244/2019, decided on 12.09.2019 has held as under:

“15. Further, in P. Radha Bai v. Ashok Kumar, 2018 SCC OnLine SC 1670, the Supreme Court interpreted the phrase “but not thereafter” to hold that the intent of the legislature was to give finality to the Arbitral Award by fixing an outer boundary limit for challenging the award. It has been held that Proviso to Section 34 gives discretion to the Court to condone the delay for a sufficient cause, but such discretion cannot be extended beyond the period of thirty days. This is evident from the following observations of the Court:—

“39. 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.”

16. Further, in Simplex Infrastructure Ltd. v. Union of India, (2019) 2 SCC 455, the Supreme Court further clarified that the statutory limit to challenge the arbitral award has to be strictly adhered to and has held that administrative difficulties would not be a reason to condone delay beyond statutory prescribed period,...

17. Keeping in view the aforesaid dicta of the Supreme Court dealing with the power of the Court while deciding

an application seeking condonation of delay, I now proceed to examine, whether there is a delay in presenting the present petition beyond the period prescribed under Section 34(3) of the Act i.e. period of 3 months and 30 days. The arbitral award was pronounced on 20th November 2018 whereby learned sole Arbitrator passed an award in favour of the Respondent and directed the Petitioner to pay a sum of Rs. 22,05,09,651/- and further awarded a sum of Rs. 25,00,000/- towards arbitration cost incurred by the Respondent. Since there was a computation error, which resulted in Respondent being granted higher amount, the Respondent preferred an application under Section 33 of the Act for rectification of mistake in calculation. The said application was allowed vide order dated 7th January 2009 and the awarded amount was reduced to Rs. 15,11,66,498/-. Concededly, Petitioners received the Corrigendum dated 7th January 2019 on 9th January 2019. As per the Petitioners, the period of limitation has to be calculated from 9th January 2019.”

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22. Let's test the period of limitation under both the scenarios. If the corrigendum was received on 7th January 2019, the period of limitation would commence from 8th January 2019 and the period of limitation calculated in terms of the aforesaid judgements would be as under:—

Date of disposal of application under Section 33	7.01.2019
Date to reckon the period of limitation	8.01.2019
Three months period from 7.01.2019 as per Section 34 Calculated in terms of judgment of Hon'ble Supreme Court in State of Himachal Pradesh v. Himachal Techno Engineers (2010) 12 SCC 210	i. 8.01.2019-7.02.2019 ii. 8.2.2019-7.03.2019 iii. 8.03.2019-7.04.2019
30 days after expiry of three months in terms of Section 34(3)	7.05.2019

calculated from 8.04.2019, end on-	
Date of filing the Petition	10.05.2019
DELAY	3 Days

23. Thus, in view of the above, the petition would be barred by a period of three days. In arguendo, if the contention of the Petitioner is accepted and 9th January 2019, the date of receipt of the corrigendum is considered to be the relevant date, even then the petition would be barred by time, which is evident from the following tabulation.

Date of receipt of corrigendum under Section 33	9.01.2019
Date to reckon the period of limitation	10.01.2019
Three months period from 7.01.2019 as per Section 34 Calculated in terms of judgment of Hon'ble Supreme Court in State of Himachal Pradesh v. Himachal Techno Engineers (2010) 12 SCC 210	i. 10.01.2019 - 9.02.2019 ii. 10.2.2019 - 9.03.2019 iii. 10.03.2019 - 9.04.2019
30 days after expiry of three months in terms of Section 34(3) calculated from 10.04.2019, end on-	9.05.2019
Date of filing the Petition	10.05.2019
DELAY	1 Day

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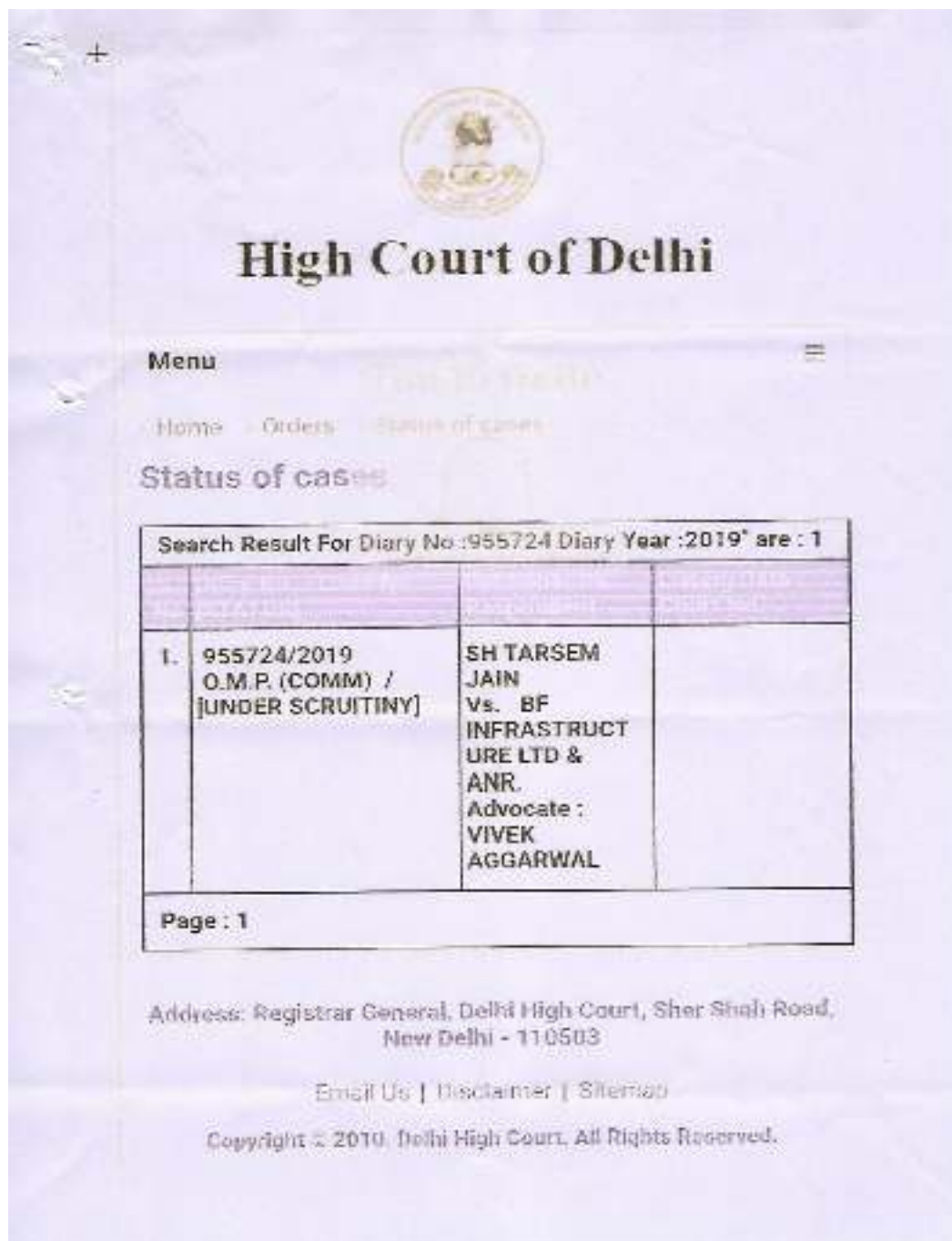
25. Petitioners contention that if 9th January 2019 is considered to be the relevant starting date for calculating the period of limitation, then the period would commence from 10th January 2019 and 3 months would expire on 10th April 2019, is misconceived and untenable. The date of receipt of the corrigendum i.e. 9th January 2019

would obviously be excluded. The starting date would be 10th January 2019. However, the corresponding date of the expiry of three months would be 9th April 2019 and not 10th April 2019, as contended by the Petitioner.....

26. Thus, even if the period of limitation is calculated from 9.01.2019, the petition would be barred by 1 day.....

27. In view of the aforesaid discussion and in view of the judgements of the Supreme Court which explicitly states that the Court does not have any power to condone the delay beyond 30 days, the petition is barred by limitation and accordingly the application is dismissed.”

11. The application for condonation of delay filed by the petitioner would have to be examined in the light of the aforesaid law. The first issue that has to be considered is whether the present petition was filed within the statutory limitation period of three months. The petitioner in his application for condonation of delay has stated that the petition was filed on 07.09.2019. Mr. Chandhiok, learned senior counsel for the respondent has handed over a copy of the defect sheet indicating the status of filing of the first petition on 07.09.2019 as well as the objections marked by the Registry. Amongst other objections, some of the vital objections raised by the Registry were that the petition, applications, memo of parties, index and Power of Attorney were neither signed by the Advocate nor the petitioner. The Vakalatnama was not signed either by the counsel or by the petitioner nor dated. Name of the Advocate and other details were not mentioned on the Vakalatnama. Signed Statement of Truth was also not filed. Copy of the defect sheet is scanned and placed below:



13. It is a settled law as held by various Benches of this Court that the petition which is filed without a Vakalatnama and a Statement of Truth and is not even signed would be no petition in the eyes of law and its filing has to be considered as 'non-est filing'.

14. In the case of ***SKS Power Generation (Chhattisgarh) Ltd. Vs. ISC Projects Private Ltd. in OMP (Comm) 132/2019 decided on 03.04.2019***, a Coordinate Bench of this Court has held as under:

“11. I have considered the submissions made by the learned counsels for the parties. It is not contested by the petitioner that the original petition filed on 14.01.2019 contained only 29 pages with blanks and with no signature of the petitioner or its authorized representative. There was no vakalatnama filed authorizing the advocate to file the said bunch of papers. I am intentionally using the words "bunch of papers" as what was filed was nothing more than that. The petition sought to impugn the Arbitral Award and the Additional Award without even annexing the same. Clearly what was filed was merely a 'bunch of papers' to somehow stop the period of limitation from running. The petitioner thereafter made no endeavour to refile the petition with expedition once the same had been returned back under objection on 15.01.2019. The petitioner took another two months to refile the petition only on 26.03.2019, albeit, still under defects. This filing was beyond a period of 30 days from three months of receipt of the Additional Award by the petitioner.

12. In my view, while considering the application seeking condonation of delay in refilling, the above is a very relevant criteria and consideration to be kept in mind. As held by this Court in Durga Construction Co. (supra), 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. This was reiterated by this Court in Sravanthi Infratech Pvt. Ltd. (supra), where the petition had been filed without documents, vakalatnama, affidavit or authority.”

15. Since the Award was received by the petitioner on 10.05.2019, the three months statutory period came to an end on 10.08.2019. Thus, the petition was not filed within the period of three months.

16. As regards the filing within the extended period of 30 days, while there is no doubt that the petition was filed within the 30 days period but as noted above, this was a 'non-est filing'. And thus the petitioner cannot seek condonation of delay on account of a non-est filing. In any case this petition is still lying under objections and has been abandoned. No benefit can be taken by the petitioner of this filing.

17. As regards the filing on 18.10.2019, the log-in information shows that the petition was filed vide a Diary number which was obviously different from the Diary number of the petition filed on 07.09.2019 as this was a fresh filing. While this petition, upon filing also had several defects as marked by the Registry on 19.10.2019, but the Court need not concern itself with the defects raised in respect of this petition, since the petition is filed beyond the outer limit of 120 days under Section 34(3) of the Act. Learned counsel for the petitioner has emphatically sought to argue that the first petition was filed on 07.09.2019 and therefore, the benefit of that filing should be given to the petitioner. In my view, there is absolutely no merit in the said contention. Learned counsel on being queried as to the status of the first petition could not dispute the fact that the said petition was never pursued and is still lying under objections with the Registry. At the cost of repetition, the status sheet clearly evidences this fact. Thus, it is a clear case where having filed the petition, the petitioner has abandoned the same and chose to file another petition with completely different set of pleadings and through a

new counsel and vide a different diary number. By no stretch of imagination, can the filing of this petition be called a re-filing and no benefit of an abandoned petition can be given to the petitioner. Since the delay in filing of this petition is of 41 days beyond the outer limit of 120 days, this Court has no power to exercise any discretion to condone the delay.

18. The petitioner's stand in the application seeking condonation of delay in filing and refiling is also without any basis for the simple reason that the present petition is, in fact, a fresh petition filed on 18.10.2019. A bare perusal of the Index, Memo of Parties, Statement of Truth and the Vakalatnama, would indicate that all the documents bear the date of 17.10.2019. None of the dates reflect any cutting or over-writing to even remotely indicate that this is the same petition which was filed on 07.09.2019 and thus as noted above, no benefit can be claimed by the petitioner of the filing done on 07.09.2019. In fact, this Court also takes notice of the fact that in the application seeking condonation of delay, the petitioner has not even disclosed to the Court that the petition filed on 07.09.2019 has been abandoned and the present petition is a fresh petition. A close perusal also indicates a very unfortunate state of affairs that while the affidavits are attested on 16.10.2019, the petition, the application and the Statement of Truth are dated 17.10.2019.

19. For all the aforesaid reasons, condonation of delay sought in the application cannot be granted, and the same is hereby dismissed.

O.M.P. (COMM) 460/2019 & I.A. 15027/2019 (Delay in re-filing)

20. In view of the dismissal of the application seeking condonation of delay, the present petition along with the accompanying application is dismissed.

JYOTI SINGH, J

NOVEMBER 01, 2019

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