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

+ O.M.P. (COMM) 476/2019 & IAs. 15756/2019, 15757/2019,
15758/2019 and 15759/2019

M/S BT & FC PRIVATE LIMITED Petitioner
Through: Mr. Shishir Pinaki and Mr. Jojo Jose,
Advs.

versus

M/S RADICO KHAITAN LIMITED Respondent
Through: Mr. B.L. Wali, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
% **27.11.2019**

IA. 15756/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

IA. No. 15758/2019 (for delay in re-filing)

1. The challenge in this petition is to an award dated March 2, 2016. It is a conceded position that this petition was initially filed on October 22, 2016. It appears that after filing of the petition on October 22, 2016, the Registry had raised certain objections, which were not pursued. The petition was taken for removing the objections only on September 2, 2019 by the present counsel pursuant to his appointment.

2. It is the stated case of the petitioner that learned Arbitrator had sent a soft copy of the award dated March 2, 2016 vide e-mail dated March 5, 2016. According to the learned counsel for the petitioner, the same was

unsigned. He states, the mail could only be accessed by the officer of the petitioner company somewhere in the month of June, 2016. According to the counsel, it is only on August 31, 2016 on receipt of the notice with regard to filing of the Execution Petition, that the petitioner received a photocopy of the signed copy of the Award and it is that date from which the limitation shall start running against the petitioner. Hence, he states, the petition having been filed on October 22, 2016, is within limitation. That part, it is his submission that the petition could not be pursued on behalf of the petitioner by the counsel, as on May 22, 2017, the then learned counsel for the petitioner got elevated as a Judge of a High Court. That apart, it is his submission that even the junior of the counsel was hospitalized w.e.f November, 2016 for certain illness. The attempts made by the petitioner to retrieve the file were unsuccessful. Later it transpired that the counsel has misplaced the same.

3. The present counsel was appointed only in the month of September, 2019, who after taking back the petition under objections, removed the same and re-filed it and got it listed. It is his submission that only delay is in re-filing the petition and the same should be condoned in the facts and the petition be heard on merit.

4. The relevant paragraphs of the application seeking condonation of re-filing the petition read as under:

“3. That the above mentioned matter was filed on 22.10.2016 through Adv. Mohit Kumar Shah and Mr. Mohit Kumar Shah was elevated as the judge of the Patna High court. Later the file was entrusted to one Adv. Srikanth Srinivas with the consent of the Petitioner and Petitioner was under the impression that the file is running properly. Later petitioner tried to contact Mr.

Srikant for getting the status of the case. However after a long time managing director of the company could not able to contact the Counsel and it was informed that the counsel was bed ridden for almost one and half year and during the transit of file to the office of Mr. Srikant from the office of Mr. Mohit Kumar Shah the defect sheet/check list and documents were lost from the file and he could not able to re-file the same.

4. Subsequently the Petitioner Company has taken back the file from Mr. Srikant and entrusted the file to Mr. Jojo Jose and said counsel has re-constructed the file and filed on 22.10.2019. However the Registry has raised certain objections and the same is cured and filing the Application before this Hon'ble court. These processes took some time causing a delay of 2 years 11 months and 14 days. It is submitted that the delay caused in re-filing the petition is neither willful nor deliberate on the part of the petitioner, however due to the aforementioned reasons.

5. That the Petitioner has a good case on merits with prima facie balance in its favour as well as strong chances of success and has every hope of succeeding before this Hon'ble Court and if the delay is not condoned as prayed for, the purpose of moving this Hon'ble Court would be rendered infructuous and the petitioner would be put to heavy and irreparable loss and injury”.

5. When the matter was listed on November 14, 2019, on a request made by the counsel for the petitioner to file an additional affidavit to explain the delay, leave was granted by this court. Paras 4 to 10 & 12 and 13 of the affidavit filed read as under:

“4. I engaged Mr. Mohit Shah; advocate for conducting the instant case before this Hon'ble Court and the Application in this regard was filed by him

before this Hon'ble Court on 22.10.2016 and in the e-filing system a Diary Number No. 277553/2016 was assigned in the matter.

5. I further depose that my counsel Mr. Mohit Shah was elevated as the Judge of the Hon'ble High Court of Judicature at Patna on 22.05.2017 and thereafter I lost my privilege communication with his lordship. Later, in the month of May, 2017 I was intimated that a junior of my former advocate Mr. Srikant Srinivas was entrusted with the case and he was following the matter.

6. That meanwhile Mr. Srikant Srinivas fell ill and he could not attend court or office since November 2016. He was diagnosed with Tuberculosis in January 2017 and had to be shifted to Bangalore for treatment at Dr. Malati Manipal Hospital, Jayanagar, Bangalore.

7. That during the treatment Mr. Srikant Srinivas encountered a minor relapse of the infection, due to which Mr. Srikant Srinivas had to undergo the medical procedure once again at Bangalore.

8. That in the month of June of 2017, Mr. Srikant Srinivas encountered severe pain in his shoulder due slip discs in my neck region, which rendered his right hand 80% immobile. I had to undergo disc removal surgery in order to address the pain in June 2017.

9. That due to my health condition Mr. Srikant Srinivas was bedridden for around Eighteen (18) months, during which Mr. Srikant Srinivas could not work or attend courts.

10. I further depose that during the period of his hospitalization Mr. Srikant Srinivas was neither in a position to give no-objection or to hand over the files and documents to the deponent.

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12. That due to his health condition Mr. Srikant Srinivas handed over the vakalatnama and the available documents to the new counsel for re-filing and pursuing the matter before this Hon'ble Court.

13. That after receiving the available case files, the petitioner collected all necessary documents and reconstructed the file and tried to refile the same. However it could not be materialized since the e-filing account of their previous counsel Mr. Mohit Shah could not be traced. Thereafter the re-constructed file was re-filed with a new Diary number 1026878/2019 before this Hon'ble Court causing a long delay of 2 years 11 months 14 days."

6. I may state here that on November 14, 2019, I permitted the learned counsel for the respondent to retrieve the arbitral record from the residence of the learned Arbitrator who has since expired. The arbitral record has been retrieved.

7. From the submissions made by the learned counsel for the petitioner, it transpires that the petitioner did receive a copy of the award dated March 2, 2016 by e-mail dated March 5, 2016, but it was only in the month of June, 2016 when the officer of the petitioner company resumed his duties that he could access the e-mail. It is his submission that the award being unsigned the same cannot be reckoned for the purpose of computing limitation. He also submitted that after accessing the e-mail / award sent by the learned Arbitrator, the petitioner did send a communication to the learned Arbitrator, who did not respond to same. It is his submission, that the petitioner received the photocopy of the signed award, pursuant to a notice received from the court on August 31, 2016 on the execution petition filed by the respondent on July 25, 2016.

8. I have perused the record of the learned Arbitrator and find that on February 23, 2016, learned Arbitrator had sent a communication to the parties to be present before him on March 2, 2016, when he intends to

pronounce the Award. The petitioner was not present and was not accordingly given a copy. Further, on March 5, 2016, learned Arbitrator had sent two attachments vide e-mail to btfc2010@rediffmail.com, which is the e-mail ID of the petitioner. The petitioner having received, assuming, an unsigned copy of the award, surely had the knowledge of passing of the award. The limitation period commences immediately on receipt. (Ref. ***P. Radha Bai and ors. V. P. Ashok Kumar and Ors. Civil appel No. 7710-7713/2013*** decided on September 16, 2018). Assuming for a moment, the award was unsigned and the receipt thereof cannot be treated as a receipt of a signed award and the petition having been filed on October 22, 2016 is within limitation, I find that there is no explanation with regard to delay in re-filing of the petition. The counsel for the petitioner got elevated on May 22, 2017, that is after almost 7 months of filing of the petition.

9. There is no explanation for this period. That apart, even the averments with regard to illness of the learned counsel does not inspire confidence as nothing precluded the petitioner to engage a new counsel and get the matter listed. The objections were finally removed on October 30, 2019 after almost three years from the date of initial filing of the petition on October 22, 2016. In view of the position of law as settled by this court in the case of ***DDA v. Durga Constructions and Company, ILR (2014) 1 Delhi 153*** the prayer of the petitioner for condoning the delay in re-filing the petition cannot be accepted and the same is dismissed. The relevant paragraphs of the said Judgment read as under:

“19. It follows from the above that once an application or an appeal has been filed within the time prescribed, the question of condoning any delay in re-filing would have to be considered by the Court in the context of the explanation

given for such delay. In absence of any specific statute that bars the jurisdiction of the Court in considering the question of delay in re-filing, it cannot be accepted that the courts are powerless to entertain an application where the delay in its re-filing crosses the time limit specified for filing the application.

*20. Although, the courts would have the jurisdiction to condone the delay, the approach in excising such jurisdiction cannot be liberal and the conduct of the applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch. The applicant would have to show that the delay was on account of reasons beyond the control of the applicant and could not be avoided despite all possible efforts by the applicant. The purpose of specifying an inelastic period of limitation under section 34(3) of the Act would also have to be borne in mind and the Courts would consider the question whether to condone the delay in re-filing in the context of the statute. A Division Bench of this High Court in *M/s. Competent Placement Services through its Director/Partner v. Delhi Transport Corporation through its Chairman*: 2011 (2) R.A.J. 347 (Del) has held as under:-*

9. In the light of these provisions and decisions rendered by the Hon'ble Supreme Court, it is thus clear that no petition under Section 34 of the A & C Act can be entertained after a period of three months plus a further period of 30 days, subject to showing sufficient cause, beyond which no institution is permissible. However, the rigors of condonation of delay in refiling are not as strict as condonation of delay of filing under Section 34(3). But that does not mean that a party can be permitted an indefinite and unexplainable period for refilling the petition.

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22. The abovementioned decision of The Executive Engineers

v. Shree Ram Construction (supra) has also been considered by this Court in Delhi Transco Ltd. v. Hythro Engineers Pvt. Ltd. (supra), wherein it has been explained as under:-

“9. The decision in Competent Placement Services (supra), in our view, does not say anything to the contrary from what has been observed by the Division Bench in Shree Ram Construction Co. (supra). All that has been observed by the same Division Bench on the same day, is that the rigors of condonation of delay in re-filing are not as strict as condonation of delay in filing under Section 34(3). At the same time, the Division Bench also observed "but that does not mean that a party can be permitted an indefinite and unexplainable period for re-filing the petition".

10. It is in Shree Ram Construction Co. (supra) that the Court actually examined as to what is the magnitude of delay in re-filing, which the Court may tolerate and permit to be condoned in a given case. Obviously, there cannot be any hard & fast rule in that respect, and the Court would have to examine each case on its own facts & merits and to take a call whether, or not, to condone the delay in re-filing the objection petition, when the initial filing of the petition is within the period of limitation. However, what is to be borne in mind by the Court is that the limitation period is limited by the Act to three months, which is extendable, at the most, by another thirty days, subject to sufficient cause being disclosed by the petitioner to explain the delay beyond the period of three months. Therefore, it cannot be that a petitioner by causing delay in re-filing of the objection petition, delays the re-filing to an extent which goes well beyond even the period of three months & thirty days from the date when the limitation for filing the objections begins to run. If the delay in re-filing is such as to go well and substantially beyond the period of three months and thirty days, the matter would require a

closer scrutiny and adoption of more stringent norms while considering the application for condonation of delay in refiling, and the Court would conduct a deeper scrutiny in the matter. The leniency shown and the liberal approach adopted, otherwise, by the Courts in matter of condonation of delay in other cases would, in such cases, not be adopted, as the adoption of such an approach by the Court would defeat the statutory scheme contained in the Act which prescribes an outer limit of time within which the objections could be preferred. It cannot be that what a petitioner is not entitled to do in the first instance, i.e. to file objection to an award beyond the period of three months & thirty days under any circumstance, he can be permitted to do merely because he may have filed the objections initially within the period of three months, or within a period of three months plus thirty days, and where the refiling takes place much after the expiry of the period of three months & thirty days and, that too, without any real justifiable cause or reason.

(underlining added)”

10. Consequently, the petition is dismissed being not maintainable. The Registry shall preserve the arbitral record as got retrieved from the residence of the learned Arbitrator.

IA. 15757/2019 (for stay) and 15759/2019 (for direction)

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 27, 2019/jg