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

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Date of Judgment: 19.02.2019

+ **FAO(OS) (COMM) 39/2019 & CM APPL. 7719-7721/2019**
UNION OF INDIA Appellant

Through: **Mr. Ashok Singh & Mr. Rakesh
Kumar, Advocates**

versus

M/S PARNIKA COMMERCIAL & ESTATES PVT LTD

..... Respondent

Through: **Mr. Bhupesh Narula, Advocate**

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') read with Section 13 of the Commercial Courts Act, 2015. Challenge in this appeal is to the order dated 27.09.2018 by which an application being IA 10262/2018 seeking condonation of 689 days delay in filing a petition under Section 34 of the Act has been rejected.
2. The necessary facts required to be noticed for disposal of this appeal are mentioned below.
3. The appellant vide notice dated 05.10.2005 floated a tender for the work of 'Construction of two new high-level island passenger platforms including two washable aprons in connection with development of New Delhi Station Yard, Phase-III & IV'. The work was awarded to the respondent vide acceptance letter dated 17.11.2005 at the accepted cost of

Rs.4,57,64,672/- (approx) (Rupees Four Crores Fifty-Seven Lacs Sixty-Four Thousand Six Hundred Seventy-two). The date of completion of the work was 14 months from the date of issuance of acceptance letter i.e. to be completed on or before 16.01.2007. The written contract was executed between the parties on 10.02.2006. The site was handed over to the respondent on 10.12.2005 and the respondent started mobilizing his resources at the site. However, the drawings were given to the respondent on 16.02.2006 and drawing of GA plan had been modified as per the site requirement. The respondent commenced the work, but the progress was slow. Notices regarding lack of resources deployed at site and for accelerating the progress of work were issued to the respondent vide letters dated 15.05.2006, 04.08.2006, 04.09.2006, 14.11.2006 and 09.12.2006. The respondent submitted a bar chart with regard to the completion of work in Phase-I by 30.03.2017, but the respondent failed to comply with his own timeline. The work progress was far behind the target given to the respondent due to non-deployment of adequate resources at site. Seven days' notices under clause 62 of GCC 1999 were issued to the respondent on 15.05.2006, 04.08.2006, 04.09.2006 and 02.01.2007 to deploy adequate resources for timely completion of work. However, the respondent failed to complete the construction work within the stipulated time period and thus the appellant was compelled to invoke provisions under Note no.15 below the Schedule of items, quantities and rates and impose a penalty of Rs.2,000/- per day w.e.f. 11.08.2006 on the respondent. In furtherance to issuance of the seven days' notice, a 48 hours' notice dated 09.01.2007 was also served upon the respondent to restart the work at the site. The respondent had acknowledged these

notices vide its letter dated 15.01.2007 and requested for granting extension of the DOC, but the period of such extension was not mentioned in its request. The respondent was asked to submit a fresh request for such extension along with completion schedule vide letter dated 27.01.2007. The respondent vide letter dated 09.02.2007 applied for granting extension upto 15.07.2007. The appellant granted the said extension under clause 17-B of GCC (General Conditions of Contract), without PVC (Price Variation Clause) and penalty of Rs.2,000/- per day for such delay. The respondent vide its letter dated 14.07.2007 requested for grant of further extension to the DOC upto 31.03.2008 as the respondent was carrying the work of platform shelters. The appellant granted the extension without penalty but with PVC under clause 17-A of GCC. Despite the extension, respondent failed to comply with the timelines, due to which, appellant imposed penalty of Rs.2,000/- per day w.e.f. 11.08.2006 and upto 31.03.2007 and deducted the said amount from the bills dated 19.12.2006 and 01.06.2007. Respondent failed to complete the work by 31.03.2008, resulting in the frustration of the contract. Respondent then filed a Claim Petition before the Arbitral Tribunal on 05.10.2013 and the appellant filed its reply to the claim dated 04.01.2014. The Arbitral Tribunal rendered the award on 11.08.2016. Feeling aggrieved, the appellant filed the objection under Section 34 of the Act, before the learned District Judge on 5.11.2016 for setting aside the impugned award. The Additional District Judge (ADJ) vide order dated 04.05.2018 observed that the commercial dispute involved was of more than Rs.1,00,00,000/- and hence, the ADJ lacked pecuniary jurisdiction. However, the ADJ further granted liberty to the appellant to

approach the appropriate forum under Section 34 of the Act. The appellant, thereafter, filed an OMP (COMM) 332/2018 before the learned Single Judge of this Court. He also filed an I.A.No.10262/2018 seeking condonation of 689 days delay along with the aforesaid OMP. The learned Single Judge vide impugned order dated 27.09.2018 dismissed the petition as being barred by Limitation, thus, giving rise to the present appeal. It was held as under:

“6. On being confronted with the fact that even if the petitioner is given full benefit under Section 14 of the Limitation Act, 1963, the petition would still be barred by the law of limitation and in view of proviso to sub-section 3 of Section 34, the delay being even beyond the period of thirty days as prescribed therein, cannot be condoned...”

4. Learned counsel appearing for the appellant submits that the objections to the award dated 11.08.2016 were filed within the statutory period allowed i.e. 3 months on 11.11.2016, after receipt of the award on 18.08.2016. Mr. Singh contends that objections were filed in the Court of District Judge but on account of lack of pecuniary jurisdiction and not being a commercial court, the objections were withdrawn on 04.05.2018 and filed before this court on 18.07.2018.
5. Learned counsel submits that the learned Single Judge has erred and did not take into consideration the provisions of Order VII Rule 10A of the Code of Civil Procedure and dismissed the application seeking condonation of delay.
6. Learned counsel next contends that the order of the Single Judge is contrary to the law and facts. The Single Judge lost track of the fact that the period of limitation prescribed under Section 34 (3) of the Act would

not be applicable to the facts of the present case, as in the present case, the objections were initially filed within the period of limitation and filing in this court would amount to re-filing and not a case of fresh filing and thus, Section 34(3) would not apply to the facts of the present case.

7. Mr. Narula, who enters appearance on an advance copy, has opposed this appeal. He submits that the objections were initially filed before the District Judge. In the reply filed by the respondent on 08.02.2018, at the earliest point of time an objection was raised with regard to the maintainability of the objections before the Additional District Judge, both on account of lack of pecuniary jurisdiction and on the ground that the dispute was a commercial dispute and could only have been filed under the Commercial Courts Act before a Commercial Court. He submits that once the appellant had been cautioned and put to notice, the appellant should have immediately taken remedial measures. He further submits that this objection also finds reflected in the order sheet of the Additional District Judge dated 19.04.2018 but even at that stage, the appellant did not choose to seek liberty for return of the objections to be filed in the appropriate court of jurisdiction and delayed the matter further upto 18.07.2018. He submits that the Single Judge has rightly rejected the application seeking condonation of delay as delay could not have been condoned beyond the period of three months and 30 days as per settled law. Reliance is placed on paragraphs 11-12 and 16 of ***Union of India vs. Popular Construction Co.*** reported at (2001) 8 SCC 470 to buttress his arguments. Relevant paragraphs are extracted herein under: -

“11. Thus, where the legislature prescribed a special limitation for the purpose of the appeal and the period

of limitation of 60 days was to be computed after taking the aid of Sections 4, 5 and 12 of the Limitation Act, the specific inclusion of these sections meant that to that extent only the provisions of the Limitation Act stood extended and the applicability of the other provisions, by necessary implication stood excluded [Patel Naranbhai Marghabhai v. Dhulabhai Galbabbhai, (1992) 4 SCC 264]

12. 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.

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16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award “in accordance with” sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an 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. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

“where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court”.

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to “proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow” (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act.”

8. We have heard learned counsel for the parties and given our thoughtful consideration to the matter. The sequence of events as narrated in paragraph 3 of the foregoing are not in dispute. The award was rendered on 11.08.2016 and received by the appellant on 18.08.2016. The objections were filed within 86 days, on 11.11.2016. The same were however withdrawn and liberty was sought from the Court of Additional District Judge to file an application under Section 34 before the appropriate Bench of this Court. Order dated 4.5.2018 reads as under:

“The specified value of the present commercial dispute is clearly beyond one crore rupees.

In terms of section 10 of the Act, the application under section 34, Arbitration and Conciliation Act, 1996 ought to have been filed before the Commercial Court

and not before this Court. This court is not a commercial court as defined in the Act.

At this stage, Sh. Sanjay Chawla submits that liberty be given to petitioner to file the application under section 34, Arbitration and Conciliation Act, 1996 before the appropriate Bench of Hon'ble Delhi High Court. The petitioner Union of India may file the application under section 34 Arbitration and Conciliation Act, 1996 afresh as per the law of the land.

This file be consigned to record room. Copy of this order be given dasti."

9. Reading of the aforesaid order would show that the objections filed were returned and liberty was sought to file an application under Section 34 of the Arbitration & Conciliation Act before the appropriate Bench of the Delhi High Court. Thus, placing reliance on Order VII Rule 10A would not come to the aid and rescue of the appellant and neither the two judgments sought to be relied upon by the appellant being ***Northern Railways vs. M/s. Pioneer Publicity Corp. Pvt. Ltd.***, reported at 2018(1) RAJ 395 (SC) would apply, as the present case is not the one of refiling, but of fresh filing.
10. The next question which would arise is whether provisions of Section 14 of the Limitation Act would apply to the facts of the present case. It has been submitted before us that time was spent before the Court of Additional District Judge and the said period should be deducted, moreover, when the objections were filed within the period of limitation, in that Court.
11. In our view, Section 14 of the Limitation Act would not come to the aid and rescue of the appellant as he has failed to make out a case that the

objections were filed with due diligence and in good faith. We say so, for the reason that on 08.02.2018 itself, the respondent in his reply had taken an objection with regard to the maintainability of the petition in the District Court. This is also reflected in the subsequent order dated 19.04.2018 passed by the Court of Ld. Additional District Judge. Finally, vide order dated 04.05.2018, the Ld. Additional District Judge observed that the value of the commercial dispute was beyond Rs.1 crore and thus, in terms of Section 10 of the Commercial Courts Act, 2015, the application under Section 34 of the Arbitration and Conciliation Act, 1996 ought to have been filed before the commercial court. Liberty was given to the appellant to file an application under Section 34 of the Act before the appropriate Bench of the Delhi High Court. Even thereafter, the appellant was not vigilant enough to file the objections and fresh objections were filed only on 18.07.2018. This was clearly even beyond the extended period of 120 days available under the Act. We also find that even in the application seeking condonation of delay, the explanation is far from satisfactory. The relevant paragraphs of the application are being reproduced below:

“5. That Shri Murari Prasad Singh, Additional District Judge, Tis Hazari Court, Delhi vide order dated 04.05.2018 was pleased to observe that the dispute in commercial and the amount involved is more than one crore and hence the objection ought to have been in the Commercial court observing that Ld. A.D.J. has no pecuniary Jurisdiction to entertain the petition.

6. That on 4.05.2018 the case was marked to the Counsel for the railways to draft the section-34 objection and file the same before the Hon’ble High

Court of Delhi but due to some reason the same was not drafted by the said counsel and the case was marked to the present counsel for drafting the objections and filing before the Hon'ble Delhi High Court. The draft of the objection under section-34 of the Act were prepared along with the application under section-14 of the limitation Act and send to the department for vetting and signing.

7. That on 18.07.2018 the objection under section 34 of the Arbitration and Conciliation Act 1996 were filed before the Hon'ble High court of Delhi.

8. That the petitioner was bonafidely pursuing the objection under section -34 of the Act before the Ld District Judge and hence there is the delay in filing the objection under section -34 of the act before the Hon'ble High Court."

12. In the case of ***M/s Simplex Infrastructure Ltd vs. Union of India*** reported at (2019) 2 SCC 455, the Supreme Court upholding the decision of ***Popular construction (supra)*** held that Section 14 of the Limitation Act, 1963 would apply to an application challenging an arbitral award under Section 34 of the 1996 Act. The Supreme Court further held as under:

"10... Section 14 of the Limitation Act deals with the "exclusion of time of proceeding bona fide" in a court without jurisdiction, subject to satisfaction of certain conditions. The question whether Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the 1996 Act has been answered by this Court in Consolidated Engineering Enterprises v Principal Secretary, Irrigation Department. This court observed thus:

"At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of

Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be found in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the

powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting aside an arbitral award, has to be made is not unusually long. Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well to remember that Section 14 of the Limitation Act does not provide for a fresh period of limitation but only provides for the exclusion of a certain period. Having regard to the legislative intent, it will have to be held that the provisions of Section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award.”

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13 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.”

13. The next question which arises for consideration is as to whether the delay can be condoned being beyond the period of 3 months and 30 days keeping in view that the objections were filed within the period of limitation, but not in the appropriate Court of jurisdiction. This question also, has to be answered in the negative, for the reason that the objections were filed before the Court of District Judge within 86 days and thereafter filed afresh on 18.07.2018 and even if the period of limitation is to be counted from 04.05.2018 when the order was passed by the Additional District Judge, it would cross the period of 120 days and as per the settled law in the case of ***Popular Construction (supra)*** period of limitation cannot be extended beyond 120 days. Accordingly, we find no infirmity in the order passed by the learned Single Judge.
14. The appeal is without any merit and the same is accordingly dismissed.

G.S. SISTANI, J

JYOTI SINGH, J

FEBRUARY 19, 2019

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