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

% **Date of decision: 25.09.2019**

\+ **O.M.P. (COMM) 401/2019**

RAJNISH GUPTA & ANR. ..... Petitioners

Through: Mr. Siddhant Nath, Mr. Bushra Waseem, Mr Rajnish, Advocates

versus

BRIJ MOHAN AGGARWAL ..... Respondent

Through:

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

I.A. No. 13424/2019 (Exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

I.A. No. 13425/2019 (delay application)

1. The present application has been filed seeking condonation of delay of 150 days in filing the present petition. The relevant paragaphs of the application are extracted hereunder:

> *"3. That it is relevant to mention herein that the Petitioners are in great financial trouble due to non-completion of certain projects and were unable to engage a counsel for filing the present petition.*
> *4. That more over the health of Petitioner No. 2 has also not been in a good possession which further refrained the Petitioners from approaching counsels for filing the present petition.*

4. That if the present application is not allowed, it will be a travesty of justice and will cause injustice to the petitioners as the petitioners has a very good case in their favour."

2. The only ground stated in the application for condonation is that the petitioners were in great financial crisis due to certain projects not being completed. They were unable to engage a counsel due to paucity of finances, apart from the ill-health of petitioner No. 2.

3. The award of the learned Arbitrator which is impugned in the present petition is dated 08.01.2019. It is not stated in the petition and/or in the application as to when the Award was received by the petitioners. Thus, counting the statutory period of 3 months from the date of the Award, the limitation expired on 08.04.2019. 30 days period available under proviso to Section 34(3) of Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') expired on 08.05.2019. The present petition has been filed on 12.09.2019 as is evident from the log-in report. Thus, there is a delay of 157 days in filing the petition.

4. While the application does not even explain any sufficient cause for condonation of delay, be that as it may, being a petition under Section 34 of the Act, the scope of condonation of delay is extremely rigid and inelastic. A plain reading of Sub-Section (3) along with proviso to Section 34 of the Arbitration & Conciliation Act, 1996 shows that the application for setting aside the Award can be filed within 3 months of the receipt of the Award by the party and this period can be extended upto a maximum period of 30 days on the party showing sufficient cause, but not thereafter. The words 'but not

thereafter' is indicative of the intent of the legislature that the Court has no power to condone the delay even for one day beyond the extended period of 30 days.

5. The Apex Court in the case of ***Union of India Vs. Popular Construction Company (2001) 8 SCC 470*** held as under:

> *"14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimize the supervisory role of courts in the arbitral process". This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:*
>
> > *5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

6. Further, the Apex Court in ***P. Radha Bai & Ors. vs. P. Ashok Kumar & Anr. (2018) SCC OnLine SC 1670*** has held as under:

> *"**35.** Section 34(3) deserves careful scrutiny and its characteristics must be highlighted:*
>
> > *(a) Section 34 is the only remedy for challenging an award passed under Part I of the Arbitration Act. Section 34(3) is a limitation provision, which is an inbuilt into the remedy provision. One does not have to look at the Limitation Act or any other provision for identifying the limitation period for challenging an Award passed under Part I of the Arbitration Act.*
> >
> > *(b) The time limit for commencement of limitation period is also provided in Section 34(3) i.e. the time from which a party making an application "had*

received the Arbitral Award" or disposal of a request under Section 33 for corrections and interpretation of the Award.

(c) Section 34(3) prohibits the filing of an application for setting aside of an Award after three months have elapsed from the date of receipt of Award or disposal of a request under Section 33. Section 34(3) uses the phrase "an application for setting aside may not be made after three months have elapsed". The phrase "may not be made" is from the UNCITRAL Model Law[1] *and has been understood to mean "cannot be made". The High Court of Singapore in ABC Co. Ltd. v. XYZ Co. Ltd, [2003] SGHC 107)*

> *"The starting point of this discussion must be the Model Law itself. On the aspect of time, Article 34(3) is brief. All it says is that the application may not be made after the lapse of three months from a specified date. <u>Although the words used are 'may not' these must be interpreted as 'cannot' as it is clear that the intention is to limit the time during which an award may be challenged</u>. This interpretation is supported by material relating to the discussions amongst the drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three months period as Article 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the court derives its jurisdiction to hear the application from the Article alone, the absence of such a provision means the court has not been conferred with the power to extend time".*

(d) The limitation provision in Section 34(3) also provides for condonation of delay. Unlike Section 5 of Limitation Act, the delay can only be condoned

for 30 days on showing sufficient cause. The crucial phrase "but not thereafter" reveals the legislative intent to fix an outer boundary period for challenging an Award.

(e) Once the time limit or extended time limit for challenging the arbitral award expires, the period for enforcing the award under Section 36 of the Arbitration Act commences. This is evident from the phrase "where the time for making an application to set aside the arbitral award under Section 34 has expired".[2] *There is an integral nexus between the period prescribed under Section 34(3) to challenge the Award and the commencement of the enforcement period under Section 36 to execute the Award.*

36. *If Section 17 of the Limitation Act were to be applied to determining the limitation period under Section 34(3), it would have the following consequences*

(a) In Section 34(3), the commencement period for computing limitation is the date of receipt of award or the date of disposal of request under Section 33 (i.e correction/additional award).

If Section 17 were to be applied for computing the limitation period under Section 34(3), the starting period of limitation would be the date of discovery of the alleged fraud or mistake. The starting point for limitation under Section 34(3) would be different from the Limitation Act.

(b) The proviso to Section 34(3) enables a Court to entertain an application to challenge an Award after the three months period is expired, but only within an additional period of thirty dates, "but not thereafter". The use of the phrase "but not thereafter" shows that the 120 days period is the outer boundary for challenging an Award. If Section 17 were to be applied, the outer boundary for challenging an Award could go beyond 120 days. The phrase "but not thereafter" would be rendered

redundant and otiose. This Court has consistently taken this view that the words "but not thereafter" in the proviso of Section 34(3) of the Arbitration Act are of a mandatory nature, and couched in negative terms, which leaves no room for doubt. (State of Himachal Pradesh v. Himachal Techno Engineers, (2010) 12 SCC 210, Assam Urban Water Supply & Sewerage Board v. Subash Projects & Marketing Ltd., (2012) 2 SCC 624 and Anilkumar Jinabhai Patel (D) through LRs v. Pravinchandra Jinabhai Patel, (2018) SCC OnLine SC 276)

37. *In our view, the aforesaid inconsistencies with the language of Section 34(3) of Arbitration Act tantamount to an "express exclusion" of Section 17 of Limitation Act.*

38. *This Court in Popular Construction Case (supra) at page 474 followed the same approach when it relied on the phrase "but not thereafter" to hold that Section 5 of Limitation Act was expressly excluded.*

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.*
(emphasis added)

40. *Further, the exclusion of Section 17 is also necessarily implied when one looks at the scheme and object of the Arbitration Act.*

41. *First, the purpose of Arbitration Act was to provide for a speedy dispute resolution process. The Statement of Objects and Reasons reveal that the legislative intent of enacting the Arbitration Act was to provide parties with an efficient alternative dispute resolution system which gives litigants an expedited resolution of disputes while reducing the burden on the courts. Article 34(3) reflects this intent when it defines the commencement and concluding period for challenging an Award. This Court in Popular Construction Case (supra) highlighted the importance of the fixed periods under the Arbitration Act. We may also add that the finality is a fundamental principle enshrined under the Arbitration Act and a definitive time limit for challenging an Award is necessary for ensuring finality. If Section 17 were to be applied, an Award can be challenged even after 120 days. This would defeat the Arbitration Act's objective of speedy resolution of disputes. The finality of award would also be in a limbo as a party can challenge an Award even after the 120 day period.*

42. *Second, extending Section 17 of Limitation Act to Section 34 would do violence to the scheme of the Arbitration Act. As discussed above, Section 36 enables a party to apply for enforcement of Award when the period for challenging an Award under S.34 has expired. However, if Section 17 were to be extended to Section 34, the determination of "time for making an application to set aside the arbitral award" in Section 36 will become uncertain and create confusion in the enforcement of Award. This runs counter to the scheme and object of the Arbitration Act.*

43. *Third, Section 34(3) reflects the principle of unbreakability. Dr. Peter Binder in International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 2nd Ed., observed:*

> *"An application for setting aside an award can only be made during the three months following the date on which the party making the application has*

received the award. Only if a party has made a request for correction or interpretation of the award under Art. 33 does the time limit of three months begin after the tribunal has disposed of the request. This exception from the three-month time limit was subject to criticism in the Working group due to fears that it could be used as a delaying tactics. However, although "an unbreakable time limit for applications for setting aside" was sought as being desirable for the sake of "certainty and expediency" the prevailing view was that the words ought to be retained "since they presented the reasonable consequence of article 33". <u>According to this "unbreakability" of time limit and true to the "certainty and expediency" of the arbitral awards, any grounds for setting aside the award that emerge after the three-month time limit has expired cannot be raised.</u>"

7. The Apex Court in the case of ***Simplex Infrastructure Ltd. vs. Union of India (2019) 2 SCC 455*** has clearly 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.”

8. This judgment has been subsequently followed by various Benches of this Court and petitions filed beyond the extended period of 30 days after the expiry of the statutory period of 3 months, have been dismissed.

9. This Court in the case of ***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, in the following terms:*

> *"9. Section 34 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 the grounds for setting aside an award. An application filed beyond the period mentioned in sub-section 3 of Section 34, would not be an application "in accordance with" that subsection. By virtue of Section 34(3), recourse to the court against an arbitral award cannot be beyond the period prescribed. Sub-section (3) of 5 Section 34, read with the proviso, makes it abundantly clear that the application for setting aside the award on one of the grounds mentioned in sub-section (2) will have to be made within a period of three months from the date on which the party making that application receives the arbitral award. The proviso allows this period to be further extended by another period of thirty days on sufficient cause being shown by the party for filing an application. The intent of the legislature is evinced by the use of the words "but not thereafter' in the proviso. These words make it abundantly clear that as far as the limitation for filing an application for setting aside an arbitral award is concerned, the statutory period prescribed is three months which is extendable by another period of upto thirty days (and no more) subject to the satisfaction of the court that sufficient reasons were provided for the delay.*
>
> *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.

20. Administrative difficulties would not be a valid reason to condone a delay above and beyond the. statutory prescribed period under Section 34 of the 1996 Act"

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) calculated from 8.04.2019, end on-	7.05.2019
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**

xxx xxx xxx

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."*

10. Reading of the above mentioned judgments makes it clear that this Court has no power to condone the delay beyond 120 days from the receipt of the Award by the party.

11. In view thereof the delay of 157 days in filing the present petition cannot be condoned.

12. The application is hereby dismissed.

O.M.P. (COMM) 401/2019 & I.A. No. 13423/2019 (Stay)

13. In view of the dismissal of the application for condonation of delay, the OMP along with the application for stay is hereby dismissed.

JYOTI SINGH, J

SEPTEMBER 25, 2019
pkb/rd/