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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 240/2019, CM APPL. 43050/2019, CM APPL.43051/2019 (exemptions), CM APPL. 43049/2019 (by the appellant seeking stay) & CM APPL. 43052/2019 (by the appellant seeking condonation of delay of 66 days in filing the present petition) & CM APPL. 43053/2019 (by the appellant seeking exemption from filing lengthy list of dates)**

**DIRECTOR CUM SECRETARY, DEPARTMENT
OF SOCIAL WELFARE**

..... Appellant

Through: Mr. Shadan Farasat, ASC with Ms.
Rudrakshi Deo, Mr. Zakir Hussain,
Mr. S.K. Pandey, Advocates.

versus

SARVESH SECURITY SERVICES PVT LTDRespondent

Through: None.

**CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON**

**ORDER
25.09.2019**

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1. This is an appeal filed by the Director-cum-Secretary, Department of Social Welfare, Government of NCT of Delhi, Delhi Gate, New Delhi – 110002, under Section 37(1)(C) of the Arbitration and Conciliation Act, 1966 read with Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 being aggrieved by the order of the learned Single Judge dated 08.05.2019,

whereby the petition filed by it under Section 34 of the Arbitration and Conciliation Act, 1966 (for short as “the Act”), was dismissed on the ground of limitation.

2. The present appeal has been filed with a delay of 66 days, which is sought to be explained as being on account of the change in counsel and the requirement of approvals at different levels of the appellant’s department, to engage a new counsel. It is stated that the new counsel was contacted for the first time in early August, 2019 and after exchange of instructions and drafts, the appeal was finalized and approved on 06.09.2019 and filed on 11.09.2019.

3. This appeal has also been filed under Section 13(1) of the Commercial Division and Commercial Appellate Division of the High Courts Act, 2015, (Commercial Courts Act, for short) which provides that an appeal can be preferred only within 60 days from the date of the judgment/order. Unlike Section 34, no separate period of limitation has been prescribed under Section 37 of the Act. Under Article 117 of the Schedule to the Limitation Act, 1963, a decree or order of the High Court can be appealed against within 30 days of the decree or order. However, the Commercial Courts Act provides for 60 days time to file an appeal. Going by the said timeline, this appeal ought to have been filed within 60 days reckoned from 08.05.2019 i.e. on or before 08.07.2019. However, the appeal has been filed on 11.09.2019, after expiry of additional 60 days. The delay can be condoned only for just and sufficient reasons, which we find in the present case, are woefully lacking. The sole explanation offered is that the delay has occurred due to a change in the counsel which is not enough to wish away the delay of 126 days reckoned from the date of passing the

impugned judgment, i.e., 08.05.2019 and 66 days if we exclude the permissible period of 60 days available to file an appeal.

4. Even on merits, we do not find any cause to interfere with the decision of the learned Single Judge. Before proceeding further, it may be noticed that the present appeal sets out the facts in great detail on the basis whereof the appellant had challenged the validity and legality of the Award dated 22.10.2018 and the findings returned in the impugned order dated 08.05.2019, which in our opinion, is beyond the scope of an appeal preferred under Section 37 wherein the Court is only required to consider as to whether the learned Single Judge had proceeded in terms of the Act while dealing with a petition under Section 34. The Court cannot act as the First Appellate Court to re-evaluate the evidence and re-determine issues either while dealing with a petition under Section 34 or an appeal under Section 37 of the Act. It is only where conclusions drawn by the learned Single Judge while disposing of a petition under Section 34 of the Act appear to be patently untenable and perverse, that interference under Section 37 would be justified.

5. In this background, it has to be seen as to whether the learned Single Judge has fallen into an error while refusing to entertain the petition filed by the appellant under Section 34 of the Act on the ground that it was barred by time. The Award was passed on 22.10.2018 in respect of certain disputes that had arisen between the parties in relation to a contract dated 30.09.2014, executed pursuant to a tender floated by the appellant. Section 34(3) of the Act prescribes that an appeal against an Award should be filed within 30 days from the date of receipt of the Arbitral Award. The learned Single Judge has noted that the appellant had received the Award on 22.10.2018

i.e., the very day when it was made and thus, the period of limitation would commence from 23.10.2018. Three months reckoned from 23.10.2018, would have elapsed on 22.01.2019. The extended period of one month available to the appellant provided that it was prevented by sufficient cause from moving an application within the period of three months, also expired on 21.02.2019.

6. It is the contention of Mr. Farasat, learned Additional Standing Counsel appearing for the appellant that the petition under Section 34 of the Act had been filed for the first time well within this period of limitation, on 01.12.2018. He states that the said petition was however returned by the Registry multiple times under objections and that the delay of 118 days had occurred only on account of belated re-filing and therefore, the learned Single Judge ought to have taken a liberal view and condoned the same. It is submitted that the limitation prescribed under Section 34(3) of the Act relates to the initial filing which admittedly, was in the month of December, 2018 and condonation of delay in re-filing is not limited by time. It is the discretion of the Court to condone the delay in re-filing the appeal, which ought to have been exercised liberally in favour of the appellant. Learned counsel submits that once the delay in re-filing would have been condoned, the filing would relate back to the initial date of filing and therefore, the learned Single Judge had erred in non-suiting the appellant by holding that the petition under Section 34 of the Act was filed beyond the permissible time.

7. The learned Single Judge has observed in the impugned order that the petition under Section 34 of the Act originally filed, did not bear the signatures of the petitioner; it was not accompanied with an affidavit of the

petitioner; the learned counsel, who had initially filed the petition, did not have any vakalatnama in his favour and the statement of truth was also not filed alongwith the petition. It was in these circumstances that it was held that no valid petition was filed as the vakalatnama was filed for the first time on 27.04.2019 and the affidavits in support of the averment made in the petition, were filed on 02.05.2019. It was also observed that the initial filing was a deliberate attempt to somehow stop the period of limitation from running and the petitioner did not take any steps to file the vakalatnama and even the affidavits within the period prescribed under Section 34(3) of the Act and that the matter was sought to be kept alive without curing the defects, leading to gross delay.

8. Learned counsel for the appellant has relied on two judgments to contend that an incomplete filing could not be considered fatal. The first judgment is of the Supreme Court in Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another, reported as (2006) 1 SCC 75 and the second one is the judgment in Alka Kasana Vs. Indian Institute of Technology, reported as 2015 SCC OnLine Del 11455. Any precedent has to be considered in relation to the facts of that particular case and it is necessary to determine whether the said precedent would be applicable to the facts in hand. In Alka Kasana Vs. Indian Institute of Technology (supra) case, the court was dealing with non-compliance of the provisions of Order 6 Rule 15(4) of the CPC and it was held : -

“26. Given the aforesaid legal position, the contention of the learned counsel for the defendant that because the plaint was not accompanied by an affidavit furnished by the plaintiff in support of her pleading at the time of institution of the suit, should be considered sufficient ground for this court to hold

that the suit has not been duly instituted as contemplated under Order IV Rule 1(3) CPC, and liable to be rejected, is found to be patently erroneous. The second submission made by learned counsel that by the time the plaintiff had re-filed the plaint after curing the defects pointed out by the Registry, the period of three years reckoned from 27.06.2011, as prescribed under the Limitation Act had expired on 26.06.2014 and resultantly, on the date of re-filing, the suit was barred by limitation, is also fallacious and stands rejected.”

9. It was also held in the captioned case that a mere irregularity which was capable of being cured, could not be treated as fatal to the institution of the suit and the plaint was to be taken to have been presented, not on the date of its re-filing, but on the date of its initial filing, if the original defects stood cured.

10. However, what is significant is that in Alka Kasana (supra), the plaint when filed initially on 30.05.2014, was duly signed and verified by the plaintiff and was accompanied by an affidavit, which however, was not duly attested by an Oath Commissioner. In the present case, as has been observed by the learned Single Judge, the petition as originally filed by the appellant, was not even signed by a competent officer authorized in this behalf by the appellant/petitioner. It was only signed by the counsel and admittedly, on the date of initial filing he did not have a vakalatnama, as the vakalatnama in favour of the previous counsel was executed much later, on 16.01.2019; the court fee stamps was affixed on the petition a month thereafter, on 20.02.2019 and the petition was re-filed after over two months, on 27.04.2019. The signatures of the counsel on the petition was therefore, without any authorization, which is a fundamental flaw that distinguishes this case from the case of Alka Kasana (supra).

11. In Uday Shankar Triyar (supra), the Supreme Court was dealing with a case where the signing of a vakalatnama by one appellant, was required to be interpreted in the light of the fact that the second appellant was a juristic person, who could be represented only through a physical person. In that background, it was held that when the first appellant had signed the vakalatnama, which was filed along with the appeal, the non-mentioning that it was also on behalf of the second appellant, was a curable defect. In the present case, there was no vakalatnama at all on the record till as late as April, 2019. The appellant being a government department, was required to file at least some document with the petition to show that the signatory was authorized to file the petition. If not that, the counsel who had signed the petition ought to have filed his vakalatnama. But the petition was simply presented to the Registry without any signatures.

12. In Uday Shankar Triyar (supra), the Supreme Court further observed that : -

“17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :-

i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;

ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

iii) where the non-compliance or violation is proved to be deliberate or mischievous;

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant.”

13. In the instant case, technically, no petition was actually filed in the Registry on 01.12.2018, since it was neither signed by the appellant/petitioner or a person duly authorized to do so on its behalf. The advocate who had signed the petition, did not have any authority to file the same and had done so merely because he happened to be a panel advocate. This case is, therefore, clearly covered by Exception-(v) carved out in the captioned judgment, as the Memorandum of Appeal was filed by the appellant in December, 2018 in the complete absence of any authorization and was presented without the knowledge, consent or authority of the appellant which fact is apparent from a perusal of the averments made in the application seeking condonation of delay, wherein the appellant has sought to explain the delay on the ground of illness of the authorized signatory and Director of the appellant/petitioner. The advocate may have acted in the best interest of his client but the client does not seem to have shared his concern in protecting its rights and allowed the matter to linger on till the vakalatnama was finally filed on 27.04.2019 and the supporting affidavits were filed on 02.05.2019. As a matter of fact, the petition when it was re-filed with the vakalatnama on 27.04.2019, also remained a defective filing till 02.05.2019, when the appellant/petitioner filed the affidavits in support of the Section 34 petition. But both the dates mentioned above, take the

petition way beyond the prescribed period of limitation under Section 34 of the Act.

14. Order 41 Rule 1 of the CPC requires that the Memorandum of Appeal has to be signed by the appellant or his pleader. Similarly, Rule 2(2)(a) of the Delhi High Court Rules Practice and Procedure, Volume-V, Chapter-I, Part-A(a) provides that every memorandum of appeal (application, affidavit etc.) must be signed by the applicant or by an advocate on his behalf. In the present case, neither was the appeal originally signed by the authorized signatory, nor was it accompanied by the mandatory statement of truth, affidavits and vakalatnama.

15. Given the above factual background, we have no option but to hold that only a sheaf of papers bunched together were filed in the Registry on 01.12.2018 and the position remained the same right upto 02.05.2019, when the appellant finally filed the affidavits in support of the appeal. This was a sheer paper formality undertaken by the appellant to save the period of limitation. The conclusion drawn by the learned Single Judge in the impugned order cannot be faulted and calls for no interference whatsoever. The appeal is accordingly dismissed *in limine* alongwith the pending applications.

(ASHA MENON)
JUDGE

(HIMA KOHLI)
JUDGE

SEPTEMBER 25, 2019/MK