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

+ **FAO(OS) (COMM) 262/2019 & C.M.Applns. 43434-36/2019**

SHIVAAI INDUSTRIES PRIVATE LIMITED Appellant

Through: Mr. Neeraj Malhotra, Senior
Advocate with Mr. Sandeep Grover, Mr. Tarang
Agarwal and Ms. Cassandra Zosangiani,
Advocates

versus

DELHI TRANSPORT CORPORATION Respondent

Through: Mrs. Avnish Ahlawat, Standing
Counsel with Mr. Nitesh Kumar Singh, Advocate

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

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09.10.2019

C.M.Applns. 43435-36/2019 (Exemption)

Allowed subject to all just exceptions.

FAO(OS) (COMM) 262/2019 & C.M.Appln.43434/2019 (stay)

1. The appellant/petitioner is aggrieved by the order dated 29.07.2019, passed by the learned Single Judge dismissing a petition filed by it under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), challenging the Award dated 29.11.2017, pronounced by the learned Sole Arbitrator, adjudicating disputes that had arisen with the respondent/DTC, in respect of the contract executed between the parties for display of advertisements on DTC's Bus Queue Shelters (BQSs) and Time Keeping Booths (TKBs). By the impugned order, an

application filed by the appellant/petitioner for seeking condonation of delay of 427 days in re-filing the Section 34 petition has been dismissed and as a consequence thereof, OMP(COMM) 256/2019 has also been dismissed.

2. Following are the sequence of dates and events relevant for deciding the present appeal:-

The learned Sole Arbitrator adjudicated the disputes referred to him and pronounced the Award on 02.12.2017. The period of limitation prescribed under Section 34(3) of the Act for filing an application for setting aside an arbitral Award is three months. The said period computed from 02.12.2017, would have expired on 02.03.2018. However, the Section 34 petition came to be filed by the appellant/petitioner only on 02.04.2018. Accompanying the said petition was an application for seeking condonation of delay of 427 days in re-filing the said petition. Pertinently, the appellant/petitioner did not file an application for explaining the reasons that prevented it from filing an application within the prescribed period of three months reckoned from the date of the receipt of the Award though, the proviso to Section 34(3) of the Act makes it crystal clear that only if the Court is satisfied that the applicant was prevented by sufficient cause from making an application under Section 34 of the Act within the period of three months, may it entertain the said application within an extended period of 30 days, but not thereafter. It appears that the appellant/petitioner was confident that it would get the benefit of the proviso to Section 34(3) of the Act over and above the prescribed period of three months without needing to offer any explanation for the delay beyond three months for having filed the Section 34 petition, on 02.04.2018.

3. In para-1 of the impugned order, the learned Single Judge has taken
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note of the averments made by the appellant/petitioner in I.A.No.9034/2019, moved by it for seeking condonation of delay of 427 days in re-filing the Section 34 petition, which for purposes of ready reference, is reproduced hereinbelow: -

“1. This is an application seeking condonation of 427 days delay in re-filing of the present petition. In the application it has been asserted that the copy of the Award was received by the petitioner on 02.12.2017. It was further asserted that in April, 2018 it was realised that the said petition which had been filed and returned under objection was misplaced, apparently due to transfer of file from the office of the petitioner to the office of the advocate. In or around July 2018, the advocate of the petitioner alongwith the petitioner, with great difficulty, reconstructed the entire record and the said process took some time. The petitioner further asserts that Mr.S.C. Jain is about 79 years old and is suffering from various ailments due to which he is bed ridden and currently not in a position to stand or even walk. It is stated that due to such reasons he faced several difficulties in giving instructions, leading to delay in re-filing of the petition.”

4. After filing the petition and the captioned application, the appellant/petitioner also sought leave of the Court to file an additional affidavit for explaining the delay in re-filing the Section 34 petition. The contents of the said additional affidavit dated 23.07.2019, filed by Mr. S.C. Jain, one of the Directors of the appellant/company have been summarized in para-2 of the impugned order in the following words :-

“2. The petitioner has thereafter filed an additional affidavit further explaining the reasons for the delay. In this additional affidavit as well, the delay in re-filing has been attributed to the ill health of Mr.S.C. Jain. It states that Mr.Jain was admitted in a hospital on 06.04.2015. It further states that since 2015, Mr.Jain"s Blood Sugar Level has been considerably high and on checking the same on 01.06.2017, the same was

found to be the reason for his weakness. He also suffers from hypertension. The affidavit also states that in April 2018 it was realised that the said petition filed has been returned under objection and the documents have been misplaced apparently due to transfer of the files from the office of the petitioner to the office of the advocate. Upon conducting a Kidney Function Test on 14.06.2018, it was revealed that Mr.Jain's Blood Urea Nitrogen Level was extremely high, emanating poor kidney function, pre-renal failure, renal failure, kidney diseases etc., as shown in the report. It is further asserted that in July 2018 the advocate of the petitioner alongwith the petitioner reconstructed the entire record. The affidavit filed states that in or around February, 2019 various tests and Blood Tests of Mr.Jain showed deviation from normal range."

5. It was argued on behalf of the appellant/petitioner that there were sufficient grounds and *bona fide* reasons for condoning the delay in re-filing the Section 34 petition which have been elaborated in the application and the additional affidavit that was filed subsequently. However, the said explanation has been turned down by the learned Single Judge on the ground that the appellant/petitioner which is a private limited company, has not disclosed as to who are the Directors or officers of the company; that the affidavit filed by Mr. S.C. Jain explaining his ill health did not inspire confidence and once the records of the case were reconstructed by the counsel for the appellant/petitioner in July, 2018, there is no explanation whatsoever as to why the Section 34 petition could not be re-filed till as late as 13.03.2019.

6. Mr. Malhotra, learned Senior Advocate appearing for the appellant/petitioner states that once the learned Single Judge had arrived at a conclusion that there was no just or sufficient cause for condoning the delay of 427 days in re-filing the Section 34 petition, there was no good reason for

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the Court to have gone into the aspect of the delay in the original filing of the petition. We may note that the learned Single Judge has observed in the impugned order that even the original filing of the Section 34 petition was barred by the law of limitation, as contemplated in Section 34(3) of the Act for the reason that the said petition had been filed beyond the prescribed period of three months though the Registry had not raised an objection in this regard.

7. As noted above, the period of three months for filing a Section 34 petition reckoned from 02.12.2017, would have expired on 02.03.2018. However, the appellant/petitioner filed the petition only on 02.04.2018. It was submitted before the learned Single Judge that the extended period of 30 days reckoned from 02.03.2018, would have expired on 01.04.2018. However, 01.04.2018 being a Sunday, the petition came to be filed on the very next working day i.e. on 02.04.2018.

8. We are not inclined to accept the submission made by learned counsel for the appellant/petitioner that the learned Single Judge ought to have refrained from making any observations regarding delay in the original filing of the Section 34 petition once it was of the opinion that there was no reason to condone the delay in re-filing the Section 34 petition. For reasons best known to the appellant/petitioner, it assumed that the Statute prescribes a period of four months and not three months for filing a Section 34 petition, whereas the proviso to Section 34(3) of the Act makes it abundantly clear that it is only in the event that a litigant is able to show just and sufficient cause for filing a belated Section 34 petition, will the Court exercise its discretion and permit the petition to be taken on record. In the instant case, the appellant/petitioner was well aware of the fact that the period of three

months reckoned from 02.12.2017, would expire on 02.03.2018. However, at the time of filing the Section 34 petition on 02.04.2018, the appellant/petitioner elected not to file a separate application offering just and sufficient cause for seeking an extension of 30 days for filing the said petition. It was assumed that the Court would condone such a delay for the asking, which is not the intent or the purport of the Act.

9. Coming to the merits of the explanation sought to be offered by the appellant/petitioner for seeking condonation of delay of 427 days in re-filing the Section 34 petition, it is an admitted position that the said petition as originally filed by the appellant/petitioner on 02.04.2018 comprised of 67 pages. The Petition was filed without affixing the court fee and was bereft of any pagination. There was no *vakalatnama* accompanying the said petition. Even a copy of the impugned Award had not been annexed with the said petition. It is apparent that the filing was a mere formality and the exercise was a slapdash affair only to somehow or the other stop the clock from ticking insofar as the period of limitation is concerned. Pertinently, after filing the petition if, it can be termed as one, on 02.04.2018, the appellant/petitioner again went into the deep slumber and woke up only on 13.03.2019 i.e. after almost one year, to re-file the same. The explanation sought to be offered for the delay of 427 days hinges on the ill health of Mr. S.C.Jain, one of the Directors of the appellant/petitioner company.

10. We have pointedly enquired from learned counsel for the appellant/petitioner as to how many Directors are there in the appellant/company and are informed that there is another Director of the company by the name of Sh. Ashit Datt, aged 58 years. If that is so then the other Director could have just as well taken steps to have a petition drafted

and filed challenging the Award. The explanation sought to be offered is that it was Mr. S.C. Jain who was conducting the matter all along and due to his ill health, the company could not take timely steps to challenge the Award. But the point is that the Section 34 petition, good, bad or indifferent, had already been drafted and filed on 02.04.2018. So, nothing would turn on the purported indisposition of Mr. S.C. Jain, to explain the delay of 427 days in re-filing the petition. Even otherwise, the admission of Mr.S.C.Jain in the hospital in the year 2015, one of the explanations sought to be offered in the condonation of delay application, loses significance when, the delay relates to the period after 02.04.2018. There remains an unexplained time lag between July, 2018 when the records were reconstructed by the counsel engaged by the appellant/petitioner and the date, 13.03.2019, when the petition was re-filed. No explanation worth-the-while has been offered for the same.

11. In the above facts and circumstances, we do not find any error in the observations made by the learned Single Judge for declining to condone the delay of 427 days in re-filing the petition. As a result, the present appeal is dismissed in *limine* alongwith the application while upholding the impugned order dated 27.09.2019.

HIMA KOHLI, J

ASHA MENON, J

OCTOBER 09, 2019

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