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

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**Pronounced on: 21.01.2019**

+ O.M.P. (COMM) 254/2017

WIANXX IMPEX PVT. LTD. & ORS.

..... Petitioners

Through Mr.Muneesh Malhotra, Mr.Rajat  
Bhardwaj & Ms.Sonali Rastogi,  
Advocates

versus

EVERSHINE BUILD WELL PVT. LTD.

..... Respondent

Through Mr.Alok Kumar, Mr.Harish Kumar  
Garg & Mr.Neeraj Gupta, Advocates

**CORAM:**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J.**

**I.A.No.7356/2017** (*condonation of delay*)

This application is filed under Section 5 of the Limitation Act seeking condonation of delay of 28 days in filing the accompanying petition. It is pleaded that there was delay in removing various objections in filing/re-filing and on seeking instructions/approval from the petitioners as they are under judicial custody since 12.07.2016. The application is allowed and the delay of 28 days in filing the accompanying petition is condoned.

**OMP (COMM.) 254/2017 & I.A.No.7355/2017**(*stay*)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking to impugn the award/order dated 07.11.2016 and seeking restoration of the counter claim.
2. The petitioner does not give any details of the background facts which

led to the invocation of the arbitration clause. It is stated in the petition that the respondent invoked the arbitration clause pursuant to which this court vide order dated 17.11.2011 appointed the presiding arbitrator. It is stated that on 10.03.2012, the tribunal fixed the fee of the arbitrators with regard to the claim petition as Rs.75,000/- per hearing to be paid by each of the party to each of the three arbitrators. In addition, Rs.2,500/- per hearing for secretarial assistance was fixed plus travel cost of one of the arbitrators who had to travel from Singapore for each hearing. The petitioners filed a counter claim on 27.11.2012. The same was taken on record. The arbitral tribunal on 08.04.2013 decided the fees of the counter claim as Rs.50,000/- per hearing to be paid by each of the parties to the arbitrators along with secretarial fees.

3. It is the case of the petitioners that he had been diligently making the payments of the fees of the arbitrators and has already paid Rs.61,50,000/- towards the counter claim for 41 hearings. In addition, it is stated that the petitioners have paid approximately Rs.2.50 crores towards the fees of entire arbitration for the claim/counter claim etc. On 07.11.2016 the arbitral tribunal terminated the counter claim of the petitioners in terms of the Section 38 of the Act on account of the default in payments of the fees by the petitioner.

4. I have heard the learned counsel for the parties.

5. The learned counsel for the petitioners has vehemently argued that they have paid in all a sum of Rs.2,60,02,710/- as fees for the arbitral tribunal for the claim petition and the counter claim. He submits that presently some of the directors of the petitioners are in judicial custody. On account of this hardship, the petitioners has been unable to pay the balance fees of the learned arbitral tribunal. He further submits that the matter was at

the final stages as final arguments were going on when the learned arbitral tribunal has chosen to terminate the proceedings of the counter claim. He also submits that so far as the claim petition is concerned, the respondent has paid the share of the fees of the petitioners under Section 38 of the Act and now the learned arbitral tribunal has reserved its award on the claim of the respondent. He relies upon Section 38 of the Act to submit that at best in this background, the learned arbitral tribunal had the option to suspend the arbitral proceedings and ought to have exercised this option in the facts and circumstances of the case.

6. A perusal of the order dated 07.11.2016 of the Arbitral Tribunal would show that the arbitral tribunal has noted that on 05.11.2016 it has noted that the arbitration fee has not been paid in terms of the order passed by the Tribunal on 07.05.2015 and 01.08.2015. The respondents requested that the matter be adjourned for three months. Similarly, on 06.06.2016 one of the directors of the petitioners had given an undertaking to pay 50% of the share of the arrears of the arbitration fees within next 30 days. He had also undertaken to pay balance share of the 50% of the arrears of arbitration fees later. Despite the said undertaking, no steps have been taken by the petitioner. It also noted that the directors of the petitioners company had been taken in custody in July, 2016 while the default in payment of arrears was from 2015. Accordingly, the tribunal terminated the counter claim of the petitioners in terms of the Section 38 of the Act.

7. Sections 38 and 39 of the Act, reads as follows:

**“38. Deposits.-** (1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim

submitted to it. Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counterclaim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

**39. Lien on arbitral award and deposits as to costs.-** (1) Subject to the provisions of sub-section (2) to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

(2) If in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(3) An application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written

agreement between him and the arbitral tribunal and the arbitral tribunal shall be entitled to appear and be heard on any such application.

(4) The Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.”

Hence, where the deposits as sought for by the tribunal are not paid by one party, the other party may pay the share of the defaulting party. However, where that is not done, the tribunal may suspend/terminate the arbitral proceedings in respect of the claim or counter claim.

Under Section 39 of the Act, the arbitral tribunal shall have also a lien on the arbitral award for any unpaid costs of the arbitral tribunal.

8. In this case, all that the learned counsel for the petitioners has argued is that the arbitral tribunal instead of terminating proceedings should have suspended the same at least till the period the directors of the petitioners are in judicial custody. He also submits that as and when the directors shall be released from custody they would be in a position to organise the funds to pay for the arbitral fees.

9. It is manifest from the perusal of the Section 38 of the Act that the discretion has been granted to the arbitral tribunal to either suspend or terminate the proceedings.

10. A Division Bench of the Bombay High Court in ***Rehmat Ali Baig vs. Minocher M. Deboo (2012) 4 Arb.Lr 410 (Bom)*** has held that an arbitrator will be justified in taking recourse to terminate the counter claim where the fees as directed is not deposited. The court held as follows:

“7..... An Arbitrator cannot be expected to continue adjudicating upon the claim or, as the case may be, a counter claim, without parties making a deposit of costs representing the reasonable fees and expenses of the Arbitrator. Relegating the arbitrator only to a claim of lien under Section 39 will result in an abuse of the process. A party which does not comply with an order of deposit will in cases make every effort to delay the proceedings by raising frivolous objections. Absent an obligation to comply with an order of deposit, a party may misuse the arbitral process. Arbitral proceedings take place before a private tribunal of the parties' choice. Parties who opt for arbitration cannot avoid complying with an order of deposit. The amount which was fixed by the Learned Arbitrator in the present case was evidently reasonable. Where a party which has been directed to deposit an advance towards the costs fails to do so, and the other party also does not deposit his share, the Arbitrator would be justified in taking recourse to the power conferred in Section 38(2) to terminate the counter claim as was done in the present case. The judgment of the Supreme Court in *Union of India vs. Singh Builders Syndicate* MANU/SC/0490/2009 : (2009) 4 SCC 523 does not cover a situation such as the present. The present case involves a situation where a party has been recalcitrant in depositing his share of the reasonable costs determined by the Arbitrator towards the adjudication of the counter claim. The Arbitrator has acted fairly. Though the counter claim of the Appellant was excluded, the Appellant participated in the adjudication of the claim and was allowed to cross examine the Respondent's witness, as stated in the award. The Appellant did not step into the witness box.”

The Single Bench of the Bombay High Court in ***The Comedy Store vs. Horseshoe Entertainment & Hospitality Pvt. Ltd.,*** MANU/MH/1464/2016 held as follows:-

11. In my view, the request of the petitioner for extension of time to deposit further USD 15000 for itself and USD 15000 on behalf of

the respondent in the facts and circumstances of this case was fair and reasonable. In my view, the arbitral tribunal thus already having received the amount of deposit initially made by the petitioner could have considered the application for extension of time made by the petitioner in depositing the amount as directed by the arbitral tribunal. I am inclined to consider the submission of the learned senior counsel for the petitioner that though the learned advocates for the petitioner were in process of making deposit of the further amount, the arbitral tribunal in the meanwhile terminated the proceedings. The arbitral tribunal could not have passed such harsh and unreasonable order thereby terminating the arbitration proceedings for delay of few days on the part of the petitioner to pay contribution of further deposit not only on behalf of itself but also on behalf of the respondent.

....

14. Be that as it may, this Court is of the view that the orders dated 12th April 2016 and 14th May 2016 passed by the arbitral tribunal are not fair and reasonable orders and ought not to have been passed in the circumstances stated aforesaid. In my view, the petitioner will have to adopt appropriate procedure for appointment of an arbitrator in accordance with the procedure agreed by the parties in the arbitration agreements and in accordance with the provisions of the Arbitration Act. In my view, the arbitration agreements can be re-invoked by the petitioner since this Court has set aside the orders dated 12th April 2016 and 14th May 2016. Even if the said orders would not have been set aside by this Court, the petitioner could still invoke the arbitration agreements in accordance with the procedure agreed by the parties in the arbitration agreements recorded in the aforesaid two contracts.”

12. Hence, the Bombay High Court was of the view that the learned Arbitrators should have a fair and reasonable approach in case payment of fees and costs are concerned. This is especially so as the arbitration agreement will still survive and will not perish by the termination of the

arbitration proceedings by the arbitral tribunal.

13. The Supreme Court in the case of *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523/( MANU/SC/0490/2009), held as follows:

“22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee.

23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the arbitrators' fees is not fixed by the arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an arbitrator whose fees are in their “range” having regard to the stakes involved.”

14. The facts of the case are peculiar. The petitioners have already paid a sum of Rs.2.6 crores as fees to the learned Arbitrators. The respondents also admit to have paid Rs.3 crores as fees to the learned Arbitral Tribunal. The matter was at the stage of final arguments when the arbitration of the counter

claim was terminated.

15. It is no doubt true that time was given to the respondents to pay the balance fees/costs of the learned Arbitral Tribunal which they were unable to do. However, substantial reasons have been given, namely, that the Directors of the said company are in judicial custody since 12.7.2016. One wonders if given the nature of fees having already been paid and the fact that the Arbitration Proceedings are at the final stage whether it would have been appropriate for the learned arbitral tribunal to take a more compassionate view of the matter. The impugned directions terminating the arbitration proceedings at the final stages in these circumstances appear to be harsh on the petitioner company.

16. In the above facts I set aside the award of the learned Arbitral Tribunal. An opportunity may be granted to the petitioner to make good the pending fees within a reasonable time. Parties may take steps as per law. Petition stands disposed of. All the pending applications, if any, also stand disposed of.

**JAYANT NATH, J.**

**JANUARY 21, 2019/v**