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

\+ O.M.P. (COMM) 505/2018

M/S CAPITAL CONTROL INDIA PVT LTD (NOW KNOWN AS CAPCO WATER SOLUTIONS PVT LTD) ..... Petitioner

Through: Mr. Saket Sikri and Mr. Dilip Taur, Advocates.

versus

BHARAT HEAVY ELECTRICALS LTD ..... Respondent

Through: Mr. R. Chandrachud, Mr. Nitin Tuhkral and Mr. Karan Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 10.04.2019

I.A. 17175/2018 (application under Sec. 34 (3) of the Act seeking condonation of delay in filing the present petition)

1. The impugned award was passed on 31st May 2018. Pursuant to an application under Section 33 of the Arbitration and Conciliation Act,1996 (hereinafter referred to as the 'Act'), the award was modified on 12th June 2018. The copy of the modified award was received by the Petitioner on 20th June 2018. The present petition assailing the said award has been filed on 5th December 2018. There is a delay of 78 days beyond the expiry of the 90 days as prescribed under Section 34 (3) of the Act in filing of the present petition. The proviso to Section 34 (3) of the Act provides that the Court may condone the delay in filing the petition for a further period of 30 days.

2. Thus the delay can be condoned for a maximum period of thirty days. Admittedly, even if the Petitioner is given the benefit of the proviso, the petition would still be delayed by 48 days. The Supreme Court in the case ***P. Radha Bai and Ors. v. P. Ashok Kumar and Anr.*** reported in **AIR (2018) SC 5013**, dealing with the powers of the court for condoning the delay under section 34(3) of the Act has held as under:-

> "34. Section 34(3) deserves careful scrutiny and its characteristics must be highlighted:
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> (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.
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> (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.
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> (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 Law1 and has been understood to mean "cannot be made". The High Court of Singapore in ABC Co. Ltd. v. XYZ Co. Ltd.,

MANU/SGHC/0157/2003 : [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. 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. 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.

50. In the present case, the Respondents had a right to challenge the Award Under Section 34 the moment they received it. In this case, Respondents received the Award on 21.02.2010. The alleged MoU was executed on 09.04.2010. Once the Respondents received the Award, the time Under Section 34(3) commenced and any subsequent disability even as per Section 17 or Section 9 of Limitation Act is immaterial. Merely because the Appellant

had committed some fraud, it would not affect the Respondents right to challenge the Award if the facts entitling the filing of a Section 34 Application was within their knowledge. The moment the Respondents have received the Award, the three months period prescribed Under Section 34(3) begins to commence. It was incumbent on the Respondents to have instituted an application Under Section 34 challenging an award. Therefore, in light of the discussion above, there would not have been any point for meaningful remand as the question of law is answered against the Respondents herein."

(underlining added)

3. The Supreme Court in a recent decision of ***M/s Simplex Infrastructure Ltd. v Union of India*** reported in **2019 2 SCC 455** has reiterated the above mentioned principles and has categorically held that the statutory time limit to challenge an Arbitral Award as prescribed under Section 34 of the Act ought to be strictly adhered to and has held as under:

> "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. To do so, as the High Court did, is to breach a clear statutory mandate.
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> 16. Under the circumstances, we are of the considered opinion

> that in view of the period of limitation prescribed in Section 34, the learned Single Judge of the High Court was not justified in condoning the Respondent's delay of 514 days in filing the application. The judgment rendered by the learned Single Judge of the High Court of Calcutta on 27 April 2016, in GA No. 958 of 2016 is set aside and the appeal is allowed. The petition Under Section 34 stands dismissed on the ground that it is barred by limitation. There shall be no order as to costs."
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> (underlining added)

4. Thus in view of the above, application seeking condonation of delay is dismissed. Consequently, the petition Under Section 34 of the Act is also dismissed.

SANJEEV NARULA, J

APRIL 10, 2019
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