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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 24.02.2020

Pronounced on: 04.06.2020

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O.M.P. (COMM) 444/2019, I.A. Nos. 14678/2019, 14680/2019,
16646/2019

M/S CHINTELS INDIA LIMITED

..... Petitioner

Through

Mr. Rajshekhar Rao, Mr. Kotla
Harshavardhan, Ms. Mansi Sood,
Mr. Shreedhar Kale, Advocates.
Mr. Rakesh Kumar, Authorised
Representative.

versus

M/S BHAYANA BUILDERS PVT. LTD.

..... Respondent

Through

Mr. Rajiv Nayar, Senior Advocate
with Mr. Gaurav Mitra, Ms.
Meghna Mishra, Ms. Manmeet
Kaur, Mr. Yashvardhan Bandi, Ms.
Riya, Ms. Anjali Dwivedi and Mr.
Adit Singh, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

I.A. No. 16646/2019 (take on record typed copies of documents)

For the reasons stated in the application, the same is allowed.

Application stands disposed of.

I.A. Nos. 14679/2019 (condonation of delay in filing) & 14682/2019 (condonation of delay in re-filing)

1. Present petition has been filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) challenging an Award dated 03.05.2019 passed by the Arbitral Tribunal whereby certain claims of the Respondent have been allowed and those of the Petitioner have been rejected.

2. These are applications filed by the petitioner seeking condonation of delay of 28 days in filing and 16 days in re-filing the petition, respectively. It is admitted in the application that the petition was filed beyond the initial 3 months limitation period under Section 34(3) of the Act. It is stated that the counsel in the present petition was not appearing for the Petitioner before the Arbitral Tribunal and the case was being prosecuted by another counsel. After the Tribunal published the Award, the counsel appearing before the Tribunal, expressed his inability to continue further in the matter and returned the record. Present counsel received the record in or around third week of August. Given the voluminous record and complex and technical nature of the issues, it was not possible to file the application immediately. It is further averred that the delay is not deliberate and could not have been avoided by the Petitioner. It needs to be noted that this is the only reason given in the application filed for condonation of delay. However, during the arguments, counsel for the petitioner raised number of grounds in support of condonation of delay, none of which finds mention in the application.

3. It was argued that on receipt of the Award on 08.05.2019, petition was filed on 30.08.2019, which was within 30 days extended period

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available under Proviso to Section 34(3) of the Act. Petition was complete in all respects as it was supported by a *Vakalatnama*, signed by the counsels and Authorized Representative, along with a Board Resolution dated 30.08.2019. Only the Welfare Stamp and identification of the signatory were missing, which is a curable defect, as held by the Court in the case of ***P.C. Bidwai vs. AIIMS, 2003 SCC OnLine Del 244***. Petition though not signed on each page by the Petitioner, was signed on the last page and non-signing on each page can be condoned as held in the case of ***Cdr. S.P. Puri vs. APMC, 2019 SCC OnLine Del 9861***. Affidavit supporting the Petition was signed, verified and attested. The address of the deponent mentioned in the Affidavit was of Ghaziabad but inadvertently, the words “presently in New Delhi” were omitted. However, Section 57 read with Section 114 of Evidence Act, 1872 provide a presumption in favour of the attestation being correct. Duly signed, verified and attested Statement of Truth was filed, though there were some blanks in some portions, which was an inadvertent error and curable, as held in the judgments in the case of ***Sudhakar Singh & Anr. vs. Webkul Software Pvt. Ltd., 2020 SCC OnLine Del 436*** and ***Cargo Planners Limited vs. Alpasso International Engineering Company & Ors., being CS (Comm) 127/2017, decided on 31.07.2019***.

4. Learned counsel sought to explain that while the petition was filed on 30.08.2019, the pleadings, Memo of Parties, Index, Applications, etc. bear the date of 27.09.2019, which is on account of the fact that the petition was initially filed on legal size papers, but on an objection being raised by the Registry, the entire paper book was refiled on A4 size paper. All perfunctory defects were removed within the outer limit of 120 days
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available under Section 34 (3) of the Act and this Court thus has the power to condone the delay and the discretion be exercised in favour of the Petitioner.

5. On the application for condonation of delay of 16 days in re-filing, it is argued that detailed explanation of the steps taken to refile, as and when successive objections were raised by the Registry, has been furnished in the application. It is argued that the defects were notified on 02.09.2019 but the documents sent for typing were not ready and the defects could not be cured. Petition was re-filed subsequently on three occasions. As the 30 days period for re-filing under the Rules was expiring on 02.10.2019, counsel mentioned the matter before the Judge-in-Charge (Original Side) on 27.09.2019 for listing. The prayer was rejected and the petition was compiled and filed on the same day. On 30.09.2019, it was realized that the file was not uploaded due to an error and after uploading the same, petition was re-filed. Subsequent defects were notified on 09.10.2019 and were cleared on the same day. Thereafter, defects were again notified on 11.10.2019 and refiling was done on 14.10.2019. On 16.10.2019, Registry pointed out two defects i.e. that application for condonation of delay in refiling was not filed and there was a discrepancy between the Diary Number and the CD filed. Defect with respect to blanks in the Statement of Truth was also marked, though no such defect existed. After the defects were marked, it was realized that the file uploaded on 30.09.2019 was the file with respect to a filing vide Diary No. 899683 which was in respect of another petition filed with the same parties name. This error also contributed to delay in refiling.

6. Learned counsel submits that the strict rigours of filing should not be applied to refiling and Courts have repeatedly held that a liberal approach must be adopted in condoning the delay in re-filing. Learned counsel has relied on the judgment of the Supreme Court in ***Northern Railway vs. Pioneer Publicity Corporation Pvt. Ltd., (2017) 11 SCC 234***, and a Division Bench of this Court in ***Delhi Development Authority vs. Durga Construction, 2013 SCC OnLine Del 4451*** and ***Union of India vs. Popular Construction Company, (2001) 8 SCC 470***.

7. Per contra, learned Senior Counsel for the Respondent contends that there is a strict limitation period for challenging an Award under Section 34(3) of the Act. Once the 3 months' limitation period expires, objections can be filed within an outer limit of 30 days, but sufficient cause, which prevented the party from filing the petition within the statutory period of three months, must be shown. It is further argued that mere filing a bunch of papers is not enough to stop the limitation and the petition filed must satisfy the requirements of being a 'proper' petition with all the vital documents, such as properly signed and verified *Vakalatnama*, signed and attested affidavit and a petition signed on all pages by the counsel and the Petitioner. In case a Petition does not meet these requirements, it can only be termed as a *non-est* filing. The date on which a petition, cured of all defects is filed, will be treated as the date of fresh filing and not refiling.

8. Learned Senior Counsel points out that the present petition was initially filed on 30.08.2019, which was beyond the limitation period of 3 months. The filing was a *non-est* filing as a mere stack of papers totaling to 243 pages were filed. There were gross deficiencies as the Statement
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of Truth had blanks and while the address of the deponent was Ghaziabad, it was attested/notarized at Delhi. Identification and Welfare Stamp were missing on the *Vakalatnama* and there were no signatures on the petition, except on the last page. The defects were finally cleared beyond the period of 120 days and strangely, the number of pages had increased to 3432.

9. It is next contended that the application for condonation of delay contains no reason which can be termed as ‘sufficient cause’ enabling this Court to condone the delay and on this account itself, the petition deserves to be dismissed, without prejudice to the argument that the petition filed within 120 days was a *non-est* filing. Learned Senior Counsel relies on the judgment in the case of ***Simplex Infrastructure vs. Union of India, 2019 2 SCC 455*** to argue that if the petition is cleared of the defects beyond the period of 120 days as provided under Section 34(3) of the Act then even a delay of 1 day cannot be condoned by the Court.

10. Reliance is placed on the judgment of this Court in ***Oil and Natural Gas Corporation Ltd. v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure Limited (Meil), 2019 SCC OnLine Del 10456*** to argue that a petition under Section 34(3) of the Act must meet certain threshold parameters to qualify as a proper filing, failing which it could be termed as a *non-est* petition and cannot stop limitation. He submits that the present petition lacks all the three parameters noted in Para 43 of the said Judgment.

11. Reliance is also placed on the judgment of this Court in ***Ahluwalia Contracts (India) Ltd. vs. Housing & Urban Development Corporation, OMP(COMM) 444/2019***

2016 SCC OnLine Del 2306, wherein it has been held that sufficient cause must be shown in the application for condonation of delay in order to be entitled to get the benefit of extended 30 days under the Proviso to Section 34(3) of the Act and when the defects are cured after extended 30 days, it would be a case of fresh filing.

12. I have heard the learned Counsel for the petitioner and the learned Senior Counsel for the respondent.

13. Section 34(3) of the Act provides a limitation period of 3 months for filing objections against an Arbitral Award. Proviso to Section 34(3) of the Act provides an extended period of 30 days for filing the application and the Court has the discretion to condone the delay, provided sufficient cause is shown by the party which prevented it from approaching the Court, in the limitation period of 3 months. It is clearly held by the Supreme Court in the case of **Simplex Infrastructure (supra)** that an application for setting aside the Award could be made within three months, extendable by a further period of 30 days on showing sufficient cause and not thereafter and the use of the words “but not thereafter” in the Proviso makes it clear that extension cannot be beyond 30 days. Relevant paras of the judgment are as under:

“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 sub-section. By virtue of Section 34(3), recourse to the court against an arbitral award

cannot be beyond the period prescribed. Sub-section (3) of 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 up to thirty days (and no more) subject to the satisfaction of the court that sufficient reasons were provided for the delay.

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11. *Section 5 of the Limitation Act, 1963 deals with the extension of the prescribed period for any appeal or application subject to the satisfaction of the court that the appellant or applicant had sufficient cause for not preferring the appeal or making the application within the prescribed period. Section 5 of the Limitation Act, 1963 has no application to an application challenging an arbitral award under Section 34 of the 1996 Act. This has been settled by this Court in its decision in Union of India v. Popular Construction Company [Union of India v. Popular Construction Company, (2001) 8 SCC 470] , wherein it held as follows: (SCC pp. 474-75, paras 12 &14)*

“12. 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.

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.

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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.”

14. In the case of ***Union of India vs. Popular Construction (supra)***, Supreme Court held as under:

“16. Furthermore, Section 34(1) itself 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 grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application “in accordance with” that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

“where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court”.

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to “proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow” (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the

award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act.”

15. A plain reading of Section 34(3) of the Act and its Proviso as well as the judgments referred to above, can lead to only one conclusion that the outer limit within which the Court has the power to condone the delay is 120 days. Once the delay in filing the petition exceeds, even one day beyond the outer limit of 120 days, Court has no power to condone the delay. It has been repeatedly emphasized by the Courts that the period of limitation under Section 34(3) of the Act is inelastic, as the intention of the Legislature is to provide a speedy and expeditious mechanism of adjudication in arbitration matters. In the case of **DDA vs. Durga Construction (supra)**, a Division Bench of this Court has held as under:

“21. Although, the courts would have the jurisdiction to condone the delay, the approach in exercising such jurisdiction cannot be liberal and the conduct of the applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch. The applicant would have to show that the delay was on account of reasons beyond the control of the applicant and could not be avoided despite all possible efforts by the applicant. The purpose of specifying an inelastic period of limitation under Section 34(3) of the Act would also have to be borne in mind and the Courts would consider the question whether to condone the delay in re-filing in the context of the statute. A Division Bench of this High

Court in Competent Placement Services through its Director/Partner v. Delhi Transport Corporation through its Chairman, 2011 (2) RAJ. 347 (Del) has held as under:—

“9. In the light of these provisions and decisions rendered by the Hon'ble Supreme Court, it is thus clear that no petition under Section 34 of the A&C Act can be entertained after a period of three months plus a further period of 30 days, subject to showing sufficient cause, beyond which no institution is permissible. However, the rigors of condonation of delay in refiling are not as strict as condonation of delay of filing under Section 34(3). But that does not mean that a party can be permitted an indefinite and unexplainable period for refilling the petition.”

16. In ***Consolidated Engg. Enterprises and Ors. vs. Principal Secy. Irrigation Deptt. and Ors., (2008)7 SCC 169***, Supreme Court drawing a comparison between Section 5 of the Limitation Act and Proviso to Section 34(3) of the Act observed as under:

“32. Sub-section (3) of Section 34 of the AC Act prescribes the period of limitation for filing an application for setting aside an award as three months from the date on which the applicant has received the arbitral award. The proviso thereto vests in the court, discretion to extend the period of limitation by a further period not exceeding thirty days if the court is satisfied that the applicant was prevented by sufficient cause for not making the application within three months. The use of the words "but not thereafter" in the proviso makes it

clear that even if a sufficient cause is made out for a longer extension, the extension cannot be beyond thirty days. The purpose of proviso to Section 34(3) of AC Act is similar to that of Section 5 of the Limitation Act which also relates to extension of the period of limitation prescribed for any application or appeal. It vests a discretion in a court to extend the prescribed period of limitation if the applicant satisfies the court that he had sufficient cause for not making the application within the prescribed period. Section 5 of Limitation Act does not place any outer limit in regard to the period of extension, whereas the proviso to Sub-section 3 of Section 34 of the AC Act places a limit on the period of extension of the period of limitation. Thus the proviso to Sub-section 34(3) of the AC Act is also a provision relating to extension of period of limitation, but differs from Section 5 of the Limitation Act, in regard to period of extension, and has the effect of excluding Section 5 alone of the Limitation Act.”

17. Recently, a Coordinate Bench of this Court examined an application for condonation of delay in the case of ***Union of India vs. Bharat Biotech International Ltd. and Ors., being O.M.P(COMM) No.399/2019, decided on 18.03.2020*** and made the following observations:

“26. Returning to the facts of the present petition, I find that regrettably, the petitioner has failed to provide any justifiable reason, much less a sufficient reason to seek condonation of delay. The petitioner's explanation in the application as also the additional affidavit is wholly perfunctory,

vague and demonstrate the alarmingly lackadaisical approach of the petitioner in complying with general filing practice and the statutory requirements under Section 34 of the Act. In fact the petitioner has merely made a bald averment that the delay had been caused due to repeated objections being raised on the petition by the Registry, which took time to cure. On the contrary the logbook maintained by the Registry shows that most of the defects raised by the Registry at the very first instance of filing on 04.06.2019 were not rectified till as late as 18.09.2019, which indicates that the petitioner was at fault for not removing the objections in a timely manner and the reasons sought to be advanced by it are not at all bonafide. Thus, even if the delay in question were to be treated as a 'delay in re-filing', the petitioner's explanation for the delay being vague, unsubstantiated, insufficient and contrary to the record is liable to be rejected."

18. The first and the foremost issue that needs to be examined is whether the Petitioner has shown 'sufficient cause' for condonation of delay of 28 days in filing the petition. Before examining this issue, it needs to be mentioned at this stage that during the hearing of the petition, Petitioner had filed an additional affidavit in support of the application for condonation of delay, in initial filing. Thereafter, during the course of hearing, on 19.12.2019, learned Senior Counsel for the Respondent had raised certain disputes with respect to the initial filing of the petition. With the consent of the parties, the matter was referred to the concerned Registrar to look into the entire record of filing and re-filing of the petition and submit a Report, along with filing data in a pen drive.

Subsequent to the receipt of the Report, final arguments were heard in the matter and judgment was reserved.

19. Petitioner filed the present application seeking condonation of delay of 28 days in initial filing. As mentioned in the earlier part of the judgment, the only reason mentioned was the inability of the counsel appearing before the Tribunal to continue with the present proceedings and the present counsel receiving the record in or around third week of August, which was voluminous and the nature of the issues were complex and technical. Para 5 of the application is extracted hereinunder:

“5. It is submitted that this Petition is being filed with the extra 30 days beyond the initial 3 months. This is due to the fact that the present counsel were not appearing for the Petitioner before the Arbitral Tribunal. After the Arbitral Tribunal published its Award, the earlier counsel expressed their inability to continue with these proceedings and returned the record. Present counsel only received the record in or around 3rd week of August. Given the voluminous record and complex, technical nature of the issues, it is submitted that it was not possible to file this application immediately.”

20. It is significant to note that the application is dated 27.09.2019 and the supporting affidavit is also verified and attested on 27.09.2019. Although, learned counsel for the petitioner has orally sought to explain that since the entire petition was refiled on A4 size papers, the date appearing on the petition, index, memo of parties etc. is not 30.08.2019, but is 27.09.2019. Having the benefit of the e-record of filing on

30.08.2019, it is evident that while the petition was filed on 30.08.2019, but no application for condonation of delay was filed in support of the petition. The application itself is thus filed beyond a period of 120 days. A Division Bench of this Court in ***Shivaai Industries Private Limited vs. Delhi Transport Corporation, being FAO(OS) (COMM) 262/2019, decided on 09.10.2019*** has held as under:

“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.”

21. There is no doubt that even in the present case the Petitioner was aware that the petition was being filed beyond the 3 months period and ought to have filed the application for condonation of delay, along with the petition. Be that as it may, the reasons given in the application are far from meeting the requirement of 'sufficient cause' under proviso to Section 34 (3) of the Act, to enable this Court to exercise its discretion and condone the delay.

22. Petitioner, subsequently, with the leave of the Court, filed an affidavit to support its cause for condonation of delay. In the affidavit, a new ground has been set out by the Petitioner. It is averred that there were two separate Arbitration Awards between the parties, relating to Phase I and Phase II of the Project. The Award in Phase II is dated 04.05.2019 and was received by the Petitioner by post and there was some clarification issue, as the reference number of the Arbitration was wrongly indicated. It is averred that the Tribunal had issued *suo moto* clarification with regard to the case number in the said Award on 03.06.2019 and the Petitioner was under an impression that the clarification would apply to both the Awards. It is further sought to be explained that thereafter the Petitioner engaged an Advocate on 01.07.2019 and handed over the documents on 08.07.2019. On 20.07.2019, Petitioner was advised that there were grounds available to challenge the Award and the records being voluminous, the entire record was made available to the new counsel only in and around third week of August. The Petition was finally filed on 30.08.2019, along with an application for condonation of delay.

23. Perusal of the affidavit clearly reveals that a new ground was set up by the Petitioner in addition to the one mentioned in the application for condonation of delay. Even the said ground, does not appeal to be 'sufficient cause' for condonation to meet the strict requirements of Section 34 (3) of the Act. A clarification in the case number of a connected Award can hardly be a reason for a party to wait for filing objections to an Award, being fully aware of the strict and inflexible limitation period under Section 34(3) of the Act. It also needs to be noticed that the affidavit is dated and verified on 01.11.2019. The affidavit is conspicuously silent on explanation with respect to the date of 27.09.2019 appearing on the petition and the application for condonation of delay. Strangely the affidavit makes a mention of the petition having been filed on 30.08.2019, along with an application for condonation of delay, which is contrary to the e-filing record.

24. In my view, the Petitioner has been unable to make out sufficient cause for this Court to exercise its discretion and condone the delay in light of the various judgments referred to above by the Respondent.

25. Elaborate arguments were made by the parties on the issue of the filing of the petition being *non-est*. Though the record of filing does indicate that when the petition was initially filed, there were defects in the *Vakalatnama* and the Statement of Truth, as rightly pointed out by learned Senior Counsel for the Respondent, but as the Petitioner has been unable to show any sufficient cause for condonation of delay, therefore, even assuming in favour of the Petitioner that the filing was not a *non-est* filing, Petitioner cannot succeed.

26. The application is accordingly dismissed. Since the application for condonation of delay is dismissed, application seeking condonation of delay of 16 days in re-filing is also dismissed.

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27. In view of the dismissal of the application seeking condonation of delay in filing the present petition, the petition is hereby dismissed.

I.A. No. 14678/2019

This is an application seeking stay of the operation of the Award.

In view of the dismissal of the petition, this application is dismissed.

I.A. No. 14680/2019

This is an application seeking permission to file lengthy list of dates and synopsis.

The application is dismissed as infructuous.

JUNE 4th, 2020
yo/rd

JYOTI SINGH, J