

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 28TH DAY OF OCTOBER 2021

THE MASTER

A.Nos.3634, 3636 to 3639 of 2021

IN

OP.D.Nos.150645, 150682, 150690, 150691, 150692 of 2019

O.P.D.No.150690 of 2019 in A.No.3634 of 2021:

Against Award passed in Arbitration
Case No.5 of 2017

In the matter of Arbitration and
Conciliation Act, 1996
and

In the matter of disputes arising
between BGR Energy Systems
Limited and Elecon Engineering Co.
Ltd. In relation to Khaperkheda
Project; and In the matter of
Arbitration Award dated 01.09.2019.

BGR Energy Systems Limited,
Corp. Office at No.443 Guna Complex,
Anna Salai,
Teynampet, Chennai-600 018.

...Applicant/Petitioner

-Vs-

Elecon Engineering Co. Ltd.,
P.O.Box No.6, Anand Sojitra Road,
Vallabh Vidhyanagar-388120.

.. Respondent/Respondent

A.No.3634 of 2021:

Application praying that this Hon'ble Court be pleased to condone the delay of 34 days in re-presenting the papers in O.P. (D) No.150690 of 2019.

O.P.D.No.150691 of 2019 in A.No.3636 of 2021:

Against Award passed in Arbitration
Case No.3 of 2017

In the matter of Arbitration and
Conciliation Act, 1996

and

In the matter of disputes arising
between BGR Energy Systems
Limited and Elecon Engineering Co.
Ltd. In relation to Khaperkheda
Project; and In the matter of
Arbitration Award dated 01.09.2019.

BGR Energy Systems Limited,
Corp. Office at No.443 Guna Complex,
Anna Salai,
Teynampet, Chennai-600 018.

...Applicant/Petitioner

-Vs-

Elecon Engineering Co. Ltd.,
P.O.Box No.6, Anand Sojitra Road,
Vallabh Vidhyanagar-388120.

..Respondent/Respondent

A.No.3636 of 2021:

Application praying that this Hon'ble Court be pleased to condone the delay of 34 days in re-presenting the papers in O.P. (D) No.150691 of 2019.

Arb.O.P.No.150645 of 2019 in A.No.3637 of 2021

Against Award passed in Arbitration
Case No.2 of 2017

In the matter of Arbitration and
Conciliation Act, 1996
and

In the matter of disputes arising
between BGR Energy Systems
Limited and Elecon Engineering Co.
Ltd. In relation to Khaperkheda
Project;

and

In the matter of Arbitration Award
dated 01.09.2019.

BGR Energy Systems Limited,
Corp. Office at No.443 Guna Complex,
Anna Salai,
Teynampet, Chennai-600 018.

...Applicant/Petitioner

-Vs-

Elecon Engineering Co. Ltd.,
P.O.Box No.6, Anand Sojitra Road,
Vallabh Vidhyanagar-388120.

.. Respondent/Respondent

A.No.3637 of 2021:

Application praying that this Hon'ble Court be pleased to condone the delay of 34 days in re-presenting the papers in O.P. (D) No.150645 of 2019.

Arb.O.P.No.150682 of 2019 in A.No.3638 of 2021

Against Award passed in Arbitration
Case No.1 of 2017

In the matter of Arbitration and
Conciliation Act, 1996

and

In the matter of disputes arising
between BGR Energy Systems
Limited and Elecon Engineering Co.
Ltd. In relation to Khaperkheda
Project;

and

In the matter of Arbitration Award
dated 01.09.2019.

BGR Energy Systems Limited,
Corp. Office at No.443 Guna Complex,
Anna Salai,
Teynampet, Chennai-600 018.

...Applicant/Petitioner

-Vs-

Elecon Engineering Co. Ltd.,
P.O.Box No.6, Anand Sojitra Road,
Vallabh Vidhyanagar-388120.

.. Respondent/Respondent

A.No.3638 of 2021:

Application praying that this Hon'ble Court be pleased to condone the delay of 34 days in re-presenting the papers in O.P. (D) No.150682 of 2019.

Arb.O.P.No.150692 of 2019 in A.No.3639 of 2021

Against Award passed in Arbitration
Case No.4 of 2017

In the matter of Arbitration and
Conciliation Act, 1996

and

In the matter of disputes arising
between BGR Energy Systems
Limited and Elecon Engineering Co.
Ltd. In relation to Khaperkheda
Project;

and

In the matter of Arbitration Award
dated 01.09.2019.

BGR Energy Systems Limited,
Corp. Office at No.443 Guna Complex,
Anna Salai,
Teynampet, Chennai-600 018.

...Applicant/Petitioner

-Vs-

Elecon Engineering Co. Ltd.,
P.O.Box No.6, Anand Sojitra Road,
Vallabh Vidhyanagar-388120.

.. Respondent/Respondent

A.No.3639 of 2021:

Application praying that this Hon'ble Court be pleased to condone the delay of 34 days in re-presenting the papers in O.P. (D) No.150692 of 2019.

These Applications coming on this day before this court for hearing the court made the following order:

1. These five applications are filed by the applicant to condone the delay of 34 days in representing the original petitions in O.P.D.Nos. 150645, 150682, 150690, 150691 of 2019 and 150692 of 2019.

2. The learned counsel of the applicant reiterates his averments in the affidavit as follows.

2.1. The main original petitions are filed challenging the awards of the arbitral tribunal dated 01.09.2019. The petitions were filed on 05.12.2019 within the period of limitation as set out in Section 34 of the Act. It was returned on 17.12.2019 and thereafter represented on 21.01.2020. Again the papers were returned for some defects and for compliance on 15.03.2020. Thereafter, the concerned clerk fell ill and had taken a leave of absence for a considerable period of time. As he was the only clerk who had knowledge of the return of the case papers, the counsel was not aware as to the papers were returned for defects. He had kept the

return papers and he had not informed as to whereabouts of the same.

2.2. The learned counsel for the applicant further submitted that the clerk had finally got in touch with the applicant only mid-April, 2020 stating that he recollected having taken return of the case papers. By this time, the Covid-19 pandemic had wreaked havoc due to which Courts had restricted functioning and Court premises were closed for advocates and clerks. Thereafter, several of his office colleagues had also contacted Covid-19 and due to the severity of the pandemic, their office premises were also closed for almost the entirety of 2020. The Respondent also filed an application under Section 9 of the Act for certain interim reliefs, at which time the counsel for petitioner had represented before the Hon'ble Court regarding the pendency of the present petition and the factum of filing of the same. Due to the Covid – 19 pandemic and restrictions, the petitioner was not in a position to number and bring up the same.

2.3. The learned counsel for the applicant further submitted that to access the chambers in January, 2021 for taking return of papers, he was informed that it cannot be accessed by advocates unless specific permission is sought, in light of the Covid-19 pandemic. This resulted in strict lockdowns until July, 2021 and were only relaxed in a phased manner, while access to court premises for advocates remained to be restricted, and continues till date. Finally it is permitted in a limited manner recently in

July-August, 2021. Therefore, the petition not be numbered and listed for hearing earlier.

2.4. The learned counsel for the applicant further submitted that the Hon'ble Supreme Court has also passed order (in a suo-motu petition) from time to time, in light of the severe effects of the Covid – 19 pandemic on litigants and counsel, suspending all period of limitation prescribed under law. The period starting from 15.03.2020 (date of return for compliance) till date ought to be excluded in computing the period of limitation for re-presenting the case papers in light of the order of the Hon'ble Supreme Court. The delay is neither willful nor wanton. If the delay in representation is not condoned, the parties will be put to grave prejudice and irreparable hardship. Hence, the delay of 34 days in re-presenting the papers in O.P.D.No.150692 of 2019 may be allowed.

3. The learned counsel for the Respondent reiterated his averments in its counter affidavit as follows.

3.1. The present application seeking for condonation of delay in re-presenting the petition under Section 34 of Arbitration and Conciliation Act, 1996 is not maintainable. It is submitted that Section 34 (3) of the Act clearly states that any application challenging the award has to be filed within 3 months from the date of the receipt of signed copy of the award. If the applicant is able to show that he was prevented from filing due to

sufficient cause, the court may entertain the application within further period of 30 days and not thereafter.

3.2. The learned counsel for the respondent further submitted that even as per the averments of the applicant, the petition was filed only on 05.12.2019 which is beyond the period of 3 months from the date of award. The petition can be maintained only with a separate application for condonation of delay. But there is no whisper about the said application being filed or the status of the said application. Even otherwise, the limitation period for filing the petition for setting aside the award under section 34 expired on 31.12.2019 (30 days + 3 months as provided under 34 (3)). The petition which was initially presented on 05.12.2019 was re-presented only on 21.01.2020 which is beyond the period of limitation.

3.3. The learned counsel for the Respondent further submitted that the period of limitation for rectifying the defects and numbering the petition being expired on 31.12.2019. The applicant was still in the stage of defective filing even as on 15.03.2020 which is more than 75 days thereafter. It is pertinent to note that the supreme court order suspending the period of limitation came into force only on 15.03.2020 and it has no effect on limitation in relation to proceedings prior to that.

The applicant intending to stop the period of limitation from running, has repeatedly re-filed, without curing the defects pointed out by the Registry.

Till the filing of the present petition, it remains a non-est filing despite the expiry of the limitation period on 31.12.2019. It is pertinent to note that even when the applicant re-filed the petition for the first time, it was beyond the period of limitation by 15 days (filed on 15.01.2020). Therefore non-condonable even at that stage.

3.4. The learned counsel for the respondent further submitted that even from that point of time (15.03.2020), the applicant has taken another year and half for taking steps to rectify the defects. The Hon'ble Supreme Court has also repeatedly held that what was extended by the order extending the limitation period was only “the period of limitation” and not the period upto which delay can be condoned in exercise of discretion conferred by the statute. The said order was intended to benefit vigilant litigants who proceed within the period of limitation prescribed by general or special law.

3.5. The learned counsel further submitted that the limitation period prescribed by the special statute having ended on 31.12.2019, the applicant cannot take benefit under the said order of limitation passed by the Hon'ble Supreme Court in Suo moto Writ Petition 3 of 2019. The learned counsel relied upon the following Judgments that delay in representation cannot be condoned in a routine manner.

1. Union of India Vs Popular Construction Co, 2001 8 SCC 470

2. Delhi Development Authority Vs Durga Co. 2013 (139) DRJ 133 (DB)
3. Union of India Vs. J.Sons Company 2017 SCC Online Del 6711
4. Simplex Infrastructure Ltd. Vs. Union of India 2019 2 SCC 455
5. Haji Banda Hasan Vs. Gupta & Gupta 2019 SCC Online Del 10018
6. Sagufa Ahmed Vs Upper Assam Polywood Products Private Ltd. 2021 2 SCC 317
7. Delhi State Industrial & Infrastructure Development Corp. Vs. Mapsa Tapes Pvt. Ltd. 2021 SCC Online 2728 .

The learned counsel further submitted that the application is liable to be dismissed at threshold for the simple reason that the administration of Madras High Court have been allowing limited access on particular days for the lawyers to access their chambers even from June 2020. Hence, this application may be dismissed.

4. This Court gave its anxious consideration to rival submissions and perused the case materials and relevant papers.

5. In the case in our hand, as stated by both sides the arbitral awards were passed on 01.09.2019. The applicant stated in his affidavit that the original petitions under Section 34 were filed on 05.12.2019 which were returned for defects on 17.12.2019. Later they were represented on 21.01.2020 and once again returned on 15.03.2020. But on perusal of case materials, it reveals that for the first time, the application to set aside the

award was presented on 29.11.2019. It was returned on 05.12.2019 for compliance of certain defects. It was represented again on 17.12.2019. Again the same was returned on 22.01.2020 and was represented only on 14.09.2021.

6. The averments which have been stated in the applications is that the papers were returned on 15.03.2020. But there is no such endorsement in the papers after 21.01.2020. On perusal of records it reveals the papers were returned on 22.01.2020 and the counsel has received the same by putting his signature in the relevant register. The averments stated in the affidavits that it was represented on 21.01.2020 and returned on 15.03.2020 are absolutely false.

7. We all know that Covid lockdown started only on 24.03.2020 and Hon'ble Supreme Court has also in Suo Motu Writ Petition exempted the period of limitation from 15.03.2020 only. After the papers were returned on 21.01.2020 till 15.03.2020 there was much time of two months the applicant has not represented the petitions. He represented the same only on 14.09.2021. But suppressing the same he made averments that he received the returned papers only on 15.03.2020.

8. The petitioner in his affidavit also admitted that the Respondent filed an application under Section 9 of the Act for certain interim reliefs, at which time the counsel for petitioner had represented

before the Hon'ble Court regarding the pendency of the present petition and the factum of Covid – 19 pandemic restrictions, the petitioner was not in a position to number the petitions and bring up the same. When the respondent can enter into premises of the Court and file application for interim reliefs for which this applicant entered appearance and made representation, the allegation of the applicant that he could not enter the premises to represent the original application is not acceptable. Even that time also he did not represent that original petitions and represented only on 14.09.2021.

9. At this stage it is relevant to look into the provision of Arbitration and Conciliation Act, 1996. Section 34 (3) of Arbitration and Conciliation Act, 1996 says that,

(i) an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunals.

Further it says

(ii) Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

10. The applicant has not presented original petition within the

prescribed time under Section 34 (3). He filed the original petitions and get it returned and represented again and again. The limitation period is coloured as delay in representation by the tactics of either party or the counsel. Generally it is a kind of practice to overrule the law of limitation prescribed under Section 34 of the Act, invariably, purposely defected original petitions are filed knowing that it will be returned and representing the same with delay condone application. This kind of practice should be deprecated and should be nipped in the bud.

11. The applicant taking advantage of the Covid Lockdown, made false averments in his supporting affidavit to condone the period of delay in representing the application which was happened even before the Covid -19 lockdown. At this stage it is relevant to point out the Judgment rendered by Hon'ble Supreme Court in

**SAGUFA AHMED V. UPPER ASSAM PLYWOOD PRODUCTS (P)
LTD.**

(2021) 2 Supreme Court Cases 317

**(BEFORE S.A. BOBDE, C.J., AND A.S.BOPANNA AND
VRAMASUBRAMANIAN, JJ.)**

SAGUFA AHMED AND OTHERS

... Appellants;

Versus

**UPPER ASSAM POLYWOOD PRODUCES PRIVATE
LIMITED AND OTHERS**

...Respondents.

Civil Appeals Nos.3007-3008 of 2020, decided on September 18, 2020

The relevant para extracted is hereunder as follows.

17. But we do not think that the appellants can take refuge under the above order in Cognizance for Extension of Limitation, in re. What was extended by the above order of this Court was only “the period of limitation” and not the period up to which delay can be condoned in exercise of discretion conferred by the statute. The above order passed by this Court was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law. It is needless to point out that the law of limitation finds its root in two Latin maxims, one of which is vigilantibus et non dormientibus jura subveniunt which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.

12. The Covid-19 lockdown started on 24.03.2020. In Suo Moto Writ Petition, the Supreme Court has excluded the time limit for limitation from 15.03.2020 only. These original petitions were returned on 22.01.2020. The applicant might have represented it within 30 days from the date of return or before the date of time limit as per the Act whichever is more. The petitioner taking advantage of Covid lockdown, say it as a reason for not representing the original petition within time by making false

allegation. The reason for delay in representation is not properly explained.

13. When the Act prescribed time limit to prefer an appeal the party should be vigilant in preferring appeal within time. The Court cannot help the dormant people. The applicant has come forward with false averments in his applications to condone the delay in representation. This Court do not find any merit in these applications. Hence all the applications are dismissed. No costs.

Sd./-MASTER
28.10.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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JJ 15/11/2021