

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO. 651 OF 2023 IN
COMMERCIAL ARBITRATION APPEAL (ST.) NO. 1440 OF 2023**

AND

**CIVIL APPLICATION NO. 652 OF 2023 IN
COMMERCIAL ARBITRATION APPEAL (ST.) NO. 1440 OF 2023**

State of Maharashtra
Through Public Works Department,
Through its Executive Engineer,
Public Division, Beed Tq. & Dist. Beed .. Appellant

VERSUS

Morya Infrastructure Pvt. Ltd. Beed
Through its Director,
Bhaskar Tukaram Waghmare
R/o. Head Office at Shahunagar, Beed
Tq. & Dist. Beed .. Respondent

...
Mr. P.K. Lakhotiya, AGP for the applicant – State
Mr. J.N. Singh, Advocate for the respondent
...

**CORAM : MANGESH S. PATIL &
S.G. CHAPALGAONKAR, JJ.**

**RESERVED ON : 23 JANUARY 2023
PRONOUNCED ON : 01 FEBRUARY 2023**

ORDER (MANGESH S. PATIL, J.) :

Civil application no. 651 of 2023 is filed by the Public Works Department of the State of Maharashtra (hereinafter referred to as “Department”) seeking condonation of delay calculated as 187 days in filing appeal under section 37 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”) read with section 13 of the Commercial Courts Act, 2015 (“Commercial Courts Act”), against the judgment and order

passed by the learned District Judge-2 & Commercial Court, Beed in a proceeding bearing Civil Miscellaneous Application no. 87 of 2018 dated 06-05-2022 dismissing the department's application preferred under section 34 of the Arbitration Act.

2. The learned Additional Government Pleader by referring to the application and the additional affidavit filed by the department submitted that the facts and circumstances leading to the filing of the appeal are peculiar. The department manned by the personnel has been made to suffer the award because of the misdeeds of its officers and apart from the cause which the department is required to satisfy for condonation of delay, all the happenings throughout this proceeding right from the appointment of the arbitrator, are relevant factors for this Court to exercise its discretion.

3. As regards the cause for the delay, Mr. P.K. Lakhotiya, learned AGP would submit that though the department is not entitled to claim any exception and the law of limitation has to be applied equally even against it, there are sufficient circumstances which prevented it from preferring the appeal in time. He would submit that some time was lost to complete the administrative formalities and in seeking instructions and documents. The delay is neither deliberate nor is it intentional. The department was not to gain anything by causing the delay particularly when it is intending to challenge the award which is passed

by the sole arbitrator in spite of a stipulation in the clause 3.4.17(iii)(a) that the arbitral tribunal would comprise of three arbitrators; one to be appointed by each of the sides and the third by the two such arbitrators of the parties.

4. The learned AGP would submit that according to the Bombay High Court Rules, this being an arbitration cum commercial appeal, it is supposed to be filed online. An attempt was made to submit it on 14-12-2022 but for want of bill of costs, the system was not accepting the registration and some time was lost therein till it was finally registered on 11-01-2023. The application under section 34 of the Arbitration Act was decided on 06-05-2022 and the appeal under section 37 has been filed on 19-11-2022. The limitation for filing appeal is 60 days. Five (5) days were required for obtaining certified copies from the date of application till its receipt and there is 132 days delay.

5. Mr. Lakhotiya, the learned AGP would then refer to the decision of the Supreme Court in the matter of ***Government of Maharashtra (Water Resources Department) represented by Executive Engineer Vs. Borse Brothers Engineers and Contractors Pvt. Limited; (2021) 6 SCC 460***. He would submit that the department is entitled to take benefit of this decision since the delay has occurred *bona fide* and not in a negligent manner.

6. The learned advocate Mr. Singh for the claimant would strongly oppose the application by referring to the affidavit in reply. He would submit that there is no sufficient cause demonstrated by the department for this Court to exercise the discretion. Even the application for certified copy was not filed soon after pronouncement of the judgment and order by the learned District Judge on 06-05-2022. The calculation of delay is also incorrect. There is delay of 253 days. He would submit that the department is under an obligation to demonstrate sufficient cause and any reference to the merits of the appeal is irrelevant. He would also place reliance in the judgment of **Borse Brothers** (supra). The delay is enormous and the right which by lapse of time has vested in the claimant may not be divested. He is awaiting for the fruits of the award for years together. He had to sell the properties since it was a project in the form of 'Built Operate and Transfer' (BOT).

7. We have carefully considered the rival submissions and perused the papers including the decision in the matter of **Borse Brothers** (supra).

8. To begin with, after taking a thorough survey of catena of judgments, following observations have been made in **Borse Brothers** (supra) in paragraph no. 63 :-

“63. *Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under Section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or Section 13(1-A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party’s inaction, negligence or laches.”*

9. With respect, no further deliberation is necessary. If a sufficient cause as contemplated under section 5 of the Limitation Act, 1963 can be demonstrated coupled with the fact that the aspect of *bona fides* / deliberate inaction also would be relevant.

10. There cannot be a dispute about the fact that the learned District Judge pronounced the judgment and order in the proceeding under section 34 on 06-05-2022 and the appeal is stated to have been filed on 13-01-2023. As per the provisions of section 13(1-A) of the Commercial Courts Act, the period of limitation for preferring an appeal would be 60 days. The department ought to have filed the appeal on or before 05-07-2022, of course excluding the time required for obtaining the certified copy. However, the application for certified copy is stated to have been filed on 07-09-2022 and it was obtained on 13-09-2022. Since the application for certified copy itself was filed beyond the

period of limitation, the department would not be entitled to any benefit of such time. Thus, the delay would come to 190 days.

11. Admittedly the appeal was required to be e-filed. The e-filing history placed on record by the department has not been controverted by the claimant. The history shows that the appeal was for the first time presented on 14-12-2022 but it was not accepted on 16-12-2022. Again it was pending acceptance till 26-12-2022 but was reported as not accepted on 06-01-2023. Again an attempt was made for acceptance on 11-01-2023. The scrutiny was undertaken on 13-01-2023 and it is this date which is being considered as the date of filing. There is no law which would meet such an eventuality in case of e-filing when a party is supposed to file it on-line on the requisite portal. When it is a matter of physical presentation, the Registry accepts such presentation even if it is deficient in any respect on the date of presentation *albeit* it is not registered. Date of registration is never considered as the date of presentation. The period while calculating the delay abates on presentation of appeal. Further time required for removing the office objections and registration is considered as procedural delay and is never counted. In our considered view, in view of the peculiar circumstances in e-filing of the appeals, the date of first presentation, even if it is later on not accepted or is kept pending acceptance should be regarded as the date of presentation and till that date only the delay should be counted.

12. Resultantly, the delay in the present matter will have to be counted only till 14-12-2022 and would be of 161 days.

13. The department has sought to explain the delay in following words :-

"2. The Appellant most respectfully submit that impugned judgment is delivered by the Ld. District Judge-2/Commercial Court, Beed, District Beed, dated 06.05.2022 in Civil M.A. (Arbitration) No. 87/2018. The present appeal is preferred after getting proposal of appeal vide proposal dated 05.08.2022, issued Law & Judiciary Department, Aurangabad to the office of the Public Prosecutor, High Court Bench at Aurangabad which was received in the office on 10.08.2022. Thereafter the concerned file was allotted to the Additional Public Prosecutor for drafting on 11.08.2022, thereafter, immediately appeal is drafted and filed.

3. Appellant submits that this Appeal for condonation of delay may kindly be allowed in the interest of justice as it is a matter of serious nature and for such reasons the Appellant prays that, the delay of 169 days be condoned in the interest of justice.

4. The Appellant has a very good case based on sound legal grounds and hopes to succeed in the same. Delay caused in filing the Commercial Appeal (Arbitration) was caused due above mentioned circumstances which is neither intentional nor deliberate and the same is caused due to the administrative procedure. That, for obtaining some documents and also some instructions also there was some delay caused. As such, the delay caused in filing the Commercial First Appeal (Arbitration) deserves to be condoned in the larger interest of justice."

All these circumstances pleaded in the application have been controverted by the claimant in his reply. However, in addition, the department has filed an additional affidavit which *inter alia* reads as under:-

"2. I say and submit that, thereafter, due to Court fees purpose and certified copy and bills of costs are not received by the Government Pleader Office, Aurangabad, hence appeal could not be filed. As the bills of costs of the impugned judgment was not ready and prepared at the District Court (commercial) Beed.

3. I say and submit that, by letter dated 23.08.2022 and 15.11.2022 requested to the Public Prosecutor as well as appellant to supply the bills of cost and same was intimated to the Public Prosecutor at Beed and on 17.11.2022 he intimated to the Government Pleader Office at Aurangabad that, bill of cost/decreed is not ready in the District Court (commercial) Beed. Copy of letter dated 23.08.2022, 15.11.2022 and 17.11.2022 is annexed herewith and marked as **EXHIBIT-A** collectively.

4. The applicant say and submit that, as certified copy of the decree was not there, office of registry is not accepting the commercial appeal for registration and hence the Asst. Government Pleader on 13.12.2022 given undertaking that, as and when the bills of costs will be ready in the District Court immediately it will be filed. Copy of undertaking filed by the Asst. Government Pleader dated 13.12.2022 is annexed herewith and marked as **EXHIBIT-B**.

5. The applicant say and submit that, thereafter, immediately on 14.12.2022, the office accepted the filing of the present appeals but it could not be registered for the reasons best known to them and lastly on 13.01.2023 Stamp No. is given to the Commercial Appeal and thereafter, immediately matter was circulated before this Hon'ble Court for urgent hearing.

6. The applicant say and submit that, the above stated reasons were happened subsequently after drafting of delay condonation application and hence these additional grounds are not mentioned in the delay condonation application and as such by way of present additional affidavit these grounds are brought on record for kind consideration of this Hon'ble Court so that, it can be explained that the delay caused and calculated by the office is not intentional and deliberate but same was caused due to above mentioned facts and circumstances those are beyond control of present appellant."

Pertinently, the averments in this additional affidavit have not been controverted by the claimant by filing any additional affidavit.

14. Though the State / Government departments are not entitled to have any special treatment as regards the law of limitation is concerned, which has to be applied rigoursly against the State as it is applied against individuals, one cannot overlook the fact that the

certain decision making process has to be undertaken in every department while taking any decision. It is in view of such peculiar set up that it becomes imperative to ascertain if the delay is deliberate or intentional or prompted by *mala fides* as has been laid down in the matter of ***Collector, Land Acquisition Vs. Mst. Katiji ; (1987) 2 S.C.C. 107*** and ***Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.; AIR 1962 SC 361***. However, nothing has been brought on record by the claimant to demonstrate that there was deliberate inaction or *mala fides*. In the absence of which we have no reason to doubt that the delay has occasioned *bona fide* and is unintentional.

15. It is quite trite that while considering application for condonation of delay, the Court must bear in mind the fact that a party is not to gain anything by allowing its right to prefer an appeal is lost on technicalities. It is in view of such principles that it was for the claimant to bring on record circumstances to indicate that the delay has occasioned *mala fide*. Not even allegations have been imputed to the department in spite of filing of a lengthy reply by the claimant.

16. Apart from above state-of-affairs, in our considered view, there are peculiar facts and circumstances which require this Court to exercise the discretion in condoning the delay. We do not intend to enter into the factual disputes, which could have a bearing on the decision of the appeal, but we cannot overlook the fact that in spite of

the specific stipulation in the arbitration agreement in clause 3.4.17(iii) (a) regarding composition of arbitral tribunal of three arbitrators, only an arbitrator of the claimant who initially approached the department, called upon it to appoint its arbitrator and in turn to enable appointment of third arbitrator, the claimant's arbitrator solely proceeded to conduct the arbitration proceeding and passed the award.

17. Mr. Singh for the claimant would strongly submit that there is a scheme under the Arbitration Act provided under section 12, 13 and 16 for raising an objection to challenge appointment of arbitrator or competence of arbitral tribunal but no recourse was taken by the department to resort to these provisions and the fact of composition of arbitral tribunal need not persuade this Court to exercise the discretion.

18. For the time being we do not want to deliberate in this regard. We are only concerned about the fact that there is a serious issue regarding the constitution of the arbitral tribunal which would go to the root of the legality of award and the issue deserves to be addressed to, particularly when it is a matter of public money.

19. Civil Application nos. 651 of 2023 and 652 of 2023 are allowed.

20. The delay is condoned subject to the department depositing cost of Rs.10,000/- (Rs. Ten Thousand) in this Court within four weeks. On such costs being paid in time, the appeal be registered and the cost be

paid over to the claimant. The execution of the award shall stand stayed for a period of four weeks.

[S. G. CHAPALGAONKAR]
JUDGE

[MANGESH S. PATIL]
JUDGE

arp/