

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

COMMERCIAL APPEAL NO. 1/2023

Nagrik Sahakari Rugnalaya and Research Center Limited,
A Cooperative Society, having its Office at Nagpur Nagrik
Hospital, Opp. Alankar Theater, North Ambazari Road,
Nagpur – 440 010, Through its Administrator Gautam Walde.

APPELLANT

.....VERSUS.....

Arneja Nagrik Hospital Pvt. Ltd., A company incorporated
under the Companies Act, having its Office at 123,
Ramdaspath, Nagpur – through its Authorized Signatory
Dr.Jaspal Arneja.

RESPONDENT

Shri C.S. Dharmadhikari, counsel for the appellant.
Shri S.S. Dewani, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND M.W. CHANDWANI, JJ.

DATE : APRIL 10, 2023.

ORAL JUDGMENT : (PER : A.S. CHANDURKAR, J.)

ADMIT. Heard finally with consent of the learned counsel for
the parties.

2. This appeal preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, ‘the Act of 1996’) read with Section 13 of the Commercial Courts Act, 2015 takes exception to the order dated 01.12.2022 passed by the learned District Judge – 9, Nagpur in Miscellaneous Civil Application No. 545 of 2022. By the said order, the application preferred by the appellant seeking permission to file proceedings under Section 34 of the Act of 1996 beyond the period of three months has been dismissed.

3. The facts relevant for considering the present appeal are that on 10.11.2021 an award was passed by the learned Arbitrator by which the appellant was directed to pay an amount of Rupees Four Crores to the respondent with interest at the rate of 12% per annum alongwith costs of the arbitration proceedings. The appellant being aggrieved by the said award filed an application under Section 34 of the Act of 1996 on 30.06.2022. Since the said application was filed beyond the period of three months as stipulated by Section 34(3) of the Act of 1996, an application under proviso to Section 34(3) of the Act of 1996 was moved on 05.07.2022. The said application was opposed by the respondent and by the impugned order, the said application has been rejected. The said order dated 06.12.2022 is the subject matter of challenge in the present appeal.

4. Shri C.S. Dharmadhikari, learned counsel for the appellant submitted that the learned Judge misconstrued the provisions of Section 34 of the Act of 1996 inasmuch as Section 34(3) of the Act of 1996 permits an application to be made for setting aside the award within a period of three months from the receipt of the arbitral award. Subject to the Court being satisfied that the applicant was prevented by sufficient cause from making such application within the period of three months, the Court could entertain the application within further period of thirty days but not thereafter. The learned Judge construed the period of three months as ninety days as a result of which the appellant was held entitled to a lesser period than what is provided by Section 34(3) of the Act of 1996. In other

words, the period of three months and further period of thirty days has been considered to be 120 days which was not in accordance with Section 34(3) of the Act of 1996. In that regard, the learned counsel referred to the decisions in *State of Himachal Pradesh & Another Versus Himachal Techno Engineers & Another* [(2010) 12 SCC 210] and *Sesh Nath Singh & Another Versus Baidyabati Sheoraphuli Co-operative Bank Limited & Another* [(2021) 7 SCC 313]. It was thus submitted that in terms of the order passed by the Hon'ble Supreme Court in the matter of extension of limitation due to the pandemic situation dated 10.01.2022 the period between 05.03.2020 to 28.02.2022 was to be excluded and the period of three months from 01.03.2022 became available. The period of three months therefore would commence from 01.03.2022 and the same would come to an end on 31.05.2022. An application under Section 34 of the Act of 1996 was filed on 30.06.2022 which was the thirtieth day in terms of the proviso to Section 34(3) of the Act of 1996. Since the appellant had indicated sufficient cause for not having made the application within the period of three months, the application having been made within the permissible extended period ought to have been granted. It was further submitted that merely because the application seeking permission to file the proceedings was not filed alongwith the application under Section 34 of the Act of 1996 but was filed on 05.07.2022, same would not mean that the said application was not liable to be considered. It was thus submitted that the order passed by the learned District Judge be set aside and the application under Section 34 of the Act of 1996 be directed to be entertained on merits.

5. Shri S.S. Dewani, learned counsel for the respondent opposed the aforesaid submissions. According to him, the learned District Judge rightly found that the proceedings under Section 34 of the Act of 1996 had been filed beyond the permissible period of limitation. There being no power to entertain an application filed beyond the period of thirty days after expiry of a period of three months, the proceedings were rightly not entertained. It was further submitted that even the grounds assigned by the appellant for seeking extension of the period of thirty days were not sufficient to indicate that the appellant was prevented by any sufficient cause from making such application. The vague averments in the application were not supported by any documentary material and hence even otherwise the delay was not liable to be condoned. It was then submitted that the application seeking extension of time was not filed alongwith the proceedings under Section 34(3) of the Act of 1996 and on that count also no indulgence could be shown to the appellant. Since there was absence of any sufficient cause being indicated by the appellant, no interference was called for with the impugned order. In support of the aforesaid submissions, the learned counsel for the respondent relied upon the decisions in *Assam Urban Water Supply and Sewerage Board Versus Subash Projects and Marketing Limited* [(2012) 2 SCC 624], *Simplex Infrastructure Limited Versus Union of India* [(2019) 2 SCC 455], *P. Radha Bai & Others Versus P. Ashok Kumar & Another* [(2019) 13 SCC 445], *Government of Maharashtra (Water Resources Department) Represented by Executive Engineer Versus Borse Brothers Engineers and Contractors Private Limited* [(2021) 6 SCC

460], *Mahindra and Mahindra Financial Services Limited Versus Maheshbhai Tinabhai Rathod & Others* [(2022) 4 SCC 162], *Estate Officer, Haryana Urban Development Authority & Another Versus Gopi Chand Atreja* [(2019) 4 SCC 612], *National Highway Authority of India Versus Avinash Purushottam Supe* [Arbitration Appeal No. 105/2020 with connected appeals], *National Highways Authority of India Versus Avinash Purushottam Supe* [Special Leave to Appeal (C)Dy. No.23278/2022] *Gopal Laxman Rajendra Versus The Municipal Corporation of City of Nashik & Others* [Civil Revision Application No.619 of 2018], *Union of India Versus M/s Navayuga Engineering Co. Ltd. & Anr.* [O.M.P (COMM) 97/2017], *SMPL Infra Limited Versus Graphite India Limited* [O.M.P (COMM) 494/2019].

6. We have heard the learned counsel for the parties and we have perused the documents on record. At the outset it may be noted that under Section 34(3) of the Act of 1996, an application for setting aside an award is required to be made within a period of three months from the date on which the party making such application had received arbitral award. By the proviso to Section 34(3) of the Act of 1996, on indicating sufficient cause for being prevented from making such application within a period of three months, the Court has jurisdiction to entertain such application within a further period of thirty days but not thereafter. Thus application under Section 34(3) of the Act of 1996 has to be made within a period of three months from receiving an arbitral award or within

a further period of thirty days from the expiry of three months but not thereafter. Perusal of the impugned order indicates that the learned District Judge has equated the period of three months with ninety days and has thereafter found that the application under Section 34 of the Act of 1996 as filed on 30.06.2022 was beyond the period of one hundred and twenty days. Since Section 34(3) of the Act of 1996 specifically prescribes the period of three months and not ninety days there would be no basis to hold that the application under Section 34(3) of the Act of 1996 read with the proviso has to be filed within one hundred and twenty days. Such application has to be filed within a period of three months and subject to indicating sufficient cause for not making such application within a period of three months but within a period of thirty days the same can be entertained. A similar issue has been considered by the Hon'ble Supreme Court in *Himachal Techno Engineers & Another* (supra) and the distinction between the period of 'three months' and 'ninety days' has been highlighted. It has been held that a month does not refer to a period of thirty days but refers to actual period of a calendar month. It is thus clear that the limitation would have to be reckoned by taking into consideration the period of three months under Section 34(3) of the Act of 1996 and further period of thirty days under proviso to Section 34(3) of the Act of 1996. The learned District Judge misdirected himself and on this ground itself the impugned order passed by the learned District Judge is liable to be set aside. It is accordingly set aside.

7. We may note that the learned Judge failed to consider the application moved by the appellant seeking extension of the time to challenge the award on the ground that such application had been filed beyond the permissible period. It has been found that consideration of the relevant period by the learned Judge was not in accordance with Section 34(3) of the Act of 1996. It is well settled as held in *N. Balakrishnan Versus M. Krishnamurthy* [(1998) 7 SCC 123] that if the first Court refuses to condone the delay and that order is challenged, the superior Court considering such challenge is free to consider the grounds raised for seeking condonation of delay/extension of the time. Since the aspect of delay has not been considered by the learned District Judge, we have considered the grounds put forth by the appellant in that regard.

8. Undisputedly, the award was passed on 10.11.2021 the period of thirty days to file an application under Section 34(3) of the Act of 1996 would commence from 01.03.2022 for the reason that the period between 15.03.2020 to 28.02.2022 stood excluded from consideration in the light of the order passed by the Hon'ble Supreme Court in *RE: Cognizance for Extension of Limitation* [**Miscellaneous Application No.21 of 2022**]. The period of three months would thus commence from 01.03.2022 and the same would expire on 31.05.2022. The application having been filed on 30.06.2022 the question to be considered is whether the appellant has made out a sufficient cause for being prevented from filing such application within said period of three

months and whether the same was filed within further period of thirty days. In this regard, the appellant has stated in paragraph 3 of its application dated 05.07.2022 that since its affairs were being controlled by an Administrator appointed by the State Government, for filing the proceedings, prior permission of the State Government was sought. The requisite permission was obtained telephonically on 25.06.2022 and for that reason the application could not be filed within the stipulated period. Same ground is also stated in paragraph 13 of the application filed under Section 34 of the Act of 1996.

According to the respondent this explanation could not be treated to be sufficient to extend the period for filing the proceedings under Section 34(3) of the Act of 1996 as the grounds were in general terms and were not sufficient to constitute 'sufficient cause' for making such application.

9. When the stand of the appellant is taken into consideration we find that it has been specifically pleaded that telephonic instructions were received on 25.06.2022 by the Administrator and after giving instructions for paying the requisite Court fees, the application under Section 34(3) of the Act of 1996 came to be filed. We do not find any reason to disbelieve these statements made on oath notwithstanding the general denial by the respondent. The reasons furnished indicate 'sufficient cause' for not making such application within the period of three months. Viewed in the backdrop of the order passed by the

Hon'ble Supreme Court in *RE: Cognizance for Extension of Limitation* (supra), we are satisfied that the period to file such application deserves to be extended within the permissible statutory period. In *Simplex Infrastructure Ltd.* (supra) the Hon'ble Supreme Court has held that administrative difficulties would not be a valid reason to condone delay above and beyond the statutory period prescribed under Section 34 of the Act of 1996. That is not the position here. The proceedings have been filed on the thirtieth day as per proviso to Section 34(3) of the Act of 1996.

10. It was faintly urged by the learned counsel for the respondent that though the application under Section 34 of the Act of 1996 was filed on 30.06.2022 it was not accompanied by any application seeking extension of time to file that application. Such application was filed only on 05.07.2022. Relying upon the decision of the learned Single Judge of the Delhi High Court in *SMPL Infra Ltd.* (supra), it was urged that filing of the application under Section 34 of the Act of 1996 was 'non-est' filing. Perusal of the said decision indicates that the proceedings therein had been filed without a Vakalatnama, a signed petition and Statement of Truth. It was held that in the light of the defects therein, the filing of the proceedings itself was non-est. The ratio of the aforesaid decision cannot be made applicable to the case in hand. We would rather follow the ratio of the decision of the Hon'ble Supreme Court in the *State of M.P. & Another Versus Pradeep Kumar & Another*

[(2000) 7 SCC 372] wherein it has been observed that the effort of the Court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by it, but to see whether it is possible to entertain its grievance if it is genuine. It is well settled that an application seeking condonation of delay/extension of time can be filed subsequent to filing of the main proceeding and the main proceeding cannot be rejected on the ground that it was not accompanied by any application for condonation of delay/extension of time. Reference in this regard can be usefully made to the judgment of the learned Single Judge (B.R. Gavai, J. as His Lordship then was) in *Madhao Somaji Sarode Versus Jotiba Dhyan Upasak Shikshan Sanstha, Dudhala & Others* [2004(3) Mh.L.J. 1078] wherein it has been held that the main proceeding cannot be dismissed only on the ground that it is not accompanied by an application for condonation of delay. The contention of the respondent therefore cannot be accepted since in our view, filing of proceedings under Section 34 of the Act of 1996 without the application being accompanied by a separate application under Section 34(3) of the Act of 1996 would not render filing of the application under Section 34 of the Act of 1996 non-est. In any event, even paragraph 13 of the application under Section 34 of the Act of 1996 contains averments in support of the prayer for extension of the period of three months by thirty days.

11. For aforesaid reasons, we are of the view that the proceedings under Section 34 for setting aside the award dated 10.11.2021 deserves to be entertained on merits. Accordingly, the following order is passed:-

- I. The order dated 01.12.2022 passed by the District Judge-9, Nagpur in Miscellaneous Civil Application No. 545 of 2022 is set aside.
 - II. The application filed by the appellant seeking extension of time to challenge the award is granted.
 - III. The proceedings stand restored on the file of learned District Judge-9, Nagpur who is assigned to hear these proceedings.
 - IV. The application under Section 34 of the Act of 1996 shall be decided on its own merits and in accordance with law.
12. The Commercial Appeal is allowed in aforesaid terms and disposed of with no order as to costs.

(M.W. CHANDWANI, J.)

(A.S. CHANDURKAR, J.)

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