

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

% **Date of order : 8th May, 2023**

+ **O.M.P. (COMM) 216/2019, I.A. 7724/2019, I.A. 7725/2019, I.A. 1047/2020, I.A. 1048/2020 & I.A. 8755/2023**

UNION OF INDIA

..... Petitioner

Through: Mr. Sanjiv K. Saxena, Mr. M.K. Tiwari, Mr. R. Mishra and Ms. Reba Jena Mishra, Advocates

versus

M/S PRAGATI CONSTRUCTION CONSULTANTS

.....Respondent

Through: Mr. Vivekanand and Mr. Abhishek Semwal, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Arbitration Act") has been filed on behalf of petitioner seeking the following reliefs:-

"i) set-aside the impugned Award passed by the Ld. Arbitral Tribunal, being patently illegal and against the 'public policy' and;

ii) pass any other Order/relief(s), which this Hon'ble Court may deem fit and proper in view of the present facts and circumstances of the case and in the interest of justice."

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2. A perusal of the record reveals that pursuant to a tender bearing No. 1-Aces/Tender/SSB/65 dated 4th April 2011 floated by the petitioner, the respondent was awarded the work for '*construction of printing press hall, training centre and other allied works in connection with modernization of printing press at Shakurbasti, New Delhi*' vide Award bearing No. 74-W/13/Misc./Acceptance/WA/SSB. Accordingly, the claimant/respondent was requested to complete the work within a period of 15 months from the date of issue of acceptance letter.

3. Due to delays and other issues in completion of the work as per the Agreement between the parties, the respondent herein invoked arbitration clause by way of letter dated 1st October 2012. The respondent, thereafter, approached this Court seeking constitution of Arbitral Tribunal invoking Section 11 of the Arbitration Act. The said petition came to be disposed of on 26th May 2014 with the appointment of the Arbitral Tribunal, comprising of three Arbitrators.

4. Accordingly, the arbitration proceedings were initiated for adjudication of disputes between the parties, with the filing of the Statement of Claim on 27th October 2014. Upon completion of pleadings and hearing in the matter, the impugned Award was passed on 24th February 2018.

5. The petitioner is aggrieved by the said Award and is, hence, before this Court by way of filing the instant petition assailing the same.

6. The learned counsel for the petitioner submitted that the petitioner, being aggrieved of the impugned Award passed by the Arbitral Tribunal,

approached the District and Sessions Judge, Tis Hazari Courts, however, upon finding that the value of the petition was beyond the pecuniary jurisdiction, the petitioner withdrew the petition so filed.

7. Before this Court, the petitioner has raised *inter alia* the following objections *qua* the impugned Award:-

- a. The Arbitral Tribunal violated the provision under Section 34(2)(b)(II) of the Arbitration Act and as such the impugned Award is against the public policy.
- b. The impugned Award is patently illegal and hence, liable to be set aside the impugned Award is liable to be set aside, as it is patently illegal in view of the fact that the Arbitral Tribunal has passed the award on 24th February 2018 directing to the petitioner to comply the same within 45 days vide Para No. 22.1, 22.2 and 22.3 of the Award from the date of publishing the Award, failing which simple interest @ 12% p.a. shall be payable by the respondent to the claimant till the payment of Arbitral Award and in this manner. Section 34(3) of the Act allows the aggrieved party to file the objection, if any, within 3 months and further within a period of 30 days.
- c. The learned Tribunal awarded an amount of Rs.2,420/- on account of expenses with regard to transportation, loading and unloading of 121 bags of cement @ Rs.20/- per bag, however, the respondent herein is not entitled for an amount of Rs.2,420/-, as such; in the absence of any material evidence on record, the

Award of Rs.2,420/- is liable to be set-aside, being patently illegal.

d. The learned Arbitral Tribunal allowed Claim No. A for an amount of Rs.67,93,645/- against claimed amount of Rs. 80,67,494/-, which had been claimed on account of business loss due to prolongation of the contract period. The learned Tribunal, vide Para No.21.1.6 to 21.1.14 awarded this amount after applying Hudson's Formula, but did not consider the facts and evidences as to whom the delay is attributable.

e. The impugned award is unfair and unreasonable, hence opposed to 'public policy' of India. The impugned award is based on erroneous legal preposition, which is clear from the face of it. It is further submitted that the award is patently illegal and the same is liable to be set aside by this Court.

8. The learned counsel for the petitioner submitted that it is in the view of the aforesaid grounds and objections that the impugned Arbitral Award dated 24th February 2018 is liable to be set aside.

9. Apart from the contentions and opposition on the merits of the case, the preliminary objection raised on behalf of the respondent is *qua* the bar of limitation for filing the instant petition, which according to the respondent makes the matter at hand liable to be dismissed.

10. The learned counsel appearing for the respondent, at the very outset, submitted that the instant petition has not been filed in accordance with Section 34(3) and 34(5) of the Arbitration Act and there is a

significant delay in the petitioner approaching this Court raising objections to the impugned Award. It is submitted that the Award had been passed and received by the petitioner in February 2018, whereas the instant petition has been filed in May 2019, i.e., after 15 months. It is submitted that the mandate of the Arbitration Act does not permit the petitioner to file a petition under Section 34 beyond the stipulated period of three months plus 30 days from the date of receiving the Award.

11. It is submitted that despite the inordinate delay the petitioner has failed to file any application seeking the condonation of such delay. The petitioner has not shown any cause or reason for the delay of almost 12 months beyond the stipulated time period. Instead of seeking condonation of delay in filing the petition, the petitioner only filed an application for condonation of 34 days' delay in re-filing of the petition, when the same was marked under objections, on the ground that non-availability of certified documents.

12. The learned counsel for the respondent, hence, submitted that in view of the substantial delay and the absence of any appropriate measure being taken to have the said substantial delay condoned, the instant petition is barred by limitation and is liable to be dismissed on the grounds of delay as well as for the reason of being devoid of merit.

13. The learned counsel for the petitioner, in rejoinder to the contentions raised on behalf of the respondent on limitation and on the query raised by this Court to the bar of limitation, submitted that the delay in filing the instant petition was caused since the petitioner had approached the District and Sessions Judge, Tis Hazari Courts, seeking

the appropriate remedy, however, since the matter was valued at more than Rs. 2 Crores, the concerned Department, petitioner herein, withdrew the same on 16th February 2019. It is submitted that the learned District and Sessions Judge granted liberty to file fresh objections under Section 34 of the Arbitration Act. Hence, the petitioner approached this Court by way of the instant petition within the prescribed time.

14. The learned counsel appearing on behalf of the petitioner vehemently submitted that upon receiving the impugned Award the petitioner took the right measures within the time as stipulated under the Arbitration Act but before the wrong forum. It is submitted that, however, thereafter, the petitioner withdrew the objections sought before the learned District and Sessions Judge and approached this Court within the time prescribed, which had started afresh from the date of the order passed by the learned District and Sessions Judge, i.e., 16th February 2019, granting fresh liberty to the petitioner to approach the appropriate forum. It is submitted that since there is no delay in filing the instant petition, no application for condonation of delay has been filed on behalf of the petitioner.

15. Heard the learned counsel for the parties on the issue of limitation and perused the record.

16. The preliminary objection taken on behalf of the respondent to the petition is on the ground of limitation as stipulated under Section 34(3) of the Arbitration Act. Therefore, without first delving into the merits of the case, this Court shall test the instant petition on the maintainability in light of the objections raised on behalf of the respondent.

17. Section 34 of the Arbitration Act provides recourse to those aggrieved by an arbitral award. A challenge to an arbitral award may be brought by way of an application before the Court of law, however, the same is subject to the qualifiers provided under sub-section 2 and 3 of Section 34. While sub-section 2 of Section 34 lays down the circumstances wherein an arbitral award may be set aside, sub-section 3 provides a pre-condition to be necessarily adhered to while seeking a challenge under Section 34. Section 34(3) is thus reproduced hereunder for proper adjudication of the dispute before this Court in the instant matter:

“34. Application for setting aside arbitral award.—

(3) 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 tribunal:

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.”

18. The provision under Section 34(3) of the Act stipulates that an arbitral award shall only be challenged within three months from the date when the award is received by the party challenging such award. This Section also confers the power upon the Court to condone the delay, if any, upon being satisfied of the just and sufficient reasons for doing so, for a further period of 30 days, but not thereafter. It is also essential to

note that an application for raising objections against the arbitral award shall be filed mandatorily within a total prescribed period of 120 days, provided the court is satisfied of the reasons stated for the delay beyond three months.

19. The words used in the provision are '*but not thereafter*' which show the certainty of the limitation of 120 days, that is, three months plus thirty days, when sufficient cause is shown. Hence, there is no doubt to this effect that this Court shall, at the first instant be satisfied that there was sufficient cause for the delay beyond stipulated three months and on the next step that there was no delay beyond the thirty days period.

20. In the case at hand, the impugned Award was passed on 24th February 2018 and was, admittedly, received by the petitioner the impugned Award on 27th February 2018. However, the challenge and objections to the Award have been brought before this Court in instant petition only on 21st May 2019. The prescribed period of three months ended on 27th May 2018 and thereafter, the additional discretionary period of 30 days ended in June 2018 and hence, the petitioner was bound to approach this Court within such period, that is, till the month of June 2018. The instant petition, however, has been filed after lapse of more than one year from the limitation as provided for under the Arbitration Act. Even thereafter, had the petitioner filed the petition within the subsequent 30 days and satisfied this Court of the reasonable cause for the delay, the petition would not be barred by the limitation provided under the Arbitration Act. The keywords in the provision are '*within a further period of thirty days, but not thereafter*'. Therefore, it is evident

that after three months and 30 days, this Court does not have the power to condone the delay in filing a challenge to Section 34 of the Arbitration Act.

21. Be it as it may, the petitioner has not even sought the condonation of the extraordinary delay of 12 months which has been caused in filing of the instant petition and hence, has failed to explain the delay. This explicitly contravenes the mandate of Section 34(3) of the Arbitration Act.

22. The petitioner before this Court has only sought condonation of delay in re-filing of the petition by way of filing the application bearing I.A. No. 7725/2019. At the first instance, as discussed in the foregoing paragraphs, the inordinate and extraordinary delay caused in filing of the petition has neither been explained by the petitioner nor has any application been filed on its behalf to seek condonation of the delay. Therefore, a delay in re-filing of an already significantly delayed petition cannot be granted by way of the said application.

23. The objective of the law of limitation is to prevent the outdated, fictitious, or fraudulent claims while also requiring a person to exercise his rights to action within the prescribed time. It is a settled principle that law does not help those who sleep over their rights. To this aspect, the Hon'ble Supreme Court in ***Bharat Barrel and Drum Mfg. Co. Ltd. vs. ESI Corpn., (1971) 2 SCC 860*** has observed as under:-

“7. Keeping these basic assumptions in view it will be appropriate to examine whether the topic of limitation belongs to the Branch of procedural law or is outside it. If it

is a part of the procedure whether the entire topic is covered by it or only a part of it and if so what part of it and the tests for ascertaining them. The law of limitation appertains to remedies because the rule is that claims in respect of rights cannot be entertained if not commenced within the time prescribed by the statute in respect of that right. Apart from Legislative action prescribing the time, there is no period of limitation recognised under the general law and therefore any time fixed by the statute is necessarily to be arbitrary. A statute prescribing limitation however does not confer a right of action nor speaking generally does not confer on a person a right to relief which has been barred by efflux of time prescribed by the law. The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a court of law. The principle which forms the basis of this rule is expressed in the maxim vigilantibus, non dormientibus, jura subveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims While this is so there are two aspects of the statutes of limitation the one concerns the extinguishment of the right if a claim or action is not commenced within a particular time and the other merely bars the claim without affecting the right which either remains merely as a moral obligation or can be availed of to furnish the consideration for a fresh enforceable obligation...”

24. A reference to the abovementioned judgment clarifies that the approach in exercising powers for allowing condonation of delay cannot be liberal. The conduct of the party seeking the same shall be tested to

evaluate whether the applicant has acted with due diligence.

25. Thus, the challenge has been brought before this Court after almost 12 months beyond the permissible time period stipulated under the Arbitration Act, which provides for a limitation of three months and a further extension of 30 days' time, upon satisfaction of the Court. However, the petitioner while evidently ignoring, contravening, and bypassing the entire procedural and technical requirements has not only sought to evade the process of law but also abused the same.

26. It is further to be seen that the matter has been filed on 21st May 2019 and for four years, the matter has been adjourned for the absence of the petitioner at most of the occasions and even the formal notice of the petition had been issued in the month of February 2023. The lack of due diligence to this affect is reflected in the orders passed in the instant matter for the past four years.

27. Therefore, in view of the extraordinary delay in filing the petition under Section 34 of the Arbitration Act as well as in the absence of an application seeking condonation of such delay, this Court is of the considered view that allowing such a petition to sustain would not only cause grave prejudice to the other parties involved but would defeat the scheme and purpose of the Arbitration Act itself, especially the mandate under Section 34(3) of the Act. This Court can certainly not grant any relief which has not even been sought by the petitioner by way of any appropriate measure.

28. Thus, this Court does not find any cogent reason to hear the instant

matter on merits since the same is not maintainable for being barred by limitation in terms of the mandate of Section 34 of the Arbitration Act.

29. Accordingly, the instant petition stands dismissed along with pending applications, if any.

30. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MAY 8, 2023

dy/ms

Click here to check corrigendum, if any

