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

Date of Decision:- 9th January, 2024

+ **O.M.P. (COMM) 19/2024, I.As. 477/2024, 478/2024, 479/2024, 480/2024, 481/2024, 482/2024 & 483/2024**

UNION OF INDIA & ANR.

..... Petitioners

Through: Mr. Archit Aggarwal, Adv. for Mr.
Vineet Dhanda CGSC. (M.
9811013810)

versus

M/S POPULATION SERVICES INTERNATIONAL..... Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by National AIDS Control Organization (NACO), through the Deputy Secretary (Admin) and Union of India, through the Secretary, both under Ministry of Health and Family Welfare, Government of India challenging the impugned award dated 17th June, 2021 and seeking to set aside the arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'the Act'*). The said award arises out of the contract of Condom Social Marketing Programme (CSMP), which was awarded to the Respondent – M/s. Population Services International (PSI) in respect of States i.e. Gujarat, Karnataka, Maharashtra, Odisha, Rajasthan and West Bengal.
3. The Petitioners and the Respondent entered into a contract dated 21st



May, 2014 for carrying out social marketing activity of condoms in mentioned 6 states. The aggregate value of the contract was 33.62 crores. The commencement date of the contract was 1st July, 2014. The case of the Petitioners is that the Respondent had left the work incomplete.

4. According to the Respondent, there were reasons for which the contract could not be completed and the said reasons were breaches by the Petitioners themselves.

5. From the list of dates, it is clear that there were various settlement talks, which were held between the parties. However, finally, vide order dated 11th January, 2018, the parties were referred to the Delhi International Arbitration Centre ('DIAC') and a sole Arbitrator was appointed in the Petition No.788/2017 filed under Section 11 of the Act. The Id. Sole Arbitrator has rendered the award dated 17th June, 2021. The operative portion of the order reads as under:

“Conclusion

68. In view of the above discussion and findings, the Claims and Counterclaims are decided as under:

- 1. Claim No.1 is allowed to the extent of Rs.7,33,08,661/- (Rupees seven crore thirty-three lakh eight thousand six hundred sixty-one only) with simple interest thereon at the rate of 8% per annum with effect from 17.12.2018 till realisation;*
 - 2. Claim No.2 & Counterclaim No.1 which pertain to the plea of costs are decided by holding that the parties shall bear their own costs;*
 - 3. Counterclaim No.2 is rejected;*
 - 4. Counterclaim No.3 is rejected.*
- 69. The arbitration proceedings thus stand concluded.”*



6. The present petition has been filed with a delay of more than 800 days and the reason given for the said delay in the application for condonation of delay is that the impugned award was received on 23rd June, 2021, thereafter, examination of the award commenced and the matter was sent to the legal department. After receiving the file back from the legal department, the file was sent to the Ministry of Law & Justice sometime in October, 2021 and in December, 2021, the litigation in charge appointed the CGSC - and handed over the files. Again, on legal opinion being received from the CGSC on 21st March, 2022, the file was sent to the legal department and the file was received back in April, 2022 and in view thereof, the new CGSC was appointed in May, 2022. The present petition was thereafter filed in June, 2023.

7. The petition was under objections and thereafter, it has been re-filed and listed for the first time today i.e. on 9th January, 2024.

8. A perusal of the application for condonation of delay in filing and refiling would show that the matter has been dealt with in complete negligent and callous manner by the officials in the Government as is evident from the list of dates contained in the application. Explanations given in the condonation application deserves to be extracted below herein asunder:

- “a) *That the Ld. Sole Arbitrator Justice (Retd.) Badar Durrez Ahmed, former Chief Justice, Hon'ble High Court of Jammu and Kashmir passed an Award on 17.06.2021 and the copy of the Award was received by Petitioner's office on 23.06.2021.*
- b) *That on 24.08.2021, after examining the said Award, the Petitioner forwarded the said award*



to Legal Department for seeking their Advice/Opinion.

- c) That on 03.09.2021, the case file was received back from Legal Department who suggested that the award should be contested in the Court.*
- d) That on Receipt of the opinion from Ministry of Law & Justice, a letter dated 30.10.2021 was sent to the Ministry of Law & Justice for appointment of a Government Counsel in the matter.*
- e) That on 01.12.2021, the litigation incharge (High Court) appointed Mr. R.D. Bharadwaj, CGSC in the matter and the relevant documents were handed over to the office of the Counsel.*
- f) That on 14.12.2021, preliminary discussions were held with the representative of the petitioner- wherein the counsel of the Petitioner informed him to provide the arbitration case file for preparation and filing of the objection petition.*
- g) That the Department had received a legal opinion vide an email dated 21.03.2022 whereby the Ld CGSC had advised the Petitioners to discuss the case with another Government Counsel. Therefore, the file was again sent to the Department of Legal Affairs for appointment of new counsel on 29.03.2022.*
- h) That the file was returned to the department on 26.04.2022 for appointment of a Government Counsel and the department was told to contact the litigation In-Charge (High Court).*
- i) That on 01.05.2022, the litigation incharge (High Court) appointed a new counsel, Mr. SubhashTanwar, CGSC.*
- j) That the first mail was sent to the newly appointed counsel on 11.05.2022 followed by various other communications dated 19.07.2022, 04.10.2022, 25.11.2022, 12.12.2022, 03.01.2023 and 25.05.2023, but received no response from the said counsel. Therefore, the file was again sent to*



the Department of Legal Affairs for appointment of new counsel on 01.03.2023.

- k) That on 16.06.2023, the litigation In-charge (High Court) appointed another Ld. Central Government Standing Counsel, Mr. Vineet Dhanda and thereafter the documents were handed over to the office of the newly appointed counsel.*
- l) That on 18.08.2023 Petition along with an application for condonation of delay and application for stay of execution of award was sent to the Petitioner by the Government Counsel.*
- m) That on 19.09.2023 the vetted draft objection Petition and other application were received by the Government Counsel from the petitioner and the same is filed on 27.09.2023 before this Hon'ble Court."*

9. It is the settled legal position that under Section 34 of the Act, the maximum period that is provided under statute is period of three months plus one month, if substantial cause is shown for filing of the challenge to the award. The same has been laid down categorically in ***Union of India & Ors. v. M/S Jyoti Forge And Fabrication (GAHC010044732022)***, wherein the Court held that the "*intent of the legislature is evinced by 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 3 months which is extendable by another period up to 30 days subject to the satisfaction of the court that sufficient reasons were provided for the delay and no more*". Thus, the statutory period of three months and additional 30days. The relevant portions of the said judgement are set out below:

"15. Having regard to Section 34 of the Arbitration Act, 1996,



which places the limit on the period of condonation of delay by using the word “may entertain the application within a further period of 30 days but not thereafter.” **Therefore, if a petition is not filed within the prescribed period of 3 months, the court is left to exercise its discretion to condone the delay only to the extent of 30 days and that too, if a sufficient cause is shown which would mean that when a petition is filed beyond a period of 3 months plus 30 days even if sufficient cause is made out, the delay cannot be condoned. So far as language of Section 34 of Arbitration Act, 1996 is concerned, the crucial words “but not thereafter” used in proviso to subsection (3) of section 34 of the Arbitration Act, 1996 would amount to an express exclusion within the meaning of Section 29 (2) of the Limitation Act and therefore, the same would bar the application of section 5 of the limitation Act.** In fact the Hon’ble Apex Court in the case of Union of India vs. Popular Construction Company, reported in (2001) 8 SCC 470 observed as under –

“Before us, the appellant has not disputed the position that if the Limitation Act, 1963 and in particular section 5, did not apply to Section 34 of the 1996 Act, then its objection to the award was time barred and the appeal would have to be dismissed. The submission however is that Section 29(2) of the Limitation Act makes the provisions of section 5 of the Limitation Act applicable to special laws like the 1996 Act, since the 1996 Act itself did not expressly exclude its applicability and that there was sufficient cause for the delay in filing the application under Section 34. Counsel for the respondent, on the other hand, has submitted that the language of Section 34 plainly read, expressly excluded the operation of Section 5 of the Limitation Act and that there was as such no scope for assessing the sufficiency of the cause for the delay beyond the period prescribed in the proviso to Section 34.”

16. 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 the award on one of the grounds mentioned in sub-section(2) will have to be made within a period of 3 months from the date on which the party making that application receive the arbitral award. The proviso allows this period to be further extended by another period of 30 days on sufficient cause being shown by the party for filing an application. **The intent of the legislature is evinced by 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 3 months which is extendable by another period up to 30 days subject to the satisfaction of the court that sufficient reasons were provided for the delay and no more.**

17. Section 5 of the Limitation Act provides thus –

“S. 5. Extension of prescribed period in certain cases- Any appeal or any application other than an application under any of the provision of order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he has sufficient cause for not preferring the appeal or making the application within such period.

Explanation– The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

18. Section 5 of the Limitation Act, 1963 deals with the



extension of the prescribed period for any 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 the Hon'ble Apex Court in Popular Construction Company (Supra) which reads as follows –

*“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 the Act. Parliament did not need to go further. **To hold that the court would 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. 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 unextendable by court under Section 5 of the Limitation Act....**”*

10. Clearly, the callous manner, in which the department has processed the matter and then filed the present petition shows that there is no genuine intention to challenge the award.

11. As per the award, substantial monetary amount of more than Rs.7 crores has been awarded against the Petitioners. If there was any serious challenge, the same ought to have been filed within the prescribed period of limitation. Non-filing of such a petition within prescribed period is a matter, which is serious in nature leading to the challenge itself becoming non-maintainable as barred by limitation.



12. Under such circumstances, responsibility needs to be fixed against the concerned officials, who were responsible for late filing of this petition.

13. The said petition has been sworn by Dr. Saiprasad P. Bhavsar, who claims to be the authorized signatory of NACO. It is unclear as to whether there was any specific responsibility assigned to any official in the filing of this petition.

14. The petition is, in any event, not maintainable in view of the decision of the Supreme Court in *Simplex Infrastructure Ltd vs. Union of India reported in (2019) 2 SCC 455*. The relevant portion of the said decision is set out below:

“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 3 months and the period can only be extended for a further period of 30 days on showing sufficient cause and not thereafter. The use of the words “but not thereafter” in the proviso makes it clear the extension cannot be beyond 30 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 subsection(3) read with 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.”

15. The present petition is, accordingly, dismissed. No orders as to the costs. All the pending applications are also dismissed.

16. Ld. Counsel for the Petitioners now submits that Mr. Dhanda is indisposed and he is unaware as to whether any execution petition has been filed.



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17. Under such circumstances, this Court deems it appropriate that the present order be communicated to the Director General, NACO Ms. Nidhi Kesarwani at the email ID: dir@naco.gov.in and phone: 011- 23325343 as also Secretary, Ministry of Health and Family Welfare i.e., Shri. Sudhansh Pant at the email ID: secyhfw@nic.in and phone: 011- 23061863 and 011- 23063221.

**PRATHIBA M. SINGH
JUDGE**

JANURARY 09, 2024/dk/bh