

(2016) 04 DEL CK 0167

In the Delhi High Court

Case No : O.M.P. 1122 of 2013 & I.A. No. 18319 of 2013

Ahluwalia Contracts (India) Ltd.

APPELLANT

Vs

Housing and Urban Development Corporation

RESPONDENT

Date of Decision : 04-04-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34(3)
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2016) 5 ADDelhi 443 : (2016) 157 DRJ 51 : (2016) 5 RAJ 594

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

**Advocate : Mr. Ashish Bhagat with Ms. Manisha, Advocates, for the Appellant;
Mr. Anurag Kumar, Advocate, for the Respondent**

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The petitioner has filed the objection under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award dated 28th May, 2013.

2. The objections were filed with the Registry of this Court on 26th August, 2013 and the same was returned with objections on 27th August, 2013.

3. After removing the defects, the objections ought to have been filed by 3rd September, 2013 but the same were filed on 21st October, 2013 with a delay of 55 days in re-filing. It is submitted that the delay is inadvertent and unintentional.

4. Therefore, an application being I.A. No. 18319/2013 under Section 151 CPC for condonation of delay of 55 days in re-filing has been filed.

5. It is stated in the application that the delay in re-filing the petition was neither deliberate nor intentional but due to bona fide reasons.

6. Reply on behalf of the respondent to the application under Section 151 CPC for

condonation of delay in re-filing has been filed who strongly opposed the prayer.

7. It is submitted in the reply that in the objections as averred under Para 2 of the application, the petitioner in the garb of re-filing; (i) wanted to make certain changes in the petition of which comments were needed from officials of the petitioner Company, (ii) therefore, comments were incorporated in the revised draft of the petition, (iii) Counsel sought final approval from the petitioner Company to file the same.

8. It is also stated by the respondent that the petitioner manoeuvred to buy time to overcome the delay and laches in filing the petition which lay at the petitioner's door. The process of filing revised petition in the garb of removing defects/re-filing was not formal or ancillary but of a substantial nature which changed the very nature of the original petition under Section 34 of the Act after removal of the defects would render a petition/plaint, a non petition in the eyes of law, and the date of re-filing would be the date of presentation and not the original presentation.

9. It is alleged in the reply that the petition filed on 26th August, 2013 was different from the petition filed after re-filing in the garb of removing defects and cannot attract re-filing but is a case of fresh filing. The reason spelt out in para 2 of the application shows total callousness. The petition under Section 34 of the Act was drafted in very casual manner/half baked (originally filed). The objections were filed by the petitioner, i.e. the original filing was on 26th August, 2013 but the Index and Index-I of the paper book are dated 19th October, 2013, Section 34 petition last page is dated 26th August, 2013 but the affidavit in support of the petition is dated 21st October, 2013. Similarly, Index-II is dated 19th October, 2013, the application under reply is dated 19th October, 2013, the affidavit in support of the application is dated 21st October, 2013. Index-III is dated 19th October, 2013 and the vakalatnama is dated 10th October, 2013, Court fees was purchased on 19th October, 2013 and 21st October, 2013, Index-IV is dated 19th October, 2013, index showing the list of documents is also dated 19th October, 2013.

Therefore, the delay of 55 days in re-filing is not bona fide and diligent explanation to condone the delay rather it is an abuse of the due process of law wherein the entire petition has been freshly drafted. Re-filing process has been adopted just to revert back to the original date of filing, i.e. 26th August, 2013. It is also submitted that the modus operandi adopted by the petitioner is contrary to the mandate of the legislature as award puts an end to arbitration. It is submitted that it is the duty of the Court to respect the legislative intent qua the inelastic period of limitation prescribed under Section 34(3) of the Act. Limitation cannot be extended by invoking the inherent powers under Section 151 of the CPC when the delay in re-filing is found repugnant to the legislative intent of Section 34(3) of the Act, limitation provided therein cannot be defeated by condoning the delay in re-filing. Even the reasons given for delay in re-filing do not pass the rigorous test of diligence.

10. It is also stated in the reply that the reasons given under Para 3 of the application that "due to other engagements, the petitioner company took some time in finalising the revised petition and gave the approval for filing the same" are all vague. The word "revised" is clear that the defects were not merely removed, but a new petition (revised petition) has been filed. A company is not being run by one person or by an illiterate litigant, but a company of such a stature, as in the present case which transacts business of crores of rupees and is well aware how to pursue the case diligently and not to take lightly and be careless in honouring the rules/laws. The use of words "took some time is to be taken in the context of the urgency of the case to avoid the consequences resulting/ affecting the case on merit. The delay in re-filing is deliberate and motivated. The words used "inadvertent and unintentional" are alien under the facts narrated in the application and do not stand tenable under the facts, circumstances and the law.

11. The relevant Sub-section (3) of Section 34 reads as under:

"(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."

12. A mere reading of Section 34(3) of the Act would show that the period of limitation is prescribed with respect to making an application for setting aside an award and if the objections are filed after three months, the period of limitation can only be extended upto the period of 30 days subject to the condition if a party would be able to satisfy the Courts that it was prevented by sufficient cause, otherwise, delay is not to be condoned. In any case after expiry of 30 days after the statutory period of three months, the delay of even one day cannot be condoned if the objections are not filed within three months or along with on application for condonation of delay of 30 days as provided under Section 34(3) of the Act.

13. Learned Counsel for the respondent submits that as there is delay of more than 30 days in re-filing after removing the objection, therefore, it is fresh filing and in case of such situation, the petition becomes time barred. The delay hence is not condonable as per the decision of Supreme Court in the case of Union of India v. M/s Popular Construction Co., (2001) 8 SCC 470 and the said decision has been followed in the subsequent judgment wherein it has been held that the intention of the legislature to provide a definite and inelastic period of limitation will be defeated if parties are allowed to delayed listing of the petition by delaying its refiling.

A stricter scrutiny, both for the reasons that prevented the party as also the number of days, is to be adopted to give effect to statutory provisions of Section 34. Reliance is placed on *Union of India v. Sunrise Enterprises, Panipat*, 187 (2012) DLT 244, (paras 12-13).

14. He also submits that all the objections raised by the Registry were supposed to be removed within thirty days as per rules otherwise, it would become fresh filing. Counsel submits that as per the Act, the period for filing objection under Section 34 of the Act is restricted to 3 months. The power of the Court to condone the delay has been restricted to a period of 30 days and not any further. This discretion conferred on the Court is also qualified by the requirement of the applicant satisfying the Court that there was "sufficient cause" which prevented the applicant from filing the petition in time.

15. It is rightly held in the case of *Popular Construction (supra)* that in the arbitration matters, the limitation is to be strictly construed and there is not an iota of doubt that otherwise the very same purpose would be frustrated if the delay after extended period is condoned.

16. Recently, the Division Bench of this Court has rendered the judgment after considering the various decisions of this Court and Supreme Court in the case of *Delhi Development Authority v. M/s Durga Construction Co.* 2013 (139) DRJ 133, wherein in paras 17, 18, 21 & 24 it has been held as under:-

"17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing. A similar view in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in *Ashok Kumar Parmar v. D.C. Sankhla*, 1995 RLR 85, whereby a Single Judge of this Court held as under:

"Looking to the language of the Rules framed by Delhi High Court, it appears that the emphasis is on the nature of defects found in the plaint. If the defects are of such character as would render a plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit."

A Division Bench of this Court upheld the aforesaid view in *D.C. Sankhla v. Ashok*

Kumar Parmar, 1995 (1) AD (Delhi) 753 and while dismissing the appeal preferred against decision of the Single Judge observed as under:

"5.... In fact, that is so elementary to admit of any doubt. Rules 1 and 2 of (O.S.) Rules, 1967, extracted above, do not even remotely suggest that the re-filing of the plaint after removal of the defects as the effective date of the filing of the plaint for purposes of limitation. The date on which the plaint is presented, even with defects, would, therefore, have to be the date for the purpose of the limitation act."

18. In several cases, the defects may only be perfunctory and not affecting the substance of the application. For example, an application may be complete in all respects, however, certain documents may not be clear and may require to be retyped. It is possible that in such cases where the initial filing is within the specified period of 120 days (3 months and 30 days) as specified in section 34(3) of the Act, however, the re-filing may be beyond this period. We do not think that in such a situation the court lacks the jurisdiction to condone the delay in re-filing. As stated earlier, section 34(3) of the Act only prescribes limitation with regard to filing of an application to challenge an award. In the event that application is filed within the prescribed period, section 34(3) of the Act would have no further application. The question whether the Court should, in a given circumstance, exercise its discretion to condone the delay in re-filing would depend on the facts of each case and whether sufficient cause has been shown which prevent re-filing the petition/application within time.

21. Although, the courts would have the jurisdiction to condone the delay, the approach in exercising such jurisdiction cannot be liberal and the conduct of the applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch. The applicant would have to show that the delay was on account of reasons beyond the control of the applicant and could not be avoided despite all possible efforts by the applicant. The purpose of specifying an inelastic period of limitation under section 34(3) of the Act would also have to be borne in mind and the Courts would consider the question whether to condone the delay in re-filing in the context of the statute. A Division Bench of this High Court in *Competent Placement Services through its Director/Partner v. Delhi Transport Corporation through its Chairman*, 2011 (2) R.A.J. 347 (Del) has held as under:

"9. In the light of these provisions and decisions rendered by the Hon'ble Supreme Court, it is thus clear that no petition under Section 34 of the A&C Act can be entertained after a period of three months plus a further period of 30 days, subject to showing sufficient cause, beyond which no institution is permissible. However, the rigors of condonation of delay in refiling are not as strict as condonation of delay of filing under Section 34(3). But that does not mean that a party can be permitted an indefinite and unexplainable period for refiling the petition."

24. The respondent has also relied upon the order of the Supreme Court dated 22.07.2013 dismissing Special Leave Petition No. 9175-9176/2011 in India Tourism Development Corp. Ltd. v. R.S. Avtar Singh & Co.. The above Special Leave Petitions arose from the judgment order dated 10.02.2011 in FAO No. 58/2011 and CM No. 2252/2011 which in turn had relied upon the judgment in The Executive Engineers v. Shree Ram Construction & Co. (supra). As the Special Leave Petitions against the decision in The Executive Engineers v. Shree Ram Construction & Co.(supra) had been dismissed, an application was moved for dismissal of the said Special Leave Petitions. The Supreme Court allowed the application and dismissed the Special Leave Petitions. The said order also cannot be read to hold that a court does not have the jurisdiction to condone delay in re-filing of an application under section 34 of the Act, beyond the period of three months and thirty days, where the initial filing was within the time as specified under section 34(3) of the Act."

17. It is now to be examined as to whether the present matter is covered within the principles laid down in the recent judgment delivered by the Division Bench of this Court in Durga Construction (supra) in case, the petitioner's case falls within the range of said decision, then the prayer of the application cannot be considered, if no sufficient cause is shown, then the application is liable to be dismissed.

18. In the present case, the petitioner in para 2 and 3 of the application has made the following statement, which reads as under:-

"2. That thereafter the Petitioner wanted to make certain changes in the Petition for which comments were needed from officials of the Petitioner Company. The comments were incorporated in the revised draft of the Petition and the counsels sought final approval from the Petitioner Company to file the same.

3. That due to other engagements, the Petitioner Company took some time in finalising the revised Petition and give their approval for filing the same."

19. These are the main grounds mentioned in the application. The objections were filed in 2013. No additional affidavit or any explanation is given after opposing the prayer of the petitioner. It was only at the time of hearing, some more time was sought, even the request was also strongly opposed by the counsel for the respondent. Thus, the application is being considered on the basis of averments made. For more than 2 years have been expired, the objections are still pending.

20. As per Rule 5 in Chapter 1-A of Volume 5 of the Delhi High Court Rules and Orders, the objections should have been re-filed within a time not exceeding 7 days at a time, and 30 days in aggregate to be fixed by the Deputy Registrar/ Assistant Registrar, In-charge of the Filing Counter Rule 5(3) of the said Rules makes it clear that in case the petition is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, Incharge of the Filing Counter under Sub-Rule 1. After expiry, it shall be considered as a fresh filing, then under the settled

law, the delay beyond the expiry of prescribed period cannot be condoned on any ground. The maximum period of 30 days is provided under Rule 5 Chapter-I, Part-A of Volume 5 of the High Court Rules and Orders for removing the objections by re-filing of the petition.

21. Even otherwise under Section 34 (3) of the Act the words used "but not thereafter" provides inelastic period of limitation of 3 months and 30 days which cannot be ignored. The exercise of powers under Section 151 of the CPC is to prevent the abuse of the process of the Court. Therefore, the Court exercising the powers under Section 151 CPC is to consider whether exercise of such power is expressly prohibited by any other provision as it is in the Act by the insertion of the words "but not thereafter". Inherent powers are to be exercised where specific provision does not meet the necessities. Section 151 CPC is widely worded to enable courts to do justice in proper cases, but it cannot be used as a tool to override the express provisions of the statute.

22. The purpose, aim and object of the enactment (The main object of the Bill Serial No.(v)) is minimum interference by the Court and to minimise the supervisory role of the Court in the arbitral process. Exercise of inherent powers under Section 151 CPC would be reverting back to the procedure/application of the Arbitration Act, 1940 (repealed).

23. Recently this Court in the case of INX News Pvt. Ltd. v. Pier One Construction Pvt. Ltd. reported in 2014 (3) R.A.J. 577 (Del) in para 9 held as under:-

"9. I am also deeply concerned with the fact that the applicant/petitioner while removing objections changed the entire framework of the petition. When petitions are returned, the counsels involved are not entitled to change the framework of the petitions. The petitions are returned only for removing objections pointed by the Registry. If the amendments are required to be made, the correct course would be to move the concerned court after the petition is listed in court, so that steps are taken in accordance with the law, to incorporate the necessary amendments."

24. The petitioner in the present case has failed to satisfy the Court in showing the sufficient cause and the application for condonation of delay is liable to be dismissed who is entitled to get the benefit of thirty days of initial filing and the date on which the defects are cured after thirty days period would be the fresh filing/fresh petition in the present case in the absence of sufficient cause shown by the petitioner.

25. In view of the aforesaid reasons it is clear that the petitioner has failed to satisfy the Court to disclose the sufficient cause. Thus, the application is dismissed.

26. Consequently, the objections filed by the petitioner under Section 34 of the Act are also dismissed. No costs.