

(2013) 11 DEL CK 0153
In the Delhi High Court
Case No : O.M.P. 673 of 2013

INX News Pvt. Ltd.

APPELLANT

Vs

Pier One Construction Pvt. Ltd.

RESPONDENT

Date of Decision : 11-11-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(3)

Citation : (2014) 1 ARBLR 27

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Robin David, Mr. F. Mathew and Mr. Chitranshul Sinha, for the Appellant; Lokesh Bhola and Ms. Pankhuri Jain, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.

IA No. 10631/2013 (condonation of delay in re-filing)

1. This is an application filed for condonation of delay in re-filing. In the application, it is averred that there is a delay of 105 days in re-filing the main petition. However, as per the report of the Registry, there is a delay of 157 days.

The relevant dates which are set out in the petition and which have been conveyed by the learned counsel for the applicant/petitioner are as follows:-

1.1 The award dated 01.10.2012 was received by the applicant/petitioner on the same date. The petition u/s 34 of the Arbitration and Conciliation Act, 1996 (in short the 1996 Act) was filed by the applicant/petitioner on 02.01.2013. 01.01.2013 being a holiday, the petition was filed immediately thereafter, as indicated above, on 02.01.2013. Since the Registry raised objections, the petition was re-filed on 14.01.2013. The Registry, however, took a view that objections had not been removed and therefore, the petition was returned on 14.01.2013. The applicant/petitioner re-filed the petition, once again, on 28.01.2013.

1.2 The Registry pointed to the applicant/petitioner on 29.01.2013, that it should remove the objections "properly". The applicant/petitioner appears to have re-filed the petition, on 21.05.2013.

1.3 According to the Registry, objections which had been pointed on 14.01.2013, continued to remain on record, and therefore, once again, the petition was returned on 31.05.2013.

1.4 It appears, that finally, the applicant/petitioner removed all objections on 04.07.2013. The petition, came up for hearing, before this court, for the first time, on 10.07.2013.

1.5 On that date, since the respondent entered appearance, and had, sought time to file reply to the captioned application, the petition was relisted today i.e., 11.11.2013.

2. The non-applicant/respondent has filed a reply.

2.1 Broadly, the objections taken by the non-applicant/respondent are as follows:-

(i). That the delay between 02.01.2013 to 31.05.2013 is 149 days, and not, 105 days;

(ii). The re-filed petition has been completely changed. This is sought to be demonstrated, by placing before the court a copy of the earlier petition filed with the Registry (a copy of which was obviously served on the non-applicant/respondent), and comparing the same with, the copy placed presently, on record.

(iii). The reasons for condonation of delay are untenable. The non-applicant/respondent contests the averments made in the application that seek to explain the delay between 02.01.2013 and 31.05.2013, on two grounds. The first, that there was a change in counsel. For this purpose, reliance is placed on an e-mail dated 13.03.2013 issued by the erstwhile counsel for the applicant/petitioner. Second, that the legal head of the petitioner i.e., one Mr. Dinesh Banth, had taken ill. It is averred that Mr. Dinesh Banth had a stone lodged in his kidney, for which, he was admitted to the hospital, in March, 2013, and operated upon on, 02.04.2013.

(iii)(a). As indicated above, the non-applicant/respondent contests this position by referring to the documents placed on record which, according to the non-applicant/respondent, only demonstrates that Mr. Dinesh Banth had admitted himself, in the hospital only for day care. It is, therefore, the contention of the non-applicant/respondent that there was nothing on record to suggest that the said gentleman was, operated upon, as averred in the application.

(iv) The delay is malafide and no sufficient cause has been shown for condonation of delay.

3. To be noted, the applicant/petitioner has filed a rejoinder; with which, most of

the documents relied upon, concerning the illness of Mr. Dinesh Banth, have been filed. The applicant/petitioner has also placed on record the objections raised by the Registry from time to time.

4. The learned counsel for the parties have argued in line with the averments raised in their respective pleadings filed before me.

4.1 It is the submission of Mr. David, the learned counsel for the petitioner that the delay is neither malafide nor deliberate. It is his contention that a large part of the delay occurred on account of the change in counsel and due to the illness of the legal head of the petitioner. Mr. David contended that the court while examining the delay in re-filing need not adhere to the strict rigour, which it may be required to adopt, while examining the delay in the initial filing. In support of his submissions, Mr. David has relied upon the following three judgments:- Indian Statistical Institute Vs. Associated Builders and Others, ; S.R. Kulkarni Vs. Birla VXL Limited, ; and DSA Engineers (Bombay) and Others Vs. Housing and Urban Development Corporation (HUDCO), .

5. On the other hand, Mr. Bhola, who appears for the non-applicant/respondent submitted that this court would have to rigorously examine the delay in re-filing in view of the provisions of the Section 34(3) of the 1996 Act. He submits that examination of the delay in re-filing should be governed by the provisions of the New Act i.e., 1996 Act and not by keeping in mind the provisions of the Arbitration Act, 1940 (in short the 1940 Act).

5.1. The learned counsel for the non-applicant/respondent submits that while the frame of the petition on record is different from that which was filed in the first instance, the affidavit on record remains the same, that is, the one which was filed with the earlier petition.

5.2 To be noted, the affidavit is dated 02.01.2013, and is sworn by, one, Mr. Aman Thukral; an authorised representative of the petitioner.

5.3 The learned counsel for the petitioner further submits that at no stage did Mr. Dinesh Banth represent the applicant/petitioner, and that, Mr. Aman Thukral, represented the applicant/petitioner before the arbitrator. Therefore, it is the learned counsel's contention that, the reason advanced to explain the delay; which is that the legal head, Mr. Dinesh Banth, had to be operated upon, and thus, the delay in re-filing ought to be condoned; is to say the least, nebulous and unworthy of acceptance.

5.4 In support of his submission, the learned counsel for the non-applicant/respondent has relied upon the judgment of the Division Bench of this court in the case of The Executive Engineer (Irrigation and Flood Control) Vs. Shree Ram Construction Co., ; and Delhi Transco Ltd. and Another Vs. Hythro Engineers Pvt. Ltd., .

5.5 The learned counsel has also relied upon a judgment dated 23.09.2013 delivered by me, in: IA No. 7795/2013 and 7796/2013 filed in OMP 477/2013, in

the case of Union of India Vs. M/s. Ravinder Kapoor. In the said judgment, I have followed the view taken by the two separate Division Benches in the aforementioned cases i.e., Shree Ram Construction Co. and Delhi Transco Ltd. and Anr.

5.6 Having regard to the above, I am of the view that the court does have the power to condone the delay in re-filing if the initial filing is within the period prescribed u/s 34(3) of the Act. The result, however, would depend on the facts and circumstances of each case. It is my reading of the Division Bench judgments of this court in Shree Ram Construction Co. and Delhi Transco Ltd. and Anr. that the court is not emasculated of its power to condone the delay, [and therefore, in a given case it may condone the delay] if sufficient cause is shown. The reasons, advanced, to explain the delay should reflect the bonafides of the applicant. I may only point out that if there was any lurking doubt with respect to this approach, it has been set at rest by yet another Division Bench of this Court in a recent judgment dated 07.11.2013, passed in FAO (OS) 485-86/2011, titled: Delhi Development Authority Vs. M/s. Durga Construction Co.

5.7 Thus, what has to be examined in this case is: whether sufficient cause is shown to explain the delay.

6. A perusal of the record would show that the following facts obtain in the case:-

(i). The petitioner received a signed copy of the award dated 01.10.2012, on the same date.

(ii). There is nothing on record to show that Mr. Dinesh Banth was operated on 02.04.2013. There is no discharge summary filed; which is ordinarily issued, after an operation conducted by a hospital.

(iii). A perusal of the e-mail dated 13.03.2013, (put on record by the applicant/petitioner), would show that the lawyer then representing it, declined to appear for the applicant/petitioner because he had issues vis-?-vis the inability of the applicant/petitioner to take a decision qua his professional fee.

(iv). Most of the objections, which were raised on 14.01.2013 when, the applicant/petitioner was returned the petition, continued to appear on record even upto 04.07.2013.

(v). The petition, which is placed on record, is accompanied by an affidavit of Mr. Aman Thukral; the authorised representative of the petitioner, and not that of, Mr. Dinesh Banth.

6.1 The learned counsel for the applicant/petitioner has confirmed that Mr. Dinesh Banth continues in the employment of the applicant/petitioner.

6.2 According to the applicant/petitioner, there is delay of 105 days. This obviously is an incorrect calculation. If only the period between 02.01.2013 and 31.05.2013 is taken note of, that itself accounts for 149 days.

6.3 Be that as it may, the moot question is: whether the delay has been properly explained. It is noted that there are two reasons given for seeking condonation of delay. The first reason, advanced is that: the lawyer for the petitioner had to be changed. The second reason articulated is, the illness of Mr. Dinesh Banth. Both events occurred in the month of March, 2013. The first event occurred somewhere in the middle of March, 2013, while the second event occurred at the end of March, 2013 and beginning of April, 2013. There is no explanation for delay which occurred prior to March and that which occurred in the months of April and May, 2013. As indicated above, the objections were finally removed on 04.07.2013.

7. In my view, the reasons advanced by the petitioner do not supply sufficient cause, and therefore, the captioned application will have to be rejected. The time lines fixed, for filing objections to the award, are strict as indicated in three separate judgments of the Division Benches of this court in the following cases: Shree Ram Construction Co.; Delhi Transco Ltd. and Anr.; and M/s. Durga Construction Co.. It may be worthwhile to note that a SLP as also a review petition was preferred against the judgment rendered in the case of Delhi Transco Ltd. & Anr. which were dismissed on 24.01.2013 and 21.03.2013 respectively. Similarly, a SLP preferred in the case of Shree Ram Construction Co, was also dismissed.

7.1 Since the judgments relied upon by the learned counsel for the petitioner pertain to the 1940 Act, therefore, in my view, they would not have any applicability to the instant case. The regime under the 1996 Act, is perceptibly different to that of the 1940 Act. In any event, the condonation of delay is an aspect which turns on facts and circumstances of each case. Even if the test enunciated in the judgments relied upon by the petitioner is applied to the present facts, in my view, the applicant/petitioner has been negligent in not removing the objections in time.

7.2 As indicated above, there are vast periods qua which there are no explanations rendered by the applicant/petitioner.

8. 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.

9. In foregoing circumstances, the application being without merit, is dismissed.

OMP 673/2013 and IA No. 10629/2013 (stay)

In view of the dismissal of IA No. 10631/2013, the necessary consequences will

have to follow, which are, that the petition and the remaining application would also have to be dismissed. It is ordered accordingly.