

(2019) 11 DEL CK 0531

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 259 Of 2019,
Miscellaneous Application No.9129, 9130 Of 2019

M/S Metro Builders (Orissa) Pvt Ltd

APPELLANT

Vs

Indian Oil Corporation Ltd

RESPONDENT

Date of Decision : 20-11-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34, 34(2), 34(3)
Limitation Act, 1963 — Section 5

Citation : (2019) 11 DEL CK 0531

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Simranjeet Singh, Anish Dayal, Rupam Sharma

Final Decision : Dismissed

Judgement

Jyoti Singh, J

I.A. 9129/2019

The present application has been filed seeking condonation of delay of 111 days in re-filing the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) challenging the Arbitral Award dated 10th August, 2018.

The petitioner has averred in the application that on 22nd September, 2018 the respondent had moved an application under Section 33 of the Act for grant of interest from the date of termination of the contract till final payment including pendent lite and future interest and for correction of certain typographical errors in the Award. The Arbitrator vide e-mail dated 8th November, 2018 had circulated the corrected Award and thus the limitation for the petition under Section 34 commenced only on 9th November, 2018.

It is next averred that the erstwhile counsel who practices in Orissa withdrew from the case on or around 15th November, 2018. On 18th November, 2018 the

petitioner sought permission from the Arbitrator to inspect the Arbitral Record. The request was reiterated vide e-mail dated 23rd November, 2018. On 29th November, 2018 the Arbitrator refused inspection and on 6th December, 2018 the petitioner sent another request attaching the authorisation of the concerned person for inspection. Finally, on 12th December, 2018 the record was inspected and the counsel was engaged who also inspected the record on the same day.

It is next averred that the present petition was filed in this Court on 22nd December, 2018 vide diary No. E-588306/2018 accompanied by duly attested affidavits of the petitioner and documents totalling to 500 pages. The Registry communicated the defects to the counsel vide e-mail dated 5th January, 2019. The petitioner is a Company based in Orissa and therefore it took time to clear the defects as also because certain documents were not available. One of the previous lawyers had a personal tragedy in the month of Jan-Feb, 2019 and even the clerk of the erstwhile counsel had left the job. On account of all these factors it is averred that a delay of 111 days has occurred in re-filing the petition.

On 25th July, 2019 this Court had issued notice to the respondent on the present application who sought time to file the reply. The Court noted the contention of the petitioner in the order that the petition was originally filed on 22nd December, 2018. However, it was observed by the Court, after perusing the log information, that no such filing was reflected in the information given by the Registry. In these circumstances the Court directed the Registry to place on record the log information sheet with respect to the said filing done vide diary No. E-588306/2018. The petitioner was also directed to file an affidavit indicating what was filed vide the above diary number. Court had stayed the enforcement of the Award subject to deposit of Rs. 2.50 crores with the respondent within six weeks.

On 16th October, 2019 when the matter was listed, the Registry had placed on record the requisite information but the petitioner had not filed the affidavit. A new counsel appeared on behalf of the petitioner and submitted that he had telephonic instructions to appear in the matter but there was no Vakalatnama issued in his favour. The Managing Director of the petitioner company was directed to remain present in the Court on the next date of hearing. On 22nd October, 2019 in view of the dispute raised between the parties with regard to the filing on 22nd December, 2018 this Court had directed the Registrar (original) to investigate the matter regarding the status of filing and file a report in a sealed cover. The direction to the petitioner to file the affidavit was reiterated.

The sealed cover sent by the Registry was opened in the Court today, in presence of the counsels for the parties. The report reveals that a petition was filed on 22nd December, 2018 under the diary number given by the petitioner comprising of 634 pages. On 5th January, 2019 the said petition was checked and many objections were marked. The same were conveyed to the counsel on 5th January, 2019 by SMS as well as by e-mail. The report further brings out that these objections have not been removed till date. Instead a new petition was filed on

27th May, 2019 vide diary No. E-501495/2019 by another Advocate comprising 814 pages. The report also notes that there is variation in the cause title of the two petitions.

The report was shared with both the counsels present in the Court. Confronted with the report, learned counsel for the petitioner sought to argue that since a petition was filed on 22nd December, 2018 the benefit of the filing should be given to the petitioner as the petitioner is not to be blamed for the erstwhile lawyer not having cleared the objections in the earlier petition necessitating the present lawyer to file a fresh petition.

In my view since the earlier petition was never refiled and is still lying under objections, the benefit of the filing of the first petition cannot accrue to the petitioner. The present petition, which is a fresh petition, was filed only on 27th May, 2019 and is beyond the limitation period of three months provided under Section 34(3) of the Act. It is also beyond the extended 30 days period available to a party under proviso to section 34 (3) of the Act within which the Court has discretion to condone the delay, if 'sufficient cause' is shown. Date of Award is 10.08.2018 and even if the limitation period is counted from 09.11.2018 as contended by the petitioner, the delay being beyond the outer limit of 120 days cannot be condoned.

It has been held by the Apex Court in *Simplex Infrastructure Ltd. V. Union of India (UOI)*, 2019 (2) SCC 455, that the Court has no power to condone any delay beyond the outer limit of 120 days prescribed under Section 34(3) of the act. The relevant para of the judgement reads as under:-

"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 three months and the period can only be extended for a further period of thirty days on showing sufficient cause and not thereafter. The use of the words "but not thereafter" in the proviso makes it clear that the extension cannot be beyond thirty 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 sub-section (3) read along with the 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."

Having gone through the Report what clearly emerges is that the first petition filed on 22.12.2018 is lying under objections and hence its filing is irrelevant. Present petition is filed afresh and cannot be termed as 'refiling' so as to give the benefit of filing of first petition. Since it is filed beyond the statutory period, the delay in filing cannot be condoned, following the law laid down in *Simplex Infrastructure Ltd. (supra)*.

For the reason stated above there is no merit in the application and the same is

dismissed.

O.M.P. (COMM) 259/2019 and I.A. No. 9130/2019

Since the application for condonation of delay has been dismissed the present petition stands dismissed.