
(2014) 11 DEL CK 0027
In the Delhi High Court
Case No : OMP No. 1277/2013

Traffic Media (India)

APPELLANT

Vs

Delhi Metro Rail Corporation

RESPONDENT

Date of Decision : 18-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(3)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 3
Criminal Procedure Code, 1973 (CrPC) — Section 9

Citation : (2014) 11 DEL CK 0027

Hon'ble Judges : Deepa Sharma, J

Bench : Single Bench

Advocate : Anil Sapra, Sr. Advocate, Sonia Khandelwal, Rupali Kapoor and Mridul Yadav, Advocate for the Appellant

Judgement

Deepa Sharma, J.

IA No. 20803/2013 (for condonation of delay in re-filing)

1. This application has been filed alongwith the objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") raised by the petitioner in OMP No. 1277/2013. Vide this OMP, the petitioner has challenged the award dated 01.02.2013.

2. The petition under Section 34 was filed on 01.05.2013, but, it was returned with objections. Finally, the petition was re-filed on 16.12.2013, after removing all objections. There was a delay of 199 days. The petitioner has filed this application for condonation of delay. It is submitted that the objections which were initially raised by the Registry on 01.05.2013 were removed and the petition was re-filed again on 08.05.2013. Again, the objections were raised which were removed and the petition was re-filed on 16.05.2013. The objections were again raised by the Registry and the counsel for the petitioner, after removing the objections, re-filed the same vide diary No. 119049 on 08.08.2013. Again, after removing the objections, it was re-filed vide Diary No. 138216 on

11.09.2013. It is submitted that the brother of the counsel for the petitioner was detected for kidney problem in October, 2012 and was under observation and medication. He was on dialysis from January, 2013 on weekly basis and in the third week of May, he developed medical complications and despite dialysis, there was no improvement and both the kidneys were functioning up to 35% and the dialysis was needed to be given every third or fourth day with lot of other medication. Since the counsel for the petitioner was informed that there was no chance of survival if the transplant of the kidney was not done, he initiated the process of transplantation by arranging a kidney from the mother. The process required heavy documentation which were prepared and submitted before CMO as well as SDM concerned at the native place in District Baghpat, U.P. and it took around 2 1/2 months for verification and approval. Brother of the counsel for the petitioner is the eldest son and the sole earning member of the family as his father expired in the year 1992. The age of the brother of the counsel at the relevant time was only 27 years. He had also made representations to PMO and got a sum of Rs. 3 lakh sanctioned from PM's Relief Fund and finally, the operation was done on his brother on 19.10.2013 and, thereafter, he was required to be taken to the hospital for routine medical check up. His brother was finally discharged on 08.11.2013. It is submitted that thereafter the petition was re-filed. Again, the objections were raised which could not be removed immediately as the cousin brother of the counsel for the petitioner developed some post operation complications and as a result, the counsel could not perform his professional duties. It is submitted that because of these reasons, the delay had occurred.

3. Learned counsel for the petitioner has relied upon Rafiq and Another Vs. Munshilal and Another, ; Delhi Jal Board vs. M/s. Digvijay Sanitations and Anr., OMP No. 396/2007, decided on 26.05.2014 by this Court and National Highways Authority of India vs. M/s. JSC Centrodorstroy, OMP No. 46/2009, decided on 17.09.2009 by this Court.

4. It is argued that because of the default on the part of the counsel for the petitioner, the parties cannot be made to suffer. It is submitted that in Delhi Jal Board (supra), the delay was condoned on the ground that the uncle of the counsel for the petitioner had suffered heart attack and the counsel remained out of office for more than 20 days and, thereafter, since the matter was not listed before the Court and was not reflected in the diary, it slipped from his memory, after resuming office and only on receipt of the execution proceedings, counsel realized about the rectification to be done to their petition. It is submitted that facts in the present case are also similar and, therefore, the delay be condoned.

5. The petitioner has also relied on the findings in the case of National Highway Authority of India (supra) and has submitted that the Court had condoned the delay of 78 days in re-filing the petition under Section 34. It is submitted that in that case, the petition was filed within time. Another petition challenging an identical award between the parties was also before the Court. The clerk of the

counsel for the petitioner got confused between two cases since both the petitions were between the same parties and were filed simultaneously, and he bona fide believing that the matter had already been listed for hearing, did not notice that the objections have been raised by the Registry in one of the petitions and did not bring the same to the notice of the counsel and that is why the objections could not be removed. On these facts, the Court found that the delay was not intentional and was bona fide.

6. The petitioner has also relied upon Rafiq and Anr. (supra), wherein the Supreme Court has held that it is not proper that the party should suffer for inaction, deliberate omission or misdemeanour of his agent. Party should not suffer injustice, merely because his chosen advocate defaulted. On this ground, it is prayed that delay of 199 days be condoned.

7. I have heard the learned counsel for the petitioner and have perused the relevant record.

8. The condonation of delay has been sought on the ground of sickness of brother of the counsel for the petitioner. It is, however, pertinent to mention that the name of the counsel and the name of the brother of the petitioner is not disclosed in the application.

9. In this case when the application had come up for hearing, the Court found the explanation given for condonation of delay as inadequate. The Court observed in its order dated 28.05.2014 that it is not disclosed that the counsel during that period was not attending any professional work and his office was lying closed and he did not appear before any Court during the said period. Upon that, the learned senior counsel sought an adjournment for filing a better affidavit of the counsel. On 25.07.2014, the petitioner was directed to file an affidavit of the counsel disclosing the number of cases he attended during this period of 199 days and the number of orders from the various Courts which he obtained after arguing the matter and number of cases he filed during this period and all the other things related to his work as an Advocate during this period and listed the matter for 21.08.2014. On that date, i.e., 21.08.2014, the counsel for the petitioner had submitted that it was difficult for the petitioner to file the affidavit of his counsel pursuant to the directions of this Court on 25.07.2014. Thereafter, the arguments in the matter were heard.

10. The position of law is very clear. The Court has the power to condone the delay even where the petition has been filed beyond 120 days as laid down under Section 34(3) of Act. However, in catena of judgments, it has been held that where there is delay in re-filing which is beyond the period of 120 days, the matter requires closer scrutiny and adoption of more stringent norms. (Reliance has been placed on Delhi Development Authority vs. M/s. Durga Construction Co. FAO (OS) 485-86/2011).

In number of judgments, it has been held that where the delay in re-filing exceeds 120 days, the Court has to exercise its jurisdiction stringently and not

liberally and the petitioner has to satisfy the Court that it has pursued the matter diligently and delay was unavoidable and beyond its control.

11. This Court in the case of The Executive Engineer (Irrigation and Flood Control) vs. Shree Ram Construction Co.: 2010 (120) DRJ 615 (DB) has observed as under:-

"41. The question, which still requires to be answered, is whether a reasonable explanation has been given with regard to delay of 258 days in the refiling of the Objections. Since this delay crosses the frontier of the statutory limit, that is, three months and thirty days, we need to consider whether sufficient cause had been shown for condoning the delay. The conduct of the party must pass the rigorous test of diligence, else the purpose of prescribing a definite and inelastic period of limitation is rendered futile.

.....

No other explanation has been tendered for the delay. The avowed purpose of the A&C Act is to expedite the conclusion of arbitral proceedings. It is with this end in view that substantial and far reaching amendments to the position prevailing under the Arbitration Act 1940 have been carried out and an altogether new statute has been passed. This purpose cannot be emasculated by delays, intentional or gross, in the course of refiling of the Petition/ Objections.....".FAO(OS) 295

12. This Court in Delhi Transco Ltd. and Another Vs. Hythro Engineers Pvt. Ltd., , while relying on the findings in case of Shree Ram Construction Co." case (supra) has observed as under:

"10. It is in Shree Ram Construction Co. (supra) that the Court actually examined as to what is the magnitude of delay in re-filing, which the Court may tolerate and permit to be condoned in a given case. Obviously, there cannot be any hard & fast rule in that respect, and the Court would have to examine each case on its own facts & merits and to take a call whether, or not, to condone the delay in re-filing the objection petition, when the initial filing of the petition is within the period of limitation. However, what is to be borne in mind by the Court is that the limitation period is limited by the Act to three months, which is extendable, at the most, by another thirty days, subject to sufficient cause being disclosed by the petitioner to explain the delay beyond the period of three months. Therefore, it cannot be that a petitioner by causing delay in re-filing of the objection petition, delays the re-filing to an extent which goes well beyond even the FAO(OS) 295/2012 Page 7 of 10 period of three months & thirty days from the date when the limitation for filing the objections begins to run. If the delay in re-filing is such as to go well and substantially beyond the period of three months and thirty days, the matter would require a closer scrutiny and adoption of more stringent norms while considering the application for condonation of delay in re-filing, and the Court would conduct a deeper scrutiny in the matter. The leniency shown and the liberal approach adopted, otherwise,

by the Courts in matter of condonation of delay in other cases would, in such cases, not be adopted, as the adoption of such an approach by the Court would defeat the statutory scheme contained in the Act which prescribes an outer limit of time within which the objections could be preferred. It cannot be that what a petitioner is not entitled to do in the first instance, i.e. to file objection to an award beyond the period of three months & thirty days under any circumstance, he can be permitted to do merely because he may have filed the objections initially within the period of three months, or within a period of three months plus thirty days, and where the re-filing takes place much after the expiry of the period of three months & thirty days and, that too, without any real justifiable cause or reason."

13. It is, therefore, clear that where there is a delay in re-filing beyond the period of 120 days of the receipt of the award, the Courts are required to do scrutiny in the matter to see if the petitioner was prevented due to sufficient reasons/causes from re-filing the petition within time. The liberal approach in such cases is deprecated by the Court, as discussed above.

14. In this case, the reason of delay has been given in the application in para 6 wherein it is submitted that the "brother" of the counsel was suffering from kidney problem and was undergoing repeated dialysis and ultimately, he had to undergo the kidney transplant operation on 19.10.2013 and, thereafter, he had to be taken to the hospital for his regular medical check-ups. The age of the brother of the counsel, who had undergone the kidney transplant, is given as 27 years. In para 9 of the petition, however, the submission made is that the objections could not be removed immediately as the "cousin brother" of the counsel for the petitioner developed some post operation complications which prevented the counsel from performing his professional duties. This application is supported by the affidavit of authorized representative Mr. Mayank Sharma of the petitioner as well as Advocate Vivek Kumar. It is clear from the contention that neither the name of the counsel nor the name of the brother of the counsel is given. It is also clear that while at one place it is stated that "brother" of the counsel who was 27 years of age had undergone the operation, at another place, it is submitted that it was the "cousin brother" of the counsel. If we take that the counsel who had been prevented from re-filing the petition within time was Mr. Vivek Kumar, Advocate, whose affidavit is accompanying this application, then it is important to note that there was no vakalatnama on record of Advocate Vivek Kumar. In this case, the petitioner has filed vakalatnama dated 16.12.2013 signed by Shri Sandeep Sharma and one another Advocate and the said vakalatnama bears the names of Advocates Sandeep Sharma, Vikas Sharma, Kanika Singh, Vatsal Kumar, Kapil Yadav, Anant Gautam and Anshika Sud, Advocates. There is another vakalatnama dated 14.07.2014 filed by the petitioner and it is in favour of Advocate Sonia Khandelwal. Pursuant to the directions of this Court dated 28.05.2014, an additional affidavit was filed by Advocate Vivek Kumar, wherein it is submitted that delay had occurred due to illness of his "cousin brother", who is the eldest son of the family and whose

father already expired in the year 1992, while in his application for condonation of delay, in para 6, it is submitted that the age of the "brother" of the counsel for the petitioner is 27 years and he is the eldest son and the sole earning member of the family and his father expired in the year 1992. The inference from the contention in para 6 is that the real brother of the Advocate Mr. Vivek Kumar had suffered kidney failure, who is 27 years old and this had prevented him from doing the needful. He being the eldest son and the sole earning member of the family and his father having expired in the year 1992, had to bear the entire responsibility and, therefore, could not do the re-filing within time. While in the same application in para 9, it is mentioned that it was the "cousin brother" of the counsel for the petitioner who developed the kidney problems. There is shifting contentions. In this affidavit, Advocate Vivek Kumar has not mentioned that his office was closed during that period and that he did not file any fresh petition or that he did not argue before any Court. This means that even during this period, despite all the problems he was facing, he had been discharging his professional duties as an Advocate. In the affidavit, it is also submitted that he got the present OMP filed through another Advocate, but, if he was the Advocate of the petitioner in the OMP, he should have had filed his vakalatnama as well, but there is no vakalatnama of Advocate Vivek Kumar.

15. In the case of Shree Ram Construction Co. (supra), the condonation of delay in re-filing was sought on the ground that the delay had occurred due to ill-health of senior standing counsel. The Court had made the following observations:-

"The reason attributed by the Appellant for the delay is the ill health of the Senior Standing Counsel. However, as has been pithily pointed out, the Vakalatnama contains the signatures of Ms Sonia Mathur, Standing Counsel for the Department; in fact, it does not bear the signature of Late Shri R.D. Jolly. Because of the explanation given in the course of hearing, we shall ignore the factum of the Vakalatnama also bearing the signature of another Standing Counsel, namely, Ms Prem Lata Bansal. We have called for the records of OMP No. 291/2008 and we find that the Objections have not been signed by Late Shri R.D. Jolly but by Ms Sonia Mathur on 9.8.2007, on which date the supporting Affidavit has also been sworn by the Director of Income Tax. In these circumstances, the illness of Late R.D. Jolly is obviously a smokescreen."

16. The petitioner has relied on the findings in Delhi Jal Board (supra), but those findings were given on entirely different set of facts. There, the application had been made under Section 9 Rule 4 of CPC wherein another application had been filed for condonation of delay in filing the application under Section 9 Rule 4 of CPC and the Court had made the observation relied upon by the petitioner.

As discussed above, the law dealing with the delay in re-filing the petition under Section 34 is entirely different.

17. Also, in the case National Highway Authority of India (supra), the facts on

which the Court had condoned the delay are entirely different. The findings in the case of Rafiq and Anr. (supra) are also entirely on different set of facts. These facts have been given on an application for recalling of an order and under different provisions of the law. As discussed above, the law, dealing with the condonation of delay in re-filing beyond the period of limitation, i.e., 120 days, is entirely different and the law is very clear that the Court has to make a deep scrutiny and has to see whether the delay is such which is bona fide, reasonable and beyond the control of the petitioner.

18. In the present case, the facts are similar to that of Shree Ram Construction Co." case (supra) and I am of the opinion that the illness of the brother or the cousin brother of Advocate Vivek Kumar is to be taken as smokescreen. There is nothing on record to show that he was authorized by the petitioner to file the present petition. He holds no vakalatnama in his favour.

19. Moreover, in Part G of Delhi High Court Rules which relates to the proceedings in the High Court of Delhi and Chapter I, Part A (a) deals with Judicial business relating to presentation and reception of Appeals, Petitions etc. and Rule 5 reads as under:

"5. Amendment--The Deputy Registrar Assistant Registrar, Incharge of the Filing counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order XLI, Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not taken back for amendment within the time allowed by the Deputy Registrar, Asstt. Registrar, in charge of the filing Counter under sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution.

(3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Asstt. Registrar in charge of the Filing Counter, under sub-rule (1) it shall be considered as fresh institution.

Note--The provisions contained in Rule 5(1), 5(2) and 5(3) shall mutatis mutandis apply to all matters, whether civil or criminal.].....

It thus empowers the Deputy Registrar, Assistant Registrar, Incharge of the Filing Counter to return the appeal, petition etc. with objections requiring refiling within a time not exceeding 7 days at a time and 30 days in the aggregate and sub-rule (3) specifically and categorically stipulates that if the refiling is done beyond the time allowed under Sub rule 1, it "Shall be considered as fresh institution". The expression used is "Shall".

20. Also, in the case Delhi Transco Ltd. and Another Vs. Hythro Engineers Pvt. Ltd., , it has been clearly held by this Court that if the petition is filed beyond the time given by Deputy Registrar/Assistant Registrar Incharge for removal of

objections, this in view of Rule 5(3) of Chapter I Part A of Vol. 5 of High Court Rules and order, should be considered as fresh filing. The Court has observed as under:-

"11..... Moreover, there is no answer with the appellant to the reliance placed by the learned Single Judge on Rule 5, Chapter "I", Part A of Vol. 5 of High Court Rules and Orders, according to which, 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, Incharge of Filing Counter. Rule 5 (3) read with the note also makes it abundantly clear that in case the petition is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, Incharge of Filing Counter under Sub-Rule 1, it shall be considered as a fresh institution..... "

21. Since in the present case, the re-filing has been done beyond the period of 30 days from the date of return of the objections at the first instance and the delay is 199 days in re-filing, in view of the above said clause, is a fresh filing with the Registry.

22. In view of the above discussed reasons, I find no justification in condoning the delay of 199 days as the petitioner has failed to show any reasonable ground for the Court to do so. The application is dismissed.

OMP No. 1277/2013

Since the application for condonation of delay is dismissed, the present petition also stands dismissed.