

(2010) 03 DEL CK 0235
In the Delhi High Court
Case No : O.M.P. No. 30 of 2010

Union of India (UOI)

APPELLANT

Vs

Harbhagwan Harbhajan Lal

RESPONDENT

Date of Decision : 11-03-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(5), 34, 34(3)
Limitation Act, 1963 — Section 5

Citation : (2010) 03 DEL CK 0235

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Jitender Kumar Singh, for the Appellant; A.K. Singla and Pankaj Gupta, for the Respondent

Judgement

Valmiki J Mehta, J.

I.A. No. 570/2010 in O.M.P. No. 30/2010

1. This is an application for condonation of delay in re-filing of the petition u/s 34 of the Arbitration and Conciliation Act, 1996. The counsel for the petitioner/applicant admits that the figure of 152 days as stated in the application is not correct and the delay in re-filing in fact works out to 195 days. The counsel for the respondent also agrees that delay in re-filing is 195 days. The issue is, can this delay of 195 days be condoned.

2. It has now been repeatedly held by the Supreme Court and by this Court that no doubt the provision for condonation of delay has to be read and applied liberally, however, if there is negligence or inaction writ large on the face of the record, then condonation of delay ought not to be allowed.

Let us accordingly examine the averments made in the application for condonation of delay. Paras 2 and 3 of the application reads as under:

2. That the accompanying O.M.P. had been filed on 29-05-2009. The O.M.P. came

under objections. The said O.M.P. was collected from registry after summer vacation on 03-07-2009. All the steps were being taken to remove the objections of the registry. There was large number of documents and typing of documents which were not legible. Some documents which were not legible and not understandable were made available with typed copy by the concerned dealing/staff of Railway. The typing of all illegible documents consumed lot of time.

Thereafter the paper-book of the petition got misplaced and was wrongly being put in another file. The file could be traced on 16-11-2009. Thereafter the rest objections of the registry were removed and O.M.P. was refilled on 27-11-2009.

3. That the delay in refilling is not willful or intentional rather circumstantial.

3. The aforesaid averments are now sought to be buttressed by additional averments in rejoinder and the basic additional averments in rejoinder read as under:

1. (i)....

(ii) There was large number of documents which was hand written and there was large number of documents which were dim and not legible. The registry of Hon"ble High Court took specific objection and instructed to file fair typed copy of dim annexures and hand written annexure. The page No. 335 to page No. 427 was dim annexure and same were filed after getting fairly typed.

Some documents which were not legible and not understandable were made available with typed copy by the concerned dealing/staff of Railway. The typing of all illegible documents consumed lot of time. Many of pages between 141 to 230 got typed before refiling.

4. It would be necessary at this stage to refer to the objections which were raised by the Registry seeking re-filing after removing of the objections. These objections are:

S.No. Defects Marked Removed On 1 Caveat report be obtained/at the time of each subsequent 30-May-09 NO filing and proof of service be filed. (101) 2 Petition/applications/annexures/order/power of attorney 30-May-09 NO should be stamped. (109) 3 Petition/applications/power of attorney be signed and 30-May-09 NO dated. (110) 4 Left side margin of 4 c.m. be maintained. (111) 30-May-09 NO 5 Affidavit be filed in support of petition/appeal/application 30-May-09 NO and attested/identified. Parental details/age/complete address be given. Necessary averments be given since the affidavit has been signed in vernacular. (112) 6 Fair typed copy of dim annexures and hand written 30-May-09 NO Annexures be filed. (115) 7 Annexures be made true copy of their original. (116) 30-May-09 NO 8 Underline and highlighting be deleted. (118) 30-May-09 NO 9 Annexures be filed on foolscap and one side of paper. 30-May-09 NO (125) 10 Vakalatnama be filed and signed/dated. Advocates must 30-May-09 NO Mention their enrolment number in Vakalatnama. (137) Identify the sign of client. Please mention phone number On Vakalatnama. 11 Certified of

the award be filed or an application seeking Exemption be filed. The above unremoved objections be removed hence same may be returned to be refiled within a week. Scrut Assistant: Sh. Dharmender Joshi

AOJ/AR (Filing)

Signature

Dealing Assistant

Objection No. 11 and the last line of objection No. 10 were taken subsequently by the registry on the first re-filing.

5. The counsel for the respondent has basically stressed upon two arguments in support of the prayer for condonation of delay. The counsel firstly contends that since there were around 200 pages which required re-typing therefore, a lot of time was taken for such re-typing. The second argument is that certain documents were dim and could not be re-typed and subsequently they were sent to the concerned department so that the same could be got re-typed by the concerned department. I may only note that in addition to the aforesaid two arguments, there appears to be a contention with regard to tagging of these objections with another matter. Though the counsel for the petitioner had not so argued, there appears to be a third ground taken in the rejoinder seeking condonation of delay on account of the papers being mixed up with another matter between the same parties.

6. A reference to the aforesaid objections which have been raised by the registry and the first two arguments of the counsel for the petitioner shows that the objections were clerical and administrative in nature which in my opinion, would require at best a period of four or five days for removal. The registry had in fact given one week for removal of the objections. To this period of one week, if we further add a reasonable period of time for getting the dim documents typed from the concerned relevant department, then, one may further add at the very best a period of two weeks. Taking a most liberal approach, it can be said that within a period of 30 days all the objections could have been and ought to have been removed as raised by the registry of this Court. As regards the averments that the papers got wrongly tagged, in my opinion the same lacks bona fides because no particulars of the date when the same got mixed up, by whom, and when the same was discovered, on which date and by whom, have not been mentioned in the rejoinder.

7. The issue therefore is that should delay be condoned in the aforesaid facts and circumstances where inaction, negligence and lack of expedition in removing the objections are stark on the record.

8. A Learned Single Judge of this Court (Rajiv Sahai Endlaw, J.) had an occasion to deal with this issue with regard to the condonation of delay in re-filing in the case reported as *Gautam Associates v. Food Corporation of India* 2009 (111) DRJ 744. The Learned Single Judge has referred to the various provisions of CPC

1908, Limitation Act 1963, and the rules of this Court with respect to filing and re-filing and condonation of delay. The Learned Single Judge has also referred to various decisions of the Supreme Court and High Courts, including this Court, on the aspect of condonation of delay. The final conclusion as given by the Learned Single Judge is contained in Paras 31 to 37 of the said judgment and the said paragraphs read as under:

31. Besides the legalese aforesaid, the petitioner in the present case is not found entitled to condonation of delay in re-filing, for the following reasons;

A. The objections raised by the Registry on 21st November, 2002 make for an interesting reading. One of the objections is that the affidavit, (apparently accompanying the OMP) is neither signed nor attested. Another objection is that the power of attorney is not signed. As noted by me above, the OMP ultimately filed and on the court record is supported by an affidavit verified and attested on 1st November, 2002. This attestation is contrary to the objection. It is quite clear that the affidavit now on record is not the affidavit filed with the petition initially filed. Else the petitioner appears to have indulged in attestation of affidavit on a back date. The same is also borne out from the fact that the last page of the petition is dated 20th November, 2002. The affidavit verified on 1st November, 2002 seeks to affirm the contents of the petition which is dated 20th November, 2002. The petitioner is thus found to have indulged in substituting what was ultimately filed in May, 2003 for that which was originally filed on 21st November, 2002. Thus the petition filed in May, 2003 cannot be said to be the petition initially filed.

B. This is also borne out from the overwriting on the index to the petition. From the said overwriting, it is clear that what was filed on 21st November, 2002 was a petition comprising of approximately nine pages while what has been filed in May, 2003 is a petition comprising of 59 pages. Yet another objection raised on 21st November, 2002 was of blanks left on page 9 of the petition. Thus the petition filed in May, 2003 cannot be said to be a case of re-filing and is a case of fresh filing.

C....

D....

E. The conduct of the petitioner in the present case shows total callousness. The application is drafted in a most casual manner without any particulars whatsoever, as to with which file the paper were mixed, what steps/enquiries the petitioner made. Even after the papers are alleged to have been found on 19th April, 2003, the same were filed in this Court only on 2nd May, 2003. There is no explanation whatsoever for this delay.

F....

32. The Supreme Court recently in Katari Suryanarayana and Others Vs. Koppiseti Subba Rao and Others, has held that the extent or degree of leniency

to be shown by a court in condoning delay depends on the nature of application and facts and circumstances of the case. Examples were given of delay in making applications in pending appeal being considered more leniently than delays in institution of an appeal and of delay in filing and re filing.

33. In the present case, when the legislature has, as interpreted in *Union of India Vs. M/s Popular Construction Co.*, purported to limit the time within which the petition u/s 34 can be preferred, if such huge delays in re-filing and for which there is no bonafide diligent explanation are to be condoned, it would run contrary to the mandate of the legislature. The effect is there to see in the present case itself. The award of 2002 remains unenforced till date.

34. In *Commissioner of Customs & Central Excise v. Hongo India (P) Ltd.* 2009 (5) SCC 791 also it was held that "it is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act". It was further held that "the applicability of the provisions of the Limitation Act, therefore is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act (with which the court was concerned in that case) relating to filing of reference application to the High Court." Applying the said ratio to the present case also, it will be found that the law earlier laid down of the court being required to be liberal in condoning the delay in refiling is found repugnant to the legislative intent of Section 34(3) and the limitation provided therein cannot be defeated by condoning liberally the delays in refiling.

35. This Court recently in *Union of India (UOI) Vs. Ogilvy and Mather Ltd. and Another*, has also rejected an application for condonation of delay in re-filing the petition u/s 34 of the Act. In that case also the reason cited was of the illness of the advocate and which was not believed.

36. Though earlier, whenever delay on the part of advocate was the reason, the courts were lenient in condoning the same, the trend has changed. The present times are not of illiterate litigants who were solely dependent upon the advocate and his wisdom. The litigants, such as the petitioner in the present case who transact business of crores of rupees and who are more aware of their rights than an advocate, cannot hide behind the veil of lapse of the advocate. There is not a whisper as to what steps the petitioner took in between November, 2002 and May, 2003. In fact as aforesaid the application for condonation of delay is not even accompanied by any affidavit of the petitioner. Even if the file had got lost in the office of the advocate, there is no averment that the petitioner contacted the advocate during the said period or made attempts for tracing out the file or for filing of another set of papers in the court.

37. Thus no ground is found for condoning the delay. The application is dismissed.

9. I am bound by the decision of the Learned Single Judge in the case of *Gautam Associates (supra)*. Not only am I bound, I am in respectful agreement with the

ratio of the said judgment. Whether condonation of delay is to be allowed or not necessarily depends on the facts of each case, however, once there is inaction and negligence, there is no inherent right, even if the applicant is the Union of India, that condonation of delay should be allowed routinely and almost as a matter of right. The facts of the present case show that the petition was returned by the registry for the first time on 30th May, 2009. The petition therefore necessarily ought to have been filed after removing of objections in the first week of July, 2009 after the summer vacations. The counsel for the petitioner feebly sought to contend that because of the summer vacations, the counsel was out of station, however I do not find any averment made either in the application or in the rejoinder that the counsel was out of station. Even if I presume that the counsel was out of station, no date has been given as to when the counsel went out of station and returned. This is necessary because the petition was available for re-filing on 30th May, 2009, and if the counsel for the petitioner had gone out of station, he could have ordinarily, surely collected back the petition for removing of the objections from 30th May, 2009 till the date when the counsel left out of station, which date of course is left to the imagination because no date is specified. Further taking the case of the petitioner at its best that the counsel only returned after the summer vacations, the fact of the matter is that the summer vacation ended on 1st July, 2009, but, the petition was taken for removal of objections only on 3rd July, 2009. Even if I give a period of 30 more days from 3rd July, 2009, the petition after removal of objections ought to have been filed latest by first week of August, 2009. The fact of the matter is that the re-filing was done after about two and a half months on 27th November, 2009. There is absolutely no explanation, worthy of acceptance for the delay during the months of August to November, 2009. Not only there is no explanation for these months, however, the next re-filing after taking back the petition from the registry is on 11th and 16th January, 2010. Again, there is no explanation whatsoever as to why this additional delay of around 40 days has further taken place.

10. The aforesaid facts therefore clearly disentitle the petitioner/applicant to seek condonation of delay in the facts of the present case. In fact, as held in the judgment of Gautam Associates, (supra) condonation of delay in a petition u/s 34 has to be viewed differently than the condonation of delay in other cases because if there is unnecessary liberalness in condoning delay, then, the ratio of the Supreme Court in the case of Union of India Vs. M/s Popular Construction Co., will be set at naught. Also, the object of arbitration is speedy and early determination of the disputes, and unnecessary latitude, although, inaction is quite clear from the record would frustrate, the intendment of the Arbitration and Conciliation Act, 1996 itself.

11. With the aforesaid observations, I do not find any merit in the application for condonation of the delay in re-filing. The application is therefore dismissed. Since the application is dismissed, the original O.M.P. also would stand dismissed as being barred by limitation. I may only finally note that even till date there is no

certified copy of the Award on record and which is a pre-condition to hearing of the objections by virtue of Sections 31(5) and 34(3) of the Arbitration and Conciliation Act, 1996. I am however not going in detail into these aspects because I have already held that the facts of the case disentitle any condonation of delay.

12. With the aforesaid observations, the application and the petition stands disposed of.