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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(EFA)(COMM.) 2/2021 & EX.APPL.(OS) 72/2021, EX.APPL.(OS) 760/2021

REEBOK INTERNATIONAL LIMITED ..... Decree Holder
Through: Mr. Rajshekhar Rao, Sr. Adv. with Mr. Ajoy Roy, Mr. Shantanu Tyagi, Mr. Anand Raja and Mr. Niraj Singh, Advs.

versus

FOCUS ENERGY LIMITED ..... Judgment Debtor
Through: Mr. Jayant Mehta, Sr. Adv. with Mr. Ujjal Banerjee, Mr. Akash Khurana, Mr. Svyambhu Talwar, Advocates

**CORAM:**
**HON'BLE MR. JUSTICE C.HARI SHANKAR**

**O R D E R (ORAL)**

**% 14.09.2021**

**EX.APPL.(OS) 760/2021 in O.M.P.(EFA)(COMM.) 2/2021**

**1.** The delay of 56 days in filing reply to EX APPL (OS) 72/2021 is condoned.

**2.** The reply is taken on record.

**3.** The application stands disposed of.

**EX.APPL.(OS) 72/2021 in O.M.P.(EFA)(COMM.) 2/2021**

**4.** This application, at the instance of the beneficiary of the award, (for the sake of convenience be referred to, hereinafter, as "the award

holder"), seeks condonation of delay in preferring OMP (EFA) (COMM) 2/2021, which has been filed for execution of a partial award dated 4th November, 2009 and a final award dated 24th May, 2011, passed by the learned Arbitral Tribunal.

**5.** The execution petition was filed on 23rd December, 2020, admittedly, within a period of 12 years of passing of the aforesaid partial award as well as the final award of the learned Arbitral Tribunal.

**6.** By virtue of the judgment of the Supreme Court in ***Government of India v. Vedanta Ltd.***[1], the limitation for filing of an application for execution/enforcement of a foreign award is required to be reckoned on the basis of Article 137 of the Schedule to the Limitation Act, 1963. Under the said Article, an application for execution of the award is required to be moved within three years of passing of the award. The aforesaid period of three years would expire, in the case of the partial award, in November, 2012, and in the case of final award, in May, 2014.

**7.** It is for this reason that the award holder has moved the present application for condonation of delay in filing the enforcement petition.

**8.** Mr. Rajshekhar Rao, learned Senior Counsel for the award holder, relies, for the purpose of application for condonation of delay, on para 78 of the report in ***Vedanta***[1] which, for ready reference, may

[1] **2020 SCC OnLine SC 749**

be reproduced thus:

> "**78.** In the facts of the present case, the respondents submitted that after the award dated 18-1-2011 was passed, the cost account statements were revised, and an amount of US $22 million was paid to the Government of India. On 10-7-2014, a show-cause notice was issued to the respondents, raising a demand of US $77 million, being the Government's share of profit petroleum under the PSC. It was contended that the cause of action for filing the enforcement petition under Sections 47 and 49 arose on 10-7-2014. The enforcement petition was filed on 14-10-2014 i.e. within 3 months from the date when the right to apply accrued. We hold that the petition for enforcement of the foreign award was filed within the period of limitation prescribed by Article 137 of the Limitation Act, 1963. *In any event, there are sufficient grounds to condone the delay, if any, in filing the enforcement/execution petition under Sections 47 and 49, on account of lack of clarity with respect to the period of limitation for enforcement of a foreign award*."
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> (Emphasis supplied)

**9.** In order to appreciate the grounds on which condonation has been sought, some bare facts are required to be noted.

**10.** Consequent on the passing of the partial award dated 4th November, 2009, OMP 214/2010, challenging the said award, under Section 34 of the Arbitration and Conciliation, Act, 1996 (the 1996 Act), was filed by the respondent, on 16th April, 2010. Similarly, OMP 716/2011, challenging the final award dated 24th May, 2011, was also filed by the respondent on 19th September, 2011.

**11.** Both the aforesaid OMPs were dismissed by a learned Single Judge of this Court on 1st November, 2018, on the ground of maintainability.

**12.** It is stated that FAO (OS) 37/2019, challenging the said decision, is pending before the Division Bench of this Court.

**13.** Admittedly, at the time when the aforesaid OMPs, challenging the partial award dated 4th November, 2009 and the final award dated 24th May, 2011 were filed, Section 34 of the 1996 Act envisaged an automatic stay of the operation of the award, on the award being subjected to challenge under the said provision.

**14.** This regime was altered only consequent to the amendment of the 1996 Act with effect from 23rd October, 2015. As such, Mr. Rao submits that, till 24th October, 2015, at least, there was no provocation for his client to file for execution of the partial award or the final award, as the effect thereof stood stayed by operation of statute.

**15.** Additionally, submits Mr. Rao, after the passing of the partial award on 4th November, 2009 and final award on 24th May, 2011 and till the rendition of the judgment of the Supreme Court in ***Vedanta***[1], there was a flux in the legal position, which stands acknowledged by the Supreme Court in para 78 of the ***Vedanta***[1] (reproduced *supra*).

**16.** To demonstrate this position, Mr. Rao has invited my attention to paras 72 to 76 of the judgment of a learned Single Judge of this Court in ***Cairn India Ltd. v. Govt. of India***[2] **(**the appeal against which came to be decided in ***Vedanta***[1]**).**

[2] **2020 SCC OnLine Del 1426**

**17.** Though the ultimate decision in ***Cairn India***[2] was reversed by the Supreme Court in ***Vedanta***[1], for ready reference, the aforesaid passages are reproduced as under:

> "**72.** As noticed above, there were two diametrically opposite views holding the field at the relevant time. A Single Judge of the Madras High Court in Compania Naviera, after, *inter alia*, noticing the judgment of the Supreme Court in ***Furest Day Lawson Ltd.* v. *Jindal Exports Ltd.***[3]**,** concluded as follows.
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> > "**42.** I am unable to accept this submission also. Under the Act, 1996, the foreign award is already stamped as a decree and the party, having a foreign award can straight away apply for enforcement of it and in such circumstances, the party having a foreign award has got 12 years time like that of a decree holder. Therefore it cannot be said that the present petition is barred by limitation."
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> **73.** On the other hand, a Single Judge of the Bombay High Court in ***Noy Vallesina***[4], after a detailed discussion, held that when an application for enforcement and/or execution of a foreign award is filed, it will be governed by the provisions of Article 137 of the Limitation Act (i.e. the residuary provision) if, at that stage, the Court has not recorded its satisfaction that the award is enforceable.
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> **74.** In other words, according to the learned Single Judge, such an application, at that stage, would not be an application for execution of any decree or order of a civil court which is the requirement under Article 136 of the Limitation Act, although, it will be an application for execution of an award which is capable of being converted into a decree. Therefore, such an application, as per the learned Single Judge, would have to be made within 3 years from the date when the right to make such an application accrues. The relevant observations made by the Court in this behalf are extracted hereafter.

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[3] **(2001) 6 SCC 356**
[4] **Noy Vallesina Engineering Spa v. Jindal Drugs Ltd, (2006) 3 Arb LR 510**

"**31.** … Now under the Act on the Court being satisfied that the Award is enforceable the Award itself operates as a decree. But it is clear from the provisions of section 49 of the Act which are quoted above, the Award operates as a decree only on the Court recording its satisfaction that it is enforceable and it is only at that point of time that the Award becomes a decree of that Court which has recorded its satisfaction that it is enforceable. As observed above Article 136 of the Schedule of the Limitation Act becomes applicable for execution of any decree or order of any Civil Court. Till the Court records satisfaction contemplated by section 49 of the Arbitration Act the foreign Award is not deemed to be a decree of that Court. Therefore, when an application is filed before the Court, before the Court has recorded its satisfaction that the foreign Award is enforceable, it will not to be an application for execution of any decree or order of any Civil Court. It will be an application for execution of an Award which is capable of being converted into a decree and obviously therefore, Article 136 of the Schedule of the Limitation Act would not apply to such an application. There is no period of limitation provided by any of the Article in the Schedule of the Limitation Act specifically for making an application for execution of a foreign Award which is capable of being converted into a decree of the Civil Court, and therefore, such an application would be governed by the residuary Article 137 and therefore, an application for execution of a foreign Award which has not become a decree, has to be made within a period of three years from the date on which the right to make such an application accrues. In my opinion, placing such interpretation would also be in favour of the persons who are holding foreign awards in their favour, because they can apply for recognition of the foreign award within a period of three years of the right to apply accruing to them and after the Court records satisfaction contemplated by section 49 of the Act, the Award becomes a decree and they get further period of 12 years under Article 136 to apply to the Court for execution of that Award. In any case, the judgment of the Supreme Court in the case of

***Thyssen Stahlunion GMBH***[5] or in the case of ***Furest Day Lawson Ltd***[3] cannot be taken to mean that it is compulsory for a person who is holding a foreign award in his favour to make an application for execution. All that the Supreme Court says is that such a person can make an application for execution even before the Court has recorded its satisfaction as contemplated by section 49 of the Act. It is always open to a person who is holding a foreign Award in his favour to make an application only for recognition of the foreign Award and thereafter to make a separate application for execution of the Award which has become a decree after the Court records its satisfaction. …."

**75.** Interestingly, as would be evident upon perusal of the aforesaid extract in ***Noy Vallesina***[4], the learned Single Judge has also considered the judgment of the Supreme Court in ***Furest Day Lawson***[3] and ***Thyssen Stahlunion GMBH v. Steel Authority of India Ltd***[5].

**76.** Pertinently, since then, another Single Judge of the Bombay High Court in a more recent judgment rendered in ***Imax Corporation v. E-City Entertainment (I) Pvt. Ltd.***[6], has taken a contrary view, that is, Article 136 of the Limitation Act would be applicable. While taking this view, the learned Single Judge, *inter alia*, has noticed the earlier judgment of his own Court (i.e. in the ***Noy Vallesina***[4]) as also the judgment of the Madras High Court in ***Compania Naviera***[7]. Besides this, the learned Judge has also noted observations of the Supreme Court in ***Shriram EPC Ltd.* v. *Rioglass Solar Sa***[8]. This apart, there is also a reference to the judgments of the Supreme Court rendered in ***Furest Day Lawson*** and ***Thyssen Stahlunion***[5].[See: Paragraphs 22, 26-28]"

**18.** Though the ultimate decision in ***Cairn India***[2] was reversed in ***Vedanta***[1], a bare reading of the afore-extracted paras in ***Cairn India***[2]

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[5] **Thyssen Stahlunion GMBH v. Steel Authority of India Ltd, (1999) 9 SCC 334**
[6] **2020 (1) ABR 82**
[7] **M/s Compania Naviera v. Bharat Refineries Ltd, AIR 2007 Mad 251**
[8] **(2018) 18 SCC 313**

reveal that there was, in fact, a state of flux and uncertainty, with respect to the law regarding the limitation which would apply, for applications for execution of foreign arbitral awards to be filed. One view was that the award would be treated as a decree and, therefore, the application for execution could be filed within 12 years of passing of the award. The second view – which ultimately came to endorsed in ***Vedanta***[1]**–** was that the period of limitation which would apply would be three years under Article 137 of the Schedule to the Limitation Act.

**19.** Besides, the fact that there was such a state of flux also stands expressly acknowledged by the Supreme Court in para 78 of its decision in ***Vedanta***[1].

**20.** The attempt, of learned counsel for the respondent, to distinguish para 78 of ***Vedanta***[1] on the basis of the recitals which precede the observation, in the final sentence in the said paragraph, regarding the uncertainty which existed in the law, fails to impress. Though the facts stated in para 78 in ***Vedanta***[1] may not apply to the present case, Mr. Rao is entirely justified in relying on the final observations in para 78, that there was a state of flux and uncertainty regarding the period of limitation for executing a foreign award and that, therefore, it was open to the award holder to seek condonation of delay.

**21.** I am, therefore, in agreement with Mr. Rao that the position of law, regarding the period within which foreign arbitral awards could be enforced, was in a state of indecision, till the judgement in

***Vedanta*[1]. In fact, even in *Cairn India*[2], which was a judgment of this Court, and which was rendered within 12 years of the partial award and the final award in the present case, the view expressed by this Court was that the application for enforcement of the award could be filed within 12 years. The position in law was clarified, to the contrary, only in *Vedanta*[1] which came to be rendered on 16th September, 2020.

**22.** Even on first principles, where there is a state of uncertainty in the law, it is well-settled that the delay deservers to be condoned.

**23.** The position which emerges, therefore, is as under:

(i) The partial award and the final award, of which enforcement is sought, were rendered on 4th November, 2009 and 24th May, 2011 respectively.

(ii) The present execution petition has admittedly been filed within a period of 12 years from the passing of both awards.

(iii) That an execution petition could be filed within 12 years of the passing of the award, was the view taken by various High Courts, till the decision in law was settled in ***Vedanta***[1]. The fact that there was uncertainty in law stands acknowledged by para 78 in ***Vedanta***[1] as well as paras 72 to 76 of the decision of this Court in ***Cairn India***[2]**.**

(iv) The right of the award holder, to seek condonation of

delay on the ground of uncertainty in the law, till it was settled in ***Vedanta*[1]*,*** also stands expressively acknowledged and recognised in para 78 of ***Vedanta*[1]**.

(v) More than a year and a half before the expiry of 12 years from the passing of the partial award of the learned Arbitral Tribunal, and more than three years before the expiry of the 12 years from the passing of final award, this Court had also in ***Cairn India*[2]**, held that 12 years were available to an award holder, to seek execution of the award.

(vi) Besides, the impugned awards also stood stayed by operation of statute, under the pre-amendment Section 36 of the 1996 Act, by virtue of the challenge to the awards by the respondent under Section 34, which came to be rejected only on 1st November, 2018.

**24.** Learned counsel for the respondent has emphasised the fact that, with the rendition of the judgment in ***Vedanta*[1]**, it remains no longer open to any party to contend that 12 years were available with it, to seek enforcement of a foreign arbitral award. Undoubtedly, that is the position.

**25.** That makes no difference, however, to the merits of the present application. In fact, it is precisely because by operation of law in ***Vedanta*[1]**, the period for filing the present execution petition was three years from the rendition of the award, that the award holder has moved the application for condonation of delay.

**26.** Learned counsel for the respondent has also placed reliance on the judgment of a Supreme Court in ***Thirumalai Chemicals Ltd. v. U.O.I.***[9], of which paras 22, 29 and 45 were pressed into service. These paragraphs may be reproduced thus:

> "22. Law is well settled that the manner in which the appeal has to be filed, its form and the period within which the same has to be filed are matters of procedure, while the right conferred on a party to file an appeal is a substantive right. The question is, while dealing with a belated appeal under Section 19(2) of FEMA, the application for condonation of delay has to be dealt with under the first proviso to sub-section (2) of Section 52 of FERA or under the proviso to sub section (2) of Section 19 of FEMA. For answering that question it is necessary to examine the law on the point.
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> 29. Law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. On expiry of the period of limitation, the right to sue comes to an end and if a particular right of action had become time barred under the earlier statute of limitation the right is not revived by the provision of the latest statute. Statutes of limitation are thus retrospective insofar as they apply to all legal proceedings brought after their operation for enforcing cause of action accrued earlier, but they are prospective in the sense that neither have the effect of reviving the right of action which is already barred on the date of their coming into operation, nor do they have effect of extinguishing a right of action subsisting on that date. Bennion on Statutory Interpretation 5th Edn.(2008) Page 321 while dealing with retrospective operation of procedural provisions has stated that provisions laying down limitation periods fall into a special category and opined that although prima facie procedural, they are capable of effectively depriving persons of accrued rights and therefore they need be approached with caution.

[9] **(2011) 6 SCC 739**

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> 45. The question we have already pointed out is whether Section 52(2) of FERA or Section 19(2) of FEMA will govern the appeal. As noticed above, any provision relating to limitation is always regarded as procedural and in the absence of any provision to the contrary, the law in force on the date of the institution of the appeal, irrespective of the date of accrual of the cause of action for the original order, will govern the period of limitation. Section 52(2) can apply only to an appeal to the appellate Board and not to any appellate tribunal. Therefore, irrespective of the fact that the adjudicating officer had passed the orders with reference to the violation of the provisions of FERA, as the appeal against such order was to the appellate tribunal constituted under FEMA, necessarily Section 19(2) of FEMA alone will apply and it is not possible to import the provisions of Section 52(2) of FERA."
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> (Emphasis supplied)

**27.** To my mind, the decision in ***Thirumalai Chemicals Ltd***[9]**.** has no application, whatsoever, to the facts of this case. That decision dealt with the question of whether the appropriate provision which would apply for filing of an appeal was the provision under the Foreign Exchange Regulation Act, 1973 (FEMA) or the Foreign Exchange Management Act, 1999 (FEMA). The authorities below had reckoned the limitation on the basis of Section 52 of the FERA. The Supreme Court ultimately came to hold that Section 52(2) of the FERA was not applicable and that limitation would have to be computed under Section 19(2) of the FEMA. This judgment cannot, in any way, impact the merits of the present application filed by the award holder for condonation of delay in seeking enforcement of the award.

**28.** In these circumstances, in my view, there is a clear case for condoning the delay in filing the present execution petition.

**29.** For the aforesaid reasons, I am of the opinion that the delay in filing the OMP (EFA)(COMM) 2/2021 deserves to be condoned.

**30.** Accordingly, the delay is condoned.

**31.** EX APPL(OS) 72/2021 is allowed accordingly.

**O.M.P.(EFA)(COMM.) 2/2021**

List before the Joint Registrar (Judicial) for completion of pleadings on 21st October, 2021.

**C. HARI SHANKAR, J.**

**SEPTEMBER 14, 2021**
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