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

% **Reserved on : 10.06.2020**
Pronounced on: 17.06.2020

+ O.M.P. (COMM) 363/2019

SHARMA KALYPSO PVT. LTD. Petitioner
Through: Ms. Anusuya Salwan, Ms. Nikita
Salwan & Ms. Shreya, Advocates
versus

ENGINEERS INDIA LIMITED Respondent
Through: Mr. Pradeep Dewan, Sr. Advocate
with Ms. Anupam Dhingra,
Advocate

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

I.A. No. 13437/2019 (condonation of delay in filing) & I.A. No. 12472/2019 (condonation of delay in re-filing)

1. I.A. No. 13437/2019 is an application filed by the Petitioner seeking condonation of delay of 1 day in filing the present petition and I.A. No. 12472/2019 is an application seeking condonation of delay of 8 days in re-filing.

2. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') assailing the Award dated 23.04.2019 passed by the Arbitral Tribunal. Petition was filed on 23.07.2019, and along with the petition, Petitioner had only filed an application seeking condonation of delay in re-filing. It was averred

that the objection petition was filed within the statutory period of 90 days. Objections were raised by the Registry for the first time on 26.08.2019, which were removed by the Petitioner and the petition was re-filed on 28.08.2019. On 29.08.2019, Registry raised a further objection of delay in re-filing. It is averred that the delay is unintentional.

3. Thereafter, the matter was listed in Court on 11.09.2019 and during the hearing Mr. Dewan, learned Senior Counsel for the Respondent had objected to condonation of delay and learned counsel for the Petitioner had sought time to address further arguments on the delay in filing. Subsequent thereto, Petitioner filed an application for condonation of delay of 1 day in initial filing. An Additional Affidavit in support of the application seeking condonation of delay in re-filing was also filed by the Petitioner.

4. It is stated in the Affidavit that the petition was filed on 23.07.2019 and was returned by the Registry on 25.07.2019 pointing out defects. Petitioner had annexed a number of documents with the petition which included Balance Sheets etc. which were illegible. It took some time for the Petitioner to search for the legible copies and, therefore, clearing the defects took time and the petition was re-filed on 23.08.2019, which was, however, within the period of 30 days, allowed under Proviso to Section 34 (3) of the Act. It is stated that on 26.08.2019, fresh defects were pointed out, which were removed and objections were re-filed. On 29.08.2019, petition was returned with an observation that application for condonation of delay in re-filing should be filed. Fresh objections were raised in terms of the new Practice Directions that all documents be arranged in ascending chronological order etc. It is stated that on

30.08.2019, the associate counsel visited the Registry to explain that since the Directions were issued after the petition was filed, it would be difficult to change the entire petition. The associate counsel was asked to visit the Registry on 02.09.2019, as the senior person incharge of filing was on leave. On 03.09.2019, associate counsel again visited the Registry and was informed that request for exemption be endorsed on the petition. It is further stated that on 05.09.2019 again certain objections were raised which were cleared and petition was re-filed on 06.09.2019. In these circumstances, the delay is unintentional and the Petitioner prays for condonation of delay.

5. Ms. Anusuya Salwan, learned counsel for the Petitioner argued that the objections were filed within the statutory period of 3 months on 23.07.2019. All mandatory compliances had been done at the time of filing i.e. Affidavit in support of the petition, duly attested on 23.07.2019 filed; Statement of Truth, duly verified and attested on 23.07.2019 filed; Court Fees as per Rules filed and *Vakalatnama* duly signed by the Authorised Representative of the Petitioner and two counsels was filed.

6. Learned counsel argues that once the initial filing was with all the vital documents and was compliant with all procedural requirements, it was a 'proper' filing and in so far as re-filing is concerned, it is settled law that the Court should adopt a liberal approach, while condoning the delay in re-filing. Learned counsel places reliance on the judgement of the Supreme Court in *Northern Railway vs. Pioneer Publicity Corporation Pvt. Ltd., 2017 (11) SCC 234; Bharat Sanchar Nigam Limited (BSNL) vs. Exnxt Software Private Limited, being O.M.P. (COMM) 337/2016, decided on 31.07.2017; Indira Gandhi National*

Open University vs. Presidency Educational Trust, being LPA No. 588/2014, decided on 27.05.2015; D.V.H. Industries vs. Hartley Knits, 176 (2011) DLT 106 and State of Himachal Pradesh & Ors. vs. Himachal Techno Engineers & Ors, (2010) 12 SCC 210.

7. Learned Senior Counsel for the Respondent *per contra* vehemently opposes the condonation of delay in filing and re-filing the present petition. Drawing the attention of the Court to the chronology of dates, Learned Senior Counsel submits that the Award was received by the Petitioner on 23.04.2019 and the petition was filed on 23.07.2019, with 128 pages. Objections were raised by the Registry on 25.07.2019 and the petition was re-filed on 23.08.2019 with 455 pages. Again, objections were raised on 26.08.2019 and re-filing was done on 28.08.2019. On 29.08.2019 objections were raised and the petition was re-filed on 04.09.2019. Finally, clearing the objections raised on 05.09.2019, the petition was re-filed on 06.09.2019.

8. Learned Senior Counsel argues that the reasons given in the applications for condonation of delay are unfounded and untenable and in fact, the Petitioner has been extremely negligent in prosecuting its case. He submits that the Award was received by Mr. Ramesh Sharma, Director of the Petitioner himself, on 23.04.2019 and therefore, to state in the application that the Petitioner was expecting the Award by post is completely false. It is further argued that even the petition filed on 23.07.2019 was a *non-est* filing and cannot help the Petitioner to overcome the bar of limitation. *Vakalatnama* filed is clearly dated 22.08.2019 and therefore, the petition filed on 23.07.2019, by the counsel, was without any authority to do so. Filing was also not

compliant with provisions of Section 34 (5) of the Act, which mandates prior notice to the opposite party. No explanation has been given for re-filing on 23.08.2019, which in any case is one day beyond the period of 3 months and 30 days period, permissible under Section 34 (3) of the Act. The Award was received on 23.04.2019 and thus, reckoning the limitation by excluding the said date, the period of 3 months and extended 30 days expired on 22.08.2019. The filing on 23.08.2019, is beyond the period of 120 days, as benefit of Section 12 (1) of the Limitation Act, 1963, cannot be availed twice. Looked at from this angle, the averment in para 9 of the additional Affidavit is also wrong, wherein it is stated that the re-filing done on 23.08.19, was within 30 days.

9. It is next contended that Rule 5 of Chapter I part (a) of Delhi High Court Rules requires re-filing to be done within a period not exceeding 7 days at a time and 30 days in aggregate. Similar provision exists in Rule 3 of Delhi High Court (Original Side) Rules, 2018, pertaining to defective pleading/document. After the petition was returned on 25.07.2019, re-filing of the petition, on 23.08.2019, is beyond 7 days. The aggregate of 30 days will be counted from 25.07.2019 when the petition was first returned. Thus, the period of 30 days expired much before the final re-filing on 06.09.2019. The time taken by the Registry to raise objections at each successive re-filing cannot be exempted in view of Section 9 of the Limitation Act, 1963 which provides that once time has begun to run, no subsequent disability to institute a suit or an application stops it. Even if the time taken by the Registry is excluded, the delay exceeds aggregate of 30 days i.e. 29 days between 25.07.2019 to 23.08.2019, two days between 26.08.2019 to 28.08.2019, 5 days between 29.08.2019 to 04.09.2019 and

two days between 04.09.2019 to 06.09.2019. No application for condonation of delay in re-filing was filed.

10. Learned Senior Counsel argues that the time period of 3 months and 30 days under Section 34 (3) of the Act is very stringent and relies on the judgements of the Division Bench of this Court in ***Delhi Development Authority v. Durga Construction Co, 2013 SCC OnLine Del 4451*** and ***Northern Railway v. Pioneer Publicity Corporation Pvt. Ltd., 2015 (6) ArbLR 41.***

11. The judgements relied upon by the Petitioner are distinguished by the Learned Senior Counsel. It is submitted that in case of ***BSNL (supra)*** petition was re-filed within the outer limit of 30 days and this was within the powers of the Court to condone. In the case of ***Indira Gandhi (supra)*** the Court in para 17 held that a case for condonation of delay was made out and moreover the said case did not relate to the proceedings under Section 34 of the Act. Likewise, in the case of ***D.V.H. Industries (supra)*** the proceedings were arising out of a Civil Suit where parameters for condonation of delay are not as strict as those in proceedings under Section 34 of the Act.

12. Ms. Salwan sought to argue in rejoinder that the judgement in the case of ***Northern Railway v. Pioneer Publicity Corporation Pvt. Ltd., 2015 (6) ArbLR 41 (supra)*** relied upon by the Respondent has been overruled by the Supreme Court in the case of ***Northern Railway vs. Pioneer Publicity Corporation Pvt. Ltd., 2017 (11) SCC 234.*** The judgement in ***Durga Construction (supra)*** is distinguishable as the delay therein was of 166 days. The Division Bench had observed that the benefit of first filing cannot be given if the defects relate to vital

requirements of a petition, but in the present case, the Petition as originally filed was complete in all respects with affidavits/Statement of Truth, Court fee and signed *Vakalatnama*.

13. Learned counsel further argues that the Respondent has incorrectly argued that there was a delay of one day in filing the petition. The petition was filed on 23.07.2019 i.e. within the statutory period of 3 months as the period would reckon from 24.04.2019. In any case, the Petitioner had filed an application under Section 5 of the Limitation Act, 1963 for condonation of delay of 1 day.

14. I have heard learned counsel for the Petitioner and Learned Senior Counsel for the Respondent and examined their rival contentions.

15. Section 34 (3) of the Act provides a limitation period of 3 months for filing objections against an Award. Under the Proviso to the Section, Court has the power to condone the delay in filing beyond the statutory period of 3 months, provided the petition is filed within 30 days and the party shows 'sufficient cause', which prevented it from filing the petition within statutory period of 3 months. The period of limitation as held by the Supreme Court in *Union of India v. Popular Construction, (2001) 8 SCC 470* and *Simplex Infrastructure Limited vs. Union of India, 2019 (2) SCC 455* is very stringent and inflexible and Court has no power to condone the delay of even 1 day beyond the 3 months and 30 days.

16. The first question that arises in the present petition is whether there is a delay of one day in the initial filing of the petition. The Award in the present case was passed on 23.04.2019 and served on the Petitioner on the same day. Petition was filed in this Court on 23.07.2019. For the purpose of calculating the three months' period, the date of 23.04.2019

would have to be excluded. Thus, the three months' statutory period for filing the objections under Section 34(3) of the Act would expire on 23.07.2019. Petition was filed on 23.07.2019 and is, therefore, filed within the limitation period of three months under the Act. The application seeking condonation of delay of one day has been filed by way of abundant caution only. Since there is no delay in filing the petition, the application seeking condonation of delay is infructuous and no condonation of delay is required.

17. It is settled law that in case the petition filed originally is a *non-est* filing, then, as and when a valid petition is filed, the said date will be treated as a date of fresh filing. It is equally settled that in case a proper petition is filed, but it has certain defects which are not fundamental to the filing but are only perfunctory, then the Courts have to adopt a liberal approach in re-filing, provided the delay is not unduly long and the party is able to show 'sufficient cause' that prevented the re-filing within a reasonable period.

18. A Division Bench of this Court in the case of ***Durga Construction*** (*supra*) has held as under:-

“18. In several cases, the defects may only be perfunctory and not affecting the substance of the application. For example, an application may be complete in all respects, however, certain documents may not be clear and may require to be retyped. It is possible that in such cases where the initial filing is within the specified period of 120 days (3 months and 30 days) as specified in section 34(3) of the Act, however, the re-filing may be beyond this period. We do not think that in such a situation the court lacks the jurisdiction to condone the delay in re-filing. As stated earlier, section 34(3) of the Act only prescribes

limitation with regard to filing of an application to challenge an award. In the event that application is filed within the prescribed period, section 34(3) of the Act would have no further application. The question whether the Court should, in a given circumstance, exercise its discretion to condone the delay in re-filing would depend on the facts of each case and whether sufficient cause has been shown which prevent re-filing the petition/application within time.”

19. Two issues arise in the present case for consideration by this Court. The first issue is whether the filing could be termed as *non-est* and if not, the second issue would be whether the Petitioner is entitled to condonation of delay in re-filing.

20. The principle objection of the Respondent with respect to the filing of the petition is that the *Vakalatnama* was not filed when the petition was originally filed on 23.07.2019 and therefore, it is a *non-est* filing. In the recent past, the issue of *non-est* filing has been considered in several judgements of this Court. In the case of ***Durga Construction (supra)*** the Division Bench held that where the petitions filed by a party are hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, the filing would be *non-est* and of no consequence. In such a case, benefit of initial filing cannot be given and the date on which defects are cured, would be the date of initial filing. Relevant portion of the judgement is as under:-

“17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in

certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing.”

21. In ***SKS Power Generation (Chhattisgarh) Ltd. vs. ISC Projects Private Limited***, 2019 SCC OnLine Del 8006, a Coordinate Bench of this Court while examining the petition filed, as a matter of record, found that the petition was filed without any affidavit, *Vakalatnama* or documents and therefore, held that it was only a ‘bunch of papers’ and not a proper petition. In the case of ***Oil and Natural Gas Corporation Ltd v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure Limited (Meil)***, 2019 SCC OnLine Del 10456, this Court laid down certain basic parameters, which cumulatively, must be fulfilled, in order to term the filing as a ‘proper’ filing. Reading the various judgements what emerges, in the opinion of this Court is, that a petition, when filed, can be termed as a ‘bunch of papers’ when it lacks all the parameters as detailed in the various judgements, cumulatively. However, when the petition as filed substantially complies with most of the parameters, it cannot be said that a mere ‘bunch of papers’ is filed. This expression is intended to apply to a situation where the petition is filed without *Vakalatnama*, Statement of Truth, Signatures, Court Fees etc. cumulatively, and is ‘hopelessly

inadequate' in the words of the Division Bench in *Durga Construction (supra)*.

22. What needs to be examined is whether in the present case, the filing was a *non-est* or a proper filing. The case of the Petitioner is that all the requisite vital documents such as affidavit, Statement of Truth and *Vakalatnama* were filed on 23.07.2019, along with the petition and Court Fee was also affixed. A categorical stand with respect to *Vakalatnama* is that a *Vakalatnama* duly signed by the Authorized Representative of the Petitioner and two counsels engaged by the Petitioner was filed on 23.07.2019. The Respondent on the other hand has vehemently contended that the filing on 23.07.2019 is a *non-est* filing since no *Vakalatnama* was filed on the said date as the date of the *Vakalatnama*, which is on record of the Court, is 22.08.2019. The petition thus filed by the counsel was without any authority to file the same. The other objection is on the increase of number of pages in the petition from 128 pages, as initially filed, to 455 pages, when the petition was re-filed on 23.08.2019.

23. The defect sheet showing the defects notified by the Registry, after the initial filing, has been placed on record by both sides. A perusal of the defect sheet clearly reveals that a *Vakalatnama* was filed alongwith the petition on 23.07.2019, although there were some defects with respect to the identification, etc. Therefore, the Respondent is not correct in contending that the petition was filed without the *Vakalatnama*. After the defects were notified with respect to the *Vakalatnama*, the Petitioner while seeking to remove the defects filed a fresh *Vakalatnama* on 23.08.2019. According to the Respondent, since this *Vakalatnama* is

filed beyond a period of 120 days, the filing of the petition will be *non-est* and cannot be entertained. In my view, once a *Vakalatnama* was initially filed, though with certain defects, a filing of a fresh *Vakalatnama*, without any defect, cannot be treated as a deficiency of a threshold which could lead to dismissal of a petition as '*non-est*'. This, in my view, would be an incorrect understanding of the judgements on *non-est* filing. The thread that runs in the various judgements, where it is held that filing of a mere bunch of papers cannot stop limitation, is that applicants who are not diligent and carelessly file some papers, without vital documents only to stop limitation, cannot be given the benefit of condonation of delay. The underlying rationale is to prevent mischief by entertaining a wholly inadequate petition. However, this rationale cannot be applied to the facts of the present case. Present petition when filed was substantially compliant with all requirements and supported by vital documents, including *Vakalatnama*, though it had defects. Since the *Vakalatnama* was not filed for the first time on 23.08.2019, the contention of the Respondent, that there was no *Vakalatnama* within the outer limit of 120 days under Section 34(3) of the Act, cannot be accepted.

24. The only question that now survives for examination is, whether the delay in re-filing can be condoned. Re-filing of a petition is governed by the Delhi High Court Rules, as mentioned above, which require re-filing to be done within a time of 7 days at a time and 30 days in aggregate. From 25.07.2019, when the petition was first returned and was finally re-filed on 06.09.2019, the total period comes to 38 days. In the Additional Affidavit filed by the Petitioner, it has explained the steps taken during this period, in successive re-filing, after the objections were

raised by the Registry on various occasions. It is stated in the affidavit that a number of defects were pointed out by the Registry on 25.07.2019, more particularly with respect to the documents which were dim and illegible. These documents included the balance sheets and therefore, it took some time to get clear copies of the balance sheets, which had to be necessarily placed on record for adjudication of the case on merits. After removing the defects, the petition was re-filed on 23.08.2019, within a period of 30 days from the date of defects being marked by the Registry. On 26.08.2019, fresh defects were pointed out, which were removed immediately and petition was re-filed on 28.08.2019. On 29.08.2019, Registry returned the petition for moving an application for condonation of delay in re-filing the petition and also raised a new objection that as per the new Practice Directions, all the documents were to be arranged in an ascending chronological order and there were certain objections with regard to the Filing Index. On 30.08.2019, associate counsel of the Petitioner requested the Registry to accept the petition in the form that it was filed as the direction for arranging the documents in an ascending order were issued after the filing of the petition and it would be difficult to change the entire petition. The counsel was asked by the dealing assistant to visit the Registry on Monday i.e. 02.09.2019 as the Senior Officer was on leave. On 03.09.2019, when the counsel visited the Registry, he was informed that if an exemption was being sought, the same should be endorsed on the petition. After the counsel made an endorsement, the petition was re-filed on 04.09.2019 and the Index showing the noting is available on the record. On 05.09.2019, the

Registry raised some objections which were removed on the same day and the petition was re-filed on 06.09.2019 and was registered.

25. A perusal of the re-filing from the log-in information, coupled with the explanation given in the additional affidavit, would show that the re-filing of the petition was done within aggregate of 30 days, as per Rule 5 of the Delhi High Court Rules, from the date the objections were first marked on 25.07.2019. Successively as and when the objections were raised by the Registry, the same were removed diligently and there is no undue delay or negligence in re-filing.

26. In the case of **BSNL** (*supra*) a Coordinate Bench of this Court while examining a similar issue with respect to the time period for re-filing under Rule 5 Chapter I of the Delhi High Court Rules, held as under:-

“24. As is apparent from the above, the Deputy Registrar/Assistant Registrar may return memorandum of appeal for amendment and re-filing the same within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him for any reason specified in Order XLI, Rule 3 of the Code of Civil Procedure, 1908. The note to the aforesaid Rules clearly specifies that the provisions of Rule 5 would mutatis mutandis apply to all matters, whether civil or criminal. In terms of Rule 5(3), if a memorandum of appeal is filed beyond the prescribed time, it shall be considered as fresh institution. In the present case, the petition has been accepted by the Deputy Registrar as it was filed within the period of 30 days. Since no objection as to delay in re-filing was raised by the Deputy Registrar/Assistant Registrar, In-charge of filing counter, it has to be inferred that time for re-filing had been extended (which was within the outer limit of 30 days). Thus, this Court is not persuaded to accept that the

present petition ought to be considered as a fresh institution.

25. In any view of the matter, even if the petition was filed beyond the period of time specified by the Deputy Registrar/Assistant Registrar, In-charge of filing counter, the petition would, nonetheless, for the purposes of Section 34(3) of the Act has to be considered as a re-filing and not as an original filing. This is the authoritative view of the Supreme Court in Northern Railway v. Pioneer Publicity Corp. Pvt. Ltd.: 2016 SCC OnLine SC 1583, which arose from a decision of this Court declining to condone a period of 65 days in re-filing objections under Section 34 of the Act. In that case, the award sought to be challenged was delivered on 29.10.2012 and the objections were filed within the period prescribed under Section 34(3) of the Act. The petition was returned under objections on 23.01.2013 and seven days time was granted to remove objections. The petition was finally re-filed on 21.03.2013 which was clearly beyond the time granted by the Deputy Registrar for removal of objections. This Court refused to condone the delay and this led the appellant (Northern Railways) to approach the Supreme Court. The respondent therein referred to Rule 5(3) of the Delhi High Court Rules and contended that since the petition was re-filed beyond the period granted by the Deputy Registrar, its re-filing had to be considered as a fresh institution and such institution was beyond the period specified under Section 34(3) of the Act. This is identical to the plea urged by EXNXT to oppose the maintainability of the present petition.

26. The Supreme Court rejected the aforesaid contention and held that Section 34(3) of the Act “has no application in re-filing the petition but only applies to the initial filing of the objections under Section 34 of the Act”. The Court further held that if Rule 5(3) of the Delhi High Court Rules is strictly applied, “it would mean that any re-filing

beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing”.

27. In view of the aforesaid decision of the Supreme Court, EXNXT's contention that the petition was filed beyond the period as specified under Section 34(3) of the Act, must be rejected. It is also relevant to mention that in an earlier decision of the Division Bench of this Court in Delhi Development Authority v. Durga Construction Co.: (2013) 139 DRJ 133, this Court had considered the question whether delay in re-filing could be condoned if the cumulative period exceeded the specified period of three months plus 30 days, from the receipt of the award. This Court had held that if the petition was filed within the period as specified under Section 34(3) of the Act, this Court would retain the jurisdiction to condone the delay in re-filing notwithstanding that the cumulative delay in filing and re-filing exceeded the period specified under Section 34(3) of the Act. However, this Court had also observed that a liberal view in condoning the delay in re-filing would not be warranted given the legislative intent in Section 34(3) of the Act.”

28. In the present case, the petition, as initially filed, had defects but was not incompetent as it was signed and supported by an affidavit. The petition was re-filed within the outer limit of thirty days and thus the petition cannot be rejected as being beyond the period specified in Section 34(3) of the Act.”

27. In the case of *Northern Railway vs. Pioneer Publicity Corporation Pvt. Ltd.*, 2017 (11) SCC 234, Supreme Court held as under :-

“2. Eventually, the appellant re-filed the matter on 21-3-2013. The explanation given by the appellant is that the amount of court fees to the extent of Rs 8,94,000 was to be

arranged and that took some time. The appellant is the Northern Railway and while it is difficult to condone such inefficiency which seems to be a persistent reality with the organisation, such as the Northern Railway, that took time in arranging even the small things.

3. Mr Amarjeet Singh Chandiok, learned Senior Counsel appearing for the respondent submitted that Section 34(3) of the Act bars re-filing beyond the period stipulated therein. The said sub-section reads as follows:

“34. (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

4. We find that said Section 34(3) has no application in re-filing the petition but only applies to the initial filing of the objections under Section 34 of the Act. It was submitted on behalf of the respondent that Rule 5(3) of the Delhi High Court Rules states that if the memorandum of appeal is filed and particular time is granted by the Deputy Registrar, it shall be considered as fresh institution. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were

given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing.”

28. In the case of ***Union of India vs. M/s. Gupta Construction Co. and Anr., 2014 SCC Online Delhi 968***, the Court while dealing with delay in re-filing of a petition under Section 34 (3) of the Act, held as under :-

“10. It appears to the Court that the grounds taken by the petitioner are bonafide and the benefit of delay would go in favour of the petitioner. It is not dispute that the original objections under Section 34 were filed in time. As far as re-filing is concerned, in Delhi Development Authority v. Durga Construction Co., 2014 (1) R.A.J. 490 (Del.), the Division of this Court has come to the conclusion that the aspect of re-filing has to be considered as per its own merit. In view of the statement made in the application for condonation of delay in re-filing, I am of the considered view that the reasons given in the said application are sufficient to condone the said delay.

11. It is manifest that the petitioner has been pursuing its remedy with all diligence without avoiding any delay. The original objection rather was filed within the prescribed period of three months. Thus, there was not even a single day delay in challenging the Award. It is different matter if some delay has happened on returning the petition on account of lack of pecuniary jurisdiction and to refile the same in this court. At the best the said delay of few days is to be considered as delay in re-filing and an advantage cannot be derived by the respondent for such a delay when the objection under Section 34 are filed in time. No doubt the court has to consider the application for condonation of delay in refilling as per its own merit and incase the petitioner is able to make out a case by establishing a case of sufficient cause, the same can be considered in view of observation made by the Division Bench in the case of Durga Construction (Supra).”

29. In the case of ***Durga Construction (supra)***, a Division Bench of this Court while on one hand deprecated the practice of filing the petition initially as a mere bunch of papers, but on the other hand held that filing of an application and re-filing the same, after removing defects, stand on completely different footings in so far as provisions of limitation are concerned. In the said case also delay in re-filing was contested under the provisions of Rule 5 of the Delhi High Court Rules. The Division Bench was of the view that Court has the jurisdiction to condone the delay in re-filing, even if the period extends beyond the time specified in Section 34(3) of the Act, subject, of course, to the sufficient cause being shown by the applicant and the Court being satisfied that the matter was pursued diligently. Relevant paras of the judgement are as under :-

“12. It is also contented by the counsel for respondent that as per Rule 5 in Chapter 1-A (a) of Volume 5 of the Delhi High Court Rules, 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 the Filing Counter. Rule 5(3) of the said Rules also makes it abundantly clear that in case the petition is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, Incharge of the Filing Counter under Sub-Rule 1, it shall be considered as a fresh institution. The moment it becomes a fresh filing, then under the settled law, the delay beyond the expiry of prescribed period cannot be condoned on any ground. The maximum period of 30 days is provided under Rule 5, Chapter 1, Part A of Vol. 5 of the High Court Rules and Orders for removing the objections by re-filing of the petition. In the present case, the same was not done and the application was filed after the expiry of 166 days.

13. We have heard the learned counsel for the parties at length. The questions that arise for consideration in the present appeal are, whether a court has the jurisdiction to condone delay in re-filing of an application under section 34 of the Act, where the aggregate period of delay exceeds the period of limitation as specified under section 34(3) of the Act. And if so, whether the delay in re-filing ought to be condoned in the present case.

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15. A plain reading of section 34(3) of the Act indicates that the period of limitation prescribed is with respect to making an application for setting aside an award and not in respect of further steps once such an application is made. Thus, there is no time specified in the Act, in respect of re-filing of an application under section 34 of the Act, which has been returned to remove to certain defects. Thus, in our view, while section 34(3) of the Act does indicate the intention of the legislature to ensure that there is no undue delay in filing of an application under section 34 of the Act, the same does not provide any time limit for re-presenting the application. Any restriction with regard to the jurisdiction of the court in condoning the delay in re filing cannot be read into the provision of section 34(3) of the Act.

16. In our view, filing of an application and re-filing the same after removing defects, stand on completely different footings in so far as the provision of limitation is concerned. It is now well-settled that limitation does not extinguish an obligation but merely bars a party to take recourse to courts for availing the remedies as available to the party. Thus, in the event a party fails to take expeditious steps to initiate an action within the time as specified, then the courts are proscribed from entertaining such action at the instance of such a party. The rationale of prescribing time limits within which recourse to legal

remedies can be taken has been explained by the Supreme Court in the case of Bharat Barrel and Drum Mfg. Co. Ltd. v. ESI Corpn., (1971) 2 SCC 860 as under:

“7. ... The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dormientibus, jura subveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims.”

17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial

filing. A similar view in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in Ashok Kumar Parmar v. D.C. Sankhla, 1995 RLR 85, whereby a Single Judge of this Court held as under:

“Looking to the language of the Rules framed by Delhi High Court, it appears that the emphasis is on the nature of defects found in the plaint. If the defects are of such character as would render a plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit.”

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23. The abovementioned decision of The Executive Engineers v. Shree Ram Construction (supra) has also been considered by this Court in Delhi Transco Ltd. v. Hythro Engineers Pvt. Ltd. (supra), wherein it has been explained as under:-

“9. The decision in Competent Placement Services (supra), in our view, does not say anything to the contrary from what has been observed by the Division Bench in Shree Ram Construction Co. (supra). All that has been observed by the same Division Bench on the same day, is that the rigors of condonation of delay in re-filing are not as strict as condonation of delay in filing under Section 34(3). At the same time, the Division Bench also observed “but that does not mean that a party can be

permitted an indefinite and unexplainable period for re-filing the petition”.

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 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 refiling takes place much after the expiry of the period of three months & thirty days and, that too, without any real justifiable cause or reason.”

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25. Thus, in our view a Court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in section 34(3) of the Act. However, this jurisdiction is not to be exercised liberally, in view of the object of the Arbitration and Conciliation Act to ensure that arbitration proceedings are concluded expeditiously. The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the Court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable. In the present case, there has been an inordinate delay of 166 days and in our view the appellant has not been able to offer any satisfactory explanation with regard to the same. A liberal approach in condoning the delay in refiling an application under section 34 of the Act is not called for as it would defeat the purpose of specifying an inelastic period of time within which an application, for setting aside an award, under section 34 of the Act must be preferred.”

30. From a reading of the judgements, referred to above, what emerges in my view is that once the initial filing is within the 3 months limitation period or the extended 30 days, and is a valid filing, then refiling has to be looked at with a liberal approach. Secondly, even if the re-filing is beyond the period specified under Section 34(3) of the Act, it can be condoned.

31. Having perused the contents of the application seeking condonation of delay in re-filing as well as the Additional Affidavit filed in support of the application for condonation of delay in re-filing, this Court is of the opinion that the delay of 38 days in re-filing has been sufficiently explained and deserves to be condoned.

32. The application seeking condonation of delay of one day in filing the petition is disposed of as infructuous. Application seeking condonation of delay in re-filing is allowed and the delay is condoned.

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33. Issue notice to the Respondent.

34. Since the Respondent has already entered appearance, service of formal notice is dispensed with.

35. Reply be filed to the petition within a period of four weeks from today.

36. Rejoinder, if any, be filed within a period of two weeks thereafter.

37. List on 06.08.2020 before the Roster Bench.

JYOTI SINGH, J.

JUNE 17th, 2020/yo/rd/yg