

Misc Arbitration (Commercial) :- 26/2024
[CNR No. WBBD17-000012-2024]

COMMERCIAL COURT AT ASANSOL

**(FOR THE DISTRICTS OF MURSHIDABAD, BIRBHUM, PURBA
BARDHAMAN, PASCHIM BARDHAMAN, PURULIA AND
BANKURA)**

Present :- Shaikh Kamal Uddin.
Judge, Commercial Court at Asansol.

JO Code :- WB01311.

I.A No. 03 of 2024

In

Misc. Arbitration (Commercial) :- 26/2024
[CNR No. WBBD17-000012-2024]

State of West Bengal

..... Petitioner.

-V E R S U S-

Ramky Infrastructure Limited

..... Respondent.

Order No. 12

Dated 04/01/2025

Mr. Arindam Mondal, Ld. Counsel for the petitioner and Mr. Pourush Bandopadhyay, Ld. Counsel for the respondent are present.

I.A No.03 of 2024 dated 02/03/2024

I.A No. 03 of 2024 as been filed by the petitioner for condoning the delay of 29 days in filing the application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as A & C Act, 1996) challenging the award dated 24th August, 2023, corrected on 17th October, 2023 and passed by the Sole Arbitrator in connection with dispute and differences arising out of contractual agreement No.43/B-11 of 2011-12 of Superintending Engineer, State Highway Circle-V, Public Works (Roads) Directorate dated 12/03/2012.

It is submitted by the Learned Counsel for the petitioner that the soft copy of the corrected award dated 17th October, 2023 was sent to the petitioner by E. Mail on 17th October, 2023 and even after re-opening the office on 29th October, 2023 after the Puja Vacation the hard copy

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was not received by the petitioner. He also submitted that the corrected award dated 17th October, 2023 as received by E. Mail was sent to the award examining committee in the month of November, 2023 and it was decided by the committee to challenge the award. The approval of engaging Advocate for that purpose was decided by the Ld. Legal Remembrancer on 15th January, 2024 and immediately thereafter the matter was sent to the Advocate-on-record for the State of West Bengal for doing the needful. The Ld. Counsel also submitted that the draft of the Section 34 application was prepared on 11th February, 2024 and the Ld. Government Pleader, Asansol was contacted by the Executive Engineer to file the application under Section 34. The Ld. Counsel also submitted that it took some time to organize the voluminous documents and paginate the same and finally the application was affirmed on 13th February, 2024. The Ld. Counsel also submitted that the court remained closed on account of Swarasati Puja on 14th and 15th of February, 2024 and the application under Section 34 of the Arbitration and Conciliation Act, 1996 was filed through E. Filing on 15/02/2024.

It is also submitted by the Learned Counsel for the petitioner that there was sufficient cause which prevented the petitioner from filing the application for setting aside the award within a period of three months from the date of receipt of the copy of the corrected award dated 17/10/2023 which was received through E. Mail on 17th October, 2023. It is also submitted that the application under Section 34 (3) of the A & C Act, 1996 has however been filed within the extended period of 30 days and this court under the proviso to Section 34 (3) of the A & C Act, 1996 has the power to condone the delay.

The Learned Counsel for the respondent in his fairness submitted that the application under Section 34 of the A & C Act, 1996 has indeed been filed within the extended period of 30 days.

I have heard the Learned Counsels and have considered their submissions.

Section 34 (4) of the A & C Act, 1996 mandates that “*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.”

While Section 5 of the Limitation Act does not place any outer limit with regard to the period of delay that could be condoned, the proviso to sub-Section 3 of Section 34 of the A & C Act, 1996 stipulates that if a petition is filed beyond the prescribed period of three months, the court is conferred with the discretion to condone the delay only for a further period of thirty days, provided that sufficient cause is made out. The delay beyond the aforesaid period cannot be condoned, even if sufficient cause is made out.

In the instant case the award was passed on 28/08/2023 and subsequently corrected vide order dated 17/10/2023. A copy of the corrected award was received by the petitioner through E. Mail on 17th October, 2023. The Limitation for filing the application under Section 34 (3) of the A & C Act, 1996 starts from the date of receipt of the signed copy of the award by the ‘party’, which according to the Section 2 (1) (h) of the A & C Act, 1996 means a party to an arbitration agreement.

In the case on hand, the petitioner has contended that the copy of the corrected award in question was received through E. Mail on 17th October, 2023. The same has not been disputed by the respondent. The three months from the date of receipt of the corrected copy of the award expired on 17th January, 2024 and the further period of 30 days expired on 16th February, 2024. The application under Section 34 (3) of the A & C Act, 1996 was filed on 15th February, 2024. As already stated that the proviso to sub-Section 3 of Section 34 empowers the court to condone the delay for a further period of thirty days provided

sufficient cause is made out. Having gone through the grounds of delay, I am convinced that the petitioner was prevented by sufficient cause in not filing the application under Section 34 (3) of the A & C Act, 1996 within the period of three months from the date of receipt of the signed copy of the corrected award. From the averments made in the application it is clear that the petitioner had been proceeding with due diligence and had taken expedient steps for filing the application under Section 34 of the A & C Act, 1996 at the earliest. The application for condoning the delay of 29 days is thus allowed. Delay is condoned. I.A No.03 of 2024 dated 02/03/2024 is accordingly disposed of. The application under Section 34 of the A & C Act, 1996 for setting aside the award dated 24th August, 2023 and corrected on 17th October, 2023 is taken on record.

The Ld. Counsel for the respondent raised preliminary objection on the maintainability of the application under Section 34 of the A & C Act, 1996 filed by the petitioner on the ground that the petitioner has not complied with the provision of Section 34 (5) of the A & C Act, 1996. He also submitted that Section 34 (5) of the A & C Act, 1996 mandates that a prior notice has to be issued to the other party before filing an application Section 34 of the A & C Act, 1996 and in the instant case no such notice has ever been served to the respondent. He also submitted that the provision of Section 34 (5) of the A & C Act, 1996 is not an empty formality and since the petitioner has not complied with the provisions of Section 34 (5) of the A & C Act, 1996, the instant application is liable to be rejected.

Per contra, Ld. Counsel for the petitioner submitted that the provisions of Section 34 (5) of the A & C Act, 1996 is merely directory in nature and not mandatory. To buttress his submission the Ld. Counsel relied on the decision of **State of Bihar and others V/s. Bihar Rajya Bhumi Vikas Bank Samiti, reported in (2018) 9 SCC 472.**

I have heard the Ld. Counsels for the parties and have considered their submissions.

In the case of State of Bihar and others V/s. Bihar Rajya Bhumi Vikas Bank Samiti (Supra) it has been held by the Hon'ble Apex Court that the requirement of issuance of prior notice to the other party and filing of an affidavit endorsing with the said requirement under Section 34 (5) of the A & C Act, 1996 is directory and not mandatory. In paragraph 19 of Bihar Rajya Bhumi Vikas Bank Samiti (Supra) it has been held :

“19. It will thus be seen that Section 34(5) does not deal with the power of the Court to condone the non-compliance thereof. It is imperative to note that the provision is procedural, the object behind which is to dispose of applications under Section 34 expeditiously. One must remember the wise observation contained in Kailash, where the object of such a provision is only to expedite the hearing and not to scuttle the same. All rules of procedure are the handmaids of justice and if, in advancing the cause of justice, it is made clear that such provision should be construed as directory, then so be it.”

Thus, in view of the judgment of the Hon'ble Apex Court as rendered in the case of Bihar Rajya Bhumi Vikas Bank Samiti (Supra) the argument of the Ld. Counsel for the respondent that the application under Section 34 of the A & C Act, 1996 is to be rejected for non-compliance of Section 34 (5) of the Act is not sustainable.

Misc. Arbitration (Commercial) 26/2024 is accordingly taken up for hearing.

Heard Mr. Mondal in part.

Fix **15.02.2025** for further hearing.

D/C by Me.

**Judge, Commercial Court
At Asansol**

**Judge, Commercial Court
At Asansol**