

Present: Sri Dev Kumar Sukul (JO Code:WB00766)
Judge, Commercial Court at Alipore
Misc Case (Arb.) 47 of 2022
CNR No. WBSP18-000106-2022

Order No. 04

Date: 05.12.2022

In the matter of:

An application under
Section 34 of the
Arbitration and
Conciliation Act, 1996.

AND

In the matter of:

The State of West Bengal

Vs.

In the matter of:

Makintosh Burn
Limited.

Appearance for the Applicant:

Mr. Arindam Mondal....Ld. Counsel

Mr. Soumendra Roy Chowdhury....Ld. Counsel

Appearance for the Respondent:

Mr. Arijit Bhowmik....Ld. Counsel

Mr. Koushik Panja...Ld. Counsel

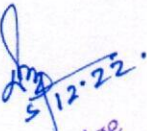
Mr. Hirak Mukhopadhyay...Ld. Counsel

Order

Today is fixed for hearing of the application being I.A. No. 01 of
2022 under Section 34(3) of the Arbitration and Conciliation Act, 1996
(hereinafter referred to as Act).

Both file their respective haziras.


As such the said application is taken up for hearing and disposal of
the same by way of this order.


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I.A. No. 01 of 2022

1. A Tender being No. 02/CE-II of 2012-13 pertaining to reconstruction of Midnapore Anicut Structure on river Cosseye under Anicut Section of Lachmapore (I) Sub-division under West Midnapore Division, Midnapore, Paschim Midnapur (Part A); Anicut Civil Works' was floated and Respondent herein become successful bidder of the said tender to execute the attributed works as per terms and conditions as prescribed therein.
2. Certain disputes arose between the parties concerning these tender works and to resolve such disputes, Sole Arbitrator was appointed. Thereafter, the arbitration proceedings was being crept and passed the award (said award) on 25th March, 2022 allowing claim nos. 1A, 1C, 5 and 6 and also disavowing the claim nos. 1B, 2, 3, 4 and counter claim made by the Appellant being the Respondent therein. The said award was received by the Appellant herein on 28th March, 2022 through post and entered into the Appellant's inbound register. On 27th July, 2022 Applicant, the State of West Bengal herein, filed an application under Section 34 of the Act for setting aside of the said award. This application was accompanied by an application for condonation of delay in filing the application under Section 34 of the Act for setting aside of the award.


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3. Respondent, Mackintosh Burn Limited herein, filed written objection to the said Section 34(3) application as filed by the Appellant.

4. Appellant in the said application sought for condonation of delay in filing the application under Section 34 of the Act and tried to substantiate exposed the delay more or less day to day basis. As the Appellant being a Govt. entity, it is stated that there are some stereotype hard and fast loops to transgress the primordial threshold for taking initiation of a legal case before any Court of law. As such, also in the said case, Appellant had to cross such fences, pertaining to obtain appropriate instruction to allow to sue and/or to engage empanelled lawyers, to take into consideration for initiation of the present case before this Court. That being so, Appellant herein could not file the application for setting aside the arbitral award resorting to Section 34 of the Act within 3 months from the date of receipt of the award and there has been a delay, but such delay is within 30 days after expiry of three months and as such this Court has ample power and/or authority to condone the same under Section 34(3) of the Act.

5. *Per contra*, Respondent by preferring it written objection and also during the course of arguments strenuously contends that the period of three months pertaining to condonation for filing of Section 34 application expired on 27.06.2022, reckoned from the date on which they had received the award viz. 28.03.2022. As the Act thereafter allows a further period of 30 days, only in case this Court is satisfied that the Applicant was prevented


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by sufficient cause for making the application, notwithstanding expiry of the said period of three months. It is also submitted by the Respondent that the period of 30 days beyond the three months cannot be allowed in case the Applicant fails to demonstrate on day to day basis, why he was so prevented from making the application in time. The Applicant further required to justify each day of delay beyond the period of three months. On both these counts the applicant having failed to justify its entitlement to file the application beyond 27.06.2022, this Court has been assisted with no justifiable cause to allow admission of the present application. As regards, Ld. Counsel for Respondent reads out the provision of the Section 34(3) of the Act and also submitted the decision of the Hon'ble Supreme Court of India in the case of Assam Urban Water Supply and Sewerage Board v. Subhas Projects and Marketing Limited reported in (2012) 2 SCC 624.

Respondent herein also stated that the Applicant further failed to issue the statutory notice required under the provisions of Section 34(5) of the Act, which provides as an application under Section 34 of the Act shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

Besides the aforesaid statement, Respondent further stated that the present arbitration proceeding started after amendment of the Act of 1996 by way of amendment Act of 2015 and as the said amendment an admission of the


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application does not confer an automatic stay on operation of the award, which is otherwise final and binding upon the parties. It is also provided under Section 36(3) of the Act that upon filing of an application under Sub-section 2 for stay of operation of the award, the Court may, subject to such conditions as it may deem fit grant stay of the operation of such award.

As regards, as there is no stay application, Respondent prayed for a direction upon the Applicant to deposit the amount as indicated in Annexure A for the purpose of admission of the application for setting aside of the said Award..

6. This Court, *ex facie*, went through the application alongwith the objection contemplatively and also heard and considered the submissions as preferred by the Ld. Counsel appearing on behalf of parties to this present proceedings.

7. *In limine*, it is stated that the Section 34(3) of the 1996 Act provides that an application for setting aside an award may be made within three months of the receipt of the arbitral award. The proviso that follows sub-section (3) of the Section 34 provides that on sufficient cause being shown, the court may entertain the application for setting aside the award after the period of three months and within a further period of 30 days but not thereafter.

8. This Court also takes into consideration of the observation as made by the Hon'ble Supreme Court of India in the case of

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Union of India v. Popular Construction Co. reported in (2001) 8 SCC 470. wherein, the Hon'ble Apex Court viewed that as far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). The Hon'ble further held that the Court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result. In an another decision of the Hon'ble Supreme Court in the case of State of Maharashtra v. Hindustan Construction Co. Ltd. reported in (2010) 4 SCC 518 made an observation that the mandatory nature of the limit to the extension of the period provided in the proviso to Section 34(3) of the Act has to be made within the time prescribed under sub-section (3) of the Section 34.

9. Therefore, from the perusal of the statutory provision as delineated in Section 34(3) of the Act as well as aforesaid observations as made by the Hon'ble Apex Court of our country, there is no dubitation that there is a stringent statutory time frame for filing an application under Section 34 of the Act i.e. within three months and a further period of 30 days on sufficient cause being shown and not thereafter.

10. In the present case in hand, Applicant received the said award on 28th March, 2022 and filed the application under Section 34 of the Act on 27th July, 2022, which conspicuously clarifies that the period of three months expired on 27th June, 2022, but it is also noticeably exposted that the filing of the said 34

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application is within the 30 days as stated in the provision of 34(3), but not thereafter. So far as the provided clause of the said Section 34(3) is concerned, this Court has to consider whether the Applicant enumerates justifiable cause to allow admission of the present application.

11. On perusal of the application of the application under Section 34(3) being I.A. no. 1 of 2022 and/or consideration of the submission as preferred by the Ld. Counsel of the Applicant, this Court is satisfied with the reason behind the delay of filing of the Section 34 application as exposted by the Applicant being a Govt. body.

12. As regards, the observation made by the Hon'ble Supreme Court of India in the case of Assam Urban Water Supply and Sewerage Board (supra), this Court finds that on the said case the Hon'ble Supreme Court made it clear that the period of 30 days mentioned in the proviso that follows sub-section (3) of the Section 34 of the 1996 Act is not the "period of limitation" and, therefore, not the "prescribed period" for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the Court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of the Section of the 1996 Act being not the "period of Limitation" or in other words, the "prescribed period". In the said case the application under Section 34 of the Act was filed beyond the 30 days and as such condonation of delay by filing Section 34(3) application was

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dismissed by the District Judge that was flagrantly affirmed by the Hon'ble Supreme Court at the end.

13. But, in our case, the 30 days time framed has not yet been crossed, and the grounds as enumerated by the Applicant being a Govt. body behind the delay are justifiable and as such the condonation of delay may be condoned subject to imposition of certain costs.
14. The points regarding non-serving of notice as per Section 34(5) of the Act and the direction upon the Applicant to deposit the amount under the Award alongwith interest as the Applicant did not file a stay application under Section 36(3) of the Act, are kept opened and those are to be decided at the time of consideration of the Section 34 application.
15. Therefore, this Court condoned the delay of filing of the application under Section 34 of the Act by directing the Applicant, State of West Bengal to pay a costs of Rs. 5,000/- (five hundred only) to the Respondent within the next date as fixed hereunder. As such the application being I.A. No. 01 of 2022 is hereby disposed off and the present application under Section 34 of the Act is admitted accordingly.
16. Applicant is further directed to serve a copy of application under Section 34 of the Act upon the Respondent within 7 days from the date of this present order and also directed to file affidavit of service on the next date as fixed hereunder.
17. Fix the matter on 9th February, 2023 at 11:00 a.m. for filing affidavit of service Applicant and also for filing written


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objection to the application under Section 34 of the Act by the Respondent.

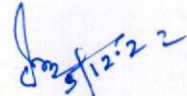
Let a copy of this Order be supplied to the Ld. Advocate of the Petitioner after observation of proper formalities.

Dictated and corrected by me



Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram

Judge
Commercial Court at Alipore



Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram

Judge
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Commercial Court at Aden

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Judge
Commercial Court at Aden