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

Date of decision: 29th OCTOBER, 2024

IN THE MATTER OF:

+ **O.M.P. (COMM) 419/2023**

VASISHTA MANTENA NH04 JV & ORS.Petitioners

Through: Mr. Ashish Kothari and Mr.
Balasubramanian Ramesh,
Advocates.

versus

BLACKLEAD INFRATECH PVT LTD.Respondent

Through: Mr. Varun Shankar, Mr. Aryan
Panwar, Mr. Anand Bhushan and Mr.
Ahmed Alam, Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

I.A. 42258/2024

1. This is an application for condonation of delay in filing the petition under Section 34 of the Arbitration & Conciliation Act, 1996.
2. The Petitioner has approached this Court by filing a petition under Section 34 of the Arbitration & Conciliation Act challenging an Award dated 24.05.2023 passed by the Sole Arbitrator.
3. Material on record indicates that dispute had arisen between the Petitioner and the Respondent under an agreement for hire utilization of Wirtgen Cold Recycler/Stabilizer Unit WR-240 Model 2016 and a Cement Spreader Model SW16MC for work at its project at Andaman.
4. Disputes arose between the parties regarding payments to be made by the Respondent. The Respondent filed a petition under Section 11 of the



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Arbitration & Conciliation Act being Arbitration Petition No.140/2020 for appointment of an Arbitrator and this Court *vide* Order dated 14.03.2022 appointed an Arbitrator.

5. The petition under Section 34 of the Arbitration & Conciliation Act is accompanied by an application for condonation of delay in filing the petition under Section 34 of the Arbitration & Conciliation Act the same has been objected by the Respondent stating that the challenge has been filed beyond the period prescribed under the Arbitration & Conciliation Act, 1996.

6. The Award has been passed partly in favour of the Respondent who was a Claimant before the learned Arbitrator. A preliminary objection has been raised by the Respondent stating that the challenge to the Award is beyond the period prescribed under the Arbitration & Conciliation Act and therefore the challenge cannot be considered.

7. The short question which arises for consideration is whether the petition under Section 34 has been filed within the time period prescribed under the Arbitration & Conciliation Act.

8. The Log Information as placed on record indicates that the Petitioner filed the petition under Section 34 of the Arbitration & Conciliation Act on 21.08.2023 when total 65 pages were filed. The said petition has been filed within 89 days of the passing of Award. The defects were notified by the Registry on the same date.

9. Since the petition had been filed without an Award or any documents, the filing was marked as defective and sent back for re-filing on the very same date. Re-filing was done on 25.09.2023, thereby some more defects which were marked on 26.09.2023. The matter was re-filed on 03.10.2023 again with defects and ultimately the defect free filing was done on



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07.10.2023.

10. Learned Counsel for the Respondent contends that the first filing on 21.08.2023 which was without the award is a *non-est* filing, i.e., it cannot be taken as a filing at all and the re-filing on 25.09.2023 which even assuming but not admitting as the correct filing has been made beyond the time prescribed under Section 34 of the Arbitration & Conciliation Act and therefore the present petition cannot be considered.

11. *Per contra*, learned Counsel for the Petitioner contends that the initial filing was within the period of limitation and was not a *non-est* filing. He states that the objections to the petition were cured and the petition was again filed on 25.09.2023 in proper format containing detailed grounds after thorough analysis of the impugned Award. The petition was duly stamped and supported by duly executed affidavit and accompanied by a *vakalatnama* and therefore cannot be said that the filing was completely *non-est*. The Petitioner places reliance on the judgment passed by this Court in Oriental Insurance Company Limited v. Air India Limited, **2019 SCC OnLine Del 11634** for the said proposition.

12. He further states that the Award was passed on 24.05.2023. Section 34 of the Arbitration & Conciliation Act mandates that the application for setting aside the award should be filed within three months and therefore the three months period ends on 24.08.2023. He states that the further 30 days period would commence from 25.08.2023 and ends on 24.09.2023 and since 24.09.2023 was a Sunday, the petition which was filed on 25.09.2023 is within the period of limitation and therefore this Court has to only consider the reason for condoning the delay is correct or not and it cannot be said that the petition has been filed beyond the prescribed period.



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13. Heard learned Counsel for the parties and perused the material on record.

14. Section 34 (3) of the Arbitration & Conciliation Act mandates that an application for setting aside an arbitration Award may not be filed after three months having elapsed from the date on which the party making that application had received the arbitral award. The proviso to Section 34(3) states 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 30 days and not thereafter.

15. It is now well settled that the application under Section 34 of the Arbitration & Conciliation Act cannot be filed after a period prescribed under the Act.

16. In Section 34 of the Arbitration & Conciliation Act, the term used is that of a 'month' and not 'days'. Admittedly, the award was passed on 24.05.2023 and therefore the petition should have been filed on or before 24.08.2023. It is stated that the initial petition has been filed on 21.08.2023, which is within the period prescribed under the Arbitration & Conciliation Act. The said petition has been admittedly filed without the copy of the Award.

17. A petition under Section 34 of the Arbitration & Conciliation Act is for challenging the Award. It cannot be said that a challenge to the Award without the award itself being filed would be a valid filing. Without the Award, the challenge would become meaningless because unless the Award is perused by the Court, it cannot test or adjudicate on the correctness of the Award. An application under Section 34 of the Arbitration & Conciliation



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Act filed without an Award and *vakalatnama* can only be a bunch of papers filed only to save the limitation.

18. A Division Bench of this Court in Oil & Natural Gas Corporation Limited v. Joint Venture of M/s Sai Rama Engineering Enterprises (SREE) & M/s Megha Engineering & Infrastructure Limited (MEIL), FAO (OS) (COMM) 324/2019, has observed as under:-

"32. It is material to note that Section 34 of the A&C Act does not specify any particular procedure for filing an application to set aside the arbitral award. However, it does set out the grounds on which such an application can be made. Thus, the first and foremost requirement for an application under Section 34 of the A&C Act is that it should set out the grounds on which the applicant seeks setting aside of the arbitral award. It is also necessary that the application be accompanied by a copy of the award as without a copy of the award, which is challenged, it would be impossible to appreciate the grounds to set aside the award. In addition to the above, the application must state the name of the parties and the bare facts in the context of which the applicants seek setting aside of the arbitral award." (emphasis supplied)

19. This Court is not going into other defects which have been pointed out for it is of the opinion that without an Award there cannot be a challenge under Section 34 of the Arbitration & Conciliation Act. It is not the case of the Petitioner that he did not have the copy of the Award which he sought to challenge by way of the present petition. The Award was with the Petitioner on 24.05.2023 and there is no reason forthcoming as to why the copy of the Award was not filed. The filing on 21.08.2023 was therefore a *non-est* filing.

20. Since the filing on 21.08.2023 is a *non-est* filing the only question that



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is to be considered is as to whether the filing on 25.09.2023 can be said to be a filing within the maximum time prescribed under Section 34 of the Arbitration & Conciliation Act.

21. Taking 24.05.2023 as the *terminus a quo*, for challenge to the Award, the application under Section 34 of the Arbitration & Conciliation Act should have been filed on or before 24.08.2024 failing which the petition could have been entertained only if it was filed within a period of 30 days from 25.08.2023, i.e., 24.09.2024.

22. The case of the Petitioner that since 24.09.2023 was a Sunday, it was filed on 25.09.2023, which was the next available day and therefore the filing was done within the maximum time prescribed and therefore this Court has to consider as to whether the delay beyond 25.08.2023 has been properly explained or not. The Petitioner places reliance on Section 10 of the General Clause Act and Section 4 of the Limitation Act.

23. This issue as to whether the bar of Section 10 of the General Clause Act is available in such cases or not is no longer *res integra* and has been decided against the Petitioner by the Apex Court in Assam Urban Water Supply & Sewerage Board v. Subhash Projects & Marketing Limited, (2012) 2 SCC 624, the Apex Court has observed as under:-

"6. 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 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."

24. A perusal of the above said judgment indicates that the benefit of



Section 10 of the General Clauses Act is not available while considering an application of delay after the period of limitation.

25. The said issue has been explained by the Apex Court in Bhimashankara Sahakari Sakkare Karkhane Niyamita v. Walchandnagar Industries Limited (WIL), (2023) 8 SCC 453, wherein the Apex Court has observed as under:-

"50. Section 34(3) of the Arbitration Act and Sections 2(j) and 4 of the Limitation Act, 1963 fell for consideration before this Court in Assam Urban [Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd., (2012) 2 SCC 624 : (2012) 1 SCC (Civ) 831] . Even the very issue raised in the present appeal fell for consideration before this Court in Assam Urban [Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd., (2012) 2 SCC 624 : (2012) 1 SCC (Civ) 831] . In the aforesaid decision, this Court interpreted the aforesaid provisions and has specifically observed and held that the benefit of exclusion of period during which Court is closed is available only when application for setting aside the award is filed within "prescribed period of limitation" and it is not available in respect of period extendable by the Court in exercise of its discretion.

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58. Therefore, in light of the application of the Limitation Act, 1963 to the proceedings under the Arbitration Act and when Section 10 of the General Clauses Act, 1897 specifically excludes the applicability of Section 10 to any act or proceeding to which Limitation Act, 1963 applies and in light of the definition of "period of limitation" as defined under Section 2(j) read with Section 4 of the Limitation Act and as observed and held by this Court in Assam Urban [Assam Urban Water Supply & Sewerage



Board v. Subash Projects & Mktg. Ltd., (2012) 2 SCC 624 : (2012) 1 SCC (Civ) 831], benefit of exclusion of period during which the Court is closed shall be available when the application for setting aside award is filed within “prescribed period of limitation” and shall not be available in respect of period extendable by Court in exercise of its discretion.”

(emphasis supplied)

26. Similarly, in Shahgufa Ahmed & Ors. v. Upper Assam Polywood Products Private Limited & Ors., (2021) 2 SCC 317, the issue as to whether Section 10 of the General Clauses Act can be made applicable for condoning the delay after the prescribed period of limitation is over and within the period extended under the said Act, the Apex Court in the said judgment has observed as under:-

"17. But we do not think that the appellants can take refuge under the above order in Cognizance for Extension of Limitation, In re [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : 2020 SCC OnLine SC 343] . What was extended by the above order [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : 2020 SCC OnLine SC 343] of this Court was only “the period of limitation” and not the period up to which delay can be condoned in exercise of discretion conferred by the statute. The above order [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : 2020 SCC OnLine SC 343] passed by this Court was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law. It is needless to point out that the law of limitation finds its root in two Latin maxims, one of which is vigilantibus et non dormientibus jura subveniunt which means that the law will assist only those who are vigilant about their rights and not those who sleep over



them.

18. *It may be useful in this regard to make a reference to Section 10 of the General Clauses Act, 1897 which reads as follows:*

“10. Computation of time.—(1) Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877 (15 of 1877), applies.

(2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887.”

19. *The principle forming the basis of Section 10(1) of the General Clauses Act, also finds a place in Section 4 of the Limitation Act, 1963 which reads as follows:*

“4. Expiry of prescribed period when court is closed.—Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens.

Explanation.—A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it



remains closed on that day.”

20. The words “prescribed period” appear in several sections of the Limitation Act, 1963. Though these words “prescribed period” are not defined in Section 2 of the Limitation Act, 1963, the expression is used throughout, only to denote the period of limitation. We may see a few examples:

20.1. Section 3(1) makes every proceeding filed after the prescribed period, liable to be dismissed, subject however to the provisions in Sections 4 to 24.

20.2. Section 5 enables the admission of any appeal or application after the prescribed period.

20.3. Section 6 uses the expression prescribed period in relation to proceedings to be initiated by persons under legal disability.

21. Therefore, the expression “prescribed period” appearing in Section 4 cannot be construed to mean anything other than the period of limitation. Any period beyond the prescribed period, during which the court or tribunal has the discretion to allow a person to institute the proceedings, cannot be taken to be “prescribed period”.

22. In Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd. [Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd., (2012) 2 SCC 624 : (2012) 1 SCC (Civ) 831] , this Court dealt with the meaning of the words “prescribed period” in paras 13 and 14 as follows : (SCC pp. 627-28)

“13. The crucial words in Section 4 of the 1963 Act are “prescribed period”. What is the meaning of these words?



14. Section 2(j) of the 1963 Act defines:

“2. (j) “period of limitation” which means the period of limitation prescribed for any suit, appeal or application by the Schedule, and “prescribed period” means the period of limitation computed in accordance with the provisions of this Act.”

Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside arbitral award is three months. The period of 30 days mentioned in proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the “period of limitation” and, therefore, not “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 Section 34 of the 1996 Act being not the “period of limitation” or, in other words, “prescribed period”, in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case.”

27. A Division Bench of this Court in Mypreferred Transformation and Hospitality Private Limited & Anr. v. Faridabad Implements Private Limited, **2024 SCC Online Del 2437**, has observed as under:-

“28. Mr. Nayar, earnestly contended that there is inconsistency in the decision of the Supreme Court in Bhimashankara Sahakari Sakkare Karkhane Niyamita v. Walchandnagar Industries Limited (WIL)³. He referred to paragraph 54 of the said decision where the Supreme Court had reiterated that the provisions of the Limitation Act would be inapplicable to the extent, they were excluded by virtue of express provision contained



*in Section 34(3) of the A&C Act. He submitted that if the provisions of the Limitation Act were expressly excluded in view of the special provisions relating to limitation contained in Section 34(3) of the Limitation Act, the proviso to Section 10 of the General Clauses Act would be applicable. The said contention appears attractive but we are unable to accept the same. There is no ambiguity in the decision in *Bhimashankara Sahakari Sakkare Karkhane Niyamita v. Walchandnagar Industries Limited (WIL)*³. The Supreme Court has expressly held that Section 10 of the General Clauses Act is not applicable in respect of the period of delay, which could be condoned by the Court in terms of the proviso to Section 34(3) of the A&C Act. This Court is informed that a petition seeking review of the said decision is pending before the Supreme Court. However, that is of little assistance to the appellants at this stage as undisputedly, the said decision, unless reviewed, is a binding authority."*

28. The filing on 25.09.2023 was therefore beyond the period of prescribed limitation and this Court cannot entertain this petition.

29. In view of the above this Court has no other alternative but to dismiss the petition on the ground that it is barred by time. Resultantly, the application is dismissed.

SUBRAMONIUM PRASAD, J

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