

Cinema Ventures Private Limited vs Satya Developers Private Limited & Anr on 19 January, 2023

Author: Chandra Dhari Singh

Bench: Chandra Dhari Singh

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB. A. (COMM.) 90/2022

CINEMA VENTURES PRIVATE LIMITED

Through:

Mr. Chinmoy Pradip Sharma,
Advocate with Mr. Mohit Pa
Irfan Hasieb, Mr. Krishnaji
Mr. Rishabh Munjal, Ms. Mu
Nagpal and Ms. Rangoli Set
Advocates

versus

SATYA DEVELOPERS PRIVATE LIMITED & ANR.

..... Respondents

Through: Ms. Kadambari, Ms. Savita Vashisht,
Ms. Niharika and Ms. Ayushi
Ranade, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH
ORDER

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19.01.2023

I.A. 21406/2022 (Delay)

1. The instant application under Section 43 of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the applicant seeking condonation of delay in filing the instant appeal.

2. Learned counsel appearing on behalf of the petitioner/applicant submitted that there is delay of 165 days in filing the instant appeal against the impugned interim order dated 31st May, 2022 passed by learned Sole Arbitrator.

3. It is submitted that on earlier occasion, an appeal was filed against the impugned interim order dated 31st May, 2022 under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") before this Court vide Diary No. 1442750/2022 on 28th August, 2022. It is submitted that the said appeal was filed by another advocate. The earlier appeal was kept under defect and the said defect was not cured by the earlier advocate. Despite several emails requests, the earlier counsel has not cured the defect of the appeal. As the earlier counsel has not performed properly, he was

changed by the appellant/applicant.

4. It is submitted that the petitioner/applicant had engaged some other advocate to pursue the said appeal in this Court. Accordingly, the appellant approached his previous counsel for obtaining documents for the present suit and NOC on the Vakalatnama which eventually took a considerable amount of time. It is submitted that as per the e-filing system of the Registry, a new advocate after seeking a no objection from the erstwhile advocate cannot enter the stage of curing defects and thus a fresh appeal had to be filed and the delay has been caused due to the said reason.

5. It is submitted that since the previous appeal was filed through a different counsel, the counsel for the applicant could not clear the defects and continued with the same appeal. After obtaining necessary instructions, the counsel has filed the present appeal challenging the impugned interim Order dated 31st May, 2022 passed by the learned Sole Arbitrator.

6. Learned counsel for the petitioner/applicant submitted that there are bona fide reasons and sufficient reasons as explained hereinabove to condone the delay in filing the instant appeal.

7. Per contra, learned counsel appearing on behalf of the respondents/non-applicants vehemently opposed the instant application and submitted that there is extraordinary delay in filing the instant appeal and there are no sufficient reasons mentioned in the instant application for delay in filing the instant appeal.

8. It is submitted that the Appellate Court under Section 37 of the Act are governed by Section 13 of the Commercial Courts Act. It is submitted that sub-Section 1(a) of Section 13 of the Commercial Courts Act provides the forum for appeals as well as limitation period to be followed, Section 13 of the Commercial Courts Act being a special law as compared with the Limitation Act which is a general law, which follows from a reading of Section 29(2) of a period of limitation of 60 days uniformly for all appeals that are preferred under Section 37 of the Arbitration Act. It is submitted that in the instant case, there are admittedly 165 days delay in filing the instant appeal.

9. Learned counsel for the respondents further submitted that the instant application is devoid of any merit and is liable to be dismissed.

10. Heard learned counsel for the parties and perused the record.

11. In the instant case, on earlier occasion, an appeal under Section 37 was filed by the appellant/applicant through some other counsel challenging the impugned interim order passed by the learned Sole Arbitrator. Since, the erstwhile counsel of the applicant has failed to perform his professional duty to cure the defects of the earlier appeal filed by the applicant, therefore, the applicant has changed the counsel and filed the instant appeal. For filing, the instant appeal, the appellant has tried his level best to obtain necessary documents from the erstwhile counsel but the erstwhile counsel took considerable time to provide all the documents. In view of the foregoing submissions, this Court finds that there are sufficient reasons explaining the delay in filing the instant appeal.

12. In a recent judgment passed by the Hon'ble Supreme Court in the case of SCG Contracts (India) (P) Ltd. v. K. S. Chamankar Infrastructure (P) Ltd., a Division Bench has held as follows:

"8. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23-10-2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order 5 Rule 1 sub-rule (1), for the second proviso, the following proviso was substituted:

'Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.'

Equally, in Order 8 Rule 1, a new proviso was substituted as follows:

'Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred and twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit right to file the written statement and the court shall not allow the writes statement to be taken on record.

This was re-emphasised by re-inserting yet another proviso in Order & Rule 10 CPC, which reads as under:

'10. Procedure when party fails to present written statement called for by court-Where any party from whom a written statement is require under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the court, as the case may be, the court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up:

Provided further that no court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.' A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the

fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order 8 Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days.

9. In Bihar Rajya Bhumi Vikas Bank Samiti, a question was raised as to whether Section 34(5) of the Arbitration and Conciliation Act, 1996, inserted by amending Act 3 of 2016 is mandatory or directory. In para 11 of the said judgment, this Court referred to Kailash v. Nanhku, referring to the text of Order 8 Rule 1 as it stood pre the amendment made by the Commercial Courts Act. It also referred (in para 12) to Salem Advocate Bar Assn. (2) v. Union of India, which, like the Kailash judgment, held that the mere expression "shall" in Order 8 Rule 1 would not make the provision mandatory. This Court then went on to discuss in para 17 of State v. N.S. Gnaneswaran²⁹, in which Section 154(2) of the Code of Criminal Procedure was held to be directory inasmuch as no consequence was provided if the section was breached. In para 22 by way of contrast to Section 34, Section 29-A of the Arbitration Act was set out. This Court then noted in para 23 as under:

23. It will be seen from this provision that, unlike Sections 34(5) and (6), if an award is made beyond the stipulated or extended period contained in the section, the consequence of the mandate of the arbitrator being terminated is expressly provided. This provision is in stark contrast to Sections 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences."

10. Several High Court judgments on the amended Order 8 Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of CPC will have to be held to be mandatory. See Oku Tech (P) Ltd. v. Sangeet Agarwal by a learned Single Judge of the Delhi High Court dated 11-8-2016 in CS (OS) No. 3390 of 2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics v. Oasis Commercial (P) Ltd.

11. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement;

non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order 8 Rule 1 on the filing of written statement under Order 8 Rule 1 has now been set at naught."

13. In the case of State of Maharashtra v. Borse Bros. Engineers & Contracts (P) Ltd., the Hon'ble Supreme Court has held as under:

63. Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under Section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or Section 13(1-A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 respectively, is to be condoned by way of exception and not by way of rules a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches.

64. Coming to the facts of the appeals before us, in the civil appeal arising out of SLP (C) No. 665 of 2021, the impugned judgment of the High Court of Bombay, dated 17-12-2020, has found that the Government of Maharashtra had not approached the court bona fide, as follows:

7. I have carefully gone through the papers. There can be no view of the documentary evidence in the form of copy of the application tendered by the advocate representing the applicant for obtaining a certified copy (Ext. R-1) that in fact, after pronouncement of the judgment and order in the proceeding under Section 34 of the Act, the advocate concerned had applied for certified copy on 14-5-2019. The endorsement further reads that it was to be handed over to Mr. A.D. Patil of the Irrigation Department, Dhule, who is a staff from the office of the applicant. The further endorsements also clearly show that the certified copy was ready and was to be delivered on 27-5-2019. In spite of such a stand and document, the applicant has not controverted this or has not come up with any other stand touching this aspect. It is therefore apparent that the applicant is not coming to the Court with clean hands even while seeking the discretionary relief of condonation of delay."

14. In view of the ratios of aforesaid judgments passed by the Hon'ble Supreme Court, this Court agrees with the contentions made by learned counsel appearing on behalf of the appellant/applicant and there are sufficient reasons to condone the delay in filing the instant appeal under Section 37 of the Act.

15. In view of the above facts and circumstances, the instant application is allowed and the delay of 165 is condoned subject to deposition of cost of Rs. 50,000/- in the name of "DHCBA Lawyers Social Security and Welfare Fund" within two weeks.

16. Accordingly, the instant application stands disposed of. I.A. 21407/2022 (Stay)

1. Learned counsel for the petitioner submitted that he does not wish to press the instant application and prayed that the same may be dismissed as not pressed.
2. In view of the above submission, the instant application is dismissed as not pressed.

ARB. A. (COMM.) 90/2022

1. Learned counsel appearing on behalf of the respondent appears on advance notice. Hence, there is no requirement for issuing formal notice.
2. Learned counsel appearing on behalf of the parties submitted that the counter affidavit/reply and rejoinder have already been filed. Therefore, learned counsel appearing on behalf of both the parties prayed that the matter may be listed for final hearing as the pleadings have already been completed in the matter.
3. At joint request of the parties, list on 30th January, 2023 for final hearing.

CHANDRA DHARI SINGH, J JANUARY 19, 2023 gs/ak [Click here to check corrigendum, if any](#)