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

+ ARB. A. (COMM.) 44/2024 & I.As. 36469-71/2024.

UNION OF INDIA

.....Petitioner

Through: Mr. R.P. Singh, Mr. Anant Vijay,
Mr. Yash Aggarwal, Mr. Aman
Sinha, Advocates.

versus

RISHABH CONSTRUCTIONS PVT LTD

.....Respondent

Through: Mr. D.K. Mishra, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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14.08.2024

I.A. 36468/2024 (for condonation of delay)

1. This is an application for condonation of delay, filed by the Union of India [“the Union”], in filing of an appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 [“the Act”], against an interim order of the arbitral tribunal dated 07.01.2024.
2. In the application, the Union has sought condonation of delay of 156 days in filing of the appeal; however, Mr. R.P. Singh, learned counsel for the Union, states that the delay is, in fact, of 132 days.
3. By the impugned order, the arbitral tribunal has disposed of two applications under Section 17 of the Act. The application of the respondent herein for release of performance bank guarantee and advance bank guarantee was allowed in part, and the application of the Union for extension of the bank guarantee was rejected.



4. It is the accepted position that, in terms of the judgment of the Supreme Court in *State of Maharashtra v. Borse Brothers Engineers & Contractors (P) Ltd.*¹, the period of limitation for filing the present appeal, under Section 37 of the Act, was 60 days. The appeal was therefore to be filed by 08.03.2024. However, even according to Mr. Singh, it has been filed only on 19.07.2024.

5. In *Borse Brothers*², the Supreme Court accepted that the provisions of Section 5 of the Limitation Act, 1963, would apply to an appeal under Section 37 of the Act, but emphasised that the overarching objective of speedy resolution of disputes embodied in the Act, must be borne in mind, while considering an application for condonation of delay. It has also been clarified that a different yardstick cannot be applied simply because the Government is the appellant³, and that even upon sufficient cause being shown, the appellant cannot claim condonation of delay as a matter of right. The Court has summarised the principles thus:

“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 days, respectively, is to be condoned by way of exception and not by way of rule. In 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.”⁴

¹ (2021) 6 SCC 460.

² Ibid.

³ Ibid., paragraph 59.

⁴ Emphasis supplied.



On the facts of the case in *Borse Brothers*⁵, the Court found a delay of 131 days beyond the 60-days limitation period, to be unexplained “*beyond the usual file pushing and administrative exigency*”⁶. It therefore affirmed the order of the High Court of Bombay dismissing an appeal under Section 37 of the Act, filed by the Government of Maharashtra, on the ground of delay. In a connected appeal, arising out of a judgment of the High Court of Madhya Pradesh, a delay of 75 days was sought to be explained on the ground that it was sent to the appellant’s law officer for opinion, and after obtaining the opinion and approval of the concerned authority, further delay had been caused due to bulky records and to obtain necessary documents. It was also stated that the appellant therein was a public sector undertaking under the State Government and the delay was *bona fide*. The Supreme Court reversed the judgment of the High Court condoning the delay.

6. The judgment in *Borse Brothers*⁷ has been noticed and applied in several decisions of the Division Bench of this Court, including in *Union of India v. Incom Cables (P) Ltd.*⁸ and *Telecommunication Consultants India Ltd. v. NGBPS Ltd.*⁹.

7. Applying these judgments to the facts of this case, it may be noted that delay in this case, even according to Mr. Singh, is to the tune of 132 days, which means that the appeal has been filed after lapse of more than three times the prescribed limitation period.

⁵ Supra (note 1).

⁶ Ibid., paragraph 65.

⁷ Ibid.

⁸ 2022 SCC OnLine Del 2641.

⁹ 2024 SCC OnLine Del 4257.



8. The explanation stated in the application is contained in the following paragraphs of the application:

“4. That the delay caused in filing this appeal is unintentional. The same can be explained through the inordinate procedural aspects of seeking legal opinions and filing court applications within the government. It is further submitted that the previous counsel for the Appellant due to unwarranted reasons delayed any further action on this matter.

5. That the Ld. Arbitral Tribunal passed the interim award on 07.01.2024. Subsequently, the Appellant sought opinion of LA (Defence) on 23.02.2024. The Appellant received the opinion of LA (Defence) on 19.03.2024.

6. That the previous counsel on mistake of his own and due to unwarranted reasons delayed any further action on the opinion against the interim award. It is further submitted that the previous counsel did not bring to the knowledge of the Appellant that an execution application had been filed by the contractor for the interim award, and that its proceedings had been held on 17.05.2024. It is further submitted that the previous counsel made no efforts whatsoever to obtain the instructions of the Appellant while dealing with this matter. Subsequently, the previous counsel was discharged from this matter. Further, the present Govt Counsel was appointed on 11.07.2024. A copy of the letter dt. 11.07.2024 mentioning the appointment date of the previous counsel, withdrawal of the matter from the previous counsel and the appointment of the present counsel is annexed herewith as DOCUMENT: 21

7. That since the appointment of the present Counsel, the Appellant has been rigorously working on filing this appeal.

8. That any filing before the Court, done by the government, requires approval of the administrative machinery at various stages. Therefore, any delay caused due to the inordinate procedural aspects of filing this appeal is a sufficient cause for the delay caused in filing this appeal.”

9. Several judgments have been cited in the application in support of the plea for condonation of delay, but Mr. Singh submits that the law as stated in *Borse Brothers*¹⁰ is sufficient to adjudicate the present case.

10. I am unable to accept the plea of the Union that sufficient cause has

¹⁰ Supra (note 1).



thus been shown for a delay of over 130 days in filing of an appeal, for which the limitation period is only of 60 days. It is clear from paragraph 5 of the application that the appellant first approached the Legal Advisor (Defence) only on 23.02.2024, i.e., after approximately 45 days of the 60-days limitation period had already lapsed. The Legal Advisor (Defence) took about 25 days to give his opinion. The appeal was not filed even immediately thereafter, but only after an order passed in proceedings for enforcement of the impugned order [in O.M.P.(ENF.)(COMM) 109/2024].

11. While the blame for this delay is sought to be placed on the erstwhile counsel for the Union, who has since been replaced in this case, there is no indication as to why such action was not taken earlier. It is evident from the contents of the application that the appeal has been filed only after the enforcement proceedings have been allowed. Mr. Singh submits that the Union had no knowledge of the enforcement proceedings prior to disposal of the enforcement petition on 02.07.2024, as counsel appearing on its behalf did not keep the department informed.

12. Although, this contention is disputed by Mr. D.K. Mishra, learned counsel, who appears on advance notice on behalf of the respondent. I am of the view that it is, in any event, irrelevant. The limitation for filing of an appeal is independent of whether proceedings for enforcement of the impugned order have or have not been instituted. The Union was obliged to follow up with its counsel diligently, to ensure that the appeal is filed within the period of limitation. It could have sought replacement of the counsel at the appropriate stage, if it was dissatisfied with his services, as



it has done after the enforcement order was passed. Mr. Singh has drawn my attention to a communication dated 11.07.2024, addressed by the concerned department to the Litigation Cell, Ministry of Law and Justice, detailing its grievances against the erstwhile counsel. It is clear therefrom that these grievances have been ventilated only after the execution proceedings. Further, as far as filing of the appeal is concerned, even the erstwhile counsel was appointed only on 10.04.2024, which itself was well beyond the period of limitation.

13. The judgments cited above emphasise the objective of speedy resolution of disputes by arbitration, and hold that the Court's consideration of an application for condonation of delay in filing of an appeal under Section 37 of the Act, must be informed by that overarching objective. The explanation offered in the present case, is broadly in the nature of administrative lethargy of the Government machinery. The Supreme Court has expressly held that the Government is not entitled to any special consideration on that account.

14. In the facts of this case, the second consideration noted by the Supreme Court in paragraph 63 of *Borse Brothers*¹¹, is also relevant. The respondent has already sought enforcement of the impugned order and has been granted the relief sought. Mr. Singh states that an application for recall of the order dated 02.07.2024, is pending before the Executing Court. That is a matter upon which the parties may address the Executing Court, but certain rights and entitlements have undoubtedly vested in the respondent by reason of the Union's failure to file the appeal within time.

¹¹ Supra (note 1).



15. I, therefore, do not consider this an appropriate case for condonation of the long delay of 132 days in filing of the appeal. The application is therefore rejected. Consequently, the appeal is barred by delay and stands dismissed, alongwith all pending applications.

16. Needless to say, it is clarified that the order under appeal was in the nature of an interim order, and parties may press their claims and counterclaims before the learned arbitrator in accordance with law.

PRATEEK JALAN, J

AUGUST 14, 2024

“Bhupi”/