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

Reserved on: 19 May 2025
Pronounced on: 23 May 2025

\+ FAO(OS) (COMM) 173/2024, CM APPL. 45539/2024, CM APPL. 45540/2024 & CM APPL. 45541/2024

KAL AIRWAYS PRIVATE LIMITED .....Appellant

Through: Mr. Gaurav Pachnanda, Sr. Adv., Ms. Nandini Gore, Ms. Sonia Nigam, Ms. Swati Bhardwaj, Mr. Akarsh Sharma, Mr. Akhil Abraham Roy, Mr. Gauhar Mirza, Ms. Hiral Gupta, Ms. Sukanya Singh, and Ms. Shreya Bansal, Advs.

versus

SPICEJET LIMITED & ANR. .....Respondents

Through: Mr. Amit Sibal, Sr. Adv., Mr. K.R. Sasiprabhu, Mr. Goutham Shivshankar, Ms. Chinmayi Chatterjee and Mr. Darpan Sachdeva, Advs.

\+ FAO(OS) (COMM) 171/2024, CM APPL. 45530/2024, CM APPL. 45531/2024 & CM APPL. 45532/2024

KALANITHI MARAN .....Appellant

Through: Mr. Gaurav Pachnanda, Sr. Adv., Ms. Nandini Gore, Ms. Sonia Nigam, Ms. Swati Bhardwaj, Mr. Akarsh Sharma, Mr. Akhil Abraham Roy, Mr. Gauhar Mirza, Ms. Hiral Gupta, Ms. Sukanya Singh, and Ms. Shreya Bansal, Advs.

versus

SPICEJET LIMITED & ANR. .....Respondents

Through: Mr. Amit Sibal, Sr. Adv.,

Mr. K.R. Sasiprabhu, Mr. Goutham Shivshankar, Ms. Chinmayi Chatterjee and Mr. Darpan Sachdeva, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE AJAY DIGPAUL

JUDGMENT

% **23.05.2025**

per C. HARI SHANKAR, J.

1. We have heard Mr. Gaurav Pachnanda, learned Senior Counsel for Kalanithi Maran[1] and Kal Airways Pvt. Ltd.[2] [3], the appellants in these appeals and Mr. Amit Sibal, learned Senior Counsel for Spicejet Limited and Ajay Singh[4], the respondents in these appeals.

2. Arguments were heard on CM Appl. 45531/2024 in FAO (OS) (Comm) 171/2024 and CM Appl. 45540/2024 in FAO (OS) (Comm) 173/2024, which seek condonation of delay of 55 days in filing the appeals and on CM Appl. 45532/2024 in FAO (OS) (Comm) 171/2024 and CM Appl. 45541/2024 in FAO (OS) (Comm) 173/2024, which seek condonation of delay of 226 days in re-filing the appeals.

3. For reasons which would presently become apparent, we find no merit in CM Appl. 45532/2024 and CM Appl. 45541/2024 which seek condonation of delay of 226 days in re-filing the appeals. Resultantly, the appeals themselves are liable to be dismissed.

[1] "Kalanithi", hereinafter
[2] "KAPL", hereinafter
[3] "the appellants" collectively hereinafter
[4] "the respondents", collectively hereinafter

Facts

4. Disputes arose between the appellants, on the one hand, and the respondents, on the other, which were referred to an arbitral tribunal comprising three Hon'ble Retired Judges of the Supreme Court. The arbitral tribunal rendered its award on 20 July 2018.

5. The arbitral award was challenged both by the appellants, as well as by the respondents in these appeals by preferring petitions under Section 34 of the Arbitration and Conciliation Act, 1996[5]. The appellants challenged the award by way of OMP (Comm) 450/2018[6] and OMP (Comm) 451/2018[7] whereas the respondents challenged the award by way of OMP (Comm) 42/2019[8] and OMP (Comm) 43/2019[9], respectively.

6. All the Section 34 petitions were dismissed by a learned Single Judge of this Court by two separate judgments, rendered on 31 July 2023.

7. The judgment dated 31 July 2023, in OMP (Comm) 42/2019 and OMP (Comm) 43/2019, was assailed by Ajay Singh by way of FAO (OS) (Comm) 179/2023 and by Spicejet by way of FAO (OS) (Comm) 180/2023. Both the appeals were filed on 22 August 2023, within the statutory period of 60 days available in that regard, under

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[5] the 1996 Act, hereinafter
[6] **Kal Airways Pvt. Ltd v Spicejet Ltd & Anr**
[7] **Kalanithi Maran v Spicejet Ltd & Anr**
[8] **Spicejet Ltd v Kal Airways Pvt Ltd & Ors**
[9] **Ajay Singh v Kal Airways Pvt Ltd & Ors**

Section 13(1-A)[10] of the Commercial Courts Act.

8. We may note the admitted position, at the Bar, that the statutory period for filing the appeal, as it emanates from an order of the Commercial Court, has to be determined in accordance with Section 13 of the Commercial Courts Act, as held by the Supreme Court in ***Government of Maharashtra v Borse Brothers Engineers and Contractors Pvt Ltd***.[11] The said Section provides for 60 days for preferring the appeal against the judgment or order of the Commercial Division of this Court to the Commercial Appellate Division of this Court. It does not provide for condonation of delay. Accordingly, Section 5[12] of the Limitation Act, 1963 would apply, whereunder delay can be condoned on sufficient cause being shown.

9. The FAOs preferred by the respondents were listed before the Division Bench on 23 August 2023, 24 August 2023, 31 October 2023, 09 November 2023, 17 November 2023, 30 November 2023, 8 December 2023, 14 December 2023, 8 January 2024, 15 January 2024, 29 January 2024 and 7 February 2024, before they were finally disposed of by judgment dated 17 May 2024. The Division Bench

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[10] (1-A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

[11] **(2021) 6 SCC 460**

[12] **5. Extension of prescribed period in certain cases**. – Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. – The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

held that the learned Single Judge had erred in dismissing the Section 34 petitions filed by the respondents without due consideration to the challenge raised by them and an apparent absence of reasoning to support the decision at which the learned Single Judge arrived. The Division Bench, therefore, restored the OMPs of the respondents to the Board of the learned Single Judge for consideration afresh.

10. The said OMPs filed by the respondents are presently pending before the learned Single Judge.

11. While the FAOs of the respondents were being heard by the Division Bench, in which the appellants also participated, the appellants proceeded to file the present appeals, FAO (OS) (Comm) 171/2024 and FAO (OS) (Comm) 173/2024, also challenging the judgment of the learned Single Judge dated 31 July 2023, insofar as it dismissed the appellant's OMPs, on 23 November 2023 and 24 November 2023. These appeals were admittedly filed after a delay of 55 days beyond the period of 60 days provided in Section 13 of the Commercial Courts Act.

12. It is significant that, even prior to the filing of these appeals, the FAOs of the respondents had already been heard by the Division Bench on five occasions, that is, 23 August 2023, 24 August 2023, 31 October 2023, 9 November 2023 and 17 November 2023.

13. Admittedly, the appellants did not effect any advance service of the present FAOs, filed by them on 23 and 24 November 2023, on the respondents. Service of the FAOs was effected, on the respondents, at

a highly belated stage. The reasons for this would become presently apparent.

14. Also, the Division Bench, which was hearing the respondents' FAOs, was never apprised by the appellants of the filing of the present appeals, or that they were pending with the Registry for removal of defects, despite the appellants having continuously participated in the hearing of the FAOs.

15. The defects noted by the Registry in the present FAOs filed by the appellants were allowed to remain uncured, till 30 July 2024, when they were removed and the FAOs refiled after 226 days delay.

16. After the filing of the present FAOs by the appellants under defects on 23 and 24 November 2023, the FAOs filed by the respondents had been heard on seven more occasions, i.e., 30 November 2023, 8 December 2023, 14 December 2023, 8 January 2024, 15 January 2024, 29 January 2024 and 7 February 2024, and had finally been disposed of on 17 May 2024. As already noted earlier, the Division Bench allowed the FAOs of the respondents and restored their OMPs to the file of the learned Single Judge for decision afresh.

17. Even at this stage, the appellants did not cure the defects in the present FAOs and refile them. Instead, they chose to challenge the judgment dated 17 May 2024 of the Division Bench in the respondents' FAOs before the Supreme Court, by way of SLP (C) 14936/2024 and SLP (C) 14741/2024.

18. The Supreme Court dismissed the SLPs of the appellants, by the following order dated 26 July 2024:

> "1. We are in agreement with the reasoning which led the Division Bench of the Delhi High Court to remand the proceedings back to the Single judge for reconsidering the petition under Section 34 of the Arbitration and Conciliation Act 1996.
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> 2. Interference with an arbitral award under Section 34 must be confined to the grounds which are permissible under the statute. But equally, the judge hearing an application under Section 34 must apply their mind to the grounds of challenge and then deduce as to whether a case for interference within the parameters of Section 34 has been made out. Reading the order of the Single judge, we find no discernible reason which has weighed with the Single judge. There has been no consideration of the arguments which were urged before the Single judge.
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> 3. In paragraphs 121 of the impugned judgment, the Division Bench has observed as follows:
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> > "We, additionally and out of abundant caution, deem it appropriate to observe that the discussion appearing in the preceding parts of this judgment and concerning the validity of the award of refund and the grant of interest, appears in the context of examining the correctness of the judgment rendered by the learned Single judge alone. None of those are liable to be viewed or accepted as being determinative of some of the submissions which were addressed on this appeal."
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> 4. In this view of the matter, the Division Bench did not err in remitting the proceedings back to the Single judge.
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> 5. In the facts and circumstances, we request the learned Chief justice of the Delhi High Court to assign the hearing of the petition under Section 34 to a judge other than the judge who heard and passed the impugned order.
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> 6 Since the Division Bench of the High Court has remanded the proceedings back to the Single judge for reconsidering the petition under Section 34 which order has been affirmed by this Court, it needs to be clarified that all the rights and contentions of the parties are kept open.

7. The Special Leave Petitions are accordingly disposed of.

8. Pending applications, if any, stand disposed of.

19. This constitutes the factual and litigative background, in which we have to consider the appellants' prayer for condonation of delay of 55 days in filing, and 226 days in refiling, the present appeals.

Rival Contentions

Submissions of Mr. Gaurav Pachnanda

20. Mr. Pachnanda submits that the Court has classically to adopt an expansive approach while dealing with prayers for condonation of delay in refiling proceedings. He has also candidly drawn our attention to Rule 5 of Part A of Chapter 1 Volume V of the Delhi High Court Rules and Orders[13], which reads:

> "5(1) The Deputy Registrar/Assistant Registrar, In-charge of the Filing Counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order XLI, Rule 3, Civil Procedure Code.
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> (2) If the memorandum of appeal is not taken back, for amendment within the time allowed by the Deputy Registrar/Assistant Registrar, in charge of the Filing Counter under sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution.
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> (3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, in charge of the Filing Counter, under sub-rule (1) it shall be considered as fresh institution.

[13] "the DHC Rules" hereinafter

> Explanation : The period of seven days or thirty days mentioned above shall commence from the date, the objections are put on the notice board.
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> Note: The provisions contained in Rule 5(1), 5(2) and 5(3) shall mutatis mutandis apply to all matters, whether Civil or Criminal."

Mr. Pachnanda submits that the respondents' contention is that, under Rule 5(3) in Part A of Chapter 1 Volume V of the DHC Rules *supra*, the re-filing of the present appeals by the appellants on 30 July 2024 had to be treated as a fresh filing, by which reckoning the delay in filing the appeal would be of 281 days. The rigour of Rule 5(3), submits Mr. Pachnanda, has been practically effaced by the following paragraphs from the judgment of the Supreme Court in ***Northern Railway v Pioneer Publicity Corporation Ltd***[14]:

> "4. We find that said Section 34(3) has no application in re-filing the petition but only applies to the initial filing of the objections under Section 34 of the Act. It was submitted on behalf of the respondent that Rule 5(3) of the Delhi High Court Rules states that if the memorandum of appeal is filed and particular time is granted by the Deputy Registrar, it shall be considered as fresh institution. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing.
>
> 5. We are not inclined to accept this contention, particularly since the petitioner has offered an explanation for the delay for the period after the extensions."

Mr. Pachnanda also relies on the following paragraphs from the judgment of a learned Single Judge of this Court in ***Dr Narender Kumar Sharma v Maharana Pratap Educational Center***[15], in which

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[14] **(2017) 11 SCC 234**
[15] **2018 SCC OnLine Del 13146**

reliance had been sought to be placed on the judgment of the Division Bench in ***Northern Railway v Pioneer Publicity Corporation Pvt Ltd***[16], which was reversed by the judgment of the Supreme Court in ***Pioneer Publicity (supra)***:

> "6. Learned counsel appearing for the appellant has opposed the appeal. He submits that re-filing tentamounts to fresh filing. He relies upon the judgment of the Division Bench of this court in ***Northern Railway v Pioneer Publicity Corporation Pvt. Ltd.,*** to contend that re-filing would tentamount to fresh filing and delay cannot be condoned.
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> 7**.** It is admitted fact that the defendants have filed the written statement on 07.05.2018 after being served on 08.01.2018.
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> 8**.** It is settled legal position that delay in re-filing has to be considered on a different footing. Reference in this context may be had to the judgment of the Division Bench of this court in ***S.R. Kulkarni v Birla VXL Ltd.***[17], where the court held as follows:—
>
> > "8. Notwithstanding which of the aforesaid Rules are applicable, the question of condensation of delay in refiling of an application has to be considered from a different angle and viewpoint as compared to consideration of condensation of delay in initial filing. The delay in refiling is not subject to the rigorous tests which are usually applied in excusing the delay in a petition filed under Section 5 of the Limitation Act (See ***Indian Statistical Institute v Associated Builders***[18]). In the present case, the initial delay of 7 days in filing the application for leave to defend stood condoned and that has not been challenged by any of the parties. It is no doubt true that the counsel for the appellant had not been very diligent after filing of application for leave to defend on 19th August, 1995 as counsel did not check whether the application was lying in the Registry with any objection or not. Considering however, the nature of the objections, it was a matter of removal of the objections by the counsel and on the facts of the present case, it is difficult in this case to attribute any negligence to the party. On the facts of the case, the effect of negligence or 'casual approach', which would be

[16] **2015 SCC OnLine Del 11646**
[17] **1998 SCC OnLine Del 1018**
[18] **(1978) 1 SCC 483**

appropriate term to be used here, of the counsel on his client, does not deserve to be so rigorous so as to deny condensation of delay in refiling the application. The casual approach of the counsel is evident as no timely efforts were made firstly to find out after filing application on 19th August, 1995 as to whether the Registry had raised any objection or not. Secondly, despite order of the Joint Registrar dated 9th January, 1996, the objection was removed only on 4th March, 1996 i.e. after the date which the Joint Registrar had fixed for the application being posted for hearing before the Court. When the application was refiled on 4th March, 1996, one would expect the person filing to be more careful thereby not giving an opportunity to the Registry to raise any other objection. But that was no so. The result was that the second objection was raised which, as noticed above, was removed on 21st March, 1996 but application was refiled only on 27th March, 1996. Apart from this casual approach, we do not find any mala fide intention on the part of the appellant to delay the proceedings. When there is negligence or causal approach in a matter like this in refiling of an application, though the court may not be powerless to reject an application seeking condensation and may decline to condone the delay but at the same time, passing of any other appropriate order including imposition of cost can be considered by the court to compensate the other party from delay which may occur on account of refiling of the application."

9. Similarly, the Supreme Court in ***Indian Statistical Institute v Associate Builders*** held as follows:-

"10. The High Court was in error in holding that there was any delay in filing the objections for setting aside the award. The time prescribed by the Limitation Act for filing of the objections is one month from the date of the service of the notice. It is common ground that the objections were filed within the period prescribed by the Limitation Act though defectively. The delay, if any, was in representation of the objection petition after rectifying the defects. Section 5 of the Limitation Act provides for extension of the prescribed period of limitation. If the petitioner satisfies the court that he had sufficient cause for not preferring the objections within that period. When there is no delay in presenting the objection petition Section 5 of the Limitation Act has no application and the delay in representation is not subject to the rigorous tests which are usually applied in excusing the delay in a petition under Section 5 of the

> Limitation Act. The application filed before the High Court for condonation of the delay in preferring the objections and the order of the court declining to condone the delay are all due to misunderstanding of the provisions of the Civil Procedure Code. As we have already pointed out in the return the Registrar did not even specify the time within which the petition will have to be re-presented."

10. I may now note that the judgment of the Division Bench of this court, relied by the learned counsel for the appellant in ***Northern Railway v Pioneer Publicity Corporation Pvt. Ltd. (supra)*** was set aside by the Supreme Court in ***Northern Railway v Pioneer Publicity Corporation Pvt. Ltd.***, wherein it has held as follows:

> "4. We find that said Section 34(3) has no application in refiling the petition but only applies to the initial filing of the objections under Section 34 of the Act. It was submitted on behalf of the respondent that Rule 5(3) of the Delhi High Court Rules states that if the memorandum of appeal is filed and particular time is granted by the Deputy Registrar, it shall be considered as fresh institution. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing." "

21. Apropos the delay between the filing of the present FAOs on 23 November 2023 and their refiling on 30 July 2024, Mr. Pachnanda submits that the delay was inadvertent, and that it was only occasioned because the appellants were simultaneously negotiating the FAOs filed by the respondents.

22. Responding to Mr. Pachnanda, Mr. Sibal emphasizes the egregiousness of the attitude of the appellants, and submits that the delay between the filing of the present FAOs and their refiling cannot be said to be attributable either to inadvertence or even negligence. He submits that the appellants are fence sitters, who were taking a

chance, complacent in the belief that, as interim relief had initially been delayed to the respondents in their FAOs, the appeals themselves would ultimately fail. When the appeals succeeded, and the SLPs preferred thereagainst by the appellants were dismissed, they decided to revitalize the present FAOs. No courtesy of any condonation of delay can, in such circumstances, be extended to the appellants.

23. Not only were the appellants fence sitters, points out Mr Sibal, they had also studiedly concealed, both from the Division Bench as well as from the respondents, the fact of filing of the present FAOs, throughout the entire period when they continued to appear in, and contest, the FAOs filed by the respondents. They even concealed the fact of the filing of the present FAOs, and their languishing under objections, from the Supreme Court. They cannot, therefore, be entitled to any leniency in the matter of condonation of delay. This, therefore, is, he submits, an exceptional case in which the present FAOs have to be dismissed on the ground of delay both in filing and in re-filing.

Analysis

24. From the judgments noted hereinabove, it is clear that, while the Court has ordinarily to be expansive in its approach while dealing with applications for condonation of delay in refiling, the principle is not inelastic. The prevailing philosophy behind the theory that delay in refiling is to be treated with a lighter hand than delay in filing is essentially premised on the presumption that, if a party has approached the Court in time or without any unreasonable delay, the

delay in removing objections is essentially attributable to the counsel or, even if the litigant has filed the proceedings in person, the delay is removing objections is essentially a ministerial act. The delay in refiling, therefore, does not represent delay in approaching the Court for seeking legal redress. If a party has approached the Court within a reasonable period of time, the delay in curing objections and refiling the proceedings is, therefore, treated as more liberally condonable than delay in filing.

25. One of the primary reasons for incorporating a provision of limitation is to avoid divesting of rights which may have crystallized in favour of the opposite party in the interregnum. Where a successful party in a litigation is not placed on notice regarding any challenge, to the order or judgement in his favour, by the opposite party, within the period of limitation prescribed therefor, he is entitled to believe that the rights, that enure to his benefit as the successful litigant, stand crystallized. Belated divesting of this right is, therefore, permissible only where the party who challenges the decision beyond the prescribed limitation period is able to demonstrate sufficient cause for doing so.

26. Where, however, the successful litigant is placed on notice regarding the challenge to the decision in his favour by the opposite party, there is a radical change in the equity balance. If the opposite party has raised the challenge within time, or with delay, if at all, which is reasonable and condonable, the successful litigant is shaken out of his complacency and placed on notice regarding the challenge.

Delay in removal of objections, thereafter, cannot retore the equity balance, unless it is gross and inordinate. It is for this reason that delay in removing objections, i.e., delay in refiling, is not accorded as strict a treatment as delay in filing.

27. Where, however, the delay in refiling is completely lacking in *bona fides*, and represents a gamble by the unsuccessful litigant keeping all, including the successful litigant before the Court below, in the dark, the entire paradigm changes. Limitation is a statute of equity and repose, and if the delay, whether in filing or refiling, is found to be lacking in *bona fides*, it has to be sternly dealt with.

28. We may profitably refer, in this context, to the following passages from the recent decision of the Supreme Court in ***Thirunagalingam v Lingeswaran***[19]:

> "31. It is a well-settled law that while considering the plea for condonation of delay, *the first and foremost duty of the court is to first ascertain the bona fides of the explanation offered by the party seeking condonation* rather than starting with the merits of the main matter. *Only when sufficient cause or reasons given for the delay by the litigant* and the opposition of the other side is equally balanced or stand on equal footing, the court may consider the merits of the main matter for the purpose of condoning the delay.
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> 32. Further, this Court has repeatedly emphasised in several cases that *delay should not be condoned merely as an act of generosity. The pursuit of substantial justice must not come at the cost of causing prejudice to the opposing party*. In the present case, the respondents/defendants have failed to demonstrate reasonable grounds of delay in pursuing the matter, and this crucial requirement for condoning the delay remains unmet."

[19] **2025 SCC OnLine SC 1093**

The most crucial element in assessing whether the delay in moving the Court is, or is not, explained by sufficient cause is, therefore, *the bona fides of the party concerned*. Where there are no *bona fides*, no cause is sufficient. This may be regarded in a sense as axiomatic, but the words of the Supreme Court, nonetheless, enlighten.

29. Apropos condonation of delay in commercial disputes, the Supreme Court has held thus, in ***Borse Brothers***, incidentally in the context of an appeal under Section 37 of the 1996 Act:

> "58. Given the object sought to be achieved under both the Arbitration Act and the Commercial Courts Act, that is, the speedy resolution of disputes, the expression "sufficient cause" is not elastic enough to cover long delays beyond the period provided by the appeal provision itself. Besides, the expression "sufficient cause" is not itself a loose panacea for the ill of pressing negligent and stale claims. This Court, in ***Basawaraj v LAO***[20], has held:
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> > "9. Sufficient cause is the cause for which the defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the viewpoint of a reasonable standard of a cautious man. *In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive"*. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. … The court has to examine whether the mistake is bona fide or was merely a device to

[20] **(2013) 14 SCC 81**

cover an ulterior purpose. (See ***Manindra Land & Building Corpn. v Bhutnath Banerjee***[21], ***Mata Din v A. Narayanan***[22], ***Parimal v Veena***[23] and ***Maniben Devraj Shah v Municipal Corpn. of Brihan Mumbai***[24].)

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11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only *so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned*, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (*Vide* ***Madanlal v Shyamlal***[25] and ***Ram Nath Sao v Gobardhan Sao***[26].)

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15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, *or for want of bona fide on his part in the facts and circumstances of the case*, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature."

(emphasis supplied)

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[21] **AIR 1964 SC 1336**
[22] **(1969) 2 SCC 770**
[23] **(2011) 3 SCC 545**
[24] **(2012) 5 SCC 157**
[25] **(2002) 1 SCC 535**
[26] **(2002) 3 SCC 195**

> 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."
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> (Italics in original; underscoring supplied)

30. Albeit in the context of an application under Section 11 of the 1996 Act for appointment of an arbitrator, the Supreme Court has thus distilled the prevailing philosophy of Section 5 of the Limitation Act, in ***HPCL Bio-Fuels Ltd v Shahaji Bhanudas Bhad***[27]:

> "123**.** *The primary intent behind Section 5 of the Limitation Act is not to permit litigants to exploit procedural loopholes and continue with the legal proceedings in multiple forums. Rather, it aims to provide a safeguard for genuinely deserving applicants who might have missed a deadline due to unavoidable circumstances.* This provision *reflects the intent of the legislature to balance the principles of justice and fairness, ensuring that procedural delays do not hinder the pursuit of substantive justice*. Section 5 of the Limitation Act embodies the principle that *genuine delay* should not be a bar access to justice, thus allowing *flexibility in the interest of equity, while simultaneously deterring abuse of this leniency to prolong litigation unnecessarily*.
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> 124. The legislative intent of expeditious dispute resolution under the Act, 1996 must also be kept in mind by the courts while considering an application for condonation of delay in the filing of an application for appointment of arbitrator under Section 11(6). Thus, the court should exercise its discretion under Section 5 of the Limitation Act only in exceptional cases where a very strong case is made by the applicant for the condonation of delay in filing a Section 11(6) application."

[27] **2024 SCC OnLine SC 3190**

31. Adverting to the facts of the present case, the undisputed position is that the appellants filed the present appeals, challenging the order dated 31 July 2023, after 55 days' delay on 23 November 2023 and 24 November 2023, by which time the FAOs filed by the respondents, within time, had already been heard by the Division Bench on five occasions. It was between the fifth and sixth dates of hearing in the FAOs of the respondents, that the appellants filed the present FAOs in defects, *without serving any copy thereof on the respondents*. The appellants *never informed the Division Bench*, which was hearing the FAOs filed by the respondents, of the fact that they had also filed FAOs challenging the order passed by the learned Single Judge on 31 July 2023 in their OMPs, though all arose out of a common arbitral award. *Neither did the appellants choose to remove the objections in the present FAOs filed by them*, so that they could be taken up and heard along with the FAOs of the respondents. Instead, they allowed the present FAOs to remain under objections *for 226 days till 30 July 2024*. In the interregnum, the FAOs of the respondents were allowed by way of remand, to the learned Single Judge, by judgment dated 17 May 2024 passed by the Division Bench, and the SLPs preferred by the appellants thereagainst were also dismissed by the Supreme Court on 26 July 2024. The appellants, all along, *kept the Division Bench of this Court, and even the Supreme Court, in the dark* regarding the fact that they had filed the present FAOs, which were languishing without removal of objections. It was only *after* the Supreme Court also dismissed the SLPs filed by the appellants on 26 July 2024, that the appellants, *within 4 days of the dismissal, served the copies of the present FAOs to the respondents*, removed the objections in the present FAOs and refiled them.

32. It is impossible for the Court to believe, in such circumstances, that the delay in removing objections raised by the Registry and refiling of the present FAOs was *bona fide*. The case presents a classic example of fence sitting, keeping, in the process, the respondents, the Division Bench of this Court, as well as the Supreme Court, completely in the dark regarding the filing of the present FAOs, and of their languishing under objections. It is impossible to believe the appellants' plea of "inadvertence", given the fact that, after waiting for the respondents' FAOs to be listed on 23 August 2023, 24 August 2023, 31 October 2023, 9 November 2023 and 17 November 2023, the appellants filed the present FAOs on 23 and 24 November 2023 and again proceeded to participate in the remaining hearings in the respondents' FAOs on 30 November 2023, 8 December 2023, 14 December 2023, 8 January 2024, 15 January 2024, 29 January 2024 and 7 February 2024 as though nothing on earth had happened between 17 and 30 November 2023. The matter in which the appellants acted in the present case is frankly disquieting to the conscience of the court.

33. Perhaps as a Freudian slip, the appellants have acknowledged as much, in para 5(e) of CM Appl 45532/2024 filed by them for condonation of delay in refiling the present appeals, which reads:

> "e) It is submitted that the Judgment dated 17.05.2024 passed by the Hon'ble Division Bench of this Hon'ble Court, in the understanding and humble submission of the Applicant herein, was not in accordance and in conformity with the principles of law laid down by the Hon'ble Supreme Court in relation to Section 34 and Section 37 of the Act. *Aggrieved by the Judgment dated 17.05.2024*, the management of *the Applicant decided to challenge*

> *the said judgment before the Hon'ble Supreme Court as well as refile the captioned Appeal*. However, due to the summer vacations, the Special Leave Petition and the refiling of the subject Appeal was further delayed."
>
> (Emphasis supplied)

As one may say, Q.E.D.

34. *In the above paragraph, the appellants have candidly, albeit perhaps unwittingly, admitted that the delay in refiling the present appeals was not because of oversight or inadvertence, as they so assiduously seek to contend even at the Bar, but because the FAOs filed by the respondents were decided in their favour. The only inaccuracy in this admission is that the appellants did not decide to revitalize the present appeals, by removing the objections therein, even after the judgment dated 17 May 2024 passed by the Division Bench, but only after the SLPs filed by the appellants before the Supreme Court, thereagainst, were also dismissed.*

35. The inaction in removing the objections in the present FAOs and have them relisted, therefore, does not admit even of a scintilla of *bona fides*.

36. The facts of the present case, therefore, do not attract the general principles regarding leniency in the matter of condonation of delay in refiling. This is not a case in which the appellants *bona fide* filed the present FAOs in time and were merely indolent or even negligent in removing objections in refiling the FAOs. This is a case in which the appellants took a calculated gamble, of which the delay

in refiling, and allowing the FAOs to languish in objections, constitutes the fundamental *modus operandi*.

37. The respondents had already filed their FAOs on 22 August 2023. There was no reason why the appellants did not do so likewise. They waited for five dates of hearing to be over in the FAOs filed by the respondents before filing the present FAOs on 23 November 2023 and 24 November 2023 with 55 days' delay. Obviously in order to conceal the fact that they had filed the FAOs, no advance copy of the FAOs was served on the respondents. The Registry pointed out objections in the FAOs on 24 November 2023 itself, one of the primary objections being that no advance service had been effected on the respondents. The present appellants did not, however, choose to remove the objections and allowed the FAOs to languish under objections. This position continued throughout the pendency of the FAOs filed by the respondents before the Division Bench and even thereafter till the SLPs against that decision were dismissed by the Supreme Court. At no stage did the appellants ever make the Court wise about the fact that they had filed FAOs on 23 and 24 November 2023 and had chosen not to remove objections or even serve a copy thereof on the respondents. It was only after the Supreme Court dismissed the present appellants' SLPs against the judgment dated 17 May 2024 of the Division Bench in the FAOs against the respondents that the present appellants chose to serve a copy of the present FAOs on the respondents and, thereafter, refile the FAOs on 30 July 2024. The alacrity with which the appellants effected service of the present FAOs on the respondents, removed the objections in the FAOs and

refile the FAOs within four days of the Supreme Court order on 26 July 2024, indicates that the entire exercise was carefully orchestrated.

38. This, therefore, we reiterate, is not a simple case of delay in removing objections in refiling the appeals. It is a case of deliberate and wilful concealment of facts both from the Division Bench as well as from the respondents and a calculated gamble taken by the appellants.

39. As we have already noted earlier in this judgment, the appellants have, perhaps unwittingly, acknowledged this fact in para 5(e) of CM Appl 45532/2024, which admits, in so many words, that their decision to refile the present appeals was prompted by their grievance at the judgment dated 17 May 2024 passed by the Division Bench in the FAOs of the respondents. In actual fact, the appellants waited till the SLPs preferred by them against the said judgment dated 17 May 2024 of the Division Bench were also dismissed by the Supreme Court.

40. The Court cannot, in any circumstance, condone the delay which is attributable to such factors. In such circumstance, it hardly matters whether the delay is in filing or in refiling of the appeals.

41. We do not, in the circumstances, deem it necessary to enter into the rival contentions with respect to Rule 5(3) in Part A of Chapter 1 Volume V of the DHC Rules.

42. Accordingly, we decline to condone the delay of 55 days in filing and 226 days in re-filing the present appeals. The applications for condonation of delay in filing and re-filing are, accordingly, dismissed.

FAO(OS) (COMM) 173/2024 and FAO(OS) (COMM) 171/2024

43. As the applications for condonation of delay in filing and re-filing have been dismissed, the appeals also stand dismissed on the ground of delay without going into merits.

C. HARI SHANKAR, J.

AJAY DIGPAUL, J.

MAY 23, 2025
yg/aky

Click here to check corrigendum, if any