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

% ***Date of Decision: 27.09.2019***

\+ **FAO(OS) (COMM) 44/2019 & CM APPL. 9200/2019** ***(stay)***

UNION OF INDIA ..... Appellant

Through: Mr. Manish Mohan, CGSC with Ms. Manisha Saroha, Advocate.

versus

M/S JCB INDIA LTD ..... Respondent

Through: Mr. Ashish Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

G.S. SISTANI, J. ***(ORAL)***

Caveat No. 191/2019

1. Since the learned counsel for the respondent enters appearance, caveat petition stands discharged.

CM APPL. 9202/2019 *(exemption)*

2. Exemption is allowed, subject to all just exceptions.

The application stands disposed of.

CM APPL. 9201/2019 *(delay)*

3. This application has been filed by the applicant/appellant seeking condonation of 12 days delay in filing the present appeal.

4. The prayer made in the application is not opposed. Delay of 12 days in filing the appeal is condoned. Let the appeal be taken on record.

5. The application stands disposed of.

FAO(OS) (COMM) 44/2019 & CM APPL. 9200/2019 *(stay)*

6. Challenge in this appeal is to the order dated 22.11.2018 passed by the learned Single Judge of this court by which the objections to the award dated 14.10.2016 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) have been dismissed on the ground of limitation.

7. The necessary facts required to be noticed for disposal of this appeal are that a dispute had arisen between the parties in relation to the agreement dated 17.08.1993 for the supply of 32 Nos. JCB excavators. It is contented that the sole arbitrator, while adjudicating the dispute rendered an award on 14.10.2016 in favour of the respondent thereby directing the appellant to pay to the respondent, a sum of Rs.46.83 lacs (Rupees Forty Six Lacs Eighty Three Thousand) in terms of liquidated damages with simple interest @ 9% per annum from the date on which such damages had become due and payable, along with sum of Rs.3,47,000/- (Rupees Three Lacs Forty Seven Thousand) towards costs. As per the appellant, copy of the award was received from the Arbitrator on 21.10.2016 and the same was placed before the competent authority for seeking approval as to the further course of action. Subsequently, a petition challenging the award under Section 34 of the Act was filed before the Additional District Judge (ADJ) on 20.02.2017, i.e. on the 30th day after the expiry of the period of three

months from the date of receipt of award. The ADJ vide order dated 29.01.2018 condoned the delay in filing the petition. Subsequently, an application under Order VII Rule 10 of Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') for the return of plaint was filed by the respondent on the ground that the court of ADJ lacks pecuniary jurisdiction as the dispute would be to the tune of Rs.1, 46, 91,251/- (Rupees One Crore Forty Six Lacs Ninety One Thousand Two Hundred Fifty One). Accordingly, by an order dated 04.04.2018, the objection was allowed and it was ordered that the petition be returned to the petitioner/appellant herein to enable him to present the same in the appropriate court of jurisdiction. It is also not in dispute that an application seeking return of the petition was filed on 16.05.2018 and the petition was returned to the appellant on 13.07.2018 and filed before this court on 30.07.2018.

8. The learned Single Judge vide order dated 22.11.2018 dismissed the petition filed under Section 34 of the Act as the same was filed beyond the period of 30 days after the expiry of three months from the date of receipt of the award, on the ground that the court would have no jurisdiction to condone such delay. Hence, the present appeal.

9. Mr. Mohan, learned counsel for the appellant submits that the learned Single Judge has dismissed the objections on the ground that the same was filed beyond the time allowed in terms of Section 34 (3) of the Act being three months with an additional 30 days (90+30 days). Counsel submits that while there is no quarrel to the proposition, the time cannot be extended beyond 120 days (90+30 days). Counsel further submits that in this case, the petition was filed within the

period of 120 days, as admittedly, delay was condoned by the ADJ vide order dated 29.01.2018, on the ground that the appellant has shown sufficient cause for such delay. The said order has also attained finality.

10. Counsel for the appellant further submits that the learned Single Judge has fallen into an error while relying on Order VII Rule 10 CPC and the judgment, which was sought to be relied upon by the learned counsel for the respondent on the ground that the delay could not have been condoned for a period beyond 120 days or at best once the plaint was returned, it should have been re-filed within a reasonable period of time and not with delay of almost 17 days. It is the submission of Mr. Mohan, learned counsel for the appellant that the appellant took only 17 days in re-filing of the petition after the return. Since the predecessor court has not fixed any date for appearance in terms of Order VII Rule 10A of CPC, there was no embargo upon the High Court in condoning this delay as objections were filed within the statutory prescribed period and thus, the delay should be condoned.

11. In support of this contention, counsel for the appellant has relied upon the decisions rendered in ***Joginder Tuli vs. S. L. Bhatia & Anr.***, reported at *(1997) 1 SCC 502, Narendar* ***Singh & Ors. vs. Indian Institute of Architects***, reported at *(2013) 205 DLT 240*, ***Ziff- Davis Inc. vs. Dr. J.K. Jain & Ors.*** reported at *2006 (32) PTC 86 (Del.)* and ***Hawkins Cookers Limited vs. Citizen Metal Industries (India)*** *reported at 133 (2006) DLT 281* in support of his contention that it is not an absolute rule that the petition returned under Order VII Rule 10 of CPC would result in *de-novo* proceedings. He contends that in the

case of ***Joginder Tuli*** *(supra),* the Supreme Court held that there is no hard and fast rule, which mandates that once a plaint is returned under the provision of Order VII Rule 10 of CPC, proceedings before the competent court have to continue *de novo*. If a petition is returned under Order VII Rule 10 of CPC, the court would have the jurisdiction to treat the same as having being transferred under Section 24 of the CPC and take up the proceedings from the stage that they were at before the court of ADJ. He further submits that if this course is adopted, then the date of filing of petition before the trial judge would be the determinable factor of limitation. Since the delay has been condoned by the district judge, the present petition would, thus, be maintainable.

12. Counsel contends that the above-mentioned view was upheld by this court in the case of ***Narendra Singh*** (Supra), where another Division Bench of this court has categorically held as follows:-

> *"20. Two questions arise: whether the proceedings before this Court, as called up by the orders of the Learned Single Judge dated 03.05.2010 and 20.05.2010, must be de novo or from an advanced stage; and secondly, whether the valuation of the suit property must be done at the time of the re-presentation of the plaint.*
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> *21. On the first question, the Appellant in this case argues that the return of the plaint under Order VII, Rule 10 mandates a fresh filing of a new plaint, thus requiring proceedings to begin de novo. As noticed above, the authorities of this court and the Supreme Court suggest that the return of a plaint under Order VII, Rule 10 - whether for want of territorial or pecuniary jurisdiction - ends those proceedings, thus requiring fresh proceedings to be filed before the Competent Court.*

However, the Supreme Court has in a later decision, having regard to the facts of the case, upheld the High Court's direction that the suit be continued from the stage of its being returned by the previous court. Thus, in Joginder Tuli v. S.L. Bhatia, (1997) 1 SCC 502 it was held that:

"5……Under these circumstances, the original order passed by the High Court directing the District Judge to proceed from the stage at which the suit stood transferred to the District Court appears to be correct in the circumstances. Normally, when the plaint is directed to be returned for presentation to the proper Court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that state at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference."

It would thus be apparent that there is no universal or invariable rule mandating that once a plaint is returned under Order VII Rule 10 CPC, the proceedings before the competent court have to continue de novo.

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23. These cases apart, in Pushpa Kapal v. Shiv Kumar, 35 (1998) DLT 187, the plaint was returned by the Trial court for re-presentation to the District Judge. Before re-presenting the suit to the District Judge, however, an application under Section 24 read with Section 151, CPC was made to the High Court for transfer of the plaint to prevent unnecessary hardship inherent in the rehearing of the entire matter de novo; in Rail Chand v. Atal Chand, 13 (1977) DLT 153, the suit was not tried afresh, but that was because instead of returning the plaint, the High Court ordered the transfer of the matter to the Commercial Sub-Judge.

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26. In a similar case, Hawkins Cookers Ltd. v. Citizen Metal Industries (India), 133 (2006) DLT 281, the District Judge "sent" the file to the High Court upon a finding that the case fell within the pecuniary jurisdiction of the High Court; just as the Plaintiff in this case requested the court to call up the file from the Learned District Judge. Although the Court recognized that:

> *"2. (iv)……the return of the plaint for want of jurisdiction whether pecuniary or territorial cannot be equated to the transfer of the suit or proceeding either by virtue of Section 24 of the CPC…….. …"*

The court then concluded as follows:

> *"6……..In several cases where suits have been transferred from the High Court to the District Court the plaintiffs have, after succeeding in an upward revision of the valuation of the suit, approached the Court under Section 24 of the CPC. This section contemplates the filing of an application by the parties desirous of a transfer, or of its own motion…….. … It is, therefore, for the High Court to decide what action has to be adopted. To set all controversies at rest, I assume jurisdiction under Section 24 and hold and direct that the suit stands transferred to this Court by Order of this Court itself." (paragraph 6).*

27. This precise reasoning may be applied to this case to hold that the proceedings must not begin de novo. The apparent difficulty is that the orders of the learned Single Judge, of May, 2010 do not allude to Section 24. Further, as noted in Ramesh Chand Bharadwaja v. Ram Prakash Sharma, 44 (1991) DLT 528, once the plaint is returned, there is no suit pending before the subordinate Court for Section 24 to become operative. In Hawkins Cookers (supra), there was a plaint existing before the lower court, as was also the case in Aviat Chemicals Pvt. Ltd. v. Magna Laboratories (Gujarat) Pvt. Ltd., 127 (2006) DLT 300, where the Court noted that Section 24

could not be used when "the proceedings in the suit have fully and finally terminated and the Court below has become functus officio" (paragraph 10). Nevertheless, the Court noted that in cases such as the present one, where the provisions of Section 24 do not seem to apply, the inherent power of the Court under Section 151 are apposite as "[i]t will be a travesty of justice if the proceedings have to commence de novo" (paragraph 16-7). It was also earlier held that:

> *"15……It may be noticed that some of the suits are stated to be fixed for hearing while in others evidence has been recorded, still some other suits are pending at initial stages. Now this Court alone would have the pecuniary jurisdiction to entertain and decide the suits because of the orders passed by the trial Court. In the event the plaints are taken back by the plaintiffs and are represented in the registry of this Court for de novo trial it would but naturally result in further delay and prejudice to parties. There would be expeditious disposal of the suits, if suits are permitted to be transferred, in the sense that all the proceedings so far lawfully taken by the court of competent jurisdiction would be protected and not treated as having invalidated in law. It is difficult to accept the reasoning that loss of pecuniary jurisdiction before a Court whether by virtue of operation of law or by act of the parties covered by an order of the Court should be permitted to vest parties with different consequences in law, particularly when one of such consequences could be adverse to the very system of expeditious disposal of suits.*
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> *16. The argument raised on behalf of the respondents that loss of jurisdiction as a result of amendment would necessarily have to be construed as no suits or proceedings are*

pending before the trial Court, is without any merit. I have already noticed that the provisions of Section 24 and Order 7 cover a different domain and there is no conflict between these provisions. The provisions of Section 151 would come to the aid of the Court, as no Code can possibly make provisions so as to meet every situation which may arise during the pendency of the suit. It is a situation where inherent jurisdiction of this Court would come to the aid and supply the vacuum. The inherent jurisdiction of the Court would normally be exercised in the interest of justice and for attainment of object of expeditious disposal of suits. May be it is the creation of the applicants themselves that the Court has lost pecuniary jurisdiction and the applications under Order 7 Rule 10 and 10(A) are pending or that the order has been passed for return of plaint but the plaint as a matter of fact has not been returned to the plaintiffs as of today. Thereafter interim orders in the present petitions were passed in favour of the petitioners. In these circumstances, it is difficult for this Court to hold that there is no suit or proceedings in the suit, pending before the trial Court. The Legislature in its wisdon has worded the language of Section 24 in wide terms by empowering the High Court to transfer any suit or appeal or other proceedings pending before it for trial or disposal to any Court subordinate to it. In other words, the meaning of the word "such or other proceedings pending in any court" cannot be restricted or construed so as to exclude the proceedings as contemplated under Order 7 Rule 10, 10(A) of the Act.

17. The present are the cases which have been filed by the plaintiffs in the Court of Competent jurisdiction. However, earlier they were

> *transferred to the District Courts in view of the notification and now the district courts have lost pecuniary jurisdiction as a result of the order of the Court at the behest of the parties. The interim orders, undertakings have continued for years together. In some cases evidence has been recorded. It will be travesty of justice if the proceedings have to commence de novo right from the stage of filing a written statement as the plaintiff would be returned only plaint, to be presented before the court of competent jurisdiction there is nothing in the provisions of Order 7 Rule 10 which on its plain reading or by necessary implication be construed as a bar to maintainability of a petition under Section 24 of the Code……..."*

13. While relying on the aforesaid judgments, Mr. Mohan, learned counsel for the appellant contends that in both the matters, the Supreme Court and the High Court continued the proceedings from the point where the plaints were returned to be filed in the appropriate court of jurisdiction and once it is held that *de-novo* proceedings would not be an absolute rule, the embargo of Section 34(3) of the Act would not stand in its way and the delay of 17 days are liable to be condoned.

14. The appellant's counsel further submits that the pecuniary limit of the award was increased by the objection of the respondent, which was accepted by the ADJ, which resulted in transferring of the matter to this court. It is not to be overlooked that the ADJ condoned the delay and the petition before the learned Single Judge would tantamount to admission of the petition before the ADJ. Thus, contending that the proceedings before the ADJ were at the preliminary stage is wrong and arbitrary. He submits that the petition was returned to the

appellant on 13.07.2018 and the same was filed before this court on 30.07.2018 after making the requisite changes in accordance with the High Court Rules and that a reasonable period was required for making the necessary amendments.

15. Mr. Ashish Kumar, learned counsel for the respondent submits that the petition filed by the appellant before the learned Single Judge was beyond the period of limitation as prescribed under Section 34(3) of the act, even otherwise, the delay beyond the period of thirty days from the expiry of the three months from the date of receipt of the award cannot be condoned. He submits that the law with regard to Order VII Rule 10 of CPC is well settled. Reliance is placed on ***Hanamanthappa and Another vs. Chandrashekharappa and Others*** reported at *1997 (9) SCC 688* and ***Vogel Media International GMBH & Anr. vs. Jasu Shah & Ors.*** reported at *115 (2014) DLT 679*, where the court specifically held that a petition returned under Order VII Rule 10 of CPC shall be treated as a fresh petition for the purpose of limitation.

16. He further submits that a petition returned under Order VII Rule 10 of CPC is to be treated as a fresh petition and period of limitation beyond 120 days could not have been condoned and at best Section 14 of the Limitation Act would come to aid and rescue of the appellant, only during the period between 90+30 days or a reasonable period of 1 or 2 days when the plaint was returned to be filed in the appropriate court of jurisdiction. He further submits that there is no reasonable explanation as to why the application for return of the plaint was filed

after a gap of one month from 04.04.2018. Further there is no explanation for the delay in refilling from 16.05.2018 to 30.07.2018.

17. Mr. Kumar, learned counsel for the respondent has relied upon *2010 (120) DRJ 615 (DB)* in ***Executive Engineer vs. Shree Ram Construction Co***., more particularly paras 14 and 16 and contends that the facts of ***Executive Engineer*** *(supra)* and the present case are identical. The relevant paragraphs are reproduced as under:-

> *"**14.** The decision in Amar Chand v. Union of India, (1973) 1 SCC 115: AIR 1973 SC 313 immediately comes to mind. This is for the reason that their Lordships had enunciated that the filing of an action in a wrong Court would, for all intents and purposes, including the Limitation Act, be nonest and secondly that the presentation of the action in another Court would not be construed as its continuation. Harshad, in fact, takes support of this precedence and, therefore, we quote the relevant paragraph thereof:—*
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> > *8. It was contended for the appellant that even if the Karnal Court was not the proper Court in which the suit should have been filed, the plaintiff was entitled to the benefit of Section 4 of the Act. Section 4 of the Act provides that where the period of limitation prescribed for any suit expires on a day when the Court is closed, the suit may be instituted on the day the court reopens. But, if the Karnal Court was not the proper court in which the suit should have been filed, the plaintiff would not be entitled to the benefit of Section 4. The decision of the Privy Council in Maqbul Ahmad v. Pratap Narain Singh, AIR 1935 PC 85 is an authority for this proposition. In that case the Privy Council said:*
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> > > *...the language of Section 4 is such that it seems to Their Lordships to be impossible to apply it to a case like the present. What it*

> *provides is that, where the period of limitation prescribed expires on a day when the court is closed, the application may be made on the day when the Court reopens. In Their Lordship's view that means the proper Court in which the application ought to have been made….*

If the plaintiff had filed the suit in the trial court, on March 2, 1950, then certainly the suit would have been within time under Section 4, as that was the proper Court in which the suit should have been filed. As the Karnal Court had no jurisdiction to entertain the plaint, it was not the proper Court. The fact that the plaintiff would be entitled to take advantage of the Provisions of Section 14 of the Act would not, in any way, affect the question whether the suit was filed within the time as provided in Section 4 in the Karnal Court. Section 14 of the Act only provided for the exclusion of the time during which the plaintiff has been prosecuting with due diligence another civil proceeding against the defendant, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it. Even if the plaintiff was entitled to get an exclusion of the time during which he was prosecuting the suit in the Karnal and Panipat Courts, the suit would not be within time as the filing of the suit in the Karnal Court was beyond the period of Limitation. It was, however, argued by Counsel for the appellant that the suit instituted in the trial court by the presentation of the plaint after it was returned for presentation to the proper Court was a continuation of the suit filed in the Karnal Court and, therefore, the suit filed in Karnal Court must be deemed to have been filed in the trial court. We think there is no substance in the argument, for, when the plaint was returned for presentation to the proper Court

> *and was presented in that Court, the suit can be deemed to be instituted in the proper Court only when the plaint was presented in that Court. In other words, the suit instituted in the trial court by the presentation of the plaint returned by the Panipat Court was not a continuation of the suit filed in the Karnal Court see the decisions in Harachand Succaram Gandhy v. G.I.P. Rly. Co., AIR 1928 Bom 421, Bimla Prasad Mukerji v. Lal Moni Dev, AIR 1926 Cal. 355, and Ram Kishun v. Ashirbad, AIR 1950 Pat 478. Therefore, the presentation of the plaint in the Karnal Court on March 2, 1959, cannot be deemed to be a presentation of it on that day in the trial court.*
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> *16. To clarify the position, so far as the present case is concerned, had the refiling been carried out in this Court after three months plus thirty days plus one year and seven months, then a jural consideration of 'sufficient cause' would have become irrelevant altogether. The Award was served on the Objector on 17.11.2004. The time would ordinarily have expired on 17.3.2005; discretion to condone further delay would have been obliterated. After a further period of one year and seven months, that is, 17.10.2006, limitation would have irretrievably and irremediably run out. Fortunately, for the Plaintiff the filing of Objections in this Court was carried out on 10.10.2006, ergo, within the condonable period. We have found it fortunate since we are mindful of the fact that this position has not been argued by learned counsel for the Appellant."*

18. He further submits that section 5 of the limitation act is not applicable to the proceedings under Section 34 of the Act. Reliance is placed on ***Union of India vs. Popular Construction Co.*** reported at *(2001) 8 SCC 470*. Relevant paras are extracted herein under:

> *"11. Thus, where the legislature prescribed a special limitation for the purpose of the appeal and the period*

of limitation of 60 days was to be computed after taking the aid of Sections 4, 5 and 12 of the Limitation Act, the specific inclusion of these sections meant that to that extent only the provisions of the Limitation Act stood extended and the applicability of the other provisions, by necessary implication stood excluded [Patel Naranbhai Marghabhai v. Dhulabhai Galbabhai, (1992) 4 SCC 264]

12. 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). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold 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.

xxxx xxxx xxxx

16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently, by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

> *"where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court".*
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> *This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act.*

19. Counsel for the respondent contends that in the case of ***Joginder Tuli*** (supra), the Apex Court had allowed the proceedings to continue from the stage at which it was transferred for the reasons that the evidence had been recorded in the matter and thus, it was considered appropriate in the facts of that case as an exception.

20. We have heard learned counsel for the parties, perused the impugned order passed by the learned Single Judge and also gone through the judgments placed on record.

21. In view of the decision rendered by this court in ***Executive Engineer*** *(supra)*, the best remedy available to the appellant is under the ambit of Section 14 of the Limitation Act. The bare reading of Section 14 of the Limitation Act makes it clear that in order to seek the remedy under Section 14, the prior proceeding should have been prosecuted

with due diligence and in good faith. Section 14 intends to provide relief, where the proceedings are being prosecuted in good faith in a court, which lacks jurisdiction to entertain the same. Section 14 does not provide for fresh period of limitation but only provides for the exclusion of a certain period. However, it is true that Section 14 will not help the party, who is guilty of negligence lapse or inaction. Even if prosecution before a wrong forum is considered as a sufficient cause for explaining the delay, the period still cannot be extended in excess of an additional 30 days as provided under the proviso of Section 34 (3) of the Act, 1996.

22. Section 34 (3) of the Act clearly provides that an application for setting aside an award shall not be entertained if it is made after the time period of three months. The proviso to Section 34 further makes it clear that if the court is satisfied that the parties were "prevented by sufficient cause" from making an application within a stipulated time period of three months, the court may use its judicial discretion, further to extend the period for 30 (90+30)days "but not thereafter". The word "prevent" means to hinder or to stop. Thus, while time period under the statute never comes to a halt, certain circumstances may stop an applicant from making such an application. If the court, may find the circumstances constituting a "sufficient cause", it would permit the party to make the application but not beyond 120 days (90+30) as mentioned under Section 34 of the Act. However, in the present case the delay cannot be condoned as the appellant has already exhausted the time period of filing the petition under Section 34 before the court of the ADJ, where the petition was filed after the exhaustion

of 120 days (90+30). Thus, it is beyond the cavil that the discretion of the court to permit an application beyond the original period cannot extend beyond 30 days, being the statutory outer limit for exercise of discretion.

23. The position has further been clarified by the Apex Court in ***Consolidated Engineers v. Principal Secretary*** reported at *(2008) 7 SCC 169,* wherein the court demarcated the difference between "extension of time" and "computation of time". The concept of "exclusion of time" has been duly recognized under the rule of computation of time period and the court has specifically permitted the parties to take recourse to Section 14 of the Limitation Act, 1963 and exclude from computation the time spent in bonafide litigious activity, in other words "mistaken remedy" or "selection of a wrong forum". Irrespective of the findings of the court in ***Consolidated Engineers*** *(supra)* and ***Executive Engineer*** *(supra),* even beyond the exclusion of such time, the petition has still been filed beyond the period of 120 days (90+30). In fact, even under the ambit of section 14 of the limitation act, the appellant would have been entitled to exclusion of time for the purpose of limitation only between the period of filing of the petition before the District Court, that is from 20.02.2017 to 04.04.2018. Thus, this court under no circumstances could have condoned such delay.

24. In the case of ***M/s Simplex Infrastructure Ltd vs. Union of India*** reported at *(2019) 2 SCC 455,* the Supreme Court upholding the decision of ***Popular construction (supra)*** held that Section 5 of the Limitation Act, 1963 would not apply to an application challenging an

arbitral award under Section 34 of the 1996 Act. The Supreme Court further held as under:

> *"10… Section 14 of the Limitation Act deals with the "exclusion of time of proceeding bona fide" in a court without jurisdiction, subject to satisfaction of certain conditions. The question whether Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the 1996 Act has been answered by this Court in Consolidated Engineering Enterprises v Principal Secretary, Irrigation Department. This court observed thus:*
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> > *"At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period*

between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be found in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting aside an arbitral award, has to be made is not unusually long. Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the

> *legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well to remember that Section 14 of the Limitation Act does not provide for a fresh period of limitation but only provides for the exclusion of a certain period. Having regard to the legislative intent, it will have to be held that the provisions of Section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award."*
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> *xxxx xxxx xxx*
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> *13. A plain reading of sub-section (3) along with the proviso to Section 34 of the 1996 Act, shows that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 could be made within three months and the period can only be extended for a further period of thirty days on showing sufficient cause and not thereafter. The use of the words "but not thereafter" in the proviso makes it clear that the extension cannot be beyond thirty days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent, there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section (3) read along with the proviso to Section 34 of the 1996 Act. The delay of 131 days cannot be condoned."*

25. Another issue pertaining to the return of plaint under Order VII Rule 10 of CPC to be treated as a fresh petition for the purpose of limitation has been dealt in ONGC Vs. Modern Construction & Co. reported at (2014) 1 SCC 648, wherein the Supreme Court has categorically held that the plaintiff can move the competent jurisdiction, after the plaint

filed by him is returned in view of the provision of Order 7 Rule 10 from the forum, which lacked such jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which, he prosecuted the case before the court, having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, 1963. The plaint returned under Order 7 Rule 10 needs to be considered as a fresh plaint and the trial is to be conducted de novo even if it stood concluded before the court having no competence to try the same. Paragraph 16 and 17 are the operative paras, read as under:-

> *"**16.** Section 14 of the Limitation Act provides protection against the bar of limitation to a person bona fide presenting his case on merit but fails as the court lacks inherent jurisdiction to try the suit. The protection also applies where the plaintiff brings his suit in the right court, but is nevertheless prevented from getting a trial on merits because of subsequent developments on which a court may lose jurisdiction because of the amendment of the plaint or an amendment in law or in a case where the defect may be analogous to the defect of jurisdiction.*
>
> *17. Thus, in view of the above, the law on the issue can be summarised to the effect that if the court where the suit is instituted, is of the view that it has no jurisdiction, the plaint is to be returned in view of the provisions of Order 7 Rule 10 CPC and the plaintiff can present it before the court having competent jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which he prosecuted the case before the court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, and may also seek adjustment of court fee paid in that court. However, after presentation before the court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted de novo even if it stood concluded before the court having no competence to try the same."*

26. Furthermore, for the purpose of limitation, the petition before the learned Single Judge was to be treated as a fresh petition, which clearly surpassed the time period mandated under Section 34(3) of the Act. Even if for the purpose of Section 14, the exclusion of time has been extended till 13.07.2018,then also the period taken from the receipt of the copy of the award till the filing of the petition before this Court have also extended the mandate of 120 days, the maximum permissible period granted to Court under Section 34 of the Act. Thus, the delay in such case could not have been condoned. Therefore, we find no infirmity with the order of the learned Single Judge.

27. Accordingly, the appeal stands dismissed.

G.S.SISTANI, J

JYOTI SINGH, J

SEPTEMBER 27, 2019
ssc//