

Change of counsel is not “sufficient cause” to entertain a set-aside application filed after three-months (Delhi High Court)

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Published on 19 June 2020

Chintels India Limited v. Bhayana Builders Pvt. Limited

Court: Delhi High Court | **Case Number:** OMP (COMM) 444 of 2019 | **Citation:** (2020) 270 DLT 381 | **Bench:** Jyoti Singh J | **Date:** 04 June 2020 | **Available at:** <https://indiankanoon.org/doc/117236752/>

A. The maximum limitation to file a set aside application is three months, and on court’s discretion, another thirty days (it is not 120 days)

The limitation to file a petition under Section 34 ACA to challenge an award is three months from the date of receiving the award, but a proviso says that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within three months, it may entertain the application within a further period of thirty days, but not thereafter.¹

B. Petition was filed 28 days beyond the three months period. Chintels sought condonation of the delay by making a belated application

A petition under Section 34 ACA was filed in this case 28 days after the expiry of the three months. Chintels sought condonation of this delay of 28 days on two grounds:²

- (a) Once the award was rendered, the previous counsel was unable to continue further in the matter. Hence, Chintels had to engage another counsel. Since the record in the arbitration was voluminous and complex issues were involved, “it was not possible to file the application immediately,” after the engagement of the new counsel.
- (b) Two awards relating to different phases of the project were made. The tribunal issued *suo motu* clarification in the connected award (not a subject-matter here). The petitioner understood that this clarification would also apply to the Phase I award and waited for the tribunal to clarify this issue before filing the objections to the award.

C. The court’s decision

C1. The law on Section 34(3) ACA

¹ **Editor’s note:** Several decisions, including this one, have confused the maximum limitation period with being 120 days. That is simply not correct. Three months plus thirty days will not always be equal to 120 days. It may be more, and it may also be less. Refer to our update on *National Highways Authority of India & another v. Subhash Bindlish & others* available at <https://www.nfral.in/limitation-for-filing-setting-aside-application/>.

² An applicant has to demonstrate that it was prevented by sufficient cause from making the application within three months. The additional period of a maximum of thirty days within which a petition can still be considered has been considered a delayed period.

First, Jyoti Singh J set out the law.

She referred to *Union of India v. Popular Construction Company*, (2001) 8 SCC 470, and concluded that “a plain reading of Section 34(3) of the Act and its proviso as well as the judgments referred to above, can lead to only one conclusion that the outer limit within which the Court has the power to condone the delay is 120 days. Once the delay in filing the petition exceeds, even one day beyond the outer limit of 120 days, Court has no power to condone the delay. It has been repeatedly emphasized by the Courts that the period of limitation under Section 34(3) of the Act is inelastic, as the intention of the Legislature is to provide a speedy and expeditious mechanism of adjudication in arbitration matters.”³

Then, Singh J referred to *DDA v. Durga Construction*, a judgment of a 2-judge bench of the Delhi High Court (Badar Durrez Ahmad and Vibhu Bakhru JJ in FAO (OS) 485-86/2011 available at <https://indiankanoon.org/doc/189284773/>). The court was considering if the time limit set out in Section 34 (4) ACA applies to re-filing also. The *DDA* court had concluded that there is no statute which bars the jurisdiction of the court in considering the question of delay in re-filing. Further, once an application has been filed within time, condonation of delay in re-filing would have to be considered in the context of the explanation given for such delay. Then, the *DDA* court commented (at para 21, Indian Kanoon version) that the approach in exercising the discretion to condone the delay “cannot be liberal and the conduct of the applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch.” Specifically, Singh J referred to this passage.

She then referred to another 2-judge bench decision in *Competent Placement Services v. Delhi Transport Corporation*, 2011 (2) RAJ. 347 (Del), where the court had remarked that though “the rigors of condonation of delay in re-filing are not as strict as condonation of delay of filing under Section 34(3)... it does not mean that a party can be permitted an indefinite and unexplainable period for re-filing the petition.”

Jyoti Singh J referred lastly to a decision of the Delhi High Court in *Union of India v. Bharat Biotech International Ltd. and others*, being OMP (COMM) No.399 of 2019, decided on 18 March 2020. Siting singly, Rekha Palli J had rejected the argument that “the delay had been caused due to repeated objections being raised on the petition by the Registry, which took time to cure.” Palli J had concluded that the “petitioner was at fault for not removing the objections in a timely manner and the reasons sought to be advanced by it are not at all bonafide. Thus, even if the delay in question were to be treated as a ‘delay in re-filing,’ the petitioner’s explanation for the delay being vague, unsubstantiated, insufficient and contrary to the record is liable to be rejected.”

C2. Change of counsel is not “sufficient cause”

After referring to the law in the manner set out above, Jyoti Singh J noted that “the first and the foremost issue that needs to be examined is whether the petitioner has shown “sufficient cause” for condonation of delay of 28 days in filing the petition.”

The question was examined as follows (and a reader would possibly conclude that change in counsel as a reason is not directly addressed on its own merits):

- (a) The court noted that the only reason mentioned in the application for condonation of delay was the inability of the earlier counsel to continue and the new counsel receiving the record in or around the third week of August, which was voluminous, complex, and technical.

³ Some passages later, the court also referred to *Consolidated Engg. Enterprises and Others v. Principal Secy. Irrigation Deptt. and others*, (2008)7 SCC 169 on the point that the extension can never be beyond the additional period of thirty days, and Section 5 of the Limitation Act does not apply to Section 34 ACA.

- (b) Then, the court noted that though it was argued that the application for condonation of delay was filed with the petition on 30 August 2019, the record (which, as Singh J noted at the start of her discussion in the issue) establishes that the application was filed on 27 September 2019. The application itself, therefore, was beyond a period of 120 days.
- (c) Now the court referred to a 2-judge bench decision of the Delhi High Court in *Shivaai Industries Private Limited v. Delhi Transport Corporation*, FAO (OS) (COMM) 262/2019, decided on 09 October 2019⁴ and then said that Chintels “was aware that the petition was being filed beyond the 3 months period and ought to have filed the application for condonation of delay, along with the petition.” After this discussion, the court concluded “be that as it may, the reasons given in the application are far from meeting the requirement of ‘sufficient cause’ under proviso to Section 34 (3) of the Act, to enable this Court to exercise its discretion and condone the delay.”

C3. Clarification given in a connected award is not sufficient cause

The court examined another argument that Chintels ran in an additional affidavit filed later. This new ground was under the impression that a *suo motu* clarification issued by the tribunal in a connected award would also apply to the award under challenge.

The court rejected the argument saying that “clarification in the case number of a connected Award can hardly be a reason for a party to wait for filing objections to an Award, being fully aware of the strict and inflexible limitation period under Section 34(3) of the Act.”⁵

C4. Whether the initial filing was *non-est* not considered

Bhayana Builders had argued relying on *Oil and Natural Gas Corporation v. Joint Venture Of M/s Sai Rama*, 2019 SCC OnLine Del 10456 (Jyoti Singh’s judgment of 01 October 2019) that the initial filing was *non-est* because a proper petition “with all the vital documents, such as properly signed and verified Vakalatnama, signed and attested affidavit and a petition signed on all pages by the counsel and the Petitioner” was not filed. Merely filing a bunch of papers, it was argued, would not stop the limitation, and the date on which a petition, cured of all defects is filed, will be treated as the date of fresh filing and not re-filing. The court did not go into this argument because “even assuming in favour of the Petitioner that the filing was not a *non-est* filing, Petitioner” could not have succeeded.

C5. Ancillary matters

Chintels had also sought condonation of delay in re-filing. Several arguments were made relating to the defects pointed by the registry and the time taken to rectify them. The court did not particularly examine these given the fact that the petition was dismissed on the primary ground that the court was not satisfied that Chintels was prevented by sufficient cause in making the application.

⁴ There, the petitioner had applied to condone the delay in re-filing. The single-judge did not condone the re-filing delay, and while doing so also concluded that there had been a delay in the original filing itself (for which no application to condone was filed). The 2-judge bench commented that the petitioner’s assumption that the limitation period is four months (*sic* three months plus thirty days) was incorrect, and it should have filed an application for condonation rather than simply assuming that condonation would be for the asking.

⁵ The court also remarked that the new affidavit “is conspicuously silent on explanation concerning the date of 27.09.2019 appearing on the petition and the application for condonation of delay.” Also, “[s]trangely the affidavit makes a mention of the petition having been filed on 30.08.2019, along with an application for condonation of delay, which is contrary to the e-filing record.”