

**Is change of counsel a sufficient cause to condone delay in filing a set-aside application?
A case comment on Delhi High Court’s Chintels India Limited v. Bhayana Builders Pvt.
Ltd.**

Case Comment by Gunjan Soni & Khushbu Turki

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Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.

Court: Delhi High Court | **Case Number:** OMP (COMM) 444 of 2019 |
Citation: (2020) 270 DLT 381 | **Judge:** Jyoti Singh J | **Date:** 4 June 2020

Can change in counsel be a ‘sufficient cause’ to condone delay under Section 34(3) ACA? On 4 June 2020, a single-judge bench of the Delhi High Court answered in the negative. In the authors’ view, the court’s decision is not correct for several reasons. The decision is also conclusory because it lacks reasons.

This case comment aims at putting into perspective the *Chintels* decision.

A. Section 34(3) — limitation to file a Section 34 petition is three months extendable by thirty days on establishing ‘sufficient cause’

Section 34(3) provides the limitation to file a petition under Section 34 to challenge an award. Relevant to our purpose, this petition “may not be filed after *three months* have elapsed from the date on which the party making that application had received the arbitral award ...”. However, a proviso to this subsection states 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*” (emphasis added).

B. Facts and decision

On 30 August 2019, Chintels India Limited (“Chintels India”) filed a petition under Section 34 ACA challenging an award of 03 May 2019 (“Petition”). Later, Chintels India sought condonation of delay of 28 days in filing the petition.¹ The petition was filed after three months but within the thirty-days discretionary period. The condonation application (“Application”), however, was filed even beyond the discretionary period.²

In the Application, Chintels India mainly urged that: –

¹ It is not clear as to how this delay was computed. Chintels India received the award on 08 May 2019. Hence, the three-month limitation was to end on 07 August 2019. Section 34 petition was filed on 30 August 2019. By this timeline, there was a delay of only 23 days. Even if one were to calculate the delay as per the limitation period of 120 days (90 days + 30 days), the initial limitation period would end on 06 August 2019. This results in a delay of 24 days.

² The Court considered the Application to be delayed because it was filed beyond the outer limitation period of three months and 30 days; see paragraphs 20 and 21.

- (a) The original counsel was unable to continue with the set-aside proceedings, and a new counsel had to be engaged who received the record after some time.
- (b) Since the arbitral record was voluminous and complex issues were involved, the new counsel took time and could not apply immediately.³

Jyoti Singh J examined the argument in the following manner: –

- (a) First, she set out the law on Section 34(3) ACA by relying on the decisions in *Union of India v. Popular Construction Company*,⁴ *DDA v. Durga Construction*,⁵ *Competent Placement Services v. Delhi Transport Corporation*,⁶ and *Union of India v. Bharat Biotech International Ltd. and others*.⁷
- (b) Then, she 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.”
- (c) To answer this question, she observed that the only ground urged in the Application was of change of counsel [see para 19].
- (d) Then, she noted that the Petition was filed on 30 August 2019, but the Application was dated 27 September 2019 (which was also corroborated by the e-filing record). Therefore, the Application itself was filed beyond the three-month limitation and the discretionary period (three months+30 days) [see para 20].
- (e) Then, she relied on *Shivaai Industries Private Limited v. Delhi Transport Corporation*,⁸ to say that Chintels India “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” [see para 21].

Singh J then refused to condone the delay on the ground of change of counsel by concluding:

“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” [see para 21].

C. Comment

The court’s decision on the Application and the ground of change of counsel is set out mainly in paragraphs 19, 20, and 21 of the judgment. These paragraphs, as summarised in section B above, reveal that the court merely stated in a conclusory fashion that such a ground is not ‘sufficient cause’.

³ Later other arguments were also raised by Chintels India seeking condonation of delay, but they are not discussed here as the subject of this case comment is limited to the court’s observations on the ‘change of counsel’ ground. To know the other grounds, [read our update on Chintels](https://www.nfral.in/the-argument-that-there-was-change-of-counsel-and-new-counsel-took-time-given-the-complex-and-technical-nature-of-the-matter-is-not-sufficient-cause-to-entertain-a-set-aside-application-filed-after-t/) at <https://www.nfral.in/the-argument-that-there-was-change-of-counsel-and-new-counsel-took-time-given-the-complex-and-technical-nature-of-the-matter-is-not-sufficient-cause-to-entertain-a-set-aside-application-filed-after-t/>.

⁴ (2001) 8 SCC 470, Supreme Court of India, GB Pattanaik and Ruma Pal JJ.

⁵ FAO (OS) 485-86 of 2011, available at <https://indiankanoon.org/doc/189284773/>. Delhi High Court, Badar Durrez Ahmad and Vibhu Bakhru JJ.

⁶ 2011 (2) RAJ. 347 (Del), Delhi High Court, Vikramajit Sen and Mukta Gupta JJ.

⁷ OMP (Comm) No. 399 of 2019 available at <https://indiankanoon.org/doc/13618343/>, Delhi High Court, Rekha Palli J.

⁸ 2019 SCC OnLine Del 10672 at para 9, Delhi High Court, Hima Kohli and Asha Menon JJ.

In our view, for the reasons discussed below, this was neither a correct approach nor the right conclusion.

C1. Exercise of discretion to condone delay must be supported by reasons

The power to condone the delay, whatever be the source of the power, is usually discretionary. Under Section 34(3) ACA, the court has to be satisfied that the applicant was prevented by sufficient cause from making the application within time.⁹ Sufficient cause has to be established based on the facts and circumstances of each case, enabling the court to exercise discretion but judiciously so.¹⁰

This is the principle under the general law of limitation too. For example, the Bombay High Court in *Chandrakant v. The State of Maharashtra & Others*¹¹ was of the view that the refusal or grant of condonation of delay must be supported with reasons. The court, while entertaining an application under Section 5 of the Limitation Act, 1963, held:

“The provision of section 5 of the Act has given discretionary power to the Court and the party applying for condonation has no right as such. In a case the party applying for condonation of delay may be in a position to show “sufficient cause” and there may be a ground in that regard that cannot be disputed. However, in such a case also the Court has to exercise discretion judiciously and the exercise must be to advance substantial justice. The Court is expected to give reasons for refusing to condone the delay or for giving relief of condonation of delay. This needs to be done in systematic manner as observed above. The reasons must be on the grounds mentioned to make out sufficient cause and there must also be reasons on the point of prima facie merits of the case and bona fides.”¹²

This line of reasoning was also adopted in *P. Subramanian and Ors. v. S. Viswasam*, 2011 (2) CTC 502, where a single-judge bench of the Madras High Court heard a Civil Revision Petition against an order of the Subordinate Judge, Devakottai. The Subordinate Judge refused to condone the delay under Section 5 of the Limitation Act, 1963 without recording any reasons in the order. KK Sasidharan J set aside the order of the Subordinate Judge and concluded:

“The learned trial Judge, other than extracting a portion of the evidence in the order, appears to have not made a genuine attempt to consider the question as to whether the Petitioners have made out a case for condoning the delay or there was sufficient cause which precluded them from filing the application to set aside the ex parte decree within the time permitted by law. In fact, *other than recording that the reasons assigned by the Petitioners for condoning the delay were not acceptable, the learned trial Judge has not supplemented reasons for arriving at such a conclusion.*”

In *Maya Devi v. Raj Kumari Batra*, (2010) 9 SCC 486, the Supreme Court also emphasised “the need to give reasons for orders made by Courts.” It held that the “orders can be made only after due and proper application of mind” as “[a]pplication of mind brings reasonableness...to the ultimate conclusion.” Application of mind is best demonstrated by disclosure of the mind which is shown by recording reasons in support of the conclusion.

⁹ *M/s Consolidated Engineering Enterprises v. The Principal Secretary (Irrigation Department) & Ors.*, (2008) 7 SCC 169 at para 12, KG Balakrishnan, JM Panchal and RV Raveendran JJ.

¹⁰ *Parimal v. Veena*, AIR 2011 SC 1150 at para 9, P Sathasivam and BS Chauhan JJ.

¹¹ *Chandrakant v. The State of Maharashtra & others*, 2014 SCC OnLine Bom 367, TV Nalawade J.

¹² *Ibid*, at para 16. These observations in *Chandrakant* have been followed *Nandlal Gangaram Ranglani v. Nishita Harshal Ranglani and Anr.*, 2019 (1) BomCR (Cri) 864 and *Vithal v. Akrambee*, 2014 (6) BomCR 23.

It is submitted that in rejecting the change-of-counsel, *Chintels* does not satisfy the test of the principle discussed above. It did not provide with specificity any reason as to why a change of counsel would not be considered a ‘sufficient cause’ under Section 34(3) in the facts of the case.

The court should have focused on the argument concerning the specific facts, for example, when did the earlier counsel withdraw, when was the new counsel engaged, was the time taken by the new counsel reasonable?

C2. The court must adopt a liberal approach in condoning the delay up to 30 days

It is well established that a petition under Section 34 ACA cannot be filed after the outer limit of 30 days. However, it is also well established that the courts must be liberal in allowing condonation of delay within thirty days. It has been the consistent view of Indian courts that Section 34(3) is analogous to Section 5 of the Limitation Act, 1963 (to the extent the delay is considered within the thirty days limit).¹³

Therefore, as the court does in cases under Section 5 of the Limitation Act, a liberal approach must also be adopted while condoning delay under Section 34(3) ACA. Taking a liberal approach becomes all the more critical in the latter cases because once the outer limit of 30 days expires, the applicant loses his valuable right to object.¹⁴ The Delhi High Court also recognised this reasoning in *Tirupati Structural Ltd. v. Indian Oil Corporation Ltd. and others*, 2017 SCC OnLine Del 11657. Valmiki Mehta J observed:

“In my opinion, once the law is harsh that there cannot be condonation of delay after three months plus 30 days then if there is any delay beyond three months up to 30 days, Courts should be liberal in allowing condonation of delay up to 30 days, otherwise vested rights and valuable rights of an objector to file objections to the Award would be rejected only on the ground of limitation, though every endeavour should be made to decide the objections on merits.”

It is submitted that the approach of the *Chintels* court was rigorous. It rejected the ground of change of counsel mentioned in the Application without affording any reasons. It appears that the court focused more on the fact that the Application to condone the delay was itself filed with delay.

C3. Change of counsel can be considered a ‘sufficient cause’ to condone delay

It is submitted that change of counsel, in appropriate circumstances and by a proper appreciation of facts can be considered as a ‘sufficient cause’ to condone delay under Section 34(3) ACA.

In *New Okhla Industrial Development Authority v. KM Paramjit & another*,¹⁵ the Delhi High Court condoned a delay of 78 days on the ground of change of counsel. To reach this conclusion, the court considered the following facts:

- (a) The counsel earlier dealing with the matter changed;

¹³ *ICON Management Security and Detectives v. Union of India and others*, 2011 SCC OnLine P&H 3556, Jaishree Thakur J; *MCD v. GD Builders & others*, 2005 SCC OnLine Del 340, TS Thakur J.

¹⁴ In *Union of India v. Ogilvy & Mather Ltd. & another* (Manmohan Singh J), the Delhi High Court observed that “[t]he objections for challenging the award are a valuable right of the parties and if they are not filed within time, it takes away the said right to the benefit of the other.”

¹⁵ *Indermeet Kaur J*, 2011 SCC OnLine Del 4582. The matter before the court was an order of the lower court which had refused to condone under Section 5, Limitation Act, 1963 a delay of 78 days for filing an appeal.

- (b) The new counsel requested the earlier counsel to hand over the complete case file, which took some time;
- (c) The inspection report necessary to file the appeal was missing, and obtaining the certified copies of these papers again took time.

The court in *KM Paramjit* appreciated the above-stated facts and found the explanation sufficient to condone the delay in filing the appeal.

In *Fernas Construction India Pvt. Ltd. v. Artson Engineering Ltd.*,¹⁶ a petition under Section 34 ACA was filed after the expiry of the three months limitation period. The petitioner sought condonation of delay on the ground of change of counsel. “The only reason stated in the application [was] that the petitioner had requested the counsel, who was handling the matter before the Sole Arbitrator, to prepare a petition under Section 34 [ACA]. However, after some time, he...declined to proceed further with the matter and, thereafter, it took time for the petitioner to engage another counsel to brief him for filing of the...petition ... Since voluminous documentation was involved, the counsel engaged by the petitioner took time to understand the matter and prepare the petition.”

The court considered the ground urged in the condonation application. While the court refused condonation of delay, it did so after affording reasons as to the insufficiency of the cause. Its reasons were as follows:-

- (a) The petitioner did not provide any particulars including for substantiating the ground raised in the condonation application. It did not provide proof as to— (i) when was the counsel engaged; (ii) on which date did he declined to prepare the petition; (iii) when was the new counsel involved; and (iv) when was the petition drafted.
- (b) Reading of the award also disclosed that it was the petitioner’s regular practice to change counsel resulting in unnecessary delays.

Thus, it can be seen that the sufficiency of the ground of change of counsel must be made out based on relevant facts and timeline.

Also, the time in the preparation of the petition and in collating the required documents can be considered as a ground to condone delay under Section 34(3) ACA. In its recent decision in *NHPC Limited v. BGS-SGS-SOMA JV*¹⁷ the Delhi High Court condoned the delay of 15 days in filing a petition under Section 34 ACA on the ground of time taken in the preparation of the petition, collating requisite documents, and establishing communication with its counsel.

C4. Belated filing of the condonation application cannot be the sole basis of concluding that a cause is not a ‘sufficient cause’

It may appear to a reader that the court’s reasoning in *Chintels* is based on the fact that Chintels India did not file the Application along with the Petition and assumed that the court would condone such a delay for the asking.¹⁸ Though presumptuous, this cannot be the reason to assess a ground mentioned in the condonation application for ‘sufficient cause’.

¹⁶ Vibhu Bakhru J, 2018 SCC OnLine Del 950.

¹⁷ Rekha Palli J, MANU/DE/1247/2020.

¹⁸ At para 20, the court relied on *Shivaai Industries* to refuse condonation of delay. In *Shivaai Industries*, the petitioner sought condonation of delay in re-filing. The court refused to condone the delay and observed that the original filing was also done outside the limitation period and without a condonation application. It held that at the time of filing the original petition, “the petitioner elected not to file a separate application offering just and

First, the time limit for applying to condone a delay usually is set out in the rules of the court. It has nothing to do with “sufficient cause”. It will not affect the adjudication as to whether a cause is a ‘sufficient cause’ to condone delay under Section 34(3) ACA. In *JK Manoj Kumar v. Smt. B. Lavanya*,¹⁹ a division bench of the Telangana High Court held that the mere fact that the condonation application was not filed along with the Section 34 petition and was only filed beyond the three months and 30 days limitation period is not fatal. It noted that the lower court could have entertained the condonation application “if it was satisfied that the applicant was prevented for sufficient cause from making the [petition] within the period of three months.” “The question, whether or not the petitioner had shown sufficient cause, necessitates examination in the first instance by the court.” The division bench ultimately set aside the order of the lower court based on the fact that the lower court failed to examine “whether or not sufficient cause was shown to condone the delay.”

Second, Section 34(3) does not set filing of a condonation application as a prerequisite to seeking condonation of delay. “It only contemplates the courts (*sic* court’s) satisfaction that the applicant/objector was prevented by sufficient cause from making the application/objections within the three-month period.”²⁰

Hence, non-filing or late filing of a condonation application should not have been considered fatal.

Thus, the authors submit that the court in *Chintels* could not have refused to condone the delay only based on the belated filing of the Application. It was required to apply its mind to evaluate the cause mentioned in the Application on the anvil of ‘sufficient cause’ and record reasons for its dissatisfaction.

D. Conclusion

It is submitted that the background facts in *Chintels* were stated as well as examined meticulously by the court except for those facts linked to the argument of change of counsel. The decision effectively censures *Chintels* India’s conduct in approaching the issue of condonation of delay. But the court missed the crucial point. Substitution of counsel is hardly surprising. There is nothing odd about it. A new counsel will always take time to peruse the voluminous arbitration record and prepare and file the petition. Whether there were merits in the argument must have been examined on its own merits. The *Chintels* court fell in error in not examining these aspects. The case lacks proper reasoning and does not consider several relevant authorities. Its value as precedent is doubtful.

sufficient cause for seeking an extension of 30 days for filing the said petition. It was assumed that the court would condone such a delay for the asking, which is not the intent of the purport of the Act.” However, it should be noted that the court in *Shivaai* did not base its decision on the delayed filing of the condonation application. It examined the facts mentioned in the condonation application for ‘sufficient cause’. It supported its findings with reasons as to why such circumstances could not be considered sufficient to condone the delay.

¹⁹ Civil Revision Petition No.3483 of 2018, decision date: 30 July 2018, Ramesh Ranganathan and N. Balayogi JJ, available at: http://distcourts.tap.nic.in/hcorders/2018/crp/crp_3483_2018.pdf.

²⁰ *Executive Engineer v. Shree Ram Construction Co.*, 2010 SCC OnLine Del 3951 at para 11, Vikramajit Sen and Mukta Gupta JJ.