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

Reserved on: 19.09.2022
Decided on : 09.11.2022

\+ O.M.P. (T) (COMM.) 99/2018 & I.A. No. 13048/2018

TRICOLOR HOTELS LIMITED & ORS. ..... Petitioners

Through: Mr. Ritin Rai, Sr. Advocate with Mr. Soham Kumar, Ms. Aditi Rao, Ms. Prarthana Singhania, Advocates (Ph. 9818350561, e-mail: prarthana@sandvpartners.com).

versus

DINESH JAIN & ORS. ..... Respondents

Through: Mr. Vikas Dhawan, Sr. Advocate with Mr. Sabmit Nanda, Mr. S.P. Das and Mr. Koushal Dogra, Advocates (Ph. 9818291376, e-mail: snanda@senchambers.co.in).

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

% **09.11.2022**

MINI PUSHKARNA, J.

1. By way of the present petition under Section 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act"), petitioner is seeking appointment of a substitute arbitrator as the earlier arbitrator recused himself from adjudicating the matter vide order dated 27.07.2015 conveyed by email of even date.

2. Two Share Purchase agreements dated 04.11.2006 were signed and executed between the petitioners and respondents. Subsequently,

since disputes arose between the parties in respect of the agreements, petitioners through their counsel issued arbitration notice dated 27.05.2009 to the respondents invoking arbitration clause.

3. As per the agreements, one arbitrator was to be appointed by each of the parties. The two appointed arbitrators were to appoint a Presiding arbitrator. Thus, petitioners nominated an arbitrator in terms of the agreements between the parties. Vide notice dated 27.05.2009, respondents were requested to appoint their nominee arbitrator within 30 days of receipt of the said notice. Even after completion of the statutory period, respondents did not reply to the notice of the petitioners and did not nominate their arbitrator in terms of the agreement between the parties.

4. Hence, in these circumstances petitioners approached this Court in Arbitration Petition No. 289/2009 under Section 11 of the Act for appointment of an Arbitrator. Even though as per the specific clause of the agreements between the parties there was provision for an arbitral tribunal of three members, the parties agreed for appointment of a sole arbitrator before this Court. Thus, with the consent of the parties vide order dated 12.05.2010, this Court appointed a retired High Court judge as the sole arbitrator to adjudicate disputes between the parties.

5. Both the parties appeared before the learned sole arbitrator and filed their respective pleadings. After completion of the pleadings, evidence of the parties was concluded on 26.03.2015. The matter was posted for final arguments on 24.08.2015. At that stage, the learned sole arbitrator vide order dated 27.07.2015 recused himself from adjudicating the matter due to personal reasons. Learned arbitrator

sent the said order dated 27.07.2015 thereby recusing himself by email to the respective parties on the same date, i.e., 27.07.2015.

6. It is the case of the petitioner that due to some technical default, the email account of the petitioner was not fully operational for almost a week. Hence, the said mail was not within the knowledge of the counsel for the petitioner. The petitioner's counsel could access her mail account by the second week of August, 2015 only when she noticed the mail by learned arbitrator and immediately intimated the petitioner accordingly. In the present circumstances, petitioner has approached this Court for appointment/substitution of another sole arbitrator to adjudicate the disputes between the parties.

7. The present petition is accompanied with an application, I.A. No. 13048/2018 under Section 5 of the Limitation Act read with Section 151 CPC seeking condonation of delay in filing the present petition. By way of the said application, it is sought to be explained on behalf of the petitioner that the learned sole arbitrator sent the order dated 27.07.2015 of his recusal to the petitioner's counsel through email. However, due to some technical default, the email account of the petitioner was not fully operational for almost a week. The petitioner's counsel could access her mail account by the second week of August, 2015. Hence, the order came to the knowledge of the petitioner only in the second week of August, 2015. The petitioner filed the present petition on 01.08.2018 within three years from the date of knowledge of the recusal order. Hence, there is no delay in filing the present petition.

8. It is further stated in the said application that the counsel for the petitioner also deals with other matters of the petitioner. Since the

learned arbitrator recused himself from the matter, counsel for the petitioner returned the brief back to the office of the petitioner along with other matters. It appears that the file of the present matter got mixed up with other disposed of files. Further, there were other two-three matters of the petitioner in which the learned arbitrator had recused himself. In some of the matters, compromise talks were going on and in some of the matters, new arbitrators got appointed. Hence, in this process the present matter got misplaced. However, recently while checking the old matters, the present case came to the notice of the petitioner and the instant petition was immediately filed. Thus, it is submitted that this Court may condone the delay, if any, in filing the present petition, though it is the case of the petitioner that the present petition for substitution of arbitrator has been filed within three years from the date of knowledge of the order of learned arbitrator by which he recused himself.

9. Opposing the petition vehemently, it is submitted on behalf of respondents that the present petition has been filed after an inordinate delay of more than 3 years without any acceptable justification. The petitioners have grossly failed to show any sufficient cause for the inordinate delay in approaching this Court and have miserably failed to provide any acceptable reason for delay of more than three years. It is submitted that petitioners consciously decided to sit on the fence and permit the limitation to run out. The conduct of the petitioners is not acceptable as they did not make any efforts for substitution of arbitrator for three years. Their conduct demonstrates lack of bonafides and complete indifference to the process of Dispute Resolution through the mechanism of Arbitration.

10. It is further submitted on behalf of respondents that email dated 27.07.2015 sent by learned arbitrator was deliberately suppressed in the present proceedings by filing only a true typed copy purporting the same to be the correct version of the said email. Respondents have filed copy of the email sent by learned arbitrator to all parties and its counsels on 27.07.2015 along with their reply. Referring to the said email, it is contended that communication from the learned arbitrator to all the concerned parties and their counsels was always through email address. As is apparent from the bare perusal of the said email, the same is marked to three individuals working in the law firm representing the petitioners. Thus, the contention on behalf of the petitioners that petitioners' counsel could access her email account by second week of August, 2015, refers to only one of the three persons to whom the email was sent.

11. It is further contended that no sufficient cause has been disclosed by the petitioners for condonation of delay. In the application for condonation of delay, petitioners have alleged that due to some technical default, the email account of the petitioners' counsel was not fully operational for almost a week. However, there is no specific date or period of the month stated in the application as regards alleged technical default and neither have the petitioners given any detail or proof of the alleged technical default. It is, thus, denied by the respondents that there was any technical default in the email account of the petitioners' counsel or that the petitioners' counsel accessed her email account in the second week of August, 2015 only. It is submitted that the application for condonation of delay as filed by the petitioners contains nothing but falsehood and that the petitioners

have tried to overreach this Court by resorting to falsehood.

12. In rejoinder, by referring to Article 137 of the Limitation Act, 1963, it is submitted on behalf of petitioners that the period of limitation for filing a petition under Section 15 of the Act commences from the date when the right to apply accrues. The right to apply accrued only after expiry of 30 days from the date of recusal of the learned Arbitrator. Thus, right to apply arose on 26.08.2015. The learned arbitrator recused himself on 27.07.2015 and the limitation of three years started running only after the expiry of 30 days from the date of said recusal, which expired on 26.08.2018. It is submitted that the present petition was filed on 01.08.2018 and after removal of defects was re-filed on 25.08.2018. Hence, the present petition has been filed well within the limitation period as provided under Article 137 of the Limitation Act, 1963.

13. The petitioners have relied upon the following judgments in support of their submissions:

(i) National Highways Authority of India and Anr. Vs. Bhumihiway DDB Ltd. (JV) & Ors*., (2006) 10 SCC 763*.

(ii) Balwant Singh and Ors. Vs. Gurbachan Singh and Ors.*, (1993) 1 SCC 442*.

(iii) Govt of Maharashtra Vs. Bose Brothers Engineers and Contractors Pvt. Ltd. *(2021) 6 SCC 460*

14. In rebuttal, respondents made further submissions and contended that the right to apply accrued from the date when the sole Arbitrator recused himself. As per Section 15(2) of the Act, an arbitrator shall be substituted in the same manner and according to the same Rules that were applicable to the appointment of an arbitrator

being replaced. Since in the present case, initial appointment of Arbitrator was by this Court, substituted Arbitrator can be appointed only by this Court in terms of Section 15 of the Act. Thus, petitioners cannot count period of 30 days while calculating the period of limitation on the wrong premise that respondents were to appoint substitute Arbitrator within 30 days of recusal by Arbitrator.

15. In support of their submissions, respondents have relied upon the following judgments:

(i) ***Bharat Sanchar Nigam Ltd. and Another Vs. Nortel Networks India Private Limited***, *(2021) 5 SCC 738*.

(ii) ***Government of Maharashtra (Water Resources Department) Vs. Borse Brothers Engineers and Contractor Pvrivate Limited,*** *(2021) 6 SCC 460*.

(iii) ***Basawaraj and Another Vs. Special Land Acquisition Officer***, *(2013) 14 SCC 81*.

(iv) ***GMR Ambala Chandigarh Expressways Pvt. Ltd. Vs. National Highway Authority of India & Ors.***, *2018 SCC Online Del 7588*.

(v) ***Taurant Projects Ltd. Vs. GAIL (India) Ltd. and Anr***, *OMP (T)(COMM) 38/2020, Order dated 15.03.2021*.

(vi) ***Yogesh Kumar Gupta Vs. Anuradha Rangarajan***, *2007 SCC Online Del 287*.

(vii) ***SAP India Private Limited Vs. Cox & Kings Limited***, *2019 SCC Online Bom 722*.

(viii) ***Hukumdev Narain Yadav Vs. Lalit Narain Mishra***, *(1974) 2 SCC 133*.

(ix) ***P. Radha Bai & Ors. Vs. P.Ashok Kumar & Anr***, *(2019) 13 SCC 445*.

(x) ***Pushpa P. Mulchandani & Ors. Vs. Admiral Radhakrishin Tahilani (Retd.)***, *2000(4) Mh.L.J. 819*.

(xi) ***Tarun Kr. Jain, Sole Proprietor Vs. MCD***, *ILR (2011) IV Del 530*.

(xii) ***Gaon Sabha Samlkha Vs. R.N.Sahni & Ors.***, *ILR (2004) II Del 128*.

(xiii) ***Popat Bahiru Govardhane & Ors. Vs. Special Land Acquisition Officer & Anr.***, *(2013) 10 SCC 765*.

(xiv) ***Ramlal, Motilal & Chhotelal Vs. Rewa Coalfields Ltd***., *(1962) 2 SCR 762*,

(xv) ***Balwant Singh (Dead) Vs. Jagdish Singh & Ors***, *(2010) 8 SCR 597.*

16. I have heard learned counsels for the parties and given my thoughtful consideration to the issues raised before this Court.

17. There is no dispute that since no time limit is fixed by the Act for filing a petition under Section 15 for substitution of an Arbitrator, the Limitation is to be computed as per Article 137 of the Limitation Act, 1963, which reads as under:

PART II – OTHER APPLICATIONS

Description of application	*Period of limitation*	*Time from which period begins to run*
.....		
137.Any other application for which no period of limitation is provided elsewhere in this division.	*Three years*	*When the right to apply accrues.*

18. From a plain reading of Article 137 of Limitation Act, 1963 it is clear that the period of limitation for filing a petition under Section 15 of the Act commences from the day 'when the right to apply accrues'.

19. This Court has to consider as to when the right to apply accrued in the instant case. It has been contended on behalf of the petitioners that the learned sole Arbitrator recused himself vide order dated 27.07.2015, which was sent to the petitioners' counsel through E-mail. However, the petitioners' counsel was able to access her e-mail

account only by the second week of August, 2015, since due to some technical default, the e-mail account of the petitioners' counsel was not operational for almost a week. Thus, it has been contended that present petition filed on 01.08.2018 is within time having been filed within three years from the date of knowledge of the recusal order.

20. Having considered the submissions made on behalf of petitioners, the same do not inspire confidence. Their explanation in order to bring their petition within the period of limitation is nebulous and doubtful and cannot be accepted on the face of it.

21. Even otherwise, from perusal of Article 137 of the Limitation Act, it is clear that the said Article is not based on knowledge. The statute clearly stipulates so, wherever knowledge is intended to be the basis upon which time is to commence for the purpose of reckoning limitation. Thus, Articles 4, 54, 56, 57, 59, 61, 68, 71, 91, 92-95, 110 and 123 of the Limitation Act are based on knowledge, whereas Article 137 is not based on knowledge.

22. On the issue of knowledge for commencement of limitation, Supreme Court in the case of ***Popat Bahiru Govardhane and Others Vs. Special Land Acquisition Officer and Another***, *(2013) 10 SCC 765* held as follows:-

> *"**8.** The sole question for the consideration of the Court is whether limitation for filing the application for redetermination of the compensation under Section 28-A of the Act would commence from the date of the award or from the date of knowledge of the court's award on the basis of which such application is being filed?*
>
> ***9.** Though, there is nothing on record to substantiate the appellants' claim that they could acquire the knowledge of the court's award only on 17-7-2006 and immediately took steps to file application for redetermination under Section*

28-A of the Act.

10. *The issue involved herein is no more res integra. The appellants' case before the High Court as well as before us has been that the limitation would commence from the date of acquisition of knowledge and not from the date of award. Though, Shri Gaurav Agarwal, learned counsel for the appellants, has fairly conceded that there is no occasion for this Court to consider the application of the provisions of the Limitation Act, 1963 (hereinafter called "the 1963 Act") inasmuch as the provisions of Section 5 of the said Act.*

.....

14. *In State of A.P. v. Marri Venkaiah [(2003) 7 SCC 280 : AIR 2003 SC 2949] , this Court reconsidered the aforesaid judgments including the judgment in Harish Chandra Raj Singh [AIR 1961 SC 1500] and held that the statute provides limitation of 3 months from the date of award by the court excluding the time required for obtaining the copy from the date of award. It has no relevance so far as the date of acquisition of knowledge by the applicant is concerned. In view of the express language of the statute, the question of knowledge did not arise and, therefore, the plea of the applicants that limitation of 3 months would begin from the date of knowledge, was clearly unsustainable and could not be accepted. The Court also rejected the contention of the applicants that a beneficial legislation should be given a liberal interpretation observing that whosoever wants to take advantage of the beneficial legislation has to be vigilant and has to take appropriate action within the time-limit prescribed under the statute. Such an applicant must at least be vigilant in making efforts to find out whether the other landowners have filed any reference application and if so, what is the result thereof. If that is not done then the law cannot help him. The ratio of the judgment in Harish Chandra Raj Singh [AIR 1961 SC 1500] was held to be non-applicable in case of Section 28-A of the Act. The Court observed : (Marri Venkaiah case [(2003) 7 SCC 280 : AIR 2003 SC 2949] , SCC pp. 284-85, paras 11-12)*

"11. ... In that case, the Court interpreted the

proviso to Section 18 of the Act and held that clause (a) of the proviso was not applicable in the said case because the person making the application was not present or was not represented before the Collector at the time when he made his award. The Court also held that notice from the Collector under Section 12(2) was also not issued, therefore, that part of clause (b) of the proviso would not be applicable. The Court, therefore, referred to the second part of the proviso which provides that such application can be made within six months from the date of the Collector's award. In the context of the scheme of Section 18 of the Act, the Court held that the award by the Land Acquisition Officer is an offer of market price by the State for purchase of the property. Hence, for the said offer, knowledge, actual or constructive, of the party affected by the award was an essential requirement of fair play and natural justice. Therefore, the second part of the proviso must mean the date when either the award was communicated to the party or was known by him either actually or constructively.

12. The aforesaid reasoning would not be applicable for interpretation of Section 28-A because there is no question of issuing notice to such an applicant as he is not a party to the reference proceeding before the court. The award passed by the court cannot be termed as an offer for market price for purchase of the land. There is no duty cast upon the court to issue notice to the landowners who have not initiated proceedings for enhancement of compensation by filing reference applications; maybe, that their lands are acquired by a common notification issued under Section 4 of the Act. As against this, under Section 18 it is the duty of the Collector to issue notice either under Section 12(2) of the Act at the time of passing of the award or in any case the date to be pronounced before passing of the award and if this is not done then the period prescribed for filing application under Section 18 is

six months from the date of the Collector's award."

.....

16. *It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation."*

23. Similarly in the case of ***Gaon Sabha Samhalka Vs. RN Sahani and Ors.,*** *2004 SCC OnLine Del 575; ILR (2004) 2 Delhi 128*, this Court has held in very categorical terms that where Parliament intended knowledge to be the basis upon which time is to commence for the purposes of reckoning limitation, the statute has enacted it to be so. Thus, this Court has held as follows:-

*"**20.** The well-known canon of statutory interpretation embodied in the maxim "Expresio unis est exclusio alterius"- i.e. what is expressly mentioned in one place but not in another must be taken to be deliberately omitted has been resorted to frequently by the Supreme Court [Khemka & Co. (Agencies) Pvt. Ltd. v. State of Maharashtra, (1975) 2 SCC 22 : AIR 1975 SC 1549. Union of India v. Shiv Daya & Sons, (2003) 4 SCC 695 : AIR 2003 SC 1877.] . That rule would squarely apply to the present case. The express allusion to knowledge in Entry 15 leads to the conclusion that knowledge has no role to play in respect of the other periods of limitation under the Act.*

21. *It is, therefore, clear that where Parliament intended knowledge to be the basis upon which time is to commence for the purposes of reckoning limitation, the Statute has enacted it to be so. This consider the "knowledge" based construction canvassed by Mr. Shali, in respect of Entry 17(ii).*

22. *So far as the argument of an interpretation based on the objects, or purpose of the enactment is concerned, it is settled law that where the words of a statute are plain, there can be no recourse to external aids [N. Bhagvattry Ammal v. Commissioner of Income Tax, (2003) 3 SCC 161 : AIR 2003 SC 1040; Bhaiji v. Sub Divisional Officer, (2003) 1 SCC 692.] . Hence the plain meaning of the expression "use" in Entry 17 has to be applied. Consequently, the limitation (for taking action) commenced in the present case at least from 1988, when the use of the lands had changed. The proceedings were started on 29/01/1993, admittedly beyond the period of three years.*

23. *The issue can be viewed from another perspective. The power to initiate proceedings under Section 81(2) for ejectment is regulated by express terms of the enactment. One such express term is the limitation placed upon the power, namely, the period within which it can be exercised. Such limitation is not merely akin to statute or a provision that prescribes a period of limitation — it also trenches upon the very exercise of power. Having not used the power within the parameters prescribed by the statute, it is not open to the authority, to wit, the Collector/Additional Collector to take recourse to it beyond the conditions imposed by law.*

24. *It may be observed that the Supreme Court has held that while interpreting a provision in a statute prescribing a time limit for initiation of proceedings, considerations of equity and hardship are out of place.*

25. *In view of the above discussion, inescapable conclusion is that the period of limitation prescribed by entry 17 in the first Schedule to the Delhi Land Reforms Act, 1954 is the actual date of unlawful use of land and not the date of knowledge."*

24. In view of the aforesaid discussion, it is clear that the right to apply accrues in the present case on 27.07.2015 when the learned arbitrator recused himself by order dated 27.07.2015 which was sent by e-mail to the respective parties. The contention raised on behalf of the petitioners that the period of limitation will commence from the date of the alleged knowledge in the second week of August, 2015, is accordingly rejected.

25. The second contention raised on behalf of the petitioners on the aspect of limitation is that the right to apply in terms of Article 137 of the Limitation Act accrued only after expiry of 30 days from the date of recusal of the learned arbitrator. From the perusal of record, it is seen that when the disputes arose between the parties, the petitioners issued arbitration notice dated 27.05.2009 to respondents invoking arbitration clause and nominated an arbitrator on their behalf, and requested the respondents to appoint their nominee arbitrator within 30 days of receipt of the said notice. Since respondents did not nominate their arbitrator, petitioners approached this Court by way of filing a petition under Section 11 of the Act. Thus, by order dated 12.05.2010, this Court appointed a sole arbitrator with the consent of the parties.

26. It is settled law that the procedure for substitution of an arbitrator under Section 15 of the Act must be the same as the initial appointment of the said arbitrator, who is sought to be substituted. Section 15 of the Act is very categorical in its stipulation that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the Rules that were applicable to the

appointment of the arbitrator being replaced. Section 14 of the Act states that mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator if he withdraws from his office. Thus, in the present case the mandate of the arbitrator was terminated when he recused himself from the arbitral proceedings.

27. Considering the facts in the present case, it is clear that appointment of the sole arbitrator in the present case was done by this Court. Section 11(2) of the Act provides that the parties are free to agree on a procedure for appointing an arbitrator or arbitrators. If there is no procedure agreed between the parties for appointment of an arbitrator, then in terms of Section 11(5) of the Act, appointment of an arbitrator is to be made within 30 days from receipt of a request by one party from the other party. If an arbitrator is not so appointed within 30 days of receipt of request for appointment of an arbitrator, then as per Section 11(4) of the Act, an application is made before Court for appointment of an arbitrator. In the present case, arbitrator was not appointed by respondent in terms of Section 11(5) of the Act. Thus, this Court in exercise of its power under Section 11(6) of the Act appointed sole arbitrator in the present case. Once a party forfeits its right for appointment of an arbitrator and arbitrator is appointed by Court, then said right cannot be revived subsequently for substitution of an arbitrator in terms of Section 15 of the Act. The procedure as given under Section 11(5) of the Act cannot be resorted to for substitution of an arbitrator, when the initial appointment of an arbitrator is done by Court in exercise of its power under Section 11(6) of the Act.

28. In the present case, order appointing the arbitrator by this Court

was a consent order and on this account, the parties in the present case had given up their right for appointment of an arbitrator. Therefore, petitioner did not have the option to resort to the procedure as envisaged under Section 11(5) of the Act to wait for 30 days for the respondent to appoint an arbitrator after recusal by the arbitrator in order to contend that the limitation period in terms of Article 137 of the Limitation Act commenced only after expiry of 30 days. Such a course of action was not available to the petitioner.

29. Considering the above, substituted arbitrator in the present case is to be appointed by this Court only in terms of Section 15 of the Act in consonance with the Rules applicable to the appointment of the arbitrator being replaced. It was not permissible for the respondents to appoint a substitute arbitrator as the initial appointment itself was made by this Court. Therefore, the contention on behalf of the petitioners that the limitation period of 3 years in terms of Article 137 of the Limitation Act started running only after expiry of 30 days from the date of recusal of the arbitrator, is totally misplaced and is rejected.

30. Reliance by the petitioner on the decision of ***National Highways Authority of India and Anr. Vs. Bhumihiway DDB Ltd. (JV) & Ors.*** (supra), is not found tenable. In the said case, Supreme Court held that the initial appointment by the High Court under Section 11(6) was invalid as the Procedure under the Contract had not been followed. It was only after holding the initial appointment to be bad that the Supreme Court held that parties would need to follow the procedure under their contract for substitution under Section 15(2). However, that is not the position in the present case, as petition under

Section 11(6) of the Act was filed as per law which culminated in appointment of the Arbitrator, who is now sought to be substituted.

31. Distinguishing the judgment in the case of ***Bhumihiway*** (supra) from a case like the present one where there was failure on the part of the party to appoint/nominate their arbitrator, this Court in the case of ***GMR Ambala Chandigarh Expressways Pvt Ltd. Vs. National Highway Authority of India & Ors.***, 2018 SCC OnLine Del 7588 held as follows:-

> *"**10.** However, if one may look into paras 4, 9, 26 & 40 of the same judgment one finds the facts are little different Bhumihiway case (supra). Para 4 gives the relevant arbitration clause which is as under:*
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> > *"4. On 11.06.2001, the appellants entered into an agreement with respondent No. 1 for the aforesaid contract. The contract agreement contained a mechanism for resolution of disputes between the parties as contained in Sub-Clause 67.3 Sub-Clause 67.3 reads as follows:*
> >
> > > *(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the President, Indian Roads Congress."*
> >
> > *"9. Mr. D.P. Gupta, vide letter dated 15.04.2005, disagreed with the names proposed by respondent*

No. 3. Thereafter, in view of the disagreement between the two nominated arbitrators, respondent No. 1 sought clarification from respondent No. 2 herein vide its letter dated 29.04.2005. Respondent No. 1 requested respondent No. 2 if any judicial arbitrator is available with them for the purpose of nomination as Presiding Arbitrator. It was pointed out that respondent No. 1 never sought any intervention of respondent No. 2 for appointment of the Presiding Arbitrator rather it only sought clarification in this regard. Vide letter dated 03.05.2005, respondent No. 2 - Indian Road Congress (IRC) informed respondent No. 1 that there does not exist any judicial arbitrator in its panel. Thereafter, respondent No. 1 filed Arbitration Petition No. 23 of 2005 before the High Court under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") requesting for the appointment of the Presiding Arbitrator. The said petition, according to the appellants, was in gross violation of the statutory provisions of Section 11(6) as also against the contractual terms agreed to between the parties without making any reference to respondent No. 2 for the appointment of the Presiding Arbitrator.

26. It is pertinent to state that under Section 11(6) of the Act, the Court has jurisdiction to make the appointment only when the person including an institution, fails to perform any function entrusted to it under that procedure. In the present case, the relief claimed by the respondents by invoking Section 11(6) is wholly erroneous as prior to the order dated 1.7.2005, the respondents only sought a clarification from IRC and without making a reference to them, immediately filed the petition under Section 11(6) on the purported ground that the Indian Road Congress had failed to make the appointment within the stipulated time. Therefore, the reliance placed by the respondent on the judgment of this Court in the case of Punj Lloyd

Ltd. v. Petronet MHB Ltd., (2006) 2 SCC 638 is wholly erroneous and is not applicable to the facts of the present case.

40. As rightly pointed out by the appellants, the High Court failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the Presiding Arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only respondent No. 2 was authorized to make the appointment. Unless respondent No. 2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act. Respondent No. 1 has wrongly invoked the jurisdiction of this Court without first following the procedure agreed to between the parties. Thus no cause of action had arisen in the facts of the case to seek the appointment from the High Court under Section 11(6) of the Act and thus the said petition was premature. The High Court also is not correct in relying on the contention of the respondent No. 1 that in case one of the arbitrators is retired Chief Justice, the Presiding Arbitrator should be at least a retired Chief Justice or a retired Judge of a High Court with considerable experience. It was submitted by learned Solicitor General appearing for the appellants that the said finding of the High Court is self contradictory inasmuch as if the Presiding Arbitrator is a retired Judge of the High Court and one of the arbitrators is a retired Chief Justice of the High Court, the member of hierarchy is upset. Even otherwise, there does not exist any such provision in law which requires that if one of the arbitrators is a retired Judge the Presiding Arbitrator also has to be a retired Judge. The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed

> *to and the defaulting party cannot be allowed to take advantage of its own wrong."*
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> ***12.*** *Thus the law as discussed is very clear that if within 30 days time a party fail to respond to the request of the applicant to appoint an arbitrator or it fails to appoint till prior to filing of an application under Section 11 of the Act he can still appoint, but once application under Section 11(6) is filed by the applicant the right of appointment of the non-applicant seizes.*
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> ***13.*** *Bhumihiway (Supra) is distinguishable from the judgments cited above in the sense that instead of refusal to appoint the presiding arbitrator, the respondent no. 1 rather sought a clarification from Indian Road Congress vide its letter dated 29.04.2005 requesting if any panel of judicial arbitrators is with them. It never sought intervention of respondent no. 2 for appointment of presiding arbitrator nor refused but simply sought clarification, hence as there was no failure on the part of the respondent no. 2 to nominate the presiding arbitrator, the Court held the respondent no. 1 had no right to approach the Court under Section 11(6) of the Act.*
>
> ***14.*** *However in the present case as there was a failure on the part of respondent no. 2 and 3 to appoint to nominate their arbitrator, so the Court appointed the same under Section 11(6). Per settled law as this Court had appointed Mr. Justice B.N. Kirpal (Retd.) the nominee arbitrator for respondents no. 2 and 3, hence only this Court can nominate a substitute arbitrator inplace of the said arbitrator."*

32. In the present case, neither party has asserted that the initial appointment by this Court was incorrect. Accordingly, when one of the parties to the arbitration agreement approached this Court for appointment of an arbitrator, the rights of the other party for appointment of an arbitrator stand forfeited. In the case of ***Sap India Private Limited Vs. Cox and Kings Limited***, *2019 SCC OnLine Bom 722*, it has been held as follows:-

"48. It can be thus clearly seen from the common thread which flows from decisions of the Supreme Court in Yashwith Constructions (P) Ltd. (supra)[1] and Shailesh Dhairyawan (supra)*[2] and the decisions of learned Single Judge of Delhi High Court in Mithlesh Kumar Aggarwal (supra)*[3] and GMR Ambala Chandigarh Expressways Pvt. Ltd. (supra) *[4], and the decision of learned Single Judge of Calcutta High Court in "R.B. Rajesh Vs. The Chief Engineer" (supra) *[5], and the decisions of learned Single Judge of this Court in Rajesh K. Shah Vs. Kamlesh K. Sahani (supra)*[6], and Ignatius Tony Pereira (supra)*[7], that when the initial appointment of an arbitrator is made by the Court by an order passed under Section 11 of the Act, an appointment of a substitute arbitrator would be required to be made in the same manner by the Court, as in terms of Section 15 subsection (2) of the Act the initial procedure and the rule so followed, would be required to be followed in appointing a substitute arbitrator. This is also for the reason that the party whose right to make an appointment of an arbitrator as per the arbitration agreement stands forfeited, in the Court making the appointment as per Section 11 of the Act, would not have any authority to make an appointment of a substitute arbitrator.*

49. The following principles of law can be clearly derived from the aforesaid decisions of the Supreme Court and the High Courts:

(i) Parties to an arbitration agreement at the threshold would have a right to appoint an arbitral tribunal as per the arbitration agreement entered between the parties. In case of non-concurrence, inaction or disagreement to so appoint, if requested by one party, this right if not exercised for a period of 30 days would continue to exist

**1 (2006) 6 SCC 204*
**2 (2016) 3 SCC 619*
**3 2017 SCC OnLine Del 7875*
**4 2018 SCC OnLine Del 7588*
**5 2018 SCC OnLine Calcutta 8461*
**6 2018 (4) Mh.L.J. 159*
**7 2016 SCC OnLine Bom 547*

till an application by the other party is filed under Section 11(6) of the Act.

(ii) Once one of the parties to an arbitration agreement approaches the Court under Section 11(6) of the Act seeking appointment of an arbitrator on failure of the other party to appoint an arbitrator, the rights of the party not appointing an arbitrator stands forfeited and it will be for the Court to then pass an order under Section 11(6) of the Act to appoint an arbitrator.

(iii) Once the Court appoints an arbitrator by an order passed on an application under Section 11 of the Act, and a vacancy arises on the arbitral tribunal on account of any of the circumstances as set out under Section 14(1) and/or Section 15(1) of the Act, then necessarily Section 15(2) becomes operational for appointment of a substitute arbitrator and it would be the Court which would be required to be approached to fill up the vacancy. The same procedure/rule would be required to be followed by an application under Section 15(2) of the Act to fill up the vacancy of the Court appointed arbitrator.

(iv) As a sequel to (iii) above, once the Court appoints an arbitrator under Section 11(6) of the Act, it is not open for the party against whom such an order is passed to contend that the right which was so forfeited would revive for any purpose including to appoint a substitute arbitrator in case of any vacancy on the arbitral tribunal as postulated by Sections 14 and 15 of the Act.

(v) In other words a party who suffers an order under Section 11(6) of the Act of the Court appointing an arbitrator, cannot contend that the arbitration agreement has become available to such a party after the very foundation of such right to appoint an arbitrator is taken away by the Court appointing an arbitrator.

*(vi) The above position in law is implicit from the provisions of subsection 2 of Section 15 of the Act when the provision says that when the mandate of an arbitral tribunal terminates, a substitute arbitrator shall be appointed "**according to the rules that were applicable to the appointment of an arbitrator being replaced**".*

50. As observed by the Supreme Court in ACC Ltd. Vs.

Global Cements Ltd.(supra)[1] Section 15(2) of the Act has to be given a liberal interpretation so as to apply to all possible circumstances in which the mandate of the arbitrator could be terminated. Also considering the clear position in law which would flow from the decisions as referred above, it cannot be conceived that Section 15(2) would not recognize rights of a party being forfeited (to take recourse to the arbitration agreement) to appoint a substitute arbitrator when such right stood extinguished when the Court appointed an arbitrator in an order passed under Section 11(6) of the Act. Thus, necessarily the rule that would be applicable to the appointment of a substitute arbitrator would be the rule/procedure which was applicable for the initial appointment namely the appointment by the Court and not appointment by a party who had already lost and/or forfeited its right to make an appointment of an arbitrator. In other words, once such right to make an appointment of an arbitrator/arbitral tribunal are given up by one of the parties, then necessarily the only rule and procedure of an arbitrator being appointed by the Court is required to be recognized in terms of Section 15(2) and no other procedure. It cannot be accepted that the forfeiture of the right of a party not appointing an arbitrator is only a partial or temporary forfeiture limited to Section 11(6) of the Act and that such a right would resurrect or is reborn when it comes to appointment of substitute arbitrator. Such an interpretation would amount to a complete misreading of the legislative scheme of Sections 11, 14 and 15 of the Act.*
51. In addition to the above discussion in my opinion, a rebirth of a right which stood forfeited also cannot be conceived for other two primary reasons, firstly for the

**1 (2012) 7 SCC 71*

reason that this would amount to a clear waiver of right as recognised by Section 4 of the Act, and secondly and most importantly the law would not permit sanctity of judicial procedure adopted in the court passing an order under Section 11(6) of the Act to be obliterated, diluted, taken

away or being extinguished, merely because there is vacancy on the arbitral tribunal. Once the initial appointment itself is under the orders of the Court, there is no question of waived rights or forfeited rights being revived or resurrected for the purposes of either Section 14 and 15 of the Act. In the present case indubitably the appointment of Mr. Justice D.B. Bhosale (Retd) was made in pursuance of an order dated 30 November 2018 passed by this Court under Section 11(6) of the Act as a nominee arbitrator of the respondent. This order was confirmed by the Supreme Court by its order dated 2 January 2019 passed in a petition of the respondent for Special Leave to Appeal (c) No.33555 of 2018. Thus the rule and the procedure as followed in appointment of initial arbitrator Mr. Justice D.B. Bhosale (Retd) was the rule and the procedure under Section 11(6) of the Act and not any other procedure. This procedure would be required to be recognised as a rule followed in the appointment of initial arbitrator in terms of Section 15(2) of the Act for the purpose of appointment of a substitute arbitrator."

33. In view of the law discussed as aforesaid, it is clear that the limitation period of 3 years in terms of Article 137 of the Limitation Act commenced from the date when the arbitrator recused himself. Once the initial appointment was under the order of the Court, the right of the party to appoint an arbitrator stood extinguished and forfeited. Thus, period of 30 days for appointment of an arbitrator after recusal of the sole arbitrator, would not be available for the purposes of calculating the period of limitation in order to assess when the limitation period commenced in terms of Article 137 of the Limitation Act.

34. In this regard, following dates are material:

(i) 27.07.2015 – Recusal by Arbitrator

(ii) 26.07.2018 – 3 years period came to an end

(iii) 01.08.2018 – Present petition under Section 15 was filed without any condonation of delay

(iv) 22.09.2018 – Application under Section 5 of the Limitation Act was filed for condonation of delay.

35. In view thereof, the present petition is clearly barred by limitation.

36. The next question that arises for consideration of this Court is whether the petitioner has made out a case for condonation of delay in the present case. There is a delay of 5 days in filing the present petition.

37. On the aspect of limitation, this Court in the case of ***Tarun Kumar Jain, Sole Proprietor Vs. MCD***, *2011 SCC Online Del 1789; ILR (2011) 4 Del 530* has held as follows:-

> *"13. The period within which a party must approach the competent court to seek the appointment of an arbitrator is three years in terms of entry No.137 of the schedule to the Limitation Act. The right to apply to the court to seek the appointment of substitute arbitrator accrued upon the passing of the order dated 8th October, 2006. Therefore the petitioner should have approached the court for appointment of substitute arbitrator by 17th October, 2009.*
>
> *14. Reliance placed by Mr. Singla on Section 15(2) of the Act is again misplaced. All that the said provision provides is that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. However, this does not mean that the process for appointment of substituted arbitrator can be delayed by a party indefinitely. The said process has to be initiated within the period of limitation prescribed by law."*

38. Holding that three year period of limitation as prescribed under Article 137 of the Limitation Act is unduly long period for filing an application under Section 11 for appointment of an arbitrator, since it would defeat the object of Arbitration Act, Supreme Court in the case of ***Bharat Sanchar Nigam Limited and Another Vs. Nortel Networks India Private Limited****, (2021) 5 SCC 738* held as under:-

> *"21. Given the vacuum in the law to provide a period of limitation under Section 11 of the Arbitration and Conciliation 1996, the Courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues. However, this is an unduly long period for filing an application under Section 11, since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time-bound period. The 1996 Act has been amended twice over in 2015 and 2019, to provide for further time-limits to ensure that the arbitration proceedings are conducted and concluded expeditiously. Section 29-A mandates that the Arbitral Tribunal will conclude the proceedings within a period of 18 months. In view of the legislative intent, the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act. It would be necessary for Parliament to effect an amendment to Section 11, prescribing a specific period of limitation within which a party may move the court for making an application for appointment of the arbitration under Section 11 of the 1996 Act.*"

39. Thus, Supreme Court has time and again stressed that arbitration proceedings ought to be conducted in a time bound manner and concluded expeditiously. It has been held that one of the main

objectives of the Arbitration Act is the speedy disposal of disputes through the arbitral process. Unduly long period of limitation for filing an application under Section 11 for appointment of an arbitrator has been held by Supreme Court to defeat the very object of the Arbitration Act for expeditious resolution of disputes. The aforesaid observations of Supreme Court apply fully to petitions under Section 15 of the Act for substitution of an arbitrator.

40. It has been repeatedly held by various courts that the main object of the Arbitration Act is speedy resolution of disputes and that the said object would be the most important principle to be applied when applications under Section 5 of the Limitation Act are filed seeking condonation of delay in courts in respect of proceedings qua Arbitration. It has been held by Supreme Court that delay qua proceedings under Arbitration and Conciliation Act, 1996 are to be condoned by way of exception and not by way of rule. Thus, in the case of Government of ***Maharashtra (Water Resources Department) Vs. Borse Brothers Engineers and Contractors Private Limited***, *(2021) 6 SCC 460*, Hon'ble Supreme Court has held as follows:-

> *".....**27.** Even in the rare situation in which an appeal under Section 37 of the Arbitration Act would be of a specified value less than three lakh rupees, resulting in Article 116 or 117 of the Limitation Act applying, the main object of the Arbitration Act requiring speedy resolution of disputes would be the most important principle to be applied when applications under Section 5 of the Limitation Act are filed to condone delay beyond 90 days and/or 30 days depending upon whether Article 116(a) or 116(b) or 117 applies. As a matter of fact, given the timelines contained in Sections 8, 9(2), 11(4), 11(13), 13(2)-(5), 29-A, 29-B, 33(3)-(5) and 34(3) of the Arbitration Act, and the observations made in some of this*

> *Court's judgments, the object of speedy resolution of disputes would govern appeals covered by Articles 116 and 117 of the Limitation Act.*
>
> *.....*
>
> ***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.*
>
> *....."*

41. Undisputed position of law is that when there is no sufficient cause shown for condoning delay or when the application for condonation of delay is vague, then such application for condonation of delay must be rejected, regardless of duration. Detailing as to what is "sufficient cause" which may prevent a party from approaching the Court within limitation, Supreme Court in the case of ***Basawaraj and Another Vs. Special Land Acquisition Officer***, *(2013) 14 SCC 81; 2013 SCC OnLine SC 758* held as follows:-

> *"**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 applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See Manindra Land and Building Corpn. Ltd. v. Bhutnath Banerjee [AIR 1964 SC 1336] , Mata Din v. A. Narayanan [(1969) 2 SCC 770 : AIR 1970 SC 1953] , Parimal v. Veena [(2011) 3 SCC 545 : (2011) 2 SCC (Civ) 1 : AIR 2011 SC 1150] and Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai [(2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24 : AIR 2012 SC 1629] .)

.....

***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 [(2002) 1 SCC 535 : AIR 2002 SC 100] and Ram Nath Sao v. Gobardhan Sao [(2002) 3 SCC 195 : AIR 2002 SC 1201] .)*

***12.** It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory*

provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. *The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to Halsbury's Laws of England, Vol. 28, p. 266:*

> *"605. Policy of the Limitation Acts.—The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence."*

An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches. (See Popat and Kotecha Property v. SBI Staff Assn. [(2005) 7 SCC 510] , Rajender Singh v. Santa Singh [(1973) 2 SCC 705 : AIR 1973 SC 2537] and Pundlik Jalam Patil v. Jalgaon Medium Project [(2008) 17 SCC 448 : (2009) 5 SCC (Civ) 907] .)

.....

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."*

42. Considering the aforesaid law, it is seen that in the present case initially the present petition was filed on 01.08.2018. The application for condonation of delay came to be filed only on 22.09.2018. Perusal of the application for condonation of delay shows that the petitioner has miserably failed to show any 'sufficient cause' for the delay caused in filing the present petition. The petitioner did not make any efforts for substitution of the arbitrator for three years and permitted the limitation period to run out. No sufficient cause has been disclosed by the petitioner for condonation of delay. The petitioner has tried to cover up its lackadaisical approach in approaching this Court under the garb of technical default of the mail account of the lawyer in question and the vague explanation regarding case file of the present case getting mixed up with other disposed of files. The said explanation is totally ambiguous and does not disclose any 'sufficient' cause to condone delay.

43. In the light of the aforesaid discussion, it is held that the

application under Section 5 of the Limitation Act filed by petitioners does not disclose any justifiable reasons for condoning delay. As noticed above, the basic principle of Arbitration and Conciliation Act is to achieve an expeditious and effective disposal of matters. Thus, the very object of the Act shall be hampered if delay is condoned in proceedings qua the arbitration, when no cause, least to say 'sufficient cause', has been disclosed by the petitioner. The conduct of the petitioners in the present case demonstrates lack of bonafides and complete indifference to the process of dispute resolution through the mechanism of arbitration. By allowing application for condonation of delay in the absence of any 'sufficient cause', the very purpose of expeditious resolution of dispute by way of arbitration, would stand defeated.

44. In view of the aforesaid discussion, it is held that there is no sufficient cause for condoning delay in the present case. This Court is aware that delay in filing in the present case is only five days. However, it is not length of delay but 'sufficient cause' which is the criteria for condoning delay in approaching the Court, all the more so in matters related to arbitration, taking into account the object of speedy disposal sought to be achieved under the Arbitration and Conciliation Act, 1996. Hence, application for condonation of delay is dismissed.

45. Accordingly, the present petition is dismissed.

(MINI PUSHKARNA)
JUDGE

November 9, 2022/ c