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

% Reserved on : 29.01.2026
Pronounced on : 26.05.2026
Uploaded on : 26.05.2026

\+ **FAO 331/2019**

M/S MAMCOM .....Appellant
Through: Mr. Viresh Kumar, Mr. Devjani Deka, and Mr. Rajneesh Tingal, Advocates.

versus

SUBHASH PROJECTS & MARKETING LTD .....Respondent
Through: Mr. Sourav Dutta, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

CM APPL. 6759/2021 (delay in filing reply to application)

1. This is an application moved by the respondent seeking condonation of delay of 89 days in filing a reply to the appellant's condonation of delay application.

2. Statedly, the delay was occasioned by the respondent's authorized signatory being on academic leave until 21.03.2020, followed by the COVID-19 lockdown which impeded the execution of the relevant documents.

3. It is pertinent to note that the appellant has filed a reply to the instant application, expressing no objection to the condonation of delay.

4. In view of the above, the present application is allowed, and the delay of 89 days is condoned. The reply filed by the respondent is accordingly taken on record.

5. The present application is disposed of in the above terms.

CM APPL. 36611/2019 (delay in filing appeal) and CM APPL. 36614/2019 (delay in re-filing appeal)

1. By way of these applications, the appellant seeks condonation of delay of 34 days in filing and the subsequent delay in the re-filing of the accompanying appeal.

2. Insofar as the delay in filing is concerned, it is submitted that the appellant sole proprietor is a senior citizen with failing health, residing in *Kolkata*. It is stated that while a certified copy of the order concerned was received by counsel on 20.03.2019, the same was initially dispatched to an incorrect address of the appellant and therefore returned, causing delay in the preparation of the appeal.

3. Regarding the delay in re-filing, it is submitted that after the initial filing of the appeal on 28.05.2019, the Registry of this Court was closed for summer vacations. Upon the reopening of the Court, the appeal was returned by the Registry on multiple occasions with various defects marked. It is stated that the curing of these defects accounted for a substantial portion of the delay in re-filing.

4. The respondent has opposed the condonation of delay, contending in its reply to the application(s) that the appellant had sat over his remedy and such conduct ought not to be encouraged. Reliance has been placed on the

decision in *M/s N.V. International Vs. State of Assam*[1] to argue that an appeal under Section 37 of the Act must be filed within 120 days and that any delay beyond such a period is not condonable.

5. In his rejoinder, the appellant denies the respondent's characterization of the delay. He further submits that his chronic health issues, specifically complications arising from diabetes and high blood pressure which necessitated multiple hospitalizations, made it difficult to adhere strictly to the prescribed timelines.

6. It is pertinent to note that the timeline established by *N.V. International* (*supra*) has since been overruled by the 3-Judge Bench of the Supreme Court in *Government of Maharashtra Vs. M/s Borse Brothers Engineers & Contractors Pvt. Ltd.*[2], which held that delay in filing an appeal under Section 37 of the Act can be condoned, subject to sufficient cause being shown.

7. In the considered opinion of this Court, the reasons provided by the appellant constitute sufficient cause for the relatively short delay in the present facts.

8. Consequently, both the present applications are allowed, and the delays in filing and re-filing of the accompanying appeal are condoned.

9. The present applications are disposed of in the above terms.

FAO 331/2019 and CM APPL. 36612/2019

1. The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter the "Act") has been preferred against the

[1] (2020) 2 SCC 109
[2] (2021) 6 SCC 460

order dated 23.02.2019 passed by the learned ADJ-03, South East, *Saket* Courts, in ARBTN No. 317/17.

2. *Vide* the impugned order, the objections filed by the respondent herein under Section 34 of the Act were allowed, thereby setting aside the arbitral award dated 27.12.2013. The arbitral award had directed the respondent to pay, *inter alia*, Rs.19,37,086/- plus interest @ 18% per annum from the date of appointment of the arbitrator, along with a refund of the security deposit of Rs.84,000/- to the appellant herein (who was the respondent before the Court below).

3. Briefly, the facts of the case as culled out from the record are that on 06.06.2003, the appellant issued an offer letter to the respondent for performing certain construction/renovation work in connection with the 10.5 MLD Water Treatment Plant at *Hole*, *Maharashtra*, which was part of a contract awarded to the respondent by the *Maharashtra Jeevan Paradhikaran* (hereinafter "MJP"). The offer made by the appellant was for the execution of the balance unfinished work in the said project.

4. It is claimed that in a meeting between the parties on 08.06.2003, it was agreed that the respondent would award the works to the appellant for a lump sum amount of Rs.26,00,000/-. Minutes of the said meeting were drawn up and signed by both the parties. Pursuant thereto, on 15.06.2003, the appellant commenced execution of the balance work. Later, after the commencement of work, a letter of intent was issued by the respondent to the appellant on 31.07.2003, and the work order, including the Special Terms and Conditions as well as the General Terms and Conditions, was issued on 22.09.2003.

5. As pleaded, for the works executed by the appellant, last abstract of the RA bill acknowledging the completion of works amounting to Rs.21,36,462/-, was signed by the respondent, based on which, internal advice for payment of the said amount to the appellant was issued by the respondent.

6. However, it is alleged that on 11.10.2004, the appellant abandoned the work site and *vide* letter dated 04.11.2004, the respondent requested the appellant to return to the site and complete the remaining work, but the appellant did not respond to the said letter.

7. Later, on 03.01.2005, the appellant raised his alleged claims against the respondent, stating that the scope of work had been significantly enlarged beyond the initial agreement and raising claims for extra works and unpaid dues. This claim was disputed by the respondent, who accused the appellant of abandoning the site and leaving the work incomplete. This led to the invocation of arbitration, wherein the arbitral award came to be passed in favour of the appellant, which was subsequently set aside by the Court under Section 34 of the Act, on the objections filed by the respondent.

8. In allowing the Section 34 petition, the Court below observed that clause 7 of the "Special Terms and Conditions" annexed to the work order explicitly barred claims for extra work unless MJP released corresponding payments, which was not the case in the present facts. It further held that the learned arbitrator had misread the minutes of the meeting dated 08.06.2003 and erred in relying on the initial offer letter, as the letter of intent dated 31.07.2003 and the work order dated 22.09.2003 constituted the final binding contract between the parties. The Section 34 Court also noted that the allegations regarding enlargement of scope were raised only after

abandonment of the site and were thus held to be an afterthought. Concluding the findings of the learned arbitrator to be perverse and against public policy, the Court set aside the arbitral award as well as the learned arbitrator's decision to reject the counter-claim.

9. The counter-claim filed by the respondent pertained to the forfeiture of the security deposit, liquidated damages, over-payment, and interest thereupon, that the respondent claimed it was entitled to under the contract. The Section 34 Court left the counter-claim to be re-arbitrated if the respondent were to invoke arbitration for the said purpose.

10. Learned counsel for the appellant, while assailing the impugned order, submits that the letter of intent and the work order were issued, respectively, about 46 and nearly 100 days after the commencement of work by the appellant, by which time approximately 25% of the total work had already been executed. In this context, it is argued that while the minutes of the meeting dated 08.06.2003 were signed by both parties, the subsequent letter of intent and work order were merely unilateral documents which sought to modify the agreed scope of work. It is further contended that the appellant performed substantial extra work based on the oral instructions of the respondent's site engineers to ensure compliance with MJP specifications. Learned counsel argues that such work was essential for the project's completion and was executed under the assurance that financial adjustments would be made later. The appellant also challenges the procedural validity of the impugned order, contending that the Court exceeded its jurisdiction under Section 34 of the Act by remanding the counter-claim to the arbitrator after setting aside the award.

11. *Per contra*, learned counsel for the respondent has supported the

impugned order and submitted that the Court below was justified in setting aside the arbitral award as it was passed in contravention of the contractual terms between the parties. It is submitted that the appellant, having accepted the letter of intent and the work order without any protest and having acted upon them, cannot now be allowed to renounce them as unilateral documents. Learned counsel further submits that clause 7 of the "Special Terms and Conditions" annexed to the work order categorically stipulates that no payment for extra work would be released unless the same was first received by the respondent from MJP, which has not transpired in the present facts. It is also argued that the appellant's claims were an afterthought, having been raised after a significant delay only on 03.01.2005, whereas the appellant had abandoned the work site on 11.10.2004. Learned counsel submits that the arbitrator essentially re-wrote the contract between the parties, and such an award was rightly held to be against public policy and set aside under Section 34 of the Act.

12. I have heard the learned counsels for the parties and perused the record.

13. Insofar as the first contention regarding the unilateral nature of the letter of intent and the work order is concerned, it is a matter of record that the appellant commenced execution of work on 15.06.2003 and continued to work until 11.10.2004. During this period, the respondent issued the letter of intent dated 31.07.2003 and the work order dated 22.09.2003. Both these documents were accepted and acted upon by the appellant. It is pertinent to note that not a single letter or correspondence was produced by the appellant to show that any objection was raised at the relevant time. Notably, the appellant is stated to be a qualified civil engineer with 32 years of

experience as a contractor, and it is therefore difficult to accept that such a person would continue to work and receive payments of lakhs of rupees without objecting to an alleged enlargement of the scope of work.

14. The work was commenced on 15.06.20023, before the issuance of the work order, pursuant to a meeting between the parties that took place on 08.06.2003, wherein the decision to award the works to the appellant was taken. The minutes of the meeting dated 08.06.2023 record the initial understanding between the parties, whereby the balance work for the 10.5 MLD Water Treatment Plant was awarded to the appellant, and a list of specific items was enumerated. In fact, the said understanding also explicitly records that the appellant has agreed to all the balance work even other than the items listed therein. The minutes do not lay down the complete terms and conditions on which the works were to be executed by the appellant. A work order was eventually issued on 22.09.2003, and the same came along with General as well as Special Terms and Conditions. This work order contained the complete terms and conditions of contract. The appellant is too experienced a contractor to assume that the minutes of the meeting represented the complete and binding contract between the parties, even though it was shorn of any details. Also, there was no subsequent protest or refusal to accept the work order when the same was issued. There is no evidence that the appellant disputed the applicability of the work order dated 22.09.2003 or asserted the supremacy of the minutes of the meeting dated 08.06.2003. The conduct of the appellant clearly establishes that the appellant understood that the minutes constituted merely a preliminary agreement to enter into an agreement which would eventually bear out all the terms and conditions of the contract. Even otherwise, as per the rule of

precedence, a later agreement is deemed to have superseded an earlier agreement if they pertain to the same subject matter. Even assuming that the minutes were a concluded and binding contract between the parties, the same stood superseded by the subsequent work order, which the appellant never disputed as binding, until much later.

15. For the said reason, the appellant's contention that the minutes of the meeting were the only concluded and binding contract between the parties is legally untenable.

16. Regarding the claim for extra work, the Court below specifically noted that clause 7 of the "Special Terms and Conditions" annexed to the work order categorically stipulates that any extra work required for completion of the plant would be carried out at no extra cost. The only exception provided was if MJP made any payment for the same, in which case the corresponding payment, less 20%, would be released to the appellant. No such payment for extra work has been shown to have been released by MJP. The Court below also noted that this was not even pleaded in the statement of claim filed by the appellant, and that no suggestion in this regard was put to the respondent's witnesses.

17. It is also worthwhile to note that the allegations regarding the enlargement of the scope of work were raised for the first time after a significant delay only on 03.01.2005, whereas the appellant had abandoned the work site nearly 3 months prior on 11.10.2004. In view of the same being raised only after the abandonment of the work site, the claims were rightly held to be an afterthought.

18. Adverting to the issue of the counter-claim and the security deposit, the Court below found that the learned arbitrator had rejected the counter-

claim without appreciating the same on merits. It was observed that the respondent was entitled to forfeit the security deposit of Rs.84,000/- because the appellant had failed to complete the work and had abandoned the site. The Court below further noted that under the terms of the work order, the respondent was entitled to levy liquidated damages and could appropriate the appellant's security deposit against the same. Under these circumstances, the Court below was correct in setting aside the decision of the learned arbitrator and directing that the counter-claim be decided again if the parties approached the learned arbitrator.

19. In the considered opinion of this Court, the findings of the Court below do not suffer from any illegality or perversity. It was rightly held that the letter of intent and the work order constituted the final, settled, and binding contract between the parties. When a contract is formed in writing, the rights and obligations of the parties are governed strictly by the specific terms of the said contract. The learned arbitrator essentially re-wrote the contract and ignored the binding nature of the written terms, which rendered the award patently illegal. This Court is also mindful of the narrow scope of interference permissible under Section 37 of the Act. Accordingly, the Court below was justified in setting aside the award under Section 34 of the Act. Consequently, the present appeal is dismissed.

20. The present appeal, along with the pending application, is disposed of in the above terms.

(MANOJ KUMAR OHRI)
JUDGE

MAY 26, 2026
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