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

***Date of Decision:-8th January, 2024.***

\+ **O.M.P. (COMM) 238/2023, I.As. 12522/2023, 12523/2023 & 12524/2023**

NATIONAL RESEARCH DEVELOPMENT CORPORATION & ANR. ..... Petitioners

Through: Mr. Rama Shankar, Adv.

versus

CHROMOUS BIOTECH PVT LTD ..... Respondent

Through: Mr Balaji Subramanian, Adv. (M. 9958110162)

**CORAM:**
**JUSTICE PRATHIBA M. SINGH**

**Prathiba M. Singh, J. (Oral)**

1. This hearing has been done through hybrid mode.

2. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by the Petitioners-National Research Development Corporation (*hereinafter, 'NRDC'*) and the Department of Scientific and Industrial Research (*hereinafter, 'DSIR'*) under the Ministry of Science and Technology, Government of India. NRDC is an enterprise of DSIR and is involved in the Technology Development and Demonstration Programme (*hereinafter, 'TDDP'*).

3. The Respondent-company is engaged in manufacturing drugs and intermediates, established in 2006. Its director approached the Petitioners with a proposal to develop a rapid molecular diagnostics kit for malaria detection. A royalty agreement dated 18th October, 2011 was entered into between the Petitioners and the respondent, outlining the development of the

malaria diagnostics kit, including design, standardization, validation, and expenses estimation. As per the said royalty agreement, the Respondent is also liable to transfer the *'know-how document'* and other improvements if they fail to commercialize the technology within the specified timeframe. The Respondent is also obligated to pay interest and royalties as per the agreement. The relevant clauses of the said royalty agreement are as follows:

> "*11. UTILISATION OF TECHNOLOGY*
> *a. CBPL will enter into an agreement with NRDC within 120 days from the date of first sanction letter by DSIR under the "Project" to enable NRDC to collect lumpsum royally as mentioned in clause 4.1(f) and 4.1(g) above, and will pay to NRDC a lumpsum royalty on the sale of the "Product" as per clauses 4.1(f) and 4.1(g) of this Agreement.*
> *b. CBPL will have the right to utilize the technology developed or other IPRS generated through the "Project for production and sale of "Products on commercial basis. For such commercial utilization of technology by CBPL, CBPL will pay to NRDC, who will receive on behalf of DSIR, royalty/lumpsum premium as envisaged in clause 4.1(f) and/or 4.1(g) above.*
> *c. After commercialisation of technology by CBPL as stated in clause 11(b) above, CBPL may do third party licensing, if CBPL and DSIR perceive that such a need arises. This third-party licensing and related terms and conditions would be finalised by CBPL with the approval of DSIR. The revenue so generated by such third-party licensing shall be shared between CBPL and DSIR in the ratio of their actual financial contributions towards the project as assessed at the end of the project.*
> *d. CBPL may, if they so desire, utilise the services of NRDC for third party licensing as per mutually agreed*

*terms and in consultation with DSIR. The revenue so collected by NRDC on behalf of DSIR by way of third party licensing shall be shared between CBPL and DSIR in ratio of their actual financial contributions towards the Project as assessed at the end of the Project.*

*e. CBPL shall assign the technology proposed to be developed under this Project with right to license the intellectual property owned by them and transfer the know-how document to NRDC within 60 days from the occurrence of any of the following :*

*(i) If CBPL refuses to exercise its right, within one year of completion of the Project, its option to commercialise technology*

*(ii) If CBPL fails to commercialise technology within four years of completion of the project.*

*(iii) If fails to execute agreement referred to in clause 11(a) above.*

*NRDC will have an exclusive right to license the technology developed through the Project to third parties in case of occurrence of either of the events referred in clause 11(e) above. CBPL will provide to NRDC full details of any improvement(s) made on the Product(s) and the process of manufacture and any additional information, which NRDC may require to license this technology to third parties, in the event of third party licensing under the circumstances given in clause 11(e) above. In such cases, CBPL will also provide training to third party licensees on request from NRDC on mutually agreed terms. Revenues earned by NRDC through third party licensing under this clause will be shared in the ratio of actual financial for sale by CBPL*

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*13. TERMINATION OF THE PROJECT*

*a. DSIR will have the right to terminate the Agreement*

*based on recommendation of the Project Review Committee (PRC) at any stage, if it is satisfied that:*

- *the moneys released have not been properly utilized, or*
  - *appropriate progress on the Project is not being made, or*
  - *the project is not being carried out as per the terms and conditions and/or as per the nature and scope of work as defined in the approved project proposal.*

*b. DSIR will have the right to recover from CBPL at any time the moneys disbursed by DSIR for the Project along with 12% simple interest, if CBPL abandons the Project on its own without approval of DSIR or if the Project is terminated as above,*

*c. If the Project is abandoned for any techno-economic and other reasons, other than the above, based on the recommendations of the Project Review, Committee and as directed by DSIR. CBPL shall pay back all unspent DSIR grants released for the Project and interest accrued thereon and any amounts recoverable by way of disposal of assets procured out of DSIR funds.*

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*15. ARBITRATION AND JURISDICTION*

*a) If any dispute or difference arises between the parties hereto as to the construction, interpretation, effect and implication of any provision of this Agreement including the rights or liabilities or any claim or demand of any Party (or its extent) against other party or its sub-contractor or in regard to any matter under these presents but excluding any matters, decisions or determination of which is expressly provided for in this Agreement such disputes or differences shall be referred to the sole arbitration of the Secretary of Department of Legal Affairs, Govt. of India or his nominee. A reference la the arbitration*

*under this clause shall be deemed to be submission within the meaning of the Arbitration and Conciliation Act 1996 and any modification or re-enactment thereof and the rules framed there under for the Ume being in force.*

*b) The venue of the Arbitration shall be at Delhi.*

*(ii) Each Party shall bear and pay its own cost of the arbitration proceedings unless the arbitrator otherwise decides in the award.*
*(iii) The provision of this clause shall not be frustrated, abrogated or become in-operative, notwithstanding this Agreement expires or ceases to exist or is terminated or revoked or declared*
*c) The Courts at Delhi shall have exclusive jurisdiction in all matters containing this Agreement, including any matter related to or arising out of the arbitration proceedings or any award made therein.*"

4. In the above background, the DSIR was informed by the Respondent that the project was completed on 17th October, 2014. Thereafter, the Respondent admitted in a letter dated 29th March, 2017 their inability to pay the royalty at that time, but made no efforts to return the technology developed under the project. Finally, vide communication dated 17th March, 2021, the Respondent offered to return the technology after seven years, which was declined by the Petitioners, leading to the constitution of the Arbitral Tribunal in December, 2021.

5. Vide order dated 23rd May, 2022, this Court appointed a sole arbitrator in the matter. The Award has been pronounced by the ld. Arbitrator on 10th December, 2022. The ld. Arbitrator held that the Claimants-NRDC are not entitled to any amount against the Respondent, either on account of royalty, damages, interest or cost as claimed by them in

the SOC. Therefore, their claims were rejected by the ld. Arbitrator. The main findings of the said Award are extracted below:

> *"11. In view of the reasons given above, the conclusion is inescapable that the liability of the Respondent for payment of royalty under the Agreements was contingent upon commercialization of the product. This issue is decided accordingly in favour of the Respondent and against the Claimants.*
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> *XXX*
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> *13. The question that is required to be considered by the Tribunal is whether the Claimants were justified in declining the offer of the Respondent for transfer of technology made by it in March, 2021. Since in the present case, the project was declared successfully completed by the Claimants on 17.10.2014, in terms of clause 11 (e) of the TDDP Agreement the Respondent was under an obligation to transfer the technology alongwith technical know-how document to the Claimants within 60 days from its failure to commercialize the technology within four years of completion of the project. The time for transfer of technology and know-how document envisaged in the TDDP Agreement was over by 16.12.2018 and, therefore, the offer of the Respondent made to the Claimants for transfer of technology vide letter dated 17.03.2021 was beyond the time for the same envisaged in the Agreements. Hence, the Claimants under the Agreements were justified in declining/rejecting the offer of the Respondent contained in its letter dated 17.03.2021. This issue is decided accordingly in favour of the Claimants and against the Respondent.*
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> *XXX*
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> *14. All these three issues are interconnected as they all deal with the entitlement of the Claimants and the*

*corresponding liability of the Respondent for payment under the Agreements. This Arbitral Tribunal has already held that the liability of the Respondent for payment of royalty under the Agreements did not commence for failure of the Respondent to commercialize the technology developed by it under the project. Mr. Rama Shankar, Ld. Counsel appearing on behalf of the Claimants, in the alternative, has argued that in case the Claimants are not entitled for return of their money given by them as grant in aid to the Respondent for the project, as royalty, then the Tribunal may award the said amount as damages suffered by the Claimants. It may be noted that the claims of the Claimant are not based upon their plea for damages or having suffered any loss under the Agreements. There is no whisper at all either in the SOC or in the rejoinder to the SOD filed by the Claimants about the claim for damages.*

***15. There are no pleadings before the Tribunal filed by the parties to consider the contention of damages urged on behalf of the Claimants for the first time during arguments. The issue of damages is not even the term of reference referred by the parties to the Tribunal for adjudication. This Tribunal is of the considered view that the Tribunal has to remain within the bounds of the term of reference and in case the Tribunal travels beyond the terms of reference, the award is liable to be set aside by the Court in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 as is so provided in Section 34 (2) (iv) of the Arbitration and Conciliation Act, 1996 extracted herein below****:*

> *"34. Application for setting aside arbitral award*
> *(1)…..*
> *(2) An arbitral award may be set aside by the Court only if –*
> *(a) the party making the application furnishes proof that –*

*(i) …….*
*(ii) ……..*
*(iii) …….*
*(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.*

*Hence, in view of the expressed statutory provisions contained in Section 34 (2)(iv) of the Arbitration and Conciliation Act, 1996 extracted above, the plea of Claimant's Ld. Counsel to award damages cannot be granted by the Tribunal.*

***16. In view of the above findings of this Arbitral Tribunal, the Claimants are found not entitled to any amount against the Respondent either on account of royalty, damages, interest or cost as claimed by them in the SOC. Their claims are, therefore, are rejected****."*

6. An application has been filed seeking condonation of delay in filing the present petition. According to Section 34(3) of the Arbitration and Conciliation Act, 1996, the time period of ninety plus thirty days expired on 9th April, 2023.

7. An application being ***I.A. 12524/2023*** has been filed seeking condonation of 54 days delay in refiling the present petition. The case of the Petitioner is that petition was filed on 2nd March, 2023 and was returned under objections on 4th March, 2023.

8. However, on behalf of the Respondent, it is submitted that the statement of truth itself was signed on 24th May, 2023. Thereafter, *vakalatnama* was executed on 2nd May, 2023.

9. Heard.

10. The Supreme Court in ***Union of India v. Popular Construction (2001) 8 SCC 470*** observed that that the scheme of the Arbitration and Conciliation Act, 1996 lends credence to the conclusion that the time-limit prescribed under Section 34 of the Arbitration and Conciliation Act, 1996 is absolute. The relevant extract of the said judgment is as follows:

> *"As for as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3).* ***In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result****.*
> *Apart from the language, 'express exclusion' may follow from the scheme and object of the special or local law. "Even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine"*
> ***Here the history and scheme of the 1996 Act support the conclusion that the time limit prescribed under Section 34 to challenge an Award is absolute and unextendable by Court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process****."*

11. Further, in ***Simplex Infrastructure Ltd. v. Union of India (2019) 2 SCC 455***, the Supreme Court held that the proviso to Section 34(3) of the Arbitration and Conciliation Act, 1996 allows the said period to be further

extended by another period of thirty days on sufficient cause being shown by the party for filing an application. It observed that the intent of the legislature is evinced by the use of the words *"but not thereafter"* in the proviso. According to the Supreme Court, these words make it abundantly clear that as far as the limitation for filing an application for setting aside an arbitral award is concerned, the statutory period prescribed is three months which is extendable by another period of upto thirty days (and no more) subject to the satisfaction of the Court that sufficient reasons arere provided for the delay. The relevant portion of the said decision is as follows:

> *"13. A plain reading of sub-section (3) along with the proviso to Section 34 of the 1996 Act, shows that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 could be made within three months and the period can only be extended for a further period of thirty days on showing sufficient cause and not thereafter. The use of the words "but not thereafter" in the proviso makes it clear that the extension cannot be beyond thirty days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent, there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section (3) read along with the proviso to Section 34 of the 1996 Act. The delay of 131 days cannot be condoned. To do so, as the High Court did, is to breach a clear statutory mandate."*

12. Further, in any case, while dealing with an application for condonation of delay in re-filing of a petition beyond the time prescribed under Section 34(3) of the Arbitration and Conciliation Act, 1996, the Division Bench in ***Delhi Development Authority v. Durga Construction Co. [2013 (139) DRJ 133 (DB)]*** held that though the Court is empowered to

condone delay beyond the extended period of limitation of three months and thirty days, it is requisite for the party seeking the condonation to show that despite his diligence, the rectification of defects and re-filing could not be carried out within the limitation period, for *bonafide* reasons beyond its control. The relevant portion of the said decision is as follows:

> *"17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing. A similar view in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in Ashok Kumar Parmar v. D.C. Sankhla: 1995 RLR 85, whereby a Single Judge of this Court held as under:-*
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> *....*
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> *18. In several cases, the defects may only be perfunctory and not affecting the substance of the application. For example, an application may be complete in all respects, however, certain documents may not be clear and may require to be retyped. It is possible that in such cases where the initial filing is within the specified period of 120 days (3 months and 30 days) as specified in section 34(3) of the Act, however, the re-filing may be beyond this period.* ***We do not think that in such a situation the court lacks***

***the jurisdiction to condone the delay in re-filing. As stated earlier, section 34(3) of the Act only prescribes limitation with regard to filing of an application to challenge an award. In the event that application is filed within the prescribed period, section 34(3) of the Act would have no further application. The question whether the Court should, in a given circumstance, exercise its discretion to condone the delay in re-filing would depend on the facts of each case and whether sufficient cause has been shown which prevent re-filing the petition/application within time****.*

*…*

*25. Thus, in our view a* ***Court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in section 34(3) of the Act. However, this jurisdiction is not to be exercised liberally, in view of the object of the Arbitration and Conciliation Act to ensure that arbitration proceedings are concluded expeditiously. The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the Court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable.*** *In the present case, there has been an inordinate delay of 166 days and in our view the appellant has not been able to offer any satisfactory explanation with regard to the same.* ***A liberal approach in condoning the delay in re- filing an application under section 34 of the Act is not called for as it would defeat the purpose of specifying an inelastic period of time within which an application, for setting aside an award, under section 34 of the Act must be preferred****.*"

13. In view of the above facts, it is not possible for the petition to have been filed in March, 2023 without the *vakalatnama* having been executed and the statement of truth having been filed only on 24th May, 2023.

Moreover, no proof of filing in March 2023 has been placed on record. No draft of the petition which was filed is also on record. A mere averment without any support to show that the filing was done in March 2023 cannot be accepted.

14. On the last date, 5th January, 2024 Ld. Counsel for the Respondent had made a submission that his client is willing to give the technology to NRDC. The matter was then adjourned to enable the ld. Counsel to place some documents or seek instructions. However, he submits today that NRDC does not wish to take the technology from the Respondent.

15. In view of the decisions in ***Popular Construction (supra)*** and ***Simplex Infrastructure Ltd. (supra),*** the law in respect of Section 34 of the Arbitration and Conciliation Act 1996 is clear. Delay beyond three months plus one month is not condonable. Further, no reasonable explanation has been proffered by the Petitioner for this Court to be convinced for condonation of delay under Section 34(3) of the Arbitration and Conciliation Act, 1996.

16. Under these circumstances, the petition is dismissed as being delayed beyond the time period provided under Section 34(3) of the Arbitration and Conciliation Act, 1996. Needless to state, this Court has not opined on the merits of the case.

17. All pending applications are also disposed of.

**PRATHIBA M. SINGH**
**JUDGE**

**JANURARY 08, 2024**
*mr/dn*