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

+ O.M.P. (COMM) 107/2021, I.A. 3723/2021 & I.A. 3726/2021

SPML INFRA LIMITED

..... Petitioner

Through: Mr. Ayush Agarwala and Mr.
Rahul Kumar, Advocates.

versus

NTPC LIMITED

..... Respondent

Through: Mr. Animesh Sinha, Mr. Shubham
Budhiraja and Ms. Ishita Pandey,
Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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27.02.2024

1. By way of this petition, under section 34 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner assails an Arbitral Award dated 26.05.2018.
2. The petition was accompanied by applications for condonation of 16 days delay in filing [I.A. 3724/2021], and 846 days delay in re-filing [I.A. 3726/2021]. I.A. 3724/2021 was allowed by order dated 17.09.2021.
3. Mr. Animesh Sinha, learned counsel for the respondent, has thereafter taken a preliminary objection to the effect that the petition, as originally filed, was an invalid filing and that defects having been cured only after the limitation period of three months and the maximum condonable period of thirty days delay had lapsed, the petition is barred

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by limitation.

4. By an order dated 28.03.2023, the log information with regard to filing of the present petition was called for from the Registry. Learned counsel for the parties have examined the log information and submit that when the petition was originally filed on 14.09.2018, various defects were noted, including the non-filing of the impugned award.

5. Mr. Ayush Agarwala, learned counsel for the petitioner, states that the petitioner and its counsel do not have any records relating to the original filing of the petition. He, therefore, accepts the position in the log information provided by the Registry, which shows that the award was not filed until after the maximum condonable period of three months plus thirty days had already lapsed.

6. Three Division Bench judgments of this Court make it clear that the non-filing of the award is by itself a fatal defect which renders the original filing *non-est*.

7. In *ONGC v. Sai Rama Engineering Enterprises* [2023 SCC OnLine Del 63] the Division Bench emphasized that the statement of necessary grounds of challenge and filing a copy of the award, are essential to a proper filing, and noted as follows:

*“32. It is material to note that Section 34 of the A&C Act does not specify any particular procedure for filing an application to set aside the arbitral award. However, it does set out the grounds on which such an application can be made. **Thus, the first and foremost requirement for an application under Section 34 of the A&C Act is that it should set out the grounds on which the applicant seeks setting aside of the arbitral award. It is also necessary that the application be accompanied by a copy of the award as without a copy of the award, which is challenged, it would be impossible to appreciate the grounds to set aside the award.** In addition to the above, the application must state the name of the parties and the bare facts in the context of which the applicants seek setting aside of*



the arbitral award.

33. It is also necessary that the application be signed by the party or its authorised representative. The affixing of signatures signify that the applicant is making the application. In the absence of such signatures, it would be difficult to accept that the application is moved by the applicant.”

[Emphasis Supplied.]

8. The position has been articulated beyond the pale of doubt by two subsequent Division Bench judgments, both dated 19.12.2023, in *Union of India v. Panacea Biotec Ltd.* [2023 SCC OnLine Del 8491] and *ONGC v. Planetcast Technologies Ltd.* [2023 SCC OnLine Del 8490]. In these two judgments, the Division Bench has considered various defects, under different heads, and recorded its findings on each of them. As far as the non-filing of the award is concerned, these judgments make it clear that the filing of an award is essential for the Court to proceed further, and a failure to do so renders the nature of filing *non-est*.

9. To counter this view, Mr. Agarwala cites a Division Bench decision of this Court in *Oriental Insurance Co. Ltd. v. Air India Ltd.*, [2021 SCC OnLine Del 5139] and a judgment of a Coordinate Bench in *Ambrosia Corner House (P) Ltd. v. Hangro S Foods* [2023 SCC OnLine Del 517], which followed it. He places paragraphs 10 and 11 of *Oriental Insurance* which read as follows:

“10. Pertinently, under the relevant High Court Rules, there is no clear and definite guideline to show as to when a petition-when originally filed, would be considered as non-est, or otherwise. The nature of defects - which would render an initial filing as non-est, is not clearly set out. Therefore, it would not be fair to a party - who files a petition before a Court, to be told that his initial filing was non-est due to certain defects. That declaration or pronouncement by the Court - in each case, would be subjective and ad-hoc.



11. *In our view, a filing can be considered as non-est, if it is filed without any signatures of either the party or its authorised and appointed counsel. Therefore, if a petition - as originally filed, bears the signatures of the party, or its authorised representative, in our view, it cannot be said that the same is non-est. So also, if it is signed by the counsel, and the Vakalatnama appointing the counsel, duly signed by both - the party and the counsel, is filed at the initial stage, the filing cannot be said to be non-est. This is because the ownership of the document/petition filed is fixed. Also, the factum of filing the document/petition by the party or on its behalf becomes a matter of record.”*

10. Mr. Agarwala submits that the Court has confined the issues of *non-est* filing only to cases where the signatures of the parties or its authorised representatives or of its counsel are absent. Mr. Agarwala submits that this judgment has not been considered in *Sai Rama [supra]*, *Panacea [supra]* or *Planetcast [supra]*, which renders the latter judgments *per incuriam*.

11. I am unable to accept this contention. I do not read the observations in *Oriental Insurance [supra]*, relied upon by Mr. Agarwala, to lay down that non-filing of the award would not be a fatal defect. The Court’s finding of the requirement of “ownership of the document/petition” by signature of the party or its authorised representatives or its counsel, does not imply that it would be considered a valid filing if only these ingredients were satisfied and nothing else.

12. The judgment of a Coordinate Bench in *Ambrosia [supra]*, follows *Oriental Insurance [supra]*. Mr. Agarwala submits that *Ambrosia [supra]* decided that a petition is not rendered *non-est* only by reason of non-filing of the award. However, the Division Bench in *Planetcast [supra]* has considered the judgment in *Ambrosia [supra]* and specifically stated that this is a misconception, noting as follows:



“36. To further clarify the law on the indispensable requirements while filing a Petition under Section 34 of the Act, 1996, it is pertinent to refer to the judgment of the Single Bench of this Court in *Ambrosia Corner House Private v. Hangro S Foods*, 2023 SCC OnLine Del 517. **It has been widely misconstrued that the said judgment recognised the filing of a Petition under Section 34 of the Act, 1996 to be valid even though it was not accompanied by the Award.** However, the perusal of the judgment itself makes it evident that the impugned Award had not been e-filed in a separate folder as was required under the Delhi High Court (Original Side) Rules, 2018. In those peculiar circumstances, the objections were entertained and the first filing was not found to be non-est. Clearly, it is not as if the Award had not been filed along with the objections under Section 34 of the Act. The facts as involved in *Ambrosia Corner House* (*supra*) are, therefore, clearly distinguishable.”

[Emphasis Supplied.]

13. In view of this position, based upon the Division Bench judgments, the conclusion that the present petition, as originally filed, was *non-est* is unavoidable. The petition is, therefore, barred by limitation.

14. For the sake of completeness, and having regard to the fact that the delay in re-filing was as much as 846 days, I have also considered the petitioner’s case for condonation of delay in re-filing. Part of this period is explained by the COVID-19 pandemic and consequent lockdown, but Mr. Agarwala accepts that a delay of approximately 400 days is not attributable to the pandemic.

15. In the application, this delay is explained only on the basis that the petition relates to a project in Korba, Chhattisgarh, which has long been closed, and documents have been shifted to the petitioner’s head office in Kolkata, which made it difficult to locate the old documents. A second and vague assertion has been made, of a communication gap between the petitioner and its counsel. The rest of the application pertains to the COVID-19 pandemic and circumstances arising therefrom. These



averments are, in my view, insufficient to explain an inordinate delay of this magnitude. While the Court is generally liberal in considering applications for condonation of delay in re-filing of a petition, the petitioner, in the present case, has failed to satisfy even the minimal test of due diligence.

16. Mr. Agarwala, submits that some additional documents have been filed by the petitioner pursuant to the impugned award, to show that the parties were in the process of reconciling accounts in the period from September 2018 until March 2020. Although these documents are not on record, copies have been handed up in Court and are taken on record, as directed by an order dated 17.09.2021 in I.A. 6578/2021. These documents, at best, show that parties were engaged in re-conciliation of accounts, but I am unable to accept that this would in any way obviate the necessity for re-filing of the petition with due diligence.

17. For the aforesaid reasons, the present petition is barred by limitation, and is dismissed, alongwith pending applications.

PRATEEK JALAN, J

FEBRUARY 27, 2024

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