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

Date of Decision: 23.02.2023

+ **O.M.P. (COMM) 516/2018 & I.A. 17541/2018, 17544/2018, 4986/2019 & 4987/2019**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Dr.Maurya V Chandra &
Mr.Abhishek R. Shukla, Advs.

versus

PATEL-KNR(JV)

..... Respondent

Through: Dr.Swaroop George &
Mr.Tanmay Cheema, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 26.05.2018 limited to the extent of claim nos.1, 2, 3, 5, 6 and 7 thereof.

2. The learned counsel for the respondent has raised the objection on the maintainability of the present petition, claiming that the same has been filed beyond the period of limitation as prescribed in Section 34(3) of the Act. He submits that though the petition was originally filed on 24.08.2018, the same was a *non-est* filing. He submits that, thereafter, the petition was re-filed on 28.11.2018, that is, beyond the period of limitation as prescribed under Section 34(3) of the Act and even beyond the maximum condonable period of delay as provided in the Proviso to Section 34(3) of the Act.

3. The learned counsel for the petitioner, in the hearing held on 24.01.2023, had submitted that the petition was re-filed by the petitioner on 25.09.2018, which would be within the maximum period by which delay can be condoned by this Court. He submits that, therefore, even if the filing made on 24.08.2018 is treated to be *non-est*, considering the filing made on 25.09.2018 and for reasons explained, this Court could condone the delay in filing of the petition.

4. On the submission of the learned counsel for the petitioner, the following order was passed on 24.01.2023:-

“1. A controversy has arisen as to whether this petition was re-filed by the petitioner on 25.09.2018, as has been claimed by the petitioner in application, being LA. 17544/2018.

2. The learned counsel for the respondent has handed over a copy of the Log Report of the filing of the present petition, which indicates that though the petition was filed on 24.08.2018, on it being returned under objections, it was re-filed only on 28.11.2018. The Log Report, therefore, does not indicate any re-filing done on 25.09.2018.

3. The learned counsel for the respondent, placing reliance on the Log Report, further states that the filing done on 24.08.2018 appears to be not one challenging the Impugned Award as the date of the Award mentioned in the Log Report is 27.12.2017 whereas the Impugned Award is dated 26.05.2018. He further submits that the petitioner in the Additional Affidavit dated 29.01.2019 itself has admitted as under:

“4. That since the matter was filed in a rush as the counsel had received instruction only few days prior to the last date of limitation, the filing was done in anticipation of approval from NHAI and usually the final version is sent for records to NHAI, therefore, no record of the said version is available with NHAI.”

4. He submits that, therefore, the filing of 24.08.2018 clearly was *non-est* as it was not done with the approval of the petitioner.

5. The learned counsel for the petitioner prays for time to re-affirm the fact of re-filing the petition on 25.09.2018.

6. In the meantime, the Registry is also directed to, if possible, retrieve the petition that was filed on 24.08.2018 under Diary No.238062/18 and attach the same on record of the present petition. The Registry shall also reconfirm if this petition was re-filed on 25.09.2018.

7. List on 22nd February, 2023.”

5. The Registry has now filed its report dated 04.02.2023, wherein it is stated that as per the Log Report, the petition was not re-filed on 25.09.2018 as claimed by the petitioner.

6. Today, the learned counsel for the petitioner admits that the petition was not re-filed on 25.09.2018. He submits that an attempt was made to re-file the petition on 25.09.2018, however, due to a change in the filing procedures that had been notified just prior to the said date, the Registry did not accept the filing in the form that was sought to be made.

7. Be that as it may, the fact remains that on 25.09.2018 there was no re-filing of the petition done by the petitioner. The fact also remains that the re-filing of the petition was done only on 28.11.2018, that is, beyond the period of 30 days of three months of the receipt of the copy of the Award. The only question, therefore, left to be considered by this Court is as to whether the filing of the petition on 24.08.2018 can be termed as a *non-est* filing.

8. In this regard, the objections that were raised on the filing of the petition on 24.08.2018 are as under:-

“25/08/2018 2:42 PM

User Comments: Description of any other
Defects:TOTAL 119 PAGES FILED

*WITHOUT BOOKMARKING WITHOUT
PAGINATION. PLEASE CORRECT THE
CATEGORY.PETITION IS NOT
MAINTAINABLE AS PER PECUNIARY
JURISDICTION.AFFIDAVIT BE
ATTESTED.DELAY IN FILING. CATEGORY
AND TITLE BE GIVEN ON THE INDEXES
AND SIGNED. COMPLETE APPLICATIONS
NOT FILED. VAKALATNAMA NOT FILED.
NO AWARD FILED. NO DOCUMENTS
FILED.*

MR. MANJIT(10012035)

25/08/2018 2:42 PM

*User Comments: DATE OF
AWARD=27/12/2017 DATE OF RECEIPT OF
AWARD 30/12/2017 DATE OF
FILING=24/08/2018 237-90=147 DAYS
DELAY IN FILING.*

MR. MANJIT(10012035)”

9. The learned counsel for the respondent drew my attention to the Office Noting of 25.08.2018 at 2:42 PM, reproduced hereinabove, which states that the date of the Impugned Award is stated to be 27.12.2017. He submits that the present petition challenges the Award dated 26.05.2018, which Award is for an amount more than the pecuniary jurisdiction of this Court. He submits that, therefore, it appears that the petition was filed challenging some other Award.

10. On this query, the Registry was also directed to retrieve the filing that was made by the petitioner on 24.08.2018. The Registry has now placed on record the filing that was made. A perusal of the said filing would show that in the list of dates and events, the date of the receipt of the Impugned Award is stated as 30.12.2017. The title of the petition also states that the petition challenges the Award dated 27.12.2017. However, the prayer mentions the date of the Award as 26.05.2018. The

petition was admittedly not accompanied with a copy of the Impugned Award. I have also perused the petition as was filed on 24.08.2018 and find that at various places there are blanks. Furthermore, the affidavit filed in support of the petition is not attested and the Statement of Truth filed therewith also has various blanks.

11. The petitioner has, in compliance with the order dated 19.12.2018 filed an additional affidavit setting out the changes, if any, brought about in the main petition as was filed on 24.08.2018. One of the most important assertions for the purpose of the present adjudication made in the said affidavit, is as under:-

“4. *That since the matter was filed in a rush as the counsel had received instruction only few days prior to the last date of limitation, the filing was done in anticipation of approval from NHAI and usually the final version is sent for records to NHAI, therefore, no record of the said version is available with NHAI.*”

12. From the above, it would be apparent that the petition that was filed on 24.08.2018 did not even have the final approval of the Competent Authority of the petitioner. It is apparent that certain pages were just filed by the petitioner to somehow stop the limitation from running.

13. A Division Bench of this Court in ***Oil and Natural Gas Corporation Ltd. v. Joint Venture of M/s Sai Rama Engineering Enterprises (SREE) & M/s Megha Engineering & Infrastructure Limited (MEIL)***, Neutral Citation Number: 2023/DHC/000135, considered the question of what can be considered as a *non-est* filing and observed as under:-

“30. We concur with the learned Single Judge that certain defects are curable and do not render the application as non est. However, the nature of certain defects is such that it would not be apposite to consider the defective application as an application under Section 34 of the A&C Act, to set aside an arbitral award. Undisputedly, every improper filing is not non est.

31. We are unable to concur with the view that the minimum threshold requirement for an application to be considered as an application under Section 34 of the A&C Act is that, each page of the application should be signed by the party, as well as the advocate; the vakalatnama should be signed by the party and the advocate; and it must be accompanied by a statement of truth. And, in the absence of any of these requirements, the filing must be considered as non est. It is essential to understand that for an application to be considered as non est, the Court must come to the conclusion that it cannot be considered as an application for setting aside the arbitral award.

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.

34. In addition to the above, other material requirements are such as, the application is to be supported by an affidavit and a statement of truth by virtue of Order XI, Section 1 of the Commercial Courts Act, 2015. It is also necessary that the filing be accompanied by a duly executed vakalatnama. This would be necessary for an advocate to move the application before the court. Although these requirements are material and necessary, we are unable to accept that in absence of these requirements, the application is required to be treated as non est. The application to set aside an award does not cease to be an application merely because the applicant has not complied with certain procedural requirements.

35. It is well settled that filing an affidavit in support of an application is a procedural requirement. The statement of truth by way of an affidavit is also a procedural matter. As stated above, it would be necessary to comply with these procedural requirements. Failure to do so would render an application under Section 34 of the A&C Act to be defective but it would not render it non est.

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41. We may also add that in given cases there may be a multitude of defects. Each of the defects considered separately may be insufficient to render the filing as non est. However, if these defects are considered cumulatively, it may lead to the conclusion that the filing is non est. In order to consider the question whether a filing is non est, the court must address the question whether the application, as filed, is intelligible, its filing has been authorised; it is accompanied by an award; and the contents set out the material particulars including the names of the parties and the grounds for impugning the award.”

14. In ***Oriental Insurance Co Ltd v. Air India Ltd***, 2021 SCC OnLine Del 5139, another Division Bench of this Court, again considering the question of *non-est* filing, has held as under:-

“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.

12. The right to prefer objections to assail the arbitral award under Section 34 of the Arbitration and Conciliation Act is a valuable right. It is the only limited right that a party aggrieved of an arbitral award, has. The said right, in our view, cannot be denied unless the party concerned has clearly failed to file the objection petition within the strict period of limitation prescribed under the Act. The objections to the arbitral award – under Section 34 of the Act, should necessarily be filed within three months, or within 30 days thereafter with justification i.e. sufficient cause, for such delay. No doubt, if they are filed even beyond that period, they cannot be entertained under any circumstance. However, when the objections are initially filed within the period of 3 months plus 30 days, the approach of the Court while dealing with an application to seek condonation of delay cannot be too tight fisted. If the party

*concerned inhibits careless attitude even after the first filing and causes delay which is disproportionately large to the period of limitation prescribed under Section 34 of the Act, the delay in filing and refiling may be fatal. (See: **Executive Engineer v Shree Ram Construction Co.**, (2010) 120 DRJ 615 (DB) and **Delhi Transco Ltd. & Anr. vs Hythro Engineers Pvt. Ltd.**, 2012 SCC OnLine Del 3557). However, where they party – after the initial delay in filing (which is within the 30 days period of the expiry of the 3 month period of limitation), exhibits a sense of urgency in refiling(s), then a more favourable view should be taken by the Court to condone the delay. In such cases, it is always possible to put such a party to terms.”*

(Emphasis supplied)

15. A learned Single Judge of this Court, recently in its judgment titled **Brahmaputra Cracker and Polymer Ltd v. Rajshekhar Construction Pvt Ltd**, Neutral Citation Number: 2023/DHC/000642, has also observed as under:-

*“15. A petition under Section 34 represents a challenge to the award rendered by the Arbitral Tribunal. A petition which is not accompanied by a copy thereof cannot possibly be understood or recognised as a valid challenge presented under Section 34. The non-filing of the award would clearly amount to a fundamental defect. This since the award would constitute an essential element of the filing and be liable to be viewed as an inviolable prerequisite. A petition purporting to be under Section 34 of the Act which neither carries the grounds on which the award is assailed or one which fails to annex a copy of the same cannot possibly be construed or accepted as an action validly initiated under Section 34 of the Act. It becomes pertinent to note that non-filing of an arbitral award was recognised to be a fundamental defect and one which would clearly render the filing to be non est both in **Bharat Biotech** as well as in **Oil and Natural Gas Corporation Ltd**. The basic precept of a non est filing was succinctly explained by the Division Bench in **Durga Construction Co.** to be a petition or an*

application filed by a party which is so hopelessly inadequate or suffering from defects which are clearly fundamental to the institution of the proceedings. Clearly therefore and if the aforesaid basic precepts are borne in mind, it is manifest that a petition which purports to be under Section 34 of the Act cannot possibly be countenanced or accepted as such unless it is accompanied by a copy of the award.

16. The Court also bears in mind that the filing of a petition or an attempted filing of a petition under Section 34 unaccompanied with a Statement of Truth or the award should not be lightly countenanced especially where the same may be merely presented in order to stall the limitation period prescribed in Section 34 from commencing. Such attempts have to be clearly discouraged and disapproved. It is to ward off that greater mischief which convinces the Court to hold that the filing of a copy of the award and the submission of the Statement of Truth must be recognised to be foundational, basic and indispensable requirements of a petition under Section 34 of the Act.

17. Since in the facts of the present case, the petitioner had admittedly failed to file a petition which complied with the aforesaid fundamental requirements of a Section 34 petition before the terminal date of 01 June 2022, it clearly falls within the meaning of the expression “non est filing” as enunciated in the decisions aforesaid.”

(Emphasis supplied)

16. A reading of the above judgments would show that if a petition, as originally filed, bears the signatures of the parties or its authorised representatives, it cannot be said that the same is a *non-est* filing, however, at the same time a wholistic view of the filing as done is to be taken to determine whether in spite of the petition carrying the signatures of the party or its counsel it can still be termed as a *non-est* filing.

17. In the present case, the petitioner admits that the petition that was filed on 24.08.2018 did not have the approval of the Competent Authority of the petitioner. It was filed '*in anticipation of approval from NHAI*'. The same was not accompanied with a copy of the Award. In fact, at various places the date of the Award was wrongly mentioned. There are other places where the petition is blank, so is the position with the Statement of the Truth.

18. On a wholistic consideration of all the objections raised on the petition that was filed on 24.08.2018, and applying the law as explained in the above referred judgments, in my view, the petition filed on 24.08.2018 has to be termed as a *non-est* filing.

19. The petition, therefore, having been filed only on 28.11.2018, that is, beyond the period of 30 days of the expiry of three months from the date of the receipt of the Award, such delay cannot be condoned in terms of the Proviso of Section 34(3) of the Act.

20. Accordingly, the present petition is dismissed as having been filed beyond the period of limitation. All pending applications are also disposed of.

NAVIN CHAWLA, J

FEBRUARY 23, 2023/rv