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

+ O.M.P. (COMM) 20/2024 & I.As. 568/2024, 570/2024, 3462/2024.

BHARAT BROADBAND NETWORK LIMITED..... Petitioner

Through: Mr. Jayant Mehta, Sr. Advocate
with Mr. Deepayan Mandal, Mr.
Naman Varma, Mr. Mridul Bansal,
Advocates.

versus

STERLITE TECHNOLOGIES LIMITED Respondent

Through: Mr. A.K. Thakur, Mr. Rishi Raj,
Mr. Sujeet Kumar, Advocates
[9810141402].

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER
21.03.2024

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1. This petition, under Section 34 of the Arbitration and Conciliation Act, 1996, is pending for determination of the question as to whether the original filing of the petition was a valid filing or was *non est*.

2. The impugned award was pronounced on 24.07.2023, and received by the petitioner on the same date. The petition was originally filed on 27.10.2023, which was within the limitation period of three months, in view of the fact that the Court was closed from 23 10.2023 to 29.10.2023. After marking of defects, the petition was refiled on 06.12.2023, which is after the maximum condonable period of three months plus thirty days

from the date of the award.

3. The point raised by Mr. A.K. Thakur, learned counsel for the respondent, is that 06.12.2023 must be considered as the date of first filing, because the filing of the petition on 27.10.2023 was *non est*, due to lack of a Statement of Truth, and due to the fact that the contents of the petition were extensively amended after filing.

4. As far as the Statement of Truth is concerned, it is undisputed that the Statement of Truth was not filed on 27.10.2023, when the petition was first filed. However, learned counsel for the parties have drawn my attention to two Division Benches judgments, which come to different conclusions as to whether the lack of Statement of Truth constitutes a fatal defect in the original filing.

5. The first of these decisions is *ONGC v. Sai Rama Engineering Enterprises* [2023 SCC OnLine Del 63]. Mr. Jayant Mehta, learned Senior Counsel for the petitioner has drawn my attention to paragraph Nos. 30 to 35 which read as follows:

“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 filling 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.**

[Emphasis supplied.]

6. In contrast, Mr. Thakur cites a later Division Bench judgment in *ONGC v. Planetcast Technologies Ltd.*, [2023 SCC OnLine Del 8490], in which the Court has held as follows:

“40. It has been argued by the counsel for the appellant that procedural enactments ought not to be considered in such a manner

that it would prevent the Court from meeting the ends of justice. The amendments effected in Commercial Courts Act, 2015 to various provisions of CPC as applicable to the commercial disputes have been geared to achieve such object but being procedural in nature, they are directory in nature and non-compliance thereof would not automatically render the plaint non-est. Reliance had been placed on *Vidyawati Gupta vs. Bhakti Hari Nayak* (2006) 2 SCC 777, wherein the Supreme Court after noting the celebrated decision of the Supreme Court in the case of *Salem Advocate Bar Association vs. Union of India* (2003) 1 SCC 49, the effect of the amendments introduced in the Code by the amending Act 46 of 1999 and 22 of 2002, reiterated the principle that rules or procedure are made to further the cause of justice and not to obstruct the same.

41. Petitions under Section 34 of the Act, 1996 fall within the jurisdiction of the Commercial Division of the High Court, making the Commercial Courts Act, 2015 applicable to such petitions. The prerequisite of filing a Statement of Truth has been emphasised in Order XI Rule 1 C.P.C. as amended under Commercial Courts Act, 2015 which reads as under:

—Order XI Rule 1CPC:

(3) **The plaint shall contain a declaration on oath from the plaintiff that all documents in the power, possession, control or custody of the plaintiff, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed and copies thereof annexed with the plaint, and that the plaintiff does not have any other documents in its power, possession, control or custody.**

Explanation.—A declaration on oath under this sub-rule shall be contained in the Statement of Truth as set out in the Appendix.”

42. In this regard, it is pertinent to refer to Section 15A of the Commercial Courts Act, 2015 which provides for the verification of pleadings presented to the commercial courts which reads as under:

—15A. **Verification of pleadings in a commercial dispute. –**

(1) Notwithstanding anything contained in Rule 15, every pleading in a commercial dispute shall be verified by an affidavit in the manner and form prescribed in the Appendix to this Schedule.

(2) An affidavit under sub-rule (1) above shall be signed by the party or by one of the parties to the proceedings, or by any other

person on behalf of such party or parties who is proved to the satisfaction of the Court to be acquainted with the facts of the case and who is duly authorised by such party or parties.

(3) Where a pleading is amended, the amendments must be verified in the form and manner referred to in sub-rule (1) unless the Court orders otherwise.

(4) Where a pleading is not verified in the manner provided under sub-rule (1), the party shall not be permitted to rely on such pleading as evidence or any of the matters set out therein.

(5) The Court may strike out a pleading which is not verified by a Statement of Truth, namely, the affidavit set out in the Appendix to this Schedule.”

43. Section 15A of C.P.C as amended under Commercial Courts Act, therefore, requires that a pleading has to be mandatorily supported by a duly attested affidavit by way of verification failing which the said pleading shall not be permitted to be read as evidence of any manner set out therein. It further provides that any pleadings not verified by a Statement of Truth, namely, the affidavit may be struck out by the Court. It is, therefore, evident that the affidavit by way of the Statement of Truth is mandatorily required to be filed along with the petition in order to be a document worth considering under the law.

44. The pre-requisite of filing the Statement of Truth has been reiterated in the case of Jay Polychem (India) Ltd & Ors. Vs. S.E. Investment Ltd. 2018 SCC OnLine Del 8848, where this Court while dealing with non-filing of Statement of Truth, held that a Statement which is neither signed nor supported by an affidavit cannot be considered as an application under Section 34 of the Act. The Petition thus filed without the Statement of Truth is non-est.

45. Similarly in Director-cum-Secretary, Department of Social Welfare v. Saresh Security Services Pvt. Ltd., (2019 SCC OnLine Del 8503), the petition was filed without a Statement of Truth. The question therefore was whether such a petition could qualify as a filing in law? This question has been a subject matter of several decisions including the one relied upon by the learned counsel for the Respondent. **It has been held that such a petition would not qualify as a filing** and the Court has discouraged litigants to file such petitions in order to avoid the rigour of strict provision of limitation as stipulated under Section 34(3) of the Act.

46. Suffice is it to say, without the Statement of Truth, the filing of the petitions under Section 34 of the Act, 1996 by the petitioners becomes non-est and is reduced to a sheer futile attempt to pause the limitation period from running out. The appellant cannot claim the

benefit of a non-est filing though made within the period of limitation, when the proper filing of the petition was only made after the expiry of the stipulated period of three months and thirty days.”

[Emphasis supplied.]

7. It may be mentioned that the judgment in *Planetcast* has noticed the earlier judgment in *Sai Rama*, which has been referred to in paragraph 34, *albeit* in the context of filing of a copy of the award.

8. It appears to me that there is a clear conflict between the views taken by the two Division Benches. In *Sai Rama*, the requirement of the statement of truth has been described as “procedural” and capable of rectification. A similar argument was taken before the Division Bench in *Planetcast* (para 40), but rejected.

9. The question of requirement of a valid filing arises in several cases under Section 34 of the Act. The point with regard to non-filing of the Statement of Truth is one which requires authoritative clarification in view of the conflicting views taken by the Division Benches.

10. In these circumstances, I am of the view that the matter be referred to a Bench of two or more Judges, as provided for under Rule 2, Chapter II of the Delhi High Court (Original Side) Rules, 2018. The Registry is directed to place the matter before Hon’ble the Acting Chief Justice for reference of the matter to an appropriate Bench.

11. List before the Bench nominated by Hon’ble the Acting Chief Justice on 15.04.2024.

PRATEEK JALAN, J

MARCH 21, 2024

‘Bhupi’/