

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

Reserved on : 13.10.2023

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Pronounced on : 04.12.2023

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O.M.P. (COMM) 302/2019 & I.A. 475/2022

IN THE MATTER OF:

VICEROY ENGINEERING Petitioner

Through: Mr. Percival Billimoria, Senior
Advocate with Mr Shekhar Kumar, Mr Gandharav
Anand, Ms Jasmine Damkewala, Mr Aditya Raj,
Ms. Rachita Sood, Mr. Divyam Khera, Mr Divyam
Khera, Mr Advait Joshi and Ms. Nishtha Tyagi,
Advocates

versus

SMITHS DETECTION VEECON

SYSTEMS PRIVATE LIMITED Respondent

Through: Ms. Payal Chawla, Ms. Latika Arora,
Advocates

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

**I.A. 6933/2022 (u/s 34 (3) of A&C Act for condonation of delay of 25 days
in filing)**

1. By this judgement, I proceed to consider and dispose of the respondent's objections as to the maintainability of the petition on the ground of it being *non-est* and time barred as well as petitioner's application seeking condonation of delay in filing and re-filing of the petition.

2. Pertinently, the petitioner has preferred the present petition impugning the Arbitral Award dated 15.03.2019 (hereafter, referred to as '*the impugned Award*') passed by Sole Arbitrator. Indisputably the impugned Award was rendered and delivered to the parties on the same day.

3. The issues that arise for consideration are whether the petition is liable to be dismissed, due to the initial filing being *non est* and whether the delay in filing and re-filing of the petition has been sufficiently explained.

4. The factual matrix reveals that initially a petition assailing the impugned award was filed with the Registry of this Court on 29.06.2019, i.e., the first day of reopening after the summer vacations. The e-log of the said petition reveals that Registry had raised certain objections. Apparently, instead of filing the petition in the appropriate format, a company petition had been filed. Petitioner concedes that the petition filed on 29.06.2019 was *non est*.

5. Notably, the present petition was filed on 10.07.2019. Registry again raised defects *albeit* different from the earlier ones. Petitioner cleared the defects on 30.07.2019. Another set of defects were pointed out on 31.07.2019 which were cleared on 01.08.2019. Lastly, the defects were pointed out on 02.08.2019, which were cleared on the same day.

6. Petitioner claims that the three months statutory period of limitation prescribed under Section 34 of the A&C Act computed from the date of receipt of the impugned award i.e., from 15.03.2019 expired during the period the Registry was closed on account of summer vacations i.e., on 15.06.2019. The present petition filed on 10.07.2019 is within the extended period of limitation, the delay being only 25 days, which has been sufficiently explained.

7. Respondent while referring to the 'objection sheets' contended that not only was the filing of the petition on 10.07.2019 time barred, the same was also *non est*, the defects being non-curable. Petitioner has also not explained 25 days' delay from 10.07.2019 to 02.08.2019. The delay in re-

filing is also required to be satisfactorily explained. While referring to Rule 3 of Chapter IV of the Delhi High Court (Original Side) Rules, 2018, it was contended that the defects raised by the Registry were to be necessarily removed within a maximum period of seven days and a total aggregate period of 30 days. Petitioner failed on both counts and thus the last re-filing done on 02.08.2019 ought to be considered as the date of filing of the petition thereby making the total delay to be of 48 days, which cannot be condoned. Lastly, it was contended that in the captioned application, petitioner's stand is contrary to its earlier stand and further, the application itself is filed belatedly on 03.05.2022 essentially being an afterthought, and ought not to be considered. Reliance was placed on the decisions in DDA v. Durga Construction Co.¹, DSI IDC Ltd. v. Mapsa Tapes Pvt. Ltd.², Delhi Transco Ltd. & Anr. v. Hythro Engineers Pvt. Ltd.³, Telecommunication Consultants India Ltd. v. IDEB Projects (P) Ltd.⁴ and National Highways Authority of India v. Patel-Knr (JV)⁵ among others.

8. In rejoinder submissions, learned Senior Counsel for the petitioner submitted that respondent's reliance on 'Codes' mentioned in the log information provided by the Registry were not the correct indicators as they do not point out the exact defect and rather refer to a pool of defects. In the e-log, the exact defect is pointed out. Each time the petitioner removed the defects, the Registry pointed out fresh defects. Reference was made to the decision of a Coordinate Bench of this Court in Alka Kasana v. Indian

¹ 2013 (139) DRJ 133

² 2021 SCC OnLine Del 2728

³ 2012 SCC OnLine Del 3557

⁴ Judgement dated 16.02.2018 in FAO(OS) 321/2017

⁵ 2023 SCC OnLine Del 1354

Institute of Technology⁶. Attention of the Court was also invited to a decision of the Coordinate Bench in New India Assurance Co. Ltd. v. Rudraksh Laminates Pvt. Ltd.⁷, in support of the submissions that mere increase in number of pages would not render the initial filing *non est*.

9. Section 34 of the A&C Act prescribes grounds for making an application to challenge an award but does not specify any procedure for filing such an application. What would amount to a *non est* filing is neither prescribed in the A&C Act nor in the Delhi High Court Rules. Whether a filing is *non est* or not would depend upon the defects raised on a case-to-case basis. If the defects raised are only procedural and curable, the filing cannot be termed as *non est*.

10. The issue in question arose in the case of Oriental Insurance Company Ltd. v. AIR India Ltd.⁸ The Division Bench opined that a *non est* filing would be the one where the filing is without any signatures of either of the parties or its authorised and appointed counsel. It was further opined that if the petition is signed by the party and its counsel, and is accompanied by a *Vakalatnama* duly signed by both, the filing cannot be called *non est*. The right to file objections under Section 34 was further held to be a valuable right.

11. The issue again resurfaced in Oil and Natural Gas Corporation Ltd. v. Joint Venture of M/s. Sai Rama Engineering Enterprise (SREE) and M/s. Megha Engineering and Infrastructure Ltd. (MEIL)⁹. The Division Bench opined thus:-

⁶ 2015 SCC OnLine Del 11455

⁷ 2021 SCC OnLine Del 3186

⁸ 2021 SCC OnLine Del 5139

⁹ Judgement dated 09.01.2023 in FAO(OS)(COMM) 324/2019

“xxx

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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37. *It is, thus, necessary to bear in mind the distinction between the procedural requirements that can be cured and those defects that are so fundamental that the application cannot be considered as an application under Section 34 of the A&C Act, at all.*

xxx

40. *It is relevant to note that the affidavits accompanying the application filed on 20.02.2019 were signed but not attested and to that extent, the defects as pointed out are not accurate. It is clear from the above, that none of the defects are fundamental as to render the application as non est in the eyes of law. All the defects, as pointed out, are curable defects. It is settled law that any defect in an affidavit supporting pleadings can be cured. It is seen from the record that the filing was also accompanied by an executed vakalatnama, however, the same was not stamped. It is also settled law that filing of a court fee*

is necessary, however, the defect in not filing the court fee along with the application can be cured. In view of above, we are unable to accept that the application, as filed on 20.02.2019 or thereafter on 23.02.2019, was non est.

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.

xxx”

12. The aforesaid opinion was reiterated by a Coordinate Bench of this Court in Ambrosia Corner House Pvt. Ltd. v. Hangro S. Foods¹⁰ and by this Court in Ravi Batra v. New IFS Cooperative Housing Society Ltd.¹¹

13. In the above backdrop, this Court proceeds to examine the defects pointed out by the Registry from time to time. On 12.07.2019, the Registry pointed out following defects:-

“Defect Marked by Registry on 12.07.2019

Total 174 pages filed without bookmarking and without complete pagination;

Petition is not maintainable as per pecuniary jurisdiction;

Affidavits and statement of truth not attested.

¹⁰ 2023 SCC OnLine Del 517

¹¹ 2023 SCC OnLine Del 4556

Highlighting/bold and underline not allowed in the Petition;

In addition to the E-filing it is mandatory to file hard copies of the fresh matters.”

14. On the aspect of what would amount to *non est* filing, respondent's reliance on the decision in National Highway Authority of India (Supra), is found misplaced as in the said case, the petition was filed without the approval of competent authority. The petition was not even accompanied by the award. Further, in view of the subsequent exhaustive decision of the Division Bench in ONGC (Supra) extracted hereinabove, this Court is of the opinion that looking into the nature of defects pointed out by the Registry on 12.07.2019, the petition filed on 10.07.2023 cannot be termed as invalid or *non est*. The defects were procedural and curable. Petitioner has further explained that the increase in number of pages in the subsequent filing was on account of filing of true-typed copies of documents. For instance, true-typed copies of TDS certificates alone resulted in an increase of 50 pages.

15. Coming to the second aspect i.e., whether the petitioner has satisfactorily explained the delay in filing and re-filing the petition. Pertinently, petitioner has filed the captioned application thereby explaining that the 90 days' period to file the petition expired on 15.06.2019. The petition could not be filed from 15.06.2019 to 30.06.2019 as the Registry of the Court was closed on account of summer vacations. The Registry was closed for non-urgent filing. The petitioner became aware of the objections raised by the Registry to the initial filing only on 04.07.2019 whereafter, the present petition was filed on 10.07.2019 with a delay of 25 days. The Court while considering an application for condonation of delay should be liberal and justice oriented. Proviso to Section 34(3) of the A&C Act vests

discretion in the Court to condone the delay for a further period not exceeding 30 days. The delay of 25 days, in the opinion of the Court has been satisfactorily explained by the petitioner and is thus condoned.

16. Now, the question remains whether delay in re-filing is satisfactorily explained and whether the non-removal of the objections raised within a period of 7 days would render the subsequent re-filing to be considered as a fresh filing thereby adding further days to the delay.

17. Chapter IV of Delhi High Court (Original Side) Rules, 2018 provides that defects pointed out by the Registry are to be removed within the stipulated period of time. The relevant portion of the Rules is extracted below:-

“xxx

3. *Defective pleading/document – (a) Upon scrutiny, if any pleading(s)/document(s) are found defective, the Deputy Registrar/Assistant Registrar, Incharge of the Filing Counter, shall specify the objection(s), a copy of which will be kept for the Court Record, and return for removal of objection(s) and re-filing within a time not exceeding 7 days at a time and 30 days in aggregate. On every re-filing caveat clearance shall be taken. In addition, the party must again serve the corrected copy upon the caveator(s) who had a valid caveat at the time of the first filing.*

(b) If the pleading(s)/document(s) are not taken back for removal of objection(s) within 30 days time allowed under sub-Rule (a), it shall be listed before the Court for appropriate orders.

The 30 days' period for the purpose of (a) and (b) above, shall commence from the date when the Registry raises the objections on the pleading/document filed.

(c) If the pleading(s)/document(s) are filed beyond the time

allowed under sub-Rule (a) it shall be accompanied with an application for condonation of delay in re-filing.

xxx”

18. Filing of the petition under Section 34 of the Act has strict timelines. The timelines have been held to be inflexible beyond the total period of 120 days, provided the petitioner explains the delay of 30 days beyond the permissible time limit of 90 days. Once the petition has been found to be filed within the extended permissible time limit, would the Court be equally strict if the objections are not removed within the time granted by the Registry. Pertinently, in the context of present petition, Registry raised objections thrice. As noted above the objections were not of such a nature as would render the filing *non est*. Pertinently, the Registry had not declined registration of the petition. Even if the Registry declines registration, the Court has ample power to condone the delay in re-filing. This power has to be exercised liberally although cautiously to avoid delay by an unscrupulous litigant. In the opinion of the Court, respondent's contention that one set of objections, if not removed within a period of 7 days, should result in the drastic consequence of petitioner being non suited, especially when the entire objections were removed within a total aggregate period of 30 days, is baseless and merits rejection.

19. At this stage the Court also takes note of the decision in Northern Railway v. Pioneer Publicity Corporation Pvt. Ltd.¹², wherein the Supreme Court clarified that Section 34 of the A&C Act has no applicability to re-filing of the petition. The Court negated the contention that re-filing beyond

¹² (2017) 11 SCC 234

7 days would amount to fresh institution. The relevant extract reads as under:-

“xxx

4. ...It was submitted on behalf of the respondent that Rule 5(3) of the Delhi High Court Rules states that if the memorandum of appeal is filed and particular time is granted by the Deputy Registrar, it shall be considered as fresh institution. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing.

5. We are not inclined to accept this contention, particularly since the petitioner has offered an explanation for the delay for the period after the extensions.

xxx”

20. Although the respondent has cited number of authorities but in view of the settled law, each one of them need not be gone into. Resultantly, the application is allowed, and the delay is condoned.

21. The application is disposed of.

O.M.P. (COMM) 302/2019

List on 20.03.2024.

**MANOJ KUMAR OHRI
(JUDGE)**

DECEMBER 4, 2023

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