

* IN THE HIGH COURT OF DELHI AT NEW DELHI

*Reserved on:*13.01.2023

*Date of decision:*30.01.2023

+ O.M.P. (COMM) 323/2022 & I.As. 12200/2022, 12201/2022, 12202/2022

AMBROSIA CORNER HOUSE PRIVATE LIMITED

..... Petitioner

Through: Mr.Lalit Bhasin, Ms.Nina Gupta,
Ms.Ananya Marwah, Mr.Ajay Pratap
Singh, Advs.

versus

HANGRO S FOODS Respondent

Through: Mr.V.K.Garg, Sr. Adv. with Mr.Avneesh
Garg, Mr.Parv Garg, Mr.Pawas
Kulshrestha, Mr.K.S.Rekhi, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

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 14.03.2022 passed by the learned Sole Arbitrator.

2. The learned senior counsel for the respondent has raised a preliminary objection on the maintainability of the present petition contending that the same has been filed beyond the period prescribed in Section 34(3) of the Act, including the maximum period of delay that can be condoned by this Court in filing of the present petition.

3. At the outset, a few admitted facts deserve to be noticed:-

(a) The date of the Impugned Award is 14.03.2022;

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 30.01.2023

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O.M.P. (COMM) 323/2022

- (b) The petitioner does not dispute that a copy of the Award was supplied by the learned Arbitral Tribunal to the petitioner on the same day and, therefore, for the filing of the present petition, the period shall commence from 14.03.2022;
- (c) The period of three months prescribed under Section 34(3) of the Act for filing of the petition expired on 13.06.2022;
- (d) The Court was closed for summer vacation between 04.06.2022 till 01.07.2022. For the purpose of limitation, by the Notification dated 20.05.2022 issued by the High Court, the Court was deemed to have re-opened only on 04.07.2022;
- (e) The petition was filed by the petitioner on 04.07.2022. The same was, however, marked defective by the Registry of this Court with the following observation:-

“TOTAL 82 PAGES FILED, NO AWARD FILED, NO DOCUMENTS FILED, NO BOOKMARKING DONE, NON OF THE AFFIDAVIT ATTESTED. CANNOT RAISE PROPER OBJECTIONS, BE FILED AS PER THE NORMS GIVEN FOR E FILING ON THE WEB PORTAL OF DELHI HIGH COURT.”

- (f) The petition was thereafter re-filed by the petitioner on 26th, 27th and 29th July, 2022, when again certain defects were found in the filing of the petition, and the petition was returned to the petitioner for re-filing.
- (g) The petitioner then re-filed the petition on 01.08.2022, when it was accepted for listing by the Registry of this Court.

4. Based on the objections that were found by the Registry in the filing by the petitioner on 04.07.2022, the learned senior counsel for the respondent submits that the said filing was ‘non-est’. He submits that the

Office Report indicates that only 82 pages were filed on 04.07.2022. The filing was without a copy of the Impugned Award or the documents in support of the grounds for challenge. Even the affidavit in support of the petition was not attested through the Oath Commissioner. He submits that the petitioner eventually filed the petition only on 26.07.2022, running into 715 pages. He submits that though the said petition was also returned by the Registry raising some defects, at best, 26.07.2022 can be considered as the date of first filing of the petition. In support he places reliance on the judgments of this Court in *DDA v. Durga Construction Co.*, (2013) 139 DRJ 133; *Union of India v. Bharat Biotech International Ltd.*, (2020) 268 DLT 140; *Oil and Natural Gas Corporation Ltd. v. Joint Venture of M/s Sai Rama Engineering Enterprises (SREE) & M/s Megha Engineering & Infrastructure Limited (MEIL)*, 2019 SCC OnLine Del 10456; *Oil and Natural Gas Corporation Ltd. v. Planetcast Technologies Ltd.*, (2020) 271 DLT 474; *Chintels India Limited v. Bhayana Builders Pvt. Ltd.*, (2020) 270 DLT 381; and *Executive Engineer National Highway Division v. S&P Infrastructure Developers (P) Ltd.*, 2022 SCC OnLine Del 1859.

5. The learned senior counsel for the respondent further submits that in terms of the proviso of Section 34(3) of the Act, a delay of not more than 30 days in filing of the petition can alone be condoned by this Court. In support he places reliance on *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470; *State of H.P. v. Himachal Techno Engineers*, (2010) 12 SCC 210; and *State of Maharashtra v. Ramdas Construction Co.*, (2021) 4 SCC 629. He submits that as the petition was filed only on 26.07.2022, that is after the expiry of 30 days period from 13.06.2022,

this Court would not have the jurisdiction to condone the delay in filing of the petition.

6. The learned senior counsel for the respondent submits that the period of three months prescribed for filing of the petition under Section 34 of the Act having expired on 13.06.2022, which is during the summer vacation of this Court, the petition, in terms of Section 4 of the Limitation Act, 1963 (hereinafter referred to as the 'Limitation Act'), could have been filed on the date of the re-opening of the Court after the summer vacation, which was 04.07.2022. As the filing of the petition on 04.07.2022 was '*non-est*', the petitioner is not entitled to seek benefit of Section 4 of the Limitation Act.

7. Relying upon the judgment of this Court in *Telecommunication Consultants India Ltd. v. IDEB Projects (P) Ltd.*, 2018 SCC OnLine Del 7971, he submits that for the purposes of the 30 days' period, which is the maximum condonable period of delay, the petitioner is not entitled to seek the benefit of Section 4 of the Limitation Act. The 30 days' period would commence from 13.06.2022 itself and not from 04.07.2022.

8. The learned senior counsel for the respondent further submits that even if the period of three months from the date of the receipt of the Award is to be calculated by excluding the ten days that fell within the summer vacation of this Court, that is, 04.06.2022 to 13.06.2022, then also the period of three months would expire on 14.07.2022. The petition having been filed on 26.07.2022, was, therefore, beyond the prescribed period. As the petitioner has not filed an application seeking condonation of delay in filing of the petition, therefore, the petition is liable to be dismissed as having been filed beyond the prescribed period.

9. On the other hand, the learned counsel for the petitioner submits that the petition having been filed on 04.07.2022, is filed within the period prescribed in Section 34(3) of the Act. He submits that though the petition was not accompanied with a copy of the Impugned Award, the same contained the complete particulars and grounds for challenge of the Award. He submits that the petition was signed on each page by the Director of the petitioner Company and was also signed by the counsel, whose *vakalatnama* was also filed.

10. Placing reliance on the judgment dated 26.11.2021 of this Court in FAO (OS) (COMM) 6/2020 titled ***Oriental Insurance Co Ltd. v. Air India Ltd.***, he submits that a Division Bench of this Court has held that it is only where the petition is filed without signatures of either the party or its authorized or appointed counsel, that the filing of the petition can be considered as *non-est*.

11. He further places reliance on the judgment dated 09.01.2023 passed in FAO (OS) (COMM) 324/2019 titled ***Oil and Natural Gas Corporation Ltd. v. Joint Venture of M/s Sai Rama Engineering Enterprises (SREE) & M/s Megha Engineering & Infrastructure Limited (MEIL)***, to submit that merely because the affidavit accompanying the petition was not attested, it cannot be said that the filing was *non-est*. He submits that the non-filing of the copy of the Arbitral Award and/or attested affidavit are curable defects.

12. The learned counsel for the petitioner further submits that in terms of the Notification dated 20.05.2022 issued by the High Court of Delhi, it was prescribed that the limitation will not run during the vacation period for the purposes of institution of civil and criminal cases. He submits

that, therefore, the entire period of summer vacation has to be excluded for purposes of calculating the three months' period as prescribed in Section 34(3) of the Act. He submits that, excluding the period of the summer vacation, the petition filed even on 26.07.2022 would be within the period of limitation of three months.

13. He further submits that even if 04.07.2022 is considered as the date on which the period of three months expire, in view of the Notification dated 20.05.2022 of the High Court of Delhi, the period of 30 days, that is the maximum period by which the delay in filing of the petition can be condoned, would expire on 03.08.2022. He submits that in the facts of the present case, the petitioner has made out a case for condonation of such delay. He submits that filing of an application for seeking condonation of the delay is not a mandatory requirement; reasons for the delay can also be explained orally.

14. In rejoinder, as far as the Notification dated 20.05.2022 of the High Court of Delhi is concerned, the learned senior counsel for the respondent submits that the Notification has to be read in conjunction with Section 4 of the Limitation Act. He submits that as the said Notification had further stipulated that the office of the Court will remain open from 10:00 AM to 5:30 PM except for second Saturday, fourth Saturday, Sundays and other holidays, Clause 5 of the Notification merely clarifies that in spite of opening of the office of the Court, the period of limitation will not run during the period of summer vacation. This was necessitated as otherwise, in view of the judgment of the Supreme Court in *Ajay Gupta v. Raju Alias Rajendra Singh Yadav*, (2016) 14 SCC 314, if the Registry

of the Court is open, the benefit of Section 4 of the Limitation Act would not be available to the litigant.

15. I have considered the submissions made by the learned counsels for the parties. The law on what can be considered as a ‘*non-est*’ filing for purposes of Section 34 of the Act is no longer *res integra* and has now been settled by the judgments of the Division Bench of this Court in *Oriental Insurance Co Ltd.* (Supra) and *Oil and Natural Gas Corporation Ltd.* (Supra).

16. In *Oriental Insurance Co Ltd.* (Supra), a Division Bench of this Court 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.”*

17. In *Oil and Natural Gas Corporation Ltd.* (Supra), another Division Bench of this Court has further held as under:-

“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.”*

18. From the above judgments, it is clear that a more liberal approach is to be adopted by the Court while considering whether the filing should be treated as ‘non-est’. In ***Oriental Insurance Co Ltd.*** (Supra), it has been held that a filing can be considered as ‘non-est’ if it is filed without signatures of either the party or its authorized or appointed counsel. Though in ***Oil and Natural Gas Corporation Ltd.*** (Supra), it has further been held that the filing may be considered as ‘non-est’ where the

application as filed is intelligible or is not accompanied with a copy of the Impugned Award or does not set out the material particulars, including the names of the parties and the grounds for impugning the Award, it has been clarified that the Court must assess the facts of each case while determining the issue of the filing being considered as ‘*non-est*’.

19. In the present case, the learned counsel for the petitioner has submitted that the petition filed on 26.07.2022 was the same as the petition filed on 04.07.2022. The petition as filed on 04.07.2022 was duly signed by the Director of the petitioner Company on all pages of the petition, and even by the counsel for the petitioner, whose *vakalatnama* was also filed with the petition. From the perusal of the index of the petition filed on 04.07.2022, as supplied by the learned counsel for the petitioner during the course of the hearing, it appears that the petitioner also was to file the documents, including copy of the Impugned Award, in a separate e-folder, that is, part IV as prescribed in the Delhi High Court (Original Side) Rules, 2018. The same appears to have not been filed. The petitioner has thereafter re-filed the petition after removing the defects on 26.07.2022, wherein all documents, including the Impugned Award was filed. In my opinion, therefore, the first filing on 04.07.2022 cannot be treated as ‘*non-est*’ filing. At best, the petitioner committed an error in not filing the documents in a separate folder as prescribed in the Delhi High Court (Original Side) Rules, 2018.

20. As observed by the Division Bench in *Oriental Insurance Co Ltd.* (Supra), the right to prefer objections to assail the Arbitral Award under Section 34 of the Act, though extremely limited, is a valuable right; the

same 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. In the present case, in my opinion, the conduct of the petitioner clearly evidences its endeavour to file a proper petition under Section 34 of the Act on 04.07.2022, that is, the date of re-opening of the Court for the purposes of limitation in terms of Section 4 of the Limitation Act. The petition was, therefore, filed within the period prescribed under Section 34(3) of the Act.

21. In view of the above, I need not go into the issue of the effect of the Notification dated 20.05.2022 of this Court.

22. Accordingly, the objection of the respondent on the present petition being barred by the provisions of Section 34(3) of the Act is rejected.

23. List the petition for preliminary hearing on 27th March, 2023.

NAVIN CHAWLA, J.

JANUARY 30, 2023/rv/Ais