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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 03.09.2019

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Pronounced on: 01.10.2019

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O.M.P. (COMM) 97/2019

OIL AND NATURAL GAS CORPORATION LTD.

..... Petitioner

Through: Mr. Amitesh Mishra, Mr. Gunjan
Arora, Advocates

versus

**JOINT VENTURE OF M/S SAI RAMA ENGINEERING
ENTERPRISES (SREE) & M/S MEGHA ENGINEERING &
INFRASTRUCTURE LIMITED (MEIL)**

..... Respondent

Through: Mr. Purvesh Buttan, Mr. Fahad
Imtiaz, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

I.A. No. 4451/2019 (Delay 27 days in filing)

1. This is an application seeking condonation of delay of 27 days in filing the petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging an Award dated 23.10.2018 of the Arbitral Tribunal adjudicating the disputes between the parties.
2. When the petition was listed on 13.03.2019, the respondent had raised a preliminary objection that the petition is barred by limitation as provided under Section 34(3) of the Act. He submitted that various objections were raised by the Registry on repeated filing of the petition and submitted that the petition can be considered to have been filed for the first time only on 25.02.2019, which is beyond the extended period of 30 days, after the three months period prescribed

under Section 34(3) of the Act. Learned senior counsel of the petitioner had sought time to file an additional affidavit explaining the refiling as well as making other submissions on this preliminary objection.

3. On 10.04.2019, this Court had, after perusing the affidavit dated 18.03.2019 filed by the petitioner, noted in its order the case set up by the petitioner, which was that though he had filed the correct petition along with affidavit and vakalatnama on 23.01.2019, but by mistake, CD of another case was filed. The Court had then directed the petitioner to file on record, a copy of the petition that was stated to be filed on 23.01.2019, along with copies of the affidavit and the Vakalatnama claimed to have been signed by the authorized representative of the petitioner on 21.01.2019.
4. However, when the matter came up on 01.05.2019, counsel for the petitioner submitted that the documents directed to be filed on 10.04.2019 had been destroyed and that the petitioner did not want to file an affidavit on this aspect.
5. On 11.07.2019, petitioner prayed for time to file an additional affidavit explaining the delay in filing/refiling. Respondent was permitted to file a reply thereto.
6. Matter was taken up for hearing on the application for condonation of delay on 03.09.2019, with the consent of the parties.
7. Both parties have filed their written submissions on the aspect of delay and have been heard at length.
8. Learned counsel for the petitioner submits that Section 34(3) of the Act provides a limitation period of three months from the date of

receipt of the Arbitral award by a party. However, the Courts are empowered to condone a delay not exceeding 30 days, if 'sufficient cause' is shown for the delay. He submits that in the instant case, the award was received by the petitioner on 23.10.2018. As per Section 34(3) of the Act, the time period of three months expired on 23.01.2019 and the extended period of 30 days expired on 22.02.2019. He further submitted that the petitioner is entitled to cure the defects pointed out by the Registry, if any, and re-file within a time not exceeding 7 days at a time and 30 days in aggregate, from the date of marking of the defects under Rule 3 of Chapter IV of the Notification No. 722 of the Delhi High Court dated 16.10.2018, published in the Delhi Gazette on 18.10.2018. The submission is that assuming, for the sake of arguments, that the filing on 20.02.2019 is considered to be the date of 'first' filing, the same would still be within the 30 days extended period, beyond the three months statutory period prescribed under Section 34(3) of the Act. The petitioner then had time till 22.03.2019 under the Delhi High Court Rules, to cure the defects pointed out by the Registry.

9. The learned counsel next submitted that on 22.02.2019, refiling of the master index was done by the petitioner's counsel at 4 P.M. The main petition was not uploaded on that day by the Registry since it was past 4 P.M. and the full file running into more than 6300 pages was uploaded on the next day i.e. 23.02.2019.
10. Being confronted with a date of 25.02.2019 on the index, learned counsel explained that since refiling was done on 25.02.2019, the date was changed as per the practice followed. Whenever the documents

are refiled, the Registry insists on putting the date of re-filing on the Index. It is for this reason that there are different dates on the petition and applications. Finally, by 25.2.2019, all the minor defects were cleared and petition was marked for listing. He, thus, submits that petition was filed within the 30 days extended period under Proviso to Section 34(3) of the Act and the delay in re-filing deserves to be condoned.

11. Learned counsel contends that this Court as well as the Apex Court has in a catena of judgments such as *Uday Shankar Tariyar Vs. Ram Kalewar Prasad Singh & Anr. (2006) 1 SCC 75*, *Vidyawati Gupta & Ors. Vs. Bhakti Hari Nayak & Ors (2006) 2 SCC 777*, *Alka Kasana Vs. Indian Institute of Technology (2015) SCC Online Del 11455*, held that Rules of procedure are made to further the cause of justice and not to prove a hinderance thereto.
12. *Per contra* learned counsel for the respondent has vehemently opposed the condonation of delay in filing/re-filing the petition on several grounds.
13. Learned counsel submitted that the award was received by the petitioner on 23.10.2018. Excluding the date of receipt of the award, the 3 months period ended on 23.01.2019 and excluding the last day of the 3 months, the 30 days period ended on 22.02.2019. At the outset it is contended that vide order dated 10.04.2019, copy of the petition claimed to be filed on 23.01.2019, was directed to be filed along with copies of affidavits and Vakalatnama. Subsequently, it was stated by the petitioner that these documents were destroyed. Hence, the petitioner is unable to prove that any petition was filed on the said

date. The submission was that one fails to understand what was the occasion/necessity to destroy a signed Vakalatnama and signed pages of the petition as well as the affidavits.

14. Learned counsel further submitted that from paragraphs 16 and 17 of the affidavit filed by Mr. Sudhish Kumar, it appears that the framework of the petition was changed and this necessitated fresh signing of all documents including vakalatnama and affidavits on 19.02.2019 and that is the reason why the affidavits were attested later. However, according to him, even this submission of the petitioner is false, as neither the petition nor the applications are dated 19.02.2019. The applications filed along with the main petition bear the date of 21.02.2019 and the supporting affidavits to the applications are dated 20.02.2019. Further, while the main petition is dated 22.02.2019, the supporting affidavit and the supporting statement of truth are dated 20.02.2019, which clearly shows that when the affidavits were attested, the applications and the petition were non-existent. Learned counsel has drawn the attention of this Court to pages 87 to 92 and the applications for stay and exemptions with supporting affidavits, to point out the discrepancy in the dates.
15. Learned counsel, in support of this contention, has placed reliance on a judgment in the case of ***INX News Pvt. Ltd. Vs. Pier One Construction Pvt. Ltd.***, reported as ***2013 SCC OnLine Del 4508***, para 9 of which is reproduced as under:

“...When petitions are returned the counsels involved are not entitled to change the framework of the petitions. The petitions are returned only for removing objections pointed out by the registry. If the amendments are required to be made, the correct course would be to

move the concerned court after the petition is listed in court, so that steps are taken in accordance with law, to incorporate the necessary amendments.”

16. Learned counsel vehemently points out that the falsity of the statement in the affidavit of Mr. Sudhish Kumar could also be seen from the fact that notice of motion, urgent application and Memo of Parties are dated 21.02.2019 and thus none of these documents including the stay and exemption applications were prepared on 19.2.2019, as falsely stated in the affidavit except for the Vakalatnama which is dated 19.02.2019. Learned counsel further submits that the petitioner has all through been blaming the clerk for the filing, in the manner in which it has been done, whereas as per the Delhi High Court Rules, it is the petitioner or his duly authorized agent or an Advocate who is permitted to file and is responsible for the same.
17. The next contention of the counsel for respondent is that no report of caveat was taken until 25.02.2019, which is also against Rule 3 of the Delhi High Court Rules and copy of the petition was also not served on the respondent.
18. The next contention is that the stand of the petitioner that even if 20.02.2019 is taken as a date of ‘fresh’ filing, the filing of the petition is within the extended period of 30 days, is also not sustainable in law. He submits that on 21.02.2019, the defects pointed out by the Registry were that (i) the petition was not properly signed ; (ii) the affidavits were not signed and not attested; ;(iii) Vakalatnama not filed; (iv) Court fees not paid and (vi) Caveat report not taken and no copy served on the respondent. Hence even on 20.02.2019 filing was not ‘proper’ and cannot be construed as filing, in the eyes of law.

19. The respondent has, in his support, relied upon the following judgments:
- (i) ***SKS Power Generation (Chhattisgarh) Ltd. Vs. ISC Projects Private Limited*** (in O.M.P. (COMM) 132/2019 Date of decision 3.4.2019).
 - (ii) ***Sravanthi Infratech Private Limited Vs. Green Power Equipment (China) Co. Ltd.*** (in O.M.P.(COMM) 470/2015 Date of decision 19.10.2016).
 - (iii) ***Ahluwalia Contracts (India) Ltd. Vs. Housing and Urban Development Corporation*** (in O.M.P. 1122/2013 Date of decision 4.4.2016).
 - (iv) ***INX News Pvt. Ltd. (supra).***
 - (v) Reliance is also placed on the relevant portions of the Delhi High Court (Original Side) Rules, 2018.
20. Three crucial issues arise for consideration of this Court from the above narrative:
- a) Whether the petition is filed within the statutory period of 3 months prescribed under section 34 (3) of the Act.
 - b) In the alternate, whether the petition was filed within the extended period of 30 days under the Proviso.
 - c) Whether the filing in the first or the second instance is a 'non-est' filing.
21. To answer these questions, firstly the statutory provisions and the law would have to be examined. The statutory period for filing an application for setting aside of the Award is provided in sub-Section (3) of Section 34 of the Act, which reads as under:

“(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

22. Reading of the Section 34(3) of the Act, leaves no manner of doubt that the period of limitation is three months. If the objections are filed beyond three months, then the delay in filing can be condoned upto a maximum period of 30 days and no more. Condonation of delay in the extended period of 30 days, is at the discretion of the Court, provided, the party satisfies the Court that there was ‘sufficient cause’ for the delay. Delay in initial filing, beyond 30 days cannot be condoned, even for one day.

23. The Apex Court in the case of ***Union of India vs. M/s. Popular Construction 2001 (8) SCC 471*** has clearly held that the legislative intent of providing a strict and non-flexible limitation period should not be defeated by condoning the delay, without ‘sufficient cause’.

The relevant para is as under:

“14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by Court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need “to minimize the supervisory role of courts in the arbitral process”. This objective has found

expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain times:

“5. Extent of judicial intervention. – Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

24. In the case of *Simplex Infrastructure Limited vs. Union of India* 2019 (2) SCC 455, the Apex Court, relying on the judgment in the case of **Popular construction (supra)** interpreted the words “but not thereafter” occurring in Section 34(3) of the Act, and emphasized the importance of limitation in filing an application under Section 34 and held that not a day beyond 120 days from the date of receipt of the Award can be condoned by the Court.
25. A reading of these judgments is a pointer to the fact that while in condonation of delay, the Courts have been generally liberal, but when it comes to Section 34(3) of the Act, the limitation period is inelastic and meant to be strictly followed. Therefore, under this jurisdiction, the applicant would have to pass a higher threshold of showing that his conduct was of due diligence and dispatch and a casual explanation for delay cannot and should not be accepted. The applicant has to show not only due diligence in filing within the 30 days period, but more importantly, “sufficient cause” has to be shown, which prevented the applicant for 3 months in filing the petition.
26. The stand of the petitioner as reflected in the initial application filed by the petitioner for condonation of delay, together with the various affidavits subsequently filed, pursuant to the directions of this Court, can be summarized as under:

Stand taken in I.A. No. 4451/2019 (initial application for condonation of delay)

- Award dated 23.10.2018 received by the petitioner on 23.10.2018. Three months expired on 23.01.2019.
- The Petition prepared, signed by the authorized representative. Signed copy together with signed and notarized affidavit handed over for filing in the evening of 21.01.2019. These were about 6000 pages in all.
- Filed electronically on 23.01.2019. Thus, petition filed within period of limitation.
- The Registry raised objection on 29.01.2019. Discovered by the petitioner that wrong file/CD uploaded, relating to some other subject matter.
- Counting from 29.01.2019, the thirty days period ended on 28.02.2019, as per Delhi High Court Rules.
- Petition refiled on 25.02.2019. Thus within thirty days.
- The petition initially filed on 23.1.2019 within limitation, Registry did not direct the petitioner to file an application seeking condonation of delay.
- On 13.03.2019, the respondent took objection before the Court qua certain defects.
- The petition re-filed on 20.02.2019 after getting fresh affidavits signed and attested on 20.02.2019. The Court fees was also purchased on 20.02.2019 and filed on the same day.
- Without prejudice that the initial filing was done on 23.01.2019, even if 20.02.2019 is taken to be the date of 'Fresh' filing, the

filing would be within the extended period of thirty days beyond the three months statutory period. Extended time expired on 24.02.2019, which was a Sunday, and therefore, the limitation would expire on 25.02.2019. Thus, there is a delay of 27 days in filing the petition taking the initial date of filing to be 20.02.2019.

II. Stand in the affidavit dated 19.03.2019 filed pursuant to order dated 13.03.2019

- The finalized petition together with signed and attested affidavits handed over to the clerk of petitioner's counsel on 21.01.2019 for filing.
- The Regular clerk of the petitioner's counsel was on leave. The petition was filed for the first time on 23.01.2019. An outside agency was engaged to do the electronic filing. The electronic file on a CD was supplied to a person, namely, Ram who was a clerk.
- A diary number was generated and an email was received acknowledging the filing on 23.01.2019.
- On or around 29.01.2019, the uploaded document was checked by the Registry and objections were marked. It was learnt that the CD pertained to some other matter.
- On 04.02.2019, fresh CD filed, but on 05.02.2019, it was realized it was a CD relating to another matter between the same parties. Some other defects were raised by the Registry, such as paragraphs relating to territorial and pecuniary jurisdiction were missing, Court fees was not affixed, signatures

of the petitioner or the petitioner's authorized representative were not there on the Vakalatnama, certain documents which formed a part of the arbitral record were not filed, etc.

- On 19.02.2019, fresh Vakalatnama signed and the signatures were identified. Some pages in the petition and the applications were changed, after modification. Being evening time, fresh affidavits could not be signed or attested and the same were signed and attested on 20.02.2019.
- On 20.02.2019, requisite Court fees was purchased and affixed on the petition and the Vakalatnama. Finally file uploaded and refiled on 20.02.2019.
- An email pointing out certain defects was received by the petitioner's counsel on 21.02.2019. The defects pertaining to line spacing, file volumes, underlining etc. were cleared and refiled was done on 22.02.2019.
- On 23.02.2019, some more defects were pointed out and after clearing the defects, the petition was refiled on the same day.
- Vide email dated 23.02.2019, again defects were marked by the Registry. After removing the same, the petition was refiled on 25.02.2019.

27. The subsequent three Affidavits are verbatim narrations of the application filed earlier.
28. The main contention of the learned counsel today, before this Court is that even if it is assumed for the sake of arguments that the filing of the petition on 23rd January, 2019 was not a proper filing, even then

the petition was filed without any defects on 20.02.2019 and even if this is taken as the date of 'fresh' filing, the petition would be within a period of 30 days, after expiry of the statutory period of three months. In any case all the major defects were cleared by 22.2.2019 which was the last day of the 30 days extended period and thus petitioner is entitled to condonation of delay. He submits that the filing being within the 30 days period can be condoned by the Court as the petitioner has been able to show 'sufficient cause' for the delay.

29. Learned counsel for the respondent on the other hand submits that the petitioner had initially filed only a bunch of papers and the objections put by the Registry would evidence that the affidavits were not signed and attested. The Vakalatnama was not filed initially. The Caveat Report was never taken, the pleadings were not signed and even the Court fee was deficient. He has vehemently argued that the petitioner has changed dates on pleadings on every successive filing. The dates of the affidavits are prior to the dates on the petition and the applications. He thus submits that the manner in which the petitioner has filed and refiled is not deserving of condonation. He further submits that no cause let alone sufficient cause has been shown for the delay within the statutory period of three months and even thereafter between the period 05.02.2019 to 20.02.2019, there is no explanation at all as to what steps were being taken by the petitioner towards filing/re-filing. This conduct deserves to be deprecated as even earlier, having stated that he would file a copy of the initial petition filed, which he had claimed to have filed on 23.01.2019, the petitioner subsequently took a stand that the documents were destroyed.

Learned counsel for the respondent thus submits that the delay should not be condoned by the Court in the facts and circumstances of this case.

30. The learned counsel also argues that it is not open for the petitioner to even contend that 20.02.2019 should be treated as the date of the initial filing. This was not the stand of the petitioner initially and is only an afterthought and a cover up, after he could not prove that any petition was filed on 23.1.2019.
31. I have heard the parties and given my thoughtful consideration to the pleas raised before me.
32. While dealing with the issue of condonation of delay in filing and re-filing in a matter pertaining to an application under Section 34 of the Act, strict and non-flexible limitation period has to be followed and condonation is not a matter of right.
33. In the present case, I find that the petitioner has been taking shifting stands. Initially, the main plank of the petitioner's stand was that the filing had been done on 23.01.2019 and was therefore, within the statutory period of three months. Confronted by the respondent in the Court, when the petitioner filed an application for the first time seeking condonation of delay, it was explained that some wrong CDs had been inadvertently uploaded on 23.01.2019 and the stand shifted to submitting that 20.02.2019 should be treated as a date of 'fresh' filing and this would be within the thirty days period beyond the initial three months and the delay can be condoned.
34. In my view, this shifting of stand by the petitioner particularly in the background of the facts of this case which I will detail hereinafter and

the manner in which the filing and refiling has been done in this case definitely deserves to be deprecated.

35. I would first deal with the claim of the petitioner that the petition was initially filed on 23.01.2019. Strangely it is the petitioner's own stand in the affidavit filed by Mr. Sudhish Kumar and the written submissions, that the filing on 23.01.2019 may not be considered as a 'proper filing in the eyes of law'. The relevant paragraphs from the written submissions and the affidavit are extracted hereinunder:

"The Petitioner has filed the petition under section 34 of the Arbitration and Conciliation Act, 1996 ("Act") against the award dated 23.10.2018 on 23.01.2019. However, and without prejudice, due to certain circumstance narrated in detail in the accompanying application for Condonation of delay (I.A. No. 4451 of 2019) and the affidavit filed by Mr. Sudhish Kumar [DGM (Mechanical)] at ONGC, the filing on 23.01.2019 may not be considered as a "proper" filing in the eyes of law."

36. In view of this admission made by the petitioner, it is not open for the petitioner to argue that the initial date of filing of the petition should be taken as 23.01.2019 or that the petition is within the limitation period of three months prescribed under Section 34(3) of the Act. In any case petitioner could not establish that any petition was filed on 23.1.2019. Despite undertaking to the Court, copies of the documents filed on 23.1.2019 were not filed and the stand was that they were destroyed. Why a signed vakalatnama and signed affidavits were destroyed remains unanswered. The claim that wrong CDs were inadvertently loaded does not advance the case of the petitioner at all. Thus, there being no filing on 23.1.2019, the present petition in my

view is not filed within the limitation period of three months under Section 34(3) of the Act.

37. As regards the next submission of the petitioner that the date of 20.02.2019 should be taken as the date of 'fresh' filing, the log-in report regarding the status of filing and the defects marked by the Registry with respect to the filing on 20.02.2019, is as under:

History Page 2 of 3

22/02/2019 11:24 AM	Case assigned to MR. DEEPAK SINGH HARUJI(1000030)	MR. VARTIK(10010015)
22/02/2019 11:00 PM	Case Comments: A case of type O.M.P. (COMM) is re-filed. OIL AND NATURAL GAS CORPORATION LTD. VS JOINT VENTURE OF HIS SAH ENGINEERING ENTERPRISES (PVT) & M/S HIS SAH ENGINEERING & INFRASTRUCTURE LIMITED (PVT) Case assigned to MR. HARUJI(10010035)	ILXW6002018
21/02/2019 2:14 PM	Case Comments: The is marked defective and sent for refile MR. DEEPAK SINGH HARUJI(1000030)	
21/02/2019 10:05 AM	Case Comments: DATE OF AWARD 20/12/2018 DATE OF FILING-25/01/2019 O.M.P.	MR. HARUJI(10010035)
21/02/2019 10:05 AM	Case Comments: Reopening of any other defects. TOTAL 617 PAGES FILED DRAFT DRAFT BE ON AHEAD: COURT FEE BE PAID. AHEAD OF ATTORNEY SIGN. PLEASE CORRECT THE DOCUMENTS. NO. OF DOCUMENTS BE PAID. IN ADDITION TO THE FILING, IT IS MANDATORY TO FILE HARD COPIES OF THE HIGH MATTERS FOR BE UNDER SECTION 3, 1, AND ON THE 4th OCT. 1990 WITH EFFECT FROM 22.10.2018. ORIENTATION OF DOCUMENTS BE CORRECT. PLEASE CORRECT THE DOCUMENTS. ALL DOCUMENTS BE REOPENED.	MR. VARTIK(10010015)
21/02/2019 10:43 AM	Case Comments: Following defects are found. 1. 4, 11, 9, 201, 202, 203, 207, 209, 210, 214, 215, 218, 221, 222, 223, 224, 227, 241, 242, 243, 251, 254, 255, 316, 317)	MR. VARTIK(10010015)
21/02/2019 10:45 AM	Case Comments: PLS CHECK	MR. VARTIK(10010015)
21/02/2019 10:45 AM	Case Comments: Case assigned to MR. DEEPAK SINGH HARUJI(1000030)	MR. VARTIK(10010015)
20/02/2019 11:30 AM	Case Comments: A case of type O.M.P. (COMM) is re-filed. OIL AND NATURAL GAS CORPORATION LTD. VS JOINT VENTURE OF HIS SAH ENGINEERING ENTERPRISES (PVT) & M/S HIS SAH ENGINEERING & INFRASTRUCTURE LIMITED (PVT) Case assigned to MR. HARUJI(10010035)	ILXW6002018
05/02/2019 11:40 PM	Case Comments: Case is marked defective and sent for refile	

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38. Report shows that while marking defects, the Registry uses some Code Numbers, which are indicative of the nature of the defects. These Code Numbers are as per the list maintained by the Listing

Branch. The position which emerges with respect to the 'filing' on 20.02.2019 is as under:

"21.02.2019- 10:45 AM

Defects: [3, 4, 8, 9, 201, 202, 203, 207, 209, 210, 214, 215, 218, 221, 227, 231, 234, 237, 245, 260, 265, 294, 304, 305, 336, 337]

OTHER DEFECTS: TOTAL 3613 PAGES FILED. CAVEAT REPORT BE OBTAINED. COURT FEE BE PAID. AFFIDAVITS NOT ATTESTED NOT SIGNED. PLEASE CORRECT THE BOOKMARKING. VOLUMES OF DOCUMENTS BE MADE. IN ADDITION TO THE E-FILING, IT IS MANDATORY TO FILE HARD COPIES OF THE FRESH MATTERS FILED UNDER SECTION 9,11 AND 34 OF THE ACT WITH EFFECT FROM 22.10.2018. ORIENTATION OF DOCUMENTS BE CORRECT. PLEASE CORRECT THE BOOKMARKING. ALL INDEXES BE PAGINATED."

39. Learned counsel for the respondent has also pointed out that the petition was dated 22.02.2019 and the application for stay as well as for exemption are dated 21.02.2019 while the affidavits are dated 20.2.2019. Though, the affidavits bear a date of 20.02.2019, but as per the report of the Registry, they were not signed or attested on the said date. Petitioner has shown that the affidavit is attested on 20.2.2019, but the report of the Registry is otherwise. How then the attestation date is 20.2.2019, remains a mystery as the counsel for the petitioner could not explain the defect pointed out by the Registry on this aspect. What emerges from this is that when the petition was filed on the 20.02.2019, the petition was unsupported by an affidavit since the affidavit was unsigned and unattested. Thus, it cannot be said that the petition was properly filed. The date of the affidavit being prior to

the dates on the petition and the applications also leaves much to be said on this issue. When a supporting affidavit is filed the deponent swears that he has read and understood the contents of a petition or an application which have been drafted under his instructions. Surely, such an affidavit cannot be prepared or signed or attested prior to the preparation of a petition or an application.

40. Coming now to the filing/re-filing on 22.02.2019, which was admittedly the last day of the extended period of 30 days under Section 34(3), the defects as marked on 23.02.2019, were as under:

“23.02.2019 – 11.24 AM.

Defects: [3, 4, 8, 9, 201, 202, 203, 207, 209, 210, 214, 215, 218, 221, 227, 231, 234, 237, 245, 260, 265, 294, 304, 305, 336, 337] ‘Not cured’

Description of any other defects: TOTAL 10 PAGES OF INDEX FILED. EXCEPT INDEX NOTHING HAS BEEN FILED.

41. Thus, insofar as the re-filing on 22.02.2019 is concerned, the report of the Registry shows that the petition was re-filed on 22.02.2019 at 4 p.m. The petition was checked for defects on 23.02.2019 and it was noted that 10 pages of an index was filed afresh **but what is significant is that the defects that had been marked on the earlier dates had not been cured.** The petition was taken from objections on the same date and re-filed on 23.02.2019 itself. Again on re-filing nearly the same defects had been marked. It was only when **the petition was re-filed on 25.02.2019 that it was finally** cleared for listing before the Court. Thus, even the filing on 22.02.2019, was a ‘non-est’ filing.

42. It is now time to refer to the law as laid down by various Courts on the issue of ‘non-est’ filing:

a) In *Ashok Kumar Parmar vs. D.C. Sankhla*, 1995 RLR 85,, a Co-ordinate Bench of this Court in the context of Rules 1 and 2 of Chapter IX of Delhi High Court (Original Side) Rules- 1967 held as under:

“Looking to the language of the Rules framed by Delhi High Court, it appears that the emphasis is on the nature of defects found in the plaint. If the defects are of such character as would render a plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit.”

Aforesaid view was upheld by the Division Bench in appeal, reported in 1995(1) AD (Delhi) 753.

b) In *Durga Construction (Supra)*, a Division Bench of this Court held:

“17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such

cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing....”

c) In ***Sravanthi Infratech Pvt. Ltd. (supra)***, it was held:

“12. Significantly it is pointed out that on 10th July, 2015 when the petition was first it contained only 66 pages whereas when it was refiled on 18th August, 2015 it consisted 859 pages.

13. Having considered the submissions of the learned counsel for the parties, the Court is of the view that although the number of days delay in filing the petition was 17 days, even if the date of receipt is taken as 24th March, 2015 as claimed by the Petitioner what was filed could not be considered as a petition. What was filed was a petition without a vakalatnama, without an affidavit, without signature of the party on the petition. These are fatal defects and what was filed on 10th July, 2015 can hardly be considered a proper filing of the petition with there being no documents, no vakalatnama, no application for condonation of delay, no affidavit, no authority.

17. The other strange phenomena is that when the petition was filed on 10th July, 2015 it was without any affidavit of the Petitioner. Later when the defects were cured and the petition was re-filed on 18th August 2015, the date of the supporting affidavit and the signing of the petition by the Petitioner was shown as 10th July 2015. In other words they were ante-dated to 10th July, 2015. This is prima facie an attempt to falsify the record.”

d) In ***SKS Power Generation (Chhattisgarh) Ltd. (supra)***, the Court while referring to the '29 pages' filed initially as “bunch of papers” held as under:

“As held by this Court in *Durga Construction Co.* (supra), where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. This was reiterated by this Court in *Sravanthi Infratech Pvt. Ltd.* (supra), where the petition had been filed without documents, vakalatnama, affidavit or authority.”

e) In *Jay Polychem (India) Ltd. & Ors. vs. S.E. Investment Ltd.*, reported in **2018 VAD (Delhi) 581**, it was held:

“6. Clearly, a statement, which is neither signed nor supported by an affidavit cannot be considered as an application under Section 34 of the Act. Thus, the petition filed on 31.10.2015 was non-est. In this view, the present petition is not maintainable, as it has been filed beyond the prescribed period of three months and also beyond the further period of thirty days within which this Court could entertain the petition on petitioners establishing that it was prevented from sufficient cause from presenting the petition within the period prescribed.

7. The Supreme Court in the case of *Union of India v. Popular Construction*: MANU/SC/0613/2001: (2001) 8 SCC 470 has held that the time limit prescribed under Section 34(3) of the Act to challenge an award is not extendable by the Court under Section 5 of the Limitation Act, 1963 in view of the express language of Section 34(3) of the Act. The petition is, thus, not maintainable because as on 23.12.2015, the maximum time available within which the petition could be entertained by this Court – that is three

months and a further period of 30 days – had expired.”

f) Following these decisions, a Co-ordinate Bench of this Court in the case of *Director- cum-Secretary, Development of Social Welfare vs. Sarvesh Security Services Pvt. Ltd.*, reported as *2019 SCC OnLine Del 8503*, held that:

“5. It is an admitted fact that the petition as originally filed did not have the signatures of the Petitioner. It was also not accompanied with the statement of truth in the form of the affidavit. Besides, as noted above, the vakalatnama in favour of the counsel was also not placed on record. The question therefore is whether such a petition could qualify as a filing in law? This question has been a subject matter of several decision 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.”

43. The common thread that runs in the aforesaid judgments is that ‘non-est’ filing cannot stop limitation and cannot be a ground to condone delay. Thus, for a petition filed under Section 34 of the Act to be termed as a ‘properly’ filed petition must fulfill certain basic parameters such as :

- a) Each page of the Petition as well as the last page should be signed by the party and the Advocate;
- b) Vakalatnama should be signed by the party and the Advocate and the signatures of the party must be identified by the Advocate;

c) Statement of Truth/Affidavit should be signed by the party and attested by the Oath Commissioner;

44. This in my view is the minimum threshold that should be crossed before the petition is filed and can be treated as a petition in the eyes of law. The rationale behind insisting on these fundamental compliances to be observed while filing a petition, is not far to seek. Vakalatnama is an authority which authorizes an Advocate to act on behalf of a party as a power of attorney and to carry out certain acts on his behalf. Therefore, the *vakalatnama* is the first step and a precursor to the preparation of a petition. The Statement of Truth accompanying a petition or an application is sworn by the deponent who states on oath that the contents of the accompanying petition have been drafted under his instructions and are true and correct to his knowledge or belief. Surely, this affidavit must be signed after the petition is made and the attestation must also be done on the affidavit when the petition is filed. This is also a requirement under the Commercial Courts Act, 2015. The petition needs to be signed by the Advocate as well as the party before the same is filed as this would indicate that both have read the petition and there is authenticity attached to the pages filed in the Registry. If these basic documents are not annexed or the signatures as required are absent, one can only term the documents which are filed as a ‘bunch of papers’ and not a petition.
45. In several cases, of course, the defects may only be perfunctory and may not affect the filing of the petition, e.g. the documents may be illegible or the margins may not be as per the required standards etc.

These defects are certainly curable and if the petition is filed with such like defects, it cannot be termed as a non-est petition.

46. Examined in the light of the above-mentioned judgments and the provisions of Section 34(3) of the Act, the filing of the petition on 20.02.2019 was a non-est filing and cannot stop limitation as clearly even the affidavits were not signed and not attested besides a few other objections.
47. When the petition was filed on the 22.02.2019 at 4 p.m., the defects were marked during the checking on 23.02.2019 at 11.24 a.m. Only 10 pages of Index was re-filed. The Code numbers of the defects marked shows that when the petition was refiled on 22.02.2019 except for defect bearing 'Code No. 214', none of the earlier defects marked on the 21.02.2019 and 22.02.2019 were cleared. The defects marked qua the filing of 22.02.2019 were (a) Caveat report not obtained; (b) Petition/applications were neither signed nor dated; (c) Court fees was short/missing; (d) the *vakalatnama* was not duly executed lacking the Court fees and signatures etc. of the Advocates; (e) Statement of Truth was not filed as per the format under the Commercial Courts Act; (f) The Memo of parties did not contain sufficient details like the parentage, mobile number, email address etc.; (g) Advance copy was not served under the provisions of Section 34(5) of the Act. This was apart from several other defects which were marked earlier but not cured by the petitioner. Thus, even this filing can be only termed as 'non-est' filing.
48. The only inference that one can draw is that the initial filing was done only to stop the period of limitation from running. The petition was

filed and refiled without curing most of the defects. The log-in information continues to mark the same codes for different dates of filing which showed the carelessness and the casual attitude in prosecuting the filing.

49. The Apex Court in the case of Bharat Barrel and Drum Mfg. Co. Ltd. v. ESI Corpn.: (1971) 2 SCC 860, has emphasized the necessity of enacting the periods of limitation to ensure that a party exercises his right within a reasonable time and to discourage stale or fraudulent claims. Relevant para of the judgment is as under:

“7. The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dormientibus, jura subveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims.”

50. No doubt the Courts have the jurisdiction to condone delay within the extended period of thirty days under Section 34(3) of the Act, but the approach in exercising such a jurisdiction cannot be very liberal and the action of the applicant will have to be tested on the touchstones of whether there was due diligence and dispatch in filing the matter and clearing the defects. The legislature has specified an inelastic period

of limitation under Section 34(3) of the Act and this intent of the legislature cannot be likely brushed aside.

51. I may note here that even assuming for a moment that the filing done on 20.02.2019 or 22.02.2019 is treated to be a 'proper filing' as contended by the learned counsel for the petitioner, the delay beyond the statutory period of 3 months cannot be condoned. Under the proviso to Section 34(3), the Court has the discretion to condone the delay in filing upto a period of 30 days beyond the 3 months if 'sufficient cause' is shown by the applicant. But what is of utmost significance is that the sufficient cause which has to be shown by the applicant under this proviso is not for the delay in filing the petition beyond the 3 months but the 'sufficient cause' which prevented the applicant from filing the application within the statutory period of 3 months. The application as well as the affidavits filed by the petitioner contain no explanation at all regarding the steps taken by the petitioner from 24.10.2018 to 23.01.2019. In fact, the narration of events begins only from 21.01.2019 when according to the petitioner for the first time a petition was prepared and signed although as a matter of record even the filing of this petition on 23.01.2019 could not be substantiated by the petitioner. Thus, in my opinion, the petitioner has not been able to show 'sufficient cause' that prevented him from approaching this Court upto 23.01.2019. The discretion of this Court under the proviso thus cannot be invoked by the petitioner.
52. The entire emphasis of the petitioner has been on the steps taken between 23.01.2019 and 25.02.2019. However, even if I was to analyse this aspect, all that can be said is that from 23.01.2019 to

04.02.2019 wrong CDs had been uploaded by the petitioner on two occasions. From 05.02.2019 to 19.02.2019, there is complete silence on why no steps were taken to file/re-file. Perusal of the log-in report shows that in this long period of 14 days, in fact, there was no filing by the petitioner. Even thereafter, all that the petitioner did was to repeatedly refile the petition by modifying the pages time and again but not curing the basic defects. This is apart from the fact that even today the petition on record shows a very shoddy state of affairs, where the affidavits are dated 20.02.2019 and the petition and the applications bear different dates, post the date of the affidavit.

53. Having examined the entire gamut of facts in the present case, I am of the opinion that the petitioner has been unable to show sufficient cause that prevented him from filing the petition upto 23.01.2019 when the statutory period of 3 months ended. Even the petition filed on the last day of the 30 days beyond the three months period was non-est. Therefore, the contention that there is a delay in re-filing is incorrect as the delay actually is in the initial filing. Once the delay is in the initial filing and is beyond a total of 120 days, as prescribed under Section 34(3) and Proviso to the said Section of the Act, this Court has no power to condone the delay as held by the Apex Court in the case of *Simplex Infrastructure Limited (supra)*. The application for condonation of delay, thus deserves to be dismissed as the delay cannot be condoned.
54. Before I end this judgment, it needs to be noted that the petitioner here is not an individual who did not have a legal back up in terms of panel and retainer lawyers or the monetary resources to prosecute his case

diligently. The petitioner is one of the largest Public Sector Undertakings and ought to have filed a proper petition at the initial stages and assuming there were some defects, the same ought to have been diligently cleared before the period of limitation ran out.

55. The application seeking condonation of delay is thus dismissed for the aforesaid reasons.

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56. Since the application for condonation of delay in filing the petition has been dismissed, the petition is hereby dismissed along with all other pending applications.

OCTOBER 1st, 2019
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JYOTI SINGH, J