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

+ O.M.P. (COMM) 132/2019

Date of Decision : 3rd April, 2019

SKS POWER GENERATION (CHHATTISGARH) LTD

..... Petitioner

Through: Mr.Amit Sibal, Sr.Adv. with
Mr.Atul Shanker Mathur,
Ms.Priya Singh, Ms.Deepabali
Datta, Mr.Aishwary Vikram
and Mr.Soham Kumar, Advs.

versus

ISC PROJECTS PRIVATE LIMITED

..... Respondent

Through: Mr.Sameer Parekh, Ms.Smita
Bhargava, Ms.Aishwarya Dash
and Mr.Sarthak Gaur, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 4684/2019(delay of 33 days in re-filing the petition)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 11.06.2018 and the Additional Award dated 08.10.2018 passed by the Arbitral Tribunal adjudicating the disputes that had arisen between the parties in relation to three contracts, namely Services, Supply and

Coordination Agreement, all executed on 21.08.2012, between the parties.

2. It is asserted by the petitioner that the petitioner received the copy of the Additional Award from the Arbitral Tribunal only on 22.10.2018 and therefore, the period of limitation under Section 34(3) of the Act would commence only from that date.

3. The petition was original filed by the petitioner on 14.01.2019. The petition as filed contained only 29 pages without book marking, without complete pagination and more importantly without any affidavit, *vakalatnama* or documents. The petition did not even contain the copy of the Impugned Award and/or the Additional Award.

4. Learned senior counsel for the petitioner has handed across the so called petition that was filed by the petitioner on 14.01.2019. It does not contain the signature of the petitioner or its authorized representative. Infact, in paragraph 3 of the petition, the name of the authorized representative of the petitioner company has been left blank. There is also a blank left in prayer 'b' of the so called petition.

5. The petition was returned back under objection on 15.01.2019. The same was refiled on 26.03.2019, that is beyond the period of 30 days from the expiry of three months from even the date of receipt of the Impugned Additional Award.

6. Certain objections were again pointed out by the Registry of this Court and the petition was returned on 27.03.2019. It was

thereafter refiled on 28.03.2019 when it was finally registered for listing.

7. Learned senior counsel for the petitioner submits that under the Delhi High Court (Original Side) Rules, 2018 it is not essential for the petition under Section 34 of the Act to be accompanied by the Impugned Award. He also refers to Section 8(2) of the Act to contend that where the legislature intended filing of certain documents to be compulsory, it has provided for the same in the Act itself.

8. As far as non filing of the affidavit, authorization on behalf of the petitioner to file the petition, as also the *vakalatnama* is concerned, learned senior counsel for the petitioner, relying upon the judgments of the Supreme Court in *Uday Shankar Triyar v. Ram Kalewar Prasad Singh and Anr.* (2006) 1 SCC 75 and of this Court in *Alka Kasana v. Indian Institute of Technology*, 2015 SCC OnLine Del 11455, submits that these defects being procedural in nature, could be cured at a later stage and therefore, shall have no effect as far as the original filing of the petition is concerned. He submits that therefore, the original filing of the petition being 14.01.2019, is within the time prescribed under Section 34(3) of the Act and the delay is only in re-filing of the petition.

9. Learned senior counsel for the petitioner further relies upon the judgment of the Supreme Court in *Northern Railway v. Pioneer Publicity Corporation Pvt. Ltd.*, (2017) 11 SCC 234 to contend that for purposes of considering the condonation of delay in re-filing of the petition, Section 34(3) of the Act shall have no application. The

reason for such delay has to be liberally construed and benefit granted to the petitioner.

10. On the other hand, learned counsel for the respondent submits that the petition as filed on 14.01.2019 cannot be considered as a petition in the eyes of law. It was merely a bunch of papers filed in the name of a petition. He further submits that even if the same is to be considered as a petition, the petitioner having taken more than two months thereafter to cure the defects, while considering an application for condoning the delay in refiling, this Court must take into account the nature of the petition as originally filed and cannot apply the same liberal test as is usually applied to such an application. He placed reliance on the judgment dated 19.10.2016 passed by this Court in OMP 470/2015, ***Sravanthi Infratech Pvt. Ltd. v. Greens Power Equipment (China) Co. Ltd.; Delhi Development Authority v. Durga Construction Co.,*** 2013(139) DRJ 133 (DB); judgment dated 11.07.2012 in FAO(OS) 295/2012, ***Delhi Transco Ltd. & Anr. v. Hythro Engineers Pvt. Ltd.;*** and ***India Tourism Development Corporation v. CP Associates Pvt. Ltd. & Ors.,*** MANU/DE/0959/2019.

11. I have considered the submissions made by the learned counsels for the parties. It is not contested by the petitioner that the original petition filed on 14.01.2019 contained only 29 pages with blanks and with no signature of the petitioner or its authorized representative. There was no *vakalanama* filed authorizing the advocate to file the said bunch of papers. I am intentionally using the words “bunch of

papers” as what was filed was nothing more than that. The petition sought to impugn the Arbitral Award and the Additional Award without even annexing the same. Clearly what was filed was merely a ‘bunch of papers’ to somehow stop the period of limitation from running. The petitioner thereafter made no endeavour to refile the petition with expedition once the same had been returned back under objection on 15.01.2019. The petitioner took another two months to refile the petition only on 26.03.2019, albeit, still under defects. This filing was beyond a period of 30 days from three months of receipt of the Additional Award by the petitioner.

12. In my view, while considering the application seeking condonation of delay in refilling, the above is a very relevant criteria and consideration to be kept in mind. 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.

13. In ***Durga Construction Co.*** (supra), this Court further held that while the Courts would have jurisdiction to condone the delay in refiling of the petition, once such delay is beyond the maximum period provided under Section 34(3) of the Act, the approach of the Court exercising such jurisdiction cannot be liberal and the conduct of the

applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch. From the above narration of the facts, it can easily be concluded that the petitioner did not act with due diligence or dispatch.

14. Infact, in the application filed by the petitioner seeking condonation of delay in such re-filing, there is absolutely no explanation given as to how the original petition filed on 14.01.2019 did not bear the signature of the petitioner and didn't contain a *vakalatnama* or the affidavit or the authorization of the petitioner to file such petition or the Impugned Award or the Impugned Additional Award. The only explanation, if at all it could be called one, is reproduced hereinunder:-

“4. That pursuant to the filing of the petition on 14 January 2019 the Registry, Delhi High Court raised objections and directed the petitioner to file the entire arbitral records along-with the aforementioned petition. It is humbly submitted that the entire arbitral records are bulky and it required the Petitioner some time to file it. That the inadvertent delay to file the entire arbitral records was due to the records being bulky.”

15. The so called explanation is completely frivolous and bereft of particulars.

16. The reliance of the learned senior counsel for the petitioner on the Judgment of the Supreme Court in ***Uday Shankar*** (Supra) is ill founded. In the said case it has been held that defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal or the omission to file the

vakalatnama executed by the appellant alongwith the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not “deliberate” or “mischievous”. In the present case, the non filing was clearly deliberate and mischievous as it was intended only to stop the period of limitation from running and thereafter the petitioner took no steps to have the petition re-filed expeditiously.

17. In *Alka kasana* (Supra) the petitioner therein had given justification for non-filing of the affidavit alongwith the petition. As noted above, in the present case the petitioner has not even made such an endeavour.

18. In view of the above finding, no reason is found to condone the delay in re-filing of the present petition. The application is dismissed.

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In view of the above order, the petition and the pending applications also stand dismissed. There shall be no order as to cost.

NAVIN CHAWLA, J

APRIL 03, 2019/Arya