

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

Reserved on: 24th July, 2019

Pronounced on: 12th September, 2019

+ **O.M.P. (COMM) 237/2019, I.A. 8500/2019, I.A. 8501/2019, I.A. 8502/2019**

HAJI BANDA HASAN

..... Petitioner

Through: Mr. Chander Lall, Sr. Adv. with
Mr. Aditya Swarup, Mr. Karan Bajaj,
Ms. Nancy Roy, Mr. Amit Choudhry,
Mr. Aman Dhyani, Mr. Sarthak
Mannan, Ms. Kanchan S. Advs.

versus

M/S GUPTA & GUPTA PVT. LTD.

..... Respondent

Through: Mr. Sudhanshu Batra and Mr. Kirti
Uppal, Sr. Advs. with Mr. Gurinder
Pal Singh, Mr. Sidhant Borah,
Ms. Ragini Anand and Mr. Aditya
Mishra, Advs.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

I.A. 8503/2019 (delay)

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as “Arbitration Act”) challenging the Award dated 21st May 2019 (hereinafter the “impugned award”). The petition is accompanied with the present application [I.A. 8503/2019] under Section 14 of the Limitation Act 1963 seeking condonation of delay in filing the petition.

2. At the outset, the Respondents have objected to the maintainability of the petition on the grounds of delay contending that it is beyond the period prescribed under Section 34 (3) of the Arbitration Act and an application under Section 14 of the Limitation Act is not maintainable and the Court ought not to condone the delay in filing/refiling the petition. In view of the aforesaid preliminary objection raised by the Respondents, the Court has heard the learned counsel for the parties at length on the question of delay.

3. The grounds urged seeking condonation of delay are extensively mentioned in the appeal. The application also sets out lacunas in the impugned arbitral award and it is contended that the findings are erroneous and the award is liable to be set aside. Before embarking upon deciding the grounds of challenge dealing with merits of the case, the petitioner has to first overcome the objection of delay.

4. The prayers made in the application read as follows:-

“a) Allow the present application for by excluding 238 days under Section 14 of the Limitation Act, 1963 in computing the period of limitation in the present application and thereafter condoning 11 days in re-filing the present Petition under Section 34 of the Arbitration & Conciliation Act, 1996.

b) Alternatively, allow the present application for condonation of delay by of 249 days in refiling the present Petition under Section 34 of the Arbitration & Conciliation Act, 1996.”

5. Mr. Sudhanshu Batra, learned Senior Counsel for the Respondent vehemently argued that the application under Section 14 is frivolous, untenable and completely misconceived. He submitted that the Petitioner is trying to mislead this Court by alleging that there is only a delay in refiling the present petition. Petitioner has failed to disclose that the petition was originally filed on 21st August 2018 (hereinafter, the “first filing”), which did not qualify to be a ‘filing’ in law and was a non-est filing. Thereafter the present petition was filed on 31st May 2019 (hereinafter, the “second filing”). This according to him is a fresh filing and the Petitioner cannot take advantage of the first filing and proclaim that it is a case of ‘refiling’ and emphasize for a liberal approach for condonation of delay. At the initial hearing when the objection was raised, the Court called upon the Registry to give a report regarding the discrepancy pointed out by Mr. Batra. It would be apposite to note the directions issued by the court in this regard vide order dated 19th July 2019 which reads as under:-

“1. Mr. Batra, learned senior counsel for the Respondent has handed over print outs of the case history of login information relating to the filing of the present petition. He refers to the case history that shows the filing status as under:

S No	CASE /DIARY NO	PARTIES	ADVOCATE	STATUS
1.	<u>D.No: O.M.P.(Comm.)-237/2019</u>	HAJI BANDA HASAN v. M/S GUPTA & GUPTA PVT. LTD	KARAN BAJAJ	PENDING
2.	<u>D.No.:OMP(COMM)- 231177/2018</u>	HAJI BANDA HASAN v. M/S GUPTA & GUPTA PVT. LTD	KABIR DIXIT	DEFECTIVE

2. This above status reveals that two separate petitions titled as “Haji Banda Hasan v. M/s Gupta & Gupta Pvt. Ltd.” have been filed under distinct Diary Numbers and by different counsels. One is shown to be under defects and the other one is pending. The one shown to be pending [O.M.P. (COMM) 237/2019] is the present petition.

3. Registry is directed to send a report to this Court before the next date of hearing giving the status of the aforementioned filings along with the record/paper-books received by the Registry in respect of the filing that is shown to be defective and the reasoning for allocating two distinct Diary numbers.

4. List on 24th July, 2019.

6. Pursuant to the aforesaid directions, the Registry has inter alia given the following status report:-

“STATUS REPORT

This has reference to the orders dated 19.7.2019 passed in OMP(COMM) 237/2019 of the Hon'ble Court directing the Registry to send a report to the Hon'ble Court before the next date of hearing giving the status of the filings, as noted in the order dated 19.7.2019, along with the record/paper-books received by the Registry in respect of the filing that is shown to be defective and the reasoning for allocating two distinct Diary numbers.

In this regard the status report is submitted as follows:-

1) That on 21.8.2018 at 3.24 PM an OMP (Comm.) with case title HAJI BANDA HASAN VS. GUPTA & GUPTA PVT. LTD. & ANR. was e-filed at the E-Filing Centre, Appellate, through an Advocate's Login ID/Enrollment No.D4342007), which was marked to the Filing Counter (Original) on the same date at 3.42 PM. During scrutiny certain objections were found and the case was returned under objections on 24.8.2019 at 9.51 AM. Case was again re-filed on 29.10.2018 at 12.42. Still

objections were found and the same was returned under objections on 30.10.2018 at 4.51 PM. On 26.11.2018 at 3.23 PM case was again re-filed. Since objections were still there, case was again returned under objections on 28.11.2018 at 11.06 AM. On 18.12.2018 again case was refiled. Same was again re-checked and since objections were still there, same was returned under objections on 19.12.2018 at 12.15 PM. (FLAG-A)

a) That after last return of petition under objections on 19.12.2018, the same has not been re-filed.

b) That the paper book of the petitions filed through e-filing, and returned as such, are not maintained at the Filing Counter (Original) and only a log-sheet is stored in the computer system. However, the I.T. Department keeps a softcopy of the complete pleadings in e-filing cases in case the same is returned under objections, as informed by the I.T. Department (Flag-B).

2) That on 30.05.2019 at 11.31 AM an OMP (Comm.) with case title HAJI BANDA HASAN VS. M/S GUPTA & GUPTA PVT. LTD. was e-filed at the Filing Counter (Original) through an Advocate's Login ID/Enrollment No.D40292010. The petition was cleared for listing for 31.05.2019 at 5.23 PM, subject to office objections. (FLAG-C).

3) It is further submitted that our computer system/e-filing does not generate alerts in case of filing of two petitions with same title, same filing advocate, as informed by the I.T. Department (Flag-B)."

7. In light of the aforesaid status report, let me briefly spell out the controversy relating to the filing(s) of the present petition. There are two diary numbers as noted in the order dated 19th July 2019 which deal with the filing of the petition under the title [*Haji Banda Hasan v. M/s Gupta & Gupta Pvt. Ltd*] of the present petition. The same are: -

	CASE /DIARY NO	Filed on	ADVOCATE	STATUS
Second filing	D.No: O.M.P.(Comm.)-237/2019	30 th May 2019	KARAN BAJAJ	PENDING
First filing	D.No.:OMP(COMM)-231177/2018	21 st August 2018	KABIR DIXIT	DEFECTIVE

8. With respect to the first filing, the objections raised by the Registry are as under:-

19/12/2018 12:15 PM
User Comments: Filing is marked defective and sent for refilling MR. DESH RAJ SINGH THAKUR(10000938)
19/12/2018 11:30 AM
Description of any other Defects: TOTAL 953 PAGES FILED CAVEAT REPORT BE OBTAINED. ALPHA NUMERIC PAGINATION NOT ALLOWED. COMPLET PAGINATION BE DONE IN THE INDEX-1. DELAY IN REFILING. PHOTOGRAPHS BE SCANNED IN THE COLOR. FAIR TYPED COPIES OF ILLEGIBLE DOCUMENTS BE FILED. PLEASE CORRECT THE BOOKMARKING. MR. MANJIT (10012035)
19/12/2018 11:30 AM
User Comments: DATE OF AWARD=21/05/2018 DATE OF FILING=21/08/2018 92 DAYS MR. MANJIT (10012035)
19/12/2018 11:30 AM
User Comments: Following defects are found .[1, 2, 3, 7, 96, 97, 201, 202, 203, 207, 210, 212, 215, 217, 218, 223, 231, 235, 237, 265, 282, 294, 304, 305, 318, 336, 337] MR. MANJIT (10012035)
19/12/2018 11:30 AM
User Comments: PLS CHECK MR. MANJIT (10012035)
19/12/2018 11:30 AM
User Comments: Case assigned to Mr. DESH RAJ SINGH THAKUR(10000938) MR. MANJIT (10012035)
18/12/2018 11:20 AM
User Comments: A case of type O.M.P. (COMM) is e-filed. HAJI BANDA HASAN VS GUPTA & GUPTA PVT. LTD. Case assigned to MR. MANJIT(10012035) (D4342007)
28/12/2018 11:06 AM

User Comments: Filing is marked defective and sent for refiling
MR. DESH RAJ SINGH THAKUR(10000938)
27/11/2018 4:53 PM
User Comments: Description of any other Defects: TOTAL 944 PAGES FILED.CAVEAT REPORT BE OBTAINED. ALL PREVIOUS OBJECTIONS NOT REMOVED TILL DATES. THE PLAINT SHALL CONTAIN A STATEMENT CERTIFYING AUTHENTICITY OF DOCUMENT(S)/COPIES FILED.
27/11/2018 4:53 PM
User Comments: Following defects were found: [1, 2, 3, 7, 96, 97, 201, 202, 203, 207, 210, 212, 215, 216, 217, 218, 230, 231, 237, 265, 282, 294, 304, 305, 318, 336, 337]
27/11/2018 4:53 PM
User Comments: DATE OF AWARD=21/05/2018 DATE OF FILING-21/08/2018 92 DAYS
MR. MANJIT (10012035)
27/11/2018 4:53 PM
User Comments: Case assigned to Mr. DESH RAJ SINGH THAKUR(10000938)
MR. MANJIT (10012035)
27/11/2018 4:53 PM
User Comments: PLS CHECK
MR. MANJIT (10012035)
26/11/2018 3:23 PM
User Comments: A case of type O.M.P. (COMM) is re-Filed. HAJI BANDA HASAN VS GUPTA & GUPTA PVT. LTD. Case assigned to MR. MANJIT(10012035)
(D4342007)
30/10/2018 4:51 PM
User Comments: Filing is marked defective and sent for refilling
MR. DESH RAJ SINGH THAKUR(10000938)
30/10/2018 4:02 PM
User Comments: DATE OF AWARD=21/05/2018 DATE OF FILING=21/08/2018 92 DAYS
MR. MANJIT (10012035)
30/10/2018 4:02 PM
User Comments: Description of any other Defects: TOTAL 940 PAGES FILED. CAVEAT REPORT BE OBTAINED. ALPHA NUMERICA PAGINATION NOT ALLOWED.COMplete PAGINATION BE DONE IN THE INDEX-I. DELAY IN REFILEING. FAIR TYPED COPIES OF ILLEGIBLE DOCUMENTS BE FILED PAGE NO. 632-363/671-707. COLOR PHOTOGRAPHS BE FILED. COURT FEE BE PAID. 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 ARB. ACT. 1996 WITH EFFECT FROM 22.10.2018.

MR. MANJIT (10012035)
30/10/2018 4:02 PM
User Comments: Following defects are found. [1, 2, 3, 4,6, 7, 8, 9, 201, 202, 203,207,209,210,212,215,216,217, 218,230, 231, 234, 237, 265, 282, 294, 304, 305, 318, 336,337]
MR. MANJIT (10012035)
30/10/2018 4:02 PM
User Comments: Case assigned to Mr. DESH RAJ SINGH THAKUR(10000938)
MR. MANJIT (10012035)
30/10/2018 4:02 PM
User Comments: PLS CHECK
29/10/2018 12:42 PM
User Comments: A case of type O.M.P. (COMM) is re-Filed. HAJI BANDA HASAN VS GUPTA & GUPTA PVT. LTD. Case assigned to MR. MANJIT(10012035)
(D4342007)
24/10/2018 9:51 PM
User Comments: Filing is marked defective and sent for refiling MR. DESH RAJ SINGH THAKUR(10000938)
23/10/2018 3:10 PM
User Comments: Following defects are found. [1, 2, 3,4,6,7,8,9,201,202, 203, 207, 209, 210, 214, 215, 216, 217, 218, 231, 234, 237, 265, 282, 304, 305, 318, 336, 337]
MR. MANJIT (10012035)
23/10/2018 3:10 PM
User Comments: DATE OF AWARD==21/05/2018 DATE OF FILING=21/08/2018 92 DAYS
MR. MANJIT (10012035)
23/10/2018 3:10 PM
User Comments: Description of any other Defects: TOTAL 552 PAGES FILED.CAVEAT REPORT BE OBTAINED. PLEASE FILE IN NEW FORMAT IN FOUR PARTS WITH SEPERATE PAGAINTION AND INDEX FOR EACH PART AND ONE MASTER INDEX IN THE STARTING. ALPHA NUMERIC IS NOT ALLOWED. MASTER INDEX BE SCANNED PROPERLY.COURT FEE BE PAID. PHOTOGRAPHS BE SCANNED IN COLOR,ORIENTATION OF DOCUMENTS BE CORRECT.IN ANY EVENT, SIGNED VAKALATNAMA(SIGNED AND NOTARIZED/ATTESTED AFFIDAVIT SHALL BE FILED IN ORIGINAL IN THE REGISTRY.
MR. MANJIT (10012035)
23/10/2018 3:10 PM
User Comments: PLS CHECK
MR. MANJIT (10012035)
23/10/2018 3:10 PM

User Comments: Case assigned to Mr. DESH RAJ SINGH THAKUR(10000938) MR. MANJIT (10012035)
23/10/2018 11:23 AM
User Comments: pls see Mr. SUNIL DUTT (71623360)
23/10/2018 11:23 AM
User Comments: Case assigned to MR. MANJIT(10012035) Mr. SUNIL DUTT (71623360)
21/10/2018 3:42 PM
User Comments: pls check Mr. HARISH KUMAR (24560677)
21/10/2018 3:42 PM
User Comments: Case assigned to Mr. SUNIL DUTT (71623360) Mr. HARISH KUMAR (24560677)
21/10/2018 3:42 PM
User Comments: A case of type O.M.P. (COMM) is filed. HAJI BANDA HASAN VS GUPTA & GUPTA PVT. LTD. & ANR. Case assigned to Mr. HARISH KUMAR (24560677) (D4342007)

9. With respect to the second filing, the Registry has given the following details: -

30/05/2019 5:23 PM
User Comments: before court for 31052019 in a court Mr. TARUN GUPTA (10000915)
30/05/2019 5:23 PM
User Comments: Case assigned to Mrs. NEELAM CHOPRA (10000103) Mr. TARUN GUPTA (10000915)
30/05/2019 3:42 PM
User Comments: Diary is marked for registration on :31/05/2019 MR. MANJIT (10012035)
30/05/2019 3:42 PM
User Comments: DATE OF AWARD =21/05/2018 DATE OF FILING=30/05/2019 374-90=284 DAYS DELAY IN FILING. MR. MANJIT (10012035)
30/05/2019 3:42 PM
User Comments: MENTIONED MATTER SUBJECT TO OFFICE OBJECTIONS. MR. MANJIT (10012035)
30/05/2019 3:42 PM
User Comments: Case assigned to MR. DESH RAJ SINGH THAKUR(10000938)

MR. MANJIT (10012035)
30/05/2019 3:17 PM
User Comments: A case of type O.M.P. (COMM) is re-Filed. HAJI BANDA HASAN VS GUPTA & GUPTA PVT. LTD. Case assigned to MR. MANJIT(10012035) (D40292010)
30/05/2019 3:13 PM
User Comments: Filing is marked defective and sent for refiling MR. DESH RAJ SINGH THAKUR(10000938)
30/05/2019 12:17 PM
User Comments: DATE OF AWARD =21/05/2018 DATE OF FILING=30/05/2019 374-90=284 DAYS DELAY IN FILING. MR. MANJIT (10012035)
30/05/2019 12:17 PM
User Comments: Following defects are found.[96, 201, 202, 207, 210, 215, 218, 230, 245, 265, 336] MR. MANJIT (10012035)
30/05/2019 12:17 PM
User Comments: Description of any other Defects: TOTAL 987 PAGES FILED. DELAY IN FILING. CERTIFICATE BE FILED AS PER FORMAT TITLE AND CATEGORY BE GIVEN ON THE LIST OF DOCUMENTS. LIST OF DOCUMENTS BE SIGNED. PHOTOGRAPHS BE SCANNED IN THE COLOR. ORIENTATION OF DOCUMENTS BE CORRECT. SERVICE BE MADE TO THE CAVEATOR AND
30/05/2019 12:17 PM
User Comments: Case assigned to MR. DESH RAJ SINGH THAKUR(10000938) MR. MANJIT (10012035)
30/05/2019 12:17 PM
User Comments: PLS CHECK MR. MANJIT (10012035)
30/05/2019 11:31 AM
User Comments: A case of type O.M.P. (COMM) is filed. HAJI BANDA HASAN VS GUPTA & GUPTA PVT. LTD. & ANR. Case assigned to Mr. SUNIL DUTT (D40292010)

First filing [as of 21st August 2018]

10. The first filing made on 21st August 2018 was marked as defective and sent for re-filing on 24th August 2018. Thereafter, after a delay of nearly

more than two months, the petition was re-filed on 29th October 2018. It was again marked as defective and sent for re-filing on 30th October 2018. Again, there was a delay and re-filed on 26th November 2018. It was yet again marked as defective and sent for re-filing on 28th November 2018. Petition was then re-filed on 18th December 2018 and marked defective and once again sent for re-filing on 19th December 2018. There is no status update thereafter.

Second filing [as of 30th May 2019]

11. Petitioner abandoned the first filing dated 21st August 2018 and filed another petition on 30th May 2019 under the same title through another Advocate's log-in ID/Enrolment No. The petition was checked and marked as defective and sent for re-filing on 30th May 2019. Thereafter, the petition was admitted to be listed before Court, subject to office objections, on the same date.

12. The petition was finally cleared for listing on 31st May 2019 at 5.23 PM, subject to office objections. From the aforesaid narrative, two crucial questions emerge: -

- a) Whether, in the facts of the present case, the first filing is a non-est filing?
- b) Whether the Petitioner can take benefit of the first filing dated 21st August 2018 and characterize the delay in filing the present petition as delay in 're-filing'?

Analysis and Findings

WHETHER THE FIRST FILING IS A NON-EST FILING?

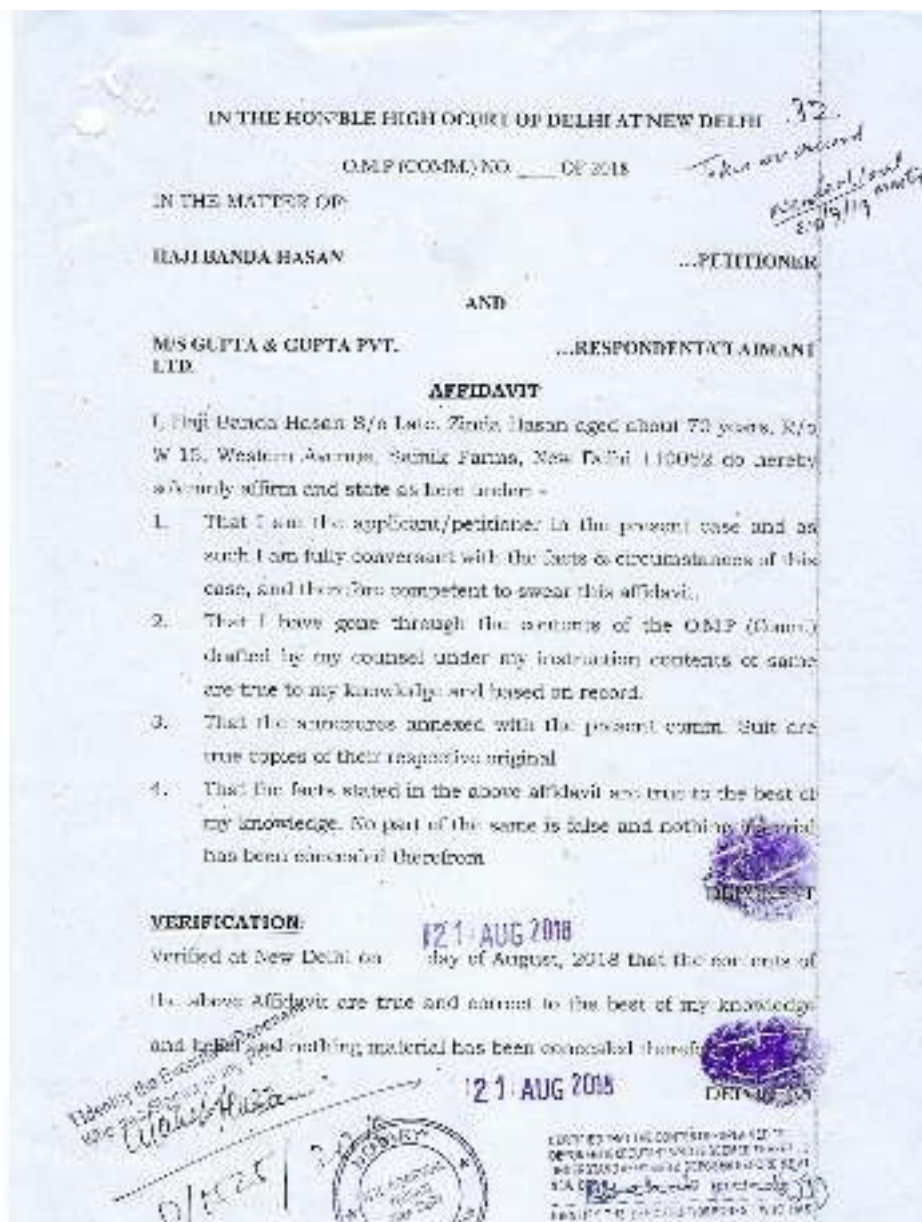
13. Since the petition was filed electronically, the Court directed the Registry to place before the Court the e-paperbook record pertaining to the first filing under Diary No. 231177/2018. A print out of the e-paperbook has been placed on record, as per my directions.

14. A perusal of the e-filing reveals that the petition as originally filed did not have any signatures on the petition. This petition was filed on 21st August 2018. The paperbook as on that date comprised of 552 pages. This filing was returned under objections on 24th August 2018. The numeric defect code listed in the case history pertaining to the aforesaid filing have been noted above. These defect numbers are used by the Registry, as per the list maintained by the Computer Cell and Listing Branch of the Delhi High Court, which are indicative of the nature of the defect. The defects indicate that the pleadings were not signed by the Petitioner. There was no Statement of Truth annexed with the first filing. There are blanks in the Statement of Truth and other documents annexed to the petition and the petition itself has no signatures. The petition as well as the interim application is however accompanied with an affidavit of one Mr. Mohd. Javed, who is stated to be the son of the Petitioner. Likewise, the Vakalatnama annexed to the petition also bears signatures of Mr. Mohd. Javed. What would be the effect thereof, is discussed later in the judgment.

15. There are several decisions including one rendered by me [Ref:

Director-Cum-Secretary, Department of Social Welfare v Sarvesh Security Services Pvt. Ltd. (2019) 260 DLT 460], holding that if a petition is not signed and is not accompanied with a vakalatnama, the same would not qualify as a petition in law. The Courts have consistently discouraged the filing of petitions without signatures and vakalatnama to circumvent the rigour of Section 34 (3) of the Act. The question that arises here is whether the vakalatnama and affidavit signed by the son of the Petitioner and not the Petitioner himself, would have any legal bearing. Mr. Chander Lall, learned Senior Counsel for the Petitioner argued that the Petitioner is physically incapacitated to sign the petition, and accordingly, the same was signed through the next kin and thus such a vakalatnama and affidavit should be accepted. He submits that first filing is proper and at the highest, the only defect in the first filing could be that it was not accompanied with the necessary application seeking leave of the Court to sue through the next friend, which would not render the filing as *non-est* or invalid. This contention may have some merit. However, there is a glaring and conspicuous fact that persuades the Court to take the contrary view. During the course of arguments, the counsel who had done the first filing had appeared before the Court along with Mr. Lall, to offer an explanation regarding the discrepancies and the defects in the filing. The counsel handed over across the board an affidavit dated 21st August 2018, which bears the thumb impression, purportedly of Mr. Haji Banda Hasan. This affidavit is duly attested by Notary Public and is stamped with the date of 21st August 2018. The said affidavit, has been taken on record.

The affidavit is reproduced as under:-



16. From the above, it becomes evident that on 21st August 2018, there was an affidavit duly signed and attested by Haji Banda Hasan. In the second filing [present petition], an application has been attached urging grounds for appointment of Mohd. Javed as the next kin. It is stated in the said application that the Petitioner is on medical support and is suffering from

Parkinson's and dementia which impairs Petitioner's ability to move, speak and understand resulting in rapid deterioration and has rendered him bed ridden and mentally unsound. Even if these facts were to be believed to be true, the Petitioner cannot be permitted to take advantage of the same as on its showing, this was certainly not the position on 21st August 2018. The affidavit of Mr. Haji Banda Hasan dated 21st August 2018 duly attested and identified by the counsel indicates that as on 21st August 2018, he was in a position to sign the petition and the accompanying affidavits. Thus, the contention of the Petitioner that the paper-book accompanied with an affidavit of Mohd. Javed and also a vakalatnama signed by him would qualify to be proper filing, cannot be accepted. The affidavit and vakalatnama accompanying the petition as filed on 21st August 2018, bearing the signatures of Mr. Mohd. Javed, son of the Petitioner, who is stranger to the petition, shows that the petition was filed with the sole intent to stop the period of limitation from running. Thus, the first filing does not qualify to be a petition in accordance with law and therefore the Petitioner cannot take benefit of the said filing to cover up the delay in filing the present petition after a delay of 284 days. Thus, the first question in the facts of the present case is answered against the Petitioner.

17. Even if the Court were to give some benefit of doubt to the Petitioner on the ground of worsening and subsisting Parkinson's disease and dementia and the physical ailments suffered by the Petitioner, there are several other factors which dissuades the Court to condone the delay. Thus arguendo, if the Petitioner's first filing is accepted to be a filing in law, there is still no justifiable ground for condoning the delay, for the reasons discussed

hereinafter.

WHETHER THE BENEFIT OF THE FIRST FILING CAN BE GIVEN TO THE PETITIONER?

18. The second filing has been made under a distinct and different Dairy No. being D.No.:OMP(COMM)-237/2018. This is ostensibly for the reason that a distinct Diary number is assigned to each filing which is interlinked to the counsel under whose name the filing is done. If there is a change of counsel, a new diary number is assigned unless the earlier counsel has divulged the log-in information and details of the earlier/prior filing. Mr. Sudhanshu Batra, learned Senior counsel for the Respondent argued that the second filing should be considered to be an independent filing as the first filing was abandoned and the Petitioner cannot take benefit of the same. However, I am not convinced to accept this contention. Change of counsel is the prerogative of the client. At the stage of discharging a counsel, ethics require that the earlier Counsel should also divulge the log-in information of the earlier filing and all other details in respect of the first filing, in order to enable the subsequent counsel to effectively pursue the filing and have the matter heard. However, this may not necessarily happen. I have rarely witnessed counsels giving a proper NOC at the time of discharge. This may professionally be the ideal way, however, I am not inclined to deprive a litigant of a benefit that may be accrued to him or her, merely because he or she has changed the Counsel. The Registry in its report has submitted that the computer system/e-filing does not generate any alerts in case of two petitions with the same title even if they are filed by the same Advocate. In the present application though there is disclosure of a change of counsel,

however, the necessary averments and disclosure relating to the factum of first filing is noticeably absent in the application. If the Court had not been informed about the first filing, there was no means for the Court to become aware of the same. Nonetheless, I hold in favour of the Petitioner by giving him the benefit of the first filing and consider the present petition (second filing) as a case of re-filing.

WHETHER THE PETITIONER IS ENTITLED TO A CONDONATION OF DELAY IN FILING/RE-FILING THE PRESENT PETITION?

19. In the above backdrop, now comes the moot question-Whether in the facts of the present case, giving the benefit of the 'first filing' to the Petitioner and considering the present listing to be a case of re-filing, would the Petitioner still be entitled to the condonation of delay?

20. On a plain reading of Sub-Section (3) of Section 34 it is clear that an application for setting aside an award has to be made within three months from the date of the receipt of the award. If the objections are not filed in the aforesaid period of three months, they may be entertained within a further period of 30 days, subject to the applicant showing that it was prevented by sufficient cause from making an application within a period of three months.

21. The Petitioner has relied upon Section 14 of the Limitation Act read with Section 151 of the Code of Civil Procedure, 1908 seeking condonation of delay. Section 151 CPC has no relevance to an application seeking condonation of delay in re-filing under the Arbitration Act. Although

Section 14 of the Limitation Act 1963 has been held to be applicable to a proceeding under section 34 of the Arbitration Act [Ref: *Consolidated Engineers v. Principal Secretary (2008) 7 SCC 169*)], however, in the facts of the present case, the invocation of the said provision is misplaced. Section 14 of the Limitation Act, reads as under:

“Exclusion of time of proceeding bona fide in court without jurisdiction. —

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, **where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.**

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation.— For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”

22. Section 14 of Limitation Act deals with the exclusion of time of proceedings instituted bona fide in a Court without jurisdiction. There have been no proceedings in a Court which suffers from a “defect” of jurisdiction. The first filing was before the court of competent jurisdiction and moreover it is professed that the said petition has been now re-filed. Therefore, clearly Section 14 is not attracted to the facts of the present case.

23. Mr. Chander Lall vociferously argued that fraud nullifies all acts and has relied upon the judgment of the Supreme Court in ***SP Chengalvaraya Naidu vs. Jagannath, (1994) 1 SCC 1***. He contended that a decree or award obtained by fraud is a nullity and even assuming that the technical objections of the Respondent are valid, in view of the fraud being writ large in the impugned award, such objections cannot be allowed to stifle the cause of justice. Respondent cannot be given the benefit of mere technical defects when there were such serious substantial concerns affecting the delivery of justice. It was also argued by Mr. Lall that when the Petitioner received the copy of the Award, he did not immediately become aware of the fraud and the fraud was discovered much later on 9th October 2018 and hence, he could not approach the Court earlier. The aforesaid argument does not hold water. The plea of discovery of the fraud is ex-facie baseless and without any cogent or plausible explanation. If the Petitioner was so seriously prejudiced and affected by the award, nothing prevented him from approaching the Court earlier as the copy of the Award had been received by the Petitioner on 21st May 2018. In fact, the said ground is contradictory to

the fact situation in as much as despite the fraud being claimed to be discovered later, on 9th October 2018, the petition for setting aside the award had already been filed on 21st August 2018. If the Petitioner did not approach the Court within the time stipulated, he cannot be permitted to ride on the plea of fraud to justify the delay. Further, I am not inclined to engage in this controversy as I am of the opinion that evaluating the question of fraud urged by the Petitioner would necessarily require me to delve into the merits of the case.

24. Petitioner has relied upon on the judgment of this Court in ***DDA v. Durga Construction Company, I LR 2014 Delhi 153*** to contend that the delay in re-filing ought to be construed liberally.

25. The relevant paragraphs of the said case are reproduced hereunder:-

*“19. The Supreme Court in the case of Union of India v. Popular Construction Company, (2001) 8 SCC 470 has held that the time limit prescribed under section 34 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. **However, this decision would not be applicable in cases where the application under section 34 of the Act has been filed within the extended time prescribed, and there is a delay in re-presentation of the application after curing the defects that may have been pointed out. This is so because section 5 of the Limitation Act, 1963 would not be applicable in such cases. Section 5 of the Limitation Act, 1963 provides for extension of the period of limitation in certain cases where the Court is satisfied that the appellant/applicant had sufficient cause for not preferring an appeal or making an application within the specified period. In cases, where the application/appeal is filed in time, section 5 would have no***

application. *The Supreme Court in the case of Indian Statistical Institute v. Associated Builders, (1978) 1 SCC 483 considered the applicability of section 5 of the Limitation Act, 1963 where the objection to an award under the provisions of the Arbitration Act, 1940 was filed in time but there was substantial delay in re-filing the same. The High Court in that case held that there was a delay in filing the objections for setting aside the award and consequently, rejected the application for condonation of delay. An appeal against the decision of the High Court was allowed and the Supreme Court rejected the contention that there was any delay in filing objections for setting aside the award. The relevant extract from the decision of the Supreme Court is reproduced below:—*

“9.....In the circumstances, it cannot be said that objections were not filed within time or that because they were not properly stamped the objections could not be taken as having been filed at all. Therefore, in our view, there had not been any delay in preferring the objections. The delay, if any, was in complying with the directions of the Registrar to rectify the defects and re-filing the objections. The delay, as we have pointed out earlier, is not due to any want of care on the part of the appellant but due to circumstances beyond its control.

*10. The High Court was in error in holding that there was any delay in filing the objections for setting aside the award. The time prescribed by the Limitation Act for filing of the objections is one month from the date of the service of the notice. It is common ground that the objections were filed within the period prescribed by the Limitation Act though defectively. The delay, if any, was in representation of the objection petition after rectifying the defects. **Section 5 of the Limitation Act provides for extension of the prescribed period of limitation if the petitioner satisfies the court that he had sufficient cause for not preferring the objections within that period. When there is no delay in presenting the objection petition Section 5 of the***

Limitation Act has no application and the delay in representation is not subject to the rigorous tests which are usually applied in excusing the delay in a petition under Section 5 of the Limitation Act. The application filed before the lower court for condonation of the delay in preferring the objections and the order of the court declining to condone the delay are all due to misunderstanding of the provisions of the Civil Procedure Code. As we have already pointed out in the return the Registrar did not even specify the time within which the petition will have to be represented.”

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25. Thus, in our view a Court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in section 34(3) of the Act. However, this jurisdiction is not to be exercised liberally, in view of the object of the Arbitration and Conciliation Act to ensure that arbitration proceedings are concluded expeditiously. The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the Court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable. In the present case, there has been an inordinate delay of 166 days and in our view the appellant has not been able to offer any satisfactory explanation with regard to the same. A liberal approach in condoning the delay in re-filing an application under section 34 of the Act is not called for as it would defeat the purpose of specifying an inelastic period of time within which an application, for setting aside an award, under section 34 of the Act must be preferred.”

(Emphasis supplied)

26. The Division Bench of this Court has made it clear that Court has jurisdiction to condone the delay in re-filing under Section 34 of the Act, beyond the period specified under Section 34 (3) of the Act. However, at the same time there is also a cautionary note- “*The delay in re-filing cannot*

be permitted to frustrate this object of the Act.” If such delay extends beyond the period specified in Section 34 (3) of the Act, the power to condone the same should be exercised with circumspect and not liberally. The Supreme Court has repeatedly held that the Court does not have the power to condone the delay beyond the prescribed time limit [Ref: ***Union of India v. Popular Constructions*** AIR 2001 SC 4010]. The condonation of delay in re-filing thus cannot be resorted to circumvent or bypass the object of the Act. Reference may also be made to the decision of this Court in ***Union of India v J. Sons Company Ltd.*** 2017 SCC OnLine Del 6711 following the decision in ***Durga Construction*** (supra). The relevant portion of the same is being reproduced as under:

“10. The Court here is concerned with the delay in filing and re-filing a petition under Section 34 of the Act which lays down strict time limits. The legislative intent is that beyond 120 days from the date of receipt of the signed copy of the Award, even the Court has no discretion to condone the delay. This discretion cannot be exercised in manner that defeats the very purpose of Section 34(3) of the Act. The Division Bench of this Court in Delhi Development Authority v. Durga Construction Co. 2013 (139) DRJ 133, after reviewing the case law till then observed inter alia that while the Court would have the jurisdiction to condone the delay, the approach in 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. The applicant would have to show that the delay was on account of reasons beyond the control of the applicant and could not be avoided despite all possible efforts by the applicant. It was further observed in the same decision that the delay in re-filing cannot be permitted to frustrated, which is the object of the Act i.e., the arbitration proceedings should be concluded expeditiously.

11. Following the decision in Delhi Development

Authority v. Durga Construction Co. (supra) in Green Valley CGHS Ltd. v. Gurcharan Singh [decision dated 7th April, 2016 in OMP No. 238/2015], this Court on the facts of the case noted that the application for delay in re-filing the petition did not contain “any valid reasons.”

12. The present case appears to be no different. As already noticed in the application seeking condonation of delay in re-filing of the petition, the principal reason has been the inability to obtain a signed copy of the Award, which reason as already noted, is not at all relevant in view of the facts in the present petition. After obtaining a signed copy of the Award, the Petitioner was expected to act diligently in curing the defects and ought to have re-filed the petition within a period of 30 days in terms of the applicable rules and, in any event, with a proper explanation for the delay beyond 30 days in re-filing. There is, in fact, no explanation whatsoever, let alone any explanation for every day's delay.”

(Emphasis Supplied)

27. In the instant case, the delay in re-filing is of 234 days which is concededly beyond three months and 30 days. In my considered opinion, the Petitioner has to be put to stringent test in such a case to satisfy the Court that he pursued the matter diligently and the delay was beyond control and was unavoidable. The inordinate delay of 234 days has been sought to be explained in the grounds urged in the application as reproduced hereunder:

“7. It is most humbly submitted that at the time when the defects were being communicated to the Petitioner, it was learnt that the Petitioner was in poor health and was not in a position to understand the contents of the documents and the contents of the applications which required his thumb impressions. The Petitioner was 70 years old and was/is suffering from Parkinson's disease since the last 10 years. Due to the said

reasons, the thumb impression and instructions from the Petitioner could not be taken in time.

8. It is pertinent to mention that **during the arbitration proceedings as well, Petitioner was incapacitated due to his poor health**, and would only communicate through small random phrases with the help of his care givers. The health of the Petitioner was an important fact consistently brought before the learned Arbitrator through Petitioner's counsel and through affidavits of his family members appearing as witnesses. **The health of the Petitioner only deteriorated significantly over the years, making him apprehensive in giving thumb impressions and he only communicates with hand gestures, thereby making it very difficult for the Petitioner's next kin and care givers to explain the contents of the documents and thereafter, obtain thumb impressions from the Petitioner.**

9. **Due to Petitioner's poor health, his signatures/ thumb impressions could not be obtained and the erstwhile counsel, due to the said circumstances, beyond his control, could not cure the defects marked on 23.08.2018 by the Delhi High Court Registry, within time. Therefore, the present petition could not be re-filed and remained defective. In view of the above facts and circumstances, the Petition was re-filed on 26.10.2018 with a delay of 70 days. The said delay was only on account of ill health of the Petitioner of the which was beyond the control of the Petitioner, his kin and the erstwhile counsel.**

10. Since all the defects pointed out by the Registry, were cured, the Petition was re-filed on 26.10.2018. To the surprise of the erstwhile counsel, on 30.10.2018, **the petition was returned as defective by the Registry. The Registry marked new defects which were not notified in the defect sheet of 23.08.2018.**

11. The Registry also notified about requirement of filing the Statement of truth and application for condonation of delay in re-filing with supporting affidavit. **Both of these documents**

required the signatures/ thumb impression of the Petitioner particularly the application for condonation of delay which could not have been filed without explaining the facts and averments sought to be made in the said application.

12. It is most humbly submitted that after procuring the documents from the Registry, the erstwhile counsel called the Petitioner's sons to get the thumb impressions of the Petitioner. However, **the erstwhile counsels were informed that health of the Petitioner had deteriorated to a point that it would be difficult to obtain a thumb impression from the Petitioner. In fact the Petitioner had undergone a tracheostomy, due to which the Petitioner would remain sedated.** In addition to the fact the Petitioner was already suffering through Parkinson's disease and dementia, on the advice of the erstwhile counsel, **it was decided to refile the petition through Petitioner's son, Mohammad Javed.**

13. The Petition was thereafter **refiled through Petitioner's son on 24.11.2018 after a delay of 24 days from the date of return of Petition as defective on 30.10.2018.** The Petition was accompanied with the application for appointment of Petitioner's son as his 'next friend' under Order 32, Rule 3 and 15.

14. The Petition was again returned on 27.11.2018, as the Registry found that all the defects marked on 30.10.2018 could not be cured.

15. It is pertinent to mention that on 01.08.2018, **the Respondent Company** on the basis of the impugned arbitration award, **had filed a Trademark Suit bearing T.M no. 131/2018 against Khan Chacha Kebabs Pvt. Ltd. - a company incorporated by the Petitioner's sons.** In the said trademark suit, the Respondents alleged "passing off" of the Trademark "Khan Chacha". The said Trademark Suit was filed in the Saket District Court.

16. Subsequently, a written statement along with the affidavit of authorized representative was filed on 22.11.2018 by Khan

Chacha Kebabs Pvt. Ltd., the Defendant Company therein. **The Written Statement contained the details of the fraud and collusion in the making of the arbitration award (impugned award).** The discovery of fact of collusion and fraud in the making of the award was incorporated in the written statement in Trademark Suit of the Respondent because- it was material to the defence set up by Khan Chacha Kebabs Pvt. Ltd.

17. In view of the above facts and circumstances, **on 26.11.2018 a day before the defects in the Petition were intimated to the erstwhile counsel, the erstwhile counsel received a legal notice**, from the counsels of the Respondent alleging scandalous, defamatory and damaging allegations made in the Written Statement vis-a-vis the discovery of fraud & collusion in the making of the impugned award, and threatened of legal action against the erstwhile counsel of the Petitioner. **The legal notice alleged that the allegations of fraud and collusion were incorporated by the erstwhile counsel, without any instructions from Khan Chacha Kebabs Pvt. Ltd.** (defendant Company in the Trademark Suit).

18. It is most humbly submitted that the whole arbitration proceedings have been initiated from a document manufactured by the Respondents and forging the signature of the Petitioner on the said document i.e. the Assignment Deed dated 04.04.2012. The Petitioner through his sons, based on the legal advice received, around October 07, 2017 filed a Criminal Complaint before the Hon'ble District Court of Saket, alleging criminal conspiracy, cheating and forgery of the Assignment Deed 04.04.2012.”

(Emphasis supplied)

28. The plea that Petitioner Haji Bandi Hasan is seriously ill, is unsubstantiated as there is no medical record accompanying the application of the Petitioner. Moreover, his affidavit of 21st August 2018, as noted above, contradicts and falsifies the plea raised to explain the delay in re-

filing. On the contrary evidence has been brought on record to say that on 21st August 2018, he was not in a position to sign and file the said affidavit. There is no explanation forthcoming as to why such an affidavit was not placed on record despite the defects mentioned by the Registry pointing to absence of affidavit. In fact, the log-in information reveals that the defects pointed out by the Registry relating to the missing signatures on the petition continued and subsisted till the filing of present petition under a different diary number. It is unclear as to why the affidavit was not filed to remove the objections if the same was indeed available with the Petitioner.

29. The only conclusion that one can draw is that the first filing was intended to stop the period of limitation from running. Thereafter, the petition was repeatedly re-filed, without curing the defects pointed out by the Registry. Till the filing of the present petition, the same remained a *non est* filing despite repeated opportunities being granted by the Registry to remove the same. The ill health of the Petitioner in absence of any convincing and substantial medical evidence remains a sham plea which cannot be believed. This is also contradicted by the affidavit of the Petitioner dated 21st August 2018 and also for the fact that re-filing being done on 29th October 2018 is in the name of the Petitioner himself. It has been alleged in the application that on the advice of the erstwhile counsel, the petition was re-filed through Mohd. Javed. Again on this count, there is no supporting evidence by way of an affidavit. Further, in paras 15 to 21 of the present application (reproduced hereinabove, in para 37), the Petitioner has made a reference to the filing of the trademark suit by the Respondent. The said suit is not against the Petitioner but against the Private Limited

Company as stated in para 15 of the application. In para 24 of the application, there is reference to a criminal complaint against the learned Arbitrator. The Respondents have informed that the said criminal complaint has been closed and the learned Arbitrator was only called upon to produce the original agreement dated 4th April 2019 which direction was complied.

30. In para 37 of the application, the Petitioner has raised the plea of the new counsels collecting all the information from the erstwhile counsel. This again is not convincing. The first counsel concededly did not share the log-in details and therefore the subsequent counsel cannot say that the information was being collected from the first counsel. As noted above, the first petition was abandoned and the second one was filed under a different Vakalatnama dated 28th May 2019. There is no affidavit of the counsel supporting the contentions of ostensible delay at the hands of the counsel. The upshot of the above discussion is that the explanation offered to justify the delay does not inspire any confidence. The approach of the Petitioner has been casual throughout. The first petition filed on 21st August 2018 was last returned under objections on 19th December 2018, and thereafter, there has been a huge delay in re-filing of nearly 162 days in filing the second petition/second filing. There is also delay in re-filings accumulated over a period of time from the date when the petition was first returned under objections and re-filed from time to time. It needs to be stressed that in all these re-filings, the Petitioner never cared to remove the objections pointed out by the Registry. The record maintained by the Registry shows that the re-filings continued to have the same defects. Mr. Lall argued that on re-filing the defects were removed and the Registry ought to have maintained

the record of the re-filings. However, the record which has been made available does not show that any such defects were removed. On the contrary, the log-in information continues to specify the same defect codes, which were notified when the petition was first filed and marked defective and sent for re-filing. These defect codes consistently reoccur exhibiting that Petitioner did not act with due diligence and dispatch. Thus, even if it is assumed for the sake of arguments that the objection petition dated 30th May 2019 is only a re-filing of the earlier petition of 21st August 2018, it is still hopelessly barred by limitation. In view of the above, I find no reason to condone the delay.

31. The application is dismissed.

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32. In view of the inordinate delay in filing the present petition and dismissal of the application for condonation of delay, for reasons as stated above, the petition is dismissed as barred by time.

SANJEEV NARULA, J.

SEPTEMBER 12, 2019/ss