

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

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Date of decision: July 27, 2020

+ OMP(COMM) 461/2019

THREE C UNIVERSAL DEVELOPERS PRIVATE LIMITED &
ORS. Petitioners

Through: Mr. Sudhanshu Batra, Sr. Adv. with
Mr. Rishi Kapoor, Mr. Abhay
Kaushik, Mr. Satish Rai and Ms.
Suvriti Batra, Advs.

versus

HORIZON CREST INDIA REAL ESTATE
& ORS. Respondents

Through: Mr. Ciccu Mukhopadhaya, Sr. Adv.
with Mr. Saurav Agrawal, Mr. Rajat
Taimni, Mr. Madhav Misra, Mr. Ribhu
Garg, Mr. Akash Ray and Mr. V.K.
Misra, Advs. for R-1 to R-6
Ms. Shivambika Sinha and Ms.
Neelambika Singh, Advs. for R-14

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The petitioners have filed the present petition with the following prayers:

“

A. *Pass an order setting aside the Impugned Award dated 02.07.2019 as the same is against the provisions of law and against the public policy; and/or*

B. *Pass an order thereby remitting back the present dispute to the Ld. Arbitral Tribunal to adjudicate and determine upon the ground of arbitrability of the dispute between the parties; and*

C. Grant ex-parte ad-interim stay in favor of the Petitioners and against the Respondent no. 1 to 6 qua the enforcement of the Impugned award dated 02.07.2019; and

D. Pass any such further or other orders which this Hon 'ble Court may deems fit and necessary in the interest of justice."

2. On June 29, 2020 an application seeking early hearing of the petition was filed by petitioner No. 2 herein, being I.A. 4901/2020. During the course of hearing of the application, Mr. Ciccu Mukhopadhaya learned Senior Counsel appearing for the respondent Nos. 1 - 6 ('respondents', for short), took an objection that the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (Act of 1996 for short) is barred by limitation.

3. Thereafter, when the matter was heard on the limited issue of limitation on July 15, 2020, Mr. Sudhanshu Batra learned Senior Counsel appearing for the petitioners had argued that the issue of limitation being raised is irrelevant for the adjudication of the present petition and submitted that the issue of limitation being raised by the respondents is only based on a belief, whereas the records procured from the website of this Court as well as the communications made to the petitioners by the Registry on record vide diary No. E-518648/2020 proves, the petition is within limitation.

4. He further stated that the petitioners in the instant matter have filed their objections under Section 34 of Act of 1996 seeking the setting aside of the Arbitral Award dated July 2, 2019 (hereinafter 'Impugned Award') as received by them on July 11, 2019.

5. According to Mr. Batra, the petition has been filed on October 01, 2019, on the 82nd day from the date of receipt of the Impugned Award which is well within the contours of limitation of 90 days (three months) from the date of receipt of the Impugned Award, as provided under S. 34(3) of the Act of 1996 and this is evident from the email dated October 01, 2019 that was received from delhihighcourt@nic.in.

6. Mr. Batra submitted that after the filing, defects marked and uploaded on the website of this Court on October 23, 2019 were rectified immediately by the petitioners and the petition was re-filed on October 23, 2019. He stated, that the petitioners being amply vigilant, mentioned the matter before this Court on October 24, 2019 on the basis of which the matter was listed on the directions of this Court on the next working day i.e. October 30, 2019 as the courts were closed from October 25, 2019 to October 29, 2019 on account of Diwali festivities. This information, he stated, can be corroborated from the email dated October 23, 2019 wherein the Registry of this Court listed the defects in Diary No. 1126739/2019 as well as the from the case records which suggests the mentioning of the instant petition on October 24, 2019.

7. Mr. Batra has argued that since the instant petition was filed well within 90 days as per Section 34 of the Act of 1996, i.e. on October 01, 2019, needs to be heard on merits. He stated that the objection of the respondents despite the documents including case information, which is the case log maintained by the Registry, being placed on record by the petitioners, is only to prevent the present petition from being heard by raking up hyper-technical and hypothetical issues, without any basis.

8. The petitioners in their written submission also stated that the record filed vide Diary No. E-518648/2020 is nothing but the

communications of Registry and the elaborate list of log which is already on record before this Court and therefore seeking the same again on one pretext or another by the respondents is an attempt to derail the proceedings.

9. It is stated in the submission that once the petition was filed within 90 days and listed within the timeline prescribed in the Delhi High Court (Original Side) Rules, 2018; neither did the Registry press for re-filing nor were any defects marked with respect to limitation, as it is evident from the records and the petition being listed prior to the statutory period under Section 34 (3) of the Act of 1996, there remains no reason as to why the baseless beliefs of the respondents should be catered to. Such submissions have been made only after the arguments were concluded and orders in relation to the issue were reserved on July 15, 2020. The respondents, at this belated stage, despite having the records of the Registry filed by the petitioners, did not raise any of these arguments earlier, due to which the respondents have waived off their opportunity of being heard on additional grounds and cannot raise issue in relation to any limitation aspect.

10. Mr. Batra has also argued that the reasons and nature of defects would be evident from the list of defects and has also explained that the same were curable keeping in mind the number of petitioners being twenty. The affidavits, vakalatnama and the pleadings were filed as would the list of defects reflect. In point 7 of the list of defects it would be evident that the affidavits were filed though some were filled in vernacular.

“7.[N]ECESSARY AVERMENTS BE GIVEN SINCE THE AFFIDAVIT HAS BEEN SIGNED IN VERNACULAR. NO

MODIFICATION IS ALLOWED. IT SHOULD BE RE-TYPED AND ATTESTED.”

Further point 9 of the list of defects would reflect that the vakalatnama was there though there were defects in title etc. which were also curable.

“9.... [T]ITLE ON THE VAKALATNAMA BE CHECKED. WELFARE STAMP BE AFFIXED. SIGNATURE OF THE CLIENT BE IDENTIFIED.”

11. According to Mr. Batra, all the other defects would reflect that the same were curable and more so, when the petitioners having pursued the filing of the petition so vigilantly, no question should thus arise of limitation as it is not the case where the Petitioners have slept over their rights.

12. It was Mr. Batra's submission that the respondents have tried to mislead the Court by ignoring the filing dated October 01, 2019 and the fact the same case history on the top right corner provides for further details clicking upon which the defect list of October 23, 2019 comes up which also has been filed vide E-518648/2020. He further stated that the respondents have ignored the fact that the case history of October 24, 2019 only to reflect to the numbering of the applications along with the petition which is the job of the Registry after the defects are removed. He also stated that the fact that the Diary No. 1126739/2019 given by the Registry vide its email dated October 01, 2019 has been eventually registered as the instant petition has also been concealed by the respondents.

13. Mr. Batra also stated that nowhere in the submissions made by the respondents, have they assailed the Registry's email dated October

01, 2019 nor has the filing number been disputed and therefore, once the filing done on October 01, 2019 is not disputed then there would remain nothing in the submission of the respondents and prayed for dismissal of objection of the respondents.

14. On the other hand, Mr. Ciccu Mukhopadhaya learned Senior Counsel and Mr. Saurav Aggarwal, Ld. Counsel appearing for the respondents ('Counsel' for short), have argued that the matter was listed for the first time on October 30, 2019, when the petitioners were directed to provide a copy of the Section 34 petition filed under the Act of 1996, to respondents. It is a matter of record that on that date no notice was issued in the matter. The Counsel also admit that the Impugned award was received by the petitioners on July 11, 2019.

15. The Counsel stated that from the perusal of the documents served on the respondents, it transpires that the petition has been drafted on October 19, 2019, the statement of truth and supporting Affidavits were executed on October 22, 2019, the vakalatnama was executed on October 19, 2019 and the petition itself has been filed on October 24, 2019.

16. The Counsel stated that the 'Case History' showed date of filing as October 24, 2019 and in view of what had been provided, Section 34 petition under the Act of 1996 is time barred, since it was filed on the said date, after the expiry of the period of 3 months on October 11, 2019. The Counsel also stated that petition being time barred, cannot be entertained as it was not accompanied by an application for condonation of delay showing 'sufficient cause'.

17. The Counsel further submitted that when this Court had directed the parties to file written submissions, the respondents in their written

submissions dated January 13, 2020 had pointed out that the petition is time barred.

18. The Counsel stated that the documents filed (without any affidavit) on July 11, 2020 by the petitioners consisted of three documents namely:

- i. *“Print copy of the e-filing information received vide email dated 1st October, 2019 from delhihighcourt@nic.in ”*
- ii. *“Copy of the list of defects being uploaded on the website of the Hon’ble High Court of Delhi dated 23rd October, 2019”*
- iii. *“Copy of the case history available on the website of the Hon’ble High Court of Delhi in the instant matter”*

19. The Counsel stated, it was for the first time disclosed through these documents that the petitioners had filed a petition on October 01, 2019, within the period of 3 months, vide Diary No. 1126739/2019 and it was that Diary No. 1126739/2019 which had been converted into the present petition under section 34 of the Act of 1996.

20. The Counsel stated that by filing the aforesaid ‘List of Documents’, the petitioners have sought to rely upon an email, from the Registry of this Court, dated October 01, 2019 wherein a diary number was assigned to the filing made by the petitioners’ counsel. The Counsel rebuts the statement by stating that no copy of the alleged filing had been served on the respondents or placed before this Court.

21. The Counsel vehemently submitted that the filing has to be treated to be done as on October 24, 2019; since as per the defect sheet, up till October 23, 2019, major defects still remained in the petition.

The Counsel also denied the service of any such petition which had been filed on October 01, 2019 and further stated that the said filing needs to be deemed as *non-est* in nature, as it lacked vakalatnama, affidavit, statement of truth and signatures on the petition.

22. Responding to the argument advanced by Mr. Batra that the filing done on October 01, 2019 was a proper filing and contained a vakalatnama, affidavit, statement of truth, etc. and that the defects notified for the first time on October 23, 2019 by the Registry were rectified initially on October 23, 2019 and on October 24, 2019, the Counsel stated that there was no basis for the said submission as service was not completed on the respondents.

23. The Counsel also contested the stand taken by the petitioners that defects were notified for the first time after 22 days, as the defects are notified immediately or at the most within 3-4 days.

24. The Counsel further submitted that an email was sent to the counsel for the petitioners on July 15, 2020 requesting for a copy of the petition along with all the documents as filed in PDF format on October 01, 2019. Request was also made for a copy of all the emails sent or received from the registry in relation to the filing from October 01, 2019 to 24 October, 2019 along with attachments, copy of the various defect sheets as received and copies of all SMSs received between October 1, 2019 to October 24, 2019. The Counsel stated that this was necessary to test the veracity of the oral arguments made on behalf of the petitioners on July 15, 2020.

25. The Counsel stated as no response was forthcoming, the respondents filed an application, being IA No. 5866/2020, which came to be listed on July 21, 2020, wherein the Court ordered the petitioners

to serve upon the respondents the documents asked for. They submitted, the plea taken by the petitioners that the aforesaid documents had already been served on the respondents was incorrect. They further stated that instead of the documents directed to be served as per the order dated July 21, 2020, the petitioners re-served on the respondents the documents sent by the petitioners to the respondents on July 11, 2020; wherein the petitioners relied upon their filing done on October 01, 2019 without providing a copy of what was filed on October 01, 2019 in order to show that it was a filing done with the mandatory documents/requirements.

26. The Counsel stated that the aforementioned sequence of events demonstrates that the petitioners first relied on the filing made by them on October 01, 2019 and then even after having made these arguments, did not disclose/provide the complete set of documents filed on October 01, 2019 together with the list of defects notified by the Registry. The Counsel submitted that in the absence of these documents, the filing as done on October 01, 2019 was in fact *non-est* and amounted to nothing more than a bunch of papers.

27. On the question of whether the petition was filed on October 01, 2019 and if so whether that filing was a valid filing containing vakalatnama, affidavit, statement of truth, etc., the Counsel submitted that the onus is on the petitioners to show that they had filed a petition on October 01, 2019 and that such a filing was a valid one.

28. The Counsel stated that submissions have been made on behalf of the petitioners concerning exact nature of what was filed on October 01, 2019, but have failed to disclose the documents filed even after being repeatedly called upon to do so and no valid reason whatsoever

has been advanced for such non-disclosure and it cannot reasonably raise a plea that these documents are not in the power, possession or control of the petitioners having heavily relied upon them to justify filing done on October 01, 2019, as valid and proper.

29. The Counsel submitted that the petitioners deliberately concealed such documents although being in possession of the same, making this a fit case for drawing adverse inference against the petitioners. In other words, it is their submission that if the petitioners had disclosed the requested documents it would have supported the case of the respondents that the filing was *non-est* and was nothing more than a 'bunch of papers'.

30. The Counsel also submitted that the Court should rely upon the defect sheet which would show that the filing was grossly inadequate and lacked vakalatnama, supporting affidavit, statement of truth, signatures on the petition etc. The very fact that the statement of truth and vakalatnama are dated October 19, 2019 or thereafter, shows that the present petition could not have been filed on October 01, 2019 and that such a filing was not a proper filing in the eye of law. Their pleas, in substance, are the following: -

- i. *The present petition could not have been filed on 01.10.2019 since the petition is stated to be drawn only on 19.10.2019.*
- ii. *The entire petition at various places [at Page 3, 4, 15, 22, 34 & 100; Index I], carries the date of 19.10.2019.*

- iii. *Vakalatnama [Page 2-3; Index III] carries the date of 19.10.2019. The Vakalatnama bears the signature of only one Company. For the rest, only blank stamps have been affixed.*
- iv. *Further, the Affidavit in support of the petition [Page 104-107; Index III] and the Statement of Truth [Page 101-103; Index III] are dated 22.10.2019.*
- v. *The 'List of Defects' [Page 2; List of Documents dated 11.07.2020] maintained by the Ld. Registry shows that the filing contained fundamental defects even in the re-filing made on 23.10.2019. These defects included - no signatures by Petitioners or advocate on the Petition, no Statement of Truth, no supporting Affidavit, no Vakalatnama etc., all of which (collectively and individually) render a filing as non-est in law*

31. The Counsel further submitted that even if there was a filing made on October 01, 2019, the status of such a filing without (a) vakalatnama; (b) Affidavit; (c) Statement of Truth; (d) without signatures etc., remained *non-est* in the eyes of law till October 23, 2019. The date of initial filing therefore, must be considered from the date on which such basic defects were removed i.e. October 24, 2019 and thus the filing was clearly beyond the 3 months period.

32. The Counsel requested that since a reply to email dated July 15, 2020 from the petitioners was not forthcoming, the Court should call for the log records in relation to the purported filing made by the petitioners dated October 01, 2019 till October 24, 2019. They submitted, the Registry would have notified defects through emails, SMSs and such communications have not been produced and that the list of defects as submitted by the petitioners shows the defects existing as on the original

filing and the re-filing date of October 23, 2019. They further submitted that this in no way means that the defects were notified on October 23, 2019 and re-filed, as otherwise it would not be possible for the petitioners to get the vakalatnama, statement of truth and affidavit of a date prior to the defect notification date which they claim to be October 23, 2019.

33. In support of their submissions above, the Counsel has relied on the following judgments:

- (i) ***Executive Engineer Irrigation & Flood Control Dept v Shree Ram Construction Co., 2007 SCC OnLine Del 1196;***
- (ii) ***Union of India v Ibrahim Uddin & Anr., 2012 8 SCC 148;***
- (iii) ***ONGC v. Joint Venture of Sai Ram Engineering Enterprises, 2019 SCC OnLine Del 10456;***
- (iv) ***OIC v. Air India, 2019 SCC OnLine Del 11634;***
- (v) ***SKS Power Generation (Chhattisgarh) Ltd. v. ISC Projects Pvt. Ltd., OMP (COMM) 132/2019;***
- (vi) ***DDA v. Durga Construction, 2013 SCC OnLine Del 4451;***
- (vii) ***Steel Stripes Wheels Ltd. v. Tata AIG General Insurance Co. Ltd., OMP (COMM) 507/2019;***
- (viii) ***Chintels India v Bhayana Builders, in OMP (COMM) 444/2019 Judgment Dt June 04, 2020 [DHC];***
- (ix) ***Ballumal A. Jaisingh v J.J. Builders & Ors., 2002***

SCC OnLine Bom 779;

- (x) Union of India v Bharat Biotech Pvt Ltd., 2020 SCC OnLine Del 483;***
- (xi) Sravanthi Infratech Private Limited v. Greens Power Equipment (China) Co. Ltd., 2016 SCC OnLine Del 5645;***
- (xii) Simplex Infrastructure Ltd v UOI, (2019) 2 SCC 455***
- (xiii) State of Arunachal Pradesh v Damani Construction Co., (2007) 10 SCC 742;***
- (xiv) Prakash Atlanta JV v National Highways Authority of India, 2016 SCC OnLine Del 743;***
- (xv) Assam Urban Water Supply & Sewerage Board v Subash Projects & Marketing Ltd., (2012) 2 SCC 62;***

34. Having heard the learned Counsels for the parties and perused the record, the issue that needs to be decided is whether the petition filed by the petitioner under Section 34 of the Act of 1996 is barred by time.

35. It is the case of the petitioners, which is not disputed by the Counsel for the respondents that the impugned Award dated July 2, 2019 was received by them only on July 11, 2019. A petition under section 34 of the Act of 1996 is required to be filed within 3 months from the date of receipt of the award.

36. It is the case of the petitioners that the petition was filed on the 82nd day i.e. October 01, 2019. The Counsel for the respondents have disputed this aspect. However, the log information provided by the Registry of this court reveal filing of a petition on October 01, 2019.

That apart the filing can also be seen from the email sent by the Registry of this Court to the representative of the petitioners on October 01, 2019. The communication reveals the Diary No. as 1126739/2019. So, it must be held that a petition was filed on October 01, 2019 which is within a period of 3 months of the from the date of receipt of the impugned Award.

37. The Counsel for the respondents stated (1) the petitioners have not placed on record, the documents / petition as filed by them on October 01, 2019. This is despite, them making a request to concerned counsel for obtaining the same and thereafter filing an application; (2) The petition filed on October 01, 2019 was not filed validly, i.e. filed without vakalatnama, affidavit, statement of truth etc., as the petition before this Court shows that these have been executed only on October 19, 2020 and October 22, 2020, so the filing on October 01, 2019 was in fact *non-est*; (3) the petition itself at various places carries the date as October 19, 2019; (4) even the defects pointed out by the Registry on October 23, 2019 was with regard to the lack of signatures by petitioners or advocate on the petition/application/power of attorney etc., absence of statement of truth, supporting affidavit, vakalatnama etc. rendering the filing *non-est*.

38. On the submission of Mr. Mukhopadhaya, Mr. Batra had submitted that the petition has been filed within the limitation period of 3 months. The defects pointed out by the Registry were curable, keeping in mind there are 20 petitioners. The affidavit, vakalatnama as well as the pleadings were duly filed, though some were in vernacular. Similarly, the vakalatnama was filed, though with some defects in the title etc., which were curable.

that too as an Arbitration Petition. Even the court fee is also dated October 22, 2019. Regrettably, a plea has been taken by the counsel for the petitioners that after filing of the petition on October 01, 2019, the defects were put only on October 23, 2019, which was taken back and re-filed on October 23, 2019 itself, which from the perusal of log information is factually incorrect, as there were defects pointed out on October 9, 2019 also and the petition was taken back by the counsel on the said date or thereafter and a fresh petition (dated October 19, 2019) was filed on October 23, 2019. On the same day again, the petition was taken back in defects and re-filed at 3:40 pm as OMP (COMM). It is a clear case of concealment of facts from the Court.

41. It must be concluded that on October 23, 2019, a completely new petition was filed.

42. That apart, I find, the objections which were put by the Registry on October 23, 2019 were the following:

1. *EACH PAGE OF PLEADING BE SIGNED BY THE PETITIONER/PETITIONERS. BLANKS BE FILLED IN THE STATEMENT OF TRUTH.*
2. *PLEASE FILE IN NEW FORMAT IN FOUR PARTS WITH SEPARATE PAGINATION AND INDEX FOR EACH PART AND ONE MASTER INDEX IN THE STARTING.*
3. *CERTIFICATE TO THE EFFECT THAT RELEVANT RECORD OF THE ARBITRATION PROCEEDINGS BEING THE RELEVANT PLEADINGS DOCUMENTS DEPOSITIONS ETC HAS BEEN FILED*
4. *CAVEAT REPORT BE OBTAINED AND AT THE TIME OF EACH SUBSEQUENT REFILEING AND PROOF OF SERVICE BE FILED.*
5. *FRESH NOTICE OF MOTION UPON COUNSEL FOR CONCERNED RESPONDENT BE FILED IF*

- 3 DAYS HAVE ELAPSED SINCE THE DATE OF LAST SERVICE. ANY AMENDMENTS DONE IN THE PETITION SHOULD ALSO BE INFORMED/SERVED TO THE OPPOSITE/CONCERNED PARTY
6. PETITION/ APPLICATIONS/ MOP/ INDEX/ POWER OF ATTORNEY BE SIGNED AND DATED BY PETITIONERS AND ADVOCATE
 7. AFFIDAVIT BE FILED IN SUPPORT OF PETITION/APPEAL/APPLICATION AND ATTESTED/IDENTIFIED. PARENTAL DETAILS/AGE/COMPLETE ADDRESS BE GIVEN. NECESSARY AVERMENTS BE GIVEN SINCE THE AFFIDAVIT HAS BEEN SIGNED IN VERNACULAR. NO MODIFICATION IS ALLOWED. IT SHOULD BE RE-TYPED AND ATTESTED.
 8. DOCUMENT BE MADE TRUE COPY AT THE BOTTOM OF EACH PAGE AND SIGNED. DOCUMENT NUMBER SHOULD BE MARKED PROPERLY IN THE INDEX AS WELL AS ON TOP OF THE ANNEXURE FILED WITH THE PETITION.
 9. VAKALATNAMA BE FILED / DATED AND SIGNED BY THE COUNSEL AND ALL PETITIONERS. EACH ADVOCATE MUST MENTION THEIR NAME/ ADDRESS/ ENROLMENT NO. MOBILE NUMBER IN VAKALATNAMA. TITLE ON THE VAKALATNAMA BE CHECKED. WELFARE STAMP BE AFFIXED. SIGNATURE OF THE CLIENT BE IDENTIFIED.
 10. STATEMENT OF TRUTH BE FILED AS PER COMMERCIAL COURTS ACT, 2015. ENTIRE PLEADINGS BE SIGNED BY THE PLAINTIFF/PETITIONER O XI- R-1(3) OF CPC (AMENDED) BY COMMERCIAL COURTS ACT, 2015 -2018
 11. ADVANCE COPY OF PETITION/APPLICATION FILED U/S 9, 11, 14, 15, 27, 34, 37 OF

*ARBITRATION AND CONCILIATION ACT. 1996
BE SERVED UPON OPPOSITE PARTY CH-III R-6
-2018*

12. .

13. DESCRIPTION OF ANY OTHER DEFECTS:PLEASE SEE PREVIOUS OBJECTIONS. BE FILED UNDER THE CORRECT HEAD. FOR PROPER SCRUTINY AND LISTING.

14. DESCRIPTION OF ANY OTHER DEFECTS:TOTAL 1425 PAGES FILED. MASTER INDEX FORMAT BE FOLLOWED STRICTLY. PLEASE MENTION THE SPECIFIC VALUE OF THE PECUNIARY JURISDICTION. EACH PAGE OF PLEADING BE SIGNED BY THE PETITIONERS. AFFIDAVIT/STATEMENT OF TRUTH OF EACH PETITIONER BE FILED. SERVICE BE MADE TO THE ALL RESPONDENTS. PLEASE CORRECT THE VOLUME NO. IN THE DOCUMENTS AS VOLUME -I IS MISSING. PAGE NO. 688 IS MISSING IN THE DOCUMENTS. PAGE NO. 858 871,971,1187 ARE DOUBLE IN THE DOCUMENTS. PAGE NO. 1000,1100,1240 ARE MISSING IN THE DOCUMENT. PLEASE CORRECT THE PAGINATION. IN ADDITION TO THE EFILING, 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.

15. DESCRIPTION OF ANY OTHER DEFECTS:PLEASE SEE WHAT YOU HAVE FILED AND UNDER WHICH HEAD. PLEASE FILE PROPERLY FOR PROPER SCRUTINY.

43. The defects as pointed out by the Registry, as noted above, more particularly at serial nos. 6, 7 and 9 are with regard to petition / application / MOP / Index/ Power of Attorney be signed by the petitioners and Advocate; Affidavit be filed; vakalatnama be filed. Even though the same are fundamental to the filing of a proper petition, the same have not been filed. It is noted that the petition is signed by one person only. Similarly, one affidavit has been filed in support of the petition. The same is the position with regard to vakalatnama, even though it consists of stamps of other petitioners in as much as it is signed on behalf of one company. What is important is the person who has signed the petition/ affidavit/ statement of truth/ vakalatnama, has not filed any power of attorney in his favour by the other companies. Even the Board resolution filed is on behalf of M/s. Three C Universal Developers Private Ltd. and not Hacienda Projects Pvt. Ltd. over whose stamp, the person Anand Ram has signed. The one single affidavit/ statement of truth/ vakalatnama would have been justified if the person signing them had the power of attorney from the other petitioner companies in his favour. In view of this position, the Registry has put the objections as noted at nos. 6, 7 and 9 above, that the petition/ applications / MOP/ Index/ Power of Attorney be signed and dated by the petitioners and Advocate. Even the vakalatnama was directed, to be filed/ dated and signed by the counsel and all the petitioners. In fact, I find that at 5:18 pm on October 23, 2019, the Registry has reiterated its objection that '*Affidavit/Statement of Truths of each petitioner be filed*'. This objection has not been cured by the Petitioners. The absence of supporting affidavit/ statement of truth/ vakalatnama are fatal defects, which has the effect on the filing being *non-est*. This Court in the case

of *Sravanthi Infratech Private Limited (supra)* has in paragraph 14 held as under:

“14. 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 24 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 10 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.”

44. Another coordinate bench of this court in *SKS Power Generation (Chhattisgarh) Ltd. (supra)* held as under:

*“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.*

45. Similarly, in *OIC v. Air India (supra)* this Court has held as under:

“22. A perusal of the log information in the present case indicates that when the petition was filed on 03.08.2019, several defects were marked by the Registry while checking on 06.08.2019. These defects were indicated with details and code numbers were clearly reflected. Amongst other defects, the main defects that emerged when the petition was initially filed were as under:

- (i) 70 pages filed*
- (ii) Affidavit and Statement of Truth not signed and attested*
- (iii) Award not filed*
- (iv) No documents filed*
- (v) Vakalatnama not filed*
- (vi) Court fees missing*
- (vii) Pecuniary jurisdiction not mentioned*

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24. As rightly pointed out by the learned counsel for the respondent, the dates appearing on the Court fees, Vakalatnama and Affidavits, are indicative of the fact that they were not filed on 03.08.2019 along with the petition. This was the 116th day from the date of start of the limitation period. Thereafter, the petition was refiled only on 31.08.2019, which was far beyond the 120th day, upto which this Court has the power to condone the delay, on sufficient cause being shown by the party.

25. Since the petition filed on 03.08.2019 is a non-est petition, it cannot be argued by the learned counsel for the petitioner that a proper petition was filed within the extended 30 days available to it under Section 34(3) of the Act and the delay be condoned.

26. This Court in the case of SKS Power Generation (Chhattisgarh) Ltd. v. ISC Projects Private Ltd. in OMP (Comm) 132/2019 decided on 03.04.2019, has clearly termed such a petition as nothing more than a mere ‘Bunch of Papers’, relying on the judgment of a Division

Bench of this Court in Delhi Development Authority v. Durga Constructions Co., 2013 (139) DRJ 133 [DB] as affirmed by the Apex Court. Relevant portion of the judgment of a coordinate Bench of this Court in SKS Power Generation (supra) is as under:—

“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 vakalatnama 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 refiling, 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.”

27. *The judgment of Durga Construction (supra), in my opinion, completely covers the present case. The relevant paras are quoted as under:*

“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....”

46. On similar lines, a coordinate bench of this Court in **ONGC** (*supra*) has held:

“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.

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

47. 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.

48. *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."*

47. Drawing inference from the above referred judgments, in the given facts, the petition having been filed only on October 23, 2019 (as a fresh petition and also not as a proper petition) which is beyond period of 3 months, which is the period of limitation for filing a petition for setting aside an arbitral award and in the absence of an application seeking condonation of delay showing sufficient cause, the period beyond 3 months cannot be condoned. The plea raised by Mr. Mukhopadhyaya that the petition is barred by limitation needs to be accepted and as such the petition filed under Section 34 of the Act of 1996 challenging the award dated July 2, 2019 is not maintainable and the same is dismissed with costs of Rs. 2 lacs to be paid by the

petitioners to the Delhi High Court Advocates Welfare Fund within two weeks from today.

V. KAMESWAR RAO, J

JULY 27, 2020/jg

