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

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Reserved on: 09.12.2019

Pronounced on: 13.02.2020

+ O.M.P. (COMM) 494/2019

SPML INFRA LIMITED

..... Petitioner

Through Mr. Darpan Wadhwa, Senior
Advocate along with Mr. Rahul
Singh, Advocate.

versus

GRAPHITE INDIA LIMITED

..... Respondent

Through Mr. T.K. Ganju, Sr. Advocate with
Mr. Rajat Jariwal and Mr.
Anupender Jassal, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

I.A 16535/2019 (Condonation of delay in filing the petition)

1. This is an application filed by the petitioner under Section 5 of the Limitation Act read with Section 151 CPC seeking condonation of delay of 28 days in filing the present petition. It is stated in the application that the petitioner is regulating its operations from Kolkata office and the Authorized Signatory is a witness and Authorized Signatory in several matters of the petitioner Company. Due to his prior occupancy in other matters, he could not sign the present petition in time. It is further stated that due to non-availability of Mr. Chakraborty, the Authorized

Signatory, the management of the petitioner decided to authorize another Signatory to sign the instant petition. However, this process took several months and after several discussions, the petition could be signed by the other Authorized Signatory. No other ground has been averred in the application.

2. Learned senior counsel for the petitioner at the outset submits that there is only a delay of 28 days and the same should be condoned for the reasons stated in the application. He also submits that the Arbitral Award is perverse as it has awarded a sum of Rs.45,37,000/- with 11% interest to the respondent and has awarded litigation costs which are three times the sum awarded. It is further submitted that the petitioner has a good case on merits and since there is no delay beyond the permissible period of 120 days, the application should be allowed.

3. Learned senior counsel further contends that the petition was initially filed on 17.09.2019 which is within the limitation period. The petition was signed by the Authorized Signatory as well as the counsel for the petitioner and had supporting affidavit, duly signed and notarized. It was accompanied with an application for condonation of delay in filing, beyond the three months period as well as an application for exemption from filing original documents. Both applications were duly signed and supported with affidavits of Authorized Signatory and notarized.

4. It is pointed out that on 19.09.2019, the Registry raised certain objections that Vakalatnama, Court fee, Statement of Truth and documents were not filed. It is argued that non-filing of the Vakalatnama is a curable defect and should not be a reason to defeat the substantive rights of a litigant. Moreover, the Vakalatnama merely confirms the

authority of an advocate to file the petition. The present is not a case where the Vakalatnama ultimately filed, contains signatures of an unauthorized person or a wrong advocate. Reliance is placed on the judgment of the Supreme Court in ***Uday Shankar Triyar vs. Ram Kalewar Prasad Singh & Anr. (2006) 1 SCC 75*** to contend that irregularities which are curable should not come in the way of seeking justice.

5. In regard to the non-filing of the Court Fee, learned senior counsel submits that at the time of initial filing the petitioner did not affix the Court fee, but the defect was cured at the time of re-filing. In the case of ***H. Dohil Constructions Company Private Ltd. vs. Nahar Exports Limited & Anr. (2015) 1 SCC 680***, the Supreme Court held that Section 149 CPC empowers the Court to accept the Court fee at a later point of time. Further, in the case of ***ONGC vs. Joint Venture of Sai Rama Engineering Enterprises (SREE) & Megha Engineering and Infrastructure Limited (MEIL) 2019 SCC OnLine Del 10456***, the Court while laying down the basic parameters of a proper filing did not include Court Fee as one of the criteria to constitute 'proper' filing.

6. It is further submitted that though the Statement of Truth was not filed but the affidavit in support of the petition was filed initially and this is equivalent to a Statement of Truth. The purpose of an affidavit is also to affirm that the contents of the petition are true to the knowledge of the petitioner and thus, there was sufficient compliance. The non-filing of Statement of Truth being a curable defect in such a situation should be condoned.

7. Mr. Wadhwa, learned senior advocate next contends that once the above mentioned defects are curable and were cured, the initial filing was a proper filing and therefore, the delay of 28 days in filing be condoned. It is submitted that thereafter, the only question which remains to be determined is whether the delay in re-filing can be condoned if the petition is re-filed beyond 30 days prescribed under Rule 3 Chapter IV of Delhi High Court (Original Side) Rules, 2018. He contends that in the instant case, there is a delay of 33 days in re-filing and can be condoned. Reliance is placed on the judgment of the Supreme Court in ***Northern Railway vs. Pioneer Publicity Corporation Private Limited (2017) 11 SCC 234***, where the Court held that Section 34 (3) of the Act has no application in re-filing and only applies to the initial filing. Reliance is placed on the judgment in ***Bharat Sanchar Nigam Limited vs. Exnxt Software Private Limited 2017 SCC OnLine Del 9564*** where the Court held that if the petition is initially filed within the limitation under Section 34(3) of the Act, the Court retains jurisdiction to condone the delay in re-filing. In fact, in ***Civil Appeal No. 7598-7599 of 2014 titled Mahanagar Telephone Nigam Limited vs. M/s. Prakash & Company***, the Supreme Court condoned the delay of 233 days in re-filing.

8. Learned senior counsel next submits that there is sufficient cause for condonation of the delay of 33 days in re-filing and this would not prejudice the respondent as he has already filed an Execution Petition. He further argues that in ***N. Balakrishnan vs. M. Krishnamurthy 1998 VI AD (SC) 465***, the Court held that in every case of delay, there can be some lapse on the part of the litigant, but if in the explanation given the

litigant makes out a case of 'sufficient cause' and there is no indication of malafides, the delay should be condoned.

9. Per contra, learned senior counsel for the respondent has vehemently opposed the present application. He contends that the petition filed was beyond the statutory limitation period of three months, as it was filed on the 118th day, which was clearly 28 days beyond the three months. He further submits that the petitioner has not made out any 'sufficient cause' in the application seeking condonation of delay which prevented it from filing the petition in three months. He submits that pre-occupation of a Signatory cannot be a reason to seek condonation of delay.

10. It is contended that in fact the initial filing was itself 'non-est', as the petition was filed without a Vakalatnama, Arbitral Award, Court Fees and the Statement of Truth. It is further highlighted that the authorized representative of the petitioner was authorized by a Board Resolution dated 12.08.2019 and being aware of the limitation, the petition was signed only on 17.09.2019. Learned senior counsel submits that only after the respondent filed an Execution Petition wherein the Court vide order dated 15.10.2019 directed the petitioner to deposit the entire awarded amount within 30 days, that the petitioner started to cure the defects.

11. Learned senior counsel contends that even the petition filed on 19.09.2019 was signed on every page only by the counsel and not by the Authorized Signatory, who only signed the last page. The Vakalatnama which grants authority to the counsel to file a petition was signed in November 2019, two months after the petition was filed on 19.09.2019.

This, he submits would be apparent from a perusal of the defect sheet. He strenuously argues that the Vakalatnama re-filed after curing the defects in the petition was ante-dated to September 2019 only to show the authorization of the counsel at the time of first filing. The Court fees was admittedly purchased only on 07.11.2019, much after the filing of the petition. Since the filing was a 'non-est' filing, no cognizance could be taken of the initial filing and therefore, it cannot be said that there is a delay of 28 days in filing which can be condoned. Defects were cured only on 21.11.2019 which would be the deemed date of initial filing. Since this date was beyond 120 days, this Court has no powers to condone the delay.

12. Learned senior counsel for the respondent without prejudice to the above, further contends that Rule 3 Chapter IV of Delhi High Court (Original Side) Rules, 2018 grants a period of 7 days at a time for re-filing and maximum of 30 days in aggregate. The present re-filing is beyond a period of 30 days and there is a delay of 66 days in re-filing. Even the application seeking condonation of delay in re-filing has the same reason which was given in the application for filing of the petition and cannot be termed as 'sufficient cause' for condonation of delay.

13. Learned senior counsel relies on the judgment in the case of ***Union of India vs. Popular Construction Co. AIR 2001 SC 4010*** to argue that Section 5 of the Limitation Act does not apply to the arbitration proceedings in view of the words "but not thereafter" used in Section 34 of the Act. Thus, the law which enables the Court to take a liberal view in condoning the delay under Section 5 of the Limitation Act cannot apply for condonation of delay under Section 34(3) of the Act. Learned

senior counsel for the respondent relies on the judgment in the case of *Simplex Infrastructure vs. Union of India AIR 2019 SC 505* and *Popular Construction (supra)* for the contention that the limitation under Section 34 is strict and inflexible and delay cannot be condoned after a period of 120 days. Reliance is placed on the judgment of the Division Bench of this Court in *Delhi Development Authority vs. Durga Construction Co. (2013) 139 DRJ 133* for the proposition that if the defects are fundamental to the institution of the proceedings then the filing is non-est. Reliance is also placed on the judgment of a co-ordinate Bench of this Court in the case of *Director-cum-Secretary, Department of Social Welfare vs. Sarvesh Security Services Private Limited (260 (2019) DLT 460)* and *Haji Banda Hasan vs. Gupta & Gupta Pvt. Ltd. 263 (2019) DLT 137* to contend that mere filing of a ‘bunch of papers’ to stop the limitation period cannot be countenanced. Learned senior counsel further relies on the judgment in *OMP (Comm) 273/2016 titled Jay Polychem (India) Ltd. vs. S.E. Investment Ltd.* where the Court held that a petition which is neither signed nor supported by signed and attested affidavits cannot be accepted as a proper filing.

14. I have heard the learned senior counsels and examined their contentions.

15. Section 34(3) prescribes a period of limitation of three months in filing a petition under Section 34 of the Act challenging an Arbitral Award. The proviso permits a party to file the petition beyond the period of three months upto a period of 30 days, provided the petitioner is able to show ‘sufficient cause’ which prevented the petitioner from approaching the Court within the three months statutory period. Needless

to state that when an application seeking condonation of delay is filed, it must contain reasons which constitute “sufficient cause”. As mentioned in the earlier part of the judgment, the application seeking condonation of delay contains only two paragraphs giving the grounds for condonation and the only reason given is that the Authorized Signatory conversant with the case was pre-occupied in other matters of the petitioner Company. In the opinion of this Court, the reason given in the application is hardly a ground to seek condonation much less a ‘sufficient cause’. The Supreme Court in the case of *Simplex Infrastructure (supra)* has clearly held that mere administrative difficulties in the office of the petitioner cannot be a valid reason to condone the delay beyond the statutory period under Section 34(3) of the Act. The relevant para reads as under:-

“20... It is an admitted position that on 27 October 2014, the arbitrator made an award in favour of the Appellant and on 31 October 2014, the Union of India received a copy of the award. One of the reasons stated by the Respondent for delay in filing an application Under Section 34 of the 1996 Act was that the departmental office was located at Port Blair, Andaman and it was a time-consuming process for obtaining permission from the circle office at Chennai. Administrative difficulties would not be a valid reason to condone a delay above and beyond the statutory prescribed period Under Section 34 of the 1996 Act.”

16. It is clear from the reading of proviso to Section 34(3) of the Act itself that the party would have to show ‘sufficient cause’ that prevented it from approaching the Court within the three months period of limitation and not thereafter. In the present case, there is no ground in the

application which could be termed as a 'sufficient cause'. Mere pre-occupancy of an Authorised Signatory in other matters of the petitioner Company cannot be termed as a 'sufficient cause' that prevented the petitioner to file a petition in three months. What is also significant is that it is pleaded in the application that once the said Authorised Signatory was not available, the petitioner decided to authorize another Signatory to sign the instant petition and the petition could be signed after several months of discussions. This ground is no more than an administrative problem of the petitioner and cannot be sufficient to condone the delay. Moreover, the petitioner could have resorted to this very course of action earlier and the new signatory could have signed the petition within the limitation period. A mere mention in the application that time was spent on 'several months of discussion' can hardly be countenanced as a ground to condone the delay under Section 34(3), where the limitation as held by several courts is strict and inflexible.

17. In view of the above, the judgments relied upon by the petitioner are irrelevant and do not further the case of the petitioner.

18. Though in view of what is stated above, this Court need not enter into the controversy of 'non-est' filing or the condonation of delay in re-filing, but since the issues have been raised by the parties, suffice would it be to state that even on those parameters, the petition has to fail. It is now no longer res integra that a party cannot stop the period of limitation by merely filing a bunch of papers. If a petition is not accompanied with a Vakalatnama, a Statement of Truth, duly signed and attested and is not signed on all pages by the petitioner as well as the counsels on record, cumulatively the defects render the filing 'non-est'. There is now a

plethora of case law on this issue which includes the Division Bench judgment of this Court in *Durga Construction (supra)* as well as *Ahluwalia Contracts (India) Ltd. vs. Housing & Urban Development Corporation 2016 (157) DRJ 51* and *Sarvesh Security Services Private Limited (supra)* rendered by the Co-ordinate Benches of this Court including a recent judgment of this Court in *ONGC (supra)*. In *ONGC (supra)*, this Court has summarised the parameters of proper filing laid down in famous judgments, two of which are mentioned above. Relevant paras read as under:-

“43. The common thread that runs in the aforesaid judgments is that ‘nonest’ 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."

19. The respondent is right in its contention that a bare perusal of the defect sheet would indicate that when the petition was initially filed, it was without a Vakalatnama, a signed petition and Statement of Truth. Thus all the three vital parameters were missing. In ***Jay Polychem (India) Ltd. (supra)***, a Co-ordinate Bench of this Court has clearly held that once a petition is unsigned and unsupported by the Statement of Truth, the filing of the petition cannot be termed as 'proper filing'. In so far as the argument of the non-filing of Vakalatnama being a curable defect is concerned, reliance is placed on ***Uday Shanker Triyar (supra)***. Having perused the judgments, in my view, the facts and issue in the said case were completely different. Supreme Court therein was dealing with the non-filing of a Vakalatnama alongwith a Memorandum of Appeal. The Supreme Court held that if the pleader signing the Memo of Appeal had appeared for the party in Court(s) below then he need not file a fresh Vakalatnama with the Memo of Appeal as the Vakalatnama filed in Court(s) below would be sufficient to sign and present the Memo of Appeal in light of Order III Rule 4(2) read with Explanation (c) thereto of

CPC. In the present case, the petition under Section 34 of the Act is filed in the Court of first instance to challenge the Award and therefore, the said judgment would not help the petitioner. In fact, in the said judgement, the Supreme Court in para 21 has highlighted the importance of filing a Vakalatnama and has taken judicial notice of non-filing or defective filing of Vakalatnamas and has held as under:-

“21. We may at this juncture digress and express our concern in regard to the manner in which defective vakalatnamas are routinely filed in courts. Vakalatnama, a species of power of attorney, is an important document, which enables and authorises the pleader appearing for a litigant to do several acts as an agent, which are binding on the litigant who is the principal. It is a document which creates the special relationship between the lawyer and the client. It regulates and governs the extent of delegation of authority to the pleader and the terms and conditions governing such delegation. It should, therefore, be properly filled/attested/accepted with care and caution. Obtaining the signature of the litigant on blank vakalatnamas and filling them subsequently should be avoided. We may take judicial notice of the following defects routinely found in vakalatnamas filed in courts:

(a) Failure to mention the name(s) of the person(s) executing the vakalatnama and leaving the relevant column blank.

(b) Failure to disclose the name, designation or authority of the person executing the vakalatnama on behalf of the grantor (where the vakalatnama is signed on behalf of a company, society or body) by either affixing a seal or by mentioning the name and designation below the signature of the executant (and failure to annex a copy of such authority with the vakalatnama).

(c) Failure on the part of the pleader in whose favour the vakalatnama is executed, to sign it in token of its acceptance.

(d) Failure to identify the person executing the vakalatnama or failure to certify that the pleader has satisfied himself about the due execution of the vakalatnama.

(e) Failure to mention the address of the pleader for purpose of service (in particular in cases of outstation counsel).

(f) Where the vakalatnama is executed by someone for self and on behalf of someone else, failure to mention the fact that it is being so executed. For example, when a father and the minor children are parties, invariably there is a single signature of the father alone in the vakalatnama without any endorsement/statement that the signature is for “self and as guardian of his minor children”. Similarly, where a firm and its partner, or a company and its director, or a trust and its trustee, or an organisation and its office-bearer, execute a vakalatnama, invariably there will be only one signature without even an endorsement that the signature is both in his/her personal capacity and as the person authorised to sign on behalf of the corporate body/firm/society/organisation.

(g) Where the vakalatnama is executed by a power-of-attorney holder of a party, failure to disclose that it is being executed by an attorney-holder and failure to annex a copy of the power of attorney.

(h) Where several persons sign a single vakalatnama, failure to affix the signatures seriatim, without mentioning their serial numbers

or names in brackets. (Many a time it is not possible to know who have signed the vakalatnama where the signatures are illegible scrawls.)

(i) Pleaders engaged by a client, in turn, executing vakalatnamas in favour of other pleaders for appearing in the same matter or for filing an appeal or revision. (It is not uncommon in some areas for mofussil lawyers to obtain signature of a litigant on a vakalatnama and come to the seat of the High Court and engage a pleader for appearance in a higher court and execute a vakalatnama in favour of such pleader.)

We have referred to the above routine defects, as Registries/offices do not verify the vakalatnamas with the care and caution they deserve. Such failure many a time leads to avoidable complications at later stages, as in the present case. The need to issue appropriate instructions to the Registries/offices to properly check and verify the vakalatnamas filed requires emphasis. Be that as it may.”

Moreover, in the case of **Director-cum-Secretary, Department of Social Welfare (supra)**, a Co-ordinate Bench of this Court has held as under :-

“5. It is an admitted fact that the petition as originally filed did not have the signatures of the Petitioner. It was also not accompanied with the statement of truth in the form of the affidavit. Besides, as noted above, the vakalatnama in favour of the counsel was also not placed on record. The question therefore is whether such a petition could qualify as a filing in law? This question has been a subject matter of several decision including the one relied upon by the learned counsel for the Respondent. It has been held that such a petition would not qualify as a filing and the Court has discouraged litigants to file such petitions in order to

avoid the rigour of strict provision of limitation as stipulated under Section 34(3) of the Act.”

20. The initial filing is therefore, ‘non-est’ and thus, no cognizance of the filing on the 118th day can be taken by this Court. In view of this, application is devoid of merits and is dismissed.

IA 16536/2019 (condonation of delay in refiling)

21. In view of the dismissal of the application seeking condonation of delay in filing, the present application is dismissed.

OMP(COMM) 494/2019 & I.A. 16537/2019 (for stay)

22. In view of the order passed in the applications above, the present petition is dismissed along with the application for stay.

JYOTI SINGH, J

FEBRUARY 13th, 2020

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