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

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Reserved on: 16.03.2020

Pronounced on: 17.06.2020

+ OMP(COMM) 380/2019

OIL AND NATURAL GAS CORPORATION LTD. ... Petitioner

Through Mr. J.P.Cama, Senior Advocate
with Mr. Shovan Mishra, Ms.
Suruchi Kumar and Mr. Mayank
Prasad, Advocates

versus

PLANETCAST TECHNOLOGIES LTD. Respondent

Through: Mr. Anshu Mahajan, Mr. Gitanshu
Rastogi and Mr. Karan Arora,
Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

IA 12712/2019 (condonation of delay of 17 days in re-filing)

1. Present petition has been filed by the Petitioner assailing an Award dated 30.01.2019 as modified by an order dated 30.03.2019 passed by the Arbitral Tribunal.

2. By way of the present application, Petitioner seeks condonation of delay of 17 days in re-filing the petition. The grounds stated in the application are that the Award was served on the Petitioner on 24.04.2019

and the petition was filed on 19.07.2019. Owing to certain defects notified by the Registry on 22.07.2019, Petitioner sought to retrieve typed copies of certain documents to cure the defects, and this resulted in delay in re-filing and the petition was re-filed on 04.09.2019.

3. Learned Senior Counsel for the Petitioner contends that a complete and signed petition was filed on 19.07.2019 along with an affidavit, duly signed and verified and notarized on 19.07.2019 and a Vakalatnama. On 22.07.2019, the petition was returned with certain objections and re-filed on 08.08.2019. Again, certain objections were raised on 09.08.2019 and the petition was re-filed on 04.09.2019, along with Statement of Truth and other documents, the Statement of Truth being notarized on 03.09.2019, prior to the re-filing. The defects raised on 05.09.2019 were duly cured on 06.09.2019 and on 07.09.2019, the petition was cleared for listing on 13.09.2019. It is submitted that the petition was initially filed within the limitation period of three months from the date of receipt of the Award on 24.04.2019.

4. With regard to the objections raised successively by the Registry, Learned Senior Counsel submits that the non-filing of the Statement of Truth at the stage of initial filing was only a bona fide mistake on the part of the Petitioner and was cured as soon as the defect was notified. In any case, an affidavit in support of the petition was filed along with the petition.

5. As far as the objection of non-filing of the Award along with the petition is concerned, learned Senior Counsel argues that the impugned Award was subsequently filed on 04.09.2019 and in any case, this cannot

lead to the dismissal of the petition as in fact the Award was only served on the counsel for the Petitioner and not on the party and therefore, the limitation did not begin to run. It is contended that it is a settled law that under Section 31(5) of the Act, limitation under Section 34(3) begins to run only on receipt of signed copy of the Award by the party and service on the counsel is not enough. Reliance is placed on the judgements in *Benarsi Krishna Committee v. Karmyogi Shelters (P) Ltd.* [(2012) 9 SCC 490], *State of Maharashtra v. ARK Builders (P) Ltd.* [(2011) 4 SCC 616] and *Union of India v. Tecco Trichy Engineers & Contractors* [(2005) 4 SCC 239]. Reliance is also placed on the Scheme of the ICC Rules of Arbitration where it is provided in Chapter XVII that the Secretariat would notify to the parties the original of the Award, Addenda and Decisions. The Secretariat will also send a Courtesy Copy of the PDF signed, original of the Award and Decisions to the parties by e-mail. Sending of a Courtesy Copy by e-mail would not trigger any of the time limits under the ICC Rules of Arbitration. It is thus argued that a conjoint reading of Rules 174 and 175 of the ICC Rules, makes it clear that limitation period does not commence till the original Award is served on the party.

6. It is further argued that the Petition, alongwith Statement of Truth and Affidavits, duly signed and verified on 19.07.2019 and *Vakalatnama* bearing the signatures of the said date was filed on 19.07.2019 and was a proper filing. The date of 03.09.2019 appearing on the Statement of Truth is only a bonafide mistake on the part of the Petitioner and cannot be taken to be the date of actual execution of the document. Once a

petition, with all supporting vital documents was filed within the limitation period, the perfunctory defects, if any, cannot make the filing *non-est*. Learned Senior Counsel relies on the judgment in the case of ***Alka Kasana vs Indian Institute Of Technology [(2015) 222 DLT 473]*** to argue that if there is any defect in the institution of the suit, plaintiff must be afforded an opportunity to cure the defects and only when in spite of several opportunities, the defects are not cured, would the Court proceed to reject the plaint.

7. It is argued that the requirement of Statement of Truth follows from Schedule to the Commercial Courts Act, 2015. However, Clause 15A(5) of the Commercial Courts Act, 2015 makes it clear that non-filing of a Statement of Truth prevents the parties in the first instance from placing reliance on the pleadings and in the second instance, permits the Court to strike off the pleadings. There is nothing in Clause 15A which, in any manner, stipulates that consequences of non-filing of the Statement of Truth is that the petition is void ab initio and should be dismissed at the outset. It is a settled law where a Statute provides a certain duty or obligation and then prescribes the consequences / penalty for its non-compliance, then only those consequences can follow for non-compliance and not any other consequence. Reliance is placed in this regard on the judgment of the Supreme Court in ***Steel Authority of India Ltd. and Ors v. National Union Water Front Workers and Ors. reported in [(2001) 7 SCC 1]***. It is further argued that in the context of the Arbitration Act, Supreme Court has followed the above principle by stipulating that one has to look at the consequences of non-compliance of a Statutory

provision. For this proposition, reliance is placed on the judgment in *State of Bihar and Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti reported in [(2018) 9 SCC 472]* in which the challenge to the maintainability of the petition was on the ground of failure to comply with Section 34(5) of the Act i.e. serving a prior notice of the petition to the opposite party. Thus the requirement of filing the Statement of Truth is only a procedural requirement and does not flow from Section 34 of the Act and can at best lead to striking off the pleadings, not verified by the Statement of Truth.

8. Learned Senior Counsel further argues that even the non-filing of a *Vakalatnama* is at best a curable defect and relies on the judgment of the Supreme Court in *Uday Shankar Triyar v. Ram Kalewar Prasad Singh and Another [(2006) 1 SCC 75]* in this regard. It is submitted that the Supreme Court observed that the degree of negligence of a party should be so high as to ban the door of a Court to a suitor seeking justice and in the said case the act of non-filing of the *Vakalatnama* was condoned by the Supreme Court.

9. Learned Senior Counsel further argues that the strict rigours of limitation and parameters of condonation of delay as they apply to initial filing, cannot apply to re-filing. Once the original petition is filed within the period of limitation, re-filing is governed by Rule 3 of the Delhi High Court Rules which prescribes that a defect must be remedied within seven days subject to an aggregate of 30 days. The period of 30 days is to be counted from the date when the petition is returned with objections. The argument is that there can be more than one re-filing and the Courts while

considering condonation of delay in re-filing, must adopt a liberal approach. In the present case, the first re-filing was done within 16 days of the return of the petition on 22.07.2019. Second re-filing was done on 06.09.2019 i.e. in 11 days from the return of the petition on 09.08.2019. Even the final re-filing was done on 06.09.2019, i.e. within the prescribed period of 30 days and thus the delay deserves to be condoned. Reliance is placed on the judgment of the Supreme Court in the case of ***Northern Railway vs. Pioneer Publicity Corporation Pvt. Ltd. [(2017) 11 SCC 234]*** where the Court held that a liberal approach must be adopted by the Court in condoning a delay in re-filing.

10. Per contra, learned counsel for the Respondent submits that when the petition was initially filed on 19.07.2019, it had 64 pages only and the Petitioner had not filed the impugned Award, Statement of Truth and Documents. Petition was not signed and there were other defects such as absence of Caveat Report, 'pecuniary jurisdiction' clause, 'no filing' clause. Registry notified these and several other objections on 22.07.2019. Petitioner re-filed the petition on 08.08.2019 and most of the defects remained uncured. Petition was then filed on 04.09.2019 with merely 2643 pages and for the first time the impugned Award, Statement of Truth and the Documents were filed. Petition was again returned under objections on 05.09.2019 and re-filed on 06.09.2019 and thereafter, the same was registered and listed before the Court.

11. Learned Counsel argues that the nature of defects raised on 22.07.2019 and 09.08.2019 clearly show that the filing was only made to stop the period of limitation and was a *non-est* filing. The Petitioner

during the arguments repeatedly contended that there was no service of the Award on the Petitioner and only its counsel had been served on 24.04.2019, and therefore, the limitation did not begin to run. However, the Petitioner has not disclosed as to if the Petitioner was ever actually served and if so, when and, in any case, the admissions made in paras 20 and 23 of the petition, belies this argument.

12. It is next argued that the contention of the Petitioner in support of non-filing the Statement of Truth, that the defects are curable under the Commercial Courts Act, 2015 and at best it can lead to the Court striking out a pleading if the defect is not cured, is absolutely misconceived. It is argued that petition will not be listed before the Court, till the Statement of Truth is filed and therefore, there would be no occasion for the Court to consider the petition in the absence of a Statement of Truth. In any case, this argument is otherwise also flawed in as much as if there is no Statement of Truth, then the pleadings not verified, would be struck off and cannot be termed as a petition and would be a mere bunch of papers.

13. In so far as the non-filing of the Award is concerned, it is argued that the Petitioner has not explained how the non-filing is not fatal to the filing of the petition. The Award is the most fundamental document which is required to be annexed with the petition, as it is the Award which is impugned by the Petitioner. Attention of the Court is drawn to the provisions of Section 34 titled as “***Application for setting aside Arbitral Award : Recourse to Court against an Arbitral Award may be made only on an application....***”. Section 34 then proceeds to detail the grounds on which the Arbitral Award may be set aside under Section

34(2). Sub-Section (2) of Section 34 by a bare reading shows that an application for setting aside the Award will be incomplete without an Award and a petition without an Award is incapable of being adjudicated.

14. Learned Counsel for the Respondent submits that Courts have repeatedly deprecated the practice of filing a mere bunch of papers and have held that a petition filed without vital documents would be a *non-est* filing and would be treated as validly filed only when all the vital defects are cured. Courts have emphasized that the mischief of filing a bunch of papers, to stop limitation has to be curbed. Reliance is placed on the judgments in ***DDA vs. Durga Construction Co. [2013 (139) DRJ 133]***; ***SKS Power Generation (Chhattisgarh) Ltd. vs ISC Projects [2019 SCC Online Del 8006]*** for the proposition that *non-est* filing, will not stop limitation.

15. It is next argued that the initial filing was done by the Petitioner only to stop the limitation and this is further evident from the re-filing on 08.08.2019, when not a single defect, pointed out by the Registry on 22.07.2019, was removed. The filing on 04.09.2019 was neither in consonance with Rule 5(3) of Chapter I of Volume V of Delhi High Court Rules nor within the outer limit of 120 days under Section 34(3). In fact, the Statement of Truth itself is sworn on 03.09.2019 which shows that there was no intent to file the petition within the statutory period of limitation. In the case of ***ONGC vs. Joint Venture of M/s Sai Rama Engineering and Megha Engineering and Infrastructure Limited, OMP (COMM.) 97/2019***, the Court has held that filing of Statement of Truth is

one of the basic parameters for filing a petition under Section 34 of the Act.

16. It is next argued that on 04.09.2019, Petitioner filed an application for condonation of delay in re-filing and the only reason in para 3 is that on 22.07.2019, the Registry pointed out certain defects which required the office of the Petitioner to retrieve certain documents which resulted in delay in re-filing. The argument is that no typed copies have been filed by the Petitioner as is evident from the List of Documents and the reason given in the application is *ex facie* false. No reason is forth coming as to why defects were not removed on 08.08.2019 and the application does not even mention the filing on 08.08.2019. It is thus submitted that the petition deserves to be dismissed as the Petitioner is not entitled to condonation of delay in re-filing.

17. I have heard the learned Senior Counsel for the Petitioner and learned Counsel for the Respondent and examined the rival contentions.

18. Section 34(3) of the Act provides a Statutory limitation period of three months to a party, aggrieved by an Award, to file a petition assailing the same. Proviso to the Section provides an extended period of 30 days for filing the petition. If the petition is filed within the extended period of 30 days, Court has the power to condone the delay, provided 'sufficient cause' is shown, that prevented the party from approaching the Court in the three months limitation period. There cannot be a doubt that in order to stop limitation, the filing of the petition must be a proper filing and not a *non-est* filing. Through several judicial pronouncements, the parameters of proper filing have been clearly laid down and in case the

petition is filed with vital defects and is non-compliant with those parameters, then it is treated as a *non-est* filing. In the case of **DDA vs. Durga Construction (supra)**, a Division Bench of this Court held 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. A similar view in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in Ashok Kumar Parmar v. D.C. Sankhla, 1995 RLR 85, whereby a Single Judge of this Court held as under:

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

A Division Bench of this Court upheld the aforesaid view in D.C. Sankhla v. Ashok Kumar Parmar, 1995 (1) AD (Delhi) 753 and

while dismissing the appeal preferred against decision of the Single Judge observed as under:

“5..... In fact, that is so elementary to admit of any doubt. Rules 1 and 2 of (O.S.) Rules, 1967, extracted above, do not even remotely suggest that the re-filing of the plaint after removal of the defects as the effective date of the filing of the plaint for purposes of limitation. The date on which the plaint is presented, even with defects, would, therefore, have to be the date for the purpose of the limitation act.”

Emphasis Supplied

19. In **SKS Power (supra)**, a Co-ordinate Bench of this Court held 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 vakalanama filed authorizing the advocate to file the said bunch of papers. I am intentionally using the words **“bunch of papers”** as what was filed was nothing more than that. The petition sought to impugn the Arbitral Award and the Additional Award without even annexing the same. Clearly what was filed was merely a ‘bunch of papers’ to somehow stop the period of limitation from running. The petitioner thereafter made no endeavour to refile the petition with expedition once the same had been returned back under objection on 15.01.2019. The petitioner took another two months to refile the petition only on 26.03.2019, albeit, still under defects. This filing was beyond a period of 30 days from three months of receipt of the Additional Award by the petitioner.*

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

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

13. *In Durga Construction Co. (supra), this Court further held that while the Courts would have jurisdiction to condone the delay in refiling of the petition, once such delay is beyond the maximum period provided under Section 34(3) of the Act, the approach of the Court exercising such jurisdiction cannot be liberal and the conduct of the applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch. From the above narration of the facts, it can easily be concluded that the petitioner did not act with due diligence or dispatch.*

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

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

Emphasis Supplied

20. In *ONGC (supra)*, this Court held as under :-

“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."

21. In the case of **Jay Polychem (India) Ltd. v. S.E. Investment Ltd., (2018 SCC OnLine Del 8848)**, Court dealing with non-filing of a Statement of Truth held as under :-

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

7. The Supreme Court in the case of Union of India v. Popular Construction, (2001) 8 SCC 470 has held that the time limit prescribed under Section 34(3) of the Act to challenge an award is not extendable by the Court under Section 5 of the Limitation Act, 1963 in view of the express language of Section 34(3) of the Act. The petition is, thus, not maintainable because as on 23.12.2015, the maximum time available within which the petition could be entertained by this Court - that is three months and a further period of 30 days - had expired."

22. Recently in the case of **Union of India vs. Bharat Biotech International Ltd. and Ors., being O.M.P (COMM) 399/2019, decided**

on 18.03.2020, the Court dealing with valid / *non-est* filing and the non-filing of the impugned Award held as under :-

“18. The aforestated principles, when applied to the facts of the present case, would provide an answer to the first question arising for my consideration-should the petition, as filed on 31.05.2019, be regarded as a 'valid' filing or as non est? It remains undisputed inter alia that the impugned award was not placed on record till 31.07.2019, by which date the extended period of limitation had already expired and that the petition, as originally filed, had been substantially altered at the time of re-filing. In fact at the time of re-filing, not only were documents spanning over 350 pages added to the petition, but even the framework of the petition was changed, yet the last page of the re-filed petition continued to reflect the date of filing as 31.05.2019; which is patently untrue, in the light of the petitioner's admission that it had made changes in the body of the petition at the time of re-filing. This, in my considered opinion, is an entirely unacceptable practice. Even the fact that when the petition was initially filed no court fees was affixed, the vakalatnama was undated, the accompanying statement of truth was incomplete and lacked critical information, and the supporting affidavit made reference to documents which were not even annexed to the petition remains undisputed. However, the most glaring defect at the time of the initial filing as also the only re-filing done prior to 14.07.2019 was that even a copy of the award which the petitioner sought to assail, was not annexed with the petition. I am unable to comprehend as to how a petition seeking to assail an order, an award in this case, without even annexing a copy thereof can be claimed as a valid filing and that too without even moving an application seeking exemption from filing a copy of the impugned award.

19. It is obvious that the original petition, as filed on 31.05.2019, and only running into 83 pages was a careless

and deliberate attempt on the petitioner's part to somehow stop the clock on limitation amounting to a clever manoeuvre to buy time. In fact even after the original petition was received back by the petitioner's counsel on 01.07.2019 with defects being pointed by the Registry, the petitioner did not take any steps to file a copy of the impugned award while re-filing the petition on 11.07.2019, i.e., within the extended period of limitation of 3 months and 30 days which expired on 14.07.2019. In fact, even as per the petitioner's admission, the impugned award was filed for the first time, belatedly, on 31.07.2019. I am of the view that the petitioner's failure to file the impugned award along with the petition at the time of filing on 31.05.2019 or at the time of its re-filing on 11.07.2019, both falling within the period of limitation, cannot be underplayed as a 'trivial' defect but is a defect of such gravity that it would render the original filing as a mere dummy filing.

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21. In fact, a similar plea regarding the effect of non-filing of the award has already been considered by a Division Bench in Executive Engineer vs. Shree Ram Construction Co. MANU/DE/3065/2010 : (2010) 120 DRJ 615 (DB) as also a coordinate Bench of this Court in SKS Power Generation (Chhattisgarh) Ltd. vs. ISC Projects Private Limited MANU/DE/1260/2019 holding that non-filing of the impugned award would be fatal. In my considered view, filing a copy of the impugned award would be a sine qua non in every petition laying a challenge thereon. On a combined consideration of the significant deficiencies in the original petition filed on 31.05.2019, especially the non-filing of a copy of the award, with the principles enunciated in Durga Construction (supra), I am compelled to hold that, notwithstanding the fact that it bore the requisite signatures, albeit not on every page, and was accompanied by the statement of truth, affidavit and the vakalatnama, the initial filing was non est in the eyes of law and is inconsequential.

Therefore, in the present case I have no hesitation in holding that a valid petition can, at the earliest, be treated as having been filed on 31.07.2019, when for the first time a copy of the impugned award came to be annexed to the petition, even though the other objections which were equally important were removed only on 18.09.2019.

22. For the aforesaid reasons the petition, being re-filed after 14.07.2019, i.e., the date on which the extended period of limitation of 3 months and 30 days stood expired, has to be treated as being barred by limitation. Now these applications in question, though styled as applications seeking condonation of delay in re-filing, have to necessarily be treated as applications seeking condonation of delay in filing the petition beyond the statutorily prescribed period. As is settled, this Court does not have the power to condone any delay caused beyond 30 days after the expiry of the limitation period of three months, which in the present case expired on 14.07.2019. In this regard, reference may be made to the decision in Union of India vs. Popular Construction Co. MANU/SC/0613/2001 : (2001) 8 SCC 470 wherein the Supreme Court held that the Court cannot entertain an application to set aside the award beyond the extended period under proviso to Section 34 (3) of the Act, thus clearly laying down that a challenge to an award filed after 3 months and 30 days of receipt of the arbitral award by the aggrieved party has to be rejected.

23. Thus, I have no hesitation in holding that these applications are seeking condonation of delay in filing, which is not permissible considering the delay in question was beyond the extended period of limitation and cannot, therefore, be condoned by this Court.

24. In the light of my aforesaid conclusion, while there is no doubt that the applications have to be treated as seeking condonation of delay in filing but even if the petitioner's plea were accepted that the delay ought to be treated as a

'delay in re-filing', it was still incumbent upon the petitioner to provide cogent and substantive reasons for the delay of 50/55 days occasioned in filing these petitions. Undoubtedly as a matter of general practice, the standards applicable while considering a prayer for condonation of delay in 're-filing' are less rigid than those applicable for condoning delay in filing, but I cannot lose sight of the fact that these applications pertain to petitions under Section 34 of the Act where the approach, even while dealing with a prayer for condonation of delay in re-filing, cannot be too liberal.

25. In this regard, reference may be made to the decision in Durga Construction (supra), wherein a Division Bench of this Court, while dealing with an application for condonation of delay in re-filing of a petition beyond the time prescribed under Section 34(3) of the Act, held that though the Court is empowered to condone delay beyond the extended period of limitation of 3 months and 30 days, it is requisite for the party seeking the condonation to show that despite his diligence, the rectification of defects and re-filing could not be carried out within the limitation period, for bonafide reasons beyond his control. At the time of considering applications of like nature, it is important for the Court to bear in mind the legislative intent for prescribing a statutory period of limitation under Section 34(3) of the Act viz. ensuring expeditious disposal of arbitration and preventing delay in implementation of an award by parties who would malafidely challenge the same. Ultimately, the Act sought to breathe life into a much needed alternate system of dispute resolution and lend greater credence to it, by removing any unwarranted obstacles to its smooth functioning. A liberal approach while dealing with an application for condonation of delay in challenging the award would only endanger and frustrate the purpose for which the Act was enacted.

26. Returning to the facts of the present petition, I find that regrettably, the petitioner has failed to provide any

justifiable reason, much less a sufficient reason to seek condonation of delay. The petitioner's explanation in the application as also the additional affidavit is wholly perfunctory, vague and demonstrate the alarmingly lackadaisical approach of the petitioner in complying with general filing practice and the statutory requirements under Section 34 of the Act. In fact the petitioner has merely made a bald averment that the delay had been caused due to repeated objections being raised on the petition by the Registry, which took time to cure. On the contrary the logbook maintained by the Registry shows that most of the defects raised by the Registry at the very first instance of filing on 04.06.2019 were not rectified till as late as 18.09.2019, which indicates that the petitioner was at fault for not removing the objections in a timely manner and the reasons sought to be advanced by it are not at all bonafide. Thus, even if the delay in question were to be treated as a 'delay in re-filing', the petitioner's explanation for the delay being vague, unsubstantiated, insufficient and contrary to the record is liable to be rejected.”

23. After traversing the law on the subject, it now needs to be examined whether the filing was within the 3 months limitation period or the extended period of limitation or beyond it. The modified Award is dated 30.03.2019. The same was received by the petitioner on 26.04.2019 and thus, the three months' limitation period expired on 26.07.2019. The extended period of 30 days under Proviso to Section 34(3) expired on 25.08.2019. The first filing was done by the Petitioner on 19.07.2019, which was within the three months' limitation period.

24. The next issue that requires consideration is whether the filing was a valid or a non-est filing. Defects notified by the Registry, reveal that initially 64 pages were filed and the major defects were: no Award; no

Documents; petition not signed; Statement of Truth not filed; Affidavit filed, with verification in August 2019 and notarized on 03.09.2019.

25. The application for condonation of delay in re-filing reads as under :-

“1. That the Petitioner has filed this Petition against the award dated 30.1.2019 modified by order dated 30.3.2019 passed by the Hon'ble Arbitral Tribunal and served on 24.4.2019.

2. That the Petitioner has stated the facts of the case and the grounds arising therefrom in the accompanying petition and the same may be treated as part and parcel of this application.

3. That the Petition was filed on 19.07.2019 following which certain defects were notified by the Registry on 22.07.2019 which required the office of the undersigned to retrieve typed copies of certain documents to cure the defects, thereby resulting in delay in refilling of the Petition. Pursuant to the delays being cured, the Petition was refiled on 04.09.2019.

4. That due to the aforesaid reason, a delay of 16 days has occurred in refiling the Petition challenging arbitral award dated 30.1.2019 modified by order dated 30.3.2019 passed by Hon'ble Arbitral Tribunal.”

26. Second filing was done on 08.08.2019, which was within the extended period of 30 days. The petition still had 64 pages and no major defects notified earlier, were removed by the Petitioner. On 04.09.2019, third filing was done which was 9 days beyond the period of 3 months

and 30 days under Section 34(3) of the Act. 2643 pages were filed and the objections were cleared.

27. Different judgments have dealt with different aspects of non-est filing. However, seen together, the holistic picture that emerges is that in order to be termed as a 'proper' petition, it must be accompanied at least by a Statement of Truth, *Vakalatnama*, and the Award impugned therein, in the absence of all these vital documents, cumulatively, it can only be said that a 'bunch of papers' has been filed as held by the Court in *SKS Power (supra)*. In *J. Polychem (supra)* and *ONGC (supra)*, Courts have emphasized the importance of filing the Statement of Truth. In *Union of India vs. Bharat Biotech (supra)*, Court has clearly held that non-filing of the impugned Award, within the outer limit of 120 days, will be fatal. Examined in the light of these judgments, the filing of the present petition cannot be treated a valid filing till 25.08.2019, when the 120th day expired. Even though the Petitioner cleared the defects subsequent thereto, but this cannot enure to its advantage and the Court has no power to condone a delay of even 1 day beyond 25.08.2019.

28. The contention of the Petitioner that the Award was never served on the Petitioner, but was only served on the Counsel on 26.04.2019 and therefore, the limitation did not run, is incorrect. The Award was filed in the Court, in compliance of the order dated 04.03.2020 and the counsel for the Respondent had pointed out the endorsements on page 1 of Award to show that Award was received by the Advocate and Representative of the Petitioner on 26.04.2019. In any case, it is not open to the petitioner to even raise this dispute at this stage, having conceded to the fact that the

Award was received by the Petitioner on 24.04.2019, in paras 20 and 23 of the petition which read as under :-

“20. The arbitral award which was passed on 30.1.2019 was modified vide an order dated 30.3.2019 and served to the petitioner on 24.4.2019. Hence, the present petition is within the period of limitation of three months as per Section 34(3) of the Arbitration and Conciliation Act, 1996.

23. That the cause of action has arisen in favor of the Petitioners to challenge the award on 24.4.2019 when the impugned award dated 30.01.2019 and modified vide order dated 30.03.2019, was served to the petitioner. The cause of action is still subsisting.”

29. Had there been any truth in the stand of the Petitioner that the Award was not received by the Petitioner, the Petitioner would not have made such an averment in the petition and would have averred that the period of limitation had not begun to run as there was no service of the Award on the Petitioner. On the contrary, as evident from the reading of the two paragraphs, the stand is that the Award was received on 24.04.2019 and therefore, the petition was filed within the statutory period of limitation.

30. It is clear from the narration above that the petition filed upto the 120th day was not filed as per the parameters laid down by the courts for a valid filing and has to be treated as a *non-est* filing. By the time the defects were cured, 120 days were over and the petition filed beyond 120 days would have to be treated as a fresh filing and not re-filing. Taken from the said date of fresh filing, it is evident that the initial filing is beyond 120 days and cannot be entertained by this Court.

31. Insofar as the argument of the Petitioner that the defects relating to non-filing of Statement of Truth and Vakalatnama are curable, is concerned, the issue stands answered by the judgment in ***Durga Construction (supra)*** and ***S.K.S. Power Generation (supra)***. In this context, I may also refer to some other judgments of this Court. In ***OMP 470/2015 titled Sravanthi Infratech Pvt. Ltd. v. Greens Power Equipment (China) Co. Ltd., decided on 19.10.2016***, this Court held as under:

“12. It is only on 3rd September, 2015, the petition was refiled but again without removing the complete defects. Therefore, for the purposes of Rule 5 Chapter I Part A of the Volume 5 of the Delhi High Court Rules and Orders, the date of filing of the petition had to be considered as 3rd September, 2015. It is stated that there is a delay of 83 days in filing the petition and in the absence of any application seeking condonation of delay filed at the time of initial filing of the petition no indulgence is sought to be granted to the Petitioner. Significantly it is pointed out that on 10th July, 2015 when the petition was first filed it contained only 66 pages whereas when it was refiled on 18th August, 2015 it consisted 859 pages.

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

14. Secondly, despite knowing that initial limitation of 90 days in terms of Section 34(3) of the Act had expired on 23rd June, 2015 even according to the Petitioner, the petition was filed only on 10th July, 2015. Thus, the Petitioner knew on that date itself that the petition was beyond the 90 days limitation period. The Petitioner ought to have filed an application for condonation of delay on the very date that the petition were filed, i.e. 10th July, 2015.

15. Thirdly, the Petitioner also did not pursue the matter diligently despite knowing that the outer limit of 120 days was expiring on 22nd July, 2015 and no attempt was made to cure the defects before 12th August, 2015, the date on which 30 days period for curing the defects as per Rule 5 Chapter I Part A of the Volume 5 of the Delhi High Court Rules and Orders expired. The defects were not cured up to 18th August, 2015. It was only then that a petition containing 859 pages was filed. When this was compared with the 66 page petition, it confirmed the suspicion that what was initially filed was neither a comprehensive nor a properly signed petition.

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

18. The Court is not expected to mechanically condone the delay in filing the petition in terms of the proviso to Section 34(3) of the Act. It can only be upon the Petitioner satisfying that the delay was for bona fide reasons can the

Court proceed to condone the delay. In the present case the Court is unable to be persuaded to hold that the delay in filing and re-filing the petition was for bona fide reasons.

19. By filing a petition with just 66 pages to start with (which later on - refiling grew to 859 pages) with no signature of the petitioner, without affidavit, without vakalatnama the Petitioner has sought to defeat the whole object of Section 34(3) of the Act. This Court is statutorily mandated to take a strict view of the outer limit within which petitions under Section 34 of the Act have to be filed. It is, therefore, not possible for this Court to lightly condone the delays that have occurred in the present case in filing and refiling of the petition.”

32. In **Jay Polychem (supra)**, the Court held as under:

“2. The present petition was filed on 31.10.2015. However, the said petition was neither signed on behalf of the petitioners nor supported by signed and attested affidavits. In addition to the above, the petition was also defective on several other grounds and, thus, was returned on 31.11.2015. It is relevant to note that the petition was filed just before the expiry of the period of three months available in terms of Section 34(3) of the Act, for filing a petition under Section 34 of the Act.

*3. The petition was thereafter refiled on 23.12.2015. This was not only beyond the period of three months as prescribed under Section 34(3) of the Act but also beyond the further period of 30 days, which could be condoned by the Court in terms of proviso to Section 34(3) of the Act. Although, Section 34(3) of the Act is not applicable for any delay in refiling - as held by the Supreme Court in *Northern Railway v. Pioneer Publicity Corp. Pvt. Ltd.*, (2017) 11 SCC 234 as well as by a Division Bench of*

this Court in Delhi Development Authority v. Durga Construction Co., 2013 (139) DRJ 133 - but what was filed by the petitioners on 31.10.2015 could not be considered as a petition at all in view of the defects noticed above.

4. In Ashok Kumar Parmar v. B.D.C. Sankiila, 1995 RLR 85, this Court had, in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967, observed as under:

“If the defects are of such character as would render a plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit.”

5. The aforesaid view would also be applicable in case of a petition under Section 34 of the Act. In Delhi Development Authority v. Durga Construction Co. (supra), a Division Bench of this Court had observed as under:

“..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.”

6. Clearly, a Statement, which is neither signed nor supported by an affidavit cannot be considered as an application under Section 34 of the Act. Thus, the petition filed on 31.10.2015 was non-est. In this view, the present petition is not maintainable, as it has been filed beyond the

prescribed period of three months and also beyond the further period of thirty days within which this Court could entertain the petition on petitioners establishing that it was prevented from sufficient cause from presenting the petition within the period prescribed.

7. The Supreme Court in the case of Union of India v. Popular Construction, (2001) 8 SCC 470 has held that the time limit prescribed under Section 34(3) of the Act to challenge an award is not extendable by the Court under Section 5 of the Limitation Act, 1963 in view of the express language of Section 34(3) of the Act. The petition is, thus, not maintainable because as on 23.12.2015, the maximum time available within which the petition could be entertained by this Court - that is three months and a further period of 30 days - had expired.”

33. In ***Director-cum-Secretary, Department of Social Welfare vs. Sarvesh Security Services Pvt. Ltd., (2019 SCC OnLine Del 8503)***, the Court 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 decisions 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.

6. The learned counsel for the Petitioner has tried to distinguish the judgment of SKS Power Generation (supra)

on facts by contending that in the said case, the copy of the award was not placed on record whereas in the present case the award had been filed along with the petition. He also contends that since he is a Panel counsel of the Petitioner, the vakalatnama that he had in his favour for the proceedings before the Arbitral Tribunal should also be deemed to be valid for the purpose of the filing of the present petition. Both the contentions are unmerited. The petition, as filed before this Court, admittedly, did not have the Vakalatnama. The Vakalatnama was filed on 27th April 2019. Perusal of the said vakalatnama shows that it has been signed on 11th January 2019 and bears the court fees stamps dated 20th February 2019. Therefore, it is clear that for the purpose of filing the present petition, the counsel needed specific authorisation to proceed in the matter. This vakalatnama has been executed after the filing of the present petition. The vakalatnama executed in favour of the counsel for the purposes of the arbitration proceedings is inconsequential for the present petition. Pertinently, the petition is also not accompanied with the said vakalatnama. This contention is now being raised only to somehow overcome the fundamental lacuna in the present case. Just because the counsel is a Panel lawyer, it does not put him in any special category. The power of attorney in his favour had to be specifically issued. The petition has not been filed on the strength of the counsel being a panel lawyer. The other fact mentioned to distinguish the decision in SKS Power Generation (supra) is of annexing the copy of the award. To the court this does not render the aforesaid decision inapplicable. The basic requisites for filing the present petition are the signatures of the parties, the affidavits accompanying the petition and the vakalatnama. Merely because an award is also accompanied with the petition does not in any way change the position in law and therefore, the decision of the coordinate Bench of this Court in SKS Power Generation (supra) would be squarely applicable to the facts of the present case. Lastly, the learned counsel for

the Petitioner has strenuously argued that he had received oral instructions from his client to file the present petition and he being one of the panel lawyers of the Petitioner, is entitled under law to file the present petition. This submission is also ex-facie devoid of merit for two reasons. Firstly, no such averment has been made in the present application and moreover, such oral instructions would not authorise him to file the present petition contrary to the rules. The Petitioner 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 initial filing.

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9. Pertinently even on the date of re-filing, i.e. after the expiry of the statutory period of three months and thirty days, the Petition was not accompanied by the affidavits of the Petitioner or the vakalatnama. The vakalatnama of the Petitioner is filed on 27th April 2019 and the affidavits have been filed on 2nd May 2019, which is beyond the expiry of the period of limitation. The conduct of the applicant does not show that he acted with due diligence and dispatch or that the delay was on account of reasons beyond his control and could not have been avoided despite all possible efforts by the applicant. In the present case there has been a delay of 118 days in re-filing. This period of delay itself beyond the statutory period of three months provided for filing the petition. Thus the petition is ex-facie, beyond the statutory period of three months and thirty days prescribed under Section 34(3) of the Act. Such a delay in re-filing cannot be permitted to frustrate the object of the Act. This view is also supported by the decision of this court in FAO (OS) 485-86/2011, dated 7th November 2013, DDA v. Durga Construction Co., M/s. Competent Placement Services v. Delhi Transport Corporation: 2011 (2) R.A.J. 347 (Del), The Executive Engineers v. Shree Ram Construction & Co.: 2011 (2)

R.A.J. 152 (Del) and Ashok Kumar Parmar v. D.C. Sankhla: 1995 RLR 85.

10. The initial filing was a deliberate attempt to stop the period of limitation from running. Thereafter, the Petitioner did not take any steps to have the vakalatnama and the affidavits filed in the Court within the period prescribed under Section 34 (3) of the Act. The re-filing done was to keep the matter alive without curing the defects leading to the gross delay. For the foregoing reasons, it is clear that the present application seeking condonation of delay for re-filing cannot be allowed.”

34. In fact, in the case of **SKS Power Generation (supra)**, the court has dealt with the issue of non-filing of the Vakalatnama as well as the judgment in the case of **Alka Kasana (supra)**, relied upon by the Petitioner. There is no merit even in the contention that the defects in Vakalatnama /**Statement** of Truth, being curable, under Rule 15A can be permitted to be cured after the period of limitation or the extended period of 30 days under Section 34(3) of the Act expires. These submissions have to be seen in the background of the law as it has evolved in field of condonation of delay in filing petitions under Section 34(3) of the Act. On one hand are the judgements interpreting the words ‘but not thereafter’, strictly holding that not even one day’s delay can be condoned, beyond 120 days and on the other hand is a plethora of case law that filing of wholly insufficient, inadequate petitions, classified as a mere ‘bunch of paper’ is a non-est filing and cannot stop limitation. If this Court was to hold that non-filing of *Vakalatnama*, Statement of Truth is a curable defect and it is open to an Objector to file a petition, lacking the vital documents and then cure the defects at his will, it would clearly be

against the principles laid down in these judgements. Various judgements referred to above, including several others, on non-est filing clearly mandate the filing of these vital documents within the period of limitation and this is in keeping with the strict timelines under Section 34(3) of the Act, so that the purpose of expeditious disposal under a special dispute resolution mechanism, is not defeated. Permitting a party, aggrieved by an Award, to file hopelessly inadequate petitions to stop limitation and then argue that the defects are curable, in my view, will also put the intent of the Legislature, to provide a strict and inelastic limitation period, to naught. Additionally, it would be wholly unfair to the party who has an Award in its favour, to wait endlessly, as even the enforcement proceedings would have to await the dismissal of the Objection Petition.

35. In so far as the law relating to re-filing under Rule 5 of the Delhi High Court Rules is concerned, it is no longer res integra. In ***Government of NCT of Delhi vs. Y.D. Builders & Hotels Pvt. Ltd., FAO(OS) (COMM) 25/2017***, a Division Bench of this Court held as under:

“9. Furthermore, we notice from the said decision itself that Rule 5 of Chapter I of Volume V of the Delhi High Court Rules and Orders had been referred to in paragraph 5 of the said decision. The said Rule 5 reads as under:-

"Rule - 5. Amendment - The Deputy Registrar, Assistant Registrar, Incharge of the Filing counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any

memorandum of appeal, for the reason specified in Order XLI, Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not taken back for amendment within the time allowed by the Deputy Registrar, Assistant Registrar, in charge of the filing Counter under sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution.

(3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Assistant Registrar, in charge of the Filing Counter, under sub-rule (1) it shall be considered as fresh institution.

Note - The provisions contained in Rule 5(1), 5(2) and 5(3) shall mutatis mutandis apply to all matters, whether civil or criminal."

10. Upon reading Rule 5(3), which would apply mutatis mutandis to all matters, whether civil or criminal, and would, therefore, apply to a petition under Section 34 of the Arbitration and Conciliation Act, it is evident that in case such a petition is refiled beyond the time allowed by the Registry under sub-Rule (1), the filing shall be considered as a fresh institution. Since the ultimate filing was done on 26.05.2016 and was well beyond the period permitted by the Registry, the filing of the petition under Section 34 would have to be construed as a fresh filing on 26.05.2016. This would mean that not only there was a delay in re-filing but there was a delay in filing of the petition itself which ought to have happened within three months and at the latest within a period of 30 days thereafter, subject to the fulfillment of the conditions laid down under the proviso to Section 34(3) of the said Act. Clearly, the petition, on this ground also, was time barred."

36. For the reasons brought out in the earlier part of the judgment, the petition cannot be treated as having been validly filed within the limitation period or the extended period of 30 days under Section 34(3) of the Act. In view of this, application seeking condonation of delay in re-filing is hereby dismissed.

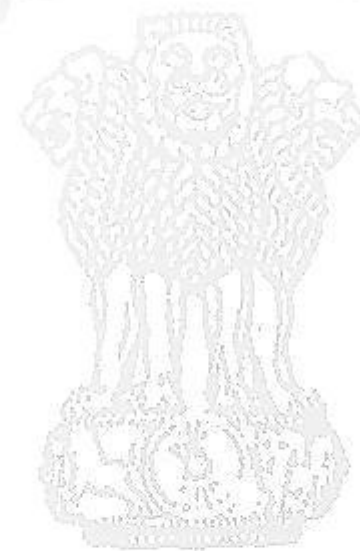
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37. In view of the dismissal of the application above, the petition is hereby dismissed.

JYOTI SINGH, J

JUNE 17th, 2020

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