

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided On: 30th January, 2023

+ O.M.P.(COMM) 7/2019

NATIONAL HIGHWAY AUTHORITY OF INDIA

R/o, G-5 and 6, Sector-10,
Dwarka, New Delhi 110075

..... Petitioner

Through: Ms. Aishwarya Bhati, Additional
Solicitor General with Mr. C.S.
Chauhan, Advocate.

versus

KNR CONSTRUCTION LIMITED

R/o, Plot No. 114, Phase-1, Kavuri Hills,
Hyderabad-500033

..... Respondent

Through: Ms. Kiran Suri, Sr. Advocate with
Ms. Aishwarya Kumar & Mr.
Hitender Nath Rath, Advocates.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

NEENA BANSAL KRISHNA, J.

I.A. 245/2019 (under Section 151 CPC for Condonation of Delay in filing of the petition under Section 34 of Arbitration & Conciliation Act, 1996) and I.A. 246/2019 (under Section 151 CPC for Condonation of Delay in re-filing of the petition)

1. The petitioner has filed the Petition under Section 34 Arbitration & Conciliation Act, 1996 (*hereinafter referred to as "A&C Act, 1996"*) on 16.11.2018 against the impugned Arbitration Award dated 30.06.2018. It is stated that the copy of the Award was received by the petitioner on

19.08.2018. The delay of 16 days is sought to be condoned *vide* **I.A. NO. 245/2019**, and *vide* **I.A. NO. 246/2019**, a delay of 61 days in re-filing of the petitioner is sought to be condoned.

2. **The respondent in its reply** has asserted that the petitioner has wrongly claimed that the petition has been filed within the prescribed period of 120 days. In fact, the delay is beyond 120 days from the date of receiving the Award by the petitioner. Three set of copies of the original Award were prepared. One copy was given to NHAI, HQ Dwarka, another copy was sent to the Project Director, PIU, NHAI, Odisha and the third copy was sent to the respondent by speed-post.

3. The tracking report reveals that the Award was received in the HQ of the petitioner on 02.07.2018 at New Delhi while the Project Director, Odisha received the Award on 03.07.2018. The present petition has been filed on 16.11.2018 which is beyond 120 days from the date of receiving of the Award by the petitioner. The information about the delivery of the Awards and the tracking report has been obtained through an RTI which is annexed along with the reply.

4. It is asserted that in terms of Section 34(3) of the A&C Act, 1996, the objections under Section 34 of the A&C Act, 1996 can be filed within three months. It further provides that if sufficient grounds and reasons are shown for condoning the delay, the period may be extended by 30 days but not beyond that. Thus, the objections under Section 34 of the A&C Act, 1996 filed by the respondent is liable to be dismissed.

5. **By way of rejoinder, the petitioner** has admitted that the Award was received in their HQ on 02.07.2018 and by the Project Director, Odisha on 03.07.2018. It is explained that due to oversight in one of the internal

communication letters dated 19.07.2018, it was wrongly noted that the Award has been received on 19.07.2018 due to which the delay has occurred unintentionally.

6. The limitation for filing the petition under Section 34 of the A&C Act, 1996 started on 03.07.2018 and the three months expired on 02.10.2018. The Court had power to condone the delay of further period of 30 days under Section 34(3) of the A&C Act, 1996 and therefore, the extended period of limitation expired on 02.11.2018. The objections were filed on 16.10.2018 which was within the period prescribed under Section 34 of the A&C Act, 1996. Therefore, it is stated that the objections have been filed within the period of limitation and the delay, if any, may be condoned for the reasons stated herein.

7. **Submissions heard.**

8. For considering the application for condonation of delay, the first aspect to be noted is the date of filing. The date on which the Petition is properly filed is to be treated as the date of filing. Filings with fundamental defects making them hopelessly inadequate were not considered as a proper filing in DDA v. Durga Construction, 2013 SCC OnLine Del 4451. It was observed in Steel Stripes Wheels Ltd. v. Tata AIG General Insurance Co. Ltd., OMP (COMM) 507/2019:

“21. The log information and the defect sheet indicate that most of the vital defects were cleared by the petitioner only on 20.11.2019 when the petition was re-filed. Thus, it is on this date, the petition can be treated to have been properly filed and since this is the date which has to be reckoned as the date of fresh filing, the petition being filed beyond 120 days is barred by limitation under

Section 34(3) of the Act. It has been held by the Supreme Court in the case of Simplex Infrastructure Limited vs. Union of India 2019 (2) SCC 455, that the Court has no power to condone the delay in filing the petition under Section 34(3) of the Act beyond a period of 120 days.”

9. In case, the first filing is found to have inherent defects and such filing has been held as *non-est*, then the date of re-filing shall be considered as the first date of filing. However, where the defects have been found to be only formal in nature, then the date of first filing is considered as the date to reckon for the purpose of limitation.

10. Rigors of interpretation for condonation of delay of 30 days beyond the initial 3 months while considering the first filing have been held to be much more stringent while the rules for condonation of delay in re-filing do not suffer from the same rigors of interpretation. It is, therefore, of great importance to understand what amounts to formal defects or fundamental defects. What are the formal defects or fundamental defects can be understood from the various cases as discussed below.

11. Rule 5(3) of the Delhi High Court Rules states that if the Memorandum of Appeal is filled, the Deputy Registrar may permit the removal of objections within 7 days. In Ashok Kumar Parmar Vs. D.C. Sankhla, 1995 RLR 85, the Single Judge of this Court held that, looking at the language of the Rules framed by the 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 eyes 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 affecting 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.

12. The Division Bench upheld this view in D.C Sankhla Vs. Ashok Kumar 1995 (1) AD (New Delhi) 753 by upholding the decision of the Single Judge and observing that the date on which the plaint is presented, even though with defects, would be the date for the purpose of the Limitation Act. Rule 1 and 2 of Delhi High Court (Original Side) Rules, 1967 do not even remotely suggest that the re-filing of the plaint after removal of the defects would be the effective date of the filing of the plaint for purpose of the Limitation Act.

13. To appreciate the reason for condonation of delay it would be pertinent to consider the log information to ascertain whether the first filing suffered from formal defects or was a non-est filing.

14. The **first filing was done on 16.10.2018**. The defects were noted on 22.10.2018 which are:

“78 pages were filed without complete bookmarking without pagination. List of dates be filed. Petition be signed by the Advocate and petitioner. Statement of Truth and I.A. Affidavits not signed, not attested. No documents filed. No Award filed. Please submit the complete original hard file at the time of passing the matter.”

15. The **first re-filing was done on 16.11.2018**. The defects were noted on 17.11.2018 were:

“Total 726 pages filed. Please file all the relevant pleadings filed in the arbitration proceedings, relevant depositions which are subject matter of the Award and the proceedings under Section 34 of the Act as also the necessary documents which have been proved and exhibited or otherwise agreed

to by the parties to be referred to by the Arbitrators, especially those documents which are referred to in the impugned Award. A certificate be filed by the Advocate that the requirements as stated above have been complied with. The plaint shall contain a statement certifying authenticity of document/copies filed. Page No. 429 is missing in the list of documents.”

16. **The second re-filing was done on 20.11.2018.** The defects were noted on 20.11.2018 were:

“Total 730 pages filed. Please remove all previous objections. Certificate be filed. The plaint shall contain a statement certifying authenticity of documents/copies filed. Page no. 429 is missing in the documents.”

17. **The third re-filing** was done on 19.12.2018 and the defects were noted on 21.12.2018 were:

“total 2554 pages filed, e-court fee receipt no. be entered at the time of filing. In addition to the E-filing, it is mandatory to file hard copies of the fresh matters filed under Section 9,11, and 34 of the Arb. Act, 1996 with effect from 22.10.2018. the plaint shall contain a statement certifying authenticity of documents copies filed. Page NO. 1757,2121 are missing. Total pages mentioned in the list of documents are 2404 whereas filed 2408 please correct.”

18. **The fourth re-filing was done on 05.01.2019** and the file was sent for registration on 07.01.2019. The matter was sent to the Court on 09.01.2019 for 10.01.2019.

Petition, Statement of Truth and Affidavit filed:

19. The first objection of the defects that were noted in the First filing may be considered. The defects essentials were that the Petition, Statement

of Truth and the Affidavit were filed without the signature of the party. The question is whether such a petition can be considered to be a petition at all in the eyes of law, in the absence of signatures.

20. The Coordinate Bench of this Court explained the rationale behind insisting on these fundamental compliances while filing a petition, which it held was not far to seek in the case of Oil and Natural Gas Corporation Ltd. vs. Planetcast Technologies Ltd., 271 (2020) DLT 474. It stated that *Vakalatnama* is an authority which authorizes an Advocate to act on behalf of a party and to carry out certain acts on his behalf. The *Statement of Truth* accompanying a petition or an application is sworn by the deponent who states an oath that the contents of the accompanying petition have been drafted under his instructions and are true and correct to his knowledge or belief. The *Affidavit* so filed has to not only be signed but also attested and filed along with the petition. This is also a requirement under the Commercial Courts Act, 2015.

21. Similar facts in hand came for consideration in Oil and Natural Gas Corporation Ltd. (ONGC) vs. Joint Venture of Sai Rama Engineering Enterprises and Infrastructure Limited 2019 SCC OnLine Del 10456, the defects as noted in the initial findings were that the affidavits were neither attested nor signed; the Court Fee was short; the petition was neither signed nor dated. *Vakalatnama* was not executed and the signatures of the Advocates were missing and the Statement of Truth was not filed. The memo of parties did not give the complete details about the e-mail address, etc. There was no book marking, volumes of the documents were to be made. Hard copies were not filed and index was directed to be paginated.

22. At the time of re-filing, it was found that none of the defects as noted

at the time of filing were cured. 10 pages of index were filed which did not cure the earlier defects. It was held that such a filing was in fact non-est as it failed to meet the basic requirements of any pleadings and such a non-est filing cannot stop limitation and cannot be a ground to condone the delay. Thus, when a petition is filed under Section 34 of the A&C Act, 1996 in order to be termed 'a properly filed petition', it must fulfil 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.

23. Likewise, in the case of Jay Polychem (India) Ltd & Ors. Vs. S.E. Investment Ltd. 2018 SCC OnLine Del 8848, this Court while dealing with non-filing of Statement of Truth, held that a Statement which is neither signed nor supported by an affidavit cannot be considered as an application under Section 34 of the A&C Act, 1996 of the A&C Act, 1996. The Petition thus filed without the Statement of Truth, is *non-est*.

24. In Sravanthi Infratech Private Limited v. Greens Power Equipment (China) Co. Ltd, 2016 SCC OnLine Del 5645 a petition was filed without a *vakalatnama*, without an *affidavit* and without the signature of the party on the petition. These were held to be fatal defects where the first filing was hardly found to be a proper filing when there has been no application for condonation of delay.

25. In the present case, the unsigned petition, accompanied by an

unsigned Statement of Truth is of no consequence as it has no authentication either by the Petitioner or its Advocate. These are nothing but a bunch of papers as was observed in (ONGC) vs. Joint Venture of Sai Rama Engineering Enterprises and Infrastructure Limited (Supra).

Non- filing of Award:

26. The number of pages filed in the first filing was 78 pages which became 726 pages in the first re-filing on 16.11.2018 and saw exponential increase to 730 by the time of second re-filing on 20.11.2018. Now filing the award, the Award was not filed at the time of first filing.

27. The consequence of non filing of the Award was considered in Union of India v. Bharat Biotech International Limited being OMP (COMM) 399/2019, decided by this Court on 18.03.2020. It was observed that at the time of filing the petition initially, no court fee was affixed, *Vakalatnama* was undated, accompanying Statement of Truth was incomplete and lacked critical information, and the supporting affidavit made reference to documents which were not annexed to the petition. The even more glaring defect was that, at the time of initial filing, the copy of the Award was not annexed with the petition. It was held that, it was in-comprehensible as to how a petition is seeking to assail an Order, an Award in this case, without even annexing a copy of the Award thereof. It cannot be claimed as valid filing and that too without moving an application seeking an exemption from filing the copy of the impugned Award. No document including the impugned Award was filed along with the petition.

28. 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 Constructions Co. (2010) 120 DRJ 615 (DB) as also a co-

ordinate Bench of this Court in SKS Power Generation (Chhattisgarh) Ltd. Vs. ISC Projects Private Limited, 2019 SCC OnLine Del 8006, wherein it was observed that filing a copy of the impugned award would be a *sine qua non* in every petition laying a challenge thereon. It held that non-filing of the impugned award would be fatal. Further, the original petition initially filed, contained only 83 pages while subsequently more than 350 pages of documents were added to the petition. It was held that it was a *non-est* filing and the defects could not be underplayed as ‘trivial’ and were rather of such gravity that it would render the original filing as a mere dummy filing.

29. In Sravanthi Infratech (Supra), this Court had condemned the practise of considerably expanding the number of pages in the petition while purporting to re-file it. A condonation application must be submitted concurrently with a petition within 120 days of the original filing date in order for it to be legal.

30. Similarly, in OIC v. Air India 2019 OnLine Del 11634 and SKS Power Generation (Chhattisgarh) Ltd. v. ISC Projects Pvt. Ltd. OMP (COMM) 132/2019, an initial filing with lesser number of pages, no signed Affidavit, Statement of Truth, award or Vakalatnama was held to be invalid.

31. In the present case as well, the petition was not supported with the Award and the documents. Moreover, the very fact that the number of pages eventually increased to 726 pages while at the time of first filing only 78 pages were filed also demonstrates that some papers were filed merely to save the limitation, of which no cognizance can be taken by the court.

32. **To conclude**, the present petition pertains to a Commercial suit. In terms of Commercial Courts Act, for any plaint/petition to be considered as a valid document, it necessarily requires to be authenticated by the

signatures of the plaintiff on each page at the end and must be supported by the Statement of Truth. In the light of the above discussion, it has to be necessarily concluded that the petition and Statement of Truth without bearing any signatures and not supported by the copy of Award, were only a bunch of papers filed in the Court which is an absolute *non-est* filing and is thus of no consequence.

33. In the light of the above discussion, it is evident that the first filing which was done on 16.10.2018, though within the extended limitation period of 30 days, but it was a *non-est* filing implying that it cannot be considered as filing in any sense. The first re-filing was done on 16.11.2018. But because the first filing is *non-est*, the date of filing of the objections has to be taken as 16.11.2018 (the date of first re-filing) which is admittedly beyond the period of three months plus thirty days which expired on 02.11.2018. The Petition was clearly barred by limitation.

34. It would also be pertinent to mention that, even otherwise, the application under Section 151 of the CPC seeking condonation of delay in filing the Petition contained only two lines and no reason whatsoever was given therein. It is only in the rejoinder that the petitioner has admitted that there has been a delay for which the only explanation given is that it was on account of an internal miscommunication and inadvertence. This by no interpretation of law can be considered any kind of explanation, leave alone sufficient explanation for condonation of delay.

35. In any case, the delay is beyond the prescribed period of three months plus thirty days under Section 34(3) of the A&C Act, 1996 which cannot be condoned. The second application for condonation of delay in re-filing necessarily fails.

36. The two applications under Section 151 of the CPC for condonation of delay in filing and re-filing the petition under Section 34 of the A&C Act, 1996 are hereby dismissed.
37. Consequently, the petition under Section 34 of the A&C Act, 1996 is also dismissed.
38. All pending applications, if any, stand disposed of.

**NEENA BANSAL KRISHNA
(JUDGE)**

**JANUARY 30, 2023
PA**

