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

% *Date of Decision: 15.05.2024*

+ **FAO(OS) (COMM) 57/2023**

**BRAHMAPUTRA CRACKER AND
POLYMER LTD.**

..... Appellant

Through: Mr Sanjeev Sagar, Ms Nazia Parveen,
Mr Avinash Kumar, Mr Ujjawal
Gaur, Mr Gauravdeep Bhardwaj, Ms
Priyanka Gupta and Mr Sachin Bhati,
Advocates.

versus

RAJSHEKHAR CONSTRUCTION PVT. LTD. Respondent

Through: Mr Mayank Mikhail Mukherjee,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J. (Oral)

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 30.01.2023 passed by the learned Single Judge in OMP(COMM) 289/2022 captioned *Brahmaputra Cracker and Polymer Ltd. v. Rajshekhar Construction Pvt. Limited*. The appellant had filed the said application [OMP(COMM) 289/2022], *inter alia*, praying that the arbitral award dated 31.01.2022 (hereafter *the impugned award*) be set aside.

2. The learned Single Judge had declined to entertain the said application on the ground that it was barred by limitation.



3. The appellant had filed the said application on 28.05.2022. Admittedly, the said application was filed beyond the period of three months from receipt of the impugned award. Thus, it was filed beyond the period as stipulated under Section 34(3) of the A&C Act. However, the appellant is required to be granted benefit of the order dated 10.01.2022 passed by the Hon'ble Supreme Court in *Suo Motu Writ Petition (C) No.3/2020 captioned In Re: Cognizance for Extension of limitation*. The relevant extract of the said order reads as under:

“i. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.”

4. In terms of the said order dated 10.01.2022, the period from 15.03.2020 till 28.02.2022 is required to be excluded for the purposes of computing the period of limitation.

5. In the present case, the impugned award was received on 31.01.2022 and therefore, the period upto 28.02.2022, would require to be excluded for the purposes of limitation. In the present case, the limitation for filing the application would expire on 30.04.2022 (being three calendar months from the date of receipt of the impugned award). However, the period from 31.1.2022 to 28.02.2022 – a period of 28 days – is required to be excluded by virtue of the order dated 10.01.2022 passed by the Supreme Court as mentioned above.



6. The appellant had filed the said application on the last date of the limitation, that is, on 28.05.2022. The said application was defective and was returned by the Registry for re-filing on 03.06.2022. It is stated that the appellant had cured the said defects and had re-filed the application on 04.07.2022. It is material to note that 03.06.2022 was the last working day before the Court closed for vacations and 04.07.2022 was the first day on which the Court reopened.

7. It is the appellant's case that the appellant had also filed an application for condonation of delay in re-filing as it was beyond the stipulated period. The said application was allowed by the learned Single Judge by an order dated 15.07.2022.

8. However, thereafter, the respondent had raised an objection that the initial filing – that is, the application filed on 28.05.2022 was inchoate and was required to be considered as *non-est*. The learned Single Judge had found merit in the said contention and had accordingly, declined to entertain the appellant's application. Thus, the only question to be considered by this Court is whether the decision of the learned Single Judge in finding that the application filed by the appellant on 28.05.2022 was *non-est*, is justified.

9. We had directed the Registry to place on record a digital copy of what was filed by the appellant on 28.05.2022. The same indicates that the initial filing spanned over 57 pages. The opening sheets were not signed by either the authorised representative of the appellant or the counsel. It also appears that the opening sheet, which included an urgent application was blank. The space for filing the court fees was blank. The notice of motion was unsigned



and blank. The memo of parties was also undated, but bore the signatures of the General Manager (Chemical) of the appellant company. The application was not accompanied by an affidavit or by a Statement of Truth as required under Order VI Rule 15A of the Code of Civil Procedure, 1908 (hereafter *CPC*) as applicable to commercial disputes. It was not accompanied by a copy of the arbitral award. It was also not accompanied by *vakalatnama* or any other document.

10. The appellant had also not served a prior notice to the respondent before filing the application as required under Section 34(5) of the A&C Act.

11. The learned Single Judge following the earlier decisions of this Court in *Oil and Natural Gas Corporation Ltd. v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure Limited (Meil): 2023 SCC OnLine Del 63* concluded that the initial filing was *non est*. Since the application filed on 04.07.2022 was beyond the period of three months and the delay was beyond the period of thirty days that could be condoned, the appellant's application was not entertained.

12. We find no infirmity with the view of the learned Single Judge that the initial filing was required to be considered as *non-est*. This Court in *Oil and Natural Gas Corporation Ltd. v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure Limited (Meil) (supra)* had held that the question whether a filing is *non-est* must be determined by addressing whether the application as filed is intelligible, its filing is authorised, it is accompanied by award and the



contents sets out material particulars including the name of the parties and grounds for impugning the award. This Court had also noted that it would be necessary to assess the overall defects plaguing the filing. The Court had also observed in a given case, there may be multitude of defects and each defect may be insufficient to render a filing as *non-est*. However, the cumulative effect of the defects is required to be assessed. In the present case, there are several fundamental defects in the initial filing. Since the application was not accompanied by an impugned award, it would be impossible to assess the grounds for assailing the same. Non-filing of the award is clearly a fundamental defect in the said filing. In addition, the application was also not accompanied by an affidavit as required. It was also not accompanied by Statement of Truth as mandatory in terms of the Order VI Rule 15A of CPC.

13. As noticed above, the application is also neither accompanied by *vakalatnama* nor signed by the counsel.

14. In view of the above, we find no infirmity with the view of the learned Single Judge in holding that the initial filing was *non est*.

15. We also concur with the view that non-filing of such documents which are fundamental to the application, should not be countenanced lightly. Such attempts to initiate a filing only for the sake of stopping the limitation, should be discouraged. In the present case, it is apparent that the appellant had filed an application on the last day of the extended period of limitation (three months, plus an additional twenty eight days excluded by virtue of the orders passed by the Supreme Court in *Suo Motu Writ Petition*



(C)No.3/2020 of stopping limitation). As noticed above, the initial filing was only 57 pages and the application finally re-filed on 13.07.2022 spanned over 911 pages.

16. The contention that the period of limitation was suspended from 03.06.2022 to 04.07.2022 as the courts were closed is unmerited. The period of filing the application under Section 34 of the A&C Act had expired on 28.05.2022 and the filing on that date is required to be considered as *non-est*. Thus, it must be construed that the appellant had not filed an application under Section 34 of the A&C Act within the period of limitation as prescribed. It is also settled law that in terms of proviso to Section 34(3) of the A&C Act, the period of delay that can be condoned is confined to thirty days and the said period is not extended on account of closure of the courts for vacations. This issue is settled by the decision of the Supreme Court in *Bhimashankar Sahakari Sakkare Karkhane Niyamita v. Walchandnagar Industries Limited (WIL): (2023) 8 SCC 453*.

17. The appeal is unmerited and accordingly, dismissed.

18. The appellant had deposited the awarded amount with the Registry of this Court. The disbursal of the said amount shall abide by the orders passed by the Court before which the enforcement proceedings are pending.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MAY 15, 2024

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