



2024:DHC:5981-DB



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

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Judgement delivered on: 12.08.2024

+ **FAO(OS)(COMM) 125/2024****CONTAINER CORPORATION OF INDIA
LIMITED**

.....Appellant

versus

M/S SHIVHARE ROAD LINES

.....Respondent

Advocates who appeared in this case

For the Appellant : Mr Sanjay Jain, Senior Advocate along with
Mr R.K. Joshi, Mr. Ojusy Joshi, Ms Palak
Jain and Ms Harshita Sukhija, Advocates.

For the Respondent : Mr V.K. Garg, Senior Advocate along with
Mr Avneesh Garg, Mr Parv Garg, Mr K.S.
Rekhi, Mr Pawas Kulshrestha, Mr Sukreet
Khandelwal and Mr Harshpal, Advocates

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MR. JUSTICE SACHIN DATTA****JUDGMENT****VIBHU BAKHRU, J.**

1. The appellant (hereafter *Concor*), has filed the present intra court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 25.04.2024 (hereafter *the impugned judgment*) passed by the learned Single Judge of this Court in OMP (COMM) No. 441/2023 captioned *M/s. Container Corporation of India Limited v. M/s. Shivhare Road Lines*.

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2. Concor had filed the aforesaid application under Section 34 of the A&C Act impugning an arbitral award dated 22.12.2022 (hereafter *the impugned award*), rendered by an arbitral tribunal (hereafter *the Arbitral Tribunal*). The learned Single Judge dismissed the said application on the ground that the application was barred by limitation. The learned Single Judge concluded that the initial filing, which was within the period of three months available for filing an application to set aside an award under Section 34 of the A&C Act, was *non-est*. And, the subsequent filing was beyond the period that could be condoned by a Court.

3. After the impugned award was delivered, the respondent (claimant before the Arbitral Tribunal) filed an application under Section 33 of the A&C Act seeking correction of certain typographical errors that had crept in the impugned award in regard to two claims (Claim No. 4 and Claim No. 6). The Arbitral Tribunal accepted that a typographical error had crept in quantification of the awarded amount in regard to one of the claims (Claim no.4), but rejected the contention that there was any error in regard to the impugned award in respect of another claim (Claim no.6). Accordingly, the Arbitral Tribunal passed an order under Section 33 of the A&C Act on 09.03.2023 correcting the impugned award.

4. Admittedly, the period of limitation under Section 34(3) of the A&C Act for filing an application to set aside the impugned award is required to be reckoned from 09.03.2023 – date of the order passed under Section 33 of the A&C Act. Thus, the period of three months available for filing the application to set aside the impugned award expired on 09.06.2023. The period of thirty days that could be condoned by a Court in terms of the



proviso to Section 34(3) of the A&C Act expired on 09.07.2023.

5. Concor states that it filed the application to set aside the impugned award on 08.06.2023. The said application was found defective and was, accordingly, returned. Thereafter, Concor re-filed the application under Section 34 of the A&C Act on 20.09.2023, which was listed for consideration before the learned Single Judge on 20.10.2023. Concor also filed an application seeking condonation of delay of sixty-six days in re-filing the petition, which was condoned by an order dated 27.02.2024.

6. The respondent claims that initial filing of the petition on 08.06.2023 cannot be considered as filing of an application to set aside the impugned award and was required to be treated as *non-est*. The said contention was premised on the basis that the initial filing was not accompanied with a copy of the impugned award, attested affidavit, or the *Vakalatnama*. The learned Single Judge accepted the said contention following the decisions of the Coordinate Bench of this Court in ***Union of India v. Panacea Biotech Limited*¹**; ***National Research Development Corporation & Another v. Chromous Biotech Pvt. Limited*²**; ***Oil and Natural Gas Corporation Limited v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure Limited (Meil)*³** and dismissed the petition as being barred by limitation.

7. The principal question that arises for consideration of this Court is whether the conclusion of the learned Single Judge that Concor's initial

¹ 2023 SCC OnLine Del 8491

² 2024 SCC OnLine Del 161

³ 2023 SCC OnLine Del 63



filing dated 08.06.2023 was required to be ignored being *non-est*, is erroneous.

8. Concededly, if it is found that Concor's initial filing was a substantive filing, although defective on account of curable defects, then Concor's petition cannot be dismissed on limitation as the learned Single Judge has condoned the delay of 66 days in refileing the petition by the order dated 27.02.2024 and, the said order has not been assailed by the respondent.

SUBMISSIONS

9. Mr Sanjay Jain, learned senior counsel appearing on behalf of Concor contended that the petition, as filed on 08.06.2023 (initial filing), contained as many as twenty-one grounds for setting aside the impugned award, which were in the nature of grounds for setting aside the impugned award under Sub-sections (2) and (2A) of Section 34 of the A&C Act. He submitted that although the petition filed on 20.09.2023 was not identical to the one filed on 08.06.2023, but the two drafts (one that was filed on 08.06.2023 and the other filed on 20.09.2023), were comparable.

10. Next, he contended that irrespective of the grounds that are urged by the applicant to set aside an arbitral award, the Court has the duty to examine the arbitral award under Section 34 of the A&C Act and set it aside if it finds that any of the grounds as contemplated under Sub-sections (2) and (2A) of Section 34 of the A&C Act are made out. He urged that addition or deletion of grounds in the petition as refiled would not be relevant and would not render the initial filing as invalid.



11. He also contended that in terms of Section 34(1) of the A&C Act, recourse to a Court against an arbitral award may be made only by an application for setting aside the award in accordance with Sub-sections (2) and (3) of Section 34 of the A&C Act. He submits that there was no statutory requirement under the A&C Act for filing the impugned award along with the application. Therefore, Concor's application for setting aside the impugned award cannot be considered as invalid on account of not being accompanied by the impugned award. He also submitted that despite the recommendations of the Law Commission of India in its 176th Report, the Parliament had not made it mandatory for filing the arbitral award with the objection petition. He also relied upon the decision of the Supreme Court in ***State of Bihar & Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti***⁴ in support of his contention.

12. He submitted that the concept of *non-est* filing does not exist in any statute or rules, but follows from the decisions rendered by this Court. Therefore, all defects remain curable and are not fatal to non-suit the petitioner who is desirous to challenge an arbitral award.

13. Next, he referred to the decision of the Supreme Court in ***Uday Shankar Triyar v. Ram Kalewar Prasad Singh & Anr.***⁵ and submitted that non-compliance of any procedural requirement does not entail automatic dismissal or rejection unless the statute or rules so mandate. He submitted that the Supreme Court had held that procedural defects and irregularities should not be allowed to defeat substantial rights or cause injustice. The

⁴(2018) 9 SCC 472

⁵(2006) 1 SCC 75



Supreme Court had proceeded to enumerate well-recognized exceptions to the rule and none of the defects as obtaining in the present case fall within the said exceptions.

14. He submitted that the filing of the petition to challenge the impugned award was within the knowledge and authority of the concerned officer as Concor had issued the authorization letter dated 07.06.2023 in his favour. He attributed the failure to file the *Vakalatnama*, Statement of Truth, and Affidavit to the negligence of the advocate engaged by Concor.

15. Lastly, he submitted that the question whether the non-filing of an arbitral award along with the petition could be fatal to the filing was referred to the Larger Bench in *Pragati Construction Consultants v. Union of India*⁶ and *Bharat Broadband Network Limited v. Sterlite Technologies Limited*⁷ and submitted that the present appeal be deferred to await the decision of the Larger Bench.

REASONS AND CONCLUSION

16. As noted above, the only controversy to be addressed is whether Concor's initial filing, notwithstanding the defects, could be considered as substantive filing. In this view, this Court had directed the Registry to place on record the digital copy of the application to set aside the impugned award as initially filed on 08.06.2023 on behalf of the Concor.

17. The Registry has since placed it on record. It is noted that the said application was not signed either by the advocate for Concor or by Concor.

⁶FAO(OS)(COMM) 70/2024 by order dated 09.05.2024

⁷OMP (COMM) 20/2024 by order dated 21.03.2024



Similarly, the Memo of Parties is unsigned. The filing comprises of forty-two pages. The application contains several blanks and is not verified. It is accompanied by an unattested affidavit, which is unsigned and unverified. The Statement of Truth is unsigned and contains several blanks and the same is also not verified. It is not accompanied by any document, arbitral award or *Vakalatnama*.

18. The filing log indicates that an application was filed on 08.06.2023. The same was marked defective. The defects as noted by the Registry on 16.06.2023 and 30.06.2023 are set out below:-

S.No.	Date	Description
1	16.06.2023	FOLLOWING DEFECTS ARE FOUND. [1, 2, 3, 5, 96, 201, 202, 203, 205, 207, 209, 210, 212, 230, 235, 237, 265, 274, 294, 352, 357]
2	16.06.2023	UNDER OBJECTIONS
3.	16.06.2023	DESCRIPTION OF ANY OTHER DEFECTS: TOTAL 42 PAGES FILED, NO PAGE NUMBEIRNG MENTIONED ON THE INDEX, NO AWARD FILED, NO DOCUMENTS FILED, AFFIDAVIT NOT ATTESTED, NO VAKALTNAMA FILED. BOOKMAKRING BE DONE AS PER THE NORMS GIVEN ON THE WEB PORTAL OF DELHI HIGH COURT.
4.	30.06.2023	FILING IS MARKED DEFECTIVE AND SENT FOR REFILING.

19. As noted above, only forty-two pages were filed, the filing was marked defective and returned on 30.06.2023 for refiling. Thereafter,



Concor refiled the petition on 20.09.2023. It is material to note that the refiling comprised 306 (three hundred and six) pages as against the 42 pages initially filed on 08.06.2023. However, this filing was also defective.

20. The filing log dated 21.09.2023, which indicates the defects is set out below:-

S.No.	Date	Description
1	21.09.2023	FOLLOWING DEFECTS ARE FOUND. [3, 5, 96, 201, 202, 203, 205, 207, 209, 210, 230, 235, 352, 215, 216]
2	21.09.2023	UNDER OBJECTIONS
3.	21.09.2023	DESCRIPTION OF ANY OTHER DEFECTS: TOTAL 306 PAGES, ? PETITION BE FILED AS PER CIRCULAR DT 16/12/22? SPECIFIED PECUNIARY VALUE BE GIVEN IN THE PARA OF PECUNAIY JURISDICTION.?ONE TIME PF FEES BE PAID AS PER NOTIFICATION DT 23/08/2019. INDEX STATES CONDONATION OF DELAY IN FILING BUT CONDOANTION OF DELAY RE-FILING FILED. ? CERTIFICATE TO THE EFFECT THAT THE RELEVANT RECORD OF THE ARBITRATION PROCEEDINGS BEING THE RELEVANT PLEADING, DOCUMENTS ETC, RELEVANT FOR DECIDING THE PETITION UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 ARE BEING FILED ESPECIALLY ALL THE PLEADING, DOCUMENTS, ETC REFERRED IN THE ARBITRATION AWARD RELEVANT TO THE PRESENT PETITION ARE BEING FILED".



		OBJECTIONS PERSIST
4.	21.09.2023	FILING IS MARKED DEFECTIVE AND SENT FOR REFILING.

21. As noted above, Concor refiled the petition on 20.09.2023, however certain defects persisted and the same was marked defective and sent for refiling on 21.09.2023. Concor refiled the petition once again on 25.09.2023. The petition as refiled now comprised of 342 (three hundred and forty-two) pages. One of the objections as raised earlier was that the petition was not filed in terms of a circular dated 16.12.2022. The said objection was not addressed. Consequently, the petition was marked defective and returned for refiling.

22. Concor refiled the petition once again on 14.10.2023. The petition as now refiled contained 358 (three hundred and fifty-eight) pages. However, some of the defects remained uncured. The filing was marked as defective on 16.10.2023 and was sent for refiling.

23. It was once again refiled on 16.10.2023. But certain defects were not cured and the petition was returned for refiling. It was next refiled on 18.10.2023 and now comprised of 349 (three hundred and forty-nine) pages. It was once again marked defective. Concor finally refiled the petition on 18.10.2023 and the same was cleared for placing it before the Court.

24. It is relevant to note that the petition, as refiled on 18.10.2023 is not the same petition as initially filed on 08.06.2023. It has been redrafted and certain averments were added and modified.



25. The learned counsel for the respondent has handed over a draft of the application to set aside the impugned award as filed, with track changes mode indicating the changes in the drafts. The same clearly indicates that the application as was presented to the Court on 18.10.2023 was not the same as was initially filed on 08.06.2023. It was redrafted and materially changed. Some averments were deleted and material averments were added. This included addition of a specific ground alleging bias on the part of the learned Arbitral Tribunal.

26. The contention that any amendment to the petition as was initially filed or any addition or deletion of grounds, is not material as the Court has the duty to examine whether the arbitral award is liable to be set aside under Sub-sections (2) and (2A) of Section 34 of the A&C Act, is unpersuasive. The point is not whether the Court is required to examine whether the grounds for setting aside the arbitral award under Section 34(2) or Section 34(2A) of the A&C Act exists, the question is whether the petition was filed within the period of limitation as prescribed under Section 34(3) of the A&C Act. For the said purpose, the question whether the petition filed is materially different from a petition filed earlier is a relevant consideration to determine the date of filing of the petition. It is clearly impermissible for a party to file a draft petition and then under the guise of curing defects file a redrafted petition at a later date. If the sanctity of the initial filing is to be maintained, it is relevant that the refiling is limited to cure the defects of the initial filing. Illustratively, if a petition or application is not accompanied by an attested affidavit and is returned for refiling to cure the defects; the petitioner is required to cure the defects by filing an attested affidavit to



support its petition or application. It cannot thereafter change the petition or application and file a fresh petition while maintaining the earlier filing date.

27. Section 34(3) of the A&C Act puts in place a rigid period of limitation for filing an application to set aside an arbitral award. It would be subverting the legislative intent if a party is permitted to lodge a skeleton petition to stop the period of limitation and then refile a different petition several days later.

28. In this case, it is material to note that the petition which was finally placed before the Court was filed more than four months after the date of initial filing. The period between the initial filing and the final filing exceeds not only the period available under Section 34(3) of the A&C Act to file a petition under Section 34 of the A&C Act to set aside an arbitral award, but also the period of delay of thirty days that can be condoned by the Court.

29. The question whether the Court can condone the delay in filing a petition under Section 34 of the A&C Act beyond the period of thirty days stipulated under the proviso to Section 34(3) of the A&C Act is no longer *res integra*.

30. The Supreme Court in ***Union of India v. Popular Construction Co.***⁸ has authoritatively held that the time period for assailing the arbitral award under Section 34 of the A&C Act cannot be extended beyond the express language of Section 34(3) of the A&C Act. However, this does not apply to refiling.

⁸ (2001) 8 SCC 470



31. In *Delhi Development Authority v. M/s Durga Construction Company*⁹ this Court did not accept the said contention and held that delay in refiling was not covered under Section 34(3) of the A&C Act. It is material to bear in mind that Courts have not accepted that there is a rigid time frame for refiling of a petition principally on the ground that Section 5 of the Limitation Act, 1963 (hereafter *the Limitation Act*) is not applicable in the case of a refiling.

32. In *Indian Statistical Institute v. Associated Builders & Ors.*¹⁰, the Supreme Court allowed the appeal against a decision of the High Court rejecting the application for condonation of delay in filing the objection to the arbitral award passed under the Arbitration Act, 1940. The objections were filed in time, but there was significant delay in refiling the same. In the aforesaid context, the Supreme Court held as under:-

“10. The High Court was in error in holding that there was any delay in filing the objections for setting aside the award. The time prescribed by the Limitation Act for filing of the objections is one month from the date of the service of the notice. It is common ground that the objections were filed within the period prescribed by the Limitation Act though defectively. The delay, if any, was in representation of the objection petition after rectifying the defects. Section 5 of the Limitation Act provides for extension of the prescribed period of limitation if the petitioner satisfies the court that he had sufficient cause for not preferring the objections within that period. When there is no delay in presenting the objection petition Section 5 of the Limitation Act has no application and the

⁹ Neutral citation: 2013:DHC:5688-DB

¹⁰(1978) 1 SCC 483



delay in representation is not subject to the rigorous tests which are usually applied in excusing the delay in a petition under Section 5 of the Limitation Act. The application filed before the lower court for condonation of the delay in preferring the objections and the order of the court declining to condone the delay are all due to misunderstanding of the provisions of the Civil Procedure Code. As we have already pointed out in the return the Registrar did not even specify the time within which the petition will have to be represented.”

[Emphasis added]

33. Plainly, if the rigors of Section 5 of the Limitation Act are to be excluded in cases of re-presentation, it must follow that the same petition / application as initially filed must be represented. It would be subverting the provisions of statutory limitation as prescribed if it was stopped on the basis of some initial filing of the petition while permitting a materially different petition to be re-presented. It would effectively amount to stopping the limitation in respect of a petition, on the basis that another petition was filed within time. Refiling of a petition marked defective and returned can be considered as refiling only if the refiling is confined to addressing the defects and the attendant changes.

34. A party seeking to assail an arbitral award cannot be permitted to file any petition to stop the period of limitation and then take its own time to refile a materially redrafted petition. This would militate against the legislative intent of providing a rigid time frame for filing a petition to set aside the arbitral award under Section 34(3) of the A&C Act.



35. In *Government of Maharashtra (Water Resources Department) Represented by Executive Engineer v. Borse Brothers Engineers & Contractors Private Limited*¹¹ the Supreme Court considered the question whether the power of the Court to condone the delay in filing an appeal under Section 37 of the A&C Act was confined to a period of thirty days as stipulated under the proviso to Section 34(3) of the A&C Act. The Supreme Court answered the question in the negative and held that the power of a Court to condone the delay in filing an appeal under Section 37 of the A&C Act was not limited to thirty days as provided under the proviso to Section 34(3) of the A&C Act, but also held that the approach of the Courts in condonation of the delay in filing the appeal cannot be elastic keeping in view the legislative intent. The relevant extract of the said decision is as under:-

“58. Given the object sought to be achieved under both the Arbitration Act and the Commercial Courts Act, that is, the speedy resolution of disputes, the expression “sufficient cause” is not elastic enough to cover long delays beyond the period provided by the appeal provision itself. Besides, the expression “sufficient cause” is not itself a loose panacea for the ill pressing negligent and stale claims...

* * *

63. Given the aforesaid principles culled out re “sufficient cause” and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under section 37 of the A&C Act, 1996 that are governed by Articles 116 and 117 of the Limitation Act or Section 13(1-A) of the

¹¹(2021) 6 SCC 460



Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule....”

36. In *Delhi Development Authority v. M/s. Durga Construction Company*⁹, a Division Bench of this Court had considered the question whether the period available for refiling is required to be included within the period as available under Section 34(3) of the A&C Act. It was argued in that case that the Court had no jurisdiction to condone the delay in refiling if the same was beyond the period of three months and thirty days stipulated under Section 34(3) of the A&C Act. Whilst the Court rejected the contention that a Court did not have the jurisdiction to condone the delay in refiling beyond the period of three months and thirty days from the date of receipt of the arbitral award, this Court also observed as under:

“21. Although, the courts would have the jurisdiction to condone the delay, the approach in 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. The applicant would have to show that the delay was on account of reasons beyond the control of the applicant and could not be avoided despite all possible efforts by the applicant. The purpose of specifying an inelastic period of limitation under section 34(3) of the Act would also have to be borne in mind and the Courts would consider the question whether to condone the delay in re-filing in the context of the statute.”

37. However, in cases, where the initial filing is insubstantive, it cannot stop the clock of limitation and is required to be considered as *non-est*.



38. In *Shri Ashok Kumar Parmar v. D.C. Sankhla & Ors.*¹², this Court had, in the context of Rules 1 and 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967, observed as under:

“10.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.”

39. The aforesaid principle would also be applicable in case of an application to set aside an arbitral award under Section 34 of the A&C Act. In *Delhi Development Authority v. M/s. Durga Construction Company*⁹, this Court had observed as under:

“17.. 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.”

40. The question whether any filing is required to be considered as *non-est* has been considered by this Court in a number of decisions. In *Oil and Natural Gas Corporation Limited v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure*

¹² 1994 SCC OnLine Del 626



*Limited (Meil)*³, this Court considered an appeal against the decision of the learned Single Judge holding the application to set aside an arbitral award was *non-est*, as it was not signed on each page; not accompanied by a duly signed *Vakalatnama*; and the affidavit accompanying the application was not attested. In the aforesaid context, this Court held as under:-

“30. We concur with the learned Single Judge that certain defects are curable and do not render the application as *non est*. However, the nature of certain defects is such that it would not be apposite to consider the defective application as an application under Section 34 of the A&C Act, to set aside an arbitral award. Undisputedly, every improper filling is not *non est*.

32. It is material to note that Section 34 of the A&C Act does not specify any particular procedure for filing an application to set aside the arbitral award. However, it does set out the grounds on which such an application can be made. Thus, the first and foremost requirement for an application under Section 34 of the A&C Act is that it should set out the grounds on which the applicant seeks setting aside of the arbitral award. It is also necessary that the application be accompanied by a copy of the award as without a copy of the award, which is challenged, it would be impossible to appreciate the grounds to set aside the award. In addition to the above, the application must state the name of the parties and the bare facts in the context of which the applicants seek setting aside of the arbitral award.

33. It is also necessary that the application be signed by the party or its authorised representative. The affixing of signatures signify that the applicant is making the application. In the absence of such



signatures, it would be difficult to accept that the application is moved by the applicant.

34. In addition to the above, other material requirements are such as, the application is to be supported by an affidavit and a statement of truth by virtue of Order XI, Section 1 of the Commercial Courts Act, 2015. It is also necessary that the filing be accompanied by a duly executed vakalatnama. This would be necessary for an advocate to move the application before the court. Although these requirements are material and necessary, we are unable to accept that in absence of these requirements, the application is required to be treated as non est. The application to set aside an award does not cease to be an application merely because the applicant has not complied with certain procedural requirements.

35. It is well settled that filing an affidavit in support of an application is a procedural requirement. The statement of truth by way of an affidavit is also a procedural matter. As stated above, it would be necessary to comply with these procedural requirements. Failure to do so would render an application under Section 34 of the A&C Act to be defective but it would not render it non est.

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41. We may also add that in given cases there may be a multitude of defects. Each of the defects considered separately may be insufficient to render the filing as non est. However, if these defects are considered cumulatively, it may lead to the conclusion that the filing is non est. In order to consider the question whether a filing is non est, the court must address the question whether the application, as filed, is intelligible, its filing has been authorised; it is accompanied by an award;



and the contents set out the material particulars including the names of the parties and the grounds for impugning the award.”

[Emphasis added]

41. The question whether an application filed under Section 34 of the A&C Act is hopelessly inadequate and cannot be considered as a filing at all, must necessarily be determined by evaluating the filing as well as the cumulative nature of the defects. Although some of the defects may be curable, a cumulative effect of such defects may be so debilitating to a valid filing, so as to render the application hopelessly inadequate and incapable of adjudication. There are several defects that the Court had pointed out, which are material, notwithstanding that some of them may be, in one sense, procedural.

42. In *A V Industries v. Neo Neon Electrical Pvt. Limited*¹³, a Coordinate Bench of this Court considered the import of non-filing of a Statement of Truth as required under Order VI Rule 15A of the Code of Civil Procedure, 1908 (hereafter *the CPC*) as amended by the Commercial Courts Act, 2015 (hereafter *the Commercial Courts Act*) and as applicable to the actions in respect of commercial disputes. In this context, the Court held as under: -

“35. A perusal of the aforesaid provisions, particularly Order VI Rule 15A of CPC as amended by CC Act, would bring to fore that the Legislature had, in its wisdom, intentionally laid great stress on the filing of the Statement of Truth along with the plaint, in support thereof, to reduce the time spent in the litigation by parties. The delay in filing of the same may be considered as a

¹³2023 SCC OnLine Del 5397



procedural irregularity, however, the filing of the same, in our view, would be mandatory. Moreover, the filing of the Statement of Truth and the limitation thereafter provided for filing of the same, in our view is restrictive in nature and cannot be extended endlessly nor can the plaint and the documents annexed thereto be read in evidence. This has great significance since sub rule (4) and (5) of Rule 15A of Order VI of CPC as amended by CC Act mandate the filing of the Statement of Truth and also prescribe the effect of such non filing. It is clear that the parties are not permitted to rely upon the said pleadings by virtue of sub rule (4) and simultaneously the Court is empowered to strike out a pleading which is not supported by the statement of truth, prescribed by sub rule (5) of Rule 15A of Order VI of CPC as amended by CC Act. Our endeavour in the present case is only to consider the effect of non filing of the Statement of Truth, since the facts obtaining in the present case do not give rise to any other question and thus, our views are restricted only to the said issue.

36. In the present case, it is admitted by the learned counsel for the respondent/plaintiff that the Statement of Truth indeed, was never filed either with the plaint or any time later at all. Keeping this fact in view, we are of the opinion that the same would fall within the purview of issue of law and hold that the plaint itself is *non est* and could not have been read in evidence either.”

43. Order VI Rule 15A (1) of the CPC, as amended by the Commercial



Courts Act provides that every pleading in a commercial dispute shall be verified in the manner and form as specified in the appendix to the said Rule (Statement of Truth). This Court has accepted that filing a ‘Statement of Truth’ along with the application to set aside an arbitral award arising from a commercial dispute, is necessary¹⁴. Although, by virtue of Section 19 of the A&C Act, the Arbitral Tribunal may not be bound by the provisions of the CPC, the provisions of CPC, insofar as relevant, would apply to proceedings in Court. However, the question whether filing the Statement of Truth for supporting an application filed under Section 34 of the A&C Act is a contentious one as Section 16 of the Commercial Courts Act posits that the CPC as amended by the said Commercial Courts Act would apply to a suit involving a commercial dispute and its trial. And, an application to set aside an arbitral award may not be considered a suit. However, under Rule 17 of the Arbitration Rules framed by this Court in the context of the Arbitration Act, 1940, the provisions of the CPC and the High Court Rules and Orders *mutatis mutandis* apply to proceedings before this Court. It is not necessary to examine the controversy whether filing of the Statement of Truth in support of the application to set aside the arbitral award is mandatory as it is not disputed that such an application under Section 34 of the A&C Act is required to be supported by an affidavit.

44. In ***Union of India v. Pancea Biotec Limited***¹, a Coordinate Bench of this Court had held that non-filing of a copy of the arbitral award is a fatal defect and would render the filing as *non-est*. The relevant extract of the said

¹⁴ Ref: Brahmaputra Cracker & Polymer Ltd. v. Rajshekhar Construction Pvt. Ltd.: 2023 SCC OnLine Del 516, Oil and Natural Gas Corporation Ltd. v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure Limited (Meil)³



decision is set out below:-

“36. Therefore, it has been consistently held that non filing of the Award along with the Petition under Section 34 of the Act, 1996 is a fatal defect, making such filing as non-est. The objections under Section 34 must be on justiciable grounds as prescribed under Section 34(2) as such grounds can be ascertained only by referring to the Award made by the learned Arbitrator. The filing of an Award is not an empty procedural requirement since sans the Award, the Court is left absolutely clueless to comprehend the grounds taken in the objection Petition and thereby unable to decide whether the Petition merits Notice to be issued or outright rejection. In the absence of the Award, the grounds on which the objections have been taken cannot be appreciated and considered if they are within the scope of Section 34(2) and thus, such filing of objections without the impugned Award render the entire objections incomprehensible for consideration under Section 34 of the Act, 1996.

37. The Award is, therefore, an absolute essential for the Court to proceed further, meaning thereby that the Court cannot proceed further until the Award is filed. The first step would commence only on filing of the Award and therefore, effective date of filing necessarily would be the date of filing of Award in support of the Petition and till then it cannot be considered valid filing. The necessary corollary is that non-filing of the Award is a fatal defect making the filing as non-est.”

45. There is some difference of opinion between the Benches of this Court as to whether non-filing of a *Vakalatnama* or an affidavit accompanying the petition or non-filing of Statement of Truth by itself is sufficient to hold that the filing of petition is insubstantive.



46. In *Bharat Broadband Network Limited v. Sterlite Technologies Limited*⁷, the learned Single Judge of this Court has noted the variance of opinion in the decisions of this Court in *Oil and Natural Gas Corporation Limited v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure Limited (Meil)*³ and *Oil and Natural Gas Corporation Limited v. Planetcast Technologies Limited*¹⁵ regarding non-filing of the Statement of Truth, particularly whether the same was a procedural error capable of being cured or, whether the same was a fundamental lacuna rendering the filing effectively *non-est*. Consequently, the said issue was referred to a Larger Bench.

47. In *Pragati Construction Consultants v. Union of India*⁶ this Court had expressed reservations as to whether non-filing of an affidavit along with the petition, absent anything more, would render the filing of the petition as *non-est* and also placed for consideration of the issue before the Larger Bench. However, there is no cavil as to the proposition that an application which is wholly and substantially inadequate and insufficient or is fraught with defects that are fundamental, would necessarily have to be considered as *non-est* and of no consequence.

48. It is, equally, well-settled that if an inchoate and insubstantive application / petition is filed only for the purpose of stopping the limitation and with a view to substantially change the same at a later date, the same would not be countenanced as a filing at all. Taking a contrary view would subvert the legislative intent of providing strict timelines for such an application/petition and debilitate the provision of law.

¹⁵2023 SCC OnLine Del 8490



49. In *Oil and Natural Gas Corporation Limited v. Planetcast Technologies Limited*¹⁵ a Coordinate Bench of this Court had noted that the initial filing comprised of only sixty-four pages, which increased exponentially to 2463 pages subsequently. The said conclusion also persuaded the Court to hold that the initial filing must be considered as *non-est*. The relevant extract of the said decision is set out below:-

“54. Interestingly, at the time of first filing on 19.07.2019, the Petition comprised of **64 pages**, which remained the same at the time of **first re-filing on 08.08.2019**. However, the number of pages at the time of **second re-filing on 04.09.2019 exponentially jumped to 2643**.

55. The Award that was subsequently filed was of only about 100 pages. There is no explanation or justification given by the appellant as to how the filing of the unsigned which was admittedly not accompanied by the Award or any documents when first filed on 19.07.2019, suddenly jumped to 2643 pages. Pertinently, the duly signed Petition has been filed on 04.09.2019, but has been dated 19.07.2019. Such exponential increase in number of pages leads to only one conclusion that the subsequent Petition which was filed was not only signed but had been substantially changed.

56. It is the only irresistible conclusion that can be drawn is that the initial Petition had lacked all the requisites of being a valid Petition to be considered by the Court and therefore, it has to be held that the first filing was *non-est*. **It is only on 04.09.2019 that a proper Petition conforming to all the mandatory requirements was filed by the first time.** The first date of filing, therefore, has to be taken as 04.09.2019, a date which is clearly beyond the prescribed period of 3 months and 30



days under Section 34(3) of the Act, 1996.”

50. Mr Jain’s contention that there is no filing that can be treated as insufficient unless it is unauthorised, is insubstantial. Mere filing of an insufficient bunch of papers, not in conformity with the mandatory requirements, cannot be considered as a filing at all.

51. If one examines the facts of the present case, the initial filing was neither signed by Concor nor its Advocate. None of the documents including the index, memo of parties, affidavits or the application for setting aside the impugned award had any signatures at all. The other documents also contain several blanks. It is difficult to accept that a petition, which is not signed by any person can be considered as a substantive application/petition. The significance of affixing the signatures is that the applicant has made the application. Lodging an unsigned draft of an application, cannot be considered as filing an application to set aside an arbitral award.

52. In *Director-cum-Secretary, Department of Social Welfare v. Sarvesh Security Services Pvt. Ltd.*¹⁶, this Court upheld the decision of the Court that in the given case no valid petition was filed within the period of limitation. In that case, the application to set aside the arbitral award was not accompanied by the Statement of Truth and was not signed. The Division Bench held that “*In the instant case, technically, no petition was actually filed in the Registry on 01.12.2018, since it was neither signed by the appellant / petitioner or a person duly authorized to do so on its behalf.*”

53. In *Oriental Insurance Co. Ltd. v. Air India Ltd.*¹⁷ another Division

¹⁶ Neutral Citation No.2019:DHC:4922-DB

¹⁷ Neutral Citation No.2021:DHC:3849-DB



Bench of this Court held as under:

“11. In our view, a filing can be considered as *non-est*, if it is filed without any signatures of either the party or its authorised and appointed counsel. Therefore, if a petition – as originally filed, bears the signatures of the party, or its authorised representative, in our view, it cannot be said that the same is *non-est*. So also, if it is signed by the counsel, is filed at the initial stage, the filing cannot be said to be *non-est*. This is because the ownership of the document / petition filed is fixed. Also, the factum of filing the document / petition by the party or on its behalf becomes a matter of record.”

54. We also find difficult it to accept that this is a case where absence of the signatures could be considered merely as a procedural irregularity. The initial filing must be considered as merely filing a bunch of papers. This is because none of the averments made in the initial filing would be binding on the petitioner / applicant. Illustratively, if a concession was made in the application regarding any issue, it would be difficult to accept that the same would be binding on a party that had not signed the same.

55. In the case of ***Uday Shankar Triyar v. Ram Kaleswar Prasad Singh & Anr.***⁵, the appellant/plaintiff had filed an eviction suit against two parties – one individual, Anugraha Narayan Singh (AN Singh) and the District Congress Committee (DCC). The plaintiff claimed that it had let out the suit premises to defendant no.1 (AN Singh) for his personal residential occupation and he had unauthorizedly sublet a portion of the suit premises to DCC. The suit was contested, *albeit* unsuccessfully. The Trial Court decreed the suit. The defendants preferred an appeal. The memorandum of appeal, referred to AN Singh, who was the first appellant, as a former



President of the second appellant (DCC). The appeal was signed by AN Singh on behalf of the appellants. However, he expired during the pendency of appeal and his legal heirs were not brought on record. In the circumstances, one another person claiming to be the working President of DCC filed an application for deleting the name of the deceased appellant and to reflect DCC as the sole appellant. He intended to pursue the appeal as the working president of DCC. The first appellate Court dismissed the appeal holding that appellant no.1 had expired and the memo of appeal was signed by the deceased appellant and no separate *Vakalatnama* had been filed on behalf of DCC. The High Court reversed the said decision. The Supreme Court found that the defect in signatures was a curable defect. The Supreme Court also held that the appeal by DCC was validly filed as it was represented by the same counsel and his colleagues in the Trial Court. The same counsel had filed the appeal and therefore, the *Vakalatnama* granted in favour of the counsel in the Trial Court was sufficient authorization. This is not the case of a draft petition/application which is not signed by any.

56. In the present case, apart from the fact that the petition / application is not filed by any person, the same is also not accompanied by any affidavit; the *Vakalatnama* or a copy of the impugned award. The question whether non-filing of the arbitral award along with the application, absent anything more, would be sufficient to consider the application as *non-est* is pending before the Larger Bench¹⁸. Irrespective of whether the failure to file the arbitral award along with the application can, on a standalone basis, render the filing as *non-est*, it cannot be disputed that non-filing of the arbitral

¹⁸Pragati Construction Consultants v. Union of India⁶ and Bharat Broadband Network Limited v. Sterlite Technologies Limited⁷



award along with the application/petition is of significant relevance in determining whether the initial filing was required to be considered as an application to set aside the arbitral award.

57. It is apparent from the above that in the present case, there are a number of factors, which when viewed cumulatively clearly indicate that the initial filing on 08.06.2023 is wholly insufficient and inadequate. And, thus the same cannot be considered as filing of an application to set aside the impugned award. As noted above, the initial filing was neither signed by the advocate or by the appellant. It was a draft of an application which also contained blanks. It was not accompanied by an affidavit. The application was not accompanied by the impugned award. It was not accompanied by any *Vakalatnama* evidencing that the filing of the said application was authorized. In addition, it was also not accompanied by any relevant document. It is also material to note that the initial filing was of only forty-two pages, which had swelled up to three hundred and forty-nine pages. Apart from the aforesaid factors, it is also material to note that the petition filed on 18.10.2023 was materially different from the petition that was filed on 08.06.2023.

58. It is apparent that the initial filing was only for the purpose of overcoming the period of limitation. It was merely a draft of an application and filed on the penultimate day of the limitation period to stop the clock of limitation. The same cannot be countenanced.

59. In the given facts, we are unable to accept that the initial filing could be considered as a substantive filing to set aside the impugned award. The same was required to be considered as *non-est*.



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60. We concur with the conclusion of the learned Single Judge that the said filing is required to be considered as *non-est*.

61. The appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

SACHIN DATTA, J

AUGUST 12, 2024

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