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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: 12th DECEMBER, 2024IN THE MATTER OF:

+ **O.M.P. (COMM) 49/2018 & I.A. 1565/2018, I.A. 4650/2018, I.A. 4659/2018, I.A. 9614/2018**
M/S. INDURE PVT. LTDPetitioner

Through: Mr. Prashant Mehta, Mr. Varun Gupta, Ms. Simran wason, Mr. Akhil G.Kurup, Advocates

versus

ANEJA CONSTRUCTION (INDIA) LTD.Respondent
Through: Mr. Sidhant Goel, Mr. Shubham Shanker Saxena, Mr. Karmanya Dev Sharma, Advocates

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The Petitioner has approached this Court under Section 34 of the Arbitration & Conciliation Act, 1996 challenging an Award dated 22.08.2017 passed by the learned Arbitrator allowing the claims of the Respondent.
2. The learned Arbitrator has directed the Petitioner herein to pay to the Respondent a sum of Rs.1,00,21,945/- on account of balance of running bills, a sum of Rs.46,28,078/- by way of refund of service tax, a sum of Rs.1,17,04,846/- being refund for retention money. Apart from the said amounts, the Petitioner has also been directed to pay a balance amount of



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running bills @ 12% per annum from 01.04.2016 till the date of the award along with interest @ 10% from the date of the award till its realization.

3. The Petitioner was also directed to pay simple interest @ 12% per annum on the retention amount from 01.04.2016 till the date of the passing of the award and the retention amount was to carry simple interest @ 10% per annum from the date of the award till the amount is paid. The learned Arbitrator by the impugned award has rejected the counter claims of the Petitioner herein.

4. Under Section 34(3) of the Arbitration & Conciliation Act, an application for setting aside an award cannot be made after three months from the date on which the party making the application receives the award. However, power is given to a Court to condone the delay of 30 days if an award is not challenged within a period of three months.

5. In the present case, the challenge to the award had to be filed on or before 22.11.2017 which is within three months' time prescribed, failing which the petition could have been filed maximum upto 22.12.2017 with an application for condonation of delay.

6. Material on record indicates that the present petition under Section 34 of the Arbitration & Conciliation Act was filed by the Petitioner on 18.11.2017. However, the log information discloses that the petition had been filed without the supporting affidavit, *vakalatnama* and the award.

7. Material on record indicates that after the file was returned under objections, re-filing was done only on 05.01.2018 which is beyond the period of three months and the additional period of 30 days as provided under Section 34(3) of the Arbitration & Conciliation Act.

8. *Vide* Order dated 02.02.2018, an application being IA No. 1566/2018



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seeking condonation of delay of 45 days in re-filing the petition was allowed and the delay in re-filing was condoned.

9. IA No. 4650/2018 has been filed by the Respondent herein seeking recall of the Order dated 02.02.2018 stating that the petition filed by the Petitioner under Section 34 of the Arbitration & Conciliation Act has been filed beyond the period of limitation. The arbitral record has been received.

10. Learned Counsel for the Respondent contends that the filing on 18.11.2017 was a *non est* filing inasmuch as it was without the supporting affidavit, *vakalatnama* and the impugned award and the next filing was made only on 05.01.2018, which is beyond the time prescribed and therefore the petition challenging the award is not maintainable.

11. *Per contra*, learned Counsel for the Petitioner draws the attention of this Court to the arbitration proceedings dated 22.08.2017 before the learned Arbitrator. The entire arbitration proceedings dated 22.08.2024 are reproduced as under:-

"1.The award was pronounced today at 4:15 pm by reading the operative part of the order. The award was signed by the Sole Arbitrator.

2. Mr. Nonihal Singh, Managing Director of the Claimant Company was present and a copy of the award was received by him personally and he acknowledged the receipt thereof. Mr. Himanshu Kapoor, Manager-Legal of the Respondent Company reached after the award was pronounced and stated that the authorized officer of the Company could not remain present. He suggested that the authorised officer of the company would be present in the office of the company tomorrow. Therefore, the Sole Arbitrator directed the Administrative Assistant to the Tribunal to serve a copy of the award on the authorized officer of



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the Respondent Company by visiting the office of the Respondent tomorrow at 9:30 am."

12. A perusal of the aforesaid proceedings indicate that on 22.08.2017, the Manager-Legal of the Petitioner company had reached after the award was pronounced and it was stated that the authorized representative of the Petitioner herein could not remain present and it was stated that the authorized representative of the Petitioner would be present in the office on the next day. The Sole Arbitrator therefore directed the Administrative Assistant to the Tribunal to serve a copy of the award to the authorized representative of the Petitioner company by visiting the office of the Petitioner herein at 9:30 AM.

13. Learned Counsel for the Petitioner contends that the copy of the award has not been served on the Petitioner and therefore the time limit under Section 34(3) of the Arbitration & Conciliation Act would start running after receipt of the award by the Petitioner. He states that the award was filed as soon as it was received by the Petitioner and therefore the instant petition has been filed within the time prescribed.

14. In rejoinder, learned Counsel for the Respondent draws the attention of this Court to the reply filed by the Petitioner herein to IA No.4650/2018 which is an application filed by the Respondent for recalling the Order dated 02.02.2018 passed by this Court to contend that the Petitioner herein has not stated in its reply to the said application for recall of the Order dated 02.02.2018 as to when was the copy of the award was received by the Petitioner.

15. Learned Counsel for the Respondent has also drawn the attention of this Court to IA No.9614/2018 filed by the Respondent seeking dismissal of



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the instant petition under Section 34 of the Arbitration & Conciliation Act stating that the award which was filed on 18.11.2017 consists only 14 pages which was filed without the supporting affidavit, *vakalatnama* and the award and therefore the filing was a *non est* filing. He states that even to the reply to the said application, nothing has been stated by the Petitioner as to when was the award received by the Petitioner. He therefore states that the mere *ipse dixit* of the Petitioner that the award was filed as soon as it was received cannot be accepted.

16. Heard learned Counsel for the parties and perused the material on record.

17. It is pertinent to mention that a bunch of emails have been handed over by the learned Counsel for the Petitioner in Court and the learned Counsel for the Petitioner draws the attention of this Court to the email dated 23.08.2017 from one Apoorv Shukla, who is the Administrative Assistant to the Tribunal. The said email dated 23.08.2017 reads as under:-

"Please find attached herewith the orders dated 25.07.2017 and 22.08.2017 passed by the Arbitral Tribunal of Shri Justice B.H. Marlapalle (Retd.), in the matter of Aneja Construction (India) Ltd. v. Indure Private Limited.

*Regards,
Apoorv Shukla
Advocate"*

18. Learned Counsel for the Petitioner states that the copy of the award was not attached to the said email.

19. It is now settled that a challenge to the award under Section 34 of the Arbitration & Conciliation Act without the award itself is *non est* filing. A



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Division Bench of this Court in ONGC v. Joint Venture of Sai Rama Engineering Enterprises (SREE) & Megha Engineering & Infrastructure Limited (MEIL), **2023 SCC OnLine Del 63**, has observed as under:-

"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." (emphasis supplied)

20. This Court in Vasishta Mantena NH04 JV & Ors. v. Blacklead Infratech Pvt. Ltd., **2024 SCC OnLine Del 7588**, has observed as under:-

"14. Section 34(3) of the Arbitration & Conciliation Act mandates that an application for setting aside an arbitration Award may not be filed after three months having elapsed from the date on which the party making that application had received the arbitral award. The proviso to Section 34(3) states that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of 30 days and not thereafter.

15. It is now well settled that the application under



Section 34 of the Arbitration & Conciliation Act cannot be filed after a period prescribed under the Act.

16. In Section 34 of the Arbitration & Conciliation Act, the term used is that of a 'month' and not 'days'. Admittedly, the award was passed on 24.05.2023 and therefore the petition should have been filed on or before 24.08.2023. It is stated that the initial petition has been filed on 21.08.2023, which is within the period prescribed under the Arbitration & Conciliation Act. The said petition has been admittedly filed without the copy of the Award.

17. A petition under Section 34 of the Arbitration & Conciliation Act is for challenging the Award. It cannot be said that a challenge to the Award without the award itself being filed would be a valid filing. Without the Award, the challenge would become meaningless because unless the Award is perused by the Court, it cannot test or adjudicate on the correctness of the Award. An application under Section 34 of the Arbitration & Conciliation Act filed without an Award and vakalatnama can only be a bunch of papers filed only to save the limitation.

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19. This Court is not going into other defects which have been pointed out for it is of the opinion that without an Award there cannot be a challenge under Section 34 of the Arbitration & Conciliation Act. It is not the case of the Petitioner that he did not have the copy of the Award which he sought to challenge by way of the present petition. The Award was with the Petitioner on 24.05.2023 and there is no reason forthcoming as to why the copy of the Award was not filed. The filing on 21.08.2023 was therefore a non-est filing."



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21. The award was filed on 05.01.2018. Copy of the award reflects that the authorized representative of the Petitioner herein was not present on 22.08.2017 when the award was pronounced by the learned Arbitrator and only the Manager-Legal of the Petitioner reached, that too, after the pronouncement of the award. He informed the learned Arbitrator that the authorized representative would be present on the next day. The learned Arbitrator directed the Administrative Assistant to the Tribunal to serve a copy of the award to the Petitioner by visiting the office of the Petitioner the next day at 9:30 AM. There is no averment either in the petition or in the reply to the application IA No.4650/2018 being an application seeking recall of the Order dated 02.02.2018 or in the reply to the application IA No. 9614/2018 which is an application by the Respondent for dismissal of the objection petition as to whether the copy of the award was served or not. No affidavit has been filed on this aspect.

22. In view of the email dated 23.08.2017 and in view of the specific directions passed by the learned Arbitrator on 22.08.2017 to serve a copy of the award to the Petitioner, it cannot be presumed that the Petitioner did not receive the award. It is for the Petitioner to show as to when it received the award.

23. Learned Counsel for the Petitioner places reliance on the judgment of the Apex Court in Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited, **2021 (7) SCC 657**, and more particularly to paragraph 27 of the said judgment, which reads as under:-

"27. Sub-section (1) of Section 31 read with sub-section (4) makes it clear that the Act contemplates a single date on which the arbitral award is passed i.e.



the date on which the signed copy of the award is delivered to the parties. Section 31(5) enjoins upon the arbitrator/Tribunal to provide the signed copy of the arbitral award to the parties. The receipt of a signed copy of the award is the date from which the period of limitation for filing objections under Section 34 would commence. This would be evident from the language of sub-section (3) of Section 34 which reads:

*“34. Application for setting aside arbitral award.—(1)-(2) * * **

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.” (emphasis supplied)

There is no quarrel with the proposition that the time limit under Section 34(3) of the Arbitration & Conciliation Act would start running from the date on which the party receives the award.

24. In this case, there is a specific instruction for the Administrative Assistant to the Tribunal to serve a copy of the award. Other than the self-serving statements made across the bar that the copy of the award was not received on 23.08.2017 the Petitioner has not shown any document as to



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whether it has received the award. The contention of the learned Counsel for the Petitioner that the Tribunal has to show as to when did it served the copy of the award on the Petitioner cannot be accepted. In the absence of any positive affirmation on affidavit from the Petitioner as to when was the award received, this Court cannot accept the mere *ipse dixit* of the Petitioner that as soon as the award was received it was filed by the Petitioner.

25. The material as it stands today discloses that the petition has been filed on 18.11.2017 without the award. The award has been filed only on 05.01.2018. Without there being any material from the Petitioner as to when did the Petitioner receive the award, this Court is of the opinion that the petition has been filed beyond the time prescribed under Section 34(3) of the Arbitration & Conciliation Act and is therefore time barred.

26. The petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

DECEMBER 12, 2024

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