



2025:DHC:1426



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

% Date of decision: 25.02.2025

+ **O.M.P. 5/2024, I.A. 32540/2024 and I.A. 32541/2024**

SUDESH HANS

.....Petitioner

Through: Mr.Jinendra Jain, Mr.Harshit,
Mr.Krishna, Ms.Bijay, Mr.Manoj Gautam and
Mr.Manoj, Advocates

versus

GIAN CHAND HANS AND ANR

.....Respondents

Through: Ms. Sangeeta Sondhi & Mr. Daksh Jain,
Advocates

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act 1996 (hereinafter, referred to as the 'A&C Act'), challenging the Award dated 29.12.2023 (hereinafter the "impugned award"). The petition is accompanied by an application for condonation of delay of 63 days in re-filing of the petition.
2. At the outset, the respondents have objected to the maintainability of the present petition on the ground of delay by asserting that it is beyond the condonable period prescribed under Section 34 (3) of the A&C Act. In view of this preliminary objection, the Court has heard the learned counsel for the parties at length on the said aspect.
3. Learned counsel for the respondents submits that the present petition



2025:DHC:1426



deserves to be dismissed inasmuch as the initial filing on 28.03.2024, though within the limitation period of 3 months from the award dated 29.12.2023, lacked the requisite documents to constitute a proper filing as the same was not accompanied by a copy of the award, rendering the filing *non-est*, with the defects being non-curable. The petition, as first filed on 28.03.2024 with only 36 pages, was missing *inter alia*, impugned Award, Statement of Truth, *Vakalatnama*, signature of party & counsel and the first re-filing was only made on 29.06.2024, i.e., after 89 days of delay from the date of first objection/defects i.e., on 01.04.2024. While referring to Rule 3(a) of Chapter IV of the Delhi High Court (Original Side) Rules, 2018, it is contended that the defects raised by the Registry were to be necessarily removed within a maximum period of seven days at a time and a total aggregate period of 30 days. It is submitted that the award was still not filed within the condonable period of 30 days and the petitioner failed on both counts and thus the first re-filing done on 29.06.2024 ought to be treated as the actual date of filing of the petition.

It is further contended that upon re-filing the petition on 29.06.2024, the petitioner significantly expanded the document length to 1147 pages. Despite this, similar objections persisted, and the petition was again marked as defective and returned for re-filing. Lastly, it is contended that the delay in re-filing also requires a satisfactory explanation, which is lacking, as the petitioner's application for condonation of delay fails to present substantive grounds. In support of the submissions, learned counsel has placed reliance on DDA v. Durga Construction Co.¹, Oil and Natural Gas Corporation Ltd

¹ 2013 (319) DRJ 133 DB



2025:DHC:1426



v. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Meaha Engineering & Infrastructure Limited (Meil)², SKS Power Generation (Chhattisgarh) Ltd v. ISC projects Private Limited³ and Executive Engineer vs. Shree Ram Construction Co⁴.

4. Learned counsel for the petitioner concedes that the initial filing, consisting of 36 pages, was submitted without the award and other material documents. However, he contends that this was due to an inadvertent error as the wrong/draft version of the petition was uploaded lacking the Award, Affidavits, Statement of Truth, and other essential documents. It is submitted that the delay in refiling of the petition was on account of DIAC's failure to provide copies of the arbitral records to the petitioner in a timely manner. The petitioner had written to DIAC on 13.03.2024, requesting the certified copies of the arbitral records but were not provided by 28.03.2024. Subsequently, the petitioner again sent an email on 02.05.2024 to the Arbitrator and DIAC, reiterating the request for the required documents. It is stated that the documents available with the DIAC were finally provided on 07.06.2024. While awaiting the remaining documents from the Learned Arbitrator, the petitioner proceeded to refile the petition on 29.06.2024. Learned counsel for the petitioner argues that since the delay was not attributable to the petitioner but rather to the failure of the DIAC and the Arbitrator to furnish the requisite documents, the delay beyond the limitation period of three months and 30 days be condoned and the petition should be heard for setting aside the arbitral award. In support of this contention,

² 2019 SCC OnLine Del 10456

³ 2019 SCC OnLine Del 8006

⁴ (2010) 120 DRJ 615 (DB)



2025:DHC:1426



learned counsel for the petitioner relies on the decision of the Full Bench of this Court in Pragati Construction Consultants v. Union of India and Another⁵, which references the judgment of a Coordinate Bench in Ambrosia Corner House Pvt. Ltd. v. Hangro S. Foods⁶ to submit that in the said case, too, the initial petition was filed without any documents and the material documents, including the impugned arbitral award, came to be filed separately in Part IV of the paper book after the maximum condonable period from the date of receipt of the arbitral award had expired.

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

6. Pertinently, the factual position is that the award under challenge came to be passed on 29.12.2023. Indisputably, the impugned award was served upon the parties on the same day by the Learned Sole Arbitrator vide Email dated 29.12.2023 at 1:19 P.M. The limitation period of 3 months for filing the petition expired on 28.03.2024. The maximum condonable period of delay lapsed on 27.04.2024. The present petition under Section 34 of the A&C Act first came to be filed on 28.03.2024. The said petition was under objection on 01.04.2024, it was marked as defective and was sent for re-filing. Subsequently, the petition came to be refiled on 29.06.2024.

7. The issues that arise for consideration are whether the petition is liable to be dismissed due to the initial filing being *non-est* and whether the delay in filing/re-filing of the petition has been sufficiently explained.

8. Section 34 of the A&C Act prescribes the grounds for making an application to challenge an award but does not specify any procedure for

⁵ 2025 SCC OnLine Del 636

⁶ 2023 SCC OnLine Del 517



2025:DHC:1426



filing such an application. What would amount to a non-est filing is neither prescribed in the A&C Act nor in the Delhi High Court Rules. However, the said issue was taken up for consideration recently and has been heard at length by the Full Bench of this Court in the case of Pragati Constructions (Supra). The Full Bench after noting various decisions observed as under:-

“49. Keeping the above cardinal principles of law in mind, the Courts have adopted the test of “non-est” filing, wherein the Courts considered if the initial filing of the application under Section 34 of the A&C Act is so deficient so as not to be considered as a filing at all. Resultantly, even if such deficient filing is made within the period of limitation as prescribed in Section 34 of the A&C Act, the Court will not consider the same to have been filed in law, and the period of limitation for filing the same shall not stop and shall continue to run.

50. We now need to determine as to what would constitute a “nonest” filing.

51. As observed earlier, in Sunny Abraham (supra), the Supreme Court has held that the term “non-est” refers to a legal instrument that is treated to be not in existence in the eyes of the law as it goes beyond remedial irregularities. Therefore, for an application filed under Section 34 of the A&C Act to be declared as “non-est”, it must be beyond remedial irregularities in the eyes of law.

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NON-FILING OF THE ARBITRAL AWARD

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59. In our opinion, none of the above conditions can be satisfied unless the Arbitral Award under challenge is placed before the Court. Therefore, filing of the Arbitral Award under challenge along with the application under Section 34 of the A&C Act is not a mere procedural formality, but an essential requirement. Non-filing of the same would,



2025:DHC:1426



therefore, make the application “non-est” in the eyes of the law.

60. In fact, we find that this Court has almost consistently held that non-filing of the Arbitral Award would make the petition “non-est”. Reference in this regard may be made to : SKS Power Generation (Chhattisgarh) Ltd., (supra), SPML Infra Ltd. v. Graphite India Ltd., 2020 SCC OnLine Del 2808, Air India Ltd., (supra), Reacon Engineers India Pvt. Ltd., (supra), Executive Engineer National Highway Division v. S&P Infrastructure Developers (P) Ltd., 2022 SCC OnLine Del 1859, ITDC v. Bajaj Electricals Ltd., 2023 SCC OnLine Del 158, NHAI v. KNR Constructions, 2023 SCC OnLine Del 519, Brahamputra Cracker and Polymer Ltd. (supra), Panacea Technologies Ltd., (supra), Delhi Development Authority v. Gammon Engineers & Contractors Private Limited, 2024 SCC OnLine Del 5154, Container Corp. of India v. Shivhare Road Lines, 2024 SCC OnLine Del 5490, and, Good Health Argo Tech Pvt. Ltd. v. Haldiram Snacks Pvt. Ltd., 2024 SCC OnLine Del 6050.

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63. Consequently, we have no hesitation in holding that for an application under Section 34 of the A&C Act, non-filing of the Impugned Arbitral Award is a fatal defect, making the application “nonest”.

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66. We, therefore, have no hesitation in holding that filing of the copy of the Impugned Award, which is under challenge, is a bare minimum, rather, mandatory requirement for an application under Section 34 of the A&C Act. Further, non-filing of the same would make such an application “non-est” in the eyes of law, thereby, not stopping the period of limitation from running.

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2025:DHC:1426



OTHER DEFECTS:

95.Even in general law, objections like the pleadings not being properly signed on each and every page, or there being a defect in the affidavit, or verification, are treated as procedural and curable defects. Stand alone, therefore, they cannot be treated as defects which would make an application filed under Section 34 of the A&C Act to be declared as non-est. **It is only cumulatively, and that too only after the Court finds that the above defects have been left by the petitioner while filing the application under Section 34 of the A&C Act with a mala fide intent of only stopping the period of limitation from running, without there being an actual initial intention of having the application listed before the Court for hearing, the Court may still find the application so filed to be nonest....**

96.It is only where the Court finds that the application originally filed by the petitioner has been substantially changed at the time of removal of defects, that the Court may form an opinion that the original application, as filed, was never intended to be the final application or one which should be listed before the Court....

.....if the Court finds that the intent was only to stall the limitation from running, and, as some Courts have held that only a “bunch of papers” had been filed, that the Court would be free to declare such filing to be non-est.”

(Emphasis Supplied)

9. In the above backdrop, this Court proceeds to examine the defects pointed out by the Registry from time to time. The petition consisting of only 36 pages was filed for the first time on 28.03.2024 and on 01.04.2024, the Registry pointed out following defects in the said petition:—

"1. Certificate to the effect that relevant record of the arbitration proceedings being the relevant pleadings documents



2025:DHC:1426



depositions etc has been filed

2. Caveat report be obtained and at the time of each subsequent refiling and proof of service be filed.

3. Fresh notice of motion upon counsel for concerned respondent be filed if 3 days have elapsed since the date of last service. Any amendments done in the petition should also be informed/ served to the opposite/ concerned party

4. Service be made to their nominated counsel personally / tracking report / delivery report of speed post / courier be attached

5. Memo of parties be filed and signed. Complete address be given in memo of party. In case of petition filed in a name of firm the name of the sole prop

6. Petition/ Applications/ Mop/ Index/ Power of Attorney Be Signed and dated by Petitioners and advocate

7. Affidavit be filed in support of petition/ appeal/ application and attested/ identified. Parental details/ age/ complete address be given. Necessary averments be given since the affidavit has been signed in vernacular. No modification is allowed. It should be re-typed and attested.

8. Full name parentage and other particulars including email id address mobile no. describing each party be given in memo of parties. Ch-iii r-c order of db in wpc/ dt...

9. Non-filing clause-that no such similar proceedings in the same matter had

previously been filed. Ch-iii, r-7 -2018

10. List of dates be filed

11. Petition/ applications/ annexures/order/ power of attorney should be stamped / court fees short or missing

12. Underline and highlighting be deleted.

13. Vakalatnama be filed / dated and signed by the counsel and all petitioners. Each advocate must mention their name/ address/ enrolment no. Mobile number in Vakalatnama. Title on



2025:DHC:1426



the Vakalatnama be checked. Welfare stamp be affixed. Signature of the client be identified.

14. Proper bookmarking be done along with the description of the annexures and page no as given in the index

15. Court fee is short or missing

16. An undertaking be given below index that each and every page of the petition/ appeal/ application is filed in ocr format

17. No Index Filed,

18. No Page Numbering Mentioned,

19. Averment to The Effect That the Matter Is Commercial in Nature or Non-commercial Be Given in The Petition,

20. No Documents Filed,

21. No Vakalatnama Filed,

22. No Award Filed,

23. No LA. Filed,

24. The Counsel Shall Specifically Indicate, Over The index Accompanying the Petition:

i. The Details of Any Connected Petition or Appeal, Arising Out of The Same Agreement or Arbitral Award, If Any" Pending Before This Court.

ii. The Bench Before Which Petition Is Listed,

iii. The Next Date of Hearing in The Connected Matter.' As Per Practice direct Dt. 15th February 2022. Affidavits Be Attested"

10. The reliance placed by the learned counsel of the petitioner on the decision in Ambrosia Corner House (*Supra*) to argue that the absence of the award at the time of the initial filing does not render the petition *non-est* is found misplaced in view of the observation made by the Full Bench of this Court in Pragati Constructions (*Supra*), which while referring to the decision of the Division Bench of this Court in ONGC Ltd. v. Planetcast



2025:DHC:1426



Technologies Ltd.⁷ held as follows :-

“4. We may, herein, itself note that the only Judgment which may be read as dispensing with the requirement of filing of the Arbitral Award was in Ambrosia Corner House Pvt. Ltd. v. Hangro S. Foods, 2023 SCC OnLine Del 517, of which one of us namely (Navin Chawla, J) was the author. However, the same has been rightly distinguished by the Division Bench of this Court in Planetcast Technologies Ltd. (supra), by observing as under:

*“36. To further clarify the law on the indispensable requirements while filing a Petition under Section 34 of the Act, 1996, it is pertinent to refer to the judgment of the Single Bench of this Court in Ambrosia Corner House Private v. Hangro S. Foods, 2023 SCC OnLine Del 517. **It has been widely misconstrued that the said judgment recognised the filing of a Petition under Section 34 of the Act, 1996 to be valid even though it was not accompanied by the Award. However, the perusal of the judgment itself makes it evident that the impugned Award had not been e-filed in a separate folder as was required under the Delhi High Court (Original Side) Rules, 2018. In those peculiar circumstances, the objections were entertained and the first filing was not found to be non-est. Clearly, it is not as if the Award had not been filed along with the objections under Section 34 of the Act.** The facts as involved in Ambrosia Corner House (supra) are, therefore, clearly distinguishable.”*

(Emphasis Supplied)

Further, in view of the said decision, this Court is of the opinion that given the nature of defects pointed out by the Registry on 01.04.2024 and the petitioner’s failure to re-file the petition within the maximum condonable period of 30 days after 3 months, the petition filed on 28.03.2024 without the award, *inter alia*, was not a valid filing. Admittedly, a copy of the award was sent to both parties via email on the same day it was

⁷ 2023 SCC OnLine Del 8490



2025:DHC:1426



passed, i.e., 29.12.2024. The mere *ipse dixit* of the petitioner that the wrong file was inadvertently uploaded and the defects remained uncured despite the Registry's observations due to DIAC's failure to provide copies of the arbitral records cannot be accepted. The first/initial filing was therefore *non est*, implying that it cannot be considered as filing in any sense. The initial filing being *non est*, the limitation time does not stop and the date of filing must be reckoned from the date of refiling, i.e., 29.06.2024, which is beyond the prescribed period of 3 months and 30 days. It would also be pertinent to mention that even otherwise, the application under Section 151 of CPC seeking condonation of delay in filing the petition lacks sufficient reasoning.

11. In light of the facts and circumstances discussed above as well the decision rendered by the Full Bench of this Court in Pragati Constructions (*Supra*), this Court finds no reason to entertain the present petition. The petition stands dismissed alongwith the pending applications.

MANOJ KUMAR OHRI
JUDGE

FEBRUARY 25, 2025

na/vs