

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

Reserved On: 05th September, 2022
Decided On: 13th January, 2023

+ **O.M.P. (COMM) 404/2019**

INDIA TOURISM DEVELOPMENT CORPORATION

Through Its General Manager (Engg),
6th Floor, Scope Complex,
Lodhi Road, New Delhi

..... Plaintiff

Through: Mr. Shilp Agrawal & Mr. Ujjwal Jha,
Advocates.

versus

M/S BAJAJ ELECTRICALS LTD.

(through its General Manager)
3rd Floor, Gulmohar House,
Community Centre,
161/B-4, Gautam Nagar,
Yusuf Sarai,
New Delhi - 110 049

..... Defendant

Through: None

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

NEENA BANSAL KRISHNA, J.

I.A.13517/2019 (under Section 151 CPC for Condonation of Delay of 1 day in filing of the petition under Section 34 of the Arbitration and

Conciliation Act, 1996) and I.A.13519/2019 (under Section 151 CPC for Condonation of Delay of 42 days day in re-filing of the said petition)

1. The petitioner being aggrieved by some of the claims decided against it, has filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "A&C Act"*) against the impugned Award. However, despite due diligence and on account of bonafide reasons, the petitioner was unable to file the petition within the stipulated period of limitation. The Award was signed by the learned Arbitrator on 30th October, 2018, but since the balance fee had not been paid to the learned Arbitrator, the copy of the Award was handed over to the petitioner on 19th December, 2018 and to the respondent on 24th December, 2018. Thereafter, an application dated 02nd February, 2019 was filed for review/ correction and the mandate of the Tribunal finally came to an end on 01st May, 2019 in regard to which an email was sent to the counsel by the learned Arbitrator on the same day, but the same was not received by the petitioner. The limitation to file the present petition was available till 31st July, 2019.

2. The petitioner has submitted that after the copy of the Award was made available, it was sent to the concerned Department where it was reviewed by the concerned Officers which took some time as the records were voluminous. A decision was taken to admit the Award on certain points but to challenge it partially to the extent it has been challenged in the petition under Section 34 of the A&C Act. The Objection petition thereafter was prepared by the learned Counsel and was sent for final approval to the concerned Legal Cell so that the same could be filed in the Court. The aforesaid procedure took some time and was filed on 02nd August, 2019 with a resultant delay of one day, but this is within the extended period of 30 days

as permitted under Section 34(3) of the A&C Act. The **I.A. No. 13517/2019** has accordingly been filed *to condone the delay of one day* in filing the objections.

3. In **I.A. No. 13519/2019**, it has been further submitted that the matter was filed on 02nd August, 2019 after which the Registry of the High Court *vide* its email dated 06th August, 2019 pointed out certain defects in the petition which after removal was re-filed on 29th August, 2019. Again, some objections were pointed out by the Registry about filing of Statement of Truth, inclusion of email ID in the Memo of Parties, arrangement of the documents in ascending chronological order and filing of affidavit mentioning the place where the petitioner was presently residing. The matter was re-filed on 03rd September, 2019 after removing the defects. However, again some defects were pointed out on 04th September, 2019 and the matter was again re-filed. In the process, *there has been a delay of 42 days in re-filing* of the petition under Section 34 of the A&C Act, which may be condoned.

4. The **Respondent in its reply** has asserted that the petitioner in its application to the Condonation of Delay of one day in filing of the petition has admitted that the copy of the Award was received by him on 19th December, 2018, but it is asserted that the delay in receiving the copy was purely on account of the petitioner's failure to pay the balance fee of the learned Arbitrator.

5. It is further stated that there were three Awards in respect of illumination of Safdarjung Monument, Purana Quila and Sabz Burj and all three were announced and signed on 30th October, 2018 and the copies received on 19th December, 2018. In the two Awards pertaining to Subz Burj

Monument and Purana Quila Monument, one year interest was left out in the calculation and clarification was sought in respect of future interest and costs. The clarifications were given and the claims of the Respondent in regard to Service Tax of ₹7,58,507/-, Labour Cess WCT and interest @ 12%, have been honoured by the petitioner in these two Awards and the payments made. The Objections of the petitioner to the present Safdarjung Monument Award is only a delay tactic in making payment of the awarded amount which is an abuse of the process of the Court.

6. It is asserted that the application dated 02nd February, 2019 filed for correction and interpretation on behalf of the petitioner was beyond 30 days of receipt of the copy of the Award and was also not accompanied by any application for condonation of delay. The present condonation of delay application and Objections under Section 34 of the A&C Act has been filed merely to delay the payments to the respondents. No cogent explanation has been given for the delay for filing the Objection Petition beyond the period of limitation as prescribed under Section 34 of the A&C Act and both the applications are liable to be dismissed.

7. Submissions heard.

8. Section 34(3) of the A&C Act provides for the period within which the objections under Section 34 of the A&C Act may be filed for setting aside the Award. It reads as under:

"(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."

9. In nutshell, it provides for a limitation period of three months in filing the Objections and a further period of 30 days in case the parties are able to show sufficient cause which prevented it from filing the petition within the prescribed period. In all, three months plus one month is the time provided for filing of the objections which is now settled to be the maximum period beyond which no further extension under any circumstances, can be granted.

10. It is a well settled law that limitation does not extinguish an obligation but merely bars the parties from taking recourse to the Courts for availing the remedy as available to the parties. In an event, a party fails to take expeditious steps to initiate an action within the time as specified then the courts are prescribed from entertaining such action at the instance of the party. In Bharat Barrel and Drum Mfg. Co. Ltd. & Anr. v. Employees State Insurance Corporation (1971) 2 SCC 860, the rationale of prescribing limit was explained. It was observed that necessity of enacting the periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence, documentary as well as oral, to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights. The principle which forms the basis of this rule is expressed in the maxim "*Vigilantibus Non Dormientibus Jura Subveniunt*"

(the law gives help to those who are watchful and not to those who sleep over their rights). The object of the statutes of limitation is to compel a person to exercise his right of action within a reasonable time and also to discourage and suppress stale, fake or fraudulent claims.

11. The Apex Court in Union of India v. Popular Construction (2001) 8 SCC 470 observed that that the scheme and history of 1996 Act supports the conclusion that the time-limit prescribed under Section 34 is absolute and unextendible by Court under Section 5 of the Limitation Act. One of the main objectives as stated in the Arbitration and Conciliation Bill, 1995 which preceded the 1996 A&C Act, was the need to minimize the supervisory role of Courts in the arbitral process. The legislative intent of providing a strict and non-flexible limitation period should not be defeated by condoning the delay without sufficient cause. This objective has found expression in Section 5 of the A&C Act which prescribes the extent of judicial authority intervention in the following terms:

“5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

12. In Popular Constructions (supra), the Supreme Court concluded that the time limit prescribed under Section 34 of the A&C Act is not extendable by resorting to Section 5 of the Limitation Act in view of the expression language of Section 34(3) of the A&C Act.

13. In Simplex Infrastructure Ltd. vs. Union of India 2019 (2) SCC 455, the Apex Court interpreted the words “but not thereafter” occurring in Section 34(3) of the A&C Act, to imply that not a day beyond 120 days

from the day of receipt of the Award can be condoned by the Court.

14. In the light of aforesaid observations, it may be examined if the delay can be condoned. The practice being followed in the Courts is that there are two stages of filing of objections: One is **the filing** for which in terms of Section 34(3) of A&C Act, is an inflexible time limit of 90 days plus 30 days, that is, 120 days in all and any delay beyond this period is non condonable. The second is **Re-filing** when at times, the objections though filed within the time frame, suffer from certain defects and the petition is returned to be re-filed after clearing the objections. *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.

15. In *Ashok Kumar Parmar Vs. D.C. Sankhla* 1995 RLR 85, the Single Judge of this Court held that the 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 that 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 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. The Division Bench upheld this view in *D.C Sankhla Vs. Ashok Kumar* 1995 (1) AD (New Delhi) 753

16. In *DDA Vs. Durga Construction Company* 2013 SCC OnLine Del 4451, Division Bench of this Court explained the distinction between *non-est* filing and re-filing. It was observed that the defects may only be perfunctory and not affecting the substance of the application. For example, an application may be complete in all respect, however certain documents

may not be clear and may require to be retyped. In such a case where the initial filing is within the period of 120 days as specified in Section 34 (3) of the A&C Act, but the re-filing is beyond this period it cannot be said that the Court lacks jurisdiction to condone the delay in re-filing. Section 34 (3) of the A&C Act only prescribes limitation with regard to filing an application to challenge the Award and not for re-filing. The question whether the court should in a given circumstance, exercise its discretion to condone the delay in re-filing would depend on the facts of each case and whether sufficient cause has been shown which prevented re-filing the petition/ application within time. It was also held that the cases of delay in re-filing are different from the cases in delay in filing in the first instance in as much as the party has already evinced its intention to take recourse to the remedies available in the Courts and also taken steps in this regard. It cannot be thus assumed at the stage of re-filing that the party has given up its rights to avail the legal remedies. once an application or an appeal has been filed within the time prescribed, the question of condonation of delay in re-filing would have to be considered by the Court in the context of the explanation given for such delay. In the absence of any specific statute that limits the jurisdiction of the Court in considering the question of delay in re-filing, it cannot be accepted that the Courts are powerless to entertain an application where the delay in its re-filing crosses the time limit specified for filing of the application.

17. In DDA Vs. Durga Construction Company (*supra*), it was further observed that however, in certain cases where the petition or application filed by a party are so hopelessly and inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases filing done by the party would be considered as *non-est* and of no

consequence. In such cases party cannot be given the benefit of initial filing and the date on which the defects are cured would be considered as the date of initial filing.

18. In M/s. Competent Placement Services through its Director/ Partner Vs. Delhi Transport Corporation through its Chairman 2011 (2) R.A.J. 347 (Del), the Division Bench of this Court held that though the rigors of condonation of delay in re-filing are not as strict as for condonation of delay in filing, it does not mean that a party can be permitted an indefinite and unexplainable period for re-filing the petition. Similar position was held in Northern Railway v. Pioneer Publicity Corporation Private Limited (2017) 11 SCC 234 M/s. Himachal Futuristic v. I.T.I. Limited 2017 SCC OnLine Del, and Indian M/s Associated Builders & Ors. (Supra), wherein it was held that the parameters to be applied for condoning the delay in re-filing are different from those applicable to delay in filing.

19. Likewise, in Executive Engineers Vs. Shree Ram Construction and Company 2011 (2) R.A.J. 152, it was noted that the conduct of the party must pass the rigorous test of diligence as the purpose of prescribing the definite and un-elastic period of limitation is rendered futile. However, each case needs to be examined on its own facts and merits to ascertain whether or not to condone the delay in re-filing the objection petition when the initial filing is within the period of limitation. If the delay in re-filing is substantially beyond the period of three months and 30 days, the matter would require a closer scrutiny and adoption of more stringent norms while considering the application for condonation of delay in re-filing.

20. What may be considered as *non-est* filing or formal defects, can be better understood in the light of facts involved in Oil and Natural Gas

Corporation Ltd. 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 affidavits were not 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; 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. 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 cured the earlier defects. It was held that such filing was in fact *non-est* as it failed to meet the basic requirements of any pleadings and the delay in re-filing was held to be not condonable and the application for condonation of delay was rejected. Thus, when a petition is filed under Section 34 of the Act in order to be termed ‘properly’ filed petition 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;*

21. It was held in ONGC (*Supra*) that the *non-est* filing cannot stop limitation and cannot be a ground to condone delay.

22. In the case of ONGC v. Planetcast Technologies Ltd. 271 (2020) DLT 474, this Court observed that the reason and the rationale behind insisting on

these fundamental compliances to be observed while filing a petition, is not far to seek. *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 of belief. The Affidavit so filed has to be not only signed but also attested and filed along with the petition. This is also a requirement under the Commercial Courts Act, 2015.

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

24. 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. 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 seeking to avail an Order, an Award in this case can be without even annexing a copy thereof can be claimed as valid filing and that to even without moving an application seeking exemption from filing the

copy of the impugned Award. 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 a ‘trivial’ but were of such gravity that it would render the original filing as a mere dummy filing.

25. SKS Power Generation (Chhattisgarh) Ltd. Vs. ISC Projects Private Limited 2019 SCC OnLine Del 8006, is again illustrative of what may qualify as *non-est* filing. Therein the original petition contained only 29 pages in which not only there weren’t any signatures of the petitioner, but in fact, the name of the authorised representative of the petitioner Company was left blank and there was also no *Vakalatnama* filed. It was termed as a bunch of papers and nothing more. It was observed that mere filing of bunch of papers with an intent to somehow stop the period of limitation from running cannot be termed as filing of objections. There was no endeavour made to refile the petition with expedition once the same had been returned with these objections. Another two months were taken for re-filing the petition. In the circumstances, it could not be said that bunch of papers that were filed initially for proper filing and the period of limitation was held to be reckonable from the date of re-filing.

26. The Supreme Court in the case of Indian Statistical Institute Vs. Associated Builders (1978) 1 SCC 483, while considering the Objections that were filed within time but were not properly stamped, held that the delay if any, was not due to any want or care on the part of the appellants, but due to circumstances beyond its control and held that there was no delay in filing the Objections.

27. Having discussed the law on the subject, it would be now relevant to

apply these propositions of law to the present case to consider whether the filing was within three months limitation period and the extended period of 30 days or was beyond it. Admittedly, Award dated 30.10.2018 was initially received by the petitioner on 19.12.2018 and by the respondent on 24.12.2018. An application for modification was filed on 02.02.2019 and the mandate of the Tribunal finally came to an end on 01.05.2019. It is not in dispute that the period of three months for filing the petition came to an end on 01.08.2019. The present objections were filed for the first time on 02.08.2019 i.e. with a delay of one day.

28. The objections that were recorded on 06.08.2019 i.e. at the time of **first filing**, as under:

“Total 131 pages filed without bookmarking, master index format be followed strictly. Affidavits and Statement of Truth not filed. Delay in filing. Pagination be done separately for each part. Orientation of documents be correct. Fair typed copies of dim, illegible and handwritten documents be filed. Award not filed. 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 Arbitration Act, 1996 with effect from 22.10.2018.”

29. The objections were thus returned for rectification of the defects. The Objections were **re-filed** on 29th August, 2019 with the defects which were noted on 30th August 2019 as under:

“Total 512 pages filed. Master Index Format be followed strictly. Petition be signed by the Advocate. Blanks be filed in the Statement of Truth. Orientation of documents be correct. Fair typed copies of dim, illegible and handwritten documents be filed. Hard file be submitted. Affidavits are attested from Delhi whereas address is of Meerut, U.P.”

30. The objections to the **second re-filing** were again stated on

04.09.2019 be as under:

Total 515 pages filed. Affidavits are attested from Delhi whereas address is of Meerut Please correct. Hard file be submitted. Fair typed copies of dim illegible and handwritten documents be filed.

31. Eventually, all the defects were removed and the objections were finally accepted on 25.09.2019.

32. The first aspect which is noticeable is that at the time of **First filing** on 02.08.2019, the major defects were of there being no signatures of the Advocate on the pleadings, absence of Affidavits and Statement of Truth and absence of copy of the Award. It was a *non-est* filing.

33. As already discussed above, the limitation for filing the objections is of 90 days which have expired on 01.08.2019 and one more month can be given by the Court in case of sufficient cause being shown by the petition. This implies that the Court in its discretion can accept the filing till 01.09.2019 and if the filing is done after removing the defects within this extended period of one month, it may be considered as proper filing.

34. The first re-filing after the removal of initial objections, was done on 29.08.2019 that is within the extended period of 30 days. The objections noticed on 30.08.2019 were that of the proper formatting of the Master Index, the signing of the petition by the Advocate, there being some blanks in the Statement of Truth, etc. From the objections which are so stated on 30.08.2019, it is evident that the Petition had been was duly signed by the party. The copy of the Award was filed. The Affidavits and Statement of Truth were also filed. The only objection was that there were some blanks in the Statement of Truth and that the Address of the petitioner in the Affidavit was of Meerut, U.P. while they were attested in Delhi. The objection which

thus remained was essentially in regard to the proper formatting. It cannot be said that the defects so noticed on 30.08.2019 were so blatant so as to make the filing as *non-est*. It may thus, be held that the date of First filing may be held as 29.08.2019 which is within the extended period of 30 days. No doubt, there were certain defects which remained but they were essentially cosmetic and had been eventually removed and proper filing was done on 24.09.2019 and was accepted by the Registry on 25.09.2019.

35. The initial delay may have been of one day beyond a period of 3 months but as discussed above, it suffered from blatant defects and could not be considered as proper filing. It was essentially a *non-est* filing; however, all the substantive defects were removed on 29.08.2019 that is before the expiry of the extended period of 30 days.

36. Considering that the petitioner had been taking steps consistently for correction/removal of the defects, it cannot be said that it lacked exercise of due diligence or there did not exist sufficient reasons for condonation of delay and permitting the petitioner to file its objections within the extended period of 30 days. The application for condonation of delay in filing the objection petition under Section 34 of the Act is therefore, allowed.

37. The log information as stated above shows that the petitioner had been diligently following the matter and removing whatever objections being taken by the Registry promptly. In *M/s. Competent Placement Services through its Director/Partner (Supra)* as already discussed above, it has been explained that the rigors of condonation of delay in re-filing are not as strict as for condonation of delay. In the circumstances, the delay in re-filing the petition is hereby condoned.

38. I.A.13517/2019 and I.A.13519/2019 are allowed and the delay in

filing and re-filing the objections is hereby condoned.

O.M.P. (COMM) 404/2019, I.A. 13516/2019

39. List before the Roster Bench on 08.02.2023.

**NEENA BANSAL KRISHNA
(JUDGE)**

**JANUARY 13, 2022
PA**

