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

% **Date of decision: 30 January 2023**

\+ O.M.P. (COMM) 289/2022, I.A. 10794/2022 (Stay)

BRAHMAPUTRA CRACKER AND POLYMER LTD

..... Petitioner

Through: Mr. Sacchin Puri, Sr. Adv. with Ms. Madhurima Mridul and Ms. Shweta Arora, Advs.

versus

RAJSHEKHAR CONSTRUCTION PVT LTD.

..... Respondent

Through: Mr. Mayank Mikhail Mukherjee, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

YASHWANT VARMA, J. (ORAL)

1. This petition preferred under Section 34 of the **Arbitration and Conciliation Act, 1996**[1] assails the validity of an award dated 31 January 2022. Undisputedly, the petition was preferred and filed before the Registry of the Court on 28 May 2022. The various defects which were pointed out by the Registry from time to time and details whereof shall be set forth in the subsequent parts of this order were ultimately removed on 13 July 2022.

2. The petition came up for initial consideration before a learned Judge of the Court on 15 July 2022. The record would bear out that

[1] Act

the petitioner had filed I.A. 10796/2022 seeking condonation of twelve days delay in the refiling of the petition. The said application came to be allowed on the said date. Subsequently and when the matter was taken up before the Court on 14 October 2022, learned counsel for the respondent pressed an application numbered as I.A. 16763/2022 seeking recall of the order dated 15 July 2022 in terms of which I.A. 10796/2022 had come to be allowed.

3. The Court noticed the objections raised with it being contended at the behest of the respondent that the petition was not only barred by time in the course of refiling, it was *per se* filed after the period of limitation as prescribed in respect of a petition under Section 34 of the Act. Accordingly, it was urged that the plea of delay be kept open to be urged at the time of final hearing. The aforesaid prayer was granted with the learned Judge observing that the assertion that the presentation of the petition on 28 May 2022 was liable to be viewed as a "*non est filing"* would be kept open.

4. Along with the application numbered as I.A. 16763/2022, the respondent has filed the refiling history of the petition. The aforesaid refiling history would indicate that on 04 July 2022 as many as twenty-one objections had come to be recorded. Objection No. 21 would indicate that the Registry noted that no court fee had been paid nor had the one-time process fee been submitted. It further recorded that a copy of the award had also not been filed. Objection No. 6 set forth the defect of the Statement of Truth having not been filed in terms of the provisions contained in the **Commercial Courts Act,**

2015[2] and insofar as they would apply to an arbitration proceeding relating to a commercial dispute of a specified value.

5. When the petition was thereafter presented before the Registry again on or about 04 July 2022, further objections came to be noted on 07 July 2022. The aforesaid objections are thereafter stated to have been attended to and removed and presented again. On 13 July 2022, the Registry noted that as against the original filing of the petition running over a mere 57 pages, 287 additional pages had been filed on 07 July 2022, a petition running over 903 pages presented thereafter and ultimately on 13 July 2022 a petition comprising of 911 pages came to be filed. The refiling history is extracted hereinbelow: -

"REFILE DATE	DEFECTS
04-JUL-22	1. IN CASE OF ELECTRONIC DOCUMENTS- DECLARATION ON OATH BE FILED BY THE PARTY FOR ELECTRONIC RECORDS AS PER ORDER XI RULE VI OF CPC. 2. LIST OF DOCUMENTS BE FILED AS PER ORDER XI RULE II AS AMENDED BY COMMERCIAL ACT. 3. PLEASE FILE IN NEW FORMAT IN FOUR PARTS WITH SEPERATE PAGAINTION AND INDEX FOR EACH PART AND ONE MASTER INDEX IN THE STARTING. 4. ONE-TIME PF TO BE FILED BY THE PLAINTIFF AT THE TIME OF FILING OF THE PLAINT/PETITION/SUIT AND BY THE DEFENDANT AT THE TIME OF FILING OF THE WRITTEN STATEMENT. CH-I, R-13 -VI, R-2 -2018

[2] The 2015 Act

5. FULL NAME, PARENTAGE AND OTHER PARTICULARS INCLUDING EMAIL ID ADDRESS, DESCRIBING EACH PARTY BE GIVEN IN MEMO OF PARTIES. CH-III, R-1(C) ORDER OF DB IN WP(C) 10362/2017 DT. 21.11.2017 - 2018

6. STATEMENT OF TRUTH BE FILED AS PER COMMERCIAL COURTS ACT, 2015. ENTIRE PLEADINGS BE SIGNED BY THE PLAINTIFF/PETITIONER O XI-R-1(3) OF CPC (AMENDED) BY COMMERCIAL COURTS ACT, 2015 - 2018

7. CERTIFICATE TO THE EFFECT THAT RELEVANT RECORD OF THE ARBITRATION PROCEEDINGS BEING THE RELEVANT PLEADINGS DOCUMENTS DEPOSITIONS ETC HAS BEEN FILED

8. DOCUMENT SHALL BE FILED ONLY WITH A LIST OF DOCUMENTS. NO DOCUMENT SHALL BE FILED AS ANNEXURE TO ANY PLEADING. CH IV R I-G DHC OS RULES

9. ALL THE DOCUEMNTS BE ARRANGED IN ASCENDING CHRONOLOGICAL ORDER. THE FILING INDEX SHALL MENTION ITS DATE ITS AUTHOR AND ITS RECIPIENT / ADDRESSEE.

10. CAVEAT REPORT BE OBTAINED AND AT THE TIME OF EACH SUBSEQUENT REFILING AND PROOF OF SERVICE BE FILED.

11. FRESH NOTICE OF MOTION UPON COUNSEL FOR CONCERNED RESPONDANT BE FILED IF 3 DAYS HAVE ELAPSED SINCE THE DATE OF LAST SERVICE. ANY AMENMENTS DONE IN THE PETITION SHOULD

ALSO BE INFORMED/SERVED TO THE OPPOSITE/CONCERNED PARTY

12. SERVICE BE MADE TO THEIR NOMINATED COUNSEL PERSONALLY / TRACKING REPORT / DELIVERY REPORT OF SPEED POST / COURIER BE ATTACHED

13. 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

14. .

15. PETITION/ APPLICATIONS/ ANNEXURES/ORDER/POWER OF ATTORNEY SHOULD BE STAMPED / COURT FEES SHORT OR MISSING

16. REST OF THE OBJECTIONS WILL BE RAISED LATER ON (AFTER MODIFICATION)/ ACCORDING TO CORRECT CLASSIFICATION/ NOMENCLATURE OF THE CASE.

17. APPLICATION FOR CONDONATION OF DELAY IN FILING/REFILING BE FILED ALONG WITH AFFIDAVIT.

18. NO. OF DAYS BE GIVEN IN THE PRAYER OF DELAY APPLICATION.

19. 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 THE VAKALATNAMA BE CHECKED. WELFARE STAMP BE AFFIXED. SIGNATURE OF THE CLIENT BE IDENTIFIED.

20. LIST OF DATES BE FILED

21. DESCRIPTION OF ANY OTHER DEFECTS:TOTAL 57 PAGES FILED, NOT BOOKMARKING DONE, NO

	COURT FEES PAID, NO ONE TIME PF FEES, NO I.A FILED, NO VAKALATNAMA FILED, NO AWARD FILED, NO DOCUMENTS FILED, CANNOT RAISE OBJECTIONS BE FILED PROPERLY FOR PROPER SCRUTINY AND LISTING OF THE PETITION.
07-JUL-22	1. DESCRIPTION OF ANY OTHER DEFECTS: NOW 287 PAGES FILED, NO BOOKMARKING DONE, CANNOT RAISE PROPER OBJECTIONS BE FILED AFTER REMOVING THE OBJECTIONS.
	2. DESCRIPTION OF ANY OTHER DEFECTS:TOTAL 903 PAGES FILED, OBJECTIONS NOT RECTIFIED PROPERLY BE FILED AFTER REMOVING THE OBJECTIONS.
13-JUL-22	1. DESCRIPTION OF ANY OTHER DEFECTS: TOTAL 911 PAGES FILED, OBJECTIONS NOT REMOVED PROPERLY BE FILED AFTER REMOVING THE OBJECTIONS OR SEE TO REGISTRY.
13-JUL-22"	

6. Before this Court, it is not disputed that the maximum period of 120 days as prescribed under Section 34 of the Act would have expired on or about 01 June 2022. It is in the aforesaid backdrop that learned counsel for the respondent submits that a *non est filing* cannot possibly be countenanced and since the Section 34 petition had in essence come to be properly presented before this Court only after 01 June 2022, it is liable to be dismissed on this score alone.

7. According to leaned counsel, a petition which suffers from fundamental defects and one which cannot possibly be viewed as answering the essential attributes of an action under Section 34 of the

Act can neither be countenanced nor can cognizance thereof be taken. Learned counsel would contend that such a filing which amounts to being merely an attempt to stop the march of limitation cannot be recognized as a valid filing.

8. Learned counsel for the petitioner in support of his submission has referred to the judgment rendered by a learned Judge of the Court in **Union of India vs. Bharat Biotech International Ltd.**[3]**,** where the legal position was explained in the following terms: -

> **"16.** I have heard the learned ASG and learned senior counsel for the respondents and with their assistance, perused the record. The primary contention raised by the learned ASG, by relying on the decisions in *Pioneer Publicity Corporation Private Limited* (supra), *Himachal Futuristic* (supra) and *Associated Builders* (supra), is that the parameters to be applied for condoning delay in re-filing are different from those applicable to delay in filing. There cannot be any quarrel with this proposition of law. However, in view of the respondent's plea that the original filing on 31.05.2019 was *non est* and the petition has to be treated as being validly filed only on 31.07.2019, i.e., the date on which the impugned award was placed on record and therefore, what the petitioner is actually seeking is not a condonation of delay in re-filing but condonation of delay in filing. To determine this issue, the foremost question which needs to be considered by this Court is whether the original filing was *non est* and a mere bunch of papers, or whether the same was filed in compliance with all legal requirements. If the Court finds that the initial petition was hopelessly inadequate or insufficient or contained defects which are fundamental to the very filing of the petition, then the filing has to be treated as *non est*, and the date of filing has to be treated as the date on which the petitioner re-filed the petition after annexing all the necessary documents and removing objections raised by the Registry. On the other hand, if the initial filing is found to be valid, then the petition would have to be treated as having been filed within time and the question then would be whether the delay in re-filing, after curing of defects, ought to be condoned.

[3] 2020 SCC OnLine Del 483

17. To determine whether the originally filed petition should be treated as valid or *non est*, this Court may be guided by the principles laid down by a Division Bench of this Court in *DDA* v. *Durga Construction Co.*, 2013 (139) DRJ 133 (DB) wherein it was held as under:—

"17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. 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. A similar view in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in Ashok Kumar Parmar *v.* D.C. Sankhla : *1995 RLR 85, whereby a Single Judge of this Court held as under:—*

> *"Looking to the language of the Rules framed by 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 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."*

A Division Bench of this Court upheld the aforesaid view in D.C. Sankhla *v.* Ashok Kumar Parmar : *1995 (1) AD (Delhi) 753 and while dismissing the appeal preferred against decision of the Single Judge observed as under:—*

> *"5. …… In fact, that is so elementary to admit of any doubt. Rules 1 and 2 of (O.S.) Rules, 1967, extracted above, do not even remotely suggest that the re-filing of the plaint after removal of the defects as the effective date of the filing of the plaint for purposes of limitation. The date on which the plaint is presented, even with defects, would, therefore, have to be the date for the purpose of the limitation act."*

18. In several cases, the defects may only be perfunctory and not affecting the substance of the application. For example, an application may be complete in all respects, however, certain documents may not be clear and may require to be retyped. It is possible that in such cases where the initial filing is within the specified period of 120 days (3 months and 30 days) as specified in section 34(3) of the Act, however, the re-filing may be beyond this period. We do not think that in such a situation the court lacks the jurisdiction to condone the delay in re-filing. As stated earlier, section 34(3) of the Act only prescribes limitation with regard to filing of an application to challenge an award. In the event that application is filed within the prescribed period, section 34(3) of the Act would have no further application. 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 prevent re-filing the petition/application within time."

18. The aforestated principles, when applied to the facts of the present case, would provide an answer to the first question arising for my consideration - should the petition, as filed on 31.05.2019, be regarded as a 'valid' filing or as *non est*? It remains undisputed *inter alia* that the impugned award was not placed on record till 31.07.2019, by which date the extended period of limitation had already expired and that the petition, as originally filed, had been substantially altered at the time of re-filing. In fact at the time of re-filing, not only were documents spanning over 350 pages added to the petition, but even the framework of the petition was changed, yet the last page of the re-filed petition continued to reflect the date of filing as 31.05.2019; which is patently untrue, in the light of the petitioner's admission that it had made changes in the body of the petition at the time of re-filing. This, in my considered opinion, is an entirely unacceptable practice. Even the fact that when the petition was initially filed no court fees was affixed, the *vakalatnama* was undated, the accompanying statement of truth was incomplete and lacked critical information, and the supporting affidavit made reference to documents which were not even annexed to the petition remains undisputed. However, the most glaring defect at the time of the initial filing as also the only re-filing done prior to 14.07.2019 was that even a copy of the award which the petitioner sought to assail, was not annexed with the petition. I am unable to comprehend as to how a petition seeking to assail an order, an award in this case, without even annexing a copy thereof can be claimed as a valid filing and

that too without even moving an application seeking exemption from filing a copy of the impugned award.

19. It is obvious that the original petition, as filed on 31.05.2019, and only running into 83 pages was a careless and deliberate attempt on the petitioner's part to somehow stop the clock on limitation amounting to a clever manoeuvre to buy time. In fact even after the original petition was received back by the petitioner's counsel on 01.07.2019 with defects being pointed by the Registry, the petitioner did not take any steps to file a copy of the impugned award while re-filing the petition on 11.07.2019, i.e., within the extended period of limitation of 3 months and 30 days which expired on 14.07.2019. In fact, even as per the petitioner's admission, the impugned award was filed for the first time, belatedly, on 31.07.2019. I am of the view that the petitioner's failure to file the impugned award along with the petition at the time of filing on 31.05.2019 or at the time of its re-filing on 11.07.2019, both falling within the period of limitation, cannot be underplayed as a 'trivial' defect but is a defect of such gravity that it would render the original filing as a mere dummy filing.

20. Though the learned ASG has vehemently urged that neither under the Original Side Rules nor the practice directions require the arbitral award to be filed along with the Section 34 petition and that in fact the award along with the entire arbitral record were required to be summoned by this Court as a matter of practice, I am unable to accept this contention. A bare perusal of the practice directions issued on 30.08.2010, which are relevant herein and reproduced below, do not support this contention. Further, on perusing the 2018 Original Sides Rules I find that Chapter XXVIII Rule 1, being the applicable provision, also merely states that the existing practice directions in relation to the proceedings under the Act shall stand incorporated by inclusion in these Rules. The same, however, do not, in any manner, either deal with or dispense with the requirement of annexing a copy of the impugned award in a Section 34 petition.

CHAPTER XXVIII

ALTERNATIVE DISPUTE RESOLUTION, ARBITRATION AND MEDIATION

1. Extant rule(s), notification(s), scheme(s) and Practice Directions in relation to proceedings under the Arbitration and Conciliation Act, 1996, as amended from time to time, shall stand incorporated by inclusion in these Rules.

PRACTICE DIRECTION

Hon'ble the Chief Justice has been pleased to issue the following practice direction:—

As soon as notice is issued in the petitions filed under Section 34 of the Arbitration & Conciliation Act, 1996, the Registry shall send a letter of request to the Arbitrator to transmit the record of arbitral proceedings as well as award to this Court after the conclusion of arbitration.

This practice direction will come into force immediately.

(Rakesh Kapoor)

Registrar General

21. In fact, a similar plea regarding the effect of non-filing of the award has already been considered by a Division Bench in *Executive Engineer* v. *Shree Ram Construction Co.* (2010) 120 DRJ 615 (DB) as also a co-ordinate Bench of this Court in *SKS Power Generation (Chhattisgarh) Ltd.* v. *ISC Projects Private Limited* 2019 SCC OnLine Del 8006 holding that non-filing of the impugned award would be fatal. In my considered view, filing a copy of the impugned award would be a sine qua non in every petition laying a challenge thereon. On a combined consideration of the significant deficiencies in the original petition filed on 31.05.2019, especially the non-filing of a copy of the award, with the principles enunciated in *Durga Construction* (supra), I am compelled to hold that, notwithstanding the fact that it bore the requisite signatures, albeit not on every page, and was accompanied by the statement of truth, affidavit and the *vakalatnama*, the initial filing was *non est* in the eyes of law and is inconsequential. Therefore, in the present case I have no hesitation in holding that a valid petition can, at the earliest, be treated as having been filed on 31.07.2019, when for the first time a copy of the impugned award came to be annexed to the petition, even though the other objections which were equally important were removed only on 18.09.2019."

9. As would be evident from the aforesaid decision, the learned Judge while coming to the conclusion that the filing in **Bharat Biotech** was *non est*, held that the petition was liable to be dismissed. The learned Judge drew sustenance in support of the aforesaid conclusion bearing in mind the salient principles with respect to a *non est* filing which had been enunciated by a Division Bench of the Court

in **DDA vs. Durga Construction Co.**[4]**.** The relevant passages from the aforesaid decision are extracted hereinbelow: -

> **"16.** In our view, filing of an application and re-filing the same after removing defects, stand on completely different footings in so far as the provision of limitation is concerned. It is now well-settled that limitation does not extinguish an obligation but merely bars a party to take recourse to courts for availing the remedies as available to the party. Thus, in the event a party fails to take expeditious steps to initiate an action within the time as specified, then the courts are proscribed from entertaining such action at the instance of such a party. The rationale of prescribing time limits within which recourse to legal remedies can be taken has been explained by the Supreme Court in the case of **Bharat Barrel and Drum Mfg. Co. Ltd. v. ESI Corpn.,** (1971) 2 SCC 860 as under:—
>
> > "7…… The necessity for enacting 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 by allowing them when challenged or disputed to remain dormant without asserting them in a court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dermientibus, jurasubveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims. …."
>
> **17.** The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. 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

[4] (2013) 139 DRJ 133

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. A similar view in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in **Ashok Kumar Parmar v. D.C. Sankhla**: 1995 RLR 85, whereby a Single Judge of this Court held as under:—

> "Looking to the language of the Rules framed by 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 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."

A Division Bench of this Court, upheld the aforesaid view in **D.C. Sankhla v. Ashok Kumar Parmar,** 1995 (1) AD (Delhi) 753 and while dismissing the appeal preferred against decision of the Single Judge observed as under:—

> "5….. In fact, that is so elementary to admit of any doubt.
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> Rules 1 and 2 of (O.S.) Rules, 1967, extracted above, do not even remotely suggest that the re-filing of the plaint after removed of the defects as the effective date of the filing of the plaint for purposes of limitation. The date on which the plaint is presented, even with defects, would, therefore, have to be the date for the purpose of the limitation act."

18. In several cases, the defects may only be perfunctory and not affecting the substance of the application. For example, an application may be complete in all respects, however, certain documents may not be clear and may require to be retyped. It is possible that in such cases where the initial filing is within the specified period of 120 days (3 months and 30 days) as specified in section 34(3) of the Act, however, the re-filing may be beyond this period. We do not think that in such a situation the court lacks the jurisdiction to condone the delay in re-filing. As stated earlier, section 34(3) of the Act only prescribes limitation with regard to filing of an application to challenge an award. In the event that application is filed within the prescribed period, section 34(3) of the Act would have no further application. 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 prevent re-filing the petition/application within time.

19. The Supreme Court in the case of **Union of India v. Popular Construction Company,** (2001) 8 SCC 470 has held that the time limit prescribed under section 34 of the Act to challenge an award is not extendable by the Court under section 5 of the Limitation Act, 1963 in view of the express language of section 34(3) of the Act. However, this decision would not be applicable in cases where the application under section 34 of the Act has been filed within the extended time prescribed, and there is a delay in re-presentation of the application after curing the defects that may have been pointed out. This is so because section 5 of the Limitation Act, 1963 would not be applicable in such cases. Section 5 of the Limitation Act, 1963 provides for extension of the period of limitation in certain cases where the Court is satisfied that the appellant/applicant had sufficient cause for not preferring an appeal or making an application within the specified period. In cases, where the application/appeal is filed in time, section 5 would have no application. The Supreme Court in the case of **Indian Statistical Institute v. Associated Builders,** (1978) 1 SCC 483 considered the applicability of section 5 of the Limitation Act, 1963 where the objection to an award under the provisions of the Arbitration Act, 1940 was filed in time but there was substantial delay in re-filing the same. The High Court in that case held that there was a delay in filing the objections for setting aside the award and consequently, rejected the application for condonation of delay. An appeal against the decision of the High Court was allowed and the Supreme Court rejected the contention that there was any delay in filing objections for setting aside the award. The relevant extract from the decision of the Supreme Court is reproduced below:—

> "9….. In the circumstances, it cannot be said that objections were not filed within time or that because they were not properly stamped the objections could not be taken as having been filed at all. Therefore, in our view, there had not been any delay in preferring the objections. The delay, if any, was in complying with the directions of the Registrar to rectify the defects and refiling the objections. The delay, as we have pointed out earlier, is not due to any want of care on the part of the appellant but due to circumstances beyond its control.
>
> 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 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."
>
> **20.** It follows from the above that once an application or an appeal has been filed within the time prescribed, the question of condoning any delay in re-filing would have to be considered by the Court in the context of the explanation given for such delay. In absence of any specific statute that bars 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 the application."

10. In the context of petitions filed under the Act, the attention of the Court was also drawn to a decision rendered by a Division Bench of the Court in **Oil and Natural Gas Corporation Ltd. vs. Joint Venture of Sai Rama Engineering Enterprises (Sree) & Megha Engineering & Infrastructure Limited (Meil)**[5]. In the said decision, the Division Bench while dealing with an identical question had an occasion to explain defects which would be curable and those which would clearly go to the root of the matter and thus be liable to be viewed as a *non est* filing. Dealing with the aforesaid question, the

[5] 2023 SCC OnLine Del 63

Division Bench in **Oil and Natural Gas Corporation Ltd.** observed as follows: -

> **"36.** In *Vidyawati Gupta* v. *Bhakti Hari Nayak*, (2006) 2 SCC 777, the Supreme Court set aside the order of the Division Bench of the Calcutta High Court treating the suit instituted as *non est* for want of compliance with the requirements of Order 6 Rule 15(4) of the Civil Procedure Code, 1908, which requires a person verifying the pleadings to furnish an affidavit in support of the pleadings. The Supreme Court after noting various decisions held as under:—
>
> > "49. In this regard we are inclined to agree with the consistent view of the three Chartered High Courts in the different decisions cited by Mr. Mitra that the requirements of Order 6 and Order 7 of the Code, being procedural in nature, any omission in respect thereof will not render the plaint invalid and that such defect or omission will not only be curable but will also date back to the presentation of the plaint. We are also of the view that the reference to the provisions of the Code in Rule 1 of Chapter 7 of the Original Side Rules cannot be interpreted to limit the scope of such reference to only the provisions of the Code as were existing on the date of such incorporation. It was clearly the intention of the High Court when it framed the Original Side Rules that the plaint should be in conformity with the provisions of Order 6 and Order 7 of the Code. By necessary implication reference will also have to be made to Section 26 and Order 4 of the Code which, along with Order 6 and Order 7, concerns the institution of suits. We are ad idem with Mr. Pradip Ghosh (sic) on this score. The provisions of sub-rule (3) of Rule 1 Order 4 of the Code, upon which the Division Bench of the Calcutta High Court had placed strong reliance, will also have to be read and understood in that context. The expression "duly" used in sub-rule (3) of Rule 1 Order 4 of the Code implies that the plaint must be filed in accordance with law. In our view, as has been repeatedly expressed by this Court in various decisions, rules of procedure are made to further the cause of justice and not to prove a hindrance thereto. Both in *Khayumsab* [(2006) 1 SCC 46 : JT (2005) 10 SC 1] and *Kailash* [(2005) 4 SCC 480] although dealing with the amended provisions of Order 8 Rule 1 of the Code, this Court gave expression to the salubrious principle that procedural enactments ought not to be construed in a manner which would prevent the Court from meeting the ends of justice in different situations.

> 50. The intention of the legislature in bringing about the various amendments in the Code with effect from 1-7-2002 were aimed at eliminating the procedural delays in the disposal of civil matters. The amendments effected to Section 26, Order 4 and Order 6 Rule 15, are also geared to achieve such object, but being procedural in nature, they are directory in nature and non-compliance therewith would not automatically render the plaint non est, as has been held by the Division Bench of the Calcutta High Court.
>
> 51. In our view, such a stand would be too pedantic and would be contrary to the accepted principles involving interpretation of statutes. Except for the objection taken that the plaint had not been accompanied by an affidavit in support of the pleadings, it is nobody's case that the plaint had not been otherwise verified in keeping with the unamended provisions of the Code and Rule 1 of Chapter 7 of the Original Side Rules. In fact, as has been submitted at the Bar, the plaint was accepted, after due scrutiny and duly registered and only during the hearing of the appeal was such an objection raised.
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>
> 54. We have, therefore, no hesitation in holding that the Division Bench of the Calcutta High Court took a view which is neither supported by the provisions of the Original Side Rules or the Code nor by the various decisions of this Court on the subject. The views expressed by the Calcutta High Court, being contrary to the established legal position, must give way and are hereby set aside."

37. It is, thus, necessary to bear in mind the distinction between the procedural requirements that can be cured and those defects that are so fundamental that the application cannot be considered as an application under Section 34 of the A & C Act, at all.

38. In the facts of the present case, the application filed on 23.01.2019 was not an application assailing the impugned award. That filing was clearly *non est*. Similarly, as the application filed on 04.02.2019 also related to another matter, which could not be considered as an application assailing the impugned award. The filing on 22.02.2019 was only 10 pages of an Index. This too could not be construed as an application; however, the application filed on 20.02.2019 and 23.02.2019 cannot be construed to be *non est*.

39. The defects as noted by the Registry in the filing log relating to the application filed on 20.02.2019 reads as under:—

> "TOTAL 6313 PAGES FILED. CAVEAT REPORT BE OBTAINED. COURT FEE BE PAID. AFFIDAVITS NOT ATTESTED NOT SIGNED. PLEASE CORRECT THE BOOKMARKING. VOLUMNS OF DOUCMENTS BE MADE. IN ADDITION TO THE E-FILING, IT IS MANDANTORY TO FILE HARD COPIES OF THE FRESH MATTERS FILED UNDER SECTION 9, 11 AND 34 OF THE ARB. ACT. 1996 WITH EFFECT FROM 22.10.2018. ORIENTATION OF DOCUMENTS BE CORRECT. PLEASE CORRECT THE BOOKMAKRING. ALL INDEXES BE PAGINATED."
>
> **40.** It is relevant to note that the affidavits accompanying the application filed on 20.02.2019 were signed but not attested and to that extent, the defects as pointed out are not accurate. It is clear from the above, that none of the defects are fundamental as to render the application as *non est* in the eyes of law. All the defects, as pointed out, are curable defects. It is settled law that any defect in an affidavit supporting pleadings can be cured. It is seen from the record that the filing was also accompanied by an executed *vakalatnama*, however, the same was not stamped. It is also settled law that filing of a court fee is necessary, however, the defect in not filing the court fee along with the application can be cured. In view of above, we are unable to accept that the application, as filed on 20.02.2019 or thereafter on 23.02.2019, was *non est*.
>
> **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.""

11. Reverting to the facts which obtain in the present matter, undisputedly, when the petition was originally presented on 28 May 2022, it was neither accompanied by the Statement of Truth nor was a copy of the award which was sought to be assailed appended to the petition. Admittedly, those two fundamental defects were not removed

prior to 01 June 2022. It becomes pertinent to note that a Statement of Truth is mandated to accompany the petition once it is shown to cross the threshold of a specified value. Quite apart from being a mere requirement of the relevant provisions of the 2015 Act and more particularly Section 10 thereof, the Statement of Truth serves a more salutary purpose. For the purposes of evaluating whether a petition under Section 34 of the Act has been instituted within the period prescribed therein, a party must necessarily make a disclosure which would enable the Registry to examine whether the application for setting aside the award had been made within the period of three months from the date when a copy of the arbitral award may have been received by the party or the date on which a request under Section 33 may have been disposed of by the Arbitral Tribunal.

12. The Court further notes that in terms of the Proviso appended to sub-section (3) thereof, a court may subject to sufficient cause being established, entertain a challenge referable to Section 34 of the Act even after the period of three months has expired. However, the Proviso extends the permissible period within which such discretion may be exercised by a court to entertain a petition under Section 34 to be restricted to a further period of thirty days and not thereafter. Section 34(3) as well as the Proviso significantly use the expressions "*may not be made after three months"* and *"but not thereafter"*.

13. It is well settled in law that Section 34(3) constructs a comprehensive code stipulating the period of limitation which would govern the filing of petitions under Section 34 of the Act. It thus prescribes and puts in place a special rule with respect to limitation

which would override the general provisions that are found in the **Limitation Act, 1963**[6]. A series of judgments have consistently held that the general provisions of the 1963 Act cannot be pressed into aid by a party while seeking condonation of delay caused in the preferment of a petition under Section 34 of the Act beyond the maximum period prescribed in that provision.

14. It is in the aforesaid backdrop that the petition must necessarily disclose the date of service of a copy of the award and bear the date of its presentation. Those disclosures must necessarily be supported by a Statement of Truth. This since the said statement acts as an assurance and a solemn declaration that the averments contained in the petition are true and correct. Insofar as Section 34 petitions are concerned, this aspect assumes greater significance since it is on the basis of the said disclosures duly supported by a statement with regard to the truthfulness thereof that the Registry proceeds further to consider whether the petition has been preferred within the time prescribed in that provision.

15. A petition under Section 34 represents a challenge to the award rendered by the Arbitral Tribunal. A petition which is not accompanied by a copy thereof cannot possibly be understood or recognised as a valid challenge presented under Section 34. The non-filing of the award would clearly amount to a fundamental defect. This since the award would constitute an essential element of the filing and be liable to be viewed as an inviolable prerequisite. A petition

[6] The 1963 Act

purporting to be under Section 34 of the Act which neither carries the grounds on which the award is assailed or one which fails to annex a copy of the same cannot possibly be construed or accepted as an action validly initiated under Section 34 of the Act. It becomes pertinent to note that non-filing of an arbitral award was recognised to be a fundamental defect and one which would clearly render the filing to be *non est* both in **Bharat Biotech** as well as in **Oil and Natural Gas Corporation Ltd.** The basic precept of a *non est* filing was succinctly explained by the Division Bench in **Durga Construction Co.** to be a petition or an application filed by a party which is so hopelessly inadequate or suffering from defects which are clearly fundamental to the institution of the proceedings. Clearly therefore and if the aforesaid basic precepts are borne in mind, it is manifest that a petition which purports to be under Section 34 of the Act cannot possibly be countenanced or accepted as such unless it is accompanied by a copy of the award.

16. The Court also bears in mind that the filing of a petition or an attempted filing of a petition under Section 34 unaccompanied with a Statement of Truth or the award should not be lightly countenanced especially where the same may be merely presented in order to stall the limitation period prescribed in Section 34 from commencing. Such attempts have to be clearly discouraged and disapproved. It is to ward off that greater mischief which convinces the Court to hold that the filing of a copy of the award and the submission of the Statement of Truth must be recognised to be foundational, basic and indispensable requirements of a petition under Section 34 of the Act.

17. Since in the facts of the present case, the petitioner had admittedly failed to file a petition which complied with the aforenoted fundamental requirements of a Section 34 petition before the terminal date of 01 June 2022, it clearly falls within the meaning of the expression "*non est filing*" as enunciated in the decisions aforenoted.

18. Accordingly and for all the aforesaid reasons, this petition shall stand dismissed.

YASHWANT VARMA, J.

JANUARY 30, 2023
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