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

\+ O.M.P. (COMM) 368/2023

M/S PRIME INTERGLOBE PRIVATE LIMITED ....Petitioner

Through: Mr. Karan Luthra, Mr. Nikhil Kohli, Mr. Kushank Garg and Ms. Saumya Tiwari, Advs.

versus

M/S SUPER MILK PRODUCTS PRIVATE LIMITED .....Respondent

Through: Mr. Shashank Garg, Mr. Aseem Chaturvedi, Mr. Shivank Diddi and Ms. Phalguni Nigam, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% 09.09.2024

I.A. 17725/2023 (delay of 01 day in filing the petition)

1. This application seeks condonation of delay of one day in filing the present petition OMP (Comm) 368/2023 under Section 34(3)[1] of the Arbitration and Conciliation Act 1996[2].

2. In order to deal with this application, certain basic dates are

[1] (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.

[2] "the 1996 Act", hereinafter

required to be noted.

3. The impugned award came to be passed by the learned Arbitral Tribunal on 11 March 2023 and was received by the petitioner on the same day.

4. On 28 March 2023, the respondent filed an application under Section 33(4) of the 1996 Act, claiming that one of the claims of the respondent had gone undecided and, therefore, seeking an additional award on the said claim.

5. Agreeing with the said submission, an additional award on the surviving claim of the respondent was passed by the learned arbitrator on 24 April 2023. The petitioner, thereafter, moved an application under Section 33(1) of the 1996 Act, seeking a correction in the additional award dated 24 April 2023 passed by the learned Arbitrator. Said application, was filed by the petitioner on 19 May 2023, came to be dismissed by the learned Arbitrator on 24 May 2023.

6. The present petition was filed by the petitioner before this Court thereafter on 22 August 2023.

Is the initial filing *non est*?

7. I may first dispose of the second submission advanced by Mr. Garg, that the filing of the present petition on 22 August 2023 was *non est***.**

8. The filing log provided by the High Court with respect to the said filing reveals that as many as 744 pages were filed by the petitioner. The petition was admittedly accompanied by the impugned award. Though there are certain defects which have been pointed out, those defects, in my view, are not fatal to the filing and do not render it *non est* within the meaning as understood by the Division Bench of this Court in ***ONGC v Joint Venture of Sai Rama Engineering Enterprises & Megha Engineering & Infrastructure Ltd***[3]. The relevant paragraphs from the said decision read thus:

> "30. We concur with the learned Single Judge that certain defects are curable and do not render the application as *non est*. However, the nature of certain defects is such that it would not be apposite to consider the defective application as an application under Section 34 of the A&C Act, to set aside an arbitral award. Undisputedly, every improper filling is not *non est*.
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> 31. *We are unable to concur with the view that the minimum threshold requirement for an application to be considered as an application under Section 34 of the A&C Act is that, each page of the application should be signed by the party, as well as the advocate; the vakalatnama should be signed by the party and the advocate; and it must be accompanied by a statement of truth. And, in the absence of any of these requirements, the filing must be considered as non est. It is essential to understand that for an application to be considered as non est, the Court must come to the conclusion that it cannot be considered as an application for setting aside the arbitral award.*
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> 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

[3] **297 (2023) DLT 574: (2023) 1 Arb LR 544**

necessary that the application be accompanied by a copy of the award as without a copy of the award, which is challenged, it would be impossible to appreciate the grounds to set aside the award. In addition to the above, the application must state the name of the parties and the bare facts in the context of which the applicants seek setting aside of the arbitral award.

33. It is also necessary that the application be signed by the party or its authorised representative. The affixing of signatures signify that the applicant is making the application. In the absence of such signatures, it would be difficult to accept that the application is moved by the applicant.

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

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

36. In ***Vidyawati Gupta v. Bhakti Hari Nayak***[4], 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

[4] **(2006) 2 SCC 777**

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***[5] and ***Kailash***[6] 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

[5] **Shaikh Salim Haji Abdul Khayumsab v Kumar, (2006) 1 SCC 46**
[6] **Kailash v Nankhu, (2005) 4 SCC 480**

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."
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> 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.*
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> 41. We may also add that in given cases there may be a multitude of defects. Each of the defects considered separately may be insufficient to render the filing as *non est*. However, if these defects are considered cumulatively, it may lead to the conclusion that the filing is *non est*. *In order to consider the question whether a filing is non est, the court must address the question whether the application, as filed, is intelligible, its filing has been authorised; it is accompanied by an award; and the contents set out the material particulars including the names of the parties and the grounds for impugning the award.*
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> 42. In the given facts, the first question - whether the application filed on 20.02.2019 and 23.02.2019 can be considered as *non est* - is answered in the negative."

Applying the ***Sai Rama*** standard, the filing of the present petition on 22 August 2023 cannot be regarded as *non est*.

What is the *terminus ad quem* for limitation?

9. Mr. Garg has, however, raised another submission, which merits greater consideration. He submits that, reckoned from the correct date from which limitation to file the present petition under

Section 34 would begin to run, the petition has been first filed beyond 3 months and 30 days from the date of receipt of the impugned arbitral award and cannot, therefore, be entertained. Section 34(3) of the 1996 Act, indisputably, permits a Court to condone the delay in filing the Section 34 petition only by a maximum period of 30 days beyond 3 months from the date of receipt of the award under challenge, and no more.

10. Mr. Karan Luthra, learned Counsel for the petitioner, submits that, if the date of filing of the petition is to be reckoned from 24 May 2023, when the petitioner's Section 33(1) application was rejected, it falls within the normal period of 90 days as envisaged in Section 34(3) and that, even if the date of filing is to be reckoned *vis-a-vis* the date of disposal of the Section 33(4) application filed by the respondent by the learned arbitrator on 24 April 2023, it still falls within 120 days from the date of receipt of the impugned award.

11. Though Mr. Garg submits that the petitioner's application under Section 33(1) was thoroughly misconceived and that the petitioner cannot be permitted to reckon limitation from the date on which the said application was dismissed, I do not deem it necessary to enter into this aspect as, in my view, the petitioner would be entitled to reckon limitation from 24 April 2023 when the respondent's Section 33(4) application was allowed by the learned arbitrator. Reckoned from the said date, the petition has been filed 28 days beyond 3 months from the date of receipt of the impugned arbitral award by the petitioner, and the said delay of 28 days, in my view, deserves to be

condoned.

12. On this aspect, Mr. Garg advances two contentions, which are dealt with *seriatim*.

Is the benefit of the second part of Section 34(3) available only to the party who has filed the application under Section 33 before the Arbitral Tribunal?

13. The first contention of Mr. Garg is that it is only *the party who has moved the arbitral tribunal under Section 33* who can reckon limitation for filing the Section 34 petition form the date on which that application was disposed of by the arbitral tribunal. In other words, he submits that the petitioner cannot be entitled to reckon limitation, for filing the petitioner's Section 34 petition before the Arbitral Tribunal, *from the date on which the respondent's Section 33(4) application* was allowed by the arbitral tribunal.

14. I am unable to agree.

15. The benefit of reckoning the *terminus ad quem* of limitation, for filing the petition under Section 34 from the date on which Section 33 application is disposed of by the tribunal, as envisaged in Section 34 (3), *is not made statutorily dependent on the party who has filed the Section 34 application*.

16. For this purpose, Section 34(3) may conveniently sub-divided

into two parts.

17. The first part states that an application for setting aside of an arbitral award may not be made after three months have elapsed from the date on which the party making that application has received the arbitral award. In other words, if a party seeks to challenge an arbitral award, he has to file the Section 34 petition within three months from the date on which he has received the arbitral award. *It is only this initial part of Section 34(3) which applies specifically to the party who is filing the Section 34 petition.*

18. The second and latter part of Section 34(3) adverts to a situation in which "a request has been made under Section 33*"*. *It does not specify who must have made the request. It applies, therefore, irrespective of whether the request is made by the claimant(s), or the respondent(s), before the Arbitral Tribunal.*

19. The latter part of Section 34(3) goes on to state that, in a case in which a request, as above, was made before the Arbitral Tribunal under Section 33, "an application for setting aside may not be made after three months had elapsed from the date on which that request had been disposed of by the arbitral tribunal". Thus, *irrespective of who had made the request under Section 33 before the Arbitral Tribunal, Section 34(3) allows the Section 34 application to be filed within three months of the date of disposal of the Section 33 request by the Arbitral Tribunal.*

20. It is not necessary, therefore, that the Section 34 petitioner must be the Section 33 applicant. The contention to that effect, as advanced by Mr. Garg is, therefore, rejected.

Is the sub-section of Section 33, under which the application is made, relevant for Section 34(3)?

21. A faint submission was advanced by Mr. Garg to the effect that the respondent's application before the Arbitral Tribunal was under Section 33(4), for rendition of an additional award, and not for correction of errors under Section 34. With his intimate knowledge of arbitration law, however, Mr. Garg did not press this point further.

22. Nonetheless, it is necessary to clarify that the liberty to compute limitation, for filing the Section 34 petition, from the date on which the Arbitral Tribunal disposes of the Section 33 application (of either party) is not dependent on the sub-section, or clause, of Section 33, under which the application was moved. It applies to *all applications under Section 33*. It uses the words "if a request had been made under Section 33" without specifying the sub-section of Section 33 under which the request was made. *In other words, irrespective of the sub-section of Section 33 under which the application was moved before the arbitral tribunal, a Section 34 petition, by either party, can be filed within three months on which the Section 33 application is disposed of.*

23. *Accordingly, this benefit would equally be available whether the application under Section 33 is preferred under sub-section (1) or*

any of the other sub-sections of Section 33, including Section 33(4).

Does the entitlement of the petitioner to challenge the initial arbitral award and the additional award rendered under Section 33(4) separately, make any difference to Section 34(3)?

24. The second contention of Mr. Garg is that the original arbitral award dated 11 March 2023 and the additional award passed by the learned Arbitral Tribunal under Section 33(4) on 24 April 2023 constitute distinct and independent awards and that they are completely unconnected with each other. Each award, therefore, he submits, could independently form subject matter of challenge. There is no justification, therefore, for the petitioner to have waited for the decision of the learned Arbitral Tribunal on the respondent's Section 33(4) application, before filing the present petition.

25. He places reliance, for this purpose, on the following passages from the judgment of a Coordinate Bench of this Court in ***NHAI v Trichy Thanjavur Expressway Ltd***[7]:

> "G. Undoubtedly, an award may comprise a decision rendered on multiple claims. Each claim though arising out of a composite contract or transaction may be founded on distinct facts and flowing from separate identifiable obligations. Just as claims may come to be preferred resting on a particular contractual right and corresponding obligation, the decision which an AT may render on a particular claim could also be based on a construction of a particular covenant and thus stand independently without drawing sustenance on a decision rendered in the context of another. If such claims be separate, complete and self-contained in themselves, any decision rendered thereon would hypothetically be able to stand and survive irrespective of an invalidity which may taint a decision on others. As long as a claim is not subordinate, in the sense of being entwined or interdependent upon another, a decision rendered on the same by the AT

[7] **2023 SCC OnLine Del 5183**

would constitute an award in itself.

> H. While awards as conventionally drawn, arranged and prepared may represent an amalgam of decisions rendered by the AT on each claim, every part thereof is, in fact, a manifestation of the decision rendered by it on each claim that may be laid before it. The award rendered on each such claim rules on the entitlement of the claimant and the right asserted in that regard. One could, therefore, validly, subject of course to the facts of a particular case, be entitled to view and acknowledge them as binding decisions rendered by the AT on separate and distinct claims.
>
> I. Once an award is understood as consisting of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power to set aside an award partly. The power so wielded would continue to remain one confined to "setting aside" as the provision bids one to do and would thus constitute a valid exercise of jurisdiction under Section 34 of the Act."

26. While the exposition of the law, in the passages from ***Trichy Thanjavur Exprsesway***, on which Mr. Garg relies, is clearly unexceptionable, I am unable to subscribe to the sequitur, as Mr. Garg would seek to derive therefrom.

27. The fact that the original award, and the additional award rendered by the Arbitral Tribunal under Section 33(4) can independently be challenged is, in my view, not a relevant consideration, while reckoning limitation under Section 34(3), for the simple reason, already noted hereinabove, that the second part of Section 34(3) does not restrict itself to applications filed under sub-section (1) or any other sub-section(s) of Section 33.

28. *The question is not whether the petitioner could, or could not, have independently challenged the additional award rendered by the Arbitral Tribunal under Section 33(4). The question is whether the*

petitioner is entitled to compute limitation, for filing its petition under Section 34, from the date of rendition of the said additional award. Mr. Garg's effort to conflate these two considerations is, in my view, misguided.

29. Section 34(3) permits a Section 34 petition to be filed within 3 months of the date of disposal, by the Arbitral Tribunal, of the Section 33 application filed, by any party before it. Q.E.D. It is not permissible for the Court to delimit this beneficial statutory dispensation by importing artificial considerations of whether both awards could, or could not, be independently challenged.

30. If I were to accept Mr. Garg's contention that would be indirectly reading, into Section 34(3), an exception in a situation in which the Section 33 application is filed under sub-section (4). That cannot be done. A court can neither legislature, nor modify the statute enacted by the legislature.

The sequitur

31. Accordingly, the period for filing the Section 34 petition by the petitioner can legitimately be reckoned from 24 April 2023 when the respondent's Section 33(4) application came to be allowed by the arbitral tribunal.

32. Reckoned from that date, as I have already held, the petition was filed within 120 days.

Should the petitioner be driven to file a revised application? Does the delay beyond 3 months deserve to be condoned?

33. Mr. Garg has also sought to point out that IA 17725/2023 reckons limitation from 24 May 2023 when the petitioner's Section 33 petition was dismissed and that the petitioner may be required to file a revised or an additional application seeking condonation of delay from 24 April 2023.

34. Technically speaking, this argument may be correct.

35. However, the fact of the matter is that, even reckoned from 24 April 2023, the present petition is within the period of 3 months and 30 days.

36. Between 24 April 2023 and 24 May 2023, the petitioner was prosecuting his Section 33(1) application, howsoever misguided it may have been.

37. As such, as the delay, even reckoned from 24 April 2023, is within 3 months and 30 days from the date of receipt of the arbitral award, I am inclined to condone the delay. Where the challenge to the award is made beyond 3 months from the date of receipt of the award, but within an additional period of 30 days, the court has, in my view, to be liberal in dealing with the prayer for condonation of delay, so as to ensure that the right of the litigant to challenge the arbitral award is not frustrated.

38. The application is accordingly allowed.

I.A. 23823/2023 (delay of 27 days in filing rejoinder)

39. This is an application seeking condonation of delay of 27 days in filing rejoinder.

40. For the reasons stated therein, the application is allowed. The delay is condoned.

O.M.P. (COMM) 368/2023

41. Issue notice, returnable on 4 December 2024.

42. Notice is accepted, on behalf of respondent, by Mr. Shashank Garg.

43. Reply, if any, be filed within four weeks from today with advance copy to learned Counsel for the petitioner who may file rejoinder thereto, if any, within four weeks thereof.

C. HARI SHANKAR, J.

SEPTEMBER 9, 2024
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Click here to check corrigendum, if any