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

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Date of Decision : 10.05.2024+ **FAO(OS) (COMM) 300/2022 CM APPL. 46455/2022**

KAILASH CHAND GIAN CHAND JAIN Appellant
Through: Mr.Vivekanand and Mr.Abhishek,
Advocates.

versus

UNION OF INDIA THROUGH MINISTRY
OF RAILWAYS (NORTHERN) Respondent
Through: Ms.Arunima Dwivedi, CGSC,
Mr.Prashant Rawat, GP, Ms.Pinky
Panwar and Mr.Aakash Pathak,
Advocates.

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****VIBHU BAKHRU, J. (Oral)**

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning an order dated 06.09.2022 (hereafter *the impugned order*) passed by the learned Single Judge in OMP (COMM) 373/2022 rejecting the same as barred by limitation.

2. The appellant had filed the aforementioned application [OMP(COMM)373/2022] under Section 34 of the A&C Act impugning an Arbitral Award dated 15.02.2022 (hereafter *the impugned award*) rendered



by the learned Arbitral Tribunal comprising of the Sole Arbitrator. The copy of the impugned award was received by the appellant on 21.02.2022, however, thereafter, the impugned award was corrected by the Arbitral Tribunal pursuant to an application filed under Section 33 of the A&C Act. The impugned award as corrected, was received by the appellant on 09.03.2022. Admittedly, the said application to set aside the impugned award could be filed within the period of three months from the said date in terms of Section 34(3) of the A&C Act.

3. It is also not disputed that the application was filed on 01.06.2022 which was within the aforesaid period. However, the said filing was defective and the same was returned for re-filing. The application was then re-filed on 27.07.2022, however, certain defects persisted. It was again filed on 06.08.2022 and finally on 02.09.2022.

4. The learned Single Judge had held that the initial filing, that is, the application as filed on 01.06.2022 was *non-est*, in view of several defects as noticed in the impugned order. The application was re-filed on 27.07.2022, which – according to the learned Single Judge – was required to be considered as the first filing. Since the same was beyond the period of limitation as prescribed under Section 34(3) of the A&C Act and exceeded the delay of 30 days that could be condoned in terms of the proviso to Section 34(3) of the A&C Act, the application was dismissed as barred by limitation.

5. The limited controversy that arises for consideration is whether the application to set aside the award filed on 01.06.2022 could be considered as



non-est. There is no cavil if the respondent is correct in its submission that the said filing was required to be considered *non-est* on account of various defects, the decision of the learned Single Judge to reject the petition as barred by limitation could not be faulted.

6. The learned Single Judge had set out the information log setting out the history of filing in the impugned order. The Court had noted that on 01.06.2022, the appellant had filed 95 pages without bookmarking the same or paying the appropriate court fees. However, the application as finally filed on 02.09.2022, spanned over more than 407 pages. The learned Single Judge also noted the defects as pointed out by the Registry including non-filing of the power of attorney, non-filing of the affidavit in support of the application, non-filing of the memo of parties, non-filing of the court fees etc. The Court held that these defects were fundamental to the filing of a proper application and clearly demonstrated that the application could not be considered as a proper filing.

7. The learned Single Judge also referred to the decision of another Single Judge of this Court in *Oil and Natural Gas Corporation Ltd. v. Joint Venture of M/s Sai Rama Engineering Enterprises (Sree) & M/s Megha Engineering & Infrastructure Limited (Meil): 2019 SCC Online Del 10456* and concluded that the petition was liable to be dismissed.

8. Since, the filing on 01.06.2022 is central to the controversy in this appeal, we had issued directions for the Registry to place a digital copy of what was filed on the said date. The same has been placed on record. Perusal of the same indicates that some of the defects as noted by the learned Single



Judge did not exist. First, the application filed included the memo of parties, which was duly signed by the advocates. It was also supported by an affidavit affirmed by the appellant on 31.05.2022. A duly executed *vakalatnama* was filed along with the application. In addition, the appellant had filed an application styled as an application under Section 151 of the Code of Civil Procedure, 1908 (hereafter *the CPC*) seeking a direction to respondent no. 2 (the sole arbitrator) to produce the entire arbitral record. The said application was also supported by an affidavit. Additionally, the appellant had filed an application seeking exemption from filing certified copies of the annexures, which was also supported by an affidavit.

9. It is clear from the above, that the application to set aside the award was clearly intelligible and sets out the grounds on which the award was assailed. The application was also accompanied with a copy of the arbitral award.

10. It however, did not include a statement of truth affirmed by the appellant. The present appeal and the application to set aside the award were filed by the sole surviving partner of the firm as an individual. Thus, the affidavits were also affirmed as an individual. Perhaps it is in this context that the defects regarding non-furnishing of power of attorney was raised by the Registry.

11. The question whether a filing can be considered as a *non-est*, has been a subject matter of consideration in several decisions. The said question was considered by a Coordinate Bench of this Court of which one of us (Vibhu Bhakru, J.) was a member in *Oil and Natural Gas Corporation Ltd. v. Joint*



Venture of M/s Sai Rama Engineering Enterprises (Sree) & M/s Megha Engineering & Infrastructure Limited (Meil): 2023 SCC Online Del 63. In terms of the said decision, this Court had allowed the appeal preferred by the appellant against the decision of the learned Single Judge in *Oil and Natural Gas Corporation Ltd. v. Joint Venture of M/s Sai Rama Engineering Enterprises (Sree) & M/s Megha Engineering & Infrastructure Limited (Meil)*, which was referred to by the learned Single Judge. A plain reading of the impugned order also indicates that the learned Single Judge’s decision was founded on the basis of the observations made by the learned Single Judge in the said decision. Since, the same has been set aside, the impugned order, which rests on the said decision, is also liable to be set aside.

12. It is also relevant to note that this Court had held that the question whether the filing is *non-est*, is necessary to be determined on the basis whether the application, as filed, is intelligible, its filing has been authorized; 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. This Court had explained that for arriving at a conclusion that the filing is *non-est*, the Court must come to “*the conclusion that it cannot be considered as an application for setting aside the Arbitral Award at all*”. This Court had further observed as under:

“32. It is material to note that Section 34 of the A&C Act does not specify any particular procedure for filing an application to set aside the arbitral award. However, it does set out the grounds on which such an application can be made. Thus, the first and foremost requirement for an application under Section 34 of the A&C Act is



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

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.”

(emphasis added)

13. It is clear from the facts obtaining in the present case that the application as filed was comprehensive and capable of adjudication. The petitioner’s challenge to the arbitral award was clearly articulated and there was no impediment for the learned Single Judge to consider the same. The only deficiency was that the Statement of Truth was not filed along with the application but it was accompanied by an affidavit verifying the contents of the application.

14. It is also relevant to note that provisions of Order VI Rule 15A of the CPC as applicable to commercial disputes which sets out the requirement of filing of statement of truth in the form as appended to the Schedule. Order VI Rule 15A is set out below:

“[15A. Verification of pleadings in a Commercial Dispute.—

(1) Notwithstanding anything contained in rule 15, every pleading in a Commercial Dispute shall be verified by an affidavit in the manner and form prescribed in the Appendix to this Schedule.

(2) An affidavit under sub-rule (1) above shall be signed by the party or by one of the parties to the proceedings, or by any other person on behalf of such party or parties who is proved to the satisfaction of the Court to be acquainted with the facts of the case and who is duly authorised by such party or parties.



(3) Where a pleading is amended, the amendments must be verified in the form and manner referred to in sub-rule (1) unless the Court orders otherwise.

(4) Where a pleading is not verified in the manner provided under sub-rule (1), the party shall not be permitted to rely on such pleading as evidence or any of the matters set out therein.

(5) The Court may strike out a pleading which is not verified by a Statement of Truth, namely, the affidavit set out in the Appendix to this Schedule.]”

15. In terms of sub-rule (1), every pleading in a commercial dispute is required to be verified by an affidavit in the manner and form as prescribed (statement of truth). The consequence of non-filing of the same are specified in sub-rule (4) and (5) of Order VI Rule 15A of the CPC. Where the pleadings are not supported by statement of truth, the parties shall not be permitted to rely on such pleadings as evidence. The said sub-rule (4) is required to be read in conjunction with the other provisions of the CPC. Illustratively, in terms of Order VIII Rule 10 of the CPC, the Court may pronounce a judgment against the defendant who has failed to present the statement of defence. Clearly, in absence of statement of truth supporting the plaint, no such judgment could be pronounced as in terms of sub-rule (4) of Order VI Rule 15A of the CPC, the plaintiff would not be entitled to rely on such pleadings as evidence. In terms of sub-rule (5), the Court may also strike off certain pleadings. However, it is difficult to accept that the defect of not filing the statement of truth, is not a curable one.

16. It is also relevant to refer to a judgment of a Coordinate Bench of this Court in *Prayag Polytech Pvt. Ltd. & Anr. v. Raj Kumar Tulsian: Neutral*



Citation No.2023:DHC:7088-DB. In the said case, the Court had considered the question whether a plaint was liable to be rejected if not accompanied by the statement of truth. In this regard, the Court has held as under:

“8. Highlighting the said aspect of interpretation of statutes, reverting back to the instant matter, if as canvassed by the learned counsel for the appellants, a strict interpretation were to be applied thereby mandating the nature and form of verification of pleadings as per Order VI Rule 15A CPC, that, by necessary implication, would only warrant an order rejecting the plaint. We have no hesitation in saying that such an interpretation would lead to palpable hardships, grave inconvenience, and the derailment of the dispensation of justice. We find that the effect of such defects in the pleadings is provided for in the same provision itself, to the effect that the Court may strike out a pleading that is not verified by the ‘Statement of Truth’ i.e., the affidavit set out in the Appendix. In other words, where the pleading is not verified in accordance with Sub-Rule (1), the party may not be permitted to rely upon the said pleading in evidence. The rule of literal construction of Order VI Rule 15A (4) & (5) CPC rather invites an interpretation that the plaint cannot be struck off or rejected as a whole. At the cost of repetition, we find that placing such a construction would be absolutely absurd, harsh and would defeat the ends of justice. The objective of Order VI Rule 15A of the CPC as grafted in the CC Act is to ensure that the party concerned must be fully acquainted with the facts personally so as to verify and account for the truthfulness of the pleadings in high-value commercial suits. Indeed, mere non-signing of each and every page of the pleadings is *per se* a defective, but the same could very well be cured. Likewise, any defect in verification of an affidavit in the nature of ‘Statement of Truth’ is also curable.”

17. In this view, the decision of the learned Single Judge to consider the



petitioner's filing as *non-est*, solely for the reason that it was not accompanied by the Statement of Truth, cannot be sustained.

18. The learned counsel appearing for the respondent referred to the decision of the Co-ordinate Bench of this Court in ***Oil and Natural Gas Corporation Limited v. Planetcast Technologies Limited: 2023 SCC OnLine Del 8490*** and submitted that the non-filing of the Statement of Truth would render the petition as *non-est*.

19. We are unable to accept the said decision as an authority for the said proposition. In the said case, the Court had noted the petition, which was without signatures of the petitioner, which was incomplete, not accompanied by a copy of the award, the affidavit, or the Statement of Truth and thus held that it could not be accepted as valid. The decision turned mainly on failure of the petitioner to file the copy of arbitral award. The rationale for treating a petition to set aside the arbitral award, which is not accompanied with a copy of the award, as *non-est* is that the grounds to set aside the award cannot not be considered meaningfully in absence of the copy of the award. The facts of the said decision have no application in the facts of the present case.

20. In addition, the learned counsel for the respondent also referred to the decision of the learned Single Judge in ***Brahmaputra Cracker and Polymer Ltd. v. Rajshekhar Construction Pvt Ltd.: Neutral Citation Number : 2023:DHC:642*** and drew the attention of this Court to paragraph no.16 of the said decision wherein the Court had observed that filing of a petition under Section 34 of the A&C Act not accompanied by the Statement of



Truth or the award should not be lightly countenanced where the same may be merely presented in order to stall the limitation period under Section 34 of the A&C Act from commencing. The Court had held that such an attempt has to be clearly discouraged and disapproved.

21. This Court is informed that an appeal is preferred against the said decision, which is pending for consideration.

22. Having stated the above, we find no infirmity in the view that if a filing is made only to stall the limitation without the necessary ingredients to be considered as an application for setting aside an arbitral award, the same should not be countenanced and such practice is required to be discouraged.

23. In the present case, we are unable to accept that non-filing of the statement of truth along with the petition renders the petition *non-est* and non-existing in the eyes of law.

24. We may also clarify that these observations should not be read to construe as the filing of the Statement of Truth is not mandatory. However, the said defect is a curable one and non-filing of Statement of Truth does not render the filing as *non-est* in the eyes of law.

25. In view of the above, the appeal is allowed. The impugned order is set aside. We note that there is an inordinate delay in re-filing the application. This order would not be construed as condoning the delay in re-filing. The question whether such delay in re-filing is required to be condoned, shall be considered by the learned Single Judge on its own merits.

26. Pending application also stands disposed of.



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27. The application [OMP(COMM)373/2022] is restored before the learned Single Judge. Let the parties appear before the concerned bench for directions on 02.07.2024.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MAY 10, 2024

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Click here to check corrigendum, if any