

## **WHAT CONSTITUTES AS NON-EST FILING FOR THE PURPOSES OF CALCULATING PERIOD OF LIMITATION**

### **INTRODUCTION:**

The High Court of New Delhi in its recent decision in **Ambrosia Corner House Private Limited v. Hangro S Foods<sup>1</sup>** held that while considering whether a filing should be considered 'non-est', a more liberal approach is to be adopted by the Court and that the facts of each case must be assessed.

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### **FACTS:**

An arbitral tribunal passed an award dated 14<sup>th</sup> March, 2022 ("**Impugned Award**").

Being aggrieved by the Impugned Award, Ambrosia Corner House Pvt. Ltd., the Petitioner filed a Petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Act**") before the Delhi High Court.

The High Court was closed for the summer vacation between 4<sup>th</sup> June, 2022 and 1<sup>st</sup> July, 2022. The Petition was filed by the Petitioner on 4<sup>th</sup> July, 2022. However, the said petition was marked as defective by the registry of the High Court with the following observations:

*"TOTAL 82 PAGES FILED, NO AWARD FILED, NO DOCUMENTS FILED, NO BOOKMARKING DONE, NONE OF THE AFFIDAVIT ATTESTED. CANNOT RAISE PROPER OBJECTIONS, BE FILED AS PER THE NORMS GIVEN FOR E FILING ON THE WEB PORTAL OF DELHI HIGH COURT."*

The said Petition was thereafter refiled on 26<sup>th</sup>, 27<sup>th</sup> and 29<sup>th</sup> July, 2022 when again certain defects were found in the filing and the petition was returned for e-filing. Thereafter, the

Petitioner refiled the petition on 1<sup>st</sup> August, 2022 when it was accepted by the registry.

The learned senior counsel for the Respondent raised a preliminary objection on the maintainability of the present petition contending that the same had been filed beyond the period prescribed in Section 34(3) of the Act, 1996, including beyond the maximum period of delay that can be condoned by the Court in filing of the present petition.

### **ISSUE FOR CONSIDERATION:**

The question to be decided by the Delhi High Court was whether:

In light of the present facts of the matter the filing of the Petition is 'non-est' and barred under Section 34(3) of the Act?

### **SUBMISSIONS ON BEHALF OF THE RESPONDENT:**

The learned senior counsel for the Respondent submitted that based on the objections that were found by the Registry in the filing by the Petitioner on 4<sup>th</sup> July, 2022, the said filing was 'non-est'. He submitted that (i) the Office Report indicated that only 82 pages of the Petition were filed on 4<sup>th</sup> July, 2022; (ii) the filing was without

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<sup>1</sup> 2023 SCC Online Del 517.

a copy of the Impugned Award or the documents in support of the grounds for challenge; (iii) the Affidavit in Support of the Petition was not attested through the Oath Commissioner; and (iv) that the Petition that was finally filed ran into 715 pages.

He further submitted that in terms of the proviso of Section 34(3) of the Act, a delay of not more than 30 days can be condoned by this Court. He submitted that as the Petition was filed only on 26<sup>th</sup> July, 2022, that is after the expiry of 30 days period from 13<sup>th</sup> June, 2022, the Court would not have the jurisdiction to condone the delay in filing of the Petition.

It was contended that the period of three months prescribed for filing of the Petition having expired on 13<sup>th</sup> June, 2022, during the summer vacation of this Hon'ble Court, the petition, in terms of Section 4 of the Limitation Act, 1963 ("**Limitation Act**"), could have been filed on the date of the re-opening of the Court after the summer vacation, which was 4<sup>th</sup> July, 2022. As the filing of the Petition on 4<sup>th</sup> July, 2022 was '*non-est*', the Petitioner was not entitled to seek benefit of Section 4 of the Limitation Act.

#### **SUBMISSIONS ON BEHALF OF THE PETITIONER:**

The learned counsel for the Petitioner submitted that the petition having been filed on 4<sup>th</sup> July, 2022, was filed within the period prescribed in Section 34(3) of the Act. He further submitted that (i) though the petition was not accompanied by a copy of the Impugned Award, the Petition contained the complete particulars and grounds for challenge; and (ii) each page of the petition was signed by the director of the Petitioner and its counsel. In this regard he

placed reliance on a Division Bench judgment of the Delhi High Court in *Oriental Insurance Co. Ltd. v. Air India Ltd.*<sup>2</sup>

Reliance was also placed on judgments passed in *Oil and Natural Gas Corporation Ltd. v. Joint Venture of Sai Rama Engineering Enterprises (SREE) & Megha Engineering & Infrastructure Limited (MEIL)*<sup>3</sup>, to submit that merely because the affidavit accompanying the petition was not attested, it cannot be said that the filing was non-est and that the non-filing of the copy of the Arbitral Award and/or attested affidavit are curable defects.

Therefore, he submitted that in the facts of the case, the Petitioner had made out a case for condonation of such delay, and stated that filing of an application for seeking condonation of the delay is not a mandatory requirement and that reasons for the delay can also be explained orally.

#### **JUDGMENT:**

The Hon'ble Court held that the law on what can be considered as a '*non-est*' filing for the purposes of Section 34 of the Act is no longer *res integra* and has been settled by the judgments of the Division Bench of the Delhi High Court in *Oriental Insurance Co. Ltd. (Supra)* and *Oil and Natural Gas Corporation Ltd. (Supra)*.

Relying on the judgments mentioned hereinabove, the Court observed that it is clear that a more liberal approach is to be adopted by the Court while considering whether a filing should be treated as '*non-est*'. In *Oriental Insurance Co. Ltd. (Supra)*, it was held that a filing can be considered as '*non-est*' if it is filed without

<sup>2</sup> 2021 SCC Online Del 5139.

<sup>3</sup> Judgment dated 9<sup>th</sup> January, 2023 in FAO (OS) (COMM) 324/2019.

signatures of either the party or its authorized or appointed counsel. In *Oil and Natural Gas Corporation Ltd. (Supra)*, it was held that the filing may be considered as 'non-est' where the application as filed is intelligible or is not accompanied with a copy of the Impugned Award or does not set out the material particulars, including the names of the parties and the grounds for impugning the Award. Further, that it has been clarified that the Court must assess the facts of each case while determining the issue of the filing being considered as 'non-est'.

The Court observed that from a perusal of the index of the Petition filed on 4<sup>th</sup> July, 2022, it appeared that the Petitioner was to file the documents, including a copy of the Impugned Award, in a separate e-folder, that is, Part IV as prescribed in the Delhi High Court (Original Side) Rules, 2018. The same appeared to have not been filed. The Petitioner had thereafter re-filed the petition after removing the defects on 26<sup>th</sup> July, 2022, wherein all documents, including the Impugned Award were filed. The Court thus observed that the first filing on 4<sup>th</sup> July, 2022 cannot be treated as a 'non-est' filing. At best, the Petitioner committed an error in not filing

the documents in a separate folder as prescribed in the Delhi High Court (Original Side) Rules, 2018.

As held in *Oriental Insurance Co. Ltd. (Supra)*, the High Court observed that the right to prefer objections to assail the Arbitral Award under Section 34 of the Act, though extremely limited, is a valuable right and the same cannot be denied unless the party concerned has clearly failed to file the objection petition within the strict period of limitation prescribed under the Act.

The Court was of the opinion, that the conduct of the Petitioner clearly evidenced its endeavour to file a proper petition under Section 34 of the Act on 4<sup>th</sup> July, 2022, that is, the date of re-opening of the Court for the purposes of limitation in terms of Section 4 of the Limitation Act. The petition was, therefore, filed within the period prescribed under Section 34(3) of the Act.

In view of the above, the Hon'ble Court rejected the objection of the Respondent that the present petition is barred by the provisions of Section 34(3) of the Act.

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*