

Misc. Arbitration (Commercial) 26 of 2024

Order No.14

Date:10-07-2025

Today is fixed for hearing in terms of order no.11 dated 23.05.2025.

Petitioner (M/s India Builders) takes steps and is further duly represented by its Ld. Counsel.

Respondent is absent without steps. Hence, the matter is fixed ex-parte against sole respondent Union of India.

Record is taken up for the purpose it is fixed today i.e. hearing in terms of order no.11 dated 23.05.2025 on the point of validity of filing of the present petition under section 34 of the Arbitration & Conciliation Act, 1996 [for the sake of brevity hereinafter referred to as the ACA, 1996] along with a photocopy of the impugned award.

Heard Ld. Counsel for the petitioner.

Ld. Counsel strenuously argues that filing of the petition under section 34 ACA with a photocopy of the impugned award attached to the same is proper filing in the eye of law and a *non-est* one basing on the following logic:

1. Section 34 of the ACA, 1996 does not mandate filing of the original award.
2. Section 34 of the ACA, 1996 does not lay down any procedure for filing of a petition thereunder.
3. Section 34 of the ACA, 1996 does not prevent the petitioner from filing of the petition with a photocopy or Xerox copy attached to the same. Hence, the petitioner is empowered to do so under law.
4. Section 34 of the ACA, 1996 should be liberally construed as it is the only avenue for challenge against an award passed by the Tribunal under the ACA, 1996.
5. Copy of an award means and includes a photocopy or Xerox copy of the said award.
6. It is a mere curable, procedural defect and should be liberally considered by the court.
7. Observation returned by the Hon'ble Delhi High Court in paragraph no.66 of Hon'ble Court's verdict in Pragati Construction Consultants clearly lays down that it is only on non-filing of the award that should be considered as a *non-est* filing and consequently not a filing that is accompanied by a photocopy/Xerox copy of the award.
8. The petitioner has prayed for leave of the court to produce the original at later stages.
9. The petitioner has prayed before the court to call for the original record from the Tribunal for the purpose of adjudication.

Perused the petition under section 34 of the ACA, 1996 filed and or preferred on 11.09.2024 before this court along with available annexure that includes a photocopy/Xerox copy of the impugned award along with the photocopy/Xerox copy of the correspondence or letter addressed by the Ld. Sole Arbitrator Mr. Jagdish Rai Garg dated 14.07.2024 both of which documents are **found without the original signature of the Ld. Sole Arbitrator.**

Considered.

On such hearing, perusal & consideration this court arrived at the following conclusions:

Right at the outset let it be laid down in no uncertain or ambiguous terms that it is the **sole contention of this court that every petition preferred under section 34 of the ACA, 1996 assailing an award passed by an arbitral tribunal must be filed accompanied by the very same copy of the award received by the petitioner from the Ld.**

Arbitrator(s) in compliance of or under section 31(5) of the ACA, 1996 as being the award sought to be assailed by her/him.

Let it be further laid down in no uncertain or ambiguous terms that this court is not oblivious or unmindful of the fact that section 34 of the ACA, 1996 does not prescribe any procedure for preferring an application or a petition thereunder. It has been so observed by the Hon'ble Delhi High Court as well in Pragati Constructions Consultants v/s Union of India & others FAO(OS) (COMM) 70/2024 & CM Appl.21475/2024 dated 07.02.2025. Hence, **it is but imperative that section 34 of the ACA, 1996 should be read in conjunction with section 31(5) of the self-same Act.**

It is under section 31(5) of the ACA, 1996 that the Ld. Arbitral Tribunal furnishes a signed copy of the award to the parties to the arbitration. This signed copy can be in different forms namely, an ink signed copy or a photocopy of the ink-signed copy under cover of a letter of authentication bearing the original signature of the Ld. Tribunal or a duly certified copy bearing original signature of the Ld. Arbitrator or an attested copy bearing original signature of the Ld. Arbitrator or a duly authenticated copy thereof bearing original signature of the Ld. Arbitrator or an e-signed copy under an e-mail communication as to its authentication of authorship and its genuineness.

Regardless the manner in which Ld. Tribunal complies with section 31(5) of the ACA, 1996, the party assailing the award is duty bound to file the same at the time of filing or preferring the petition. Different options to comply under section 31(5) of the ACA, 1996 lies with the Ld. Arbitrator and not with the party preferring a challenge against the same under section 34 of the Act. Thus, she/he cannot engage in preparing a copy out of what he is in receipt of.

This court declines to accept the contention & submission of the Ld. Counsel for the petitioner that the petitioner is empowered under law to file an unsigned photocopy/Xerox copy of the award received by her/him under section 31(5) of the ACA, 1996 as because section 34 of the ACA, 1996 does not prevent him from doing so or does not prescribe any specific procedure to file the petition thereunder. This court further declines to accept the contention & submission of Ld. Counsel for the petitioner that she/he is empowered under law to prepare a copy out of the copy received by her/him from the Ld. Tribunal under section 31(5); the new one being brought into existence by the petitioner or at her/his instance without any authentication or certification by the Ld. Tribunal.

Above being the clear stance of this court in this regard let us now probe into two other aspects of the present issue: one - why the points of objection raised by the petitioner as enumerated above fail to have legs to stand upon & two - why instant filing should be considered as a *non-est* one.

Let us take up the points *in seriatim*. Let it clarified herein that in arriving at the following findings this court draws lumen & sustenance from the precedents enlisted hereunder:

- 1. Pragati Constructions Consultants v/s Union of India & others.**
- 2. Continental Telepower Industries Ltd. v/s Union of India & others.**
- 3. Ministry of Youth Affairs & Sports v/s Ernst & Young Pvt. Ltd.**
- 4. Union of India v/s M/s GR-GAWA R (JV).**
- 5. National Agricultural Co-operative Marketing Federation of India Ltd. v/s R. Piyarelall Import & Export Ltd.**

Let us embark on the discussion.

With regards to objection nos.1 to 3 this court is of the clear view that section 34 of the ACA, 1996 indeed does not mandate the filing of original award with a petition thereunder nor does it lay down any procedure to prefer the petition nor does it prevent the petitioner from preferring the petition with an unsigned, unauthenticated, uncertified & unattested photocopy/Xerox copy of the award.

It is so because section 34 of the ACA, 1996 merely gives a relief against an award and provides the grounds on which the same may be challenged. Since it does not speak of any particular procedure for filing or preferring of the award, it neither mandates filing in a particular form nor does it prevent the party from filing the petition with any annexure she/he prefers.

At this juncture, we must be alive to the state of affair that none of the aforesaid position of statutory law “empowers” the petitioner to file her/his petition under section 34 of the ACA, 1996 with any **“random bunch/sheaf of papers”** that an unsigned, unauthenticated, uncertified & unattested photocopy/Xerox copy of the award can at best be called. That is what it is relegated to in absence of any authentication as to its authorship or as to its genuineness. It is preposterous to consider that a provision of law that does not prevent a party empowers her/him to act irresponsibly. It is further audacious to consider that a provision of law that does not prevent a party empowers her/him to prepare a document out of what has been received by him under law (in this case a Xerox copy being made out of the copy received by her/him from the Ld. Tribunal under section 31(5) of the Act.) Any empowering or enabling provision of law must be well-delineated either in a statutory provision or in any precedent law. This court, in its search of the real state of affairs, failed to detect any such statutory provision or any such precedent law that empowers a petitioner under section 34 of the ACA, 1996 to prefer the same with an unsigned, unauthenticated, uncertified & unattested photocopy/Xerox copy of the award.

Moreover, we must not lose sight of the fact that section 34 of the ACA, 1996 speaks of “recourse” to a court of law. Hence, in preferring the petition under section 34 of the ACA, 1996 the party assailing the award passed by the Ld. Tribunal takes recourse to a court of law. In so far as such remedy of the petition is concerned, it appears to be the duty of the petitioner to produce before the court the award that she/he intends to challenge and not a dubious image of the same that one can find in an unsigned, unauthenticated, uncertified & unattested photocopy/Xerox copy of the award. **If the petitioner, by filing the petition under section 34 of the Act, desires the court to issue process against the respondent then she/he is duty bound to produce original document before the court for perusal & consideration.** If not so done it cannot be said that the petitioner has taken the recourse in the right earnest.

Lastly, with regards to objection nos.1 to 3, this court is of the clear opinion (as laid down above) that **in absence of a clear procedural layout for preferring a petition under section 34 of the ACA, 1996 in the provision itself, section 34 of the ACA, 1996 should read and comprehended in conjunction with section 31(5) of the ACA, 1996 that provides for furnishing of copy of the award by the Ld. Tribunal to the parties to the arbitration. Read & comprehended thus, it is abundantly clear that a party to a petition under section 34 of the ACA, 1996 must prefer the petition along with whatever copy has been furnished to her/him by the Ld. Tribunal under section 31(5) [regardless the same being an ink signed one or a photocopy of the signed copy with due authentication thereof or a certified copy or authenticated copy or an attested copy or an e-signed copy along**

with an e-mail of authentication thereof] & not by making a copy out of the same that is unsigned, unauthenticated, uncertified & unattested photocopy/Xerox copy without any explanation for acting as such. This court is of the most humble opinion that such is the interpretation put forth by the Hon'ble Constitutional Courts in the precedents mentioned above in this regard.

Let us move ahead.

With regards to objection nos.4 to 7, this court finds guidance in the judgment of the Hon'ble Delhi High Court in Pragati Constructions Consultants v/s Union of India & others FAO(OS) (COMM) 70/2024 & CM Appl.21475/2024 dated 07.02.2025. Perusal of the observations returned by the Hon'ble Court in the referred precedent makes it abundantly clear once again that none of the points of objection raised by Ld. Counsel for the petitioner has legs to stand upon.

It has been clearly held in the aforesaid precedent that non-filing of impugned award along with a petition under section 34 of the ACA, 1996 is **a fundamental defect that cannot be liberally construed to be a curable, procedural defect.** Paragraph no.67 of the judgment is clear on the point. In fact, paragraph no.67 of the judgment answers paragraph no.66 of the same judgment as raised by Ld. Counsel for the petitioner.

Last but not the least, this court authoritatively declines to accept the analogy of Ld. Counsel for the petitioner that copy means & includes **unsigned, unauthenticated, uncertified & unattested photocopy/Xerox copy without any explanation for non-filing of the copy received under section 31(5) of the Act.** It is held that **in absence of any authentication or attestation or certification made by the Ld. Tribunal under original signature thereof, the award filed along with the petition under section 34 of the ACA, 1996 dated 11.09.2024 is nothing but a "bunch or sheaf of papers" that has no meaning in the eye of the law.** Accordingly, the consequences under law should follow. Ergo, it should be held that **in the instant case there was "non-filing" of award. Non filing cannot certainly be interpreted as mere absence of the award but must be interpreted to include filing of fundamentally defective award that failed to appeal to the judicial conscience.**

In this regard let it also be pointed out that perusal of the case record revealed that the petitioner deemed it fit to file a photocopy/Xerox copy of the letter or correspondence dated 14.06.2024 sent by the Ld. Sole Arbitrator along with a photocopy of the signed award as compliance of section 31(5) of the Act. Hence, it is but logically deducible that the petitioner decided not to file the signed correspondence of the Ld. Arbitrator along with the photocopy of the signed award that he received from the Ld. Arbitrator **without any explanation of any sorts.** It is certainly not the case of the petitioner that he has preferred execution of the part award wherein he has been compelled to deposit the original award. Thus, on this count as well contention of the petitioner falls through granting him no advantage as to limitation.

Fact that no objection on affidavit was raised by the respondent had no legal implication as such as because the question was one of law and a fundamental one that had nothing to do with consent of the adversary. No amount of consent on the part of the adversary had the potential to correct the defect.

Let us now consider last two objections raised by Ld. Counsel for the petitioner.

So far as the last two points were concerned this court failed to find any merit in both. Let us see why.

In the first place, this court being not empowered either by statute law or by precedent law, found itself in no position to grant leave to the petitioner to bring the original on record at a later stage of the proceeding whereas filing of the award was a threshold requirement. Hence, such a prayer meant nothing in contention of law.

And secondly, this court had no hesitation in accepting that it had the power to call for the record of the tribunal for the sake of salutary adjudication of the case but this court declined to accept the contention of the Ld. Counsel for the petitioner that such power, authority & jurisdiction of the court could be called into effect and be invoked for filling up the foundational lacuna of the petitioner. Such expectation of the petitioner was found baseless.

Before drawing curtains let it also be added to the tally that in the instant case the petition under section 34 of the ACA, 1996 was unsupported by the Statement of Truth in terms of O6 R15A of the CPC, 1908 (as the same stood amended by the CCA, 2015). Individually & independent such a defect was certainly a procedural & curable one. But, **held in conjunction & cumulatively with the fundamental defect as to the award itself it transmuted into a fundamental defect that was incurable.** Ergo, this point too sided against the petitioner.

Let us now summarize:

In fine, this court finds itself rather constrained to hold that very filing of instant petition under section 34 of the ACA, 1996 is non-est & void ab initio due to non-filing of the impugned award to all intents & purposes as well as for non-filing of the Statement of Truth under O6 R15A of the CPC, 1908 (as the same stood amended by the CCA, 2015). This court conclusively holds that the unsigned, unauthenticated, uncertified & unattested photocopy/Xerox copy of the award filed along with the petition amounted to "plain non-filing of the award" that was in turn *non-est* in the eye of law.

In light of above observations & findings it is hereby

ORDERED

that instant petition under section 34 of the ACA, 1996 preferred by the petitioner M/s India Builders is held to be *non-est* and is accordingly dismissed without any benefit as to limitation.

Instant case is thus disposed of.

Let it be noted in the relevant register.

Let the order be uploaded on the CIS as per rules. Data Entry Operator attached to this court is directed to do the needful in this regard.

Case record be consigned to the DRR as per rules on expiry of the prescribed period.

Sd/-
(Subhadeep Ray)
Judge, Commercial Court, Siliguri
J.O. Code WB00949