

+ **Ex.P.12/2009**

M/S SRS ENTERTAINMENT LIMITED ...Decree Holder
(Formerly known as M/s SRS Commercial Co. Ltd.)
Through: Mr. Tarun Singhla and Mr K.C. Joshi,
Advocates.

M/S HOME STORES (INDIA) LTD ... Judgment Debtor

And

OMP 460/2009

M/S HOME STORE (INDIA) LTD ... Petitioner

Through: Mr Santosh Kumar with Mr Manish Kumar, Advocates.

M/S SRS COMMERCIAL COMPANY LTD Respondent

Through: Mr Tarun Singhla and Mr K.C.Joshi,
Advocates.

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. Execution was sought of an arbitral award dated 27th October, 2005 stated to be having force of a decree, under the Arbitration Act, 1996. Notice of the execution petition was issued to the judgment

debtor. On 21 April, 2009 it was reported that upon the notice being tendered to the person available at the address of the judgment debtor, the said person after talking to the Managing Director of the judgment debtor on telephone, refused to accept the notice for the reason of the same bearing a different address of the judgment debtor. This court finding the judgment debtor to have avoided service, issued warrants of attachment of the monies lying in the bank account of the judgment debtor to the extent of Rs 6,10,000/- claimed in the execution petition. The said attachment was effected and a cheque for Rs 6,10,000/- received in this court. However, the judgment debtor thereafter preferred OMP under Section 34 of the Arbitration Act 1996 with respect to the arbitral award under execution.

2. The OMP was instituted in this court first on 10th August, 2009. The institution thereof, calculated from the date of the award i.e., 3rd July, 2008 was barred by time. However, it is the plea of the judgment debtor in the said OMP that signed copy of the arbitral award was never delivered to it and it learnt of the award only on inspection of a copy thereof filed in the execution petition.

3. The judgment debtor having denied service of the arbitral award, this court on 12th August, 2009 when the OMP came up first before the court called for the arbitral record. The arbitral record has been received.

4 The arbitral record reveals that the arbitrator under cover of his letter dated 3rd July, 2008 forwarded to both the parties the signed copy of the award. The said letter alongwith the signed copy of the award was dispatched to both the parties by speed post and the arbitral record also contains the speed post postal receipt

evidencing dispatch of the award to both the parties. The address of the judgment debtor at which the said letter was dispatched is the same as the address of the judgment debtor before the arbitrator. The arbitral record does not contain any envelope containing the letter and award returned from the address of the judgment debtor to the arbitrator.

5. The counsel for the judgment debtor(petitioner in the OMP) has contended that the limitation for preferring a petition under Section 34(3) of the Act commences from the date when the party making the petition has received the arbitral award; similarly the word used in Section 31(5) is of delivery of the arbitral award to the parties. It is contended that what was envisaged by the Act was actual delivery of the award; in the present case there is nothing to show that the award was actually delivered to the petitioner and hence the limitation period for the petitioner to institute the petition under Section 34 of the Act with respect to the award cannot be said to have commenced. Reliance in this regard is placed on ***Union of India Vs Tecco Trichy Engineers and Contractors*** (2005) 4 SCC 239.

6. On query as to why the words “received” and “delivery” in Section 34(3) and 31(5) (supra) be not interpreted as deemed receipt and deemed delivery, the counsel has relied upon ***R.K. Vashisht Vs Union of India*** 1993 supp (1) SCC 431.

7. In my view the words “delivered” and “received” cannot be interpreted in a pedantic fashion i.e. of requiring or insisting upon actual delivery of the award to the parties. The practical view of the existing realities and practices has to be taken in this regard. The arbitral tribunal has no machinery of ensuring the actual delivery of

the award to the parties. The parties/party by avoiding delivery/receipt of the award cannot be permitted to hold in abeyance the enforcement thereof against himself/itself. The award is rarely published immediately after the last hearing before the arbitrator, to enable the arbitrator to deliver the same there and then to the parties who may be present before him. In fact in most of the cases the parties themselves may not be present before the arbitrator at all and are represented through *parokars* or advocates. The awards are usually published after some time of the conclusion of the arbitral hearings and the only way in which the arbitral tribunal can deliver / serve the same on the parties is through the post / courier. Once it is held that the arbitral tribunal is entitled to serve/deliver the award on the parties through the medium of post/courier, the law with respect thereto including the presumptions arising under Section 114 of the Evidence Act and Section 27 of the General Clauses Act would get attracted.

8. In the present case it has been established from the arbitral record that the arbitrator dispatched the signed copy of the arbitral award to the parties at the addresses of the parties before the arbitrator. The decree holder received the award pursuant thereto. The postal receipts on the arbitral record of dispatch of signed copy of the award to the two parties are evidence of the same. In the absence of the arbitral record containing anything to show that the article sent under the said postal receipt was returned from the address of the judgment debtor to the arbitrator, the presumption is that the same was delivered in the normal course of postal business.

9. The counsel for the judgment debtor (petitioner in the OMP) has also urged that the presumption under Section 114 of the

Evidence Act and 27 of the General Clauses Act is a rebuttable presumption. There can be no dispute whatsoever with the said proposition. However, the fact remains that the petitioner has not rebutted the said presumption and there is nothing before this court to rebut the presumption of service arising under the law.

10. As far as the judgments (supra) cited by the counsel for the petitioner are concerned, ***Tecco Trichy Engineers and Contractors*** (supra) was concerned with delivery of the arbitral award on the Railways. It was held that for the delivery to be effective, it has to be on the person capable of taking a decision with respect to the award and not on any person in the department. Emphasis in that case was on the department of Union of India/Railways being large and not having personal interest. Similarly, ***R.K. Vashist*** (supra) though relating to service by post, in that case the envelop sent by post had been received back undelivered and it was in that context that it was held that no presumption of service arises. In my view neither of the said judgments are apposite to the facts of the present case.

11. Be that as it may, the counsel for the judgment debtor (petitioner in the OMP) has also been heard on the merits of the petition to determine whether otherwise a case for issuance of notice or of interference by this court under Section 34 is made out.

12. The disputes between the parties arise out of an agreement to lease executed by the parties and containing an arbitration clause. The proposed lease was with respect to the space in a mall being developed by the respondent at Faridabad and in which the petitioner wanted to setup its operations. The admitted position is that neither any lease came into existence nor was the judgment

debtor ever put into possession of the premises. The judgment debtor claimed Rs. 32,88,825.72p from the decree holder towards refund of security deposit made with the decree holder and for losses suffered by the judgment debtor for the alleged failure of the decree holder to deliver possession of the space agreed to be let out as agreed. The decree holder also made claims against the judgment debtor, again on account of breach of the agreement and resultant loss of rent.

13. The arbitrator has dismissed the claims of the judgment debtor and allowed the claims of the decree holder and after adjusting the amount of the security deposit made by the judgment debtor with the decree holder directed the judgment debtor to pay the balance sum of Rs 5,35,283/- with interest to the decree holder.

14. It was inter alia the case of the judgment debtor before the arbitrator that the time for delivery of possession was of the essence, that the decree holder failed to deliver the possession and hence the judgment debtor became entitled to its claims aforesaid from the decree holder.

15. The arbitrator has found that the decree holder had been offering possession of the premises to the judgment debtor and the judgment debtor had at one stage though represented that it will be taking over possession, failed to take over the possession of the premises. The arbitrator has also found that at the time of execution of the agreement to lease the decree holder was ready to deliver possession of the premises to the judgment debtor for fitments as agreed even though the completion certificate was issued a little thereafter. The arbitrator has in this regard also noticed the evidence qua the other occupants of the mall. The arbitrator found

that it was the judgment debtor who changed its mind about taking on rent the premises in the said mall and for this reason only neither made further payments to the decree holder nor took possession of the premises as it was required to take in terms of the agreement. The arbitrator thus found the judgment debtor to be in breach of the agreement and for this reason dismissed the claims of the judgment debtor for losses on account of breach by the decree holder. The arbitrator nevertheless also discussed the evidence led by the judgment debtor in support of its losses and held that there was nothing to show that the judgment debtor had incurred any expenses with a view to commence business/operations in the said mall.

16. On the plea of the judgment debtor of time for delivery of possession being the essence of the contract, the arbitrator held on an interpretation of the various clauses of the agreement to lease that though the same stipulated the time for delivery of possession but there was nothing to show that such time was agreed to be of the essence of the contract. The arbitrator in this regard found that even the date stipulated was not fixed/absolute and was subject to change and the agreement itself provided for consequences of delay, if any, in delivery of possession i.e., of extension of the term of the lease.

17. The counsel for the judgment debtor (Petitioner in OMP) has laid much emphasis on the finding of the arbitrator of time being not of the essence. The contention is that since a particular date by which possession was expected to be given was mentioned, the same made time the essence of the contract. I am unable to agree with the contention. The contract was with respect to the immovable property and the presumption is that time is not of the essence. The

contract does not even state that the intention of the parties was that time was of the essence. There is nothing to indicate that the judgment debtor at any time called upon the decree holder to deliver the possession on the alleged date or notified the decree holder that upon failure to so deliver possession the judgment debtor shall void the agreement or claim any damages with respect thereto. The award contains cogent reasons for the conclusion arrived at by the arbitrator.

18. As far as the factual finding of the arbitrator of breach of the agreement being on the part of the judgment debtor is concerned, the same is not interferable in these proceedings. Similarly, no fault can be found with the award allowing the counter claims of the decree holder for losses suffered on account of breach of contract by the judgment debtor.

19. I thus do not find any case for issuance of notice of the petition under Section 34 of the Act. The same is dismissed. Upon dismissal of the OMP under Section 34 of the Arbitration Act, the decree holder has become entitled to the monies attached in execution. The same were ordered to be kept in a fixed deposit for one year. The decree holder is at liberty to either withdraw the said monies on expiry of the term of the fixed deposit or withdraw the same immediately and in which case the registry to break/ have discharged the FDR made and release the amounts realized therefrom to the decree holder. With these directions, the execution is also disposed of.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**September 16, 2009
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