

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

+OMP No.145/2008 (U/s.34 of the Arbitration Act, 1996) & IA No.2787/2008 (of the petitioner u/s.34 (3) of the Act)

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Date of decision: August 17, 2009

M/s. Rajive Stock Brokers Limited Petitioner

Through: Mr. Jos Chiramel with Mr. R.K. Tripathi,
Advocates

Versus

Smt. Saroj Bala Respondent

Through: M.K. Verma, Advocate

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1 The petition under Section 34 of the Arbitration Act, 1996 with respect to ex-parte (against petitioner) arbitral award dated 15th December, 2006 is for consideration. The petition has been instituted on 3rd March, 2008. The petition is accompanied with IA No.2787/2008 under Section 34(3) of the Act. It is the case of the petitioner that the petitioner had not received any copy whatsoever, lest signed copy, of the award from the arbitrator and learnt of the award aforesaid for the first time only on 29th February, 2008 and immediately where after the petition was filed.

2 The grounds set out in the OMP are also inter alia under Section 34(2)(a)(i) and (iii) of the Act i.e. of the petitioner having not

been given proper notice of the appointment of the arbitrator or of the arbitral proceedings and thus being under in-capacity and or unable to present its case before the arbitrator.

3 Since the grounds in the application are the same as inter alia in the OMP, the two have been heard together.

4 The petitioner at the relevant time was a Stock Broker Member of National Stock Exchange of India Ltd. (NSE) and the respondent was a constituent of the petitioner. Disputes and differences having arisen between the parties, Col. Gujral G. Singh (Retd) was appointed as the arbitrator in accordance with the byelaws of NSE; he published an award dated 25th February, 2002; by the said award the claims, of the petitioner against the respondent as well as of the respondent against the petitioner were dismissed.

5 The respondent herein preferred OMP No.149/2002 in this court under Section 34 of the Act inter alia with respect to the award of dismissal of its claims. The petitioner herein did not prefer any proceedings with respect to the said award.

6 Notice of OMP No.149/2002 was issued by this court to the petitioner herein. The address of the petitioner in the proceedings before the Arbitrator Col. Gujral G. Singh was of 35 DSE Building, 3 and 4/4B Asaf Ali Road, New Delhi-2. The same address was given in the memo of parties in OMP No.149/2002 also. The notices sent by this court at the said address are informed to have been returned unserved with the report that the petitioner had left the said address. Even though the counsel for the respondent has during the hearing not controverted the averments of the counsel for the

petitioner with respect to the service of the petitioner in OMP No.149/2002, by way of abundant caution, at the time of hearing, the file of OMP No.149/2002 has also been called to this court and perused for the said purposes.

7 It is noted in pencil in the ordersheet dated 9th May, 2002 of OMP No.149/2002 that the petitioner herein who was the respondent No.1 therein was unserved and had since shifted to Noida. The respondent was on 16th July, 2002 directed by this court to take fresh steps and furnish fresh address of the petitioner herein and on which notice was ordered to be issued to the petitioner. The same order was reiterated on 13th November, 2002 also.

8 The counsel for the petitioner has argued and it is not disputed by the counsel for the respondent that pursuant to the said directions, the respondent herein furnished the address of the petitioner at C-131, Second Floor, Sector-49, Noida. Notice was sent to the petitioner at the said address for 12th March, 2003. The service report from the said address was awaited. On 12th March, 2003 the counsel for the respondent herein sought time to make an application for substituted service of the petitioner herein and on such application being made, on 7th April, 2003 the petitioner was ordered to be served by substituted service. The petitioner failed to appear inspite of service and was vide order dated 17th September, 2004 ordered to be proceeded against ex-parte. OMP No.149/2002 was allowed vide order dated 11th March, 2005. The award made by the arbitrator in so far as the same rejected the claims of the respondent was set aside and justice P.N. Nag (Retd) appointed as the arbitrator. It was further ordered that since the petitioner was not represented in OMP No.149/2002 before this court, the

arbitrator appointed by the said order shall issue notice to the petitioner before proceeding further.

9 The arbitral proceedings thereafter commenced before the Arbitrator Justice P.N. Nag (Retd); he presumably on the basis of the memo of parties of OMP No.149/2002 wherein the address of the petitioner was given as that of DSE Building Supra, on 23rd April, 2005 issued notice to the petitioner for 9th July, 2005 at the said address. On 9th July, 2005 the arbitrator recorded that the notice sent to the petitioner had been received back with the report that the petitioner had sold the property and is not available at that address. The arbitrator in view of the fact that the notice had not been served on the petitioner in OMP No.149/2002 also, on 9th July, 2005 itself directed the petitioner to be served by publication in the English Edition of the newspaper Hindustan Times for 24th September, 2005. However the said publication was not carried out, as noted in the order of 24th September, 2005. The arbitrator however without recording any reason, on that date ordered the petitioner to be served in the Hindi Edition of the newspaper Tribune at the address of DSE Building only for 18th November, 2005. The said publication was carried out and the arbitrator held the petitioner to have avoided notice of service and on 18th November, 2005 proceeded ex-parte against the petitioner. In these circumstances the ex-parte award under challenge was published.

10 The arbitral record shows that the signed copy of the award was forwarded by registered post AD by the Arbitrator to the petitioner again at the address of DSE Building. The arbitral record contains the envelope containing the signed copy of the award returned to the arbitrator from the said address with the postal

endorsement dated 19th December, 2002 of “left without address”.

11 Neither does thus the record shows nor is it the case of the respondent that any further attempts were made to serve the petitioner with the signed copy of the award.

12 The petitioner claims to have learnt of the arbitral award upon steps being taken by the National Stock Exchange for recovery of the amount of the award from the security deposit of the petitioner with the NSE, on being approached by the respondent.

13 In the aforesaid circumstances the counsel for the petitioner has contended that the respondent has acted fraudulently; the respondent inspite of knowledge of the Noida address aforesaid of the petitioner, allowed the arbitrator to send notice to the petitioner at the address of DSE Building which as per the orders in OMP No.145/2008 as well as the notation on the process issued by the arbitrator the petitioner had left long back.

14 The petitioner has along with the petition also filed the original notice of OMP No.149/2002 issued by this court to the petitioner at the Noida address aforesaid for 12th March, 2003. The petitioner has also filed documents to show notice given by it to NSE of change of its address as well as notices of change of address given to Registrar of companies Delhi with which the petitioner is registered as a Private Limited Company. It is thus contended that the award is liable to be set aside on the grounds aforesaid.

15 Per contra the counsel for the respondent has urged that since the petitioner inspite of service at the Noida address also had failed

to appear before this court in OMP No.149/2002, the respondent presumed that the petitioner was not available at the said address also and thus allowed the notices of arbitration proceedings to be served at the address of DSE Building which was the last known address of the petitioner. It is further contended that no public notice or intimation of change of address was given by the petitioner to the respondent and the petitioner has also not filed any documents to show its precarious financial condition for the reason whereof it is contended that the petitioner inspite of service of notice of OMP No.149/2002 failed to contest the same. Attention is also drawn to Para 12 of the OMP wherein it stands admitted that the petitioner in fact had before the notice issued by the arbitrator Justice P.N. Nag (Retd) had left the address of C-131, Second Floor, Sector 49, Noida also and moved to G-109, Second Floor, Sector-41, Noida. It is thus contended that no purpose in any case would have been served even if the notice of arbitral proceedings had been given at the address of C-131, Second Floor, Sector 49, Noida. Lastly, it is contended that the respondent has in terms of the order in OMP No.149/2002 paid the entire fee of Rs.1 lac of the arbitrator and would suffer unnecessarily if made to bear the charges of arbitration again.

16 The counsel for the petitioner has in rejoinder urged that the action of the petitioner being fraudulent, no benefit of the fee of the arbitrator borne by the respondent can be claimed. It is also contended that since the award of Col. Gujral G. Singh has been set aside, even the part rejecting the claims of the petitioner is deemed to have been set aside.

17 I have perused the record of OMP No.149/2002. I do not find

therein anything to show that the notices sent to the petitioner at the address of C-131, Second Floor, Sector-49, Noida were received back with any endorsement of the petitioner being not available at the said address. In fact the service report from the said address was awaited when the respondent applied for substituted service and which was allowed. In fact for substituted service also (i.e. in the newspaper) the respondent inter alia gave the address of C-131, Second Floor, Sector-49, Noida of the petitioner and which leads me to believe that notwithstanding service report from the said address being awaited, according to the respondent, the petitioner continued to be available at the said address only. Further, the said address had been given by the respondent itself and it is presumed that it must have been so given after inquiry and satisfying itself that the petitioner was available at said address.

18 The respondent, inspite of the same neither disclosed the said address of the petitioner to the arbitrator Justice P.N. Nag (Retd) nor made any attempts for service on the petitioner of the notice of the arbitral proceedings as directed by this court, at the said address.

19 That being the position, in my view, the case of the petitioner having not been given proper notice of appointment of the arbitrator or of arbitral proceedings within the meaning of Section 34 (2) (a) (iii) is made out. In my view, the action of the petitioner of inspite of service having not appeared before this court in OMP No.149/2002 would not come in the way of setting aside of the award on the said ground in as much as the petitioner was expressly directed to be served with the notice, inspite of having been proceeded ex-parte before this court in OMP No.149/2002.

20 Similarly, the factum of the petitioner having changed the said address also would not be material. Had the respondent made any inquiries from the said address, the respondent could have learnt of the next address also of the petitioner. I also find merit in the contention of the counsel for the petitioner that had the respondent made any inquiries from NSE of which the petitioner continued to be the member, the respondent could have found out the correct / latest address of the petitioner.

21 It cannot be lost sight of that the petitioner is a Private Limited Company registered with the Registrar of Companies. It is admitted position that the address of the petitioner with the Registrar of Companies also as on that date was not of DSE Building at which address attempts for service was made but was some other address. No efforts was made to serve the petitioner at the said address also. Section 51 of the Companies Act, 1956 also provides for service of documents on the company at the address of its registered office. No such service has been effected in this case.

22 However the contention of the counsel for the respondent of the respondent having had exclusively borne the fee of the earlier arbitrator has merit. Had the petitioner appeared in OMP No.149/2002 notice whereof was admittedly served upon it, it would have know of the appointment of the arbitrator and could have participated in those proceedings and which would have not have led to the fees of those proceedings being wasted. In the circumstances, while setting aside the award for the reasons aforesaid, it is deemed appropriate to direct that the fee of this round of arbitration shall be borne by the petitioner only, subject to final award as to costs of arbitration.

23 The award dated 15th December, 2006 is thus set aside. The respondent has indicated intention to resume the arbitral proceedings. To avoid any hick up in service this time, the parties are directed to appear before Justice P.N. Nag (Retd) arbitrator earlier appointed, on 29th August, 2009 with prior appointment. The fee earlier fixed of Justice P.N. Nag is maintained for this round of proceedings also, i.e. of Rupees One Lakh, to be borne by the petitioner, subject to the final award of costs as aforesaid. Since the date for appearance has been fixed in this order in the presence of the counsel for the parties, no further notice would be required to be given by the arbitrator to either of the parties and if either of the parties fail to appear before the arbitrator, they will do so at their own peril. The arbitral record received in this court be also returned to the arbitrator.

**RAJIV SAHAI ENDLAW
(JUDGE)**

August 17, 2009
J