

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

+OMP No.470/2008 (U/s.34 of the Arbitration Act, 1996) & IA No.10783/2008 (U/s.5 of the Limitation Act)

% **Date of decision: 16th September, 2009**

M/S. JAY YUSHIN LTD.

....Petitioner

Through: Mr. Sanjiv Kakra with Mr. Amit Punj
and Mr. Umesh Gulati, Advocates

Versus

SH. SUDHIR GOEL

... Respondent

Through: Mr. Ajay Verma with Mr. Amit Mehra,
Advocates

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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 Petition under Section 34 of the Arbitration Act, 1996 is preferred with respect to the arbitral award dated 25th April, 2008. The petition is accompanied with an application (IA No.10783/2008) for condonation of delay of 28 days in preferring the petition. The respondent has contested the application for condonation of delay.

2 The petitioner seeks condonation of delay on the ground that the signed copy of the award was not sent by the arbitrator to the petitioner but was instead sent by the arbitrator by courier at the address of the counsel for the petitioner before the arbitrator; the same was received by the old and ailing mother of the counsel for

the petitioner who did not even inform her son about the same; the petitioner thus remained under the impression that the award had not been published. It is further pleaded that the respondent sent a letter to the petitioner enclosing therewith a pay order in payment of the amount awarded by the arbitrator to the petitioner against the respondent; the said letter also was received by a peon in the Delhi office of the petitioner company who also did not inform his superiors of the same and the said letter was ultimately discovered on 19th August, 2008 whereafter inquiry was made and the petition challenging the award filed.

3 The counsel for the respondent has contested the application for condonation of delay on the ground that the same is replete with false averments. From the copies of the records obtained from the office of the arbitrator it is shown that the arbitrator had sent the award not only to the counsel for the petitioner but also at the address of the petitioner and the postal records are also shown to disclose that both were duly received by the addressees. It is also disputed that the envelope sent at the address of the advocate for the petitioner was received by the mother of the said advocate.

4 The counsel for the petitioner has fairly stated that in the face of the documents produced by the respondents he would leave the matter of condonation of delay to the discretion of the court.

5 In the circumstances the counsels have also been heard on merits.

6 The respondent was an employee of the petitioner. The claims of the petitioner against the respondent were for breach of contract

for leaving the employment of the petitioner prior to the agreed term and for recovery of the amounts which the respondent had agreed to pay to the petitioner in the event of such breach.

7 The counsel for the petitioner has drawn attention to the arbitral award to show that the arbitrator has decided all material issues in favour of the petitioner. It is contended that the arbitrator has found that the petitioner had incurred a sum of Rs.17,48,873/- in the training of the respondent in Japan and which the respondent had agreed to reimburse to the petitioner in the event of leaving the employment of the petitioner before the stipulated term. The counsel has also contended that the arbitrator has held the respondent to be in breach of the agreement. It is argued that on the basis of the said two findings of the arbitrator, the petitioner had become entitled to an award not only for Rs.17,48,873/- but also for reimbursement of the entire emoluments paid to the respondent during the term of his employment with the petitioner, as agreed, together with interest as agreed. The claims of the petitioner against the respondent were for over Rs.66 lacs. The arbitrator has awarded a sum of Rs.5 lacs only to the petitioner and the counsel for the respondent points out that the pay order for the said amount sent by the respondent as aforesaid to the petitioner has been encashed.

8 The arbitrator has while computing the damages to which the petitioner has become entitled to for breach of contract by the respondent held that since the respondent had served the petitioner for part of the term agreed, the expenses incurred by the petitioner in training of the respondent abroad have to be reduced proportionately. A sum of Rs.8,16,140/- was thus found by the arbitrator to be due on this account. However the arbitrator has

further held that the petitioner has not proved any loss to have been suffered by the petitioner on account of breach of contract by the respondent. The arbitrator has thus awarded lump sum damages of Rs.5 lacs to the petitioner as found by the arbitrator to be reasonable and fair compensation for the reason of the respondent in any case having benefited from the training abroad imparted by the petitioner to the respondent.

9 I have enquired from the counsel for the petitioner as to how the assessment of damages by the arbitrator would be challengeable under Section 34 of the Arbitration Act 1996. The counsel has contended that the arbitrator cannot award damages at his ipsi-dixit and once having held the amount of at least Rs.8,16,140/- to be due towards actual expenses incurred in the training of the respondent, the arbitrator has not given any justification for reducing the amount.

10 The only test to be applied by this court is whether the award is contrary to substantive law. As far as the same concerned, reference can be made to ***Fateh Chand Vs. Balkishan Das*** AIR 1963 SC 1405 holding that even where the damages are stipulated in the contract, the same become due only upon loss being proved. Though a slight deviation was made in ***ONGC Vs. SAW Pipes Ltd.*** AIR 2003 SC 2629 but in that case the parties had at the time of entering into the agreement satisfied themselves that the damages stipulated would be the damages which would be suffered in the event of breach and the computing of damages being not possible. No such case has been made out in the present case and as such the law laid down in ***Fateh Chand*** (Supra) would apply and which had been followed by the arbitrator. The arbitrator following the said

law held that there is breach but no loss has been established. Thus it cannot be said that the award is contrary to the substantive law or that the conclusion in the award was such which no reasonable person could arrive at.

11 In view of the above and for the reason of the facts concerning the application for condonation of delay, the petition and the application are dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

September 16th, 2009
J