

* IN THE HIGH COURT OF DELHI AT NEW DELHI
#25
+ O.M.P. 310/2011

NATIONAL HIGHWAYS AUTHORITY
OF INDIA

..... Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate
with Ms. Meenakshi Sood and Mr.
Mukesh Kumar, Advocates.

versus

M/S BHAGEERATHA ENGINEERING LTD Respondent

Through: Mr. Amit George with
Ms. Rajshree Jain, Advocates.

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER
20.10.2011

I.A. No. 6587 of 2011 (for condonation of delay)

For the reasons stated therein, the application is allowed. The delay in re-filing the petition is condoned.

The application is disposed of.

O.M.P. 310/2011

1. This petition is by the National Highways Authority of India ('NHAI') under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') challenging an Award dated 20th March 2010 further amended by an Award dated 9th September 2010 passed by the Arbitral Tribunal "to the extent it has been held therein under Claim No. 2 that where the quantity executed is less than 75% of the BOQ, the Claimant is entitled to compensation towards loss of profit due to reduction in quantity beyond 25% of BOQ and the amount awarded to the Claimant on that ground by way of the amended Award, as also to the extent that costs of Rs. 5 lakhs have been imposed against the Applicant and in favour of the Respondent by the Ld. AT."

2. At the very first hearing on 27th April 2011, this Court noted the objection raised by the Respondent claimant, who appeared on advance notice, that the petition was barred by limitation.

3. The facts relevant for the above purpose are that in the cause title of the proceedings before the Arbitral Tribunal the address of the NHAI was that of its corporate office, i.e., G-5 and G-6, Sector 10, Dwarka, New Delhi-110065. Incidentally, this is the address indicated in the memo of parties filed with the present O.M.P. No. 310 of 2011. It appears that after the Award was pronounced by the Arbitral Tribunal on 20th March 2011 certified copies thereof were sent by registered post by the Arbitral Tribunal to both parties, i.e. the NHAI as well as the Respondent claimant, to their respective addresses as appearing in the cause title of the case in the arbitral proceedings.

4. The Respondent filed an application before the Arbitral Tribunal thereafter under Section 33(4) of the Act. Notice on the said application was served on counsel for the NHAI on or around 26th April 2010. On 17th May 2010 counsel for the NHAI filed an application before the Arbitral Tribunal in which it was claimed that the NHAI had till then not received a copy of the Award. Accordingly, NHAI requested the Arbitral Tribunal for a copy of the Award.

5. This application was listed before the Arbitral Tribunal on 31st May 2010. The Arbitral Tribunal rejected the said application by the following order, which was passed in the presence of learned counsel for the parties:

“The Respondent’s Counsel had sent an application dated 17th May 2010 pleading that the copy of the Award had not been supplied to the Respondent and as such a copy may be given to the Respondent at the earliest. We have gone through the records. Signed copies of the Award were sent to both the parties by Regd. AD Post. The postal receipts as well as Ads are available on our records. Therefore, the plea of the Respondent that a copy was not sent to it cannot be accepted. The prayer for supplying one more copy is declined.

The claimant has moved an application u/s 33(4) of the A&C Act, 1996

for determination of the amounts due under the Award to claimant. Copy has been given to Ld. Counsel for the respondent. Response to the quantifications as made by the claimant be filed within 4 weeks with copy to Ld. Counsel for the claimant, who may file a rejoinder thereto within 2 weeks thereafter. The application would be taken up for consideration on 05th August 2010 at 5:00 P.M.

The parties are directed to deposit arbitration fee in equal share for 3 hearings for each of the Arbitrators @ Rs. 20,000/- per hearing. The fee be paid within 4 weeks. TDS certificates for the earlier payment be also supplied to the Arbitrators within 4 weeks.”

6. The Arbitral Tribunal passed an amended Award on 9th September 2010. It appears that the Arbitral Tribunal sent a copy of the amended Award to the parties at their respective addresses as appearing in the memo of parties by registered post on 1st October 2010. It is the case of NHAI that a copy of the amended Award, although may have been received at its corporate office at Delhi, was not received by the Project Implementation Unit (‘PIU’) of the NHAI at Salem in Tamil Nadu. A letter dated 7th December 2010 was written by the Project Director of the NHAI at Salem to the Arbitral Tribunal enclosing a written request on behalf of the NHAI for supply of a formal copy of the amended Award dated 9th September 2010. In the enclosed written request, in para 2, it was stated that the NHAI had been informed by the Respondent through its representative that the Tribunal had published an amended Award on 9th September 2010 and that the Respondent had been furnished a copy thereof. There was no indication as to when the NHAI was so informed by the Respondent. It was further stated that the NHAI had not received any formal communication or a copy of the amended Award in its office.

7. In reply to the said letter dated 7th December 2010, the Secretary to the Presiding Arbitrator wrote a letter dated 13th December 2010 to the Project Director of the NHAI at Salem as under:

“Sir,

Kindly refer to your letter No. 2130 dated 7th December 2010 along with written request for forwarding a formal copy of the

Amended Award dated 9.9.2010 to the respondent. I am directed to inform you that the signed copy of the Amended Award dated 9.9.2010 was sent to you as well as the opposite party through Regd. Post vide receipt dated 1st October 2010. It is presumed that you must have received the signed copy of the Amended Award. However, without prejudice to the respective rights of the parties in regard to the limitation for filing objections I am enclosing a True Copy of the Amended Award dated 9th September 2010. This True Copy has been certified by the Presiding Arbitrator, Hon'ble Mr. Justice R.C. Chopra (Retd.).

Thanking you,

Yours faithfully,
Sd/-
Secretary to the
Justice R.C. Chopra (Retd.)
Presiding Arbitrator"

8. According to the NHAI, the above letter was received along with a copy of the amended Award by it on 20th December 2010. It is contended that the present petition was filed on 15th March 2011 within a period of three months from the date of receipt of the amended Award and therefore was within limitation in terms of Section 34(3) of the Act.

9. The Respondent has, however, denied the above assertion. The Respondent made an application under the Right to Information Act, 2005 to the Minto Road Post Office at New Delhi and received a reply from the said Post Office by a letter dated 1st March 2011 that the registered letter sent by the Tribunal to the NHAI at its corporate office at New Delhi enclosing a copy of the amended Award dated 9th September 2010 was delivered at that address on 4th October 2010. Accordingly, it is contended by the Respondent that the present petition was filed beyond a period of three months after 4th October 2010 and is therefore clearly barred by limitation in terms of Section 34(3) of the Act. The second contention is that, in any event, NHAI seeks to challenge not merely the amended Award dated 9th September 2010 but the main Award dated 20th March 2010. Consequently, the present petition is clearly barred by limitation.

10. Mr. Sudhir Nandrajog, learned Senior counsel appearing for NHAI relied on the

judgment of the Supreme Court in *Union of India v. Tecco Trichy Engineers and Contractors AIR 2005 SC 1832* to contend that for the purposes of Section 34(3) as well as Section 31(5) of the Act the Award should be taken to have been delivered to NHAI only when it was in fact received by the concerned officer of the NHAI who was “directly connected with and involved in the project in question” and “who is control of the proceedings before the Arbitrator.” He also relied on the decision of this Court in *National Projects Constructions Corporation Ltd. v. Bundela Bandhu Constructions Company AIR 2007 Del 202* which followed the decision in *Tecco Trichy Engineers and Contractors*. It is submitted that in the present case, some of the correspondence exchanged between the Arbitral Tribunal and the NHAI was with its project office at Salem and that notwithstanding the memo of parties in the proceedings before the Arbitral Proceedings showing the address of NHAI as its corporate office at New Delhi, it was incumbent on the Arbitral Tribunal to ensure that the Award was sent to NHAI’s project office at Salem. Alternatively, it is submitted that even if it were to be assumed that a certified copy of the Award was delivered to the NHAI at its corporate office in Delhi, the limitation for the purpose of Section 34 (3) of the Act would begin to run only from the time the amended Award was further delivered to NHAI’s project office at Salem.

11. Mr. Amit George, learned counsel appearing for the Respondent, on the other hand, points out that despite the application by the NHAI before the Arbitral Tribunal being rejected on 31st May 2010, thereby negating its plea that it had not received a copy of the main Award dated 20th March 2010, the Petitioner never wrote to the Arbitral Tribunal informing it that the proper address for dispatch of the certified copy of the Award was not its corporate office but the project office at Salem. He further submits that even before this Court, both in the memo of parties as well as in the affidavit in support of the petition, the address of the NHAI is indicated as its corporate office at Delhi. The confirmation from the postal authority also is to the effect that the amended Award dated 9th September 2010 was received in the corporate office of NHAI at New Delhi on 4th October 2010. Consequently, there is no doubt that the present petition was barred by limitation in terms of Section 34 (3) of the Act.

12. In order to appreciate the above submissions, it is necessary to refer to the relevant statutory provisions. Under Section 31 (5) of the Act, once an arbitral Award is made “a signed copy shall be delivered to each party.” This is no doubt an obligation on the

Arbitral Tribunal. In the present case, as is evident from the order dated 31st May 2010 passed by the Arbitral Tribunal, once the main Award dated 20th March 2010 was passed by it, certified signed copies thereof were dispatched to the NHAI as well as the Respondent by registered post with acknowledgement due. The Arbitral Tribunal has further stated in the order dated 31st May 2010 that the postal receipt as well as the acknowledgement due card was available on its record. The Arbitral Tribunal rejected the plea of the NHAI that a copy of the Award dated 20th March 2010 was not sent to it. There was a presumption that the Award dated 20th March 2010 had been delivered in due course to the NHAI at its corporate office at New Delhi.

13. The memo of parties in the arbitral proceedings, as is evident from the first page of the main Award as well as the amended Award, indicates the address of the NHAI to be its corporate office at New Delhi. As rightly pointed out by learned counsel for the Respondent the memo of parties in the present petition as well as the affidavit in support of the petition clearly indicates the address of the NHAI to be its corporate office at New Delhi. In the absence of the NHAI informing the Tribunal that the proper address for dispatch of all communications and in particular certified copies of the Award was its project office at Salem, the Tribunal would have had no means to know that the copies of the Award ought not to have been sent to NHAI's corporate office at New Delhi. There is an obligation on the parties to a dispute to inform the forum in which such proceedings are pending of the correct address to which copies of the Award or proceedings should be sent. The Arbitral Tribunal is not required to make enquiries as to the proper address of the party for the purposes of communication. It has to go by the address that appears in the memo of parties or cause title of the case before it. In the present case, therefore, the Arbitral Tribunal fully complied with the requirement of Section 31 (5) of the Act when it sent the Award as well as the amended Award to the corporate office of NHAI at New Delhi.

14. Section 34 (3) of the Act reads as under:

“Section 34 Application for setting aside arbitral award:

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under

section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

15. The learned Senior counsel for the NHAI is right in contending that the period of limitation would begin to run only from the date the certified copy of the amended Award is received by a party to the arbitration proceedings before the Arbitral Tribunal. The key phrase in the above provision is “the date on which the party making that application had received the arbitral award.” In the considered view of this Court, the ‘party’ for the purposes of Section 34 (3) of the Act is no different from the ‘party’ for the purposes of Section 31 (5) of the Act. In both provisions, the word ‘party’ is to mean that party whose address is indicated in the memo of parties or the cause title of the proceedings before the arbitral proceedings.

16. In the present case, after the amended Award dated 9th September 2010 was sent to its project office at Salem, NHAI on 31st December 2010 filed an application under Section 33 of the Act. The Arbitral Tribunal rejected the said application on 10th February 2011. However, learned Senior counsel for the Petitioner very fairly stated that the NHAI cannot take advantage of the dismissal of its application under Section 33. In other words, the period of limitation would begin to run from the date on which the amended Award dated 9th September 2010 was delivered to NHAI and would not get postponed to 10th February 2011.

17. In the present case at no stage did the NHAI inform the Arbitral Tribunal that the address of NHAI as appearing in the memo of parties or the cause title in the arbitral proceedings was not the address to which the copies of the Award or the amended Award had to be sent. Absent such a specific communication by the NHAI to the Arbitral Tribunal, the dispatch of the certified copy of the Award as well as of the amended Award by the Arbitral Award to the NHAI at its corporate office at New

Delhi by registered post was sufficient compliance with the requirements of both Sections 31(5) as well as 34(3) of the Act. It is not possible to accept the contention of learned Senior counsel for NHAI that for the purpose of Section 34(3) of the Act the limitation would begin to run only from the date on which the project office of the NHAI received a copy of the amended Award dated 1st September 2010. As explained hereinbefore, the amended Award dated 9th September 2010 was received in Delhi office on 4th October 2010 itself and that would be the relevant date for the purpose of commencement of limitation under Section 34(3) of the Act.

18. The facts of the decision in *Tecco Trichy Engineers and Contractors* were that the Award in that case was sent to the General Manager, Southern Railway on 12th March 2001. It was received by the Chief Engineer who was also the Chief Project Manager on 19th March 2001. It was opined by the Supreme Court that for the purposes of Section 34(3) the limitation began to run only from the date on which the Chief Engineer received a copy of the Award passed by the Tribunal. Since the Railways was a large organization containing divisional heads, it was only the departmental head, which in that case was the Chief Engineer, who was likely to know whether the arbitral Award was adverse to the departmental interests. He was the person directly connected with and involved in the proceedings. However, as will be noticed, the facts in the present case are different.

19. The distinguishing feature of the present case is that there were applications made by the parties under Section 33 of the Act which would show that both parties knew of passing of the impugned Award. In the present case, however, the NHAI could not have pleaded that it did not know of passing of the main Award after it received a copy of the application filed by the Respondent under Section 33 of the Act on or around 26th April 2010. It also knew that the main Award was in fact sent to its Delhi office because the order dated 31st May 2010 was passed by the Tribunal in the presence of its counsel. The Arbitral Tribunal rejected the plea of NHAI that it had not sent the NHAI a copy of the Award. Even thereafter, the NHAI made no effort to inform the Arbitral Tribunal in writing that the amended Award or order, which it knew was going to come about as a result of the application filed by the Respondent under Section 33, should be sent to its project office at Salem.

20. For the aforementioned reasons, this Court finds that the present petition is barred by limitation in terms of Section 34(3) of the Act. The petition is accordingly dismissed with costs of Rs. 5,000/- which will be paid by the NHAI to the Respondent within four weeks.

S. MURALIDHAR, J

OCTOBER 20, 2011

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