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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.05.2012

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FAO(OS) Nos. 449/2007 & 451/2007

BUDHIRAJA MINING & CONSTRUCTIONS LTD. Appellant

Vs

IRCON INTERNATIONAL LTD. & ANR.

..... Respondents

Advocates who appeared in this case:

For the Appellant: Mr Anil Seth & Mr M.K. Pathak, Advocates.

For the Respondents: Mr K.R. Gupta & Mr Nitin Gupta, Advocates.

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

SANJAY KISHAN KAUL, J (ORAL)

1. The respondent awarded the contract to the appellant for carrying out earth work for railway formation in construction of minor bridges in pursuance to agreement dated 06.12.1990. The contract contained an arbitration clause and in view of disputes arising inter se the parties, the appellant invoked the arbitration clause vide letter dated 01.04.1990. On account of failure on the part of the respondent to appoint an arbitrator proceedings were filed in court which culminated in the appointment of Justice P.K. Bahri (Retd.) as the sole arbitrator vide order dated 17.01.2001. The arbitrator made and published an award dated 23.05.2002 awarding a sum of Rs 6,04,807/- in favour of the appellant to be paid within two months from the date of the award failing which it was to carry interest at the rate of 12% per annum. Parties were directed to bear their own cost.

2. It is the case of the appellant that the award contained clerical mistakes which were required to be corrected and thus they filed an application under Section 33 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) dated 18.06.2002. The correction was sought in the award qua the amount allowed to the appellant for the quantity of work stated to be not recorded in the measurement book. The application is stated to have been sent by UPC to the address of the arbitrator with a copy sent to the respondent. The learned arbitrator was not available in Delhi from 18.06.2002 to 28.06.2002, and though the office and residence of the arbitrator is stated to have remained opened the application was not received in the office. Another communication was sent by the appellant dated 22.07.2002 once again under UPC which was received by the arbitrator making a reference to the earlier application dated 18.06.2002 and the fact that it was pending disposal.

3. The respondent, being desirous of releasing the payment as per the award dated 23.05.2002, informed the appellant telephonically, accordingly. The payment was tendered to the appellant and was received on 23.07.2002. The receipt executed on the letter head of the appellant is in the following terms:

“Received cheque No. 426386 dated 22.07.2002 for Rs. 15,71,982/- (Rupees Fifteen lakhs seventy one thousand nine hundred eighty two only) with thanks from M/s IRCON International Ltd. against the award dated 23.05.02 of Case no. 203/2001 pronounced by Hon’ble Justice P.K. Bahri (Retd.) subject to our application dated 18.06.2002 awaiting disposal.

For BUDHIRAJA MINING &
CONSTRUCTIONS LTD.

Sd/-
DIRECTOR
23/7/02”

4. Thus the appellant while acknowledging receipt of the amount tendered under the award dated 23.05.2002 specifically, stated that the amount was being received subject to the decision in the application dated 18.06.2002 filed by the appellant before the arbitrator.

5. The appellant was informed by the office of the arbitrator about the non-receipt of the application dated 18.06.2002, in response thereto a communication dated 29.07.2002 was sent by the appellant along with sending another copy of the application dated 18.06.2002. This application was opposed by the respondent inter alia on the ground that, no application dated 18.06.2002 has been moved by the appellant and that the respondent had not received any copy of such an application. It appears that, at that stage, as a measure of abundant caution, the appellant also filed an application under Section 5 of the Limitation Act, 1963, (in short Limitation Act) seeking condonation of delay, if any, predicated on the premise that the application dated 18.06.2002 was not received by the arbitrator.

5.1 The arbitrator thereafter proceeded to deal with these two applications. The said applications were disposed of vide dated 11.08.2003. The operative part of this order directed that the amount payable in para 19 of the award dated 23.05.2002 should read as Rs 5,48,093/- in place of Rs 29,448/- and thus in the last paragraph the amount awarded should read as Rs 11,52,900/-. Consequently, a sum of Rs 5,18,545/- was awarded, in addition to the amount earlier awarded to be paid within two months of the date of the order, failing which interest was directed to be payable at the rate of 12% per annum.

6. The respondent aggrieved by this order filed objections under Section 34 of the said Act. These objections encompassed both the plea of the absence of any application being filed on 18.06.2002 and consequently the application being barred by time as also the merits of the defence against any such correction. In terms of the impugned order of the learned Single Judge

dated 24.09.2007, the plea of limitation was sustained and a conclusion reached in favour of the respondent as a consequence thereof the merits of the claim of the appellant seeking correction have, however, not been examined.

7. A perusal of the impugned order shows that the learned Single Judge has primarily dealt with the scope of the power of the arbitrator under Section 33 of the said Act and the time prescribed therein. It is the conclusion of the learned Single Judge that the provisions of the Limitation Act would not apply to the said Act qua the provisions in question and thus the subsequent application sent by the appellant was barred by time being beyond the period of 30 days from the date of the award, while the earlier application had not been received by the arbitrator.

8. It is, however, our view, that before proceeding to examine the issue of the applicability of the Limitation Act to the provisions of the said Act, the first question which ought to be examined was whether an application dated 18.06.2002 had been made by the appellant, because if it was so, it is not in dispute that such an application would be within time. This aspect has received the attention of the learned arbitrator by way of an elaborate discussion in the award.

9. If the order dated 11.08.2003 is perused in this behalf, we find that as per the respondent, the dispatch of the application dated 18.06.2002 and its alleged non-receipt was surrounded by suspicious circumstances and that the mere dispatch of the application under UPC could not raise a presumption in favour of the appellant. This plea has been negated by the learned arbitrator in para 5 on the basis of two facts:

(i) the appellant sending a subsequent communication dated 22.07.2002, wherein there is a reference to the earlier pending application of 18.06.2002; and

(ii) on the receipt of the amount awarded under the award dated

23.05.2002, the appellant specifically referring to the same and alluding to the fact that the receipt was subject to the result of the application of the appellant dated 18.06.2002, pending with the arbitrator.

10. The learned arbitrator thereafter in para 30 has proceeded to note that he received the subsequent communication, though the earlier communication dated 18.06.2002 was not received, although both had been sent under UPC. The respondent is stated to have denied having received both communications. (Learned counsel for the respondent, however, clarifies that he was not disputing the receipt of the second communication dated 22.07.2002 as well as the application sent on 29.07.2002, but on a court query admits that there was no specific response sent to the letter dated 22.07.2002 disputing the averments made therein of the factum of the existence of the communication dated 18.06.2002, though such a plea was taken before the learned arbitrator)

11. The learned arbitrator has proceeded to believe the plea of the appellant that an application dated 18.06.2002 was sent and there was no endeavour on the part of the appellant to manufacture an UPC in that regard. The arbitrator, in this respect, thus held: *“I hold that the claimant did send the application under Section 33 of the Act on 18.06.2002”*. Thereafter the learned arbitrator has observed that unfortunately the same has not been received at his residence, and thus, there is a good case made out for condonation of delay under Section 5 of the Limitation Act. It appears that the second part of the observation really is a pointer to a measure taken by way of abundant caution since once the arbitrator came to the conclusion that there was in application sent, which was dated 18.06.2002, which an ordinary course would have reached the arbitrator well before lapse of the prescribed thirty (30) days period from the date of the award dated 23.05.2003, the occasion for applicability of Section 5 of the Limitation Act would really not arise.

12. The learned Single Judge in the impugned order dated 24.09.2007 has referred to the acknowledgement of the payment by the appellant on 23.07.2002 but has failed to notice an important fact, i.e., the acknowledgement itself was conditional upon the fate of the application dated 18.06.2002, apart from the receipt issued by the appellant.

13. In order to appreciate Section 33 of the Act we reproduce the provision as under:

“33. Correction and interpretation of award; additional award. –

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties –

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) the arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-

section (20 or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.”

14. A reading of the aforesaid provision shows that the time period of 30 days is prescribed from the receipt of the arbitral award (unless another period of time has been agreed upon by the parties) for a party to request the arbitral tribunal to correct any computation error, any clerical or typographical error or any other error of a similar nature occurring in the award. Sub-section (2) of Section 33 prescribes that if the arbitral tribunal finds such a request justified, the correction would be made within 30 days from the receipt of the request. Sub-section (3) of Section 33 also provides that the arbitral tribunal on its own initiative may correct such an error within 30 days, albeit from the date of the arbitral award. It is in this part that a distinction is made qua the date on which the prescribed time frame starts in a situation wherein the Arbitrator seeks to make a suo moto correction.

15. In the facts of the present case, the dispatch of a communication dated 18.06.2002, even under UPC, ought to have been received by the arbitrator within 48 hours in the usual course. There would still have been time left for the expiry of 30 days, even if we presume that such an application ought to be received by the arbitrator within 30 days of the date of the arbitral award; though the requirement under sub-Section (1) of Section 33 is only for the party to make a request within 30 days of the receipt of the arbitral award. Thus if the application of 18.06.2002 is considered the same is well within time.

16. As to the facts of sending a communication by UPC, in the usual course of things it cannot be said that any unusual practice has been adopted. Such a mode of service is an acceptable mode of service and a presumption can be

drawn under Section 114(f) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act) in that regard. This, however, does not mean that the presumption is not rebuttable and must follow in any case since there may be surrounding circumstances which may create suspicion or other facts may be brought to notice which would belie the plea. We may usefully refer to the observations in ***Harihar Banerji v. Ramshashi Roy AIR 1918 PC 102*** for the proposition that if a letter is properly directed in this behalf and proved to be posted then, it is presumed that in regular course of business it would reach its intended destination. We extract the relevant portion as under:

“If a letter properly directed, containing notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself.”

17. It is not in dispute in the present case that letter was properly addressed to the arbitrator. It is posted, as per the UPC receipt, and thus, it will be presumed that the letter reached the destination at a proper time according to the regular course of business of the post office. No doubt in case of a registered letter the presumption would apply with greater force as observed aforesaid. This principle continues to be followed till date including in the recent judgment in ***Samriti Devi & Anr. vs Sampurna Singh & Anr. AIR 2011 SC 773***.

18. There are pronouncements of this court also dealing with the issue of presumption of service under Section 114, illustration (f) of the Evidence Act read with Section 27 of the General Clause Act, 1897. In ***Ram Murti vs***

Bhola Nath & Anr. 22 (1982) DLT 426, it has been observed that such a presumption would arise but would be rebuttable. The learned Single Judge of this court observed that “the presumption under the said two provisions is rebuttable but in the absence of proof to the contrary the presumption, of proper service or effective service on the addressee, would arise.” To the same fact are the observations made in ***Madan Lal Seth vs Amar Singh Bhalla 18 (1980) DLT 427*** and ***Om Prakash bahal vs A.K. shroff AIR 1973 Del. 39***.

19. We may also refer to the provisions of Section 16 of the Evidence Act with its illustrations which read as under:

“16. Existence of course of business when relevant. – When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations

(a) The question is, whether a particular letter was dispatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place are relevant.

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

20. Illustration (b) of Section 16 deals with the question whether a particular letter reached the addressee. The fact of it being posted in due course and was not returned is a relevant fact. The learned arbitrator himself has given weight to the fact that at the relevant stage of time he was not in Delhi. The other documents of the contemporaneous time and the subsequent communication show that it has been the consistent stand of the appellant that the application was sent on 18.06.2002 under the cover of the UPC. This includes the acknowledgement of payment as well as the subsequent letter

dated 22.07.2002. We are thus of the view that this factual finding of the arbitrator did not warrant any interference by the learned Single Judge in exercise of jurisdiction under Section 34 of the said Act and it was not necessary to go into the issue of condonation of delay in filing the application.

21. Learned counsel for the respondent sought to draw strength from the provisions of Section 3 of the said Act to contend that what has been sent ought to have been received by the arbitrator. Section 3 of the said Act reads as under:

“3. Receipt of written communication. – (1) Unless otherwise agreed by the parties, –

(a) Any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) If none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communication in respect of proceedings of any judicial authority.”

22. In our view, all that section 3 of the said Act states, is that, the written communication is deemed to have been received, if: (i) it is delivered to the addressee personally; or (ii) delivered at the place of business of the addressee; or (iii) delivered at the habitual residence of the addressee; or (iv) delivered at the mailing address of the addressee. It does not deal with the issue of presumption as to service once the document is put through the post in the normal course and that too under UPC, which is a acknowledgement of

document being put into post. Section 3 of the Act does not exclude delivery through post.

23. We thus set aside the impugned order of the learned single Judge dated 24.09.2007. However, the matter cannot rest at this since, the merits of the plea of the respondent under the application under Section 34 of the said Act has not been dealt with by the learned Single Judge. It is agreed by learned counsels for the parties that this would require the attention of the learned Single Judge and an adjudication on that aspect. Thus, the matter will have to be remitted to the learned single Judge dealing with the matters to decide the objections of the respondent on merits of the claim qua the issue of there being a clerical mistake in the award, the findings of which is in favour of the appellant.

24. The appeals are, accordingly, allowed leaving parties to bear their own cost.

25. OMP Nos. 431/2003 and 432/2003 be listed before the learned Single Judge on 09.05.2012 for further directions.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

MAY 03, 2012

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