

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

% *Order Delivered on: April 10 , 2013*

+ **O.M.P. 296/2012**

SATYAWATI SHARMA Petitioner
Through Mr.Rohit Gandhi, Adv. with
Mr.Mayank Mehandru, Adv.

versus

M/S YASH PROMOTERS & BUILDERS PVT LTD Respondent
Through Mr.Satish Sharma, Adv. with
Mr.Pawan Upadhyay, Adv.

+ **ARB.P. 136/2012**

SATYAWATI SHARMA Petitioner
Through Mr.Rohit Gandhi, Adv. with
Mr.Mayank Mehandru, Adv.

versus

M/S YASH PROMOTERS & BUILDERS PVT LTD Respondent
Through Mr.Satish Sharma, Adv. with
Mr.Pawan Upadhyay, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. Smt.Satyawati Sharma has filed two petitions; one under Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim order and second under Section 11 of the Arbitration and Conciliation Act, 1996 for an

appointment of an Arbitrator.

2. By this common order I propose to decide both the petitions as the facts are common.

3. Brief facts leading to the filing of the present petitions are that the petitioner had invested her savings for purchasing commercial space/restaurant area admeasuring 3200 sq. ft. on the second floor in Saurabh Multiplex in the building at Khasra Nos.1375, 1377, 1378, 1383 and 1384 village Pasonda, 'B' Block, Shalimar Garden Extn. II, Sahibabad, Ghaziabad, U.P., from the respondent M/s. Yash Promoters & Builders Pvt. Ltd. by agreement dated 15th July, 2005 for total sale consideration of ₹15 lac. The entire payment was made in installments before 1st June, 2006.

4. The case of the petitioner is that on various occasions the petitioner approached the respondent for execution and registration of the sale deed but the respondent delayed the same on the one pretext or the other and never applied for obtaining permission as required for execution/registration of the sale deed. Rather the respondent demanded additional money from the petitioner with malafide intention. It is the admitted position that at the time of purchase of the property a restaurant was being run by the tenant, who subsequently has entered into business understanding with the petitioner and is now sharing profits with the petitioner instead of rent.

5. It is stated that it is the obligation of the respondent to register the sale deed in favour of the petitioner. However, the respondent failed to act upon the same despite of legal notice issued by the petitioner. Not only that, the respondent also started threatening the petitioner from stopping essential facilities like water, electricity, power backup and other common maintenance services in the said property.

6. Despite of the agreement dated 15th July, 2005 which contains an arbitration clause i.e. the procedure for resolution of dispute,. It is also stated that the respondent has started harassing the petitioner in order to interrupt her business activities. Both petitions were filed before this Court on 28th March, 2012. The petitioner has prayed that an independent arbitrator be appointed.

7. As far as interim order already granted is concerned, counsel for the respondent has no objection if the same may continue till it is vacated or modified by the arbitrator. The only objection of the respondent is for an appointment of independent arbitrator as prayed in the petition. The sole argument of the respondent to the prayer is that no valid notice for invocation of the arbitration clause has been issued by the petitioner which is mandatory. The second argument is that in the absence of legal notice, an agreed procedure in the arbitration clause has to be applied in view of mutual consent of the parties whereby the respondent shall have the right to appoint an Arbitrator to settle the dispute, therefore, the Court otherwise has no jurisdiction to appoint independent sole Arbitrator, thus, the petition is not maintainable.

8. Admitted position is that there is a valid agreement between the parties. Agreement dated 15th July, 2005 contains the arbitration clause i.e. clause 23, which reads as under:

“In case of any dispute touching the Shop(s)/Commercial space, the builder shall have the right to appoint an arbitrator to settle the dispute. The decision by the arbitrator so appointed shall be binding upon both the parties i.e. builder and buyer. In any case, only a competent court of law in Delhi shall have exclusive jurisdiction to settle any dispute, subject to aforesaid arbitration provision.”

9. The petitioner has placed on record copy of notice dated 12th December, 2011 issued to the respondent for initiation of arbitration proceedings. The said notice was sent by speed post by Mr. Mayank Mahendru, Advocate on behalf of the petitioner. He has also filed his affidavit in which he has stated that notice was sent to the respondent at its registered office at A-7/6, Krishna Nagar, Delhi-110051 through Indian Post Office Speed Post Service and the same has not been received back. As per petitioner, it is deemed to be served upon the respondent. The petitioner has also produced the original letter dated 28th February, 2013 issued by the Deputy Manager, Speed Post Centre, New Delhi, who has informed that the delivery record pertinent to the said period has already been weeded out as the records of the Speed Post are kept preserved for a period of six months only.

10. On the other hand, argument of the learned counsel for the respondent is that the said notice sent by the petitioner has not been received by the respondent and in the absence thereof no order as sought should be passed.

11. Thus, it is clear that in case one party has made demand for an appointment, the right of opposite party is not forfeited and it continues. It will only cease when party who made the demand will file application under Section 11 of the Act seeking appointment so, let this Court now consider the objection of the respondent that the petitioner's alleged notice has not been received by the respondent.

In *Datar Switchgears v. Tata Finance Ltd.*, (2000) 8 SCC 151, the Supreme Court has held as under:

“19. so far as Section 11(6) is concerned, if one

party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11 that would be sufficient. In other words, in cases arising Under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application Under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.”

12. Let me first discuss the objection raised by the respondent with regard to procedure stipulated in Clause 23 of the Agreement.

13. Thus, incase the notice issued by the petitioner is served upon the respondent and no steps were taken as per Clause 23, the petitioner's prayer is liable to be allowed in view of settled law on this aspect.

14. With regard to controversy raised that the notice issued by the petitioner has not been received, it is also settled law with regard to presumption of service of notice.

i) In *Suresh Chand Agarwal and Anr. v. Mahesh Kumar Agarwal and Anr.*, 2012 (8) ADJ 213, it was observed:

“... The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best

serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the Court at various stages of the proceedings before the arbitral tribunal.

The petitioners before making the present application have duly invoked the arbitration clause vide notice dated 15.10.2008 requesting for resolving the dispute amicably or in the alternate to appoint an arbitrator. The aforesaid notice was sent to the respondents by speed post which has not been returned undelivered. Therefore, the presumption of due service by post as provided under Section 27 of the General Clauses Act, would apply as no concrete material has been brought on record to prove that it was not served or that it was not sent to the respondents at their correct addresses....”

ii) In *Budhiraja Mining & Constructions Ltd. v. Ircon International Ltd. & Anr.*, 2012 (130) DRJ 116, it was observed:

“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 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 FAO(OS)Nos. 449/2007 & 451/2007* Page 8 of 11 *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...

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."

iii) In *Food Corporation of India v. Shri Sukhdev Singh*, (1999) 121 PLR 565, it was observed:

“.....This letter has been sent by registered post to the defendant. Exhibit AW 2/1 is the postal-receipt showing that a registered letter had been sent to the respondent on 7.3.1978. When the letter of acceptance was sent by registered post a presumption arisen both under Section 114 of the Evidence Act and also under Section 27 of the General Clauses Act. It is no doubt true that the said presumption is rebuttal one. The burden of showing that the respondent has not received the acceptance letter lies on the respondent. It is for him to show by cogent evidence that he has not received the same. There is no material on record to show that the letter has not been posted or has not been received by the respondent. The reasoning given by the Additional District Judge discarding the notice Exhibit AW 2/3 and the postal receipt AW 2/1, are not in my view, correct. It is not necessary to examine any official of the Regional office and once it is proved that the letter of communication was sent by registered post, the presumption is that it has been received by the respondent.

iv) In *New Globe Transport Corporation v. Magma Shrachi Finance Ltd.*, AIR 2011 Cal 72, it was observed:

“.....The learned Arbitrator sent the award in an envelop by register post with acknowledgment due card on 8th August, 2008 which returned with postal endorsement 'Not Claimed'. The envelop is sufficiently stamped. The petitioner is receiving letters and correspondences at the said address and it was not case of the petitioner that the office was closed or for any other reason the envelop was not received by their office. Subsequent letters and correspondences all were received from the same address. Accordingly there should not be

any doubt to presume that the envelop which was sent at the office of the petitioner, was in fact tendered by the postman at the same address but the same has not been accepted.....”

“.....It was observed that though Section 138 of the Act does not require that the notice should be given only by "post", yet in a case where the sender has dispatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 (for short "the GC Act") could profitably be imported in such a case. It was held that in this situation service of notice is deemed to have been effected on the sendee unless he proves that it was not really served and that he was not responsible for such non-service."

“In Paragraph 8 of (C.C. Alavi Haji versus Palapetty Muhammed and Another) (Supra) it was held that the onus of the sendee to prove that the envelop was not really served and that he was not responsible for such non-service....”

v) In *U.P. State Industrial Development Corpn. Ltd. and Anr. v. D.S. Mathur*, 2010 4 AWC 3708, it was observed:

“Whenever service has to be effected of a communication it shall be deemed to be effected if it is properly addressed, prepaid and posted. Unless a contrary is proved it will deemed to have been effected in the ordinary course of post. In the present case, there is no allegation of refusal or denial of issuing the letters. When the presumption of service is rebuttable the same requires to be rebutted by leading evidence. The presumption under Section 114(f) of the Evidence Act arise on proof of the fact of posting the letter in the ordinary post and the presumption under Section 27 of the General Clauses Act

is with regard to the letter sent through registered post. It is settled law that the presumption can be rebutted by adducing evidence but the burden of proof is on the person who wants to rebut the presumption.

....if the Corporation dispatched the letters/notices at the last address of the allottee or last known address its service would be presumed and the Corporation cannot be placed on at a disadvantage if the G.P.O., Ghaziabad failed to deliver the letters/communication at the changed address of the allottee. Moreover this address was none other than the postal address of the plot in question where the notices were sent.

Under these circumstances it has to be held that the Corporation had sent the letters and notices by post at the address of the allottee given in the lease deed, as also on the address provided by him to the postmaster G.P.O., Ghaziabad for communication of all his mail and at the London address of the allottee which was the last known address. There is no plea that the Corporation did not issue the letters/notices by post nor the presumption of service has been rebutted by any evidence....”

vi) In *Synergy Ispat Private Ltd. v. Orissa Manganese and Minerals Limited*, MANU/WB/0753/2012, it was observed:

“The respondent has also relied on several judgments. A decision reported at MANU/SC/0313/1988: (1989) 1 SCC 264 (*Madan and Co. v. Wazir Jaivir Chand*) has been referred to for the proposition that the presumption under Section 27 of the General Clauses Act would fall into place once a postal article is dispatched by registered post and the mere denial of the receipt thereof would be inadequate rebuttal of the presumption....”

15. Mere denial of receipt of notice is not denial in the eyes of law. In

Hill Elliott & Co. Ltd. v. Bhupinder Singh, 2011 (12) DRJ 438, it was observed:

“15.....There is no dispute about the proposition of law that the presumption of service of notice under Section 27 of the General Clauses Act is a rebuttable presumption. However, the facts of each case have to be seen to reach the conclusion whether any rebuttal is forthcoming from the party who is deemed to have been served. We have already referred to hereinbefore as to how the notice terminating the tenancy was sent to Hill Elliott. A perusal of the relevant paragraphs of the written statement filed by Hill Elliott would show that it had simply denied the receipt/service of notice. The circumstances under which the notice dated 9.08.2008 was not received by Hill Elliott were not stated either in para 7 of the Preliminary Objections of the written statement or in reply to Para 5 of the Plea. Hill Elliott has not stated that the premises during the period the notice is purported to have been served were lying locked; that no responsible person of Hill Elliott was present in the premises during this time or there was any other reason by which the normal course of business of service of notice was prevented. Thus, the denial of service of notice shall be treated as a vague denial and thus deemed to have been admitted.”

16. In view of the above referred decisions, it is clear that there is a presumption in favour of the petitioner for sending notice to the respondent and the respondent ought to have received the same. There is a presumption in favour of the petitioner that the notice is deemed to have been served and thus, there is a valid initiation of arbitration proceedings. As no reply to the said notice was sent by the respondent within 30 days, the petitioner therefore was entitled to file the petition under Section 11(6) of the Act for the purpose of appointment of independent arbitrator. Thus, the prayer

made in the petition is allowed as the respondent had forfeited its right to appoint the arbitrator after the expiry of statutory period.

17. Both the petitions are disposed of with the following directions:

a) Mr. Alakh Kumar, Advocate (Mobile No. 9811063763) is appointed as sole independent Arbitrator to adjudicate the dispute between the parties.

b) Arbitration proceedings are to be conducted under the aegis of Delhi High Court Arbitration Centre and its rules and the fee shall also be paid to the sole arbitrator as per rules thereof. The Arbitrator appointed by the Delhi High Court Arbitration Centre shall give prior notice before commencing the proceedings.

18. As agreed by the parties, interim order granted on 28th March, 2012 shall continue till the same is vacated or modified by the sole arbitrator.

19. A copy of the order be sent to Delhi High Court Arbitration Centre. Dasti.


(MANMOHAN SINGH)
JUDGE

APRIL 10, 2013