

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

% Judgment delivered on: 20.11.2013

+ O.M.P. 204/2012

M/S SHIVA RICE MILLS Petitioner
Through: Ms. Anisha Upadhyay and Mr. Pawan
Upadhyay, Advocates

Versus

FOOD CORPORATION OF INDIA & ANR Respondents
Through: Mr. Sukumar Pattjoshi, Sr. Advocate
with Mr. M.L.Sharma, Advocate

+ O.M.P. 796/2011

FOOD CORPORATION OF INDIA Petitioner
Through: Mr. Sukumar Pattjoshi, Sr. Advocate
with Mr. M.L.Sharma, Advocate

Versus

M/S SHIVA RICE MILLS & ORS Respondents
Through: Ms. Anisha Upadhyay and Mr. Pawan
Upadhyay, Advocates

**CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J

**IA No.1320/2013 (u/O 6 R 17 r/w Section 151 CPC for amendment of
the petition) in OMP 204/2012**

1. This is an application filed for seeking amendment in the petition.
2. Notice in this application was issued on 29.1.2013. Thereafter, the non-applicant/ Food Corporation of India (in short FCI) has appeared on several dates but, admittedly, no reply has been filed.
3. The amendment sought is with regard to the date of award; which has been mentioned in paragraph 21 and in the prayer clauses (a) and (c) of the petition as: 15.11.2011, whereas it should have been 15.6.2011.
4. It is also noticed that in the captioned application, there is a typographical error inasmuch as the name of the Arbitrator in prayer clause (a) of the captioned application has been mentioned as Mr. S.N. Kapur, whereas it should have been Mr. Ashok Kapur. Similarly, the prayer clause in the main petition sets out the name of the Arbitrator as Mr. R.P.M. Tripathi, whereas it should have been referred to as Mr. Ashok Kapur, as indicated above.
5. There is no dispute about the fact that the award is dated 15.6.2011. There is also no dispute with regard to the identity of the Arbitrator. The Award has been rendered by Mr. Ashok Kapur.
 - 5.1 Accordingly, the amendments sought are granted. Paragraph 21 of the petition will stand amended to the extent that the date of the Award shall stand reflected as : 15.6.2011. Similarly, the date of the Award in the prayer clauses (a) and (c) of the main petition will stand reflected as, 15.6.2011. Moreover, in prayer clause (a) of the main petition, the name of the Arbitrator will read as Mr. Ashok Kapur as against Mr. R.P.M. Tripathi.
 - 5.2 As indicated above, since there is an error in prayer clause (a) of the captioned application insofar as the name of the Arbitrator is concerned, the

same will also stand corrected to Mr. Ashok Kapur as against Mr. S.N. Kapur.

6. The application is, accordingly, disposed of.

6.1 Since the amended petition is filed, the same is taken on record.

6.2 On account of the fact that errors are typographical, no fresh reply is called for.

OMP 204/2012 and OMP 796/2011

7. As noted by me in my order dated 25.07.2013, the captioned petitions are, in a sense, cross-objections to the award dated 15.06.2011, passed by a sole arbitrator. OMP No. 204/2012 has been filed by M/s. Shiva Rice Mills, (in short SRM), while OMP No. 796/2011 has been filed by FCI.

8. I had recorded in the order dated 25.07.2013 the lackadaisical manner in which the award had been passed. It would therefore suffice, if I were to extract the relevant portion of the order passed on that date.

“..The award, to say the least, is cryptic to the extent that there is no discussion of evidence which has been appraised by the sole arbitrator.

2. The sole arbitrator seems to have proceeded on the basis that since SRM did not defend its case despite several opportunities, it was not necessary for him to discuss the material and evidence produced by the claimant before it, i.e., FCI.

3. As a matter of fact, in paragraph 4 of the award, the sole arbitrator adverts to the fact that the SRM had filed a last minute petition dated 15.03.2011 seeking further time to produce evidence. This opportunity was declined as, evidently, SRM had been seeking time to do the needful since, August, 2010.

4. Prima facie, notwithstanding the above, the sole arbitrator should have adverted to the evidence which FCI, had placed before it for establishing its claim. The only reasoning in the

award is contained in paragraph 5 of the award, which reads as follows:

“....5. Held, that the Claimant in this case is a leading Public Sector Undertaking of Government of India. It has filed its claim based on a bilateral agreement, which was breached by the Respondent. The claimant is fully accountable to the Parliament. Hence, there is no reason to believe that there is no sufficient documentary evidence for the claim. This presumption by the Tribunal is further strengthened by the fact that the Respondent has repeatedly failed to appear inspite of service of notice on it....” (emphasis is mine)

5. The reasoning of the arbitrator demonstrates that he has presumed that there is no reason to disbelieve FCI that there was sufficient documentary evidence available with it to support its claim. It is obvious that the sole arbitrator has proceeded on a presumption and not examined the evidence, if any, placed on record by the FCI.

6. At this stage, learned counsel for the FCI seeks time to take instructions.

7. List on 18.09.2013..”

9. Both the petitions came up for hearing on 18.09.2013. Separate orders were passed on that date in the two petitions referred to above.

10. In OMP No. 204/2012, it was recorded that even though notice had been issued in the said petition as far back as on 29.02.2012, no reply had been filed in the matter. As a matter of fact, as noted in the order dated 18.09.2013, Mr Pattjoshi had entered appearance on behalf of FCI as far back as on 20.03.2012. Since no reply had been filed opportunity to file a reply was closed, on that date. The registry was directed to requisition the arbitration record from Indian Council of Arbitration (in short ICA). It was further directed that ICA will ensure that the record is accompanied by the proof of dispatch of the arbitration award, to the parties concerned.

11. In OMP No. 796/2011, at the hearing held on 18.09.2013, the submission of Mr Pattjoshi was recorded to the effect that FCI was challenging the award to the extent that its prayer for grant of interest had been declined. As noted in the order of 18.09.2013, FCI is claiming interest from 01.03.1995, till the date of payment.

12. It is in this background that the matter came up for hearing today. The arbitration record, available with ICA, was placed before court at today's hearing.

13. As reflected in the order dated 25.07.2013, in my view, it is difficult to sustain the award based on the reasons supplied by the learned arbitrator.

13.1 Mr Pattjoshi, who appeared for FCI, however, vehemently stated that this court could not set aside the award, as SRM's petition under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) i.e., OMP No. 204/2012 was filed beyond the time prescribed under Section 34(3) of the Act.

13.2 Mr Pattjoshi, based on the arbitration record made available by ICA, contended that a signed copy of the award had been dispatched by the Registrar of ICA to all concerned parties, which included FCI, SRM and its partners under the cover of letter dated 20.06.2011.

13.3 It was his contention that since the dispatch was made by registered post on 28.06.2011, a presumption should be drawn under Section 27 of the General Clauses Act, 1897 (in short the General Clauses Act) against SRM that it had received a signed copy of the award. Mr Pattjoshi submitted that since FCI had received a signed copy of the award by registered post, there was no reason why SRM would not have received the same. He says, if

limitation is calculated from June, 2011, then surely, SRM's petition under Section 34 of the Act, i.e., OMP No. 204/2012, was clearly time barred.

13.4 As regards the merits of the award, Mr Pattjoshi, did not advance any arguments, perhaps for the reason that he recognized the fact that the award could not pass the test of legal scrutiny. Mr Pattjoshi also submitted that FCI had placed on record the envelope in which FCI had received a signed copy of the award. Mr Pattjoshi also submitted that in the petition filed by SRM, partners of SRM have not been impleaded as parties. Mr Pattjoshi stated that an adverse inference could be drawn against SRM as it is quite possible that a signed copy of the award was received by its partners, if not by SRM.

14. It is pertinent to note that the envelope said to have been filed by FCI is not available on record. Atleast, Mr. Pattjoshi who was handed over the record was unable to locate the same.

15. Therefore, the only contention that I am required to deal with is : whether a presumption can be drawn against SRM that it had received a signed copy of the award. No doubt, it is true that once a document is sought to be served, is sent, by properly addressing, prepaying and posting by registered post to the addressee, a presumption is raised of due service or proper service under Section 27 of the General Clauses Act. This presumption flows upon a conjoint reading of provisions of Section 27 of the General Clauses Act read with Section 114(f) of the Indian Evidence Act, 1872. The presumption is, however, rebuttable.

15.1 In the instant case, SRM, in paragraph 21 of its petition filed under Section 34 of the Act, clearly stated that it had received the signed copy of the award only on 19.12.2011. The petition is accompanied by the affidavit

of Mr. Ram Saroop, who is one of the partners of SRM. Pertinently, the signed copy of the award, which was purportedly sent by ICA by registered post (though not by recorded delivery), was also sent to Mr. Ram Saroop. Since his affidavit accompanies the petition, there is a presumption created that SRM had received a copy of the award, as indicated therein, on 19.12.2011.

15.2 Ms. Anisha Upadhyay, who appears for SRM, submitted that SRM became aware of the award only upon notice being issued and served upon SRM in FCI's petition being: OMP 796/2011.

15.3 A perusal of the record shows that as per the report of the Civil Judge, Sr. Division, Ferozepur, service was effected on respondent nos.2, 5 and 6 in OMP 796/2011 if at all in the first week of December, 2011. To be noted, respondent no.2 (in OMP 796/2011) had refused service and therefore, notice was affixed, while service on respondent no.5 (Mr. Ram Saroop) was effected on 05.12.2011 through his brother. Therefore, it is quite possible that he had knowledge of the award on 19.12.2011. Service on respondent no. 6 was also effected on 05.12.2011.

15.4 In any event, since the petition under Section 34 of the Act was filed on 24.02.2012, it would still be within time, even if 05.12.2011 is taken as the date of knowledge. The stand of SRM is fortified by the fact that the FCI, at its own peril chose not to traverse this assertion made in paragraph 21 of the petition. This position continued to obtain between 20.03.2012 till 18.09.2013, when FCI's opportunity to file a reply was closed.

15.5 In view of a specific assertion by SRM in its petition, the onus which was initially, on SRM, with regard to date of service of signed copy of the award naturally shifted to FCI. The observations of the Supreme Court in

the case of: *V.N. Bharat Vs. Delhi Development Authority and Anr. (2008) 17 SCC 321*, in paragraphs 24 to 27 at page 328, in that behalf, being apposite, are culled out hereinbelow :-

“.....24. Ms Tripathy urged that since the notice of demand in respect of fifth and final instalment had been duly sent to the appellant by registered post with acknowledgment due at the address given by him, there would be a statutory presumption under Section 114 Illustration (f) of the Evidence Act that the demand notice had been duly served on the appellant. Ms Tripathy urged that the Commission rightly dealt with the matter and no ground had been made out on behalf of the appellant for interference with the same.

25. As will be evident from what has been mentioned hereinbefore, the real controversy in this appeal appears to be whether the demand letter dated 11-9-1996, for payment of the fifth and final instalment had, in fact, been received by the appellant and as to whether non-compliance with the same resulted in termination of the appellant's allotment and whether the restoration of such allotment on a representation made by the appellant would amount to a fresh or new allotment.

26. As submitted by Ms Tripathy, except for the statutory presumption under Section 114 Ill. (f) of the Evidence Act, there is no other material to suggest that the demand notice had actually been received by the appellant.

27. The assertion of service of notice on account of such presumption has been denied by the appellant as a result whereof onus of proving service shifted back to the respondent. The respondent DDA has not led any other evidence in support of the presumption of service. In such circumstances, it has to be held that such service had not been effected. Therefore, when on the appellant's application for restoration of the allotment, the allotment was restored, the only conclusion that can be arrived at is that the earlier allotment continued as no cancellation and/or termination had, in fact, taken place in terms of Clause 4 of the Scheme in question.....”
(emphasis is mine)

16. Pertinently, neither FCI filed a reply nor moved any application to place on record, evidence to prove the aspect of service of the signed copy of the award, on SRM. The record, which ICA has placed before me, contains a copy of the letter dated 20.06.2011, alongwith photocopies of dispatch receipts at pages 55 and 55(a) respectively of the arbitration record, filed in this court. The original dispatch receipts are not placed on record.

17. In these circumstances, in my view, in a matter such as this, where a valuable right obtains in SRM, to challenge the award under Section 34 of the Act; it cannot be taken away on a mere presumption, based on the present state of record, which quite frankly borders on speculation.

18. The other contention of Mr. Pattjoshi that other partners should have been made party to the present proceedings cannot further the case of FCI for the following reasons :- First, FCI chose not to raise this issue till such time the matter was taken up for final hearing. Second, as indicated above, one of the partners has filed his affidavit alongwith the petition preferred by SRM under Section 34 of the Act. The fact that other partners were not arrayed as parties, which otherwise was not mandatory in law, can at best be an irregularity, which would not result in SRM failing in its action filed before the court. The contentions of Mr Pattjoshi are thus rejected.

19. The net effect is that, as indicated in my order dated 25.07.2013, the award would have to be set aside in view of the complete failure on the part of the arbitrator to consider the evidence on record. Accordingly, the award dated 15.06.2011 is set aside. The matter is remitted to the arbitrator, if he is still available, for carrying out a de novo adjudication in the matter. The arbitrator will give an opportunity to SRM to file a response, if not already filed. The arbitrator, will set down time-lines for parties in regard to the

steps, which may be necessary for an early conclusion of the arbitration proceedings. The arbitrator, shall ensure expedition, so that the proceedings are concluded within the next four months.

20. Before I conclude, I must also notice that Mr Pattjoshi, indicated that FCI had paid the arbitrator's fee both for itself as well as for SRM. I am sure, if this aspect is brought to the notice of ICA, it will take a decision with regard to the same in consonance with the rules and procedural law, applicable to the instant case.

21. In view of my observations above, the petition filed by FCI. i.e., OMP No. 796/2011, has been rendered infructuous. It is ordered accordingly. The petitions are disposed of.

RAJIV SHAKDHER, J

NOVEMBER 20, 2013

s.pal/kk/yg