

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

% *Judgment Delivered on: March 11, 2013*

+ **OMP No.888/2012 & I.A. No.17241/2012**

M/S RAINBOW ELECTRIC SUPPLY CO. Petitioner
Through Mr.Prithvi Pal, Proxy Counsel.

versus

NORTH DELHI POWER LTD. & ANR. Respondents
Through Mr. K. Datta, Adv. with Mr. Manish
Srivastav & Mr. Satyajit S. Rana,
Advs. For R-1

AND

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CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. OMP No.888/2012 has been filed challenging the final Arbitral Award dated 13th March, 2008. By the said Award, a total sum of

Rs.72,73,103.00 with interest @10% per annum from the date of the award till payment has been awarded in favour of North Delhi Power Limited (hereinafter referred to as “NDPL”). NDPL has filed an Execution Petition No.321/2011 in respect of this Award which is pending before this Court.

2. OMP No.889/2012 has been filed challenging the final Arbitral Award dated 4th February, 2008 whereby the learned Arbitrator has awarded a sum of Rs.25,15,946/- together with interest @10% per annum from the date of the Award till payment in favour of NDPL, the respondent herein. NDPL has filed an Execution Petition No.320/2011 which is pending before this Court.

3. In both the aforesaid OMP Nos.888-889/2012, applications had been filed seeking condonation of delay in filing the petitions. The submissions of the petitioner M/s. Rainbow Electric Supply Company Limited in both the applications is primarily that :

(a) The Award was delivered on 13th March, 2008 and 4th February, 2008 “but the same was not received by the petitioner immediately thereafter”. It is submitted that this averment is highly vague.

(b) That the petitioner (Rainbow) came to know of the Award after it received notice of the Hon’ble Court on 10th March, 2012 in the aforesaid execution petitions. The signed copy of the Award was not delivered to the petitioner.

4. It is argued by the petitioner that the signed copy of the award dated 4th February, 2008 and 13th March, 2008 was not delivered to the petitioner (i.e. proprietor of the petitioner company) itself. As there is no compliance of Section 31(5) of the Arbitration and Conciliation Act, 1996 (hereinafter

referred to as 'Act') as even signed copy of the award was not delivered to the petitioner itself. Therefore, the petitions under Section 34(2) filed by the petitioner before this Court is not barred by limitation as envisaged in Section 34(3) of the Act, 1996.

5. The petitioner submits that as it was not delivered with a signed copy of the award dated 4th February, 2008 and 13th March, 2008, the petitions filed by the petitioner may be treated to be within prescribed period of limitation as the time to file petitions against the impugned awards did not stop until the date of filing of the OMPs by the present petitioner before this Court.

6. The present matters were taken up for hearing before this Court on 28th September, 2012 when this Court was pleased to pass the following order :

“1. A preliminary objection is raised by Mr. K. Datta, learned counsel for the Respondents that these petitions challenging the Awards dated 13th March 2008 and 4th February 2008 are barred by limitation as they have been filed far beyond the time provided under the proviso to Section 34(3) of the Arbitration and Conciliation Act, 1996 (“Act”). He further points out that the Petitioner was in any event aware of the passing of the Awards when notices were received by it in Execution Petition Nos.320 and 321 of 2011 filed by the Decree Holder (Respondent No.1 herein) for enforcement of the said Awards. Since the Petitioner entered appearance in March 2012 in the execution petitions, the limitation in any event began to run from the date of service of notice of the execution petitions and therefore in any event, the petitions are time barred.

2. Counsel for the Petitioner on the other hand refers to Section 31(5) of the Act and states that the requirement for the Petitioner to be served with a signed copy of each of the

Awards was mandatory. He also refers to the decision of the Supreme Court in *State of Maharashtra vs. Ark Builders Private Limited* (2011) 4 SCC 616.”

7. The petitioner’s counsel in his written submissions has also referred judgment passed in the case of *Benarsi Krishna Committee & Ors. Vs. Karmyogi Shelters Pvt. Ltd.*, (2012) 9 Scale 251 dated 21st September, 2012 passed by Supreme Court on the same point that the expression defined in Section 2(h) of the 1996 Act means a person who is party to the arbitration agreement, the said definition is not qualified in any way so as to include the agent of the party to such agreement. Any reference therefore, made in Section 31(5) and Section 34(2) of 1996 Act can only mean the party himself and not his or her agent. In such circumstances proper compliance with Section 31(5) would mean delivery of a signed copy of the Arbitral Award on the party itself.

8. It is submitted by the petitioner that in the present case, the petitioner was not at all served with the signed copy of the award. No proof of service to the petitioner was found in the arbitral records. Therefore, the delay sought by the petitioner be condoned.

9. I have also heard the learned counsel appearing on behalf of respondents who has refuted the argument of the petitioner and also argued that even on merit, the petitioner has no merit in the matters in view of two decisions rendered by this court on similar aspect. The respondents have also filed the written submissions.

10. Section 34 of the Act stipulates and prescribes the time limit for challenging an arbitral award. Section 34(3) stipulates that an application for setting aside an arbitral award may not be made after 3 months have

elapsed from the date on which the party making that application had received the arbitral award. The proviso to Section 34(3) of the Act stipulates that a further period of 30 days may be granted to challenge the award if, court is satisfied that the appellant was prevented by sufficient cause from making the application within the period of three months. These provisions have been the subject matter of judicial interpretation. In the judgment of the Supreme Court in *Popular Constructions Company vs. UOI* reported in 2001 (8) SCC 470 it has been held that time limit prescribed under Section 34 of the Act to challenge an award is absolute and cannot be extended by the Court under Section 5 of the Limitation Act, 1963.

11. As noticed above, the petitioner in the two OMPs have sought condonation of delay on the ground that they did not receive the original award after it was made and published. The petitioner learnt about passing of the Award when it was served with notice of the execution petition.

12. The original record of the Arbitral proceedings relating to the Arbitral Award dated 13th March, 2008 would reveal that original award was sent to the petitioner on 24th March, 2008 through registered post, which is at page No.782 of the original record of arbitrator before this Court which is original record of OMP No.888/2012. Similarly, perusal of Arbitral record to the award dated 4th February, 2008 would reveal that the award was received by the petitioner, which is evident from the duly signed Postal acknowledgment receipt, which is at page 543 of the original record of the Arbitral Tribunal before this Court which is subject matter of OMP No.889/2012. It is submitted that even during course of arguments, the petitioner's proxy counsel did not controvert acknowledgement of receipt.

13. Even otherwise, the record of this Court would reveal that in Execution Petition Nos.321/2011 (in relation to Award dated 13th March, 2008) notice was served on the judgment debtor on 31st January, 2012 and on 19th March, 2012 counsel entered appearances on behalf of the judgment debtor by filing his Vakalatnama.

14. Similarly, in Execution No.320 of 2011 (in relation to award dated 4th February, 2008), the record of this Court would reveal that notice was served on the judgment debtor on 17th February, 2012 and the judgment debtor entered appearances through his counsel on 15th March, 2012, when the counsel filed his Vakalatnama.

15. It is not in dispute that both the petitions under Section 34 of the Act were filed on 10th September, 2012 about 4 ½ years after the passing of the awards and about 6 months after the judgment debtors were served in Execution Petitions and received a copy of the Arbitral Award. Hence, despite knowledge of the Arbitral Award, the judgment debtor took no steps to file objections under Section 34 of the Act within the mandatory and statutory period, despite entering appearances in the execution proceedings in March, 2012.

16. The plea that the original signed award had not been received by the judgment debtor is also of no consequences, specifically in the view that postal receipt and acknowledgment were not controverted by the petitioner. In any event, after it was served in the Execution Proceedings, it was for the judgment debtor to take steps to obtain an original signed copy of the award, inter alia, by writing to the Arbitrator. Admittedly, no such steps have been taken till date.

17. The judgment relied upon by the petitioner is also of no help. In that

judgment the Supreme Court was concerned with question as to whether service of an arbitral award on an agent, namely the advocate appearing for the parties, amounts to service on the party itself. The Supreme Court held that the expression 'party' as defined in Arbitration and Conciliation Act would not cover an advocate since it is one thing for an advocate to act and plead on behalf of the parties and it is another for an advocate to act as the party itself. This judgment has no application in the present case since in the present case service was affected on the judgment debtor, i.e., the party and not on the advocate of the judgment debtor. Even otherwise judgment debtor received notice of the award when it was served with execution proceeding and took no steps for 6 months thereafter to obtain signed copies of the Arbitral Award or to file objections under Section 34 of the Arbitration and Conciliation Act, 1996.

18. Even otherwise and strictly without prejudice to the foregoing, the perusal of the grounds set forth in Section 34, the petition would reveal that the award has been challenged principally on the ground that the respondent No.2, the Arbitrator has acted with bias since he is a retired DVB employees on the rolls of the NDPL. It has also been contended that in terms of the Single Point Distribution Agreement between the parties, he was entitled to a commission in addition to a rebate.

19. To satisfy the conscious of Court, let the objections be considered on merit. It is the admitted position that the abovementioned petitions have been filed by the petitioner under Section 34 of the Act for setting aside the arbitral award dated 4th February, 2008. Brief facts of the application are that in view of unauthorized tapping of electricity from JJ Basti in Delhi, the DVB in the 59th meeting of its board held on 19th August, 1998, initiated a

proposal for providing bulk electricity supply on a single point and of engaging agencies for each colony to take the said bulk supply at its own costs and expenditure for providing electricity to the residents of such colonies. The Special Secretary, Department of Power and Water of the Government of Delhi vide letter dated 18th September, 1988/21st September, 1998 accepted the proposal of the DVB with certain modifications. The modifications suggested were for all the clauses regarding guaranteeing of 75% of the estimated current revenue which was to be the responsibility of the contractor. The DVB vide its office order dated 5th February 1999, framed further details of the scheme and provided that “ The agency shall be responsible for collections of revenue to the extent of minimum 75 % of an estimated current revenue based on net energy recording on the bulk meter.”

20. The petitioner applied for and was awarded contracts in respect of Shradhanand Park and Chandan Vihar thereafter was appointed as the contractor in respect of another unauthorized colony namely Tomar Colony. As per the petitioner, the minimum revenue clause was 75% in respect of Shradhanand Park and 50 % of the metered supply in respect of the other two colonies. The petitioner submits that in the present case the dispute relates to the Chandan Vihar SPD contract. The commission to which the petitioner was entitled to under the contract was initially fixed at 20% increased to 25%. Though as per the petitioner, he was liable to pay the revenue of only 50% in case of Chandan Vihar and Tomar Colony and 75% in case of Shradhanand Park, the DVB whilst raising its bills, showed only the rebate towards commission and did not reflect the rebate towards AT&C. The petitioner on various occasions brought the said situation to the notice of the officials of the DVB who never threatened the petitioner with

disconnection. The respondent No.1 became the successor of the DVB pursuant to the Delhi Electricity Reforms Act, 2002 , privatization but continued with the past practice of erstwhile DVB and did not give rebate towards AT&C, in October 2006 started threatening the petitioner for disconnection of electricity supplied on the ground of non-payment of amounts shown as arrears in the bills.

21. Thereafter, the petitioner approached the Permanent Lok Adalat, Delhi which stayed the disconnection of electricity supply to the petitioner vide order dated 4th October, 2002.

22. The matter could not be resolved because the respondent took the stand that it was only willing to offer an additional 2% rebate. The petitioner on the basis of SPD contract incurred huge expenditure in installing transformers, erecting poles, drawing electric wiring lines, engaging employees ,maintaining a large staff to prevent illegal tapping/theft of electricity in collection of revenue, laying the network of cables for distribution of electricity supply in the aforesaid colonies. The respondent is getting rebate of 48% towards losses on the supplies made by the Delhi Transco Limited but is not willing to pass on the benefit of the AT&C losses to the petitioner. In view of the Arbitration clause of the agreement, the petitioner served a notice dated 19th November, 2003 for appointing an arbitrator.

23. The respondent No.1 vide its letter dated 24th November, 2003 appointed Sh. H.C. Aggarwal to which petitioner objected vide letter dated 2nd December, 2003 . On receiving the notice of the arbitration proceedings petitioner filed an application under Section 12 of the Act alleging bias and prejudice of the respondent No. 2 towards him. However, the said

application was dismissed by the respondent No.2 vide order dated 24th December, 2003. The respondent issued purported termination vide letter dated 16th April, 2004 to terminate the contract in respect of Chandan Vihar. Further, respondent No.2 passed the impugned awards against petitioner in favour of the respondent No.1.

24. Inter alia, the grounds taken by the petitioner in his petitions are that

(a) The learned Arbitrator is a retired employee of the erstwhile DVB, on the pay roll of respondent No.1, instructs respondent No.1 on all the issues. This shows that the learned Arbitrator acted with bias and prejudiced mind as opposed to the Principle of equity, fair play and natural justice. The learned Arbitrator gave no opportunity to the petitioner to lead the evidence, after the pleadings of the parties were completed the petitioner filed application to lead evidence however the said application was dismissed simply because it was recorded that the parties do not wish to submit any other pleading or submissions in writing despite the fact it was specifically asked for. This shows that the entire proceedings and the final impugned award was violative of principle of equity, fair play and natural justice. The learned Arbitrator failed to appreciate that it is respondent No.1 who agreed to grant (additional) rate of 2% on account of AT&C losses and there is no justification for the respondent No.1 to not grant the similar percentage of rebate when it is being granted the rebate of about 48% for the area in reference. He failed to appreciate the over all contents and scope of the agreement executed between the parties particularly the concept of the minimum revenue as incorporated in clause 4 of the agreement and of commission as incorporated in clause 7 and that the respondent No.1 has proceeded on the premise that the bill is to be raised for the 100% and not as

per agreement between the parties. He also failed to appreciate that once certain benefits have got accrued for distribution of the electricity to the successor of DVB, there is no reason why the same should not be granted for the distribution of the electricity in the area in reference particularly when the petitioner could be taken as an agent of the respondent No.1/erstwhile DVB.

(b) The learned Arbitrator failed in observing that the copy of the contract between the respondent No. 1 and Delhi Transco Ltd. had not been placed on record or that the contract benefit of AT&C loss had actually been given to the respondent No.1 company which had not been placed and proved on record. The learned Arbitrator acted wrongly by not awarding the petitioner the amount spent by it in laying the electrical network in the colony. Also when the respondent No.1 lays the wiring, installs the meters on payment of charges and it still remains its property then by same analogy electric network including meters installed by petitioner on payment of charges remains to be its property. Moreover, there was no agreement between the parties that the property of the petitioner would become that of the respondent No.1. He wrongly interpreted the clause 10 of the agreement because in the present situation it is the respondent No.1 who has terminated the agreement of the petitioner for alleged non-payment of dues therefore it is not the kind of case which is covered in the four corners of the clause 10 of the agreement.

25. Similar agreements have already been interpreted by this Court in two judgments both dismissing similar objections under Section 34 of the Act. These judgments are as follows :

(a) ***Sahyog Power Contractor & Anr. Vs. H.C. Aggarwal & Anr.***

reported in 130 (2006) DLT 451 wherein it has been held as under :

“5. Learned Counsel for the petitioners was asked to point out as to under which sub-section of Section 34 would his objections fall. Learned Counsel submits that under Sub-clause (ii) of Clause (b) of Sub-section (2) of Section 34 of the said Act, an Arbitral Award in conflict with the Public Policy of India can be set aside. It is within this parameter that the Award is sought to be challenged. In *ONGC v. Saw Pipes Ltd.'s case* (supra), the Apex Court went into the question of what is meant by the phrase ‘Public Policy of India’ and gave it a wider meaning. If an award was *ex facie* contrary to the terms of the contract between the parties, the same was held to be opposed to the Public Policy. It is this aspect which is emphasised by learned Counsel for the petitioners.

6. Learned Counsel for the petitioners was asked to point out as to which terms of the agreement have been violated and where the Arbitrator has misconducted himself by coming to a conclusion contrary to the terms of the contract. In this behalf, learned Counsel has referred to Clauses 10 and 13 of the contract, which are as under:

“10. *Minimum Revenue*—

The agency shall have to pay minimum revenue for 50% of the electricity energy as recorded in the meter(s) shall be provided by DVB for measurement of the bulk energy. The meter(s) shall be jointly read on monthly basis by representative of DVB not below the rank of an Assistant Engineer and an authorised representative of the agency.

XXXXXXXXXX

13. *Commission*—

For the service rendered, the agency shall pay commission of twenty per cent (20%) of the revenue to DVB from the bulk supply.”

12. The contract itself provides in Clause 10 of the various agreements for the minimum revenue to be generated and Clause 13 thereof takes care of the commission to be paid. In fact, what the petitioner is asking for is something beyond the terms of the contract. The fact that the Arbitrator has come to the conclusion that such discounts beyond the terms of the contract are not admissible to the petitioner cannot, thus, call for interference.

16. The Arbitrator has gone into depth by reference to judgments of the Apex Court as to whether a contract can be determined and whether the remedy of a party is only by way of damages. It cannot be disputed that in the present case the contract is determinable. In case it is determined contrary to terms of the contract, the remedy of the party is only by damages and not by a relief of continuation of the contract, which would amount to specific enforcement of the contract. This finding can hardly be said to be contrary to law or opposed to Public Policy.

17. Learned Counsel for the petitioners has drawn attention of this Court to the fact that reconciliation of accounts between the parties did not take place. This is in relation to the amounts sought to be recovered by the respondent/NDPL from the petitioner. In para 38 of the Award, the Arbitrator has gone into the issue of an independent Chartered Accountant, M/s. Dass Gupta and Associates acting as an external auditors for reconciling the statement of accounts and submitting a report dated 18.8.2005. This report is after the parties failed to arrive and reconcile the accounts. The claim awarded against the petitioner is on the basis of this report. It has also been noticed in para 38 that the report has not been questioned in any manner by the petitioner or by the respondent. It is apparent that the matter of the claim being awarded against the petitioner is one of conciliation of accounts for which the assistance of a

Chartered Accountant was taken. This Court can hardly be expected to sit as a Court of appeal to examine the various amounts due to the respondent/NDPL from the petitioner while enquiring into the matter under Section 34 of the said Act.”

(b) Judgment and order dated 11th April, 2012 delivered by Justice S. Muralidhar in OMP No.112/2006 wherein it has been held as under :

“14. The arbitration clause in the agreement grants the predecessor-in-interest of NDPL, i.e. the DVB, the right to nominate even its employee as an arbitrator. It expressly states that the Petitioner shall have no objection if an employee of the DVB is nominated as Arbitrator. If the Petitioner could not object to an employee of the DVB acting as an Arbitrator then surely the Petitioner cannot object to an Advisor of NDPL acting as such. In view of the wording of the arbitration clause, the Petitioner must be held to have waived its right to object to the impartiality of such arbitrator in terms of Section 12 read with Section 13 of the Act. Therefore, it mattered little that the learned Arbitrator did not expressly disclose his being an Advisor to NDPL as required by Section 12 (1) and (2) of the Act. Further, for the purposes of Sections 12 and 13 of the Act, there had to be circumstances which were likely to give “justifiable doubts” as to the independence or impartiality of the learned Arbitrator. With the Petitioner agreeing to even an employee of the DVB being an Arbitrator it cannot possibly contend that it harboured “justifiable doubts” as regards the Arbitrator who was a nominee of the DVB, or its successor-in-interest, NDPL. Consequently, the challenge to the impugned Award on the ground of lack of impartiality of the learned Arbitrator is hereby rejected.

25. The next ground concerns the interpretation placed by the learned Arbitrator on the relevant clauses of the contract concerning the minimum revenue and commission. There is merit in the contention of learned counsel for the Respondents that the tariff under the present scheme approved by the Delhi Electricity Regulatory Commission (“DERC”) is on the basis

of Aggregate Revenue Requirement (“ARR”) projected on year to year basis by DISCOMS including NDPL. The tariff fixation has an in built mechanism whereby the benefits arising out of AT and C loss reduction gets accounted for in the tariff and benefit arising thereof is passed on directly to all consumers including those consumers catered by SPD contractors. There is, therefore, no justification for providing separate discount/commission on account of reduced AT and C losses to the SPD contractors.

26. A similar question was considered by this Court in its decision dated 8th November 2005 in OMP No. 394 of 2005 (M/s. Sahyog Power Construction v. North Delhi Power Limited). Clauses similar to Clauses 8 and 10 in the present agreement, concerning minimum revenue and commission, were considered in the said decision. The view of the learned Arbitrator in that case was no different from the view expressed in the impugned Award. The interpretation of the said clauses by the learned Arbitrator is the correct one on a plain reading and in the context of the scheme of getting SPD contractors to further distribute electricity in JJ clusters. In other words, the Petitioner was expected to guarantee the minimum revenue to NDPL even when its actual collections were less than 75%. If the collection was more than 75% it had nevertheless to pay NDPL the amount so collected. There is no basis for the Petitioner to contend that it is required to pay only 75% of the electricity charges collected by it from consumers. Also there is no warrant for any rebate to be provided to the Petitioner. The learned Arbitrator had to go by the clauses in the contract entered into between the parties. It does not envisage any discount or rebate being granted to the Petitioner. As rightly noted by the learned Arbitrator the Petitioner is not a consumer, but only an agent to receive supply for further distribution in the areas assigned to him against determinable contracts. In the process he has already collected the amount from the end-consumers and money is lying with him, which is required to pass on to the Respondent.”

26. Thus, even the petitioner has no case on merit. The petitioner has failed to make any case on the point of condonation of delay as well as on merit. Therefore, both applications seeking condonation of delay in filing objections to the Arbitral Award are liable to be dismissed. OMP No.888/2012 and I.A. No.17241/2012 and OMP No.889/2012 and I.A. No.17244/2012 and all pending applications, are, therefore, dismissed. No costs.

(MANMOHAN SINGH)
JUDGE

MARCH 11, 2013