

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

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Date of decision: 2nd May, 2014.

+ FAO(OS) 72/2014, CM No.4467/2014 (of the appellant u/S 151 CPC and Section 37 of Arbitration Act for stay) & CM No.4468/2014 (of the appellant u/S 151 CPC & Section 37 of Arbitration act for stay).

FOOD CORPORATION OF INDIA

..... Appellant

Through: Mr. Sukumar Pattjoshi, Sr. Adv. with
Mohan Lal Sharma & Mr. K. Mathur,
Advs.

versus

M/S SHIVA RICE MILLS & ANR

..... Respondents

Through: Mr. A.S. Mathur, Adv. for R-2.

AND

+ FAO(OS) 73/2014

FOOD CORPORATION OF INDIA

.... Appellant

Through: Mr. Sukumar Pattjoshi, Sr. Adv. with
Mohan Lal Sharma & Mr. K. Mathur,
Advs.

versus

M/S SHIVA RICE MILLS & ORS

..... Respondents

Through: Mr. A.S. Mathur, Adv. for R-2.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. FAO(OS) No.72/2014 under Section 37 of the Arbitration & Conciliation Act, 1996 impugns the judgment dated 20th November, 2013 of the learned Single Judge of this Court allowing OMP No.204/2012 preferred by the respondent no.1, under Section 34 of the said Act for setting aside of the

arbitral award dated 15th June, 2011 of the respondent no.2 Indian Council of Arbitration and remitting the matter to the arbitrator for carrying out a *de novo* adjudication and further observing that the respondent no.2 will take a decision with regard to the contention of the appellant qua fee payable for such remitted proceedings.

2. It was the contention of the appellant before the learned Single Judge that OMP No.204/2012 filed by the respondent no.1 under Section 34 supra was beyond the time prescribed for filing thereof under Section 34(3) of the Act. It was argued that the respondent no.2 had dispatched the award to all the concerned parties under cover of letter dated 20th June, 2011, by Registered Post on 28th June, 2011 and a presumption should be drawn under Section 27 of the General Clauses Act, 1897 that the respondent no.1 had received a signed copy of the award; that since the appellant had received the award by the Registered Post, there was no reason why the respondent no.1 would not have received the same; that if the limitation for filing the petition under Section 34 were to be calculated from June, 2011 then the petition filed by the respondent no.1 was barred by time.

3. The learned Single Judge, in the impugned judgment, held that the presumption under Section 27 supra as also under Section 114(f) of the

Indian Evidence Act, 1872 of such service is rebuttable; that the respondent no.1 had clearly stated that it had received the signed copy of the award only on 19th December, 2011; that an affidavit to the said effect of the partner of the respondent no.1 was also filed; that it was also the argument of the respondent no.1 that the respondent no.1 became aware of the award only upon notice being issued and served upon the respondent no.1 in the appellant's petition also under Section 34 of the Act, being OMP No.796/2011 being served upon the appellant. The learned Single Judge found that the notice of OMP No.796/2011 had been served on the respondent no.1 in the first week of December, 2011 and held that it was thus quite possible that the respondent no.1 had knowledge of the award only then and the petition, being OMP No.204/2012, was within time from the said date. Another reason given is, that the appellant did not traverse the averments of the respondent no.1 in the petition, of having received copy of the award only on 19th December, 2011. Reliance was placed on ***V.N.Bharat Vs. Delhi Development Authority*** (2008) 17 SCC 321 laying down that where presumption of such service is denied, the onus of proving that the service was indeed so effected goes back on the person who is so asserting and in the absence of any such evidence, it has to be held that such service

had not been effected. It was thus held by the learned Single Judge that there was nothing to show that the respondent no.1 had been served with the signed copy of the award at any time before 19th December, 2011 and the petition from that date was within time.

4. It may also be mentioned that in view of the award being set aside, OMP No.796/2011 preferred by the appellant, objecting only to the rejection of its claim for interest, was also disposed of as infructuous vide the same order. FAO(OS) No.73/2014 has been filed thereagainst. However it is obvious that the outcome of FAO(OS) No.73/2014 would be depended upon the outcome of FAO(OS) No.72/2014 in as much as if the order of the learned Single Judge allowing OMP No.204/2012 preferred by the respondent no.1 and setting aside the award were to be upheld, the question of granting any interest to the appellant on the awarded amount would not arise.

5. The learned Single Judge having found the petition supra under Section 34, preferred by the respondent no.1 to have been filed within time, otherwise found the award to be without examining the evidence before the Arbitral Tribunal and accordingly set aside the same.

6. These appeals came up before this Court on 5th March, 2014 when upon the contention of the counsel for the appellant that proof of delivery of the award on the respondent no.1 be requisitioned from the respondent no.2, notice was issued to the respondent no.2 Arbitral Tribunal to furnish the proof of the delivery status of the award on the respondent no.1.

7. The Registrar of the respondent no.2 has in response filed an affidavit *inter alia* stating that the arbitral award dated 15th June, 2011 was sent to both the parties i.e. the appellant and the respondent no.1, by Registered Post on 28th June, 2011. The Registrar of the respondent no.2 is also present in the Court along with his Advocate.

8. The senior counsel for the appellant has argued, that the said affidavit of the Registrar of the respondent no.2 still does not give the date of service of the award sent on 28th June, 2011 on the respondent no.1; that it is not even stated whether any AD Card was received or not and / or whether the envelope containing the award sent on 28th June, 2011 was returned to the respondent no.2.

9. There is indeed such a lacuna in the affidavit. However there being no clear direction in the earlier orders, as to the form of the affidavit, we, rather than adjourning the case for filing of further affidavit by the Registrar of the

respondent no.2, have in Court enquired from the Registrar of the respondent no.2 whether the envelope containing the award sent on 28th June, 2011 was along with the AD Card and whether the envelope containing the award sent on 28th June, 2011 was returned back to the respondent no.2.

10. The Registrar of the respondent no.2 states that the award was not sent along with any acknowledgment due card and the envelope containing the award dispatched on 28th June, 2011 was not returned to the respondent no.2.

11. The position thus remains the same as before the learned Single Judge. There is nothing to show that the envelope containing the award sent by the respondent no.2 to the respondent no.1 on 28th June, 2011 was delivered on the respondent no.1 and if so when. Else, there is no dispute that the respondent no.1 collected the award from the respondent no.2 on 19th December, 2011.

12. We have enquired from the senior counsel for the appellant as to how, in the absence of anything to show that the arbitral award was received by the respondent no.1 in June, 2011 as averred, can we on presumption, dismiss the petition under Section 34 of the Act preferred by the respondent no.1, as beyond time, especially when the legislature has permitted the delay in filing the petition under Section 34 of the Act to be condoned only if filed within

further period of 30 days but not thereafter and the Supreme Court in ***Union of India Vs. Popular Construction Co.*** (2001) 8 SCC 470 has interpreted the same to be mandatory and not capable of further extension.

13. We have also drawn the attention of the senior counsel for the appellant to ***Union of India Vs. Tecco Trichy Engineers & Contractors*** (2005) 4 SCC 239 concerned with delivery of the arbitral award on the Railways; it was held that the delivery of an arbitral award under Section 31(5) is not a matter of mere formality—it is a matter of substance; that for such delivery to be effective, has to be “received” by the person capable of taking a decision with respect to the award and not by any person in the department.

14. Mention may also be made of the judgment of one of us (Rajiv Sahai Endlaw, J.) in ***Karmyogi Shelters Pvt. Ltd Vs Benarsi Krishna Committee*** MANU/DE/1879/2009 holding that the arbitral award is not to be personally delivered to the party and can be delivered to the Advocate representing the party but which was set aside by the Division Bench of this Court vide judgment dated 4th May, 2010 in FAO(OS) No.578/2009 titled ***Karmyogi Shelters Pvt. Ltd Vs Benarsi Krishna Committee*** holding that the principles laid down in ***Tecco Trichy Engineers & Contractors*** supra are applicable to

private parties also and that the service of the award has to be on the concerned party and that where a thing prescribed to be done in a particular manner it must be done in that manner only, else will be held not to have been done at all. The said view of the Division Bench was affirmed by the Supreme Court in judgment dated 21st September, 2012 titled ***Benarsi Krishna Committee Vs Karmyogi Shelters Pvt. Ltd*** (SLP Civil No.23860/2010) laying down that proper compliance of Section 31(5) of the Act means delivery of a signed copy of arbitral award on the party himself and not on his Advocate and only service on the party himself gives the party concerned the right proceed under to Section 34 of the Act; delivery of a copy of the signed award on the Advocate for the parties was held to be non-compliance of the provisions of delivery on the party to the arbitral award.

15. In this light of the aforesaid two judgments, we are of the view that the presumption invoked by the senior counsel for the appellant would have no place in the absence of any proof of delivery of the signed copy of the award on the respondent no.1 itself and which does not exist. We may notice that this Court in ***Union of India Vs. Haryana Telecom Limited*** MANU/DE/0662/2010, ***Bharat Sanchar Nigam Ltd. Vs. Haryana Telecom***

Ltd. MANU/DE/4113/2010 and Sr. Divisional Commercial Manager Vs. M/s. Shriram Food & Fertilizer Industries MANU/DE/4526/2013 had drawn presumption of service of the arbitral award but in view of aforesaid, the same cannot be said to be a correct exposition of law.

16. Save for the aforesaid, the only other contention of the senior counsel for the appellant is that a direction be given to the respondent no.1 for bearing the fee of the arbitration in the remitted proceedings. No notice of this appeal has been issued to the respondent no.1 as yet and in the absence of the respondent no.1, we cannot make any such direction. Need is not felt to issue notice to the respondent no.1 only for the said purpose. Though the senior counsel for the appellant has also argued that the respondent no.2 be so directed but we are of the view that the learned Single Judge in the impugned judgment has sufficiently taken care of this aspect.

17. There is thus nothing in this appeal which is dismissed.

CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J.

MAY 02, 2014

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