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24th March, 2014

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.....Appellants

Through: Mr. Suhail Khan, Adv.

VERSUS

M/S L&T FINANCE LTD. & ANR.

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM 5226/2014 (Exemption)

Allowed, subject to all just exceptions. CM stands disposed of.

CM No.5227/2014 (condonation of delay)

For the reasons stated in the application, delay in filing of the appeal is condoned. CM stands disposed of.

FAO 88/2014 & CM No.5228/2014 (Stay)

1. This first appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (in short ‘the Act’) impugning the judgment of the

court below by which objections filed by the appellants under Section 34 of the Act were dismissed.

2. The court below notes that appellants did not appear in the arbitration proceedings initially and appeared through a person one Mr. Narendra Bhatia on 12.3.2009 but thereafter did not appear. Award dated 7.6.2010 was therefore passed *ex parte* against the appellants with respect to the balance amount due towards loan given to the appellants for purchase of an Excavator. By the Award a sum of Rs.13,74,384/- was decreed in favour of the respondent herein alongwith interest.

3. The court below also notes that appellants were sent the copy of the Award dated 7.6.2010, at the address of the appellants which is the same address as in petition under Section 34, but the same could not be served in spite of repeated efforts of the postal department. Relying upon Section 3(d) (1) of the Act, and the judgment of the Supreme Court in the case of ***M/s Madan & Co. Vs. Wazir Jaivir Chand, AIR 1989 SCC 630***, it has been held that the Award dated 7.6.2010 was deemed to be duly served upon the appellants. Objections, however since were filed only in April, 2012, and which were therefore grossly time barred being beyond 90 days plus 30 days from June/July 2010, the same were dismissed as barred by time.

4. The relevant observations of the court below are contained in the following paras of the impugned judgment and which read as under:-

- “21. Petitioners have submitted that they were never served the locus of arbitration nor the award was served upon them. Perusal of arbitral record reveals that a demand notice dated 07.10.2008 were served upon the petitioner. The dispute was referred to the Ld. Arbitrator vide letter dated 12.11.2008 and after receipt of the same, Ld. Arbitrator after accepting the same sent arbitration notice dated 17.11.2008 to both the parties i.e. petitioner as well as respondent. The notices sent to both the respondents were received back with the report of the premises being locked despite several visits i.e. seven visits by the postman. The next date was fixed as 20.01.2009 by Ld. Arbitrator. The postal receipts in original of 18.11.2008 as well as UPC are in arbitral record. The proceedings of 22.01.2009 records absence of respondents and the next date of hearing fixed as 18.02.2009. Again notices sent to both the respondents were received back with the report of the premises being locked despite several visits i.e. six visits by the postman. Proceedings of 20.02.2009 again records absence of respondents and the next date of hearing was fixed for 12.03.2009 and there are original postal receipts dated 20.02.2009 in support of sending of the same to all the parties. The same has not been received back.
22. There is a fax sent by petitioner to Ld. Arbitrator seeking their exemption from appearing before Ld. Arbitrator on 12.03.2009 because of holi. Petitioners have denied the sending of the said fax. However, the same has been sent from an address nearer to address of petitioner and bears their signatures. The said signatures are identical to the signatures of the petitioner in their affidavits filed along with the petition. Petitioners sought adjournment for the said date i.e 12.03.2009. The proceedings of Ld. Arbitrator for 12.03.2009 specifically records the intimation of petitioners seeking adjournment on account of holi. One Narinder Kumar Bhatia appeared for the petitioners and sought adjournment and matter was adjourned for two

weeks and it is also recorded that the next date of meeting will be fixed by a separate notice by the Ld. Arbitrator. The proceedings of that date are signed by the said Narinder Kumar Bhatia. The notice of 22.08.2009 sent to both the parties also records presence of Narinder Bhatia for petitioners on 12.03.2009. The next date was fixed for 15.09.2009. The original UPC of 22.08.2009 is also filed in arbitral record. The impugned award was passed on 07.06.2010 was sent by Ld. Arbitrator to all the parties. The said envelope was received back. The copy of postal receipts and registered AD have also been filed with the present application. It is relevant to note that address of petitioners on all these notices, UPC receipts, postal receipt of speed post as well as on the returned envelopes is same as given in the memo of parties by the petitioners in the present petition.

23. In the matter of **M/s Madan and Co. Vs. Wazir Jaivir Chand, AIR 1989 SCC 630**, Hon'ble Supreme Court has observed that if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct. If he is staying away for some time all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward to them to the address where he has gone or to deliver them to some other person authorized by him. The Apex Court in **State of M.P. Vs. Hiral Lal & Ors (1996) 7 SCC 523**, has again upheld that the notices returned with postal remarks "Not available in the House", "House Locked", and "Shope Closed", it must be deemed that the notices have been served on the respondents. The Hon'ble Supreme Court in the case of **Chief Commissioner of Income Tax Vs. V.K. Gururaj and Ors, 1996 (7) SCC 275**, held that notice sent by Registered Post, neither unserved envelopes nor AD card received back shall be deemed served.

24. The present award has been passed under provisions of Arbitration and Conciliation Act 1996, which specifically provides in Section 3 (a) as **"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”.

25. Thus Section 3 of the Arbitration and Conciliation Act, 1996 provides three methods of delivery of communication and if any of the three methods of delivery be followed the communication would be treated as received on the date of delivery. In the light of these observations of the Apex Court, the notices were served upon the petitioners since the same were dispatched at the address given by the petitioners to the respondent at the time of taking loan.

26. All the envelopes containing the notices posted at both the addresses are there in arbitral record. Original postal receipts are also there. The envelope of the award has been received back with the report that none was available despite several visits. Petitioners have contended that the respondents have managed false reports of service on the petitioners. However the respondents as well as Ld. Arbitrator are based in Bombay while the petitioners are residents of Delhi and the postman in cases of returned envelopes have recorded his visit to house of the petitioners severally. It is not understandable as to how the respondents could have managed the service report of petitioners. There is no force in the submissions of petitioners. As stated earlier, the address of petitioners on all the notices, award and postal receipts is same as the one given in the memo of parties as well as on affidavits of petitioners in the present petition.” (underlining added)

5. A reading of the aforesaid paras make it clear that the objections filed in April 2012 against the Award dated 7.6.2010 were grossly

barred by time. Objections were therefore rightly dismissed by the court below. It is not unknown that debtors try every trick in the book to delay and/or defeat the litigation initiated by the creditor for recovery of dues.

6. I may state that on the conclusion of the hearing of the appeal, I suggested to the counsel for the appellants as to if the appellants are interested in paying the amount due alongwith interest at 12% per annum simple, instead of higher rate of interest granted by the arbitrator, however, counsel for the appellants, after the matter was passed over, said that the appellants do not agree and therefore a judgment may be passed and hence the present judgment.

7. In view of the above, there is no merit in the appeal, and the same is therefore dismissed, leaving the parties to bear their own costs.

MARCH 24, 2014
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VALMIKI J. MEHTA, J.