

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****NOTICE OF MOTION NO. 696 OF 2016****IN****ARBITRATION PETITION (L) NO. 267 OF 2016**

Jolly Brothers Pvt. Ltd.)
a company incorporated and registered)
under the Companies Act, 1956 and having)
its registered office at 2nd Floor, Citi Mall,
Andheri (West), Mumbai – 400 053)

..... Applicant
(Orig. Petitioner)

IN THE MATTER BETWEEN

Jolly Brothers Pvt. Ltd.)
a company incorporated and registered)
under the Companies Act, 1956 and having)
its registered office at 2nd Floor, Citi Mall,
Andheri (West), Mumbai – 400 053)

..... Petitioner
(Orig.Claimant)

VERSUS

1. Surendra Nath Jolly)

2. Sudarshan Jolly)

3. Vikas Jolly)
All Indian Inhabitants, residing at)
217, Avenue No.1, Old Road No.12,)
Banjara Hills, Hyderabad – 500 034)

..... Respondents
(Orig.Respondents)

Mr.Shailesh Shah, Senior Advocate, a/w. Ms.Radhika Dixit, Mr.Abhishek Padwalkar, i/b. MDP & Partners for the Petitioner/Applicant in Notice of Motion.

Mr.Nitin Thakkar, Senior Advocate, a/w. Mr.Firoz Bharucha, Mr.Midhun Kumar, i/b. Mr.Siddharth Mehta for the Respondents.

CORAM : R.D. DHANUKA, J.

DATED : 29th APRIL, 2016

JUDGMENT

By this notice of motion the applicant seeks condonation of delay of 31 days in filing petition under section 34 of the Arbitration and Conciliation Act, 1996. Some of the relevant facts for the purpose of deciding this notice of motion are as under :-

2. On 10th October, 2015, the arbitral tribunal rendered the arbitral award. The learned presiding officer by his letter dated 16th October, 2015 to the learned advocates representing the parties informed that the arbitral award was ready and was duly signed by all the three arbitrators. The learned presiding arbitrator requested the learned advocates representing the parties to depute their representative to collect the award from his office after prior intimation. Pursuant to the said letter received from the learned presiding arbitrator, the applicant's advocate deputed his representative to collect a signed award from the learned arbitrator on 16th October, 2015 who collected the said signed award from the office of the learned presiding officer at 5.30 p.m. The learned presiding arbitrator by his e-mail dated 16th October, 2015 recorded the handing over of the original award to the representative of the learned advocate representing the petitioner.

3. The applicant lodged an arbitration petition on 16th February, 2016 impugning the said arbitral award under section 34 of the Arbitration and Conciliation Act, 1996. Since according to the applicant at that stage, there was a delay of 31 days in filing the arbitration petition, the applicant filed notice of motion (696 of 2016) in the said Arbitration Petition (L) No.267 of 2016 inter alia praying for condonation of delay of 31 days in filing the arbitration petition.

4. Mr.Shah, learned senior counsel appearing for the applicant fairly invited my attention to the averments made in the affidavit in support and more particularly paragraph (2). He submits that the arbitral tribunal had not served a copy of the signed award upon the applicant. The applicant filed an additional affidavit on 27th April, 2016. My attention is invited to the averments made in the said affidavit. It is submitted by the learned senior counsel that under section 31(5) of the Arbitration and Conciliation Act, a signed copy of the award has to be delivered by the arbitral tribunal to each party. In the present case a copy of said signed award was not delivered to the applicant as is clear from the e-mail dated 16th October, 2015 addressed by the learned presiding arbitrator. He submits that the said award was collected by the representative of the applicant's advocate from the office of the learned presiding arbitrator. He submits that due to certain disputes between the applicant and its advocate in respect of the pending fees, the learned advocate representing the applicant handed over the original award to the applicant only in the third week of December 2015. It is lastly submitted that in any event the copy of the signed award as contemplated under section 31(5) of the Arbitration and Conciliation act 1996 was admittedly not served upon the petitioner who was a party to the arbitration agreement, there was no delay in filing the arbitration petition.

5. In support of his submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***State of Maharashtra & Ors. vs. M/s.Ark Builders Pvt.Ltd.*** AIR 2011 SC 1374, judgment of Supreme Court in case of ***Benarsi Krishna Committee and others vs. Karmyogi Shelters Private Limited*** (2012) 9 SCC 496 and judgment of this court in case of ***Mukesh Nanji Gala & Ors. vs. Heritage Enterprises & Anr.*** 2015(2) Bom.C.R.123. He submits that the

limitation for filing an arbitration petition under section 34(3) would not commence unless a signed copy of the award is received upon the party as defined under section 2(1) (h) of the Arbitration and Conciliation Act, 1996. It is submitted that no advantage of such erroneous concession of law thus made in the affidavit in support of the notice of motion can be taken out by the respondents. He submits that the clear statement of law is explained in the additional affidavit dated 27th April, 2016 filed by the applicant.

6. Mr.Thakkar, learned senior counsel for the respondents on the other hand invited my attention to the averments made in the affidavit in support of the notice of motion and more particularly paragraph (2). He submits that the applicant has categorically admitted in the affidavit in support that the applicant had received a copy of the award dated 16th October, 2015. He submits that the notice of motion is filed by the applicant admittedly on the premise that there was a delay of 31 days in filing arbitration petition. My attention is also invited to the averments made in the additional affidavit dated 27th April, 2016 by the applicant. He submits that the applicant cannot be permitted to retract from the unequivocal admission of the facts made in the affidavit in support of the notice of motion to the effect that the copy of the award was already received by the applicant on 16th October, 2015. The emphasis is also laid on the averments made in paragraph (5) of the additional affidavit. He submits that excuse given in the affidavit in support of the notice of motion as well as in the additional affidavit is that in view of the pending issue of fees between the applicant and his advocate, the applicant could not file the arbitration petition within the time prescribed under section 34(3) of the Arbitration and Conciliation Act, 1996. He submits that the applicant having made a false and incorrect statement in the affidavit in support as well as in the additional affidavit, no leniency should be shown by this court to such a party. He

submits that the notice of motion thus filed for condonation of delay shall be dismissed by imposing exemptionary cost under section 35A of the Code of Civil Procedure, 1908.

7. A perusal of the record indicates that the arbitral tribunal had rendered the arbitral award on 10th October, 2015. The learned presiding arbitrator by his e-mail dated 16th October, 2015 addressed to the learned advocates representing the parties informed that the said arbitral award dated 10th October, 2015 was ready and was duly signed by all the three arbitrators. By the said e-mail, both the advocates were called upon to collect copy of the said award from the office of the presiding arbitrator after prior intimation. The learned advocates representing the applicant in pursuance of the said e-mail dated 16th October 2015 deputed his representative to the office of the learned presiding arbitrator to collect the said award. A perusal of the e-mail dated 16th October, 2015 sent by the presiding arbitrator indicates that the representative of the learned advocate of the applicant had collected the award from the office of the learned presiding arbitrator on the same day.

8. There is no dispute that the applicant filed a Notice of Motion (696 of 2016) in the Arbitration Petition (L) No.267 of 2016 in this court. The applicant was under an impression that there was delay of 31 days in filing the arbitration petition under section 34. A perusal of the affidavit in support of the notice of motion indicates that the applicant was under an impression that service of copy of the award by the arbitral tribunal upon the advocate representing the applicant was a service upon the applicant itself. Based on such erroneous premise, the applicant filed a notice of motion inter alia praying for condonation of delay of 31 days and rendered few reasons in the said affidavit explaining the delay of 31 days in filing

the arbitration petition.

9. It is stated in the affidavit in support that the applicant undertook the preparation of the petition, however due to personal difficulty of the advocate for the applicant, necessary instructions for finalization of the draft of the petition could not be taken and hence there had been delay of 31 days in filing the petition. It is stated that the delay occurred in filing petition was a bonafide and had occurred despite the best effort made by the applicant. The notice of motion was opposed by the respondents on the ground that the alleged admitted delay of 31 days could not be condoned by this court under section 34(3) of the Arbitration and Conciliation Act the same being beyond the period of 30 days after expiry of period of 3 months from the date of the receiving of copy of the signed award from the learned arbitrator.

10. The applicant thereafter filed an additional affidavit before this court affirmed on 27th April, 2016. A perusal of the said affidavit clearly indicates that the applicant has now taken a stand that under section 31(5) of the Arbitration and Conciliation Act, 1996 after arbitral award is made by the arbitral tribunal, the signed copy of the award has to be delivered to each party. It is averred by the applicant in the additional affidavit that since copy of the signed award was not served upon the applicant by the arbitral tribunal, there was no delay on the part of the applicant in filing arbitration petition within the time prescribed under section 34(3) of the Arbitration and Conciliation Act, 1996.

11. Supreme Court in case of *Benarsi Krishna Committee and others* (supra) after interpreting the provisions of section 34(3) and 31(5) of the Arbitration and Conciliation Act, 1996 has considered a similar situation and has held that the

signed copy of the award has to be served upon a party as defined under section 2(1)(h) of the Arbitration and Conciliation Act, 1996. It is held by the Supreme Court that the service of the copy of the signed award upon the advocate or the agent does not amount to compliance with the provisions of section 31(5) of the Arbitration and Conciliation Act, 1996. It is held by the Supreme Court that since the signed copy of the award had not been delivered to the party itself, the limitation prescribed under section 34(3) of the Arbitration and Conciliation Act would not commence. In my view, the judgment of the Supreme Court in case of ***Benarsi Krishna Committee and others*** (supra) squarely applies to the facts of this case. I am respectively bound by the said judgment.

12. The averments made in the additional affidavit filed by the applicant that the copy of the signed award was served upon the applicant himself by the learned arbitrator as contemplated under section 31(5) of the Arbitration and Conciliation Act has not been denied by the respondents in the affidavit in reply filed before this court. In my view, on conjoint reading of section 31(5) and 34(3) with section 2(1) (h) of the Arbitration Act, 1996, it is clear that service of copy of the signed award as contemplated under section 31(5) of the Arbitration Act has to be served on the party as defined under section 2(1)(h) of the Arbitration and Conciliation Act and not on his advocate or any other agent. In my view even if the advocate has collected the copy of the signed award from the arbitral tribunal, the same would not commence the period of limitation as contemplated under section 34(3) of the Arbitration and Conciliation Act, 1996.

13. Supreme Court in case of ***State of Maharashtra & Ors. vs. M/s.Ark Builders Pvt.Ltd.*** (supra) has also interpreted section 31(5) of the Arbitration and Conciliation Act and has held that for commencement of the limitation, party to

the arbitration agreement has to be served with a copy of the signed award as contemplated under section 31(5) of the Arbitration and Conciliation Act. The judgment of Supreme Court in case of ***State of Maharashtra & Ors. vs. M/s.Ark Builders Pvt.Ltd.*** (supra) also assist the case of the applicant and applies to the facts of this case.

14. Insofar as submission of the learned senior counsel for the respondents that in view of the applicant having made an averment in the affidavit in support of the notice of motion that the copy of the signed award was served upon the applicant by the arbitral tribunal and thus the applicant cannot be allowed to retract from such unequivocal admission made in the affidavit in support by filing an additional affidavit is concerned, in my view the concession of law erroneously made in the affidavit in support contrary to the provisions of Arbitration Act and contrary to the law laid down by the Supreme Court in case of judgment of Supreme Court in case of ***Benarsi Krishna Committee and others*** (supra) and in case of ***State of Maharashtra & Ors. vs. M/s.Ark Builders Pvt.Ltd.*** (supra) will not be binding on the party. No advantage of such erroneous admission of law contrary to the provisions of law and law laid down by the Supreme Court can be allowed to be taken by the respondents.

15. Insofar as last submission of the learned senior counsel for the respondents that the applicant having allegedly made false and incorrect statement in the affidavit in support of the notice of motion and in the additional affidavit filed before this court and thus the notice of motion shall be dismissed with exemptionary cost under section 35A of the Code of Civil Procedure, 1908 is concerned, I am not inclined to accept this submission of the learned senior counsel for the respondents. The applicant had given some explanation for

explaining delay and filing arbitration petition on erroneous premises that there was delay of 31 days in filing arbitration petition. In my view since there was no delay in filing arbitration petition, the averments made by the applicant on such erroneous premises need not be considered by this court. There is thus no substance in this submission of the learned senior counsel for the respondents.

16. In my view since there is no delay in filing the arbitration petition, question of condonation of any delay as prayed by the applicant in the notice of motion does not survive. Notice of motion is accordingly disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]