

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**APPEAL (L) NO.257 OF 2016
IN
ARBITRATION PETITION NO.220 OF 2015
WITH
NOTICE OF MOTION NO.1843 OF 2016
IN
APPEAL (L) No.257 of 2016**

Mr Anthony Magnose Thambiraj	... Appellant
v/s	
Parle Global Technologies	... Respondent

Mr Rajshekhar Govilkar i/b Mr Satish Mande for Appellant.
Mr Mayur Khandeparkar with Mr Ganesh Ambekar i/b M/s Thakore
Jariwala and Associates for Respondent.

**CORAM: A.S. OKA AND
SMT ANUJA PRABHUDESSAI JJ.**

DATE : 6TH DECEMBER 2016.

P.C.:-

1. Heard learned counsel appearing for the Appellant and the learned counsel for the Respondent. The prayer in this Notice of Motion is for condonation of delay of 379 days in preferring an

Appeal against the order dated 25th June 2015 passed by the learned Single Judge by which the Petition filed under section 9 of the arbitration and Conciliation Act 1966 (for short, Arbitration Act) has been disposed of.

2. The main contention canvassed in support of this Notice of Motion is that at no stage, the Arbitration Petition was served upon the Appellant. It is submitted by the learned counsel appearing for the Appellant that though the order dated 3rd March 2015, which is an ad-interim order, records that none appeared for the Respondent in Arbitration Petition though served, there is nothing placed on record to show that the notice of Arbitration Petition was served upon the Appellant. He submits that as per the High Court (Original Side) Rules and the Scheme framed by the Hon'ble the Chief Justice, a notice is required to be served through Court on the Respondent after the Petition is accepted. Referring to the copy of the affidavit of service tendered on record by the learned counsel for the Respondent, he submits that only on the basis of tracking record showing delivery, it cannot be concluded that the notice was served to the Appellant. He submitted there is nothing on record to show

that the Appellant had refused service. He submitted that the Petition filed under section 9 of the Arbitration Act on which impugned order is passed proceeds on wrong premise that the present appellant was the sole proprietor. He also invited our attention to the averments made in the affidavit in support of this Notice of Motion. He urged that the public notice published after passing of the impugned order is completely irrelevant for the purpose of deciding whether there was a proper service of notice of the Arbitration Petition upon the Appellant. He submitted that at no stage, notice of the Arbitration Petition was served upon the Appellant and as the learned Single Judge was misled that the notice was served, this is a fit case to condone the delay.

3. We have considered the submissions. The impugned order was passed under section 9 of the Arbitration Act granting interim relief pending the arbitral proceedings. We have perused the affidavit in support of the Notice of Motion. The impugned order is of 25th June 2015 and the Appeal alongwith the present Notice of Motion was lodged on 14th July 2016. In paragraph E of the Affidavit in Support, the Appellant has stated that he could not

remain present in the proceedings as he was facing serious domestic difficulties including indifferent health of his wife, who was detected Cancer. It is pointed out that ultimately on 18th December 2015, the Appellant's wife died. In clause G of the Affidavit in Support, he has said that the Respondent was served with the copy of Arbitration Application No.299 of 2015 (under section 11 of the Arbitration Act) some time in the month of February 2016. It is stated that as the Appellant was in a very depressed and disturbed state of mind, he could not take any action. In clause F, it is specifically pleaded that the order dated 25th June 2015, which is impugned in the Appeal, came to the notice of the appellant in February 2016.

4. We must note here that though a submission was made across the bar that at no stage there was a service of any notice under section 9 of the Arbitration Act, that is not the case made out by the Appellant in the Affidavit in Support. As stated earlier, on the contrary in clause E, the appellant has stated why he could not remain present in the proceedings of the Petition under section 9.

5. Though no such case was made out regarding failure to serve the notice, it is sought to be contended that when copy of

Arbitration Application No.299 of 2015 was served to the appellant, he became aware of the impugned order. To the Affidavit in Reply, the Respondent has annexed a copy of order dated 29th July 2016 passed by the learned Single Judge in Arbitration Application No.299 of 2015, which records that the Affidavit of Service dated 28th January 2016 notes that the Appellant has refused to accept the service. The order dated 8th February 2016 passed in Arbitration Application records that there was an Office Note that the present Appellant has refused to accept the service. Therefore, there was a specific order passed by the learned Single Judge directing the Appellant to remain present on 12th February 2016. The said Arbitration Application No.299 of 2015 appeared on board on 23rd February 2016 and 26th February 2016. As the Appellant did not appear, the learned Single Judge directed service of fresh notice to the Appellant.

6. It is pertinent to note that in Arbitration Application No.299 of 2015, the present Appellant filed a reply on 13th February 2016. It is not in dispute that though a copy of the impugned order was annexed to Arbitration Application No.299 of 2015, in the

Affidavit in Reply dated 13th April 2016, it is not the contention raised by the Appellant that the order in the Arbitration petition under section 9 of the Arbitration Act has been passed without service of any notice.

7. Thus, even going by the case made out by the Appellant, in February / March 2016, he was served with the impugned order. He filed a reply to the Application under section 11 of the Act in April 2016. Thereafter, he filed the present Appeal in July 2016. We have perused a copy of Affidavit of Service dated 26th March 2016 filed by a Clerk employed by the Attorneys of the Appellant before the learned Single Judge in the Petition under section 9. Along with the notice dated 9th March 2015, sent by speed post A.D. as well as by hand delivery, a copy of the order dated 3rd March 2015 was forwarded to the Appellant. The track report of the notice sent by speed post shows that the article was delivered on 23rd March 2015.

8. As stated earlier, it is not the case made out in the Affidavit in Support of this Notice of Motion that there was no service of notice of the Petition under section 9 of the Arbitration Act

upon the Appellant.

9. It is true that while deciding an Application for condonation of delay, the Court must adopt liberal approach. The present appeal arises out of interim order made under section 9 of the Arbitration Act. Considering the stand taken in the Reply and conduct of the Appellant of not explaining the delay in preferring Appeal though even according to the case of the Appellant, he was aware of the impugned order dated 25th March 2016, in our view, even by adopting liberal approach, it cannot be concluded that sufficient cause is made out for condonation of delay.

10. There is no merit in the Notice of Motion and the same is accordingly dismissed. No costs.

(SMT ANUJA PRABHUDESSAI J.)

(A.S. OKA J.)