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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. 158/2015**

NARENDER KUMAR RAJGHARHIA Petitioner

Through: Mr C. Mukund, Mr Ashok Kumar
Jain and Mr Amit Kasera, Advocates.

versus

KOTAK MAHINDRA BANK LTD & ORS Respondents

Through: Mr Arun Aggarwal with Mr Taranjeet
Singh, Advocates.

WITH

+ **O.M.P. 159/2015**

KALPANA RAJGHARHIA Petitioner

Through: Mr C. Mukund, Mr Ashok Kumar
Jain and Mr Amit Kasera, Advocates.

versus

KOTAK MAHINDRA BANK LTD & ORS Respondents

Through: Mr Arun Aggarwal with Mr Taranjeet
Singh, Advocates.

AND

+ **O.M.P. 160/2015**

PRATIK RAJGHARHIA Petitioner

Through: Mr C. Mukund, Mr Ashok Kumar
Jain and Mr Amit Kasera, Advocates.

versus

KOTAK MAHINDRA BANK LTD & ORS Respondents

Through: Mr Arun Aggarwal with Mr Taranjeet
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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08.08.2016

1. The above captioned petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 31.03.2011 (hereafter 'the impugned award') passed by Shri Ratan K Singh, Advocate who was appointed as a sole arbitrator by the Citi Financial Consumer Finance India Limited (hereafter 'CFCFIL').
2. Mr. Narender Kumar Rajgharhia (the petitioner in OMP 158/2015 and hereafter referred to as 'NKR') is the husband of Ms Kalpana Rajgharhia (the petitioner in OMP 159/2015) and the father of Pratik Rajgharhia (the petitioner in OMP 160/2015)
3. In his petition, Narender Kumar Rajgharhia has, essentially, pleaded two grounds for assailing the impugned award. The first being that the award was obtained by the Decree Holder without serving any notice upon the Petitioner; therefore, the same is in breach of violation of the principles of natural justice and equity. And, the second being that CFCFIL has colluded with Kotak Mahindra Bank Ltd/respondent No.1 (hereinafter 'KMBL') and fabricated the documents to raise false claim against the Petitioner. It is also alleged that the Decree Holder had obtained the impugned award in collusion with the Arbitrator.
4. Kalpana and Pratik Rajgharhia have also pleaded that they had not received the notices for arbitration. In addition, they claim that there was no arbitration agreement between them and CFCFIL.
5. Mr C Mukund, learned counsel appearing on behalf of the petitioners earnestly contended as under:

- (a) that the petitioners had no knowledge of the arbitral proceedings as the CFCFIL(predecessor in interest of KMBL) had not served any notice of invocation of the arbitration;
- (b) that even the notices regarding the arbitral proceedings were not served on the petitioners and the impugned award also records that proof of the delivery (POD) of the notices were also not received by the Arbitrator;
- (c) that Narender Kumar Rajgharhia was not residing at the address where the notices were sent (D-52 Defence Colony, New Delhi);
- (d) that the Arbitrator had grossly erred in relying on the provisions of Section 3 of the Act for assuming deemed service as the provisions of the said section applied only to notices sent by post and not by courier;
- (e) that the amount outstanding as per the statement of account furnished before the arbitrator was materially different from the amount outstanding shown as per the assignment deed between the CFCFIL and KMBL and this indicated that the accounts were fabricated.

6. Mr Mukund, referred to the decision in ***Bipromasz Bipron Trading SA v. Bharat Electronics Limited (BEL) : (2012) 6 SCC 384*** and drew the attention of this Court to para 30 of the said judgment wherein the Supreme Court had referred to Section 3 (2) of the Act and held that a communication would be deemed to have been received on the date, it is delivered. On the

strength of this decision, Mr Mukund contended that since the petitioners had not received the notices, they could not be proceeded against in the arbitration proceedings.

7. Mr Arun Aggarwal, learned counsel appearing on behalf of KMBL countered the contentions advanced by Mr Mukund. He referred to the arbitral record to indicate that the notices were sent to the petitioners at the address furnished by the petitioners. He further pointed out that even though Narender Kumar Rajgharhia had claimed that he was not residing at the given address, that is, D-52, Defence Colony, New Delhi, and had shifted to another address in NOIDA, in view of his differences with the respondent Nos.2 & 3, the affidavit filed by him in support of the petition indicates his residential address as that of D-52, Defence Colony. Mr. Aggarwal also submitted that the petitioners were fully aware of the proceedings, but had wilfully stayed away, just to delay the proceedings.

8. I have heard learned counsels for the parties and have also perused the arbitral record.

9. The impugned award indicates that the notices dated 11.10.2010 were sent to the parties, but neither the envelopes containing the notices were returned nor were the proofs of delivery supplied by the courier agency. However, the receipt of the courier agency indicating that the notices were sent, are available on the record and it is thus clear that the notices were sent to the petitioners. Since the Petitioner had not appeared, the arbitrator sent another notice dated 18.11.2010 along with the Statement of Claim, documents and evidence by way of affidavit, that were filed by CFCFIL and

this time, the arbitrator used another courier agency (Blazeflash Courier). The envelopes sent to the petitioners were returned back with the noting 'refused'. The receipts indicating that the notices were sent as also the envelopes returned with the marking 'refused' have been placed on record. In the aforesaid circumstances, the Arbitrator proceeded on the basis that the petitioners were served.

10. The contention that the arbitrator could not have presumed service, since the notices were not sent by post- is misconceived.

11. Section 3 (1) of the Act reads as under:-

“3. Receipt of written communications.-(1) Unless otherwise agreed by the parties,-

(a) 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.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority.”

12. A plain reading of Section 3 (1) (b) of the Act indicates that the provision of deemed service does not apply only to communications sent through the registered post. The communications could also be sent by *any*

other means which provides a record of the attempt to deliver it. Thus, service by the courier agency would also fall within the scope of the Section 3(1) (b) of the Act.

13. The reliance placed by Mr Mukund, upon the decision of the Supreme Court in ***Bipromasz Bipron Trading SA*** (supra) is misplaced. In that case, a communication dated 19.07.2011 appointing the arbitrator was sent by the respondent. It was contended on behalf of the respondent therein that the said communication came into effect, the moment it was signed. The petitioner therein contended that even though the letter appointing the arbitrator was signed on 19.07.2011, it was not communicated till the filing of the petition under Section 11 of the Act, and, therefore, the Court could proceed to appoint the arbitrator. The Court accepted the aforesaid contention of the petitioner and it is in that context referred to Section 3 (2) of the Act, which specifically provides that a communication is deemed to have been received on the date, it is so delivered.

14. In the present case, the record shows that the petitioners have 'refused' the service and it is their claim that they have not been served at all. The arbitrator has proceeded - in my view rightly so - on the basis that 'refusal' to accept the notice of the proceedings would be a deemed service.

15. It is also difficult to accept the contention that the notices invoking arbitration and/or appointing the arbitrator were not served on the petitioners. CFCFIL produced a notice dated 22.09.2010 sent by its advocates calling upon the petitioners to pay the outstanding amount failing

which the CFCFIL “*would without any further notice/intimation refer the disputes/matter to the Sole Arbitration of Shri Ratan Kumar Singh, Advocate*”. The said notice was sent by registered post and the receipts were produced by CFCFIL and are a part of the record. The letter dated 04.10.2010 appointing the arbitrator was also marked to the petitioners.

16. In my considered view, the second ground, that is, the documents have been fabricated by the KMBL and CFCFIL is also devoid of any merits. There is no dispute that the petitioners had availed of the loan as claimed by CFCFIL. Thus, if Narender Kumar Rajgharhia was serious in disputing the statement of accounts, he could have produced his statement of account to point out any error. However, Narender Kumar Rajgharhia, has apart from making a bald statement that the statement of account is fabricated, produced no material which would indicate that the statement of accounts maintained by the KMBL was not true and correct. The other petitioners have simply denied the loan agreement.

17. It is also contended by Mr Mukund - although not pleaded in the petition - that the Narender Kumar Rajgharhia did not have any access to his records, since the same had been taken away by an investigating agency in connection with certain criminal complaints. Even if the same is accepted as correct, the petitioner could always have obtained copies of his record by requesting the concerned agency and if the latter did not comply with, he was not precluded from approaching the Courts for redressal. However, there is no material on record which will indicate that Narender Kumar Rajgharhia even attempted to obtain records from the investigating agency

or was handicapped in any manner from producing the correct statement of accounts.

18. It is also relevant to mention that although Kalpana Rajgharhia and Pratik Rajgharhia, had pleaded that there was no arbitration agreement between them and CFCFIL. This was not pressed by Mr Mukund and in my view, rightly so because the documents produced before the Arbitrator clearly indicate that Kalpana Rajgharhia and Pratik Rajgharhia were co-applicants and co-borrowers and had signed the agreement in question.

19. In the circumstances, I find no merit in the instant petitions and same are accordingly dismissed.

VIBHU BAKHRU, J

AUGUST 08, 2016

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