

\$~38

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

+ **O.M.P. 973/2012**

PRABHAKAR JEYAPATHY

..... Petitioner

Through: Ms. Pragya Baghel, Advocate.

versus

AKSHAYA PVT LTD

..... Respondent

Through: Mr. Arjun Krishnan & Mr. Ankur Singh,
Advocates for the Respondent.

Ms. Karnika Seth & Ms. Shruti Bisht,
Advocates for National Internet Exchange
of India.

CORAM: JUSTICE S.MURALIDHAR

ORDER

07.11.2016

%

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 4th August, 2012 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondent in relation to the use of the domain name 'akshaya.in'.

2. The background facts are that the Petitioner is a software professional working as a Consultant to a Financial Institution in the United States of America since 1993. The Respondent Akshaya Private Limited is a builder involved in construction business. The Petitioner claims to have approached Goodluck Domains for registration of domain name 'Akshaya' for the purposes of setting up a family portal for the benefit of his family living in Coimbatore and in other parts of India and abroad.

3. The Petitioner states that on 5th April, 2009, he was approached by a Web Designing Company from Chennai with an interest of buying the domain name 'akshaya.in' and that they were approaching him on behalf of the Respondent. He then informed the said web designing company that he had no interest in selling the said domain name. The Petitioner further states that on 9th September, 2011, he was made a similar offer, which he again refused.

4. The Petitioner states that on 23rd August, 2012 he received an e-mail for the first time from legal@nixi.in informing him that the impugned Award had been passed by the sole Arbitrator restraining him from using the domain name 'akshaya.in'. It is only thereafter that the Petitioner came to know that the Award was an *ex parte* Award. The Petitioner claims never to have been served with any notice of the said proceedings.

5. One of the main grounds is that the Award being an *ex parte* Award is violative of the principles of natural justice since no notice was ever received by the Petitioner of the arbitral proceedings.

6. With a view to ascertaining the factual position the entire Arbitral record was summoned by this Court by the order dated 16th October, 2012. Ultimately on 13th March, 2015, the Arbitrator, who passed the impugned Award appeared in the Court and showed a copy of the relevant e-mail sent to the parties with a copy being marked to manionline@yahoo.com, which was the e-mail ID of the Petitioner. The Court then directed that the Arbitral record be requisitioned from the CEO of National Internet Exchange of India ('NIXI').

7. Ms. Karnika Seth, Advocate for NIXI has appeared together with the

entire arbitral record, which has been perused by the Court.

8. The arbitral record shows that an e-mail was sent by the learned Arbitrator on 26th November, 2011 to the Respondent with a CC (copy being marked) to manionline@yahoo.com. In other words the notice was not issued directly and principally to the Petitioner herein. That apart what is important is that the attachment to this e-mail was the notice of the arbitration and not a copy of the complaint filed by the Respondent. There is nothing to indicate that a scanned copy of the complaint was attached to the above e-mail.

9. It was sought to be urged by the learned counsel for the Respondent that once the above notice was sent by e-mail to the Petitioner it was then up to the Petitioner to find out about the said case and there was no obligation on the Respondent to ensure service of notice.

10. The above submission totally overlooks the Rules of Procedure devised by NIXI itself as regards service of notice is concerned. The IN Registry's dispute resolution process refers to the .IN Domain Name Dispute Resolution Policy ('INDNDRP') and the INDRP Rules of Procedure both of which have been in vogue since 28th June, 2005.

11. Para 2 of the INDRP Rules of Procedure provides how complaints and communications should be served upon the Respondent. Paras 2(a) and 2(b) read as under:

"2. Communications

a. When forwarding a Complaint to the Respondent, .IN Registry shall ensure to employ reasonably available means to serve notice of complaint to the Respondent. Service of notice, or employing the following measures to do so, shall discharge this responsibility:

i. sending the Complaint to all postal-mail and facsimile addresses shown in the domain name's registration data through .IN Registry's WHOIS database at www.registry.in ; and

ii. sending the Complaint in electronic form (including annexes to the extent available in that form) by e-mail to:

A. the e-mail addresses shown in the domain name's registration data through .IN REGISTRY'S WHOIS function at www.registry.in; and

B. [postmaster@\[the contested domain name\]](mailto:postmaster@[the contested domain name])

iii. sending the Complaint to any address the Respondent has notified to the .IN Registry in writing (including email) at which it prefers and, to the extent possible, to all other addresses provided to the .IN Registry by Complainant under Paragraph 3(b)(v).

b. Except the service of the notice of Complaint as provided in Paragraph 2(a), any written communication to Complainant or Respondent provided for under these Rules of Procedure shall be made

i. by facsimile transmission, with a confirmation of transmission; or

ii. by registered post and/or, speed post.”

12. It is evident that as far as the complaint itself is concerned it should be made available both in hard copy as well as in electronic form. The mere sending of a notice without the complaint will not satisfy the requirement of para 2 of the above Rules. There is a distinction made between the complaints that are to be served in terms of para 2(a) and the communications that have to be served in terms of para 2(b). Para 2(b) begins with the words “Except the service of the notice of Complaint as

provided in Paragraph 2(a), any written communication to Complainant or Respondent.....shall be made (i) by facsimile transmission, with a confirmation of transmission; or (ii) by registered post and/or, speed post.” The service of a written communication can be either by facsimile transmission or by registered post. Therefore, there is an option as far as simple communications are concerned. However, where what is to be served is a complaint there is no option but to serve it both by surface mail as well as by e-mail.

13. There is absolutely nothing in the arbitral record to indicate that a copy of the complaint was, in fact, served upon the Petitioner herein both by surface mail as well as e-mail. As already noted hereinbefore what was served upon the Petitioner by e-mail was a notice of the arbitration and not a copy of the complaint.

14. It cannot be possibly argued by the Respondent in the present case that no prejudice was caused to the Petitioner on account of the failure to serve the complaint. Without a complaint copy being served there was no effective opportunity to the Petitioner to defend himself in the arbitration proceedings. Under Section 34(2)(a)(iii) of the Act an Award is liable to be set aside where “the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;”

15. In the present case there can be no doubt that in the absence of service of the complaint on the Petitioner he was unable to present his case in the arbitral proceedings.

16. The Court is, therefore, satisfied that the impugned Award cannot be

sustained in law as it was rendered *ex parte* without proper service of the complaint upon the Petitioner.

17. The impugned Award is accordingly set aside and the petition is allowed but in the circumstances no orders as to costs.

NOVEMBER 07, 2016
b'nesh

S. MURALIDHAR, J.

