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

+ **O.M.P. 280/2015**

VENTURA EXIM

..... Petitioner

Through: Mr Sagar Saxena and Mr Rabi
Kumar, Advocates.

versus

V.S MATRIX PVT. LTD

..... Respondent

Through: Mr Saurabh Banerjee, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

15.12.2016

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VIBHU BAKHRU,J

IA No. 11031/2016

1. This is an application on behalf of the respondent for placing on record the attested copy of the relevant records of the Delhi International Arbitration Centre (DIAC) to indicate the service of notices to the petitioner.
2. The same is allowed and the documents are taken on record.
3. The application stands disposed of.

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4. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 04.08.2014 (hereafter 'the impugned award').
5. At the outset, the respondent has raised a preliminary objection that the petition is barred by limitation; the award is dated 04.08.2014 and the

present petition was filed on 17.04.2015, that is, beyond the period specified under Section 34(3) of the Act.

6. The petitioner states that it had received a copy of the impugned award on 10.02.2015 and, therefore, the present petition is within time. According to the petitioner, the petitioner was not aware of the arbitral proceedings and, therefore, had not participated in the same.

7. The disputes between the parties relate to the half portion of the second floor of the property bearing no. 486, Functional Industrial Estate, Patparganj Industrial Area, Delhi-110092 (hereafter 'the premises'). The premises were let out by the respondent to the petitioner by a lease deed dated 04.07.2011. The parties also executed a Maintenance Agreement on the same date. In terms of the aforesaid agreement, the petitioner was to pay a sum of ₹50,000/- towards rent and maintenance charges and in addition, the petitioner was also liable to bear the electricity and water charges on actual consumption. The respondent *inter alia* claimed that the petitioner had failed and neglected to pay the rent as well as dues and as on 26.12.2013, a sum of ₹16,23,000/- was due and payable by the petitioner towards rent and maintenance. In addition, the petitioner was also liable to pay a sum of ₹1 lac as balance security deposit as the cheque issued by the petitioner for the same had been dishonoured. The respondent had also claimed a sum of ₹18,356/- as due and payable towards the electricity charges which the respondent claimed to have paid on behalf of the respondent.

8. The petitioner does not dispute the existence of the agreement

between the parties but disputes claim made by the respondent. According to the petitioner, it had cleared all dues till June 2013 but had stopped paying rent from July 2013 as it is alleged that the respondent had cut off the electricity and also obstructed the egress and ingress of the employees and customers of the petitioner through security guards deployed at the entry gate of the premises.

9. On 04.05.2013, the respondent filed a petition (being Arb. Appl no. 2/2013) under Section 9 of the Act before Additional District Judge, Shahdara District, Karkardooma Courts, Delhi, *inter alia*, for seeking an order to secure the amounts claimed from the petitioner.

10. The said petition was disposed of on 06.09.2013 whereby, the petitioner was directed to provide a bank guarantee for a sum of Rs.7.5 lacs within a period of eight weeks from that date. Thereafter, the respondent filed a petition (Arb. P. 333/2013) under Section 11 of the Act praying that an arbitrator be appointed. The notice in the said petition was issued on 12.08.2013 and according to the report submitted by the Registry, the petitioner was served. However, since there was no appearance on behalf of the petitioner, the petitioner was proceeded *ex parte* and by an order dated 02.12.2013, this Court appointed Mr Lal Singh, ADJ as the Sole Arbitrator. The Court further directed that arbitration proceedings would be conducted in accordance with the Rules of DIAC.

11. The petitioner did not participate in the arbitral proceedings and, therefore, petitioner was proceeded *ex parte*.

12. The Arbitrator considered the statement of claim as well as evidence

placed on record and awarded a sum of ₹20,73,506/- in favour of the respondent along with *pendente lite* and future interest at the rate of 18% per annum. In addition, the Arbitrator had also awarded the cost of arbitration along with interest at the rate of 9% per annum. Further, the petitioner was also directed to be evicted from the premises.

13. Mr Saxena, the learned counsel for the petitioner submitted that the petitioner had not received any of the notices issued by the Arbitrator and was not aware of the arbitral proceedings. He further submitted that the petitioner had also not received the notices for the petition filed under Section 11 of the Act (Arb. P 333/2013). It was earnestly contended by Mr Saxena that all letters/posts are received by the guards at the gate, which is employed by the respondent. It is the case of the petitioner that the respondent played fraud and ensured that none of the notices issued by this Court or by the Arbitrator were served on the petitioner.

14. In addition to the above, Mr Saxena also assailed the impugned award on merits. He contended that the impugned award was liable to be set aside as the petitioner had made certain payments which were not considered by the Arbitrator. He referred to hand written scribbled notes (Annexure 6 and Annexure 11 to the petition) in support of this contention. He also contended that the impugned award be set aside inasmuch as the Arbitrator had awarded costs to the respondent even though no such prayer had been made by the respondent in its statement of claims.

15. Mr Banerjee, the learned counsel for the respondent countered the submissions made on behalf of the petitioner and had referred to the record

of DIAC which indicates that notices of the proceedings as well as a copy of the impugned award had been sent by speed post at the stated address of the petitioner. He also pointed out that the tracking report had clearly indicated that the notices had been delivered.

16. I have heard the learned counsel for the parties.

17. The contention that the petitioner had not received the notices cannot be accepted. A perusal of the records of DIAC indicates that a notice of the proceedings was sent to the petitioner on 12.12.2013 by speed post. Thereafter, the Secretariat DIAC also sent the statement of claims filed by the respondent to the petitioner and the tracking report indicates that it was delivered on 20.01.2014. Since the petitioner had failed to file a reply, the Secretariat DIAC sent another notice informing the petitioner that failure to file a reply/counter claim within the stipulated period constitutes a waiver of the petitioner's right to file a reply/counter claims. The tracking report indicates that the said notice was delivered to the petitioner on 24.03.2014. Thereafter, on 03.04.2014, the Secretariat DIAC once again sent a notice calling upon the petitioner to deposit the Arbitrator's fees and pointed out that the delay on the part of the petitioner in responding had delayed putting the matter before the Arbitrator.

18. The matter was thereafter placed before the Arbitrator and the first hearing was held on 26.05.2014. On the said date, the Arbitrator noted that the petitioner had failed to file its response to the statement of claims and had also failed to response to the notices and, therefore, directed that the petitioner be proceeded *ex parte*. This was also communicated by the

Secretariat DIAC to the petitioner on 26.05.2014 by speed post.

19. Thereafter, the signed copy of the impugned award along with copy of the order sheet was also sent to the petitioner on 04.08.2014 by speed post. None of the communications have been returned back unserved.

20. The learned counsel for the petitioner was pointedly asked as to how the petitioner received the communications addressed to it. The learned counsel stated that it was a usual practice for the guards at the gate to receive all letters addressed to the petitioner and he would hand over the same to the petitioner. However, the learned counsel clarified that the guards at the gate were not employees of the petitioner but employees of the respondent.

21. It is apparent from the above that it was the usual practice for the guards at the gate to receive the communications sent to the petitioner and the petitioner had never objected to the same. In the circumstances, the petitioner can now hardly make a grievance of the fact that all the notices were accepted by the guards; this is assuming that such notices were in fact accepted by the guards and had not been handed over to the petitioner. It is relevant to observe that although the petitioner has alleged that respondent has played a fraud by ensuring that the petitioner does not receive the notices sent to it, the petitioner had not produced any material on record which would indicate that the notices have been received by the guards and had been secreted and/or misappropriated by him. The petitioner has not filed any complaint against the guards in question and, therefore, it is not possible to accept the contention that the notices addressed to the petitioner were not received by the petitioner.

22. It is also material to note that it is the petitioner's case that the respondent had been obstructing the ingress and egress of its employees and customers by placing guards at the gate. In the circumstances, it is difficult to believe that the petitioner had entrusted the said guards to receive mail on its behalf and had not made any other arrangement.

23. The signed copy of the impugned award was forwarded to the petitioner on 04.08.2014. Plainly, the present petition is beyond the period of three months as specified in Section 34(3) of the Act. It is also relevant to note that the petitioner applied for a certified copy of the impugned award on 28.11.2014. The same was ready on 12.12.2014. However, the petitioner did not collect the same. The petitioner finally obtained the copy on 10.02.2015. It is apparent from the above that even if it is accepted – although there is no reason to do so – that a copy of the impugned award was not received by the petitioner on 04.08.2014, it was admittedly made available to the petitioner on 12.12.2014. However, the present petition has been filed beyond the period of three months from that date as well.

24. Although, it is apparent that the petition is beyond the period of limitation, the contentions of Mr Saxena on merits are also not persuasive. He contended that the impugned award was perverse inasmuch as Arbitrator had awarded cost even though there was no specific prayer made for that relief. In my view, the said contention is also without any merit. In the present case, the statement of claim included a residuary prayer for such further orders at the arbitrator deem fit. In any event, an Arbitrator would always have the discretion to award costs even though no specific prayer is made to that effect.

25. The contention that the petitioner has, in fact, paid the rentals till June 2013 is also not established. The petitioner has not produced any bank records or other documents evidencing payments to the respondent as claimed by it. The hand written note (filed along with the petition and marked as Annexure 6) relied upon by the petitioner - which can most charitably described as cryptic - does not establish that the petitioner had paid the rentals as claimed by it. The hand written note dated 06.03.2013 (Annexure 11 to the petition) - which is claimed to be a receipt - is also disputed by the respondent as being fabricated; this plainly evident from the order dated 06.09.2013. In the circumstances, the petitioner would have had to establish the payment by other material such as cash books, bank records, etc.

26. I find no infirmity with the impugned award. The petition is, accordingly, dismissed.

DECEMBER 15, 2016
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VIBHU BAKHRU, J