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

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Date of decision: 22.08.2017

+ O.M.P. (COMM) 69/2016 and IA No. 3929/2016

HONY. CAPT. HUKUM CHAND YADAV (RETD)..... Petitioner
Through Mr.K.R. Chawla, Adv.

Versus

BOMBAY MERCANTILE CO-OPERATIVE BANK
LTD & ORS. Respondents
Through Mr. Anuj Pal, Adv. for R-3.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. Present petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to "the Act") seeking to impugn the ex parte Award dated 3.2.2016 passed by the learned sole arbitrator.
2. Some of the relevant facts are that respondent No.1 states itself to be a Multi State Co-operative Bank registered under the Bombay Co-operative Societies Act and also deemed to be registered under Multi State Co-operative Societies Act, 2002. It is the case of respondent No.1 that the petitioner approached respondent No.1 for availing of a loan on 10.03.1992 for purchase of two tippers/trucks and a loan of Rs.9 lac was given on 11.5.1992. The truck was hypothecated to the respondent No.1 and was also

secured by the personal guarantees of respondents No.2,3 and one Shri Dharmender Singh Yadav who is not impleaded as a party. Various documents are said to have been signed by the petitioner. It is urged that the petitioner agreed to pay interest @ 17% per annum which may be varied as per RBI guidelines. It is urged that a sum of Rs.1,45,81,311.27/- became due and payable by the petitioner and other co-guarantors as on 30.11.2013. The Arbitrator was appointed under section 84 of the Multi State Co-operative Societies Act, 2002 read with Arbitration and Conciliation Act, 1996. The learned Arbitrator has noted that the petitioner was not served by ordinary process. Service was directed to be done by publication. As none appeared for the petitioner, he proceeded ex parte. An Award has been passed against the petitioner and other co-guarantors for a sum of Rs.1,46,01,311/-.

3. The case of the petitioner is that he has retired as Hon.Captain from the Army. It is stated that the petitioner and respondents No.2 and 3 decided to incorporate a Private Limited Company. The Director General Resettlement, Ministry of Defence, R.K.Puram, New Delhi sponsored the company to undertake transportation work at Dhanbad. It was the said Director General Resettlement, Ministry of Defence who requested the respondent No.1 Bank for financial assistance to Ex Servicemen and forwarded the loan applications for grant of loan for purchase of 14 vehicles of 11 persons including the petitioner and respondents No.2 and 3. It is stated that it was respondent No.3 who purchased two tippers for transportation and it was respondent No.3 who was looking after the business at Dhanbad. It is stated that from 28.10.1998 which is the date of the final notice said to have been issued on respondent No.1 till copy of the Award was served, no notice/summons, statement of claim or any document

was ever served on the petitioner. It is urged that the Award is illegal as no notice was served on the petitioner and the petitioner was deprived of an opportunity of defending the case. It is further urged that the Award is hopelessly barred by limitation.

4. I have heard learned counsel for the parties. Learned counsel for the petitioner has reiterated that the Award is hopelessly barred by limitation and is unfair and illegal. He relies upon the last notice dated 28.10.1998 sent by respondent No.1 where a demand is made for Rs.11,80,000/- It is stated that this sum of Rs.11,80,000/- is now being transformed into a figure of Rs.1,46,01,311/-. Hence, it is urged that the award is wholly unjust and unfair and that the entire proceedings are manifestly vitiated. It is also pointed out that the notice to the petitioner has been sent at the wrong address and hence the petitioner was not served. It is also pointed out that publication has been carried out to serve the petitioner in some unknown newspaper which has no circulation in Delhi and cannot be the basis to effect service on the petitioner. The learned counsel further submits that respondent No.1 states that his claim is within limitation under Section 85 of the Multi State Co-operative Societies Act, 2002. It is urged that precondition for application of this provision is that where the disputes relates to recovery of any sum due to a Multi State Co-operative Society by a member, the limitation has to be computed from the date on which such member dies or ceased to be a member of the society. It is urged that the petitioner ceased to be a member of the Society long back and hence the said provision would have no application to the facts of the case and the claim petition filed by respondent No.1 in 2014 for alleged dues of 1992 is clearly barred by limitation.

5. Learned counsel for the respondent No.1 has pointed out that in terms of Section 85(1)(a) of the Multi State Co-operative Societies Act, 2002 the petition is within limitation. He further reiterates that the petitioner was deliberately staying out of way to evade service, a publication had to be carried out.

6. I will now deal with the submission of the petitioner about service of notice of the arbitration proceedings on him. A perusal of the Claim Petition filed by the respondent before the learned arbitrator would show that the address of the petitioner has been correctly stated as Post and Village, Rajoukari Tehsil, Mehrauli, New Delhi. However, in the summons sent to the petitioner the address is changed to Village and Post office Rajauri. The summons have been sent by courier from Overnite Express Private Limited. The report of the courier service is that the address is incomplete. Similarly, summons have also been sent by registered A.D. There is nothing to show in the arbitration record that the document was delivered to the petitioner, as no AD Card is available.

7. The record shows that on 5.7.2014 the learned Arbitrator recorded the submission of learned counsel for respondent No.1 that the petitioner is deliberately avoiding service. Publication has been effected in Hindi newspaper '*Rashtriya Sahara*'. The order of the learned Arbitrator dated 05.07.2014 reads as follows:

“Arb/S.S./77/14

05.07.2014

Present Mr. Anisul Haq (Adv for claimant)

None for respondents

R-2 & R-4 are already ex parte R-1 & R-3 are not served.

Learned counsel for claimant state that R-1 is deliberately avoiding service. He prays for substitute service by way of

publication. Prayer allowed. Services be affected by way of publication against R-1 & R-3 in national daily fix for 16.08.2014.

-SD-
05.07.2014”

8. On the issue of effecting service by publication, reference may be had to the judgment of the Division Bench of the Calcutta High Court in the case of *Teharoonchand v. M/s Surajmull Nagarmull*, AIR 1984 Calcutta 82/(MANU/WB/0018/1984), wherein in para 9 the court observed as follows:

“9. As regards service through registered post, the registered cover shows that the addressee was not met on different occasions. There was thus no tender of the registered cover to the addressee. It is true that under the law service of summons under Order 5, Rule 20 of the Code shall be as effectual as if it had been made on the defendant person-ally. Before issuing summons under Order 5, Rule 20 of the Code, the Court is to be satisfied that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way. Before such satisfaction, the Court has to consider the case carefully having regard to the nature of the earlier attempts made for the service of summons. Mere assertion of the plaintiff in this respect to attract the provisions of Order 5, Rule 20 of the Code will not be enough. Only when the Court is satisfied from the materials on record that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way, the Court will be entitled to order service of summons under Order 5, Rule 20 of the Code. In the instant case, all these questions did not appear to have been properly considered before issue of the summons under Order 5, Rule 20 of the Code. The learned trial court has failed to exercise

jurisdiction properly. In this matter the learned appellate court has not come to any finding regarding the service of summons.”

9. Similarly, the Division Bench of the Allahabad High Court in *Johri Lal v. Commissioner of Income Tax*, AIR 1967, Allahabad 170/ (MANU/UP/0061/1967), held as follows:

“5. Order 5, Rule 20 provides for substituted service. It enables the Court, where it is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way to order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. Service by this mode is as effectual as if it had been made on the defendant personally. Now, it seems to us, that if substituted service is resorted to all the conditions mentioned in the procedure set out in Order 5, Rule 20 must be fulfilled. The Code has specifically spoken of it as "substituted service". It is not service in the ordinary sense of the word. It is service in an artificial sense proceeding upon a fiction imported by necessity. A special mode of procedure has been proscribed, and it is incumbent for the purpose of effecting such service that the entire procedure specifically mentioned in the rule should receive full compliance. When an Income tax Officer resorts to Order 6, Rule 20, not only is it necessary that a copy of the notice should be affixed upon some conspicuous part of the house in which the assessee is known to have last resided or carried on business or personally worked for gain, but it is also necessary that he should cause to be affixed a copy of the notice on a conspicuous place in the Income Tax Office. Unless this is done, it cannot be said that substituted service has been effected. We are supported in this view by the decision of the Punjab High Court in Jhabar

10. Section 19(1) of the Act provides that the arbitral tribunal is not bound by CPC or the Indian Evidence Act. However, it is clear that the arbitrator has to be careful to ensure that proper attempt to serve the party has taken place before ordering service of notice vide publication. A perusal of the order of the learned arbitrator dated 05.07.2014 would show that there is no proper application of mind as to whether the petitioner is deliberately keeping out of the way to avoid service of notice/summons. Merely the submission of the learned counsel for respondent No.1 has been noted that the petitioner is avoiding service and the plea of respondent No.1 for substituted service has been accepted. Clearly the substituted service effected is illegal.

11. Section 18 of the Arbitration and Conciliation Act reads as follows:

“18.The parties shall be, treated with equality and each party shall be given a full opportunity to present his case.”

12. It is the settled legal position that each party has to be given full opportunity to present his case. In the present case on account of a mistake on the part of the office of the Arbitrator notice has been sought to be sent at the wrong address, namely, to village Rajauri instead of village Rajokari. Summons had been returned back showing that the address is incomplete. This is clear from the report of the Overnite Express Private Limited the courier through which the notices were sought to be delivered to the petitioner. The record show that notices have been sent by registered A.D. but A.D.Card has not been received back. In view of the fact that the notices

were being sent at the wrong address, it cannot be said that any presumption arises of delivery of this notice sent by the Registered AD.

13. Another plea raised by the petitioner is that the publication has been carried out in a news paper, namely *Rashtriya Sahara*. It has been urged that this newspaper has almost nil circulation. There appears merit in the contention of the petitioner inasmuch as there is nothing on record to show the nature of the circulation of this newspaper. The respondent/learned Arbitrator had to take adequate care to ensure proper service is effected on the petitioner. This specially so as the arbitration proceedings were commenced 15 years after the last notice had been dispatched to the petitioner and other respondents. It is quite clear that the petitioner was never served with the notice of the arbitration proceedings. The procedure adopted by effecting service by publication has been wrongly affected and cannot be termed as proper service on the petitioner.

14. The Supreme Court in the case of *Associate Builder v. Delhi Development Authority*, AIR 2015 SC 620/(MANU/SC/1076/2014), held as follows:

“....The *Audi Alteram Partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These Sections read as follows:

18. Equal treatment of parties.--The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

34. Application for setting aside arbitral award:-

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(iii) 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. Section 34(2) of the Act reads as follows:

“(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) 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; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

.....”

16. Hence, the impugned award is contrary to the fundamental policy of Indian Law. It has been passed without following the principle of *Audi Alteram Partem*. The award is also hit by Section 34(2)(iii) of the Act as the petitioner was not given proper notice of appointment of an Arbitrator. The award is liable to be set aside accordingly.

17. In the light of the above, I set aside the Award dated 3.2.2016. Respondent No.1 is free to take further steps as per law.

18. Petition stands disposed of. All pending applications, if any, also stand disposed of.

(JAYANT NATH)
JUDGE

AUGUST 22, 2017

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