

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Appeal No.50 of 2011

(Arising out of order dated 2-5-2011 in Arbitration Case No.42-A/2008 of the learned District Judge, Raipur)

Order reserved on: 20-4-2018

Order delivered on: 8-5-2018

M/s Rashi Projects Private Limited, a company registered and incorporated under the Indian Companies Act, 1956 having its registered office at 2A, Ganesh Chandra Avenue, 2<sup>nd</sup> Floor, Room No.4A, Kolkata-700013, present address 240-B, AJC Bose Road, 3<sup>rd</sup> Floor, Kolkata-700020, through its Director Shri Debasis Dey, S/o Late Radhanath Dey, aged 45 years, R/o 240-B, AJC Bose Road, 3<sup>rd</sup> Floor, Kolkata-700020.

(Non-applicant No.1)  
---- Appellant

Versus

1. M/s Sagar Agriculture & Properties Private Limited, a company registered and incorporated under the Indian Companies Act, 1956 having its registered office at I-1B, Anupam Nagar, Raipur (C.G.), through its Director Shri Ankit Jindal, S/o Shri Naresh Chand Agrawal, R/o I-1B, Anupam Nagar, Raipur (C.G.)

(Applicant)

2. Dr. Rajendra Dubey, S/o Late Shivdheen Ji Dubey, aged about 64 years, R/o Near Sai Temple, Devendra Nagar, Raipur (C.G.)

(Non-applicant No.2)  
---- Respondents

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| For Appellant:       | Mr. Rajeev Shrivastava and Mr. Gagan Tiwari,<br>Advocates. |
| For Respondent No.1: | Mr. Prafull N. Bharat and Mr. Amrito Das,<br>Advocates.    |

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Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The jurisdiction of this Court is invoked under Section 37 of the Arbitration and Conciliation Act, 1996 (for the sake of brevity hereinafter called as 'the AC Act') calling in question legality, validity

and correctness of the order dated 2-5-2011 passed by the learned District Judge setting aside the award dated 5-3-2008 passed by the Sole Arbitrator, in exercise of power conferred under Section 34(2) of the AC Act.

2. The appellant initiated arbitration proceeding before respondent No.2 in which it is alleged that notices were issued to respondent No.1, but respondent No.1 did not appear despite service of notice by registered post, thereafter, again notice by registered post was issued and notice was also said to have been served upon respondent No.1 by paper publication, but respondent No.1 did not appear, therefore, the learned Arbitrator proceeded and passed ex parte award against respondent No.1 on 5-3-2008. Respondent No.1 herein filed an application under Section 34(2) of the AC Act questioning the award on the ground envisaged under Section 34(2)(a)(iii) of the AC Act that respondent No.1 was not served with proper notice of appointment of arbitrator or of the arbitral proceeding, therefore respondent No.1 was unable to present its case before the Arbitrator. The learned District Judge by its impugned order set aside the award holding that respondent No.1 was not properly served with the arbitral proceeding leading to filing of this appeal by the appellant herein under Section 37 of the AC Act.
3. Mr. Rajeev Shrivastava, learned counsel appearing for the appellant, ably assisted by Mr. Gagan Tiwari, Advocate, would submit that respondent No.1 was fully aware about the appointment of Arbitrator and therefore it cannot be said that he was not given

proper notice of appointment of Arbitrator. He would further submit that the arbitral proceedings were duly intimated by the Arbitrator by notice dated 4-7-2007 by registered post which was duly served and acknowledgement has also been received and notice of arbitral proceeding was served on the correct and admitted address of respondent No.1 which cannot be disputed. He would also submit that making of application by the appellant herein for substituted service was an additional mode of service on safer side which was also served and despite service, respondent No.1 did not appear before the Arbitrator and therefore the learned Arbitrator has no option except to proceed with the arbitral proceeding which ultimately culminated into award dated 5-3-2008 which could not have been set aside by the learned District Judge in exercise of limited jurisdiction under Section 34(2) of the AC Act that too on technical ground exceeding the scope of application under Section 34(2) of the AC Act as such, the award passed by the learned Arbitrator is strictly in accordance with law and the order passed by the learned District Judge deserves to be set aside.

4. On the other hand, Mr. Prafull N. Bharat, learned counsel appearing for respondent No.1, ably assisted by Mr. Amrito Das, Advocate, while vehemently opposing the submission made by counsel for the appellant, would submit that according to the award passed by the learned Arbitrator, proceeding was first initiated on 14-8-2007 and notice was issued on 24-8-2007 and according to the Arbitrator, notice was received on 9-10-2007 but with illegible signature of respondent No.1 Company, therefore, again notice was issued at

the instance of the appellant on 13-9-2007 for substituted service which clearly shows that respondent No.1 was never served with proper notice. He would further submit that letter dated 4-7-2007 is only an intimation of acceptance of the Arbitrator of his appointment to work as Arbitrator. He would also submit that the provisions of Order 5 Rule 20 of the Code of Civil Procedure, 1908 could not have been resorted to by the learned Arbitrator in breach of that provision, as such, no finding or condition precedent for exercise of power under Order 5 Rule 20 of the CPC has been recorded. He would lastly submit that even in the notice published in the newspaper, neither the particulars of respondent No.1 are mentioned with accuracy and precision nor name and address of the Arbitrator or the cause for which respondent No.1 has to appear has been recorded with full details as such, the learned District Judge is absolutely justified in setting aside the award passed by the Arbitrator on the ground available under Section 34(2)(a)(iii) of the AC Act. Mr. Bharat would rely upon Section 24(3) of the AC Act.

5. In his rejoinder submission, Mr. Rajeev Shrivastava would submit that on the ground of technical objection, the award cannot be set aside as such, as the provisions of the CPC are not applicable by virtue of the provisions contained in Section 19 of the AC Act.
6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.
7. The ex parte arbitral award dated 5-3-2008 passed by the Sole Arbitrator was challenged by respondent No.1 by filing an

application under Section 34(2)(a)(iii) of the AC Act questioning that award on the ground that neither he was given proper notice of arbitral proceeding nor he was given notice of appointment of arbitrator. The learned District Judge allowed that application finding that said ground is established and set-aside the arbitral award.

8. Section 34(2)(a)(iii) of the AC Act provides as under: -

**“34. Application for setting aside arbitral award.—(1)**

xxx xxx xxx

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

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

(i) xxx xxx xxx

(ii) xxx xxx xxx

(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

xxx xxx xxx

xxx xxx xxx”

9. The question for consideration would be, whether respondent No.1 was given proper notice of appointment of arbitrator or arbitral proceeding before passing of the ex parte award dated 5-3-2008?

10. The jurisdictional civil court by its order dated 30-4-2007 relegated the parties to the arbitrator. Thereafter, the appellant as a party to the agreement had for the first time, approached the Arbitrator vide its letter dated 22-6-2007 to provide his *ex post facto* consent to accept the office of the Sole Arbitrator under the agreement. The

said letter was acknowledged by the Arbitrator on 27-6-2007 and ultimately, the Sole Arbitrator accepted it on 4-7-2007 by recording it and issued notice to the parties. At this stage, it would be appropriate to notice Section 12 (1) of the AC Act, 1996 (as originally stood) as under: -

“12(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.”

11. Thus, Section 12(1) of the AC Act makes it mandatory and obligatory on the part of the person tipped for being appointed as an arbitrator to disclose the interest which he may be having in relation to arbitration matter. Such person must disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

12. The Sole Arbitrator did not even follow the mandatory procedure prescribed in Section 12(1) of the AC Act by making requisite disclosure and straightway accepted the reference without making any disclosure for arbitrating the dispute on 4-7-2007 and issued notice to the appellant and respondent No.1 fixing the date for 14-8-2007. On 14-8-2007, no one appeared on behalf of respondent No.1 and the appellant filed an application for interim relief / injunction and on the said date, the Arbitrator directed issuance of fresh notice to respondent No.1 on the said application fixing the date of hearing on 13-9-2007. Notice was issued to respondent No.1 by registered post for his appearance on 13-9-2007.

13. On 13-9-2007, again no one appeared on behalf of respondent No.1. The appellant made an application for substituted service to

respondent No.1 through paper publication which was granted by the Arbitrator fixing the date of hearing on 13-10-2007 and in compliance of the above-stated order, the notice for hearing on 13-10-2007 was published in Nav Bharat and Nai Duniya. The notice published on the above-stated newspapers states as under: -

**समक्ष मध्यस्थ श्रीमान राजेन्द्र दुबे रायपुर (छ.ग.)**

|                          |              |
|--------------------------|--------------|
| राशि प्रोजेक्ट प्रा.लि.  | .....आवेदक   |
|                          | बनाम         |
| सागर एग्रीकल्चर प्रा.लि. | .....अनावेदक |

**// उपस्थिति हेतु सूचना //**

आप अनावेदक को मेरे समक्ष उपस्थित होने हेतु रजिस्टर्ड डाक से सूचना पत्र भेजी गयी जिसे प्राप्त करने के बाद भी आप स्वयं या अपने अधिवक्ता के माध्यम से उपस्थित नहीं हुए हैं इस लिए आपको अंतिम अवसर प्रदान किया जाता है कि आप पेशी दिनांक 13-10-2007 को दोप. 2 बजे निम्नलिखित पते पर आप स्वयं या अपने अधिवक्ता के माध्यम से उपस्थित हों और अपना बचाव करें, उपस्थित न होने पर एक पक्षीय कार्यवाही की जायेगी। जिसकी जवाबदारी आपकी स्वयं की होगी।

रायपुर (छ.ग.)  
दिनांक 13-09-2007

मध्यस्थम  
राजेन्द्र दुबे, साई मंदिर के पास,  
साई नगर, देवेन्द्र नगर रोड, रायपुर (छ.ग.)

14. On 13-10-2007, the Arbitrator noted that registered envelope / letter received back does not bear the signature of the authorised person of respondent No.1, therefore, taken the said envelope on record and holding the publication of notice in newspaper as due and valid

service notice proceeded ex parte against respondent No.1 and ultimately passed the ex parte award.

15. The learned Arbitrator in opening paragraph of his award has clearly recorded that as per the order of the trial Court, party No.1 / the appellant herein informed him by letter dated 22-6-2007 and 7-7-2007 which he had accepted on 4-7-2007 and he was appointed on 20-7-2007 as an arbitrator and he initiated arbitration proceeding on 14-8-2007. From the said finding, it is quite vivid that appointment of arbitrator was never informed to respondent No.1 after the order of the trial Court relegating the parties to the Sole Arbitrator and the learned Arbitrator proceeded ex parte on the basis of notice published in Nav Bharat and Nai Duniya.

16. The contents of the notice published in the newspaper would show that the notice published was cryptic. Details of arbitral dispute, names of parties, particularly of respondent No.1 etc., were not given with accuracy and precision. It cannot be said to be notice to respondent No.1 for contesting the arbitral proceeding before the Arbitrator and registered notice dated 24-8-2007 was not properly served to respondent No.1 as per the own finding recorded by the Arbitrator.

17. The contention of learned counsel for the appellant is that notice was issued to respondent No.1 by the Arbitrator on 4-7-2007, by registered post, and all notices were served, therefore, respondent No.1 was duly served and the order of the District Judge deserves to be set aside relying upon the decision of the Supreme Court. This argument cannot be accepted for two reasons firstly, the



Arbitrator himself in opening paragraph of his award has clearly recorded and he accepted his appointment as Arbitrator on 4-7-2007 and he was appointed as Arbitrator on 20-7-2007, therefore, issuance of notice on 4-7-2007 cannot be said to be either notice of appointment of Arbitrator or notice of arbitral proceeding, and secondly, the appellant as well as the Arbitrator did not consider the notice issued on 4-7-2007 to be a valid service of notice on respondent No.1 and proceeded to issue fresh notice thereafter, even the Arbitrator did not proceed ex parte on 14-8-2007. Therefore, the contention of learned counsel for the appellant deserves to be rejected.

18. Thus, on the basis of above-stated discussion, it is held that respondent No.1 has neither given the notice of appointment of arbitrator nor given the notice of arbitral proceedings and award was passed, therefore, the learned District Judge was absolutely justified in setting aside the said award under Section 34(2)(a)(iii) of the AC Act in which I do not find any illegality or jurisdictional error.

19. The cross-objection filed by the appellant under Order 41 Rule 22 of the CPC in this appeal is not maintainable in view of the judgment rendered by the Supreme Court in the matter of **Mahanagar Telephone Nigam Limited v. Applied Electronics Limited**<sup>1</sup> in which it was held as under: -

“26. As is manifest, a person grieved by the award can file objection under Section 34 of the 1996 Act, and if aggrieved on the order passed thereon, can prefer an appeal. The court can set aside the award or deal with the award as provided by the 1996 Act. If a corrective measure is thought of, it has to be done in accordance

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1 (2017) 2 SCC 37

with the provision as contained in Section 37 of the 1996 Act, for Section 37(1) stipulates for an appeal in case of any grievance which would include setting aside of an arbitral award under Section 34 of the Act.

27. Section 5 which commences with a non obstante clause clearly stipulates that no judicial authority shall interfere except where so provided in Part 1 of the 1996 Act. As we perceive, the 1996 Act is a complete code and Section 5 in categorical terms along with other provisions, lead to a definite conclusion that no other provision can be attracted. Thus, the application of CPC is not conceived of and, therefore, as a natural corollary, the cross-objection cannot be entertained. Though we express our view in the present manner, the judgment rendered in *ITI Ltd.*<sup>2</sup> is a binding precedent. The three-Judge Bench decision in *International Security & Intelligence Agency Ltd.*<sup>3</sup> can be distinguished as that is under the 1940 Act which has Section 41 which clearly states that the procedure of CPC would be applicable to appeals. The analysis made in *ITI Ltd.* (supra) to the effect that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable seems to be incorrect, for the scheme of the 1996 Act clearly envisages otherwise and the legislative intendment also so postulates.”

20. As a fallout and consequence of the aforesaid discussion, the appeal and the cross-objection, both, deserve to be and are accordingly dismissed leaving the parties to bear their own cost(s).

Sd/-  
(Sanjay K. Agrawal)  
Judge

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2 ITI Ltd. v. Siemens Public Communications Network Ltd., (2002) 5 SCC 510

3 MCD v. International Security & Intelligence Agency Ltd., (2004) 3 SCC 250