

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ARBA No. 26 of 2018****Reserved on 26.09.2018****Pronounced on 09.10.2018**

- M/s Synergy Overseas Project And Consultant Private Limited, Having Its Registered Office At Plot No. 94, Mohan Plaza, Flat No. 203, Satya Nagar, Bhubaneshwar (Orissa) Through - Its Proprietor, Vishwaranjan Gannayak S/o Dr. Vipin Bihari Gannayak, Aged - About 43 Years R/ Plot No, 94, Mohan Plaza, Flat No. 203, Satya Nagar, Bhubaneshwar (Orissa)

---- Appellant**Versus**

- M/s Elite Engineering Through – Its Partner, Nitin Sabarwal, Having Its Registered Office At 281, Indira Commercial Complex, TP Nagar, District Korba (Chhattisgarh).

---- Respondent

For Appellant	:Shri Sanjay Patel, Advocate
For Respondent	:Shri Arvind Shrivastava, Advocate

Hon'ble Shri Justice Sanjay Agrawal**C A V JUDGMENT / ORDER**

1. This appeal has been preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) questioning the order dated 28.05.2018 passed by the learned District Judge, Korba (C.G.) in an unregistered civil Miscellaneous Judicial Case filed on 16.10.2015, by which, the application filed by the appellant under Section 34 of the Act of 1996 questioning the award dated 19.06.2014 has been rejected holding it as barred by time.

2. Briefly stated the facts of the case are that an award was passed on 19.06.2014 in Case No. RAN/77/MSEFC/2013 by the Facilitation Council, Raipur in a proceeding initiated by the respondent M/s Elite Engineering

under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, the Act, 2006) whereby the appellant was directed to pay total sum of Rs.16,64,959/- including amount of interest payable to the respondent. According to the appellant M/s Synergy Overseas Project and Consultant Private Limited, the copy of the said award was never served and came to know about it for the first time on 30.08.2015, when it received the copy of the same through its counsel in an Execution Proceedings initiated by the respondent under Section 36 of the Act of 1996 for recovery of the said amount.

3. Immediately upon knowing the aforesaid award, it was questioned by the appellant before the learned District Judge, Korba on 16.10.2015 under Section 34 of the Act of 1996 along with an application for condonation of its delay. Although an application for condonation of delay was made, but it was pleaded in the main application that it was not beyond time as the copy of the said award was served on 30.08.2015 and within the stipulated period of 3 months, as provided under sub-section (3) of Section 34 of the Act of 1996, it was filed by questioning the alleged award.

4. The respondent has contested the aforesaid application by submitting, inter alia, that the copy of the said award was already received by the appellant on 04.07.2014 and since the alleged award has been questioned much beyond the prescribed period on 16.10.2015, therefore, the application for condonation of delay filed under Section 5 of the Indian Limitation Act, 1963, is not maintainable in view of the proviso to sub-section (3) of Section 34 of the Act of 1996.

5. After considering the evidence led by the parties and that by considering the delivery report submitted in the record of Conciliation

Proceedings, it was observed by the learned District Judge that the appellant was aware of the said award, and therefore, it cannot be said that it came to its knowledge for the first time through counsel on 30.08.2015. As a consequence, the said proceeding initiated under Section 34 of the Act of 1996 has been dismissed as barred by time.

6. Being aggrieved, the appellant has preferred this appeal. Shri Sanjay Patel, learned counsel for the appellant submits that while passing the order impugned, the Court below has committed an illegality by relying upon the alleged delivery report submitted in the record of Conciliation Proceedings by holding that the appellant was aware with regard to the passing of the said award. According to Shri Patel, the appellant came to know for the first time about the delivery of the said award on 30.08.2015 when approached its counsel for attending the Execution Proceedings, which was initiated by the respondent in pursuance to the execution of the said award under Section 36 of the Act of 1996 and the said fact has duly been established by the appellant. While referring to the provisions prescribed under Section 2 (h), Section 31 (3) and Section 34 (5) of the Act of 1996, it was contended further by him that since the copy of the said award was not communicated to the party to the agreement, therefore, it cannot be said that it was duly communicated, as alleged by the respondent and that by ignoring it, the Court below has erred in holding that the appeal, as framed is barred by time.

7. On the other hand, Shri Arvind Shrivastava, learned counsel for the respondent while supporting the order impugned submits that the copy of the said award was duly received by the appellant on 04.07.2014 and in spite of that, it was filed much beyond the period as per the provision prescribed under sub-section (3) of Section 34 of the Act of 1996. The

application was, therefore, rightly held to be barred by time. He submits further, while referring to the provisions prescribed under Section 3 of the Act of 1996, that since the copy of the award was duly sent by the Facilitation Council on the registered address of the appellant, therefore, it was presumed to have been served upon the appellant on 04.07.2014. In support, he placed his reliance upon the decision rendered in the matter of ***Parimal vs. Veena Alias Bharti*** reported in (2011) 3 SCC 545.

8. I have heard learned counsel for the parties and perused the entire record carefully.

9. The award dated 19.06.2014 was passed by the learned Facilitation Council while entertaining the application filed by the respondent M/s Elite Engineering under Section 18 of the Act, 2006 directing the appellant to pay a total sum of Rs.16,64,959/- within a period of one month. The award so made was questioned by the appellant on 16.10.2015 under Section 34 of the Act of 1996 before the learned District Judge, Korba. It was, however, dismissed holding that the copy of the said award was sent and delivered to the appellant on its known address, as evidenced by the information of concerned Post-Master furnished and attached with the file of Conciliation Proceedings and as a consequence, it cannot be said that the copy of the said award was received by the appellant through its Advocate for the first time in the Court on 30.08.2015.

10. The question, which arises for determination is, as to whether the copy of award dated 19.06.2014 passed by the Facilitation Council was served upon the appellant on 04.07.2014 or on 30.08.2015?

11. In order to establish the fact that the copy of the said award was delivered on 30.08.2015 through its counsel when appeared before the

Court in an Execution Proceedings initiated by the respondent M/s Elite Engineering under Section 36 of the Act of 1996, the appellant has examined one of its witness, namely, Vishwaranjan Gannayak, Managing Director of the appellant Company. The said witness has stated the said fact at para – 4 of his evidence that the copy of the alleged award was received through the counsel in the month of August and has denied at para – 8 that the copy of the said award was sent by the Facilitation Council by a registered post and was received by the Office through the postman on 04.07.2014. No question was put to him in his cross-examination that it was not received in the month of August, 2015, as deposed by him. He was, therefore, firm in his cross-examination regarding service of the copy of the said award as such.

12. The burden to establish the fact that the copy of the said award was delivered to the appellant on 04.07.2014 was upon the respondent as per the provisions prescribed under Sections 101 and 103 of the Indian Evidence Act, 1872. However, it could not have been established by its witness Nitin Sabharwal, who was examined as Non-Applicant witness No.1. According to his statement at para – 6, the copy of the said award was duly sent to the appellant on its registered address while referring to some of the letters issued by the Facilitation Council and also of the information furnished by the Office of the concerned Post-Master. However, none of these letters/documents have got exhibited during his evidence nor any efforts have been made in this regard for the reasons best known to the Respondent. Besides, no effort was made to examine the said Post-Master in order to establish the fact that the copy of the said award was delivered to the appellant on 04.07.2014, as asserted by the Respondent. In such an eventuality, no reliance as such could be placed upon it.

13. Further examination of his statement would reveal that two separate orders were passed by the Facilitation Council and only one “postal number” containing documents of both the cases was filed and it is not clear that the order or document of which of the case number was sent. Thus, the burden of proof regarding the delivery of the copy of the said award upon the Appellant Company on 04.07.2014 could not be established by the Respondent by way of cogent and reliable evidence. Since the initial burden could not be discharged in this regard, therefore, no presumption of service of the said award upon the Appellant could be made, as contended by Shri Shrivastava, learned counsel for the Respondent and the reliance placed upon the decision rendered in the matter of **Parimal vs. Veena Alias Bharti** (supra), therefore, would not be of any use.

14. In view of the aforesaid facts and circumstances of the case, it is difficult to hold that the copy of the said award dated 19.06.2014 was served upon the appellant on 04.07.2014, as contended by the respondent. Contrarily, the unrebutted statement of Vishwaranjan Gannayak would show that the appellant came to know about the passing of the award for the first time on 30.08.2015 when a copy of it was delivered to him through counsel when he appeared in an Execution Proceeding initiated by the respondent under Section 36 of the Act of 1996.

15. In view of the foregoing discussions, the appeal is allowed and it is held that the said application filed under Section 34 of the Act of 1996 was filed well within the stipulated period of 3 months, as provided under sub-section (3) of Section 34 of the Act of 1996. The matter is, therefore, remanded back to the learned District Judge, Korba, who in turn, shall decide the authenticity of the Award dated 19.06.2014 on merits in

accordance with law, after registering the said proceeding. The parties are directed to appear before the concerned Court on 26th November, 2018. Record of the Court below be sent to the concerned Court forthwith. No order as to costs.

Sd/-

(Sanjay Agrawal)
Judge