

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION APPEAL NO.12 OF 2018

Vikramsinha Laxmansinha Jadhavrao
Aged about 63 years, Occupation : Business,
R/at 110, Raghuvendra Vihar, Mahesh Soc,
Bibvewadi, Pune – 411 037

... Appellant

versus

1) Ishwar Constructions Private Limited,
A Private Limited Company duly registered
under the Companies Act, 1956 and having
its Registered Office at C-Wing, Parmar
Trade Centre, 12, Connaught Road,
Sadhu Vaswani Chowk, Pune – 411 001

2) Ishwar Chaundulal Parmar
Age about 68 years, for self and as the
Director of Ishwar Constructions Pvt. Ltd.,
Residing at 7/8/9, B.J. Road,
Pune – 411 001

... Respondents

Mr. S.M.Gorwadkar, Senior Advocate with Mr. C.D.Nargolkar, Mr. Sagar Shah I/by
Mr. Aumkar Joshi, for Appellant.
Mr. G.S.Godbole with Mr. Drupad Patil, for Respondents.

CORAM: S.J. KATHAWALLA, J.

DATE: 23rd MARCH , 2018

JUDGMENT :

1. The Appellant – Vikramsinha Laxmansinha Jadhavrao being aggrieved, (i)
by the Judgment and Order dated 8th January, 2018 passed by the learned District
Judge – I, Pune (at Exhibit 19) in the Application filed by the Respondents dated 11th

August, 2017, holding that the Application being No.779 of 2017 filed by the Appellant under Section 34 of the Arbitration and Conciliation Act, 1996 is not in compliance with Section 34(5) of the Act and (ii) the Order also dated 8th January, 2018 (Exhibit 1) consequently dismissing Civil Miscellaneous Application No.779 of 2017, has approached this Court under the provisions of Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (Act No.XXVI of 1996) (hereinafter referred to as the 'Act').

2. The facts which are relevant for the purpose of deciding the above Appeal are set out hereunder :

2.1 The Applicant/Appellant filed a Civil Misc. Application No.779 of 2017 on 11th August, 2017 against the Respondents herein under Section 34 of the Act, challenging the Award dated 27th May, 2017 passed by the sole Arbitrator before the learned District Judge – I, Pune.

2.2 On 28th August, 2017 the Respondents took out an Application before the learned District Judge – I, Pune wherein they have submitted that as per the amended Section 34(5) of the Act, the Applicant filing an Application under Section 34 of the Act has to issue a prior notice to the other party and the Application under Section 34 of the Act has to be accompanied by an Affidavit of the Applicant endorsing the compliance with the said requirement.

2.3 According to the Respondents, in the present case, no such prior notice was issued and no such Affidavit was filed along with the said Application under the

provisions of Section 34(5) of the Act and hence the Application filed by the Applicant is not maintainable.

2.4 In response to the said Application filed by the Respondents, the Applicant submitted his Reply dated 14th September, 2017 interalia stating that the Respondents had filed Caveat No.445 of 2017 in June, 2017 before the District Judge, Pune, and hence, the Applicant by his Advocate's Notice dated 11th August, 2017 had informed the Respondents that the copies of the main Application and the stay application are sent to the Respondents in advance by way of service upon them and that the main Application filed under Section 34 of the Act **"is being filed"** by the Applicant. The Applicant, in response, also pointed out that the Respondents have acknowledged the said Notice dated 11th August, 2017 on the same day itself at 2.15 p.m. The Applicant further pointed out that along with the said Application, he also filed an Affidavit dated 11th August, 2018 in support of the Application. However, a specific mention of the fact that service of the prior notice dated 11th August, 2017 was not made in the said Affidavit by the Applicant. The Applicant has also stated in his response that the said lapse on the part of the Applicant is not fatal at all when there is substantial compliance of the requirement under Section 34(5) of the Act by virtue of the prior notice dated 11th August, 2017 served in advance before filing the main Application in Court. The Applicant submitted in his response that in the facts and circumstances of the case, the purpose of Section 34(5) of the Act was served and the Application of the

Respondents is liable to be rejected as being far-fetched and devoid of merits.

2.5 Along with the response, the Applicant, by way of abundant caution, also filed an Affidavit clearly setting out the fact that the Applicant has already filed an Affidavit in support of the main Application under Section 34 of the Act and that he has given prior notice dated 11th August, 2017 to the Advocate for the Respondents along with the copy of the Application on 11th August, 2017 at 2.15 p.m. itself i.e. before filing the main Application under Section 34 of the Act as per Section 34(5) of the Act and also as per Caveat No.445 of 2017 and that, inadvertently, a specific mention of the fact of service of the prior notice dated 11th August, 2017 was not mentioned by him in the said Affidavit.

2.6 The learned District Judge – I, Pune, by his order dated 8th January, 2018, allowed the Application filed by the Respondents and held that the main Application filed under Section 34(5) of the Act is not maintainable since the same was not filed in compliance with Section 34(5) of the Act.

2.7. In support of his findings, the learned District Judge – I, Pune held that he finds substantial force in the contention of the Respondents that the Applicant had stated that “the main Application is being filed” means “it has been filed” and therefore, it cannot be said that prior notice which is required under Section 34(5) of the Act, has been given. The learned District Judge – I, Pune also recorded that there is no dispute that an Affidavit to the effect that prior notice under Section 34(5) of the Act is

given along with the main Application. There appears to be no dispute that this fact is not mentioned in the Affidavit of the Application dated 11th August, 2017. The learned District Judge – I, Pune, in support of his decision, relied on the case law cited by the learned Advocate for the Respondents in the case of Bihari Chowdhary and Anr. V. State of Bihar and Ors.¹ wherein it is held that when the language used in the statute is clear and unambiguous, the Court must give effect to it without admitting any implication or exception and that the issuance of proper notice under Section 34(5) of the Act is mandatory and it has to be complied with in the same letter and spirit.

2.8. The learned District Judge – I, Pune passed an Order in Exhibit I and also passed an Order rejecting the main Application filed by the Applicant under Section 34 of the Act.

2.9. As stated hereinabove, being aggrieved by the said Orders, the Appellant filed the above Arbitration Appeal.

3. The learned Advocate for the Appellant has made the following submissions :

(i) that the notice dated 11th August, 2017 was indeed served on the Respondents on the very same day at 2.15 p.m., i.e. on 11th August, 2017 itself and that the Application was filed in Court after 2.15 p.m.;

(ii) if the learned District Judge would have called for and inspected the Entry

1 (1984) 2 SCC 627

Register of filing of the Pune Court, the same would have clearly shown that on 11th August, 2017, an Application under Section 34 of the Act was filed by the Appellant/Applicant in the evening on 11th August, 2017 at Sr.No.5459 of 2017 and the same was the last filing of that day;

(iii) that this fact sufficiently proves that proper notice under Section 34 of the Act was given by the Appellant to the Respondents at 2.15 p.m. on 11th August, 2017 ;

(iv) that the learned District Judge-I, Pune failed to appreciate that the Application under Section 34 of the Act could not have been filed in the Court by the Appellant without annexing the original acknowledged notice copy as per the requirement of the Pune Court Registry in Arbitration Appeal and Caveat Matters

(v) that the learned District Judge-I, Pune failed to appreciate that in the notice dated 11th August, 2017, which was admittedly received at 2.15 p.m. on the very same day by the Respondents, it is clearly written by the Advocate for the Appellant that he is enclosing therewith a copy of the main Application along with the stay application **“in advance”**;

(vi) that though the Appellant has not specifically mentioned in the Affidavit in support of the Application that a prior notice of the said Application is served on the Respondents, in paragraph 51 of the main Application, it is categorically stated that a copy of the Application has been served on the Respondents and in the Affidavit in support of the Application, the Applicant has stated that the contents of the Petition

are not repeated for the sake of brevity and the same may kindly be read and treated as part of the Affidavit;

(vii) that not only a copy of the Application was served on the Respondents prior to its filing, but in the Application, it was clearly stated that the copy of the same is served on the Respondents and contents of the Petition were repeated in the Affidavit in support of the Application;

(viii) Section 34(5) of the Act was therefore complied with by the Appellant and the learned District Judge-I, Pune, erred in holding it otherwise. It is also submitted that in any event, the provisions pertaining to prior notice and making a mention of the same in the Affidavit in support of the Application are directory and procedural in nature and are therefore, not mandatory; that the Hon'ble Patna High Court in its decision in the case of The Bihar Rajya Bhumi Vikas Bank Samiti, Bihar Jharkhand, now known as Multi State Co-op. Land Development Bank Ltd., Bihar and Jharkhand V/s. The State of Bihar and Ors.,² held that Notice under Section 34(5) of the Act is mandatory, which Notice has been given by the Appellant to the Respondents in the present case, however, the said judgment has not dealt with the issue of lack of mentioning of service in the Affidavit which is procedural and directory in nature; that this Court in Global Aviation Services Pvt. Ltd. V/s. Airport Authority of India in Commercial Arbitration Petition No.434 of 2017 along with other connected matters,

2 2016 SCC Online Pat 10103

has held that the provisions of Section 34(5) of the Act are directory and not mandatory and the Court has ample power to direct the Petitioner to issue Notice along with the papers and proceedings upon the Respondents after the Petitioner files the Arbitration Application under Section 34(1) and before such Application is heard by the Court at the stage of admission.

4. The learned Advocate for the Respondents has supported the Judgment and orders passed by the learned District Judge – I, Pune.

5. I have considered the submissions advanced on behalf of the Appellant and Respondents. The Appellant has filed an Application under Section 34 of the Act challenging the Award passed by the Sole Arbitrator dated 27th May, 2017. Sub-Section (5) of Section 34 provides as under :

“(5) An Application under this Section shall be filed by the party only after issuing prior notice to the other party and such application shall be accompanied by an Affidavit by the Applicant endorsing compliance with the said requirement”.

6. In the present case, admittedly the Respondents had filed a Caveat being No.445 of 2017. The Advocate for the Appellant served a Notice on the Respondents on 11th August, 2017 which reads thus :

“Please take notice that as per your Caveat No.445 of 2017 filed in the Hon’ble District Court, Pune, an Application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the

Arbitration Award dated 27-05-2017 of the Sole Arbitrator, is being filed today by Mr. Vikramsinha L. Jadhavrao (the Applicant) before the Hon'ble District Judge, Pune.

*A copy of the said main Application and the Application for stay is enclosed hereto which is sent to you **in advance** by way of service upon you. Hence, please acknowledge this notice.”* (Emphasis supplied)

7. The said Notice was admittedly received by the Respondents at 2.15 p.m. on 11th August, 2017. It is clearly mentioned in paragraph No.1 of the said Notice that Arbitration Application under Section 34 of the Act for setting aside the Arbitration Award dated 27th May, 2017 of the sole Arbitrator is **“being filed today”** by the Appellant before the learned District Judge-I, Pune and in paragraph No.2 of the said Notice, it is mentioned that the Application is sent/forwarded to the Respondents **“in advance”** by way of service upon the Respondents. Therefore, intimation is given to the Respondents that the Application **“is being filed today”** and a copy of the Application is sent/forwarded to the Respondents **“in advance by way of service upon them”**, which clearly establishes that the Application was yet to be filed and was not filed prior to the Notice issued to the Respondents by the Advocate for the Appellant. I am, therefore, of the view that there was no need for the learned District Judge – I, Pune, to look into the dictionary meaning of the word “being” for the purpose of ascertaining whether the Arbitration Application was already filed or not at

the time of service of the copy of the Application on the Respondents. Again, in paragraph No.51 of the main Application itself, the Appellant has categorically stated that the Applicant has received Caveat Application No.445 of 2017 from the Respondents and hence, Notice along with copy of this Application has been served on the Respondents. In the Affidavit in support of the Application, the Applicant has categorically stated, *“I hereby repeat and reiterate what is stated in the main Arbitration Application as if the same is stated herein once again and traversed. The said contents are not repeated for the sake of brevity and the same may kindly be read and treated as part of this Affidavit.”* Therefore, in my view, the Appellant has also endorsed compliance with the requirement of mentioning in the Affidavit that he has issued prior notice of the Application to the Respondent. Again, the Appellant along with his response to the Application filed by the Respondents alleging that the main Application as filed under Section 34 of the Act is not maintainable, had filed an Affidavit endorsing compliance of serving prior notice to the Respondents with regard to the filing of the main Petition under Section 34 of the Act. Even otherwise, I am in agreement with the findings of the learned Single Judge of this Court in the case of Global Aviation Services Pvt. Ltd. (supra) that the provisions of Section 34(5) are directory and not mandatory and the Court has ample power to direct the Petitioner to issue Notice along with the papers and proceedings upon the Respondents after the Petitioner files the Arbitration Application under Section 34(1) and before such

Application is heard by the Court at the stage of admission.

8. In view of the above, I hold that the learned District Judge – I, Pune has erred in holding that the Application filed by the Appellant under Section 34 of the Act is not maintainable and in consequence thereto, rejecting the main Application filed by the Appellant under Section 34 of the Act. In view thereof, the above Arbitration Appeal is allowed and both the Orders dated 08th January, 2018 passed by the learned District Judge – I, Pune are hereby set aside.

(S.J.KATHAWALLA, J.)