

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 261 OF 2018

IN

ARBITRATION PETITION NO. 602 OF 2018

Kinjal Cotton Pvt Ltd

..Appellant

Vs.

C. A. Galiakotwala and Co Pvt Ltd

..Respondent

WITH

NOTICE OF MOTION(L) NO. 759 OF 2018

IN

APPEAL NO. 261 OF 2018

IN

ARBITRATION PETITION NO. 602 OF 2018

Kinjal Cotton Pvt Ltd

..Appellant

IN THE MATTER BETWEEN

Kinjal Cotton Pvt Ltd

..Petitioner

Vs.

C. A. Galiakotwala and Co Pvt Ltd

..Respondent

Mr. Nilesh Pawaskar a/w Geetanjali Shinde, Ms. Khevna Dagli, for the Appellant.

Mr. Rohan Rajyadaksha a/w Mr. Kunal Kanungo, Mr. Rushabh Sheth, Ms. Neha Shah i/b M. S. Bodhanwalla and Co, for the Respondent.

CORAM:-S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.
DATE :- OCTOBER 19, 2018.

ORAL JUDGMENT (Per S. C. DHARMADHIKARI, J.)

By this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996(for short “the Act”), the order of the learned Single Judge dismissing the Arbitration Petition No. 602 of 2018 has been challenged by the Original Petitioner.

2 The impugned order dated 10th July, 2018 dismisses a Petition under Section 34 of the Act to challenge an Award dated 5th October, 2012.

3 The learned Single Judge refused to entertain the Arbitration Petition on the ground that it is filed beyond the period of limitation prescribed by the Act and particularly sub-section 3 of Section 34 of the Act.

4 On this Appeal, on the earlier occasion (on 27th September, 2018), we had passed the following order:-

“1 When this appeal was placed for admission, bearing in mind the impugned order as also the observations therein, we inquired from Mr. Pawaskar appearing on behalf of the appellant-original petitioner as to whether the appellant would be ready and willing to

deposit a sum of Rs.20 lakhs without prejudice to its rights and contentions so that this Court could then allow it to demonstrate the legal infirmity and error in the impugned order.

2 This query was raised because the Award in favour of the respondent directs the appellant-original petitioner to make payment of Rs.41,01,583.20 with interest and that Award is stated to be dated 5th October, 2012. A petition under Article 226 of the Constitution of India was filed to challenge such an Award which remained on the file of this Court from 12th June, 2017, to 3rd May, 2018, on which date, it was allowed to be withdrawn, but it is apparent that a petition under Section 34 of the Arbitration & Conciliation Act, 1996 was dismissed as time barred simply because it was filed on 6th June, 2018. The learned Judge, in the impugned order, says that the delay is incapable of being condoned for it must be taken to be of five years. Mr. Pawaskar says otherwise. He says that there is an appellate mechanism in the Cotton Association By-laws based on which the Award was initially challenged in Appeal and the Appeal was dismissed on 1st April, 2017.

3 *Prima facie*, it is such a litigant, who has brought this Appeal, challenging an order of the learned single Judge containing above factual material, but arguing that the learned Judge ought to have noticed section 14 of the Limitation Act, 1963, then, he cannot be allowed the luxury of litigation. All the more when the Award directing payment of money is put in execution and the movable property of the appellant is attached. At that stage, he has rushed to the Appellate Court.

4 In the light of our query, Mr. Pawaskar sought time to speak to the appellant's representatives. After they were contacted and they expressed their readiness and willingness to deposit a sum of Rs.20 lakhs in this Court, that we pass the following order :

(i) The appellants to deposit in this Court, a sum of Rs.20 lakhs (Rupees Twenty Lakhs only) within two (2) weeks from today.

(ii) In the event this amount is deposited, the appeal shall be listed for admission within three (3) weeks from today.

(iii) In the event the amount is not deposited, the appeal to stand dismissed without any further reference to Court and then the proceedings in Execution can go on.

5 To enable the appellants to deposit the sum of Rs.20 lakhs within the time stipulated above, it is directed that for a period of two (2) weeks, no further steps in execution and enforcement of the subject Award, as if it were a decree of this Court, be taken.”

5 Pursuant to our order, the sum of Rs. 20 Lakhs has been deposited by the Appellant in this Court without prejudice to its rights and contentions in the instant Appeal.

6 Mr. Pawaskar, the learned counsel appearing in support of this Appeal submitted that the learned Single Judge grossly erred in dismissing the Arbitration Petition on the ground that it is beyond the limitation prescribed by sub-section 3 of Section 34 of the Act and hence time barred.

7 Mr. Pawaskar submits that the list of the dates and events as admitted by the parties would enable him to challenge this finding in the impugned order. Mr. Pawaskar submitted that in the Arbitration Petition the Appellant/Petitioner had specifically stated that the alleged contract executed by the parties is dated 11th August, 2010. It is that contract which is breached and violated allegedly by the Appellant/Petitioner. The Respondent approached the Cotton Association of India, Mumbai on 23rd January, 2012 requesting it to appoint an Arbitrator. The appointment of sole Arbitrator was requested in terms of the Rules of the Arbitration framed by the Cotton Association of India. The Arbitration Petition contained a specific ground that though the sole Arbitrator claims that the notice of the arbitral proceedings was sent to the Appellant/Petitioner at its office or place of business at Sillod, District Aurangabad in the State of Maharashtra, factually, that is not the registered office or the place of business. That is only a processing unit. The processing unit is attended by the Appellant/Petitioner's representative only from the month of December to March and thereafter there is neither a regular establishment nor staff which could have allegedly accepted or refused any notice and dispatched by the

sole Arbitrator/arbitral Tribunal. In the circumstances, the foundation on which the Arbitrator proceeded that such a notice from the Tribunal or from the Respondent was indeed dispatched and when it was served, the service was refused, is fallacious. Thus, the Award was made ex-parte but without any foundation being laid of the Appellant/Petitioner avoiding acceptance of notices or refused the service of the packet containing the notice. In the circumstances, the Appellant/Petitioner had no notice of the arbitral proceedings much less of an Award allegedly made on 5th October, 2012.

8 It is only when this Award was put in execution that the Appellant/Petitioner was served with the copy of this execution proceeding dated 7th June, 2016 accompanied by the Award. The alleged Award was put in execution a good three and half to four years after its date of making. That is how the Appellant/Petitioner became aware of the Award and for the first time.

9 The Appellant/Petitioner was advised to move a Appellate Board by what is styled as a right of Appeal to the Board in terms of Rule 69 of the Rules of Arbitration. The Appeal was

preferred on 2nd July, 2016. The Appeal was accompanied by an Application seeking condonation of delay. The Appeal was to be allegedly filed within 30 days but if the Appellant/Petitioner was not aware of the Award itself, then, the Appeal could not have been filed within 30 days from the date of the Award. Hence, the Appeal was filed but after the Award came to the notice of the Appellant/Petitioner. That is how the Appeal filed on 2nd July, 2016 could not have been dismissed on the ground that it was time barred.

10 The further unfortunate circumstances, according to Mr. Pawaskar in which the Appellant/Petitioner was placed are that it was advised to file a Writ Petition under Articles 226 and 227 of the Constitution of India in this Court. Such a Writ Petition was filed and on 26th May, 2017. A learned Single Judge of this Court, however, dismissed it as withdrawn on 3rd May, 2018. Thus, such a Writ Petition was pending in this Court from 26th May, 2017 to 3rd May, 2018. Thereupon, the right remedy was resorted to by filing instant Petition under Section 34 of the Act. That was filed on 6th June, 2018. Such a Petition should not have been dismissed on the ground of delay. The entire period spent and *bonafide* in

prosecuting the Appeal before the Appellate Board as also the time consumed in instituting a Writ Petition and later-on withdrawing it, should have therefore, been excluded and so excluded the Arbitration Petition was within time. It was within time from the date when the Award became known to the Appellant/Petitioner. For all these reasons, the order of the learned Single Judge dismissing the instant Petition on hyper technical grounds deserves to be set aside.

11 On merits Mr. Pawaskar submits that the Appellant/Petitioner has an excellent case. The contract based on which the arbitral claim was laid, was not to the knowledge of the Appellant/Petitioner. There was no such contract at all. There could not have been a one sided contract and it is alleged that a purchase order was issued by the Respondent on the Appellant/Petitioner. That purchase order says that the quantity of Cotton had to be supplied at a rate specified therein and within the time stipulated therein. However, this was a mere offer or a proposal. Unless and until that offer/proposal was accepted, there could not have been a concluded contract. The concluded contract is inferred by relying on the two sentences appearing in the

alleged contract note. That is to the effect that in the event no confirmation of the said contract is given and within the time stipulated in the contract, it will be presumed that the contract with the terms and conditions is acceptable to the Appellant/Petitioner. That is how the Respondent proceeded on the footing that there is a firm contract. It persuaded the Tribunal to make an ex-parte Award. There was no genuine attempt to serve the claim or papers in relation thereto on the Appellant/Petitioner and there was never any opportunity to defend the claim granted by the Appellate Tribunal or the Board in Appeal. Even the learned Single Judge has refused to give an opportunity to the Appellant/Petitioner to argue the case on merits. In such circumstances and when the Appellant/Petitioner has shown its *bonafide* by depositing the amount in this Court, it should be allowed to contest the Award on merits.

12 Mr. Rohan Rajyadaksha, the learned counsel appearing on behalf of the Respondent supported the factual findings in the Award as also in the order of the learned single Judge impugned before us. He would submit that this Appeal is not *bonafide* at all. The Award has been made on 5th October, 2012.

It grants a claim of Rs. 41 Lakhs and odd with interest. The Appellant/Petitioner never made any *bonafide* attempt to settle this dispute nor it was intending to honour the Award. Today also, it is not willing to give a reasonable offer so as to put an end to this dispute. In the circumstances, it is inconceivable that a person in business and with commercial acumen would allow an Award to be made against it and not contesting it ever though it directs payment of money. For all these reasons, he would submit that the Appeal be dismissed.

13 With the assistance of the counsel appearing for the parties, we have perused the Appeal paper book. The Appeal paper book contains the impugned order. Pertinently and in addition to containing a copy of the impugned order, the necessary papers and proceedings which are Annexures to the copy of the Arbitration Petition filed in this Court, are also made available for our perusal. Upon a careful perusal of the Memo of the Arbitration Petition filed in this Court, it is apparent that the Respondent laid the statement of claim by alleging that the contract has been executed on 11th August, 2010 for supply of 600 bales of Brahma Breed Cotton of specifications , weight etc. The

price and delivery period and other terms and conditions are set out in the contract. Mr. Pawaskar has fairly invited our attention to a copy of this contract and from the copy, it is evident that this contract is by two private companies. Both are in the same business and admittedly dealing in Cotton. This purchase contract reads as under:-

“C.A. GALLAKOTWALA & CO.PVT.LTD.
66, MAKER CHAMERS III, NARIMAN POINT, MUMBAI 40 021
TEL: 91-22-23943758 FAX:91-22-22048801
E-MAIL: gallokotwala-mb@vsnl.com

PURCHASE CONTRACT

No.AG/10-11-002
Date : 11 AUGUST 2010

KINJAL COTTON PVT.LTD.
SILLOD

Dear Sirs,

We have pleasure to confirm having purchased from you this day, the following, subject to the By Laws of the Common Association of India, Mumbai which contains amongst other things, provisions for settlement of quality and other disputes by Arbitration :

QUANTITY	:	600 BALES (SIX HUNDRED BALES)
QUALITY	:	BRAHMA 2010-2011 SEASON GRADE: ICS 105 SUPER FINE STAPLE: MINIMUM 29 MM MICRONAIRE: 3.7 AND ABOVE.
DELIVERY	:	FROM 01 DECEMBER 2010 TO 15 DECEMBER 2010.

PRICE	:	RS.30,500/- PER CANDY EX-GIN
PAYMENT TERMS	:	WITHIN 30 DAYS OF APPROVAL ALL BANK CHARGES FOR REMITTING THE PAYMENT WILL BE ON SELLER'S ACCOUNT.
REMARKS	:	IN CASE OF PURCHASE AGAINST EXPORT, NO SALES TAX WILL BE LEVIED BY THE SELLER. MOISTURE TO BE LESS THAN 3.5%.

Kindly return us one copy of this confirmation duly signed by you. If no copy is received within 7 days from the date hereof, it will be taken for granted that you have confirmed the above purchase as per the above terms.

We confirm.

For C.A. GALLAKOTWALA &
CO.PVT.LTD.
Sd/-.

Sellers

REGD.OFFICE : 125, NAGINDAS MASTER ROAD, FORT, MUMBAI 400 001. ”

14 A bare perusal of this contract leaves us in no manner that it contains the address of the Appellant/Petitioner as that of Sillod, District Aurangabad. It is claimed that there is a stamp allegedly affixed at the foot of this contract but this was not served at all. Hence, it cannot be presumed that there was in existence a concluded contract between the parties. Be that as it may, the Statement of Claim alleges that when the supply was not made in terms of this purchase contract, the Respondent claimant invoked

arbitration in accordance with the Arbitration Agreement by and between the claimant and incorporated in the contract. It is claimed that the Cotton Association of India is an association, and parties before us are its members. It provides a forum to have the disputes settled in relation to the contracts or deals in Cotton expeditiously. The Rules contain stipulations with regard to the appointment of the Arbitrator and all assistance is rendered to the parties to have the disputes settled by this alternate mode. It is too well settled to require any reiteration that when such Tribunals or domestic forums are chosen by parties for adjudication of the disputes arising during the course of the contract, then, there is certain latitude and freedom so also discretion in the manner and mode in which contractual disputes have to be settled effectively and expeditiously. An interpretation has to be placed on these Rules consistent with the aim and object that they seek to achieve. That is obvious and to avoid a long drawn process of trial of civil cases by approaching the Civil Courts. It is too well settled to require reference to any judgments that in the Civil Courts, the formal procedures are followed and necessarily. The Civil Courts are flooded with cases, and therefore, the contractual disputes of present nature and particularly when

one party has to recover money, remain pending for years and decades together. The problems are compounded when Decrees are passed but remain unexecuted and unenforced. In the circumstances, such alternate mode of redressal of disputes are advisely chosen. They dispense with lot of formalities and procedural matters which are ordinarily followed in Courts. By this process, the parties get an expeditious and early decision. The Rules also give the arbitral Tribunal the freedom to determine the manner and mode of disposal of References. Several formal requirements and procedural Rules prevailing in the Court are dispensed with. This is how the Rules of Arbitration are framed. Hence, upon the receipt of the Statement of Claim, the sole Arbitrator convened the first hearing on 3rd May, 2012. The notices of hearing were duly served, according to the arbitral Tribunal, on both parties. However, due to unavoidable reasons, the hearing could not be held on that date. The matter was adjourned to 7th June, 2012. The notices of hearing were sent to both parties. The arbitral Tribunal says in the Award that the claimant Respondent before us appeared before it. However, the Appellant refused to accept the notice. It was not present nor it deputed anybody to remain present. There is absolutely no reason

assigned for its absence. Still, the arbitral Tribunal did not proceed ex-parte. To enable the Respondent to appear on a second occasion, the matter was postponed to 21st June, 2012. The notice of this hearing was also sent to the parties. However, the Appellant/Petitioner before us refused to accept the same. Thus, the Tribunal proceeded on the footing that several opportunities being extended, the Appellant is not interested in contesting the matter. It decided to proceed ex-parte. It relied upon Rule 45 (ii) (a) of the Rules of Arbitration. It then referred to the claimant's case. The claimant/Respondent had not only relied upon the contract but submitted that this contract enabled the supplies to be effected between 1st December, 2010 to 15th December, 2010. The signatures at the foot of the contract were relied upon. The document was taken on record and read in evidence simply because there was no contest from the Appellant/Petitioner before us. It is stated that the claimant waited till 28th February, 2011 and called upon the Appellant/Petitioner to deliver the Cotton. It failed and neglected to deliver the Cotton, within the fixed period of delivery, to the claimant. Another letter dated 15th March, 2011 was also dispatched and that was also accepted but no delivery was

effected.

15 Pertinently before us Mr. Pawaskar does not dispute that in the business of Cotton, the processing has to be done and carried out at a unit. Such a unit of the Appellant/Petitioner is in the State of Maharashtra. Although, the Appellant/Petitioner may have its principal place of business in the State of Gujarat, at such processing unit, Mr. Pawaskar would urge that the Appellant/Petitioner and its representatives are available from the month of December till March every year. All the letters and referred above have been addressed at this address in the State of Maharashtra at Sillod, District Aurangabad between December to March, 2011.

16 Then it is set out in the Statement of Claim that the Respondent contacted the Appellant on phone and it's representatives personally visited the office of the Appellant and urged it to deliver the Cotton. The Appellant/Petitioner sought additional time to deliver Cotton and though the claimant was keen on taking delivery and by extending time, still, within the extended time as well, the Cotton was not delivered. The

Appellant/Petitioner failed to deliver Cotton and hence there was a correspondence in May 2011. A final opportunity was given to the Appellant to honour the contract, failing which the claimants said that it would rely upon the by-laws of the Association and lay a claim against it. Thus, the invoicing back did not succeed and after waiting till the stipulated period, once again an opportunity was given to honour the contract. When within this extended time as well, the contract was not honoured, a debit note dated 21st July, 2011 was raised and it was dispatched under the cover of claimant's letter dated 16th August, 2011. If the amount was paid, the contract would have been closed. Since the amount was not paid, the arbitration proceedings were initiated.

17 The Award thereafter recites that the Appellant/Petitioner neither attended the hearing nor filed any written submissions to controvert or deny the claim.

18 It is in these circumstances that the Award says that despite being notified by letters from the Association, the Appellant/Petitioner failed to turn up. Thus, the notice of the arbitral proceedings was not given only by the Respondent but by

the Association and sole Arbitrator ensured that the Appellant/Petitioner was informed that he has been appointed to arbitrate on the disputes and they must, therefore, give their consent and if nothing was heard from them, he would proceed. There are reminders sent. Each of these find a reference in the Award. Further, the Award sets out the claim in detail, refers to the documents submitted by the claimant and in the absence of a contest, proceeds to hold that the existence of these documents and their contents being not denied, they can safely be read in evidence. That is how the sole Arbitrator proceeds. He also holds that by letter dated 23rd January, 2012, the claimant had furnished copies of all documents relating to and/or concerning the matter and the statement of claim to the Appellant/Petitioner before us.

19 It is in these circumstances that we are not satisfied with Mr. Pawaskar's arguments that there was no contract or that there were no notice of arbitral proceedings or that the Award was not made known to the Appellant/Petitioner. We have on record enough documents which would indicate that before and after the Award was made by the sole Arbitrator, the Cotton Association of

India addressed Communications to the Appellant. The letter dated 11th October, 2012, copy of which is at page no. 109 of the paper book, reads as under:-

“Cotton Association of India

Telephone No.: 3006 3400/2370 4401/
02,03,2372 9438,

Cotton Exchange Bldg., 2nd Flr
Opp.Cotton Green Rly.Station,
Cotton Green,Mumbai –33

Telegraphic Address : “COTBOARD”

Date : 11th October 2012

Fax : +91-22-2370 0337.

E-mail : cal@calonline.in

When replying please quote reference No.2537/AB/105

M/s Kinjal Cotton Pvt.Ltd.

Plot No.290,

Dharadi Road,

Opp. Agrawal Cotex, Tal: Sillod,

Dist: Aurangabad 431 112.

Dear Sirs,

Re: Arbitration No.105 of 2011-12 under By-law 38.

On behalf of the Sole arbitrator, I am to give you notice that he has made and signed his award showing charges, fees, etc. payable, a copy of which is enclosed.

In case you wish to prefer an appeal to the Board against the award, you should do so within twenty days from the date of receipt of the award on payment in advance of an appeal fee (Non-refundable) stipulated in Schedule 1 appended to the CAI's Rules of Arbitration, to the Association. A copy of the Schedule 1 is enclosed.

Kindly acknowledge receipt.

Yours faithfully,

sd/-

Secretary.

Encl : As above. “

20 Pertinently, this Communication was addressed to the Appellant/Petitioner's processing unit. That is situated at Plot No. 290, Dharadi Road, Opp. Agrawal Cotex, Tal. Sillod, District Aurangabad.- 431 112. This packet was sent by Registered Post Acknowledgement Due. This is a clear case where a presumption can be raised of service and in terms of the manner of dispatch and service. Such presumption is raised in the Indian Evidence Act, 1872. This presumption is raised when the India Post or the Post and the Telegraph Department, Government of India is approached through the Regional Post Office and with a request that not only the packet should be served but an acknowledgement obtained of such service. When the Postman went to deliver this packet, the representative of the Appellant has refused to accept it. The packet is thus returned with a remark to the effect “refused”. That endorsement duly signed by the Appellant/Petitioner's representative is on record at page 110 of the paper book. Thus, the Award was made known and with the remedy to challenge it on 11th / 16th October, 2012.

21 It is then said in a Communication, copy of which is at page 111 of the paper book dated 2nd July, 2016 by the Appellant/Petitioner that it desires to challenge the Award before the Appellate Forum. Pertinently, the address on this Communication is the same as that reproduced above. It is stated to be a unit of Ginning and Pressing and Oil Mill. It informs Cotton Association of India that Arbitration No. 105/2011-2012 and the Award dated 1st October, 2012 is to the knowledge of the Appellant/Petitioner. In this Communication, there is nothing by which one can infer that the Appellant/Petitioner was unaware of the arbitral proceedings or of making of the Award. It says that it intends to file an Appeal against this Award and it is delayed. It should be taken on record despite such delay. The Association plainly refused to do so by its Communication dated 1st April, 2017.

22 The Appellant/Petitioner must blame itself for having instituted proceedings which were entirely misconceived and not maintainable from inception. Given the nature of the disputes and the factual aspects involved therein, a Writ Petition under Articles 226 and 227 of the Constitution of India was never a efficacious

remedy to challenge the arbitral Award. The Award was referable to the Act. That contains a specific power conferred in the Court to set aside the arbitral Award. Section 34 of the Act is clear. Eventually, this Section was invoked but belatedly. To our mind, an Award passed on 5th October, 2012 had never been challenged by filing an Arbitration Petition till 6th June, 2018. The period of limitation carved out by Section 34 (3) of the Act rules out the applicability of Section 5 of the Limitation Act, 1963. Given the fact that Section 5 of the Limitation Act has a limited application and delay beyond 120 days cannot be condoned, then, the learned Single Judge was in no error in dismissing the Petition. He rightly did not allow the Appellant/Original Petitioner to rely upon filing of an Appeal before the Association's Board and belatedly on 2nd July, 2016 to challenge an Award dated 5th October, 2012. All the more when the Award was to the knowledge of the Appellant/Petitioner at least from 16th October, 2012. Thus, the Association rightly informed the Petitioner/Appellant that its Appeal was not maintainable. Then, thereafter as well, no Petition Under Section 34 of the Act was filed and for a good number of days. The arbitral Award was challenged by filing a Writ Petition which the Appellant/ Petitioner knew was not maintainable and

eventually it withdrew it . If that was withdrawn and after a period of one and half year of its institution, then, the Appellant/Petitioner cannot turn around and blame this Court. It must blame itself. The Writ Petition was withdrawn on 3rd May, 2018. In these circumstances, the learned Single Judge was in no error in refusing to condone the delay in filing the Arbitration Petition.

23 After having found no infirmity or perversity in the order under challenge, additionally, we find even on merits the Award could not have been impugned in the limited jurisdiction of this Court under Section 34 of the Act. This is not an Award made in utter breach of the principles of natural justice. This Award cannot be said to be contravening the principles of equity, justice and fair play. The Award is not contrary to the public policy of India in any manner whatsoever. It is an arbitral Award rendered by the Association of which Cotton Traders and dealers in Cotton are members. Men from Commercial World while in business dealings and possessing innate common sense are manning such associations. They are aware of the Cotton trade practices prevailing in this State for decades together. The trading member can be from the adjoining State as well. Given the fact

that Cotton is also grown in this part of the country, lot of traders come to this State and set up their purchasing unit. The bales of Cotton collected from the Cotton growers are thereafter processed and then sold. The purchasers of Cotton bales approach the Traders at the processing unit. In such circumstances, we do not think that the Appellant/Petitioner was a novice in the field. It was certainly not ignorant of the business practices. It cannot make any capital of its own faults.

24 This is a clear case where an attempt is made to defeat a lawful contract and by relying on technicalities.

25 None of the judgments relied on by Mr. Pawaskar can be of any assistance. In the first decision reported in **AIR 1968 Bom 387 (Meghji Kanji Patel v/s Kundanman Chamanlal Mehtani)** a Summary Suit was filed. The Summary Suit being filed in a Civil Court, a writ of summons had to be drawn and in a format prepared under the Code of Civil Procedure, 1908 or other procedural rules. After such a summons is prepared and duly signed, it has to be dispatched and in the manner set out in the Rules. It was claimed in the first decision reported in **AIR 1968 Bom 387 (Meghji Kanji Patel v/s Kundanman Chamanlal**

Mehtani) that the summons was sent to the Petitioner by Registered Post but the cover containing the same was returned with the postal endorsement “refused” . The learned Single Judge found that the presumption in law has been properly rebutted. There are materials to that effect. The materials are that, firstly if the ordinary mode of delivery of summons resorted to does not result in service, then, a substituted mode is provided in the law itself. The substituted mode having not been resorted to, the learned Single Judge found that the ex-parte decree cannot be sustained. In that case, the learned Judge found that though the endorsement made by the Postman was relied upon but there was never any statement by the Postman. There was never a summoning of the Postman and examining him on oath. Once he was not summoned, though the Defendant/Petitioner claimed that he had made a request to summon him and offer him for cross examination, then, his statement on oath that such a packet was never served much less refused should have been accepted. That is how the ex-parte decree was set aside.

26 In the second case as well, in **Writ Petition No. 4217 of 2018** decided on 7th August, 2018 (**Madhav Vishwanath Dawalbhakta and Others v/s Bendale Brothers**), the learned

Single Judge of this Court found that the Suit was laid but the Trial Court decreed it ex-parte. After an application was made to set aside the ex-parte decree and it was contested, it was dismissed. The Trial Court accepted the case of the Plaintiff that the summons was served on the Defendant. He failed to appear and that is good service. The record indicated otherwise. There was no attempt made to serve this service by substituted mode. The Bailiff had reported that the Defendant was not residing at the given address and the Bailiff's remark on both occasions was that "he left the premises". This was not a case where the Defendant was actually located in the premises and had an occasion to peruse the packet and after that he refused to accept it by giving an acknowledgement. In such case, the substituted mode of service should have been resorted to. This is once again a finding of fact and based on the circumstances brought before this Court. The judgment, is therefore, rendered in the peculiar facts and circumstances and is clearly distinguishable.

27 As a result of the above discussion, we do not find any merit in this Appeal. It is dismissed. No order as to costs.

28 By our earlier order, we offered the

Appellant/Petitioner an opportunity to settle the claim and by bringing in further substantial sums. If that was brought, the court would have then considered granting appropriate relaxation in the rate of interest. It could have also granted time to pay the money in installments. However, that suggestion of the Court was not acceptable. In the above circumstances, we have dismissed this Appeal but there will be no order as to costs.

29 The amount that deposited in the Court shall stand transferred to the Executing Court to the credit of the Award. The amount shall be adjusted while enforcing and executing the decree and recovering the balance sum together with interest.

30 At this stage Mr. Pawaskar prays for a stay of the enforcement and execution of the Award. He submits that the Award is executable and enforceable as if it were a Decree of the Civil Court. If execution and enforcement is not stayed, the Appellant/Petitioner would lose an opportunity to challenge this judgment in a Higher Court. Mr. Rajadhyaksha opposed this request on the ground that the execution has already commenced and Decree Holder had waited for good six years and more to recover the money.

31 On hearing both counsel on this limited point, we are of the view that in the facts and circumstances of this case, the stay of execution and enforcement cannot be granted. The request in that behalf is refused.

32 In view of dismissal of the Appeal, nothing survives in the Notice of Motion (L) No. 759 of 2018 and same stands disposed off accordingly.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)