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

Date of decision: 22nd November, 2018

\+ **O.M.P. 244/2009**

SHRI KHAILESH GARG ..... Petitioner

Through: Ms. Chanchal Sharma, Advocate (M-9811652421).

versus

M/S ABHIPRA CAPITAL LIMITED AND ANR. ..... Respondents

Through: Mr. Shekhar Gupta, Advocate for R-1 (M-9868790800).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed challenging the award dated 5th March, 2007 passed by the Learned Sole Arbitrator. The brief background is that an agreement was entered into between the Respondent – M/s Abhipra Capital Limited with the Petitioner - Shri Khailesh Garg appointed as a Business Partner for the territory of Hathras, U.P. The Respondent is in the business of stock-broking and commodity trading. As per the agreement, the Petitioner was to be given a salary and commission for managing the branch of Abhipra in Hathras. A security deposit of Rs.1 lakh was to be made by the Petitioner which was duly paid. The Petitioner was responsible for running of the branch office. The Petitioner was entitled to brokerage and commission. As per Clause 4.2(a), the Petitioner was to collect the dues from the clients which he introduced to Abhipra and make payments to Abhipra.

2. Disputes arose between the parties in respect of this agreement. The Respondent through counsel issued a notice to the Petitioner calling upon the Petitioner to pay to the Respondent all the outstanding amounts to the tune of Rs.24,59,858/-. The said notice was issued on 22nd August, 2006. In reply, the Petitioner contended as under:

> *"...*
>
> *2. <u>That my client aforesaid never entered into any kind of such agreement on 1-5-04 with your client, as stated in the notice</u>.*
>
> *3. <u>That my client aforesaid neither visited the office of your client on 13-4-06, nor made any kind of such promises to pay a sum of Rs.23,01,316-80</u> out of the total amount of Rs.24,59,858-52 to your client, as per so called "Agreement" & as such my client is not liable to pay eve a single penny to your client.*
>
> *4. That it also appears that your client intends to extort my client by way of serving such illegal notice.*
>
> *Therefore, you are through this reply of your notice called upon to sincerely advise your client not to drag my client into any frivolous & vexatious litigations & if any kind of such threatened action is taken, my client will defend the same at the sole cost & risk of your client & further your are called upon to sincerely advise your client to send the true Photostat copies of so called "Agreement" dated 01-5-04 & the details of accounts showing an outstanding of Rs.24,59,858-52/- to my client within 10 (Ten) days from the date of receipt of this notice, failing which my client shall have no option, but to understand that the notice under reply was got served upon him with a view to harass & blackmailing him unnecessarily & proper legal action shall be taken against your client, at his sole cost & risk.*
>
> *That's all."*

3. The matter was thereafter referred to arbitration. The Learned Sole Arbitrator issued two notices to the Petitioner. The Petitioner, however, did not appear. Thereafter, an order was passed for service through publication in the *Rashtriya Sahara.* The publication was effected and placed on record. Since, the Petitioner still did not appear in the arbitration proceedings, the Learned Arbitrator proceeded to hear the arguments and passed the award. The Learned Arbitrator has awarded a total sum of Rs.24,59,858/- along with Rs.5 lakhs as damages and Rs.40,000/- as litigation costs.

4. The impugned award is challenged by the Petitioner primarily on three grounds:

i) that the notice was never served by the Learned Arbitrator;

ii) the publication was ordered by the Learned Arbitrator in the *Rashtriya Sahara,* having circulation in Hathras, U.P. However, the publication was only done in a newspaper having circulation in Delhi;

iii) the agreement was entered into with Abhipra Capital Limited, and not Abhipra Commodity Consultants Pvt. Ltd. Thus dues of the latter cannot be sought to be recovered in these proceedings.

5. In response, Ld. counsel for the Respondent submits that notice was sent twice by the Arbitrator as is evident from a reading of the award. It is further submitted that the Petitioner's conduct has been dishonest and *malafide* inasmuch as in the reply to the legal notice, the Petitioner claimed that no agreement was entered into. However, in the present petition, in paras 5.2 and 5.3, the allegation is that the Petitioner signed the documents but under coercion. This plea establishes that the agreement was actually signed and that the Petitioner had paid a sum of Rs.1 lakh and the

Petitioner's stand in his reply was false.

6. This Court has heard the submissions of the parties. Each of the objections are dealt with herein below:

Objections No.1 and 2 – Issuance of notice and publication

7. The memo of parties in the arbitral proceedings has the same address of the Petitioner as was contained in the legal notice as also in the reply which is as under:

"R/o 653, Chamar Gate, Hathras, (U.P.)"

8. Admittedly, the initial legal notice was sent by the Respondent to the Petitioner at this very address by registered post. The same was duly received and was in fact replied to by the Petitioner. In the same reply, the address is also admitted to be correct. Thus, there is no dispute that the notice was issued to the correct address.

9. A perusal of the original record shows that the Learned Arbitrator issued two notices to the Petitioner at his correct address. The original envelopes showing the issuance of notices are on record. The first notice has been issued on 9th October, 2006 by speed post. The remarks on the envelope shows that the Postman visited the Petitioner's premises twice. On one occasion, he was informed that the Petitioner is travelling. On another occasion, the Postmaster again could not find the Petitioner at the premises. The two remarks of the Postmaster are dated 11th October, 2006 and 16th October, 2006 respectively. Again on 6th November, 2006, the notice was sent and has been returned with the remark that the Petitioner could not be met, however, he has been intimated of the notice. Both these envelopes show that the Petitioner had adequate notice of the arbitral proceedings and has deliberately avoided the participation in the said proceedings.

10. Insofar as the publication is concerned, the publication in *Rashtriya Sahara* is only due to the absence of the Petitioner and was by way of abundant caution. The substituted service does not by itself in an isolated manner decide the question of service. It is accordingly held that there is no justification to hold that the Petitioner was not afforded adequate opportunity. The turn of events clearly point to the fact that the Petitioner, initially, had received the legal notice and had replied to it, thereafter, two notices were issued by the Ld. Arbitrator by Speed post and finally publication was also effected. This is adequate compliance of the requirement of issuance of notice to the Petitioner.

Objection No.3 – No arbitration agreement with Abhipra commodity Consultants Pvt Ltd. and Abhipra Capital Ltd had no locus to invoke arbitration.

11. Coming to the last objection in respect of Abhipra Capital Ltd., a perusal of the agreement dated 1st May, 2004 shows that the same is entered into between the Petitioner and Abhipra Capital Limited. The word 'party' has been defined in the agreement as under:

> *"party" means Abhipra or the Business Partner, as the case may be."*

12. Further, the Petitioner had entered into an agreement dated 30th August, 2004 by which he wanted that his services should also be extended to Abhipra Commodity Consultants Pvt. Ltd. This fact is recorded in the Award as under:

> *"That the respondent had once over again approached the applicant company for carrying on the business of the commodity trade, relating to Abhipra Commodity Consultants Pvt. Ltd. as well in the same infrastructure*

and for extension of the terms and conditions of the agreement dated 01.05.04 to the commodity trade as well. Accordingly a letter, dated 30.08.04, was exchanged between the parties which duly received and signed by Director, Shri Abhinav Aggarwal, of M/s Abhipra Commodity Consultants Pvt. Ltd and by the respondent accepting all the terms as narrated in the letter, where by the respondent was specifically authorised to carry on the business of the Commodity trade relating to M/s Abhipra Commodity Consultants Pvt. Ltd as per the terms and conditioned of the Agreement dated 01.05.2004 and it was further laid down and agreed between the parties that Mis Abhipra Capital Ltd. would be entitled to file and institute Arbitration proceedings as per Article 19 of the Agreement dated 01.05.2004, for any dispute which may arise between the parties relating to the capital, derivative and commodity segment."

The Ld. Counsel for the Petitioner submits that this document has not been proved by the Respondent.

13. A letter dated 13th April, 2006 was written, duly signed by the Petitioner wherein he admitted the amount of Rs.23, 01,316/- as being due. The same is placed on record at **Annexure - D**. The said letter reads as under:

"Date: April 13, 2006
M/s. Abhipra Commodity Consultants Pvt. Ltd.
Azadpur
Delhi
Dear Sir,
The position of Hathras office (Mr. Khailesh Garg) as on 12.4.2006 is as under:

Total debit MCX		*31,83,106.67*
Credit in NCDEX	*2,65,831.80*	
	4,17,272.67	

Margin	*1,98,685.40*	
	--------------	*8,81,789.87*

Net recoverable after margin even:		***23,01,316.80***

I am giving assurance that total recovery shall be made within a period of 4 months with a minimum target of Rs. 5,00,000/- per month.
Temporarily, please allow me a limit on presumed credit basis of Rs. 5,00,000/- for smooth running of the business. On this figure regular payin/payout shall take place.
This acceptance letter is for acknowledging the above debt and shall be paid by me as per above understanding.
Any assistance for the recovery, if required may please be provided to me.
With regards
(Khailesh Garg)
Hathras
Above matter is considered favourable and as asked for credit limit is allowed with an assurance that full cooperation shall be provided by Mr. Khailesh Garg for smooth running of the business. It is advised that VSAT from NEAT shall be shifted to CTCL VSAT for risk control. VSAT may also made available by the company at free of cost except installation charges but maintenance charges i.e. around Rs. 5,000/-- is to be paid by Mr. Khailesh Garg. If he agreeable then process may be started.
(V.D. Aggarwal)"

14. This was a settlement of sorts between the Petitioner and the Respondent. It is not disputed that the Petitioner had signed this letter. Only a vague averment in the Petition is made challenging this letter. This letter is addressed to Abhipra Commodity Consultants Pvt. Ltd. Thus, the Petitioner

has been taking a completely dishonest stand, both in the reply to the notice as also before this Court in the present petition firstly, as having not signed the agreement and secondly that he has not signed any settlement.

15. The Learned Arbitrator has taken all steps required in law to ensure that the Petitioner is duly served with the notices in the arbitration proceedings. If a party chooses not to participate in the arbitration proceedings, it chooses to do so at its own peril. The Petitioner was well aware through the legal notice, through repeated notices by the Ld. Arbitrator that the Respondent had commenced arbitration proceedings against him.

16. The award to the extent admitted by the Petitioner in his letter dated 13th April, 2006 for a sum of Rs.23,01,316.80/- is upheld.

17. Insofar as damages in respect of reputation and goodwill and legal costs are concerned, since there is no evidence on record, the same deserves to be set aside. The Petitioner shall pay the entire sum due within a period of two months, failing which, interest shall be payable @ 8% per annum from the date of award. In the facts of the case, since the present petition was pending before this Court, interest from date of award is not being granted so long as the payment is made within two months from today.

18. OMP is disposed of.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 22, 2018
Rahul