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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 9th May, 2018

+ O.M.P. (COMM) 471/2016

BRIGHT SIMONS

..... Petitioner

Through: Mr.Raghenth Basant, Ms.Aanchal
Tikmani, Advs.

versus

SPROXIL, INC

..... Respondent

Through: Mr.Pankaj Anil Arora, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 31st March, 2015 passed by the Sole Arbitrator appointed by the National Internet Exchange of India (NIXI) on a complaint made by the respondent against the petitioner.

2. The complaint made by the respondent was in relation to the domain name www.sproxil.in registered with 'IN registry' in favour of the petitioner. The details of the complaint are not relevant for the present order as the petitioner has confined its case at the present stage, to the limited question of violation of principles of natural justice in making of the Impugned Award.

3. To appreciate the arguments of the counsel for the petitioner, the following dates are relevant:

4. A complaint was filed by the respondent against the petitioner on 3rd February, 2015 with NIXI. NIXI in turn appointed a Sole Arbitrator for adjudicating the dispute on the complaint and communicated the factum of appointment of the Arbitrator to the parties by its e-mail dated 23rd February, 2015. The petitioner by its e-mail of the same date, that is 23rd February, 2015, requested the NIXI to provide details of the case that had been referred to arbitration as the e-mail from NIXI did not give any such details. NIXI in turn vide e-mail dated 25th February, 2015 forwarded the said e-mail of the petitioner to the Arbitrator advising it to take note of the e-mail address of the representative of the petitioner. The petitioner again vide its e-mail dated 25th February, 2015 requested NIXI as also the Arbitrator for the records of the complaint filed by the respondent. NIXI by its e-mail dated 26th February, 2015 called upon the Arbitrator to provide necessary advice to the parties, presumably with respect to the supply of records and the conduct of the arbitration proceedings. The petitioner, having not received a copy of the complaint, again vide its e-mail dated 3rd March, 2015 requested the NIXI or the Arbitrator to provide the same to the petitioner. This e-mail was again forwarded by NIXI to the Arbitrator, however, copy of the complaint was still not forwarded to the petitioner. It was only on 7th March, 2015 that the Arbitrator vide his e-mail informed the petitioner that he had posted a copy of the complaint at the address provided by the petitioner in 'WHOIS database' and called upon the

petitioner to send its reply to the same latest by 31st March, 2015.

5. The petitioner by its e-mail dated 16th March, 2015 informed the Arbitrator that as its mailing address in 'WHOIS' records is based in Ghana, it may not receive the postal envelope containing the complaint and instead, requested the Arbitrator to send the complaint through courier service at the address given by the petitioner in the e-mail and if possible, also send an electronic copy of the complaint. The petitioner further requested the Arbitrator to grant adequate time to respond to the complaint once it is received.

6. Having received no response from the Arbitrator, the petitioner in its e-mail dated 29th March, 2015 attached a copy of the general response to the complaint, while highlighting that it is not in receipt of the complaint and sought guidance on the procedure that the Arbitrator seeks to adopt in the adjudication process.

7. The Arbitrator, in turn by its e-mail dated 31st March, 2015 forwarded petitioner's e-mail dated 29th March, 2015 to NIXI. The e-mail does not give any indication as to why the same has been forwarded to NIXI as it does not have any content apart from the e-mail received from the petitioner. On the same day, that is 31st March, 2015, the Arbitrator proceeded to pass the Award *ex parte* against the petitioner. A reading of the Award would show that at various places, the Arbitrator has recorded that the findings being given against the petitioner are because of lack of response received from the petitioner to the complaint.

8. As noted above, it is apparent from the record that the hard copy of the complaint that was sent to the petitioner could not be

delivered as the envelope had been returned unserved. In spite of a request by the petitioner, electronic copy of the complaint was not supplied to the petitioner either by NIXI or by the Arbitrator. Further, though the petitioner had submitted a response (though the same was without even receiving a copy of the complaint), the Arbitrator has failed to take the same into consideration and has in fact, by e-mails dated 14th April, 2015 and 17th April, 2015 informed the NIXI and the petitioner respectively that this response was not taken into account as no response in hard copy had been filed by the petitioner.

9. In my view, the above sequence of events clearly shows complete violation of the principles of natural justice in passing of the Impugned Award. Clearly, without supplying a copy of the complaint, the petitioner could not have been called upon to reply to an imaginary complaint and upon failure to do so, be proceeded against *ex parte*. There is absolutely no justification for not sending a copy of the complaint through electronic means in spite of the petitioner making repeated requests for the same.

10. Equally, though there was no requirement for the petitioner to have submitted a reply in absence of being supplied a copy of the complaint, the preliminary response filed by the petitioner could not have been ignored merely because a hard copy of the same had not been filed by the petitioner. In case the Arbitrator, for his own reasons, did not wish to take cognizance of the reply filed by the petitioner through electronic mode, it should have warned the petitioner of the same and called upon the petitioner to submit the reply in hard copy. In this day and age of electronic communication

and especially in an arbitration conducted under aegis of NIXI, insistence on filing of a hard copy, in my opinion, even otherwise seems not justifiable. In this regard, the counsel for the petitioner has also placed reliance on Rule 2a of the .IN Domain Name Dispute Resolution Policy (INDRP) Rules of Procedure, which provides for forwarding of a copy of the complaint to the respondent (in this case, the petitioner) in electronic form. Therefore, not only was the request of the petitioner for a copy of the complaint to be supplied to it in electronic form justified and in accordance with the Rules, the petitioner was also entitled to submit its reply in an electronic form.

11. As held in *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, one of the limited grounds to challenge an Arbitral Award under Section 34 of the Act is a violation of principles of natural justice. The Supreme Court has held as under:-

“30. The audi alteram partem principle which undoubtedly is a fundamental juristic principle of Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:

“18. Equal treatment of parties- The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

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34. Application for setting aside arbitral award-(1)

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(2) An arbitral award may be set aside by the court only if-

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

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(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;”

12. In view of the above, the Impugned Award is set aside leaving the parties open to initiate such other and further action as may be advisable and open to them in law.

NAVIN CHAWLA, J

MAY 09, 2018
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