

**IN THE HIGH COURT OF BOMBAY AT GOA**  
**APPEAL UNDER ARBITRATION ACT NO. 2 OF 2016**

|                           |     |             |
|---------------------------|-----|-------------|
| Mr. Rajendra J. Mandaviya | ... | Appellant   |
| Versus                    |     |             |
| The Goa State Co-op. Bank |     |             |
| Ltd. & 3 Others           | ... | Respondents |
| ***                       |     |             |

Mr. S.S. Kantak, Senior Advocate with Mr. Preetam Talaulikar, Advocate for the Appellant.

Mr. S.R. Rivankar with Mr. Rama Rivankar, Advocates for Respondent No. 1.

**CORAM :- C. V. BHADANG, J.**

**RESERVED ON :- 2<sup>nd</sup> August, 2019**

**PRONOUNCED ON :- 5<sup>th</sup> November, 2019**

**ORDER:**

This is an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (Act, for short), challenging order dated 16.12.2015, passed by the learned Principal District Judge at Panaji in Arbitration and Conciliation Petition No. 39/2012 (old Civil Miscellaneous Application No. 52/2012). By the impugned order, the learned Principal District Judge has rejected objection, filed by the appellant under Section 34 of the Act, challenging an award dated 07.07.2003, passed by the learned Assistant Registrar of Co-operative Societies (the Arbitrator), as being barred by limitation.

2. The brief facts necessary for the disposal of the Appeal may be stated thus:

In a dispute filed by the first respondent, the learned Arbitrator by an award dated 07.07.2003 has directed the appellant and the respondent nos. 2 to 4 jointly and severally to pay to the first respondent an amount of Rs.13,01,673/- along with interest @19.5% per annum from 01.01.2003. According to the appellant, he was not aware of the arbitral proceedings, as he was never served with a notice of the proceedings and as such, was not aware of the passing of the award dated 07.07.2003. He learnt about the passing of the award by virtue of the notice dated 28.01.2011 from the Sales and Recovery Officer of the first respondent, after which, he took steps to challenge the same. The Petition under Section 34 of the Act was filed on 01.03.2011, which was within time. However, by way of abundant precaution, the appellant filed Civil Miscellaneous Application No. 50/2011 for condonation of delay, if any, in filing the objection under Section 34 of the Act. The learned Principal District Judge by an order dated 16.02.2012 dismissed the application. The appellant challenged the same before this Court in Writ Petition No. 185/2012. This Court by an order dated 14.03.2012, allowed the Petition and directed the learned Principal District Judge to decide the objection under Section 34 of the Act, keeping all the

contentions open including the contention as to whether, the objection was filed within the time prescribed under the said Act. Now by the impugned order, the learned Principal District Judge has again dismissed the objection under Section 34 of the Act, as being barred by limitation.

3. I have heard Mr. Kantak, the learned Senior Counsel for the appellant and Mr. Rivankar the learned Counsel for the contesting respondent no 1. Perused record.

4. It is submitted by Mr. Kantak, the learned Senior Counsel for the appellant that the notice of the arbitration proceedings was never served on the appellant and as such, he was not aware of the said proceedings. It is submitted that a signed copy of the award was never served on the appellant, as required by Section 31(5) of the Act. It is submitted that the appellant for the first time came to know of the award dated 07.07.2003 on receipt of the notice dated 28.01.2011 from the Sales and Recovery Officer of the Bank, for execution of the award. It is submitted that the objection under Section 34 of the Act was filed on 01.03.2011 within time. However, by way of abundant precaution, the appellant filed an application for condonation of delay which was dismissed. He submitted that

according to the Bank, the summons were issued in respect of the first hearing, which was scheduled on 22.04.2003 of which, the acknowledgment cards were received as unclaimed. Hence, according to the Bank, a publication was made. He, however, pointed out the acknowledgment cards of September, 2003, which according to the learned Senior Counsel for the appellants, shows the falsity of the claim of the Bank. It is submitted that service by publication was not permissible as per Rule 36(3) of the Multi State Co-operative Societies Rules, 2002 (Rules, for short).

The learned Counsel has placed reliance on the decision of this Court in the case of **New India Assurance Co. Ltd. Vs. Smt. Nasibunnisa Mohd. Israr Khan and Others**, (Civil Application No. 1979 of 2011 decided on 14.10.2011), in order to submit that such a service cannot be held to be good service. It is submitted that in any event, there is no material to show that a signed copy of the award was served on the appellant and as such, the limitation for challenging the award never commenced. It is submitted that the learned Principal District Judge was in error in placing reliance on the acknowledgment card to hold that it was in respect of envelope, by which a copy of the award was served on the appellant, although, the acknowledgment card did not carry the signature of the appellant. It is submitted that the presumption under the General

Clauses Act or Section 114 of the Indian Evidence Act is not attracted in this case. He, therefore, submitted that the Appeal be allowed.

5. Mr. Rivankar, the learned Counsel for the first respondent has supported the impugned order. It is submitted that the appellant was sanctioned a loan of Rs.10,20,000/- on the surety of the respondent nos. 2 to 4 and mortgage of two shops namely shop nos. 2(12-C) and shop no. 1 on the ground floor of a building complex, 'Sameer Plaza', situated at Ponda. It is submitted that the appellant and the respondent nos. 2 to 4 failed to repay the loan, inspite of demand and a final notice dated 05.12.2001. Hence, a dispute was raised before the learned Arbitrator, of which a notice was issued. It is submitted that the notice sent to the appellant and the respondent no. 2 was returned back as unclaimed, while the notice was not served on the respondent nos. 3 and 4 and hence, a public notice was issued in daily Gomantak on 04.04.2003, fixing the hearing on 22.04.2003. It is submitted that the appellant or the respondent nos. 2 to 4, failed to remain present before the Arbitrator and the Arbitrator passed an award on 07.07.2003. It is submitted that a copy of the award was served on the appellant. It is submitted that both the shops have also been auctioned and sold to the

highest bidders, after following due procedure. It is submitted that shop no. 2 has been sold to Mr. Mandar Adpaikar, while shop no. 1 has been sold to Mr. Vasant Gaunkar and sale certificates have been issued in favour of the auction purchasers in the year 2004/2005 and possession of the shops has been handed over to the purchasers. It is submitted that the appellant and for the matter of that, the respondent nos. 2 to 4 were all along aware of the initiation of the arbitration proceedings and the passing of the award. However, they failed to take part in the proceedings and also to challenge the award within time, as prescribed by Section 34(3) of the Act. It is submitted that the challenge after a period of more than ten years, is hopelessly barred by time and has rightly been rejected.

6. I have carefully considered the rival circumstances and the submissions made and I do not find that a case for interference is made out. Under Section 34(3) of the Act, objection to the award of the Arbitrator has to be filed within three months from the date on which the party making such application has received the award, which period, could be extended by thirty days on showing sufficient cause, but not thereafter. Thus there is an outer limit fixed for condonation of delay, which is thirty days beyond the normal period of three

months. Section 31(5) of the Act requires a signed copy of the award being served on the party. The material contention of the the appellant in this case is that neither there was a notice of the arbitration proceedings served on him nor a signed copy of the award was served, as required by Section 31(5) of the Act. The learned Principal District Judge has refused to believe either of the two contentions. In order to examine the rival contentions, the record and proceedings were called from the Court of the learned Principal District Judge. The learned Principal District Judge has forwarded the record, including the true copies of the roznama of the proceedings before the learned Arbitrator. The principle issue is whether, the appellant can be said to have been served with the copy of the award. In this regard, it is necessary to note that the appellant has annexed a certified true copy of the award alongwith the application for condonation of delay. The said certified true copy is dated 01.10.2003. Even with regard to service of the signed copy of the award by the Arbitrator is concerned, there are four acknowledgments on record, one each addressed to the appellant and the respondent nos. 2 to 4. The acknowledgment addressed to the appellant at his registered address namely, H. No. 41, Leopaldina Mansion, Vasco-da-Gama, Goa, is dated 18.09.2003 i.e. after the passing of the award. This acknowledgment is in respect of a registered cover sent from the

office of the Arbitrator.

7. The last order sheet dated 22.04.2003 of the Arbitrator records that the order will be passed and communicated. The office of the Arbitrator had no reason to enter into correspondence with the appellant after the award was passed, except, in all probability, for the purpose of the communication of the award. The learned Principal District Judge has rightly noted that the address on the acknowledgment is not disputed. Thus, a presumption would arise under Section 114 of the Indian Evidence Act. The contention to the contrary cannot be accepted. It is true that in para 12 of the impugned order, the learned Principal District Judge has observed that the appellant has not produced any material to show that he did not receive the signed copy of the award. Although, the learned Senior Counsel for the appellant is right in contending that it is not expected from a party to produce any material to prove a negative fact, (except filing an affidavit of non service of the copy of the award), there are other circumstances, which belie the contention about non receipt of the copy of the award. This includes the postal acknowledgment dated 18.09.2003.

8. There is one more circumstance which is relevant for the purpose. It has come on record that the two shops belonging to the appellant, which were mortgaged as security for the loan were auctioned and sold in the year 2004 and 2005 and the possession of the shops has been handed over to the auction purchasers. The appellant has not taken any action, inspite of the same, till the year 2011. It was contended on behalf of the appellant that he did not visit the shops for all these years as he was carrying on business from a different place. It is not possible to accept the said contention. All these circumstances coupled with the fact that there is an acknowledgment dated 18.09.2003 on record, are sufficient to hold that in all probability the copy of the award was served on the appellant. Thus, the delay has rightly not been condoned.

9. The reliance placed on the decision of this Court in the case of **Smt. Nasibunnisa Mohd. Israr Khan** (supra) is misplaced. In the first place, the case involves issue of service of summons in an appeal governed by the Code of Civil Procedure. Here, we are concerned with the service of the copy of the award by the learned Arbitrator in compliance with the provisions of Section 31(5) of the Act. The issue about service of notice in the main arbitration proceedings strictly does not arise in this case.

That would have arisen, had the limitation been condoned and the objection under Section 34 of the Act was heard on merits. However, even assuming that the same arises and can be examined in this case, all that the decision in the case of **Smt. Nasibunnisa Mohd. Israr Khan** (supra) holds is that there is always a discretion in the Court to accept such private service as good service or not. It has been held that the Court will have to consider various factors before accepting such service as good service. In that case, on facts, it was found that while the notice sent by post was received back as unclaimed, the notice by regular mode at the same address was returned back as the addressee were not found and their addresses were not traced out. It was in these circumstances that the Court found that the service cannot be accepted as good service.

10. I have carefully gone through the impugned order and it does not suffer from any infirmity, so as to require interference. The Appeal is without any merit and is dismissed, with no order as to costs.

**C.V. BHADANG, J.**