

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

Reserved on: 14.05.2019

Date of Decision: 14.08.2019

+ O.M.P. 466/2015
CDR. S. P . PURI (RETD.) SOLE PROPRIETOR M/S SPIRAL
SERVICES Petitioner

Through: Mr.Deeptakirti Verma, Adv.

versus

AGRICULTURAL PRODUCE MARKET COMMITTEE

..... Respondent

Through: Mrs.Avnish Ahlawat, standing
counsel with Mr.N.K.Singh, Adv.

+ O.M.P. (COMM) 8/2016 & I.A. No.606/2016
AGRICULTURAL PRODUCE MARKET COMMITTEE
..... Petitioner

Through: Mrs.Avnish Ahlawat, standing
counsel with Mr.N.K.Singh, Adv

versus

CDR. S.P.PURI (RETD.) Respondent

Through: Mr.Deeptakirti Verma, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') have been filed by the parties to the arbitration proceedings challenging the Arbitral Award dated 23.07.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 29.12.2000 executed between them.

2. As both parties to the arbitration proceedings have challenged the Arbitral Award, 'Commander S.P. Puri (Retd.)' shall be referred to as the 'petitioner' while 'Agricultural Produce Market Committee' shall be referred to as the 'respondent' in the present order.

3. By the Agreement dated 29.12.2000 (hereinafter referred to as the 'Agreement'), 6 acres of land out of 76 acres at Tikri Khampur, Delhi was allotted by the respondent to the petitioner for construction of compost plant and other operational facilities for treatment and processing of fruit, vegetable and other bio-degradable waste generated at the Azadpur and Okhla Mandies of the respondent. The period of the Agreement was thirty years from the date of handing over of the possession of the land to the petitioner. The petitioner was to pay a nominal lease rental of Rs. 1 per sq meter per annum as also a royalty of 2.5% of gross profit. Clause 5.2 of the Agreement contained the Arbitration Agreement between the parties. In terms of Clause 17 of the Agreement, either party had a right to withdraw from the Agreement at a given point of time after giving six months' notice to the other party.

4. The respondent claims that in exercise of its right under Clause 17 of the Agreement, a notice dated 02.07.2010 was issued by it to the petitioner. Service of this notice was disputed by the petitioner and the Arbitrator has held that the service of this notice on the petitioner has not been duly proved by the respondent.

5. Be that as it may, by the letter/order dated 01.01.2011, the respondent called upon the petitioner to handover vacant possession of the land to the respondent failing which the Executive Engineer of the

respondent was directed to take physical possession of the same from the petitioner.

6. The above order led to dispute between the parties, which was referred to arbitration vide order dated 20.07.2011 passed by this Court in Arb. P. No. 73/2011. The said order records that the arbitration shall be conducted under the rules of the Delhi High Court Arbitration Centre.

7. The Arbitrator by the Impugned Award has held that though the respondent was unable to prove the service of notice dated 02.07.2010 on the petitioner, at the same time, as the Agreement is determinable in nature, the same cannot be specifically enforced. The Arbitrator has awarded a sum of Rs. 9,75,487/- as loss of profit for the period of six months in favour of the petitioner, to be paid with interest at the rate of 9% per annum with effect from 01.01.2011 till the date of the Award.

8. The Arbitrator has also partially allowed the counter claim of the respondent by directing payment of damages by the petitioner to the respondent at the rate of Rs. 40,000/- per month with effect from 01.01.2013 till the petitioner removes the belongings and hands over the vacant possession of the room at the Entry Gate no. 1 to the respondent. The Arbitrator has further allowed interest at the rate of 9% per annum in favour of the respondent on this amount. The final directions of the Arbitrator are reproduced hereinunder:-

“130. To conclude, I hereby make the following award:

a. The respondent is directed to pay to the claimant a sum of Rs. 09,75,487/- against claims no. 01 & 02.

b. The respondent is directed to pay to the claimant a sum of Rs. 03,95,072/- against claim no. 05

c. Claims no. 03, 04, 06, 07, 08, 09, 10 & 11 raised on behalf of the claimant are rejected.

d. The claimants directed to pay to the respondent a sum of Rs.12,00,000/- against counter-claims no. 01 & 03. The claimant is further directed to remove his belongings including plant and machinery from the site within 30 days from the date of this Award.

e. The claimant is directed to hand over the vacant and peaceful possession of the room at the entry gate no.01 of New Sabzi Mandi, Azadpur, Delhi to the respondent within 30 days from the date of this award.

f. In case the claimant fails to remove his belongings and/ or fails to hand over the vacant and peaceful possession of the room at the entry gate no. 01, New Sabzi Mandi, Delhi within the stipulated period, the respondent shall be entitled to recover from the claimant damages @ Rs. 40,000/- per month till the claimant complies with the said directions.

g. The claimant is directed to pay to the respondent a sum of Rs.1,30,500/- towards interest against counter claim no. 07.

h. The counter-claims no. 04, 05 & 06 raised on behalf of the respondent are rejected.

131. Thus, in all the claimant is entitled to recover from the respondent a sum of Rs.13,70,559/- against all his claims and the respondent is entitled to recover from the claimant a sum of Rs.13,30,500/- against all its counter-claims, the net result being that the claimant shall recover from the respondent a sum of Rs.0,40,059/-. Accordingly, it is held by this tribunal that that the respondent shall pay to the claimant a total sum of Rs.0,40,059/- (Forty thousand and fifty nine). The respondent is granted 60 days time from the date of this award to make the payment of the aforesaid amount. I further direct that in case

the respondent fails to make the payment of the said amount to the claimant within the stipulated time, the claimant shall be entitled to recover simple interest @12% per annum on the said amount of Rs.0,40,059/- from the date of award till the date of payment.”

9. The petitioner has challenged the Award contending that the Arbitrator has failed to appreciate that the termination of the Agreement by the respondent was for a non-existing reason and therefore, could not have been sustained. The learned counsel for the petitioner submits that the respondent being a State under Article 12 of the Constitution of India, cannot act arbitrarily and without justifiable reasons even in the contractual field. He relies on the following judgments:

- ***Kumari Shrilekha Vidyarthi & Ors. v. State of U.P. & Ors.***, (1991) 1 SCC 212.
- ***ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors.***, (2004) 3 SCC 553.
- ***State of Uttar Pradesh & Ors. v. Ashok Kumar Nigam***, (2013) 3 SCC 372.
- ***Noida Entrepreneurs Association v. NOIDA & Ors.***, (2011) 6 SCC 508.
- ***Sterling Computes Ltd. v. M/s M&N Publications Ltd. & Anr.***, (1993) 1 SCC 445.

10. The learned counsel for the petitioner submits that the respondent had sought to justify the termination of the Agreement on the ground that the petitioner had refused to re-locate the plant to a different location though the same was required by the design concept for the proposed New Mandi being developed by the respondent at the said plot of land. The learned counsel for the petitioner submits that though the decision to terminate the Agreement was taken by the respondent on this purported ground on 27.07.2009 and thereafter approved by the Delhi Agricultural Marketing Board (DAMB) on 26.04.2010, in a reply dated 03.03.2011 received by the petitioner under the Right to Information Act, 2005, the respondent has admitted that the concept design of the Mandi has been cancelled on 28.05.2009 by the Board of Assessors (BOA) and subsequently by the VC/Chairman, DAMB on 10.11.2009. With the cancellation of the concept design, the alleged requirement of re-location became non-existent and therefore, termination of the Agreement based on such non-existing reason is arbitrary and could not have been sustained by the Arbitrator.

11. On the other hand, the learned counsel for the respondent submits that the termination of the Agreement was approved by the respondent and the DAMB for valid reasons. As the Plant of the petitioner is located in the middle of the total piece of land and it had already been decided that the said land needs to be re-developed, relocation of the plant was necessary. As the petitioner refused to re-locate the plant, the respondent, in exercise of its rights under Clause 17 of the Agreement rightfully terminated the Agreement.

12. Before adverting to the submissions made by the parties it would be pertinent to quote the relevant paragraphs of the reply given by the respondent under the Right to Information Act, 2005 to the petitioner as under:-

<i>S.N</i>	<i>Question</i>	<i>Answer</i>
xxxxx	xxxxxx	xxxxxx
7.	<i>What is the latest proposal regarding the development of Mandi or setting up of new projects and what is the status of the approval by Delhi Govt.</i>	<i>The proposal to develop this mandi on SFS basis is under consideration of the Board. If needed the same may be sent to Delhi Govt. in due course.</i>
8.	<i>Is it true that the proposal of development of New Mandi at the above site was turned down by the Govt. kindly provide the relevant details.</i>	<i>No. However, the Concept Design called for this project has been cancelled by BOA on 28.5.09 and subsequently by VC/Chairman, DAMB on 10.11.09 as this project is to be taken up on SFS or PPP mode.</i>
9.	<i>Currently is there any new proposal for developing of Mandi at above site. If yes please provide details of the proposal including cost, time frame, developers, builders, architects, area of development etc.</i>	<i>The proposal for developing this market under SFS scheme is under consideration of Board. The other details are yet to be finalised.</i>

13. A reading of the above reply would show that though the particular concept design for the project of re-development of the Mandi has been

cancelled by the BOA on 28.05.2009 and subsequently by the Vice Chairman/Chairman, DAMB on 10.11.2009, this cancellation of concept design, however, was on the ground that the project would now be taken up on SFS or PPP mode. Therefore, it is not as if the respondent had decided to completely abandon the project of re-development of the Mandi at the site.

14. A useful reference may also be made to the agenda item dated 04.07.2009 placed before APMC. The said agenda item *inter-alia* records as under:

“It was decided by DAMB to construct a modernize wholesale fruit and vegetable market at Tikri Khampur on the existing land. It was decided by the Board of Assessor that the existing compost plant shall be relocated in the back side of the mandi site towards east for effective planning.

Thereafter a letter was sent to Spiral Services with request to furnish the concept to shift the existing plant to other side and same was not accepted by Spiral Services stating that since a no. of disputes which are being executed in an arbitration proceedings and giving consent for shifting of existing compost plant would effect my rights and claims.

To avoid the disturbance of the whole planning of the market due to its location in mid between the mandi and making the enterence at bottle-neck it is essential that the site of existing plant be shifted.

It has been estimated by Board of Assessors for setting up of a modern market an expenditure of Rs.500 crores be required and are of the opinion if the plant is not shifted shall lead to defective planning.

On this issue of reply of Spiral Services a legal advise of the Legal Advisor was obtained which was re-produced hereunder:

“That since as per agreement either party has right to withdraw from the agreement after giving 6 months notice, this right may be exercised by the committee. M/s Spiral Services may be given 6 months specifically indicating that the 6 months will be considered as expired from the date of receipt of the notice. They may be informed that APMC is withdrawing from agreement. The agreement will not be valid after the expiry of 6 months from the date of the receipt of the notice. Also so long as M/s Spiral Services make arrangement of closing down the plant and so long as the plant is in working condition the APMC will be supplying the fruit and vegetable waste as per the agreement till the last date of expiry of 6 months of the agreement. Notice withdrawing the agreement should be sent after due approval by the committee and should be served Personally by hand/Regd.AD/UPC/Courier all modes.”

15. A reading of the above would show that termination of the Agreement was necessary *inter-alia* to avoid disturbance in the planning of the market due to the location of the petitioner's Plant in the middle of the Mandi. Opinion of the Legal Advisor was also taken, who recommended the termination of the Agreement by invoking Clause 17 thereof. The APMC in its 94th meeting held on 22.07.2009 approved the above agenda item.

16. Thereafter, the respondent circulated the agenda item no.2 before DAMB. The same was approved by DAMB in its meeting held on 26.04.2010. It is only thereafter that the respondent on 02.07.2010 issued

the notice under Clause 17 of the Agreement, receipt whereof was denied by the petitioner.

17. From the above sequence of events it is evident that an informed decision has been taken by the respondent regarding the termination of the licence of the petitioner. As noted hereinabove, though the particular concept design may have been cancelled by the BOA, the decision to redevelop the market had not been withdrawn, on the other hand, had been reiterated. It is also not denied that the location of the Plant of the petitioner was in the middle of the whole Mandi and therefore, it cannot seriously be disputed that the same would have caused a hindrance in the redevelopment of the Mandi. For the above reason, it can also not be said that the decision of the respondent to terminate the Agreement was arbitrary or for extraneous reasons.

18. In fact, the Arbitrator, in the Impugned Award has observed that though the petitioner also alleged *mala fide* on the part of the officers of the respondent, no merit was found in the same on the ground that no officer of the respondent has been impleaded as a party to the arbitration proceedings. Even before this Court, no allegation of *mala fide* was urged against the respondent or any of its officers.

19. For the above reasons, the judgments relied upon by the counsel for the petitioner to contend that even in contractual matters the respondent being a State is bound by the mandate of Article 14 of the Constitution of India and cannot act arbitrarily, are not applicable as no such case of arbitrariness is made out against the respondent.

20. Learned counsel for the petitioner further contended that once the Arbitrator held that the notice dated 02.07.2010 had not been received by the petitioner, the Arbitrator should have held the termination of the Agreement to be invalid and ordered specific performance of the Agreement. He submits that the Arbitrator has wrongly placed reliance on the judgment of the Supreme Court in ***Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors.***, (1991) 1 SCC 533 as the said case was judged on the contractual term involved in that case and not on the basis of Article 14 of the Constitution of India. Further, placing reliance on the judgment of the Supreme Court in ***Hindustan Petroleum Corporation Ltd. v. Super Highway Services & Anr.***, (2010) 3 SCC 321, he submits that in the present case termination of the Agreement had serious business consequences on the petitioner. It was for the respondent to have ensured the service of notice on the petitioner and as it failed to do so, the termination of the Agreement has to be held invalid for violation of the Principles of Natural Justice. He further places reliance on the judgments of this Court in ***Pioneer Publicity Corporation v. Delhi Transport Corporation & Anr.***, 2003 SCC OnLine Del 207 and ***Atlas Interactive (India) Pvt. Ltd. v. Bharat Sanchar Nigam Ltd. & Anr.***, 2005 SCC OnLine Del 190.

21. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same. In ***Hindustan Petroleum Corporation*** (supra), the Supreme Court held that in order to justify the action taken to terminate the dealership, the authority concerned had to act fairly and in complete adherence to the

rules/guidelines. As the termination of the Agreement was on the ground that the product supplied by the petitioner corporation therein was contaminated and such contamination was sought to be proved by a test report, service of the same on the respondent to give him adequate time and opportunity to arrange for his presence during the test, was found necessary and failure thereof was held to be a violation of the Principles of Natural Justice. The Court specifically noted that the petitioner therein did not raise the plea of availability of alternative remedy in the form of arbitration proceedings before the High Court. The present is a case which arose out of the arbitration proceedings. As far as the decision to terminate the Agreement is concerned, it is not found to be arbitrary. Clause 17 of the Agreement makes the Agreement determinable at the option of either party by simply serving on the other a six month's notice of such intention to terminate the Agreement. Therefore, for the reason of non service of notice, the Arbitrator has rightly awarded damages in favour of the petitioner applying the principles laid down in *Amritsar Gas Service* (supra) and cannot be faulted for the same.

22. For the above reasons, the judgments of this Court in *Pioneer Publicity Corporation* (supra) and *Atlas Interactive (India) Pvt.Ltd.* (supra) would also be of no assistance to the petitioner.

23. Learned counsel for the petitioner further submitted that the Arbitrator has erred in awarding the damages for unauthorized occupation in favour of the respondent. He submits that the arbitration was to be conducted under the Delhi International Arbitration Centre (Arbitration Proceedings) Rules (hereinafter referred to as the DAC

Rules). Rule 4(1) thereof mandates the respondent to send its written response to the Statement of Claim as also raise its Counter Claim, if any, within a period of 30 days from the date of receipt of the request for appointment of the Arbitrator and the Statement of Claim. In terms of Rule 4(2), it is only the Coordinator who may, on sufficient grounds in writing explaining the delay, grant extension of time for filing the reply and/or counter claim. Proviso to Rule 4(2) however further restricts such extension to only 30 days from the expiry of the original time. Rule 4(3) expressly states that failure of the respondent to file the reply and/or counter claim within the time stipulated or the extended time shall constitute a waiver of the respondent's opportunity to file the reply. In the present case, the reply and the counter claim filed by the respondent were beyond even the extended time provided to the respondent by the Coordinator. In spite of the objection having been taken before the Arbitrator that such reply/counter claim can not be considered, the Arbitrator rejected the said prayer by his order dated 19.03.2012, thereby violating Section 19 of the Act.

24. Learned counsel for the petitioner submits that the counter claim of the respondent should have been rejected on the ground of it being filed beyond the stipulated period. Relying upon the following judgments, he submits that waiver, as provided in Rule 4(3) of DAC Rules, has the effect of abandonment of a right:

- a. ***Banning v. Wright***, [1972] 2 All E R 987 (at 998);
- b. ***Societe Generale v. National Small Industries Corporation Ltd.***, 1997 (40) DRJ 658 (at paragraph 21);

c. *BSNL and Ors. v. Subash Chandra Kanchan & Ors.*,
(2006) 8 SCC 279 (at paragraph 20).

25. I do not find any merit in the submissions made by the learned counsel for the petitioner.

26. Sub-Rules 1, 2 and 3 of Rule 4 of the DAC Rules are reproduced herienbelow:

“4. Reply to Request - (1) Within thirty days from the date of receipt of the Request and the Statement of Claim, from the Secretariat, the Respondent shall send his written response (the "Reply") to the Secretariat addressed to the Coordinator, which shall inter alia, contain the following information and be accompanied by:-

(a) his name in full, description, contact details and address;

(b) confirmation or denial of all or part of the Claim(s) made by the Claimant in the Statement of claim;

(c) comments in response to the nature and circumstances of the dispute giving rise to the Claim(s) contained in the Request;

(d) response to the relief sought in the Request;

(e) statement describing the nature and circumstances giving rise to any Counter- claim(s), if any, including all relevant or supporting documents;

(f) provisional ((Terms of Reference" and the issues to be adjudicated;

(g) comments, if any, concerning the number of arbitrators and their choice in light of the Claimant's proposals; and

(h) statements, if any, as to the applicable rules of law and the language of the arbitration.

(2) The Coordinator may, on sufficient grounds in writing explaining the delay, grant an extension of time for filing the Reply and/ or Counter-claim to the Respondent, upon

payment of such costs as may be deemed appropriate and within such time as may be specified;

Provided, that the request for extension of time shall be entertained only once and such extension shall not exceed thirty days. If the Respondent fails to file his Reply and/ or Counter-claim, the Coordinator shall proceed further in accordance with the Rules.

(3) Failure of the Respondent to file his Reply and/ or Counter claim within the time stipulated or the extended time shall constitute a waiver of the Respondent's opportunity to file the Reply.”

27. A reading of the above Rules would clearly show that it deals with the procedure adopted by the DAC before the same is forwarded to the Arbitral Tribunal for further proceedings. In terms of Rule 8 of the DAC Rules, the Arbitral Tribunal is thereafter to frame terms of reference and arbitration schedule.

28. Rule 10 of the DAC Rules further empowers the Arbitral Tribunal to take on record additional claims or counter claims. It is quoted hereinbelow:

“Rule 10- Additional Claims or Counter-Claims-

After the Terms of Reference have been signed or approved by the Arbitral Tribunal, no party shall make any Additional Claims or Counter Claims which falls outside the limit of the terms of the reference unless it is obtained the authority to do so from the Arbitral Tribunal, which shall consider the nature of such new Claims or Counter Claims, the stage of the arbitration and other relevant circumstances and thereafter issued necessary orders.”

29. A reading of the above Rule would clearly show that the Arbitral Tribunal can allow the respondent to file an additional counter claim during the course of the arbitration proceedings.

30. Rule 4 of the DAC Rules deals with the power of the Coordinator and not of the Arbitral Tribunal. Rule 10 of the DAC Rules, on the other hand, deals with the power of the Arbitral Tribunal to condone the delay in filing of the counter claim and take the same on record.

31. As held by the Arbitrator, Rule 4 of the DAC Rules is a matter of procedure and therefore, must yield to substantive right of a party.

32. While there is no gainsaying that provisions like Rule 4 are necessary so as to prevent a party from delaying the adjudication process by adopting delaying tactics and to achieve the object of expeditious hearing and disposal, at the same time, it cannot be lost sight of that it is only a rule of procedure which is handmaid of justice. It is aimed to advance the cause of justice and not to deny a party of a substantive right due to technicalities.

33. It is also relevant to note that the petitioner had earlier filed an application under Section 9 of the Act, being OMP No.17/2011, seeking an order of injunction against his dispossession. The same was dismissed as withdrawn vide order dated 20.07.2011 granting liberty to the petitioner to move an appropriate application before the Arbitrator. In the meantime, as the Plant had been sealed by the respondent, the petitioner filed a Writ Petition, being WP (C) No. 5325/2011, before this Court, which was again dismissed as withdrawn on 28.07.2011. IL&FS

Environment Infrastructure Services Limited, claiming that it had provided security to the tune of Rs. 2.40 crores to enable the petitioner to procure a loan from the Union Bank of India to set up the Waste Management Plant at Tikri and had come to know that the petitioner had shut down the Plant and may dispose of its assets, filed an application under Section 9 of the Act, being OMP 354/2011, seeking order of restraint on the petitioner. On this application an order dated 10.05.2011 was passed by this Court restraining the petitioner from wasting, damaging, alienating, selling, removing and disposing of the assets at the Tikri Plant and a Local Commissioner was appointed to prepare a detailed inventory of all the equipments and compost and other assets found at the site. In the said petition, the respondent filed an impleadment application, being IA No. 17295/2011. The application was allowed by this Court vide its order dated 18.11.2011. By a subsequent order dated 26.04.2012, this Court clarified that there was no restraint on the arbitral proceeding between the petitioner and the respondent herein and that the Arbitrator would be free to decide the application filed by the petitioner under Section 17 of the Act on its own merit. The respondent had filed its reply to the Statement of Claim as also its counter claim before the Arbitrator on 09.01.2012.

34. The above sequence of events would show that there were multifarious litigations initiated by the petitioner and also by IL&FS, which have all resulted in the respondent not being able to take over the possession of the Plant/area from the petitioner. In fact, the application filed by the petitioner under Section 17 of the Act before the Arbitrator

was disposed of by the Arbitrator on 16.08.2012 rejecting the prayer of injunction made by the petitioner, however, granting time till 16.11.2012 to the petitioner to remove its equipment, machinery and material from the Plant. By an order dated 30.11.2012 passed in Arb. A. No. 20/2012, this Court extended the time till 31.12.2012. In my view these facts would also provide sufficient cause for condoning the delay of the respondent in filing its counter claim.

35. Further, the Arbitrator by his order dated 19.03.2012 allowed the respondent to file its counter claim subject to payment of cost of Rs.25,000/-. The Arbitrator having condoned the delay in filing of the reply/counter claim subject to payment of cost by the respondent, I do not consider delay in filing to be a sufficient ground for interfering with the Final Award passed by the Arbitrator.

36. This now brings me to the challenge of the respondent to the Arbitral Award. The said challenge is confined to the finding of the Arbitrator holding that the respondent had been unable to prove the service of notice dated 02.07.2010 on the petitioner. The learned counsel for the respondent submits that this finding of the Arbitrator is perverse inasmuch as the Arbitrator has wrongly drawn an adverse inference against the respondent on the ground of address of the petitioner being incomplete on the said notice. She submits that incompleteness of the address was of no consequence as the rooms in possession of the petitioner were known to all and the notice would have reached the petitioner. She further draws my attention to the audit reports dated 19.08.2006 and 28.09.2010 prepared by the Chartered Accountant of the

petitioner wherein similar incomplete address of the petitioner has been mentioned.

37. She further submits that the Arbitrator has wrongly held that the respondent was unable to prove the delivery of the said notice by hand on the petitioner. She submits that the respondent had annexed the copy of the delivery proof alongwith the Statement of Defence which shows that the notice had been accepted by Shri Bhupinder on behalf of the petitioner. The petitioner admitted that Shri Bhupinder was his employee, however, did not produce him as a witness. Therefore, the Arbitrator should have drawn an adverse inference against the petitioner and held the delivery of notice as proved by the respondent.

38. Before I proceed on the submissions made by the learned counsel for the respondent, I may first note the preliminary objection of the petitioner that the petition is barred by limitation as prescribed in Section 34(3) of the Act. The learned counsel for the petitioner submits that while the petition was originally filed by the respondent within the stipulated period of 90 days, there was a delay of over 20 days over and above the maximum period of 120 days prescribed in the said section while removing the defects/objections raised by the Registry of this Court. Relying upon the following judgments of this Court, he submits that such delay cannot be condoned in a routine manner but requires strict scrutiny of the reasons given for such delay:-

1. ***DDA vs. Durga Construction Co.***, ILR (2014) I Delhi 153;
2. ***Union of India v. Sunrise Enterprises, Panipat***, ILR (2012) II Delhi 763.

39. I have considered the preliminary objection raised by the counsel for the petitioner, however, find no merit in the same. In ***Northern Railway v. Pioneer Publicity Corporation Pvt. Ltd.***, (2017) 11 SCC 234, the Supreme Court has held that Section 34(3) of the Act has no application while considering delay in re-filing of the petition. It only applies to the initial filing of the objections under Section 34 of the Act. In the application filed by the respondent seeking condonation of delay in re-filing of the petition, it has been asserted that one of the objections raised by the Registry was with respect to appending signature of authorised signatory on each page of the petition as well as on the annexures. For this purpose, the petition was sent to the department for obtaining signature of the authorised signatory/Secretary on each page. It is further asserted that once the petition was re-filed, a similar objection was again taken by the Registry, and in removing the same a delay of 20 days occurred in the re-filing of the petition. From the Log Information it appears that there were certain other objections also raised by the Registry from time to time. In my view, the respondent has been able to make out sufficient cause for seeking the condonation of delay in re-filing of the petition and the same deserves to be condoned. Consequently IA No. 606/2016 stands allowed.

40. As far as the merit of the petition is concerned, I am unable to agree with the submission made by the learned counsel for the respondent. On the issue of delivery of the notice, the Arbitrator has held as under:-

“82. The claimant vide its letter dated 28.11.2008, copy at page 391, Vo-II, Claimant's documents, informed the respondent that for the purpose of correspondence its address would be as follows:

SPIRAL SERVICES

APMC control Room, Entrance Gate no.1,
New Sabzi Mandi, Azadpur, Delhi- 110033

The fact regarding having written this letter to the respondent has been mentioned by the claimant in para 12(xxviii) of the statement of claim and copy of this letter has also been annexed as Annx. xxviii alongwith the documents, Vol- II, filed by the claimant. The respondent in their reply to the statement of claim in the corresponding sub-para of para 12 has not denied the receipt of this letter. In this para the respondent has stated that the letter in question (notice dated 02.07.2010) was delivered to the claimant at the same address. Though, from the facts stated in para 81, herein-above, it is evident that the notice dated 02.07.2010, was not addressed to the claimant at the complete address given by the claimant in his letter dated 28.11.2008. In fact, the said notice was sent on the address 'M/s.Spiral Services, Entrance Gate, NSM, Azadpur, Delhi- 110033' whereas the complete address as given by the claimant in his letter dated 28.11.2008 is: 'SPIRAL SERVICES, APMC control Room, Entrance Gate no. I, New Sabzi Mandi, Azadpur, Delhi-110033 '. From the aforesaid facts, it is clear that the address mentioned by the respondent on the notice, the words 'APMC Control Room' are missing, instead of the words 'Entrance Gate No.01', the words 'Entrance Gate' only are mentioned and instead of the words 'New Sabzi Mandi ', the words 'NSM' have been mentioned. From these facts, it is established that the address noted on the regd. cover by the respondent was not complete and proper. It is true that under Section 22 of the General Clauses Act, 1987, and Section 114 (f) of the Indian Evidence Act, a presumption of service can be drawn in case a letter is sent by properly addressing, prepaying and posting it by regd post. In this connection reference may be made to the judgment of the Hon'ble Supreme Court in the case: M/s.Madan & Co., Supra, which has also been relied upon by the Learned Counsel for the respondent. In this judgment, the Hon'ble Supreme Court observed that the

letter should be correctly and properly addressed. Again in the judgment rendered by the Hon'ble Supreme Court in the case of C C Alavi Haji, Supra, the Hon'ble Supreme Court held that a presumption that service of notice has been affected can be drawn when the notice is sent to the correct address by regd post. In view of the above discussion, it is held that in the present case presumption cannot be drawn that the notice dated 02.07.2010 was served on the claimant by regd. post as the regd cover was not sent at the complete and proper address of the claimant.

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84. After examining the records, I find many contradictions in the statement of this witness. In his cross examination he has stated that I was instructed to deliver at the entrance gate to Com.S.P.Puri (Retd). He also stated that he was told by the two persons that it would take time when Sh.Puri was available. It is not understood that when this peon was instructed by Sh.Gulati to deliver this letter to Com. S.P.Puri (Retd) and particularly when it was told to him that it would take some time when Mr.Puri would be available, why he could not wait for sometime to deliver this letter to Sh.Puri who was the proprietor of the claimant firm. Further, as stated above, in his cross examination at a later stage he stated that he met the above mentioned two persons outside the office of Sh.Puri and though he did not know those two persons earlier and simply since those two persons informed him that they were in the employment of Sh.Puri, he delivered the letter to them. From these facts it is evident that even according to this witness himself, the two persons to whom he has allegedly delivered this letter and who had met him outside the office of Com. Puri and simply because they told him that they were in the employment of Sh.Puri, the letter was delivered to them. Even, on the receipt Exh.R-9, no stamp of the claimant firm has been affixed which could prove that these two persons were authorized persons of the claimant firm. In view of these facts, it is not established that the notice dated 02.07.2010 was delivered to any competent person of the claimant firm.

85. As mentioned above, this witness stated in his cross examination that he had informed Mr.Gulati the names of the persons Sh.Sumit and Sh.Bhupinder who had acknowledged the letter on the receipt. But Mr.Gulati in para 16 of his affidavit dated 31.10.2011 filed by way of evidence, has stated that 'the notice by hand was accepted by one of the employee of the claimant on 03.07.2010' and he has not mentioned the names of these two persons in his affidavit. In this connection reference may be made to the letter dated 08.03.2011, copy at page 410, Vol-II of the Claimant's documents. The said letter was written by Sh.Raj Kumar, Secretary, APMC to the claimant in reply to the claimant's letter dated 11.01.2011 wherein the claimant had stated that the notice for terminating the contract was not acknowledged by him. In this letter the Secretary, APMC has stated that 'This notice was served through special messenger also which was acknowledged by an employee of your organization namely Sh.Sumit on 03.07.2010. 'This letter was written by the Secretary, APMC at the earliest stage when the claimant had denied the receipt of the notice dated 02.07.2010 and in this letter the respondent has alleged that the notice was received by Sh.Sumit. It may be relevant to note here that Com.(Retd) S.P.Puri, in para 43 of his affidavit dated 0509.2012, filed by way of evidence had stated that no person by the name of Sumit was working at or had ever worked in his office. However, in his cross examination conducted on 24.01.2013, he stated that in his office he was having a Sales Officer Brijesh Kumar, Accountant and Office Asstt. Mr.Shashi Ranjan and a peon Mr.Bhupinder Singh. The affidavit of Sh.Vijay Kumar, which was of a subsequent date i.e 14.02.2013 was filed on 14.02.2013 wherein he stated that he delivered the letter dated 02.07.2010 to Sh.Bhupinder. Thus, the name of Sh.Bhupinder was introduced by the respondent for the first time on 14.02.2013 after Comm. Puri stated on 24.012013 that he was having one peon Sh.Bhupinder Singh. Keeping in view the aforesaid facts, the statement of Sh.Vijay Kumar that he had delivered the letter dated 02.07.2010, Exh.R-6, to Sh.Bhupinder cannot be believed. ”

41. The above being matter of appreciation of evidence led before the Arbitrator, which cannot be said to be perverse or unreasonable, cannot

be interfered with by this Court in exercise of its limited power under Section 34 of the Act. This Court cannot act as a Court of Appeal to reappraise the evidence in order to determine whether a different finding can be reached thereon. The Arbitrator is the final judge on the quality and the quantity of evidence and inferences to be drawn therefrom.

42. I therefore find no merit in the petition filed by the respondent.

43. In view of the above discussion, while allowing IA No.606/2016 filed in OMP(COMM) No.8/2016, both the petitions are dismissed. The parties shall bear their own cost.

NAVIN CHAWLA, J

AUGUST 14, 2019/rv



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