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

% *Date of Judgment: 19th May, 2021*

+ **O.M.P. (COMM) 156/2021 & CAV. 18/2021, I.A. 5569/2021,
I.A. 5571/2021, I.A. 5572/2021**

RAM NANDA AND CO. & ORS. Petitioner

Through: Mr Jeetender Gupta, Advocate.

versus

SANJAY SAIGAL Respondent

Through: Mr Rajat Bhalla, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), impugning an arbitral award dated 29.06.2019 (the impugned award) passed by an Arbitral Tribunal comprising of a Sole Arbitrator.

2. The petitioners contend that the impugned award is liable to be set aside in terms of Section 34 (2)(a)(iii) in as much as the petitioners were not given any notice for appointment of an arbitrator or of the arbitral proceedings. The petitioners also claims that they were unable to present their case and contest the said proceedings.

3. This case has a chequered history spanning more than twenty-

five years. The respondent claims that a substantial amount is owed to him by the petitioners. Accordingly, on 06.05.1995, the respondent filed a civil suit in this court, being Civil Suit no. 168/1995, for recovery of ₹1,10,73,468/- from the petitioners. The petitioners contested the maintainability of the said suit in view of the arbitration clause as contained in the bye-laws of the Delhi Stock Exchange Limited (hereafter 'DSE') and sought reference of the disputes to arbitration. Both parties were members of DSE and admittedly were bound by the bye-laws of the said Stock Exchange. In view of the above, by an order dated 19.11.2001, this Court disposed of the civil suit filed by the respondent (Civil Suit No. 168/1995) and referred the parties to arbitration. It directed DSE to appoint an Arbitrator to adjudicate the disputes between the two parties.

4. There was a considerable delay in appointment of an arbitrator. Finally, on 02.04.2008, DSE appointed Justice J. K. Mehra (Retired) as the Sole Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator delivered an award dated 14.08.2008 rejecting the claims made by the respondent. Aggrieved by the same, the respondent filed a petition for setting aside the arbitral award dated 14.08.2008 (OMP No. 09/2009). The said petition also remained pending in this Court for a considerable period of time. It is pointed out that much of the time was taken in the said proceedings to serve the petitioner. Finally, this Court ordered substituted service and directed publication of notices in a national daily. The said notices were published in the Statesman on 03.04.2017 and 01.08.2017.

5. Despite publication of the said notices, the petitioner did not appear in the matter. On 25.09.2017, the concerned Joint Registrar passed an order recording that the petitioners were duly served and thereafter the matter was listed for hearing.

6. Thereafter, by an order dated 14.11.2018, this Court allowed the respondent's petition for setting aside the arbitral award (OMP 12/2009 captioned *Virender Saigal & Co. v. M/s Ram Nanda & Co. & Ors.*) Paragraphs 7 to 10 of the said judgment are relevant and are set out below:-

“7. The impugned award IS not sustainable inasmuch as the order referring the matter to arbitration had clearly directed reference after parties gave consent and after arriving at a satisfaction that the disputes were arbitrable. The objection of Limitation was also not to be raised by the Respondents or considered by the Arbitrator. The order of reference was passed in 2001, the claims were filed in 2007 and the impugned award was passed in 2009. The award is clearly unsustainable.

8. Under these circumstances, the matter is remanded to the Delhi Stock Exchange for appointment of an Arbitrator to decide the dispute on merits, within a period of six months. The present order shall be communicated by the Registry of the Court to Delhi Stock Exchange as also by the Petitioner who will make a request for appointment of an Arbitrator.

9. The Arbitrator shall issue fresh notice to the Respondents and then adjudicate the disputes as per the time limits prescribed under the Arbitration & Conciliation Act, 1996. The

pleadings have already been completed by the parties. The issue of arbitrability and limitation shall however not be raised, since both parties had conceded for the reference made in 2001. The dispute shall be adjudicated on merits.

10. The OMP is allowed in the above terms. The impugned award is set aside. The original record of the Arbitrator be transmitted back to the Delhi Stock Exchange for being handed over to the new Arbitrator to be appointed within a period of two weeks from today.”

7. In view of the aforesaid order, DSE was required to appoint an arbitrator to consider the respondent’s claims on merits.

8. In compliance with the order passed by this Court in OMP No. 12/2009, on 16.02.2019, the Board of Directors of DSE passed a resolution appointing Sh Rakesh Kumar Jain, as Sole Arbitrator. The notice of appointment was sent to the petitioners as well as to the respondents at the addresses as available with the DSE. By a letter dated 22.02.2019, the parties were called upon to give their consent for appointment of the learned Arbitrator. Although, the respondent furnished his consent by a letter dated 25.02.2019, the communication sent to the petitioners was returned undelivered.

9. Thereafter, the Arbitral Tribunal sent another notice to the petitioners on 11.03.2019, which was also returned undelivered with the remarks ‘left’. The learned Arbitrator entered reference and the first arbitral hearing was scheduled on 06.04.2019. The notice of the said hearing was also sent to the parties. Although, the notice to the respondent was served, the notice dated 27.03.2019 sent to the

petitioners was returned with the remarks 'left'.

10. Admittedly, the notices in the present case were sent to the petitioners at their address bearing No. B-111, Malviya Nagar, New Delhi – 110017. It is material to note that the said property had been auctioned by Bank pursuant to the orders passed by the Debt Recovery Tribunal for recovery of a loan advanced to the petitioners. The notice for the e-auction had been published in newspapers and a copy of the said publication was placed before the Arbitral Tribunal. The Arbitral Tribunal also took note of the same in the impugned award.

11. Considering that notices had been sent to the petitioner at the address as available with DSE and that the petitioner had not appeared before this Court in proceedings relating to OMP No. 12/2009 despite publication of notices in the newspaper, the Arbitral Tribunal proceeded ex-parte against the petitioners. The Arbitral Tribunal considered the claims made by the respondent on merits and made the award, which is impugned in this petition.

12. Mr Gupta, learned counsel appearing for the petitioner earnestly submitted that DSE was fully aware that the petitioner was not residing at the address bearing no. B-111, Malviya Nagar, New Delhi – 110017. He also referred to a letter dated 10.03.2021 received from M/s Abhipra Capital Limited (the Registrar to DSE) informing the petitioner that in cases where shares are held by a member in electronic form, the address recorded with the Depository Participant which maintains the DEMAT account, is the address on which further

communications are sent. M/s Abhipra Capital Ltd also confirmed that as per available data, the petitioner's address was B-111, Malviya Nagar, New Delhi – 110017 upto 17.03.2017 and thereafter, the address was changed to M-84, South City I Gurgaon - 122002. Mr Gupta, learned counsel for the petitioner submitted that in view of the response received from M/s Abhipra Capital Ltd., it was established that the records of DSE record the petitioner's address as M-84, South City I, Gurgaon 122002 but, admittedly, no notice had been sent either by DSE or by the learned Arbitrator at the said address. Mr Gupta also referred to the bye-laws 285, 286, 287, 288 and 289 of the bye-laws of DSE and contended that in terms of the said bye-laws, notices were not served on the petitioner.

13. Mr Bhalla, learned counsel appearing for the respondent submitted that the conduct of the petitioners is dishonest. He contended that the petitioners have been watching the proceedings and have deliberately avoided service in order to delay the proceedings. He submitted that the petitioners were fully aware of the suit filed by the respondent and the parties had been referred to arbitration at their instance. Notices of the petition, OMP 12/2009, were served on the petitioners. Thus, the petitioners were aware of the proceedings relating to OMP 12/2009 and the order dated 14.11.2018 passed by this Court remanding the matter to arbitration afresh. Despite the same, the petitioners consciously avoided service of notices and the same ought not to be countenanced.

14. I have heard the counsel for the parties.

15. The limited question that falls for consideration before this Court is whether the petitioners were served and had full opportunity to contest the arbitral proceedings that culminated in the impugned award. Plainly, the answer to this question is in the negative. The Arbitral Tribunal had proceeded on the basis that the petitioners were served notices in the proceedings in OMP No. 12/2009 and therefore, were deemed to have notice of the arbitral proceedings. This assumption is clearly erroneous. No such assumption could be drawn and the petitioners were entitled to a notice of appointment of the arbitrator.

16. The order dated 14.11.2018 passed by this Court in OMP 12/2009 also required the Arbitrator to issue fresh notice and thereafter, decide the respondent's claim on merits. The Arbitral Tribunal was thus required to ensure that the petitioners had due notice of the arbitral proceedings. The impugned order records that the notices sent to the petitioner were delivered with the remarks 'left'. Thus, the Arbitral Tribunal could not have proceeded on the basis that the petitioners were served.

17. It is not disputed that the arbitration was being held in terms of the bye-laws of DSE and therefore, the notices were also required to be served in accordance with the said bye-laws. Bye-laws 285, 286, 287, 288 and 289 are relevant and are set out below:-

“Notice and Communication how served

285. Notice and communications to a member or non- member shall be served in any one or more or all of the following ways and any

such notice or communication under (i) to (v) below shall be served at his ordinary business address and/or at his ordinary place of resident and/or at his last known address:

- (i) by delivering it by hand or courier;
- (ii) by sending it by registered post;
- (iii) by sending it under certificate of posting;
- (iv) by sending it by express delivery post;
- (v) by sending it by telegram;
- (vi) by affixing it on the door at the last known business or residential address;
- (vii) by its oral communication to the party in the presence of a third person;
- (viii) by advertising it at least once in any daily newspaper published in Delhi;
- (ix) by ticket tape message, E-mail or other electronic media;
- (x) by a notice posted on the Notice Board of the Exchange if no address be known

Service by hand when complete

- 286 A notice or communication served by hand shall be deemed to have been received by the party on the production of a certificate to that effect signed by the person delivering the notice or communication.

Service by post or telegram or Courier

287 A notice or communication served by the post or telegram or courier shall be deemed to have been received by the party at the time when the same would in the ordinary course of post or telegram or courier have been delivered. The production of a letter of confirmation from the post office or of the post office receipt or a courier airway bill or courier receipt specifying the package and to whom it WCJS to be delivered for the registered letter or telegram or of a certificate of posting or courier shall in all cases be conclusive proof of the posting or dispatch of such notice or communication and shall constituted due and proper service of notice.

Refusal to Accept Delivery does not Affect Service

288. In no case shall any refusal to take delivery of the notice or communication affect the validity of its service.

Service by Advertisement or by Notice on Notice Board

289. A notice or communication published in a newspaper or posted on the Notice Board of the Exchange shall be deemed to have been served on the party on the day on which it is published or posted. Provided however, service by notice on notice board shall not be a valid notice in the event the other party is not a member of the Exchange.

18. In terms of bye-law 285, the member is required to be served in any of the methods as listed out in clauses nos. (i), (ii), (iii) & (iv) of the said bye-law; that is, by delivering by hand or courier; by sending

it by registered post; by sending it under certificate of posting; or by express delivery post.

19. In terms of bye-law 287, a notice sent by post, telegram or courier, would be delivered “*when the same would in the ordinary course of post or telegram or courier have been delivered*”. The letter of confirmation from the courier agency or the postal authority specifying that the package has been delivered is required to be accepted as conclusive proof of proper service of such notice.

20. In the present case, the notices were returned with the remarks ‘left’ and therefore, the same did not constitute a due service of the notice as required under bye-law 287 of the bye-laws of DSE. No steps were taken to serve the petitioners by hand or by any advertisement. Notices were also not placed on the notice board of DSE.

21. The apprehension expressed by Mr. Bhalla, that the petitioners have been deliberately avoiding service may be justified considering that the petitioners have been selectively joining the proceedings. However, this Court is unable to accept that petitioners were duly served the notice of the arbitral proceedings as required. In the absence of due notice of appointment of the sole arbitrator and the constitution of the Arbitral Tribunal, the contention that the impugned award is liable to be set aside, is merited. Accordingly, the present petition is allowed and the impugned award is set aside.

22. The respondent would be at liberty to approach DSE for

appointment of an arbitrator to adjudicate his claims afresh. In the event, the respondent approaches DSE for appointment of an Arbitrator, DSE is directed to forthwith appoint an arbitrator. The notice of the said arbitration would be sent to the petitioner at the address as now provided in the Memo of parties: M-84, South City-1, Gurugram-122002 (Haryana). In addition, the petitioner shall be also be served at the email address, vnanda3317@gmail.com.

23. This Court is also informed that pleadings were complete before the learned arbitrator, Late Justice J. K. Mehra. In the circumstances, the parties agree that no fresh pleadings are required. The parties are, of course, at liberty to lead fresh evidence.

24. Mr Gupta, learned counsel for the petitioner states that due despatch of notice at the said address would be accepted as due service of the said notice. The petitioners shall not change their addresses without intimating DSE and the respondent and shall obtain a written acknowledgement from them. He also states that petitioner would keep themselves apprised regarding appointment of an arbitrator by DSE. The petitioners are bound to the aforesaid statement.

25. The petition is allowed in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

MAY 19, 2021

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