

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

Reserved on: 10.08.2021
Date of Decision: 24.08.2021

+ **FAO(COMM) 124/2021 & CMs 25375-76/2021**

PRASHANT GAUTAMAppellant

Through Ms. Archana Pathak Dave, Ms.
Ankita Chaudharay, Mr. Kumar
Prashant, Ms. Vanya Gupta,
Mr. Parmod Kumar Vishnoi,
Ms. Himanshi Shakya, Advs.

versus

AAKASH EDUCATIONAL SERVICES PVT. LTD.

..... Respondent

Through Nemo

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

1. This appeal has been filed challenging the Order dated 12.07.2021 passed by the learned District Judge (Commercial Court) – 04, Central, Tis Hazari Courts, Delhi, in OMP (COMM) No. 79 of 2019, titled *Prashant Gautam v. Aakash Educational Services Pvt. Ltd.*, dismissing the application filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the ‘Act’) in challenge to the Arbitral Award dated 12.05.2016 of

the learned Sole Arbitrator, on the ground of it being barred by limitation under Section 34(3) of the Act.

2. The dispute between the parties arose out of the offer of appointment as a Faculty in Physics Department by the respondent to the appellant vide letter dated 05.03.2014. As the appellant left the employment of the respondent on 01.04.2015, the respondent raised a claim of compensation/damages before the learned Sole Arbitrator. The learned Sole Arbitrator vide the Arbitral Award dated 12.05.2016 awarded a sum of ₹9,93,966/- (Rupees nine lakh ninety-three thousand nine hundred sixty-six) alongwith interest at the rate of 9% per annum in favour of the respondent. The appellant, claiming that the copy of the Arbitral Award was received by him only on 10.07.2019 in the enforcement proceedings filed by the respondent before the learned District & Sessions Court, Kota, Rajasthan, filed the above application under Section 34 of the Act on 14.08.2019 challenging the Arbitral Award. The same was, however, dismissed by the learned District Judge as being not maintainable under Section 34(3) of the Act.

3. The learned counsel for the appellant submits that the Impugned Order passed by the learned District Judge itself records that the Arbitral Award is contrary to law and justice and therefore, the learned District Judge has taken a hyper-technical view by dismissing the application of the appellant only on the ground of it being filed belatedly.

4. She further submits that even otherwise, the finding of the learned District Judge on the issue of limitation is incorrect inasmuch

as the appellant did not receive the copy of the Arbitral Award from the learned Arbitrator but received the same only in the enforcement proceedings on 10.07.2019. The application under Section 34 of the Act having been filed on 14.08.2018 was therefore, within the time granted under Section 34(3) of the Act.

5. We have considered the submissions made by the learned counsel for the appellant, however, find no merit in the same.

6. Section 34(3) of the Act provides that an application for setting aside the Arbitral Award has to be made within three months from the date when the applicant receives a copy of the Arbitral Award. This period of filing can be extended by the Court only for a further period of thirty days, 'but not thereafter'.

7. The Supreme Court in ***Simplex Infrastructure Ltd. v. Union of India***, (2019) 2 SCC 455, considered the above provision and has held as under:

“ 9. Section 34 provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award “in accordance with” sub-section (2) and sub-section (3). Sub-section (2) relates to the grounds for setting aside an award. An application filed beyond the period mentioned in sub-section (3) of Section 34, would not be an application “in accordance with” that sub-section. By virtue of Section 34(3), recourse to the court against an arbitral award cannot be beyond the period prescribed. Sub-section (3) of Section 34, read with the proviso, makes it abundantly clear that the application for setting aside the award on one of the grounds mentioned in sub-section (2) will have to be

made within a period of three months from the date on which the party making that application receives the arbitral award. The proviso allows this period to be further extended by another period of thirty days on sufficient cause being shown by the party for filing an application. The intent of the legislature is evinced by the use of the words “but not thereafter” in the proviso. These words make it abundantly clear that as far as the limitation for filing an application for setting aside an arbitral award is concerned, the statutory period prescribed is three months which is extendable by another period of up to thirty days (and no more) subject to the satisfaction of the court that sufficient reasons were provided for the delay.

xxxxx

18. A plain reading of sub-section (3) along with the proviso to Section 34 of the 1996 Act, shows that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 could be made within three months and the period can only be extended for a further period of thirty days on showing sufficient cause and not thereafter. The use of the words “but not thereafter” in the proviso makes it clear that the extension cannot be beyond thirty days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent, there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section (3) read along with the proviso to Section 34 of the 1996 Act. The delay of 131 days cannot be condoned. To do so, as the High Court did, is to breach a clear statutory mandate.”



8. The Supreme Court, relying upon its earlier judgment in ***Union of India v. Popular Construction Co.***, (2001) 8 SCC 470, further held that Section 5 of the Limitation Act, 1963 has no applicability to an application challenging the Arbitral Award filed under Section 34 of the Act.

9. In ***M/s Bharat Barrel and Drum MFG Co. Ltd. & Anr. v. The Employees State Insurance Corporation***, 1971 (2) SCC 860, the Supreme Court held that, “*the law of limitation appertains to remedies because the rule is that claims in respect of the rights cannot be entertained if not commenced within the time prescribed by the statute in respect of that right.*”

10. In ***Noharlal Verma v. District Cooperative Central Bank Ltd., Jagdalpur***, (2008) 14 SCC 445, the Supreme Court reiterated that the limitation goes to the root of the matter. If a suit, appeal, or application is barred by limitation, a Court or an Adjudicating Authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

11. In ***Kamlesh Babu & Ors. v. Lajpat Rai Sharma & Ors.***, (2008) 12 SCC 577, the Supreme Court in fact disapproved of the Appellate Court and the High Court giving a finding on the merit of the suit without upsetting the order of the learned Trial Court holding the suit to be barred by limitation. The Supreme Court held that even though issues were decided by the Appellate Court and the High Court, the same was of no avail since the suit continued to remain barred by limitation.

12. In the present case as well, any and all observations made by the learned District Judge on the merit of the application filed by the appellant under Section 34 of the Act are of no avail as eventually, the learned District Judge held the application to be not maintainable and barred by limitation as provided under Section 34(3) of the Act. We also cannot entertain the challenge to the arbitration award on merit unless the finding on limitation is upset by us in this appeal. In fact, we disapprove of the learned District Judge entering the merit of the Arbitration Award and making observations thereon while holding the application filed by the appellant under Section 34 of the Act to be not maintainable under Section 34(3) of the Act.

13. On the plea of the learned counsel for the appellant that the application filed under Section 34 of the Act was within the time provided under Section 34(3) of the Act, we again find no merit.

14. The learned District Judge found that the Impugned Award was sent to the appellant through e-mail. It is not contended by the learned counsel for the appellant before us that the e-mail address did not belong to the appellant. The learned District Judge further found that the copy of the Arbitral Award was also sent at the appellant's address by way of registered post vide postal receipt dated 16.07.2016. The correctness of the address is again not disputed by the learned counsel for the appellant. The learned District Judge thereafter drew presumption under Section 114 of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897 to conclude that the copy of the Arbitral Award was, therefore, delivered to the appellant in July, 2016

and the application under Section 34 of the Act having been filed on 14.08.2019 was clearly not maintainable.

15. The learned counsel for the appellant submits that the appellant having denied the receipt of the copy of the Arbitral Award, the onus was on the respondent to prove the delivery of the copy of the Arbitral Award to the appellant. She submits that the e-mail being relied upon was not accompanied by affidavit/certificate under Section 65B of the Evidence Act, 1872 and the postal receipt was not followed by a certificate of due delivery on the appellant. She submits that therefore the plea of the appellant that the copy of the Arbitral Award was received by him only in the execution proceedings should have been accepted. We do not agree with the submission made by the learned counsel for the appellant as the learned District Judge, in our opinion, has rightly drawn presumption of due service under Section 114 of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897 against the appellant. Mere bare denial of receipt of the arbitral award by the appellant cannot displace the presumption of delivery of the arbitral award on him. We must also here note that even before the arbitrator, the appellant did not appear and was proceeded ex-parte.

16. We must also note that before the learned District Judge, both the parties made a submission that as the learned Arbitrator had since died, the application be disposed of on the basis of the documents filed by the respondents. Such documents included a copy of the e-mail and the postal receipt. The said documents therefore, stood admitted by the appellant. No error can therefore, be found with the learned District

Judge having placed reliance thereon for concluding due delivery of service of the Arbitral Award on the appellant in July, 2016.

17. In view of the above, we find no infirmity in the Impugned Order. The appeal is dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

MANMOHAN, J

AUGUST 24, 2021
RN/P/AB



न्यायमेव जयते