

**Court No. - 9**

**Case :-** APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 146 of 2022

**Appellant :-** M/S Bharat Pumps And Compressors Limited

**Respondent :-** M/S Chopra Fabricators And Manufacturers Private Limited And Another

**Counsel for Appellant :-** Pradeep Kumar Sinha

**Counsel for Respondent :-** Rahul Mishra

with

**Case :-** FIRST APPEAL FROM ORDER No. - 1514 of 2022

**Appellant :-** M/S Bharat Pumps And Compressors Ltd.

**Respondent :-** M/S Chopra Fabricators And Manufacturers Pvt. Ltd. And Another

**Counsel for Appellant :-** Aarushi Khare, Sr. Advocate

**Counsel for Respondent :-** Rahul Mishra

**Hon'ble Rohit Ranjan Agarwal, J.**

1. These are two connected appeals one being Arbitration Appeal No. 146 of 2022 filed under Section 37 of Arbitration and Conciliation Act, 1996 (*hereinafter called as 'Act of 1996'*), treating it to be under Section 39 read with Section 17 of Arbitration Act, 1940 (*hereinafter called as 'old Arbitration Act'*) against the order dated 28.04.2022 passed by Civil Judge (Senior Division) acting as Small Cause Court in Misc. Case No. 4 of 2004 and also arbitral award dated 01.01.1992 made by Kashi Nath, Advocate.

2. The other appeal being F.A.F.O No. 1514 of 2022 has been preferred against the judgment and order dated 27.04.2022 passed by Civil Judge (Senior Division)/ Judge Small Causes Court in Misc. Case No. 5 of 2004 arising out of Original Suit No. 57 of 1992, on the application filed under Order 9 Rule 13 CPC for setting aside the *ex-parte* decree against the defendant-appellant.

3. The brief facts leading to filing of these two appeals, are that appellant before this Court is a Government of India undertaking under the administrative control of Union Ministry of Heavy Industries and Public Enterprises and registered as Government Company under the Companies Act. The contesting plaintiff-respondent no. 1 is a private limited Company which was incorporated on 28.05.1985 under the provisions of Companies Act, at present, the name of the company has been struck off from Register of Companies maintained by Registrar of Companies, Kanpur, due to non-compliance of the provisions of Companies Act since 2006.

4. One Harindar Singh Chopra, a proprietorship firm entered into an agreement with the appellant on 05.07.1983 as its ancillary unit for manufacture of fabricated items and accessories. The ancillary unit of Harindar Singh Chopra was thereafter registered as a private limited Company in the year 1985, and he became Managing Director of the Company. Clause 19 (viii) of the agreement provides for the validity period which was seven years. Further, Clause 19 (ix) (a) and (b) provided for the matter being referred to an Arbitrator appointed by Executive of the appellant-Company in case of any dispute, and award/decision rendered by the Arbitrator to be final and binding on both the parties. At the time of execution of agreement, old Arbitration Act was in operation.

5. Dispute arose between the parties, and on 05.05.1991, plaintiff-respondent no. 1 gave a notice to the appellant calling for appointing an Arbitrator. In para no. 5 of the notice, it was mentioned that ancillary agreement expired in July, 1990, which was not renewed. Thus, as per the condition of supply contract of appellant which is in print-agreement regarding unpaid bills, interest the notice was given for appointing Arbitrator from the appellant side and one Arbitrator to be appointed by respondent and in case of difference of opinion between Arbitrators, there was a clause of appointing an Umpire and in para no. 9, the names of four

umpires were suggested.

6. The respondent on 30.10.1991 informed the appellant that they had appointed one Pandit Kashi Nath Tripathi (Advocate) as their Arbitrator, while the appellant have not appointed Arbitrator from their side. A reply was given by the appellant on 18.11.1991 stating that as per Clause 19 (ix) (a) which was entered between the parties on 05.07.1983, the Chief Executive of appellant was to nominate the single Arbitrator and in pursuance of the said clause one C.V. Subba Rao, General Manager, BPCL had been appointed as Arbitrator in the matter and there is no provision for appointment of two Arbitrators. Hence, appointment of Kashi Nath Tripathi as Arbitrator was illegal.

7. The letter required the respondent to submit their claim before C.V. Subba Rao. The appellant also wrote a letter to Pandit Kashi Nath (Advocate) on 28.11.1991 informing him that Company had already appointed one C.V. Subba Rao as the sole Arbitrator in the matter and there being no provision for appointment of two Arbitrators, thus, appointment cannot come in line to pursue the case.

8. However, on 01.11.1991, the plaintiff-respondent moved a claim petition on behalf of M/s. Chopra Fabricators and Manufacturers Pvt. Ltd. before Pandit Kashi Nath Tripathi (Advocate). In para no. 5 of claim petition, claim was set up for period from 1983 to 1991. Total claim made was at Rs.2,49,26,778.59/-. Further, interest at the rate of 18.5 % per month (compound) till date of payment was also sought.

9. The Arbitrator on 15.12.1991 passed an order rejecting the objection of opposite party on the ground that it failed to appoint an Arbitrator within 15 days from the date of notice. Hence, in view of Section 9 (b) of old Arbitration Act, the sole Arbitrator had the jurisdiction to hear the matter. The next date fixed was 25.12.1991.

**10.** On 25.12.1991, the next date was fixed as 29.12.1991. The sole Arbitrator on 01.01.1992 made an *ex-parte* award and directed the appellant to pay the respondent a sum of Rs.30,75,330.93/- towards amount of unpaid bills and also directed for payment of Rs.10,92,231.75/- towards interest and further an amount of Rs.46,93,924.36/- towards interest payable by the claimant-respondent to bank on account of delayed payment of bank dues and also awarded Rs.80,00,000/- as damages for loss in business and lastly awarded 12% interest per annum from the date of its claim till the date of payment.

**11.** On 04.02.1992, respondent filed an application for reference before Civil Judge (Senior Division) vide Original Suit No. 57 of 1992 for making arbitral award as rule of court. Vide order dated 28.04.2003, the award was made rule of court.

**12.** In between, respondent had filed a writ petition before this Court being Writ Petition No. 13330 of 2001 which was disposed of vide order dated 11.04.2001 directing the appellant-Company to decide the representation dated 24.03.2001. According to appellant-Company, neither the award made by Arbitrator nor the order passed by court below making the same as rule of court on 28.04.2003 was within their knowledge, and it was on 20.02.2004 that some persons alleging themselves to be employees of the court had come to Company campus to realise the amount of Rs.4 crores in a decree that they came to know about the award and the decree made on 28.04.2003.

**13.** An application along with an affidavit under Order 9 Rule 13 CPC as well as a delay condonation application was filed on 25.02.2004 for recalling the *ex-parte* order dated 28.04.2003 and 12.05.2003 which was registered as Misc. Case No. 5 of 2004. Moreover, objections under Section 47 of CPC were filed in execution proceedings which was registered as Case No. 3 of 2004 and an application under Section 30 and

33 of old Arbitration Act was filed which was registered as Misc. Case No. 4 of 2004.

**14.** The court below vide impugned order dated 27.04.2022 dismissed application filed under Order 9 Rule 13 CPC against which F.A.F.O. No. 1514 of 2022 has been filed while against the dismissal of the application under Section 30 and 33 of the old Arbitration Act, Arbitration Appeal No. 146 of 2022 has been filed.

**15.** By order dated 22.09.2022 passed by Division Bench of this Court, both the appeals No. 146 of 2022 and 1514 of 2022 were connected. As counsel for both the parties have agreed to argue both the appeals, the matter was heard together and is being decided by a common order.

**16.** Sri P.K. Sinha, learned counsel appearing in Appeal No. 146 of 2022 submitted that an ancillary agreement was executed between the Company and Harindar Singh Chopra on 05.07.1983 for a period of seven years. It provided an arbitration clause, according to which, in case of dispute or difference, the matter was to be referred to sole Arbitrator to be appointed by appellant. Concealing the fact that an ancillary agreement was executed, plaintiff-respondent no. 1 appointed one Kashi Nath Tripathi (Advocate) as Arbitrator on the basis of conditions of supply contract which was there in respect of supplier where specific agreement was not entered between the Company and supplier.

**17.** According to him, the items and accessories were supplied by respondent to appellant-Company as per ancillary agreement, thus, the terms and conditions mentioned thereunder was applicable. Once the Company on 18.11.1991 had informed the respondent about the appointment of C.V. Subba Rao as sole Arbitrator as per the ancillary agreement and information also being sent to sole Arbitrator on 28.11.1991 by the Company, no question arises for the Arbitrator appointed by the respondent against the conditions laid down in the

agreement and making an award on 01.11.1992.

**18.** It was next contended that no notice of Suit No. 57 of 1992 was ever received by the appellant-Company and it was only when the persons from the court had come to serve the notice during the execution proceedings that Company came to know about the *ex-parte* award as well as the decree made in the year 2003. Further, according to learned counsel, the court below while making the arbitral award rule of court had not passed any order as to the service of notice upon the Company, or order deeming sufficiency of service of notice and for proceeding *ex-parte* in the matter.

**19.** It was on 26.02.2003 that notices were issued and steps were taken by registered post. Thereafter, dates were fixed on 10.04.2003, 17.04.2003, 19.04.2003, and 21.04.2003 but on none of the dates, the court recorded that notice was served upon Company and it having failed to appear, it was deemed that notice was served and court proceeded to pass *ex-parte* order.

**20.** He then submitted that provision of Rule 19-A of Order 5 which provides for simultaneous issue of summons for service by post in addition to personal service was omitted by Act No. 46 of 1999 w.e.f. 01.07.2002, thus, steps taken for service of notice by registered post on 26.02.2003 is against the provisions of Order 5 Rule 19-A which was omitted and summons were to be issued to be served personally through Process Server and not by registered post.

**21.** He then submitted that Suit No. 57 of 1992 was filed for making the arbitral award rule of court in the year 1992 but was pending till 2003 and in between the plaintiff-respondent had filed Writ Petition No. 13330 of 2001 before this Court seeking a direction for deciding the representation dated 24.03.2001. This Court on 11.04.2001 had directed for decision by the appellant-Company within six weeks.

**22.** According to him, there was no disclosure in the writ petition or in the representation filed by plaintiff-respondent as to the award dated 01.01.1992 or the suit pending before the court below for making arbitral award rule of court. The representation was decided by appellant-Company on 17.07.2001. According to para no. 5 and 6 of order passed on the representation, it was specifically mentioned that when the agreement came to an end in the year 1990, Company had required respondent to return the fixtures and tools, description of which has been given in para no. 5 to Company but respondent failed to do so.

**23.** Moreover, in para no. 7, it has been mentioned that order which was given in the year 1989 was also not executed and raw-material supplied was never returned back. The value of raw-material issued under purchase was Rs.1,14,188.24/- and the said amount was adjusted against the pending bills. The other issues raised in the representation by respondent was also discussed and decided in para nos. 8, 9, 10 and 11 of the order.

**24.** The order was never challenged before any authorities and it had become final and binding between the parties. Lastly, it was contended that application under Section 30 and 33 of old Arbitration Act was filed after the Company came to know about the *ex-parte* award, and award made rule of court on 28.04.2003, on 20.02.2004, and application was moved on 25.02.2004. As Article 158 of the Limitation Act provides for filing application within 30 days from the date of service while in the present case the service of notice is denied and from perusal of the order-sheet, there is no finding to the effect that there is deemed service of notice upon Company.

**25.** Sri Vinay Khare, learned Senior Counsel, appearing for the appellant in F.A.F.O. No. 1514 of 2022, has submitted that the *ex-parte* judgment and decree dated 28.04.2023 passed by the Civil Judge (Senior Division) in Original Suit No. 57 of 1992 for the first time came into the

knowledge of the appellant on 20.02.2004. Immediately, thereafter, an application under Order 9 Rule 13 CPC alongwith delay condonation application and affidavit, was filed on 25.02.2004. It was then contended that the application under Order 9 Rule 13 CPC was moved on the ground of non-service of notice issued under Section 14, as required under the old Arbitration Act. Further, the court below had wrongly held that the provisions of CPC does not apply under the old Arbitration Act. In fact Section 41 (a) of the old Arbitration Act specifically provides that provisions of CPC apply to all proceedings before the court below and to all appeals under the Arbitration Act.

**26.** According to learned Senior Counsel from perusal of the order-sheet maintained by the court below it is clear that the order-sheet dated 12.08.1992 bears an endorsement that notice has not been served upon the respondent no. 2 which was sent on 18.04.1992. Further, the notice bears that registry has not returned back. He then contended that on 26.02.2013 notice was issued to the opposite party for disposal of objection but the order-sheet does not reflect that the registry which was sent ever served nor there is any order passed by the court below holding sufficiency of service of notice upon the opposite party.

**27.** According to him, the court below has failed to record any specific finding as to the receipt of the registered notice sent to the appellant while rejecting the delay condonation application as well as application under Order 9 Rule 13 CPC. It is only presumption of service of notice by the court below without any specific finding to that effect. He then contended that the principle of Order 9 Rule 13 CPC are applicable in proceedings under Sections 14 and 17 of the old Arbitration Act. It was inherent duty of the court below to do the justice with the appellant and should have set-aside the ex-parte order when there was no material on record to hold that the notice was served to the appellant.



**28.** Sri Rahul Mishra, learned counsel appearing for the plaintiff respondent no. 1 in both the appeals, submitted that application under Sections 30/33 of the old Arbitration Act was not maintainable as it was preferred much after the decree that followed the award under Section 17. The notice under Section 14 (2) of the old Arbitration Act was issued by the court below on 26.02.2003 and as per process server report it was served upon the appellant on 04.03.2003 and the decree was made by the court below on 28.04.2003. Despite service, Bharat Pumps & Compressors Limited (appellant) chose not to challenge the award under Section 30/33 within the limitation period of 30 days under Section 119 of the Limitation Act. Moreover, even while making application under Sections 30/33, about one year after service of notice, appellant did not file any application under Sections 5/14 of the Limitation Act as the application was beyond the statutory period of 30 days. He then laid emphasis on the fact that by making award rule of the court a finding has been recorded to the effect that notice under Section 14 (2) was issued on 26.02.2003. According to him, in proceedings under Order 9 Rule 13 CPC the court below on 27.04.2022 had recorded a categorical finding about the service of notice/summon upon the appellant.

**29.** The objections filed under Section 47 CPC in execution proceedings was rejected by the court below on 27.04.2022 which was subject matter of challenge before this Court in Civil Revision No. 53 of 2022, wherein this Court on 27.05.2022 had recorded a finding that notice was served.

**30.** According to him, the records reveal that before making award rule of the court notices were issued to the judgment debtor but inspite of service neither any objection was filed nor anybody appeared on behalf of judgment debtor. It is well settled that once a party served with the notice under Section 14, and it fails to make any objection to the award within 30 days and decree follows under Section 17, then post decree the noticee

has got no further right of challenging the validity of the award. Reliance has been placed upon a decision of Apex Court in case of **Union of India and others Vs. Aradhana Trading Company and others, 2002 (4) SCC 447.**

31. It was lastly contended by learned counsel that the appellant had the opportunity to challenge the appointment of Arbitrator under Section 20 of the Act, but they never challenged the appointment, so made, and the claim having been decided and made rule of the court no useful purpose would be served in turning clock back by more than 30 years simply for the reason that the civil court omitted to record the date of service of notice in the order-sheet or the fact that service is sufficient or to record the process server report.

32. I have heard learned counsel for the parties and perused the material on record.

33. This is a case wherein ancillary agreement was executed between the appellant's company and one Harinder Singh Chopra on 05.07.1983. Later in the year 1985 the ancillary unit of Harinder Singh Chopra was registered as a private limited company, and he became the Managing Director.

34. The agreement of the year 1983 provided for the arbitration clause and matter to be referred to Arbitrator by the executive of appellant's company which was to be final and binding on both the parties. It is admitted to both the parties that after the status of ancillary unit of Harinder Singh Chopra was changed in the year 1985 no new agreement was entered between the parties, and on the strength of earlier agreement business was carried on between the parties. The life of the agreement came to an end on 04.07.1990. Thereafter, neither the agreement was renewed nor fresh agreement was entered between the parties. Sometimes, in the year 1991 dispute arose and respondent no. 1 gave a notice for

appointment of Arbitrator by the appellant's company and appointed one Pandit Kashi Nath Tripathi, Advocate, as an Arbitrator on their side. For the appointment of umpire four names were suggested by the respondent.

**35.** The appellant company had intimated the respondent as well as Pandit Kashi Nath Tripathi that one C.V. Subbarao was appointed as sole Arbitrator in the matter and he cannot come into line to pursue the case. However, the Arbitrator appointed by respondent proceeded with the matter and on 15.12.1991 rejected the objection and held that the appellant failed to appoint Arbitrator within 15 days, hence in view of Section 9 (b) of the old Arbitration Act he had the jurisdiction to hear the matter.

**36.** An ex-parte award was made by him on 01.01.1992. Respondent approached the Civil Judge (Senior Division) by filing an application for reference vide Original Suit No. 57 of 1992 for making the award rule of court.

**37.** From the order-sheet of Original Suit No. 57 of 1992 it is clear that notice was issued to the judgment debtor and on 12.08.1992 there is an endorsement in the order-sheet that notice has been issued by the registered post on 18.04.1992 but the same has not returned back. The matter was kept pending before the court below and in between respondent no. 1 had approached this Court by filing a writ petition seeking a direction upon the appellant company to decide its representation. The writ Court on 24.03.2001 directed the appellant company to take decision within six weeks. The representation was decided on 17.07.2001.

**38.** From the perusal of the representation it is clear that there is no averment to the effect that any award was made by the Arbitrator on 01.01.1992 in favour of respondent no. 1 and the same is subject to the orders of civil court for making it rule of the court. The order-sheet

brought on record, reflects that matter was kept pending before the court below and it was on 26.02.2003 that notice was issued to the appellant for disposal of objection, if any. Thereafter, the court below on 10.04.2003 adjourned the matter due to strike by lawyers. Thereafter, the matter was posted on 17.04.2003 on which date the same was adjourned due to reference and next date fixed was 19.04.2003. On 19.04.2003 the lawyers were on strike and the matter was fixed for 21.04.2003. On the said date, the court passed the order; "*Case called out. Petitioner not present. None present on behalf of the OP. Heard. No objection has been filed. Fixing for 28.04.2003.*" On 28.04.2003 the judgment was passed by the court below making award rule of the court.

**39.** A careful glance of the entire order-sheet reveals that the notice issued to the appellant company was never held to be served nor there is any finding as to service of notice. Section 14 of the old Arbitration Act provides for award to be signed and filed while Section 17 provides for judgment in terms of the award. Relevant Sections 14 and 17 of the old Arbitration Act extracted here as under;

*"14. Award to be signed and filed.\_ (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.*

*(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.*

*(3) Where the arbitrators or umpire state a special case under clause (b) of section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.*

*17. Judgment in terms of award.\_ Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time*

*for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."*

40. From the reading of both the provisions it is clear that once arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing of the award and amount of fees and charges payable in respect of the arbitration and award. Under Sub-section (2) of Section 14 the Court shall give notice to the parties of the filing of the award and it is after the issuance of notice that under Section 17 where the Court sees no cause to remit the award or any of the matter referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired proceed to pronounce the judgment according to the award.

41. Thus, it is incumbent upon the court before making an award rule of the court to issue notice to the parties under Section 14 (2).

42. Section 41 (a) of the Act provides that provisions of CPC apply to all proceedings before the court and to appeal and to all appeals under the Act. Relevant Section 41 is extracted here as under:-

*"41. Procedure and powers of Court. \_ Subject to the provisions of this Act and of rules made thereunder \_*

*(a) the provisions of the Code of Civil Procedure, 1908 (V of 1908), shall apply to all proceedings before the Court, to all appeals, under this Act, and*

*(b) the Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:*

*Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."*

43. Thus, finding recorded by the court below that provisions of CPC does not apply in proceedings under Sections 14 and 17 of the old

Arbitration Act is a fallacy and against the provisions of Section 41 of the old Arbitration Act.

**44.** In the instant case claim was made by the contesting respondent for the period 1983 to 1991 as it is clear from the claim petition filed by the contesting respondent before the sole Arbitrator appointed by them. As the agreement dated 05.07.1983 specifically provided that Arbitrator was to be appointed by the executive of appellant company and not by the disputing parties. The period of claim is when the agreement dated 05.07.1983 was in existence and had only come to an end on 04.07.1990. The Arbitrator could have made award only for the claim which was made for the period when the agreement between the parties had expired and was not in existence.

**45.** It is a case where the appellant, which is a government company, was forced to make payment in execution proceedings for an ex-parte award which was made by an Arbitrator not empowered under the agreement to act as an arbitral tribunal and make an award. Moreover, the court below failed to take notice of any aspect of the case that suit was filed in the year 1992 by the defendant respondent but the award was made rule of the court in the year 2003 after a lapse of 11 years. In between, respondent no. 1 had approached this Court by filing writ petition without disclosing the fact that an award was made in their favour by the sole Arbitrator. This clearly reflects that the appellant was disguised by conduct of respondent no. 1 who on one hand was negotiating with the appellant company and wanted to settle the claim through intervention of the order of this Court and on the other hand pursuing the O.S. No. 57 of 1992.

**46.** The court below should have considered all these aspects before rejecting the delay condonation application alongwith application under Order 9 Rule 13 CPC and application under Section 30 read with Section

33 of old Arbitration Act.

47. The order-sheet reveals that the court below proceeded in great haste from 26.02.2003 till 28.04.2003 and after fixing four dates proceeded to pass the judgment making the award rule of the court, while on three dates the lawyers were on strike and no work took place in the district court. While deciding the application under Order 9 Rule 13 CPC and Section 30/33 of the old Arbitration Act, the court below should have recorded specific finding as to the service of notice upon the appellant. The finding recorded in the order dated 28.04.2022 and 27.04.2022 is very cryptic and it proceeded to decide the application merely on assumption that notice was served upon the appellant.

48. Considering the aforesaid facts and circumstances of the case I find that the court below was not justified in rejecting the delay condonation application as well as application filed under Order 9 Rule 13 CPC vide judgment and order dated 27.04.2022 as well as the application under Sections 30/33 of the old Arbitration Act on 28.04.2022. Both the orders passed by the court below are hereby set-aside and quashed and the matter is remitted back to the court below to decide the same afresh after considering the service report, if any available on the order-sheet, within a period of six months from the date of production of certified copy of this order before it.

49. Both the appeals stand partly allowed.

**Order Date :- 04.12.2023**

V.S.Singh