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

% ***Judgment Pronounced on: 20.12.2023***

\+ **FAO(OS) (COMM) 326/2019 & CM No.49717/2019**

MINISTRY OF HEALTH & FAMILY WELFARE & ANR ..... Appellants

versus

M/S HOSMAC PROJECTS DIVISION OF HOSMAC INDIA PVT LTD ..... Respondent

Advocates who appeared in this case:

For the Appellants : Mr. Praveen Kumar Jain, Mr Naveen Kumar Jain, Mr Sachin Kumar Jain, Ms Shalini Jha, Ms Rashmi Kumari and Ms Sheetal Raghuvanshi, Advs. along with Dr Yashwant Singh, A.R. of Appellants.

For the Respondent : Mr Nakul Dewan, Sr. Adv. with Mr Pradhuman Gohil, Ms Ranu Purohit, Ms Neelu Mohan and Mr Alapati Sahithya Krishnan, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

JUDGMENT

TARA VITASTA GANJU, J.:

1. The present Appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"] assailing the Judgment dated 12.09.2019 passed by a learned Single Judge of this Court [hereinafter referred to as "Impugned Judgment"]

which has dismissed the Petition of the Appellants filed under Section 34 of the Act, on account of delay [hereinafter referred to as "Section 34 Petition"].

2. The Section 34 Petition was filed seeking to set aside an Award published on 20.11.2018 [hereinafter referred to as "Arbitral Award"] by Retd. Justice Devinder Gupta, [hereinafter referred to as "the Sole Arbitrator"], awarding an amount of Rs.22,05,09,651/- with interest and costs to M/s Hosmac Projects Division of Hosmac India Pvt. Ltd. [hereinafter referred to as "Respondent/Hosmac"].

2.1 Subsequently, the Respondent/Hosmac filed an Application under Section 33(1)(a) of the Act, for correction of computation errors in the Arbitral Award. This Application was allowed by the Sole Arbitrator on 07.01.2019 [hereinafter referred to as "Corrigendum Order"] and the awarded amount was reduced to Rs. 15,11,66,498/- with interest and costs.

3. The Appellant/Ministry of Health and Family Welfare [hereinafter referred to as "Appellant/MoHFW"] challenged both Arbitral Award and the Corrigendum Order before the learned Single Judge, and the Section 34 Petition was dismissed by the Impugned Judgment, which has led to the filing of the present Appeal.

4. The brief facts necessary for the adjudication of this Appeal are:

4.1 On 07.05.2010, Appellant/MoHFW entered into an agreement with the Respondent/Hosmac [hereinafter referred to as "the Agreement"], for construction of Emergency Care Services and for renovation of 16 existing VIP Rooms in Appellant No. 2/Dr. Ram Manohar Lohia Hospital,

New Delhi [hereinafter referred to as "RML"], which is run under the control of Appellant/MoHFW.

4.2 Disputes arose between the parties including with respect to payment and imposition of liquidated damages by the Appellant/MoHFW for adjudication of which the Respondent/Hosmac invoked the Arbitration Clause. Pursuant to an Application filed by the Respondent/Hosmac under Section 11(6) of the Act, learned Single Judge of this Court on 06.03.2017, appointed the Sole Arbitrator to adjudicate the disputes and differences between the parties.

4.3 The Respondent/Hosmac filed its claim while the Appellant/MoHFW and RML filed a counter-claim before the Sole Arbitrator.

4.4 The Sole Arbitrator published the Arbitral Award in favour of the Respondent/Hosmac in the sum of Rs. 22,05,09,651/- holding that the Respondent/Hosmac is also entitled to costs in the sum of Rs.25 lakhs along with pre-litigation, *pendente lite* and future interest.

4.5 An Application was filed by the Respondent/Hosmac under Section 33(1) of the Act setting forth errors in computing the pre-litigation and *pendente lite* interest awarded to the Respondent/Hosmac. By the Corrigendum Order, the Application was allowed and the amount awarded to Respondent/Hosmac was reduced to Rs.15,11,66,498/- with interest and costs.

4.6 The Appellant/MoHFW and RML jointly filed the Section 34 Petition for setting aside the Arbitral Award and the Corrigendum Order

on 10.05.2019. An Application was also filed under Section 34(3) of the Act seeking condonation of the delay in filing the Section 34 Petition [hereinafter referred to as "Section 34(3) Application"].

4.7 The contention raised in the Section 34(3) Application was that the Appellant/MoHFW became aware of the Arbitral Award and the Corrigendum Order, upon receipt of a letter dated 14.03.2019 from RML. The Appellant/MoHFW was not sent a signed copy of the Arbitral Award or the Corrigendum Order by the Sole Arbitrator and the signed copy of the Arbitral Award was only sent to the authorized representative of RML. Even the Corrigendum Order was delivered only to the authorized representative of RML and the lawyers for the parties and not to Appellant/MoHFW. It was thus contended that limitation for filing the Section 34 Petition would commence from 14.03.2019, making the Section 34 Petition within the statutory limitation period.

4.8 It was additionally contended by the Appellant/MoHFW that delivery of the Arbitral Award/Order on an agent/Counsel of a party does not amount to proper service on the party. Section 31(5) read with Section 2(1)(h) of the Act, provides that a signed copy of the Arbitral Award/Order must be delivered to the party to the dispute.

4.9 It was contended by the Respondent that arbitral proceedings were being prosecuted all throughout by RML on behalf of the Appellant/MoHFW and itself and that the plea raised by the Appellant/MoHFW was nothing but a ploy to save the Section 34 Petition from being dismissed on the ground of delay.

4.10 Rejecting the contention of the Appellant/MoHFW, the learned Single Judge of this Court, by the Impugned Judgment, dismissed the Section 34(3) Application holding that the Court does not have any power to condone the delay beyond the three months and the 30 days extension provided by the statue. It was further held that the Section 34(3) Application stated that the copy of the Arbitral Award was delivered to the Authorized Representative of RML and no averment was made therein that the service was not effected properly on the Appellants.

4.11 The learned Single Judge further held that since the Corrigendum Order was received on 07.01.2019, the three months period under Section 34 of the Act commencing 07.01.2019 would end on 07.04.2019 and 30 days after would expire on 07.05.2019. Thus, the Impugned Judgment held the Section 34 Petition which was filed on 10.05.2019, was barred by limitation being filed beyond the period of three months and 30 days, and was also dismissed.

4.12 This has led to filing of the present Appeal by the Appellant/MoHFW.

5. The following submissions were made on behalf of the Appellants:

5.1 Section 31(5) of the Act, mandates that after the Arbitral Award is passed, a signed copy of the Arbitral Award shall be delivered to each party. Section 2(1)(h) of the Act clearly enunciates that "*party*" means a party to an Arbitration Agreement. However, copies of the Arbitral Award and the Corrigendum Order were delivered to the authorized

representative of the RML and Counsels appearing on behalf of RML and not to the parties as is envisaged under Section 2(1)(h) of the Act.

5.2 The Impugned Judgment has returned a finding in paragraphs 11 and 12 that, the Arbitral Award and the Corrigendum Order were delivered to the authorized representative of RML and since RML was representing both Appellants before the Sole Arbitrator and, thus, the delivery to the authorised representative of RML is valid service. However, the Sole Arbitrator by its cover letter dated 20.11.2018 delivered only true copies of the Arbitral Award and not the original to the Advocates who appeared on behalf of the parties and Dr. A.K. Goila, the medical superintendent of RML. No copy of the Arbitral Award was sent to the Appellant/MoHFW. Thus, the learned Single Judge erred in holding that delivery of Arbitral Award and the Corrigendum Order on the authorised representative of RML or the Counsels for the parties was a proper service on the Appellant/MoHFW as well.

5.3 It is contended that to qualify as an effective delivery, the Arbitral Award shall not only be delivered to the parties but to a person who is best to take decisions and understand the Arbitral Award. The decision to challenge would be taken only by Appellant/MoHFW and delivery date to Appellant/MoHFW would be date for the purposes of calculating limitation. In this regard, reliance was also placed on the judgments of the Supreme Court in ***UOI vs. Tecco Trichy Engineers & Contractors***[1] and ***Benarsi Krishna Committee & Ors Vs. Karmyogi Shelters Pvt. Ltd***.[2].

[1] (2005) 4 SCC 239
[2] (2012)9 SCC 496

5.4 Section 34(3) of the Act provides that an Application for setting aside of an Arbitral Award may not be made after three months have elapsed from the date on which the party making that Application had "*received*" the Arbitral Award. Reliance was placed on the judgment of the Supreme Court in the ***State of Maharashtra vs. Ark Builders (P) Ltd.***[3], which held that the limitation prescribed under Section 34(3) of the Act would commence only from the date a signed copy of the Arbitral Award is delivered to the party making the Application for setting aside of the Arbitral Award. Since, the Appellant/MoHFW *'received'* copies of the Arbitral Award and Corrigendum Order on 14.03.2019, limitation could only be calculated from such date.

5.5 The Supreme Court in ***State of Himachal Pradesh and Ors. vs. Himachal Techno Engineers and Ors.***[4] has held the date when Corrigendum Order is received by the parties is the date that is relevant for the purposes of computation of limitation. The Corrigendum Order was received by the Appellant/MoHFW by letter dated 14.03.2019 sent by RML to the Appellant/MoHFW and therefore, the Section 34 Petition filed on 10.05.2019 has been filed within 58 days and is in time.

6. Learned Senior Counsel for the Respondent/Hosmac has contended:

6.1 The assertions made by the Appellants are an afterthought, raised only when it became evident that the Appellants' Application for condonation of delay, was not maintainable. The Appellant/MoHFW has

[3] (2011) 4 SCC 616
[4] (2010) 12 SCC 210

not asserted at any point in time, during or after passing of the Arbitral Award that it has not received a signed copy of the Arbitral Award. The Corrigendum Order specifically states that the Arbitral Award has been sent to the parties through speed post. Hence, the submission of the Appellant/MoHFW that he has not received of the Arbitral Award is only a ploy to extend the delay in filing the Section 34 Petition.

6.2 The Section 34 Petition was filed by the Appellant/MoHFW and RML jointly on 10.05.2019. Along with the Section 34 Petition, an Application seeking condonation of delay in filing the Section 34 Petition was also filed by the Appellants jointly under Section 34(3) of the Act stating that there is a 32 days delay in filing. While relying on the proviso to Section 34(3) of the Act, it has been submitted that only a delay of up to 30 days beyond the three-month period provided can be relaxed under the Act. The Section 34(3) Application states that the Corrigendum Order dated 07.01.2019 was received on 09.01.2019 in *'their offices'*. There is no averment in the Application that the Arbitral Award was not received by the Appellant/MoHFW at all.

6.3 Further, an officer of the Appellant/MoHFW has appeared before the Executing Court on 27.01.2020 and no such objection was raised before the Executing Court either.

6.4 The Appellants have not been able to show that the Arbitral Award and Corrigendum Order was in fact was served only upon RML despite categorical statements made by the Sole Arbitrator in the Arbitral Award and Corrigendum Order, stating that the copies have been served on *"the*

parties". Hence, the Impugned Judgment has rightly dismissed the Section 34 Petition.

6.5 The limitation period for filing a Section 34 Petition should be construed as commencing from 07.01.2019, as Section 34(3) of the Act, states that the limitation period begins "*from the date on which that request had been disposed of by the arbitral tribunal*" in cases where an Application under Section 33 of the Act has been filed. Even if it is to be considered from the date of receipt of the Corrigendum Order on 09.01.2019, as mentioned in paragraph 23 of the Impugned Judgment, the Section 34 Petition is still filed after a delay of 1 day and hence, was correctly dismissed by the learned Single Judge.

7. This Court by its Order dated 08.09.2022 had directed the Sole Arbitrator to file the complete Arbitral record before the Court.

8. A letter dated 13.10.2022 addressed by the Sole Arbitrator was received by Registrar General of this Court and placed before this Court and forms part of the case file.

9. The issue that arises for adjudication of this Court is whether the delivery of the true copy of the Arbitral Award and a copy of the Corrigendum Order to an authorized representative of RML would constitute delivery upon the Appellant/MoHFW in accordance with Section 31(5) of the Act for the purposes of calculating limitation under the Act.

10. Limitation under the Act for the Section 34 Petition is three months from the date of *"receipt"* of an Arbitral Award or from the date on which request under Section 33 of the Act is disposed.

10.1 The proviso to sub-section (3) gives an additional 30 days to a party provided it can satisfy the Court that it was prevented in filing on time for sufficient reasons. Sub-section (1) and Sub-section (3) of Section 34 of the Act are reproduced below:

> **"*34. Application for setting aside arbitral award-***
>
> *(1) 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)*
>
> *…….*
>
> *(3) An application for setting aside may not be made* ***after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:***
>
> *Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application* ***within a further period of thirty days, but not thereafter."***
>
> [Emphasis is Ours]

11. Section 31 of the Act sets forth the form and content of an Arbitral Award. Sub-section (1) of Section 31 states that an arbitral Award shall be drawn out in the manner as prescribed by the Section and is to be signed by all members of the Arbitral Tribunal.

11.1 Sub-section (5) of Section 31 of the Act provides that once an Award is made, a signed copy shall be delivered to each *'party'*.

11.2 A *'party'* is defined by Clause (h) of sub-section (1) of Section 2 of the Act as a party to an Arbitration Agreement.

12. The analysis of the provisions above shows that an Application for setting aside an Arbitral Award may be made by such party within three months from the date of its receipt unless the proviso is applicable and that limitation under Sub-section (3) of Section 34 of the Act commences on the date when the party has received the Arbitral Award.

12.1 Who exactly constitutes *"a party"* in the context of monolithic organisations, such as the Government, has been interpreted by the Supreme Court in ***Tecco Trichy*** case. The Supreme Court has held that in order to constitute an effective service, a copy of an Award where such party is the Ministry of Railways, is to be delivered to a person who has the knowledge and is the best person to understand and appreciate an Award and to take decision for its challenge. The Court while calculating the date of service for the purposes of Section 34(3) of the Act, in this case, held that the date of receipt by the Chief Engineer and not the date of receipt/acknowledgement by the *"inward clerk"* at the office, was the date for the purposes of calculating limitation as follows:

> "***6……*** *Under sub-section (3) of Section 34 the limitation of 3 months commences from the date on which "the party making that application" had received the arbitral award.* ***We have to see what is the meaning to be assigned to the term "party" and "party making the application" for setting aside the award in the context of the State or a department of the Government, more so a large organisation like the Railways.***
> …..
> *9.* ***In the context of a huge organisation like the Railways, the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter***

of moving an application under sub-section (1) or (5) of Section 33 or under sub-section (1) of Section 34.

10. ….. Therefore, in our opinion, service of the arbitral award on the General Manager by way of receipt in his inwards office cannot be taken to be sufficient notice so as to activate the department to take appropriate steps in respect of and in regard to the award passed by the arbitrators to constitute the starting point of limitation for the purposes of Section 34(3) of the Act. The service of notice on the Chief Engineer on 19-3-2001 would be the starting point of limitation to challenge the award in the Court.*"*

[Emphasis is Ours]

12.2 The Supreme Court in ***Benarsi Krishna*** case, while relying on the ***Tecco Trichy*** case has held that the expression "*party*", as defined in Section 2(1)(h) of the Act, clearly indicates a person who is a "*party*" to an Arbitration Agreement. The said definition is not qualified in any way to include the agent of the party to such Agreement. The ***Benarsi Krishna*** case held that party as defined in Section 31(5) and Section 2(1)(h) of the Act can only mean the party themselves and not their agent, or their Advocate and to constitute proper compliance, only service on the party himself is required. The relevant extract is below :

"15. Having taken note of the submissions advanced on behalf of the respective parties and having particular regard to the expression "party" as defined in Section 2(1)(h) of the 1996 Act read with the provisions of Sections 31(5) and 34(3) of the 1996 Act, we are not inclined to interfere with the decision [Karmyogi Shelters (P) Ltd. v. Benarsi Krishna Committee, AIR 2010 Del 156] of the Division Bench of the Delhi High Court impugned in these proceedings. The expression "party" has been amply dealt with in Tecco Trichy Engineers case [(2005) 4 SCC 239] and also in ARK Builders (P) Ltd. case [(2011) 4 SCC 616: (2011) 2 SCC (Civ) 413], referred to hereinabove. It is one thing for an advocate to act and plead on behalf of a party in a proceeding and it is another for an advocate to act as the party himself. ***The expression "party", as defined in Section 2(1)(h) of the 1996 Act, clearly indicates a person who is a party to an arbitration agreement. The said definition is not qualified in any way so as to include the agent of the party to such agreement. Any***

reference, therefore, made in Section 31(5) and Section 34(2) of the 1996 Act can only mean the party himself and not his or her agent, or advocate empowered to act on the basis of a vakalatnama. In such circumstances, proper compliance with Section 31(5) would mean delivery of a signed copy of the arbitral award on the party himself and not on his advocate, which gives the party concerned the right to proceed under Section 34(3) of the aforesaid Act.*"*

[Emphasis is Ours]

13. The letter dated 13.10.2022 sent by the Sole Arbitrator states that the record pertaining to Arbitral proceedings has been destroyed by him. It further states that the original Arbitral Award was provided to the Counsel for the parties and the Corrigendum Order was conveyed to the parties. The relevant extract is below:

"…I may point out that after the award was made and duly signed by me, ***copies thereof were duly supplied to learned Counsel for the parties****. Thereafter an application under Section 33 of the Arbitration Act was received, which was also decided and the order was duly* ***conveyed to the parties on 7th January, 2019****.*

On 23rd July 2019 a letter was addressed to the Claimant's Counsel the entire record of the arbitral proceedings is lying in my office and there is paucity of space to keep and retain the record. It is not known that whether the record would be required by the Court in case award is challenged by one party and till that date I had not received any notice from the Court to submit the record.

The Claimant being the successful party was asked to make arrangement, of the record and to preserve it till finalisation of all proceedings and in case it is required to be produced in court to do so. Accordingly, the Claimant was requested to depute someone to collect the record within one month from my office, after which I shall have no option but to destroy it. I am enclosing copies of three letters addressed to the parties.

There is no record available with me now of the aforementioned arbitral proceedings*……"*

[Emphasis is Ours]

13.1 Annexed along with the letter dated 23.07.2019 is a copy of the letter dated 20.11.2018 addressed pursuant to the publishing of the Arbitral Award, and which reads as follows:

> *"November 20, 2018*
>
> *To*
> *Mr. Himanshu Chaubey, Advocate*
> *Mr. Praveen Kumar Jain, Advocate*
> *Mr. Ajay Kumar, Goila, Addl. Medical Supdt, RML Hospital*
>
> *Subject: Arbitration Petition No.439 of 2016 - HOSMAC Projects and Ministry of Health & Family Welfare & another.*
>
> *Dear Sir,*
>
> *I have signed and published my award to-day in the above case. Signed copy is being sent to you with this letter for your record and compliance. Please acknowledge receipt thereof.*
>
> *Soft copy of the award is being sent today on the mailing list to all.*
>
> *Justice Devinder Gupta (Retd)*
> *Sole Arbitrator"*

13.2 The aforesaid extract shows that a copy of the Arbitral Award was sent to the Counsel for the parties and the authorized Representative of RML and not the Appellant/MoHFW.

13.3 No other document has been received from the Sole Arbitrator evidencing service on Appellant/MoHFW.

14. An analysis of the aforegoing Judgments shows:

(i) A signed copy of Arbitral Award is to be delivered to each party;

(ii) The delivery should be to a party who is competent to take a decision as to whether or not the Award is to be challenged;

(iii) The expression *'party'* does not include an agent or a lawyer of such

party;

(iv) The limitation under Section 34(3) of the Act commences "*when the party making the Application has received the Award"*;

(v) In the case of an Application for Correction of computational, clerical or typographical errors under Section 33 of the Act, the limitation is to be calculated from the date on which the Application is disposed off.

15. The Agreement which is the genesis of the present dispute, was executed between the Appellant/MoHFW and Respondent/Hosmac. Since the Agreement was for construction to be carried out in the RML hospital, RML was arrayed as Respondent No.2 in the Arbitral proceedings.

15.1 Every Arbitral Award as well as any corrigendum thereto must be served upon all of the parties in order for it to constitute valid service under sub-section (3) of Section 34 of the Act.

15.2 As discussed above, *'Party'* has been defined under the Act to mean a party to the Arbitration Agreement. The Agreement between the parties has been executed by the Appellant/MoHFW and Respondent/Hosmac only. The recitals of the Agreement provide that the Agreement is executed by the Appellant/MoHFW on behalf of RML and for the work at RML and Clause SC-23 of Exhibit B to the Agreement is the Arbitration Clause between the parties. Thus, it was the Appellant/MoHFW that was a party to the Agreement and not RML.

15.3 There is another factor which compels us to take into consideration the date of service on the Appellant/MoHFW. This Court is unable to agree with the contention of the Respondent/Hosmac that since RML was

the main contesting party and the pleadings have been signed and affirmed by the authorized representatives of the RML, before the Sole Arbitrator as well as before the learned Single Judge of this Court, that service on RML would constitute service on Appellant/MoHFW as well. Undoubtedly, the challenge to the Award could be laid only by the Appellant/MoHFW.

16. No document has been placed on record by the Respondent/Hosmac to show service on the Appellant/MoHFW or to dispel the notion that a copy of the Arbitral Award was received by the Appellant on any date prior to 14.03.2019.

17. Accordingly, the Appeal is allowed. The Impugned Judgment is set aside.

18. All pending Application(s) stand closed.

19. The matter be listed before the learned Single Judge for an appropriate decision on merits.

(TARA VITASTA GANJU)
JUDGE

(RAJIV SHAKDHER)
JUDGE

DECEMBER 20, 2023/r/SA