
(2019) 10 BOM CK 0097

In the Bombay High Court

Case No : Arbitration Appeal No. 24 Of 2018, Civil Application No. 25 Of 2018

Sachin Dilipkumar Nahar & Ors

APPELLANT

Vs

Shantilal Nemichand Nahar & Ors

RESPONDENT

Date of Decision : 16-10-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 20, 31, 31(1), 31(4), 31(5), 32, 33(1), 34(3), 33(4), 34, 34(3), 37

Citation : (2019) 10 BOM CK 0097

Hon'ble Judges : G.S. Kulkarni, J

Bench : Division Bench

Advocate : Abhijeet Desai, Ramesh Jain, Ashutosh Kale

Final Decision : Allowed/Disposed Of

Judgement

1. Heard Mr.Desai, learned Counsel for the appellants, Mr.Jain, learned Counsel for respondent Nos.1 to 5 and Mr.Kale, learned Counsel for respondent Nos. 6 to 13, 35, 37, 38, 43 to 46 and 49.

2. A short issue which arises for consideration in this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") is as to whether the learned Principal District Judge, Kolhapur is correct in rejecting the delay condonation application filed by the appellants in filing an application under Section 34 of the Act.

3. The award in question was made by the arbitral tribunal on 27 August 2010. The appellants contended before the learned Principal District Judge that a signed copy of the award as per the provisions of Section 31(5) of the Act was not delivered to the appellants. It is only when the execution proceedings came to be filed and were served on the appellants, the appellants received knowledge of the award and thereafter preferred to move an application under Section 34 of the Act challenging the said award. As there was delay, a delay condonation application came to be filed which is decided by the impugned order.

4. Mr.Desai, learned Counsel for the appellants has two fold submissions. He submits that in rejecting the delay condonation application, the learned Principal District Judge, Kolhapur has completely overlooked the provisions of Sub-Section (5) of Section 31 of the Act which mandate that the arbitral award is required to be delivered by the arbitral tribunal to each of the disputing parties. Mr.Desai would submit that this was the specific contention of the appellants as urged in paragraph 3 of the delay condonation application. Mr.Desai would secondly submit that the learned Principal District Judge, Kolhapur proceeded merely considering the provisions of Section 34 of the Act and accepted the appellants' knowledge of the award as received from the execution proceedings to be the lawful basis, to hold that the application filed by the appellants under Section 34 of the Act is time barred. He submits that this approach of the learned Principal District Judge is not only contrary to the provisions of Sub-Sections (1) and (5) of Section 31 of the Act but also untenable considering the decision of the Supreme Court in State of Maharashtra & Ors. Vs. ARK Builders (P.) Ltd. (2011) 4 SCC 616

5. Learned Counsel for the respondents has supported the impugned order passed by the learned Principal District Judge, Kolhapur. He would submit that the impugned order ought not to be interfered, taking into consideration the clear provisions of Sub-Section (3) of Section 34 of the Act which provides for a limitation of 90 days and the extended period of another 30 days.

6. Having heard learned Counsel for the parties and having perused the record and the impugned order, in my opinion, there is much substance in the contention as urged by Mr.Desai, learned Counsel for the appellants. The only reasoning as attributed by the learned Principal District Judge, Kolhapur in dismissing the appellants' application can be seen in paragraph 8 which reads thus:-

"8. It was further submitted by Adv.Shri. S.A. Shaha that in para 3 of this application the applicants stated that on 15-06-2016 they received notice of execution petition No. 14/2016 (filed for implementation of award dated 27-08-2010) and even if period of three months plus 30 days provided u/s.34(3) and proviso to it is computed from the said date the application would be barred by limitation. It is a matter of record that instant application for condonation of delay is filed on 20-03-2017. It is clearly beyond 3 months plus thirty days from 15-06-2016."

7. Learned District Judge has discussed some decisions which are in the context of Section 34(3). There cannot be any quarrel on the propositions these decisions lay down. The question however would be as to whether there was delivery of the award on the appellants after the arbitral award was made, and in a manner known and recognized Section 31 of the Act. Section 31(1), (4) and (5) read thus:-

"31. Form and contents of arbitral award.-

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party."

8. It is not the case of the respondents that as per the said provisions the award was delivered/served on the appellants. The respondents also have not placed any material that the original award on record to indicate that the award was actually delivered immediately and in a manner known to Sub-Section (5) of Section 31 of the Act. In my opinion, this vital aspect which would go to the root of the matter, was clearly overlooked by the learned Principal District Judge in passing the impugned order. Knowledge of the party to an arbitral award is required to be attributed only after delivery of the award as per the clear provisions of Section 31.

9. In the present case, the appellants became aware about the award from the execution proceedings. Merely the appellants becoming aware of the award on receiving a copy of the same in the execution proceedings, is not sufficient to recognize the award being delivered to a party to arbitration as provided under Sub-Section (5) of Section 31 of the Act.

10. The Supreme Court in *State of Maharashtra & Ors. Vs. ARK Builders (P.) Ltd.* (supra), in recognizing this statutory position, and referring to an earlier decision in *Union of India Vs. Tecco Trichy Engineers & Contractors*, (2005) 4 SCC 239 has held thus:-

"12. We are supported in our view by the decision of this Court in *Union of India v. Tecco Trichy Engineers & Contractors*, (2005) 4 SCC 239; in paragraph 8 of the decision it was held and observed as follows:

"8. The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by

the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings."

(emphasis added)"

11. In view of the above discussion, the appeal would be required to be allowed. The impugned order is accordingly set aside. The delay condonation application of the appellants is restored to the file of the learned District Judge, Kolhapur, to be decided on its own merits and in accordance with law.

12. All contentions of the parties are expressly kept open.

13. The learned Principal District Judge, Kolhapur shall decide the delay condonation application as expeditiously as possible and preferably within 3 months from today. In the meantime till the delay application is decided by the learned Principal District Judge, the ad-interim order passed by this Court shall continue to operate. Needless to observe that appellants would also be at liberty to move an appropriate application seeking stay to the impugned arbitral award if so required by law.

14. The appeal is accordingly allowed in the above terms.

15. In view of the disposal of the appeal, civil application would not survive. It is accordingly disposed of.