

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

+ OMP 284/2003 and IA No. 6597/06

Reserved on : February 29, 2008
Pronounced on : March 31st, 2008

KANTI BHAI DHAMANI

..... Petitioner

Through Mr. S.B. Upadhyay, Sr. Advocate with
Mr. Pawan Upadhyay, Mr. Rohit Kumar Yadav,
Mr. Bikram Dekar, Advocates

versus

ASHWANI K. GOENKA & Ors.

..... Respondent

Through Ms. Malvika Rajkotia, Mr. Jayant Mehta,
Ms. Jyoti Srivastava, Advocates for respondent No.1.
Mr. Ashu Bhanot, Advocate for respondent No.2.

CORAM:

Mr. Justice S. Ravindra Bhat

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat:

1. In this petition, under Section 34 of the Arbitration and Conciliation

Act, 1996 (hereafter called "the Act") the petitioner seeks setting aside of the Award dated 25.8.2001 (hereafter called "the impugned award") passed by the third respondent.

2. According to the averments, the petitioner and second respondent are husband and wife, their marriage was solemnized in 1980. It is alleged that in 1982 the petitioner and his wife came into contact with the first respondent (since deceased), as the later was dealing in non-ferrous metals. The parties joined hands in a business relationship. It is claimed that some time thereafter, the petitioner became aware of the first respondent's involvement in criminal cases i.e. FIR No. 151/1998 where he was alleged to have committed offences punishable under Sections 409/420 IPC. The petitioner further claims that his wife, under the influence of the first respondent and the third respondent registered various complaints against him.

3. It is alleged that on 8.2.2002, the second respondent registered a First Information Report (FIR) against the Petitioner alleging commission of offences under Section 498A. According to the complaint of the second respondent, the relationship had turned hostile for 3-4 years. It is also alleged that the respondent attempted to extract money from the petitioner. It is further alleged that the first respondent later implicated in the petitioner in a false criminal case and registered an FIR 316/2002. The petitioner was taken into custody. He relies on an order dated 11.10.2002 of this Court in W.P.(C) 1026/2002 where the matter was directed to be enquired into by the District

and Sessions Judge.

4. It is contended that during the course of police remand, the petitioner was forced to sign 50-60 written papers and 20-25 plain papers which he highlighted in an application to the Court. It is claimed that taking advantage of the said position, the respondents filed an EX. 114/2003 in March 2003 claiming enforcement of the impugned Award said to have to have been made on 25.8.2001.

5. It is contended that the petitioner was not aware of the Award said to have been made on 25.8.2001 and became aware of it only on 16.5.2003 when his counsel had detected the pendency of the execution proceedings. The petitioner was thereafter represented on 12.7.2003 in the execution proceeding, when he learnt that an ex-parte award was made saddling him with liabilities to the tune of Rs. 6.5 crores. It is alleged that no copy of the Award was ever sent to him.

6, The impugned Award is challenged on the ground of fraud played upon the petitioner and it being based on false and fabricated documents.

7. The petitioner further relies upon the fact that the impugned Award was supposed to have been made on 25.8.2001 whereas the Execution was filed in March 2003. It is claimed that the real story was that blank signatures were obtained in September 2002 during his police remand. Since the petitioner had filed an application, highlighting the illegality on the part of the police and the respondent, they kept waiting for outcome of the said

application; the writ petition was later disposed of on 21.2.2003 as the charge sheet had been filed. It is claimed that the Award surfaced subsequently. At the time of institution of the present proceedings, the petitioner was in jail, having been arrested on 6.9.2002.

8. After notice was issued, the legal heirs of the first respondent i.e. Smt. Savitri Devi Goenka entered appearance and caused a reply to be filed. Apart from several technical objections, the ground pressed for rejection of the petition is that it was filed in July 2003, beyond the period of limitation. It is alleged that the petitioner had complete knowledge about the making of the Award. It is alleged that a copy of the Award was sent to the parties including the petitioner through registered post A/D letter dispatched on 7.9.2001. In these circumstances, it is claimed that the objections are hopelessly barred in view of Section 34(3) of the Act.

9. The respondent contests the allegations about the petitioner's counsel coming to know the existence of the Award on 16.5.2003 and detection of the execution case for the first time on 15.7.2003. It is claimed that the petitioner conceded that he had filed Civil Suit 86/2004 which was pending before the Civil Judge challenging the Award. The same was however, later withdrawn.

10. The respondent No.1 does not deny that the petitioner was arrested on 6.9.2002 in connection with an FIR lodged by the late Ashwani Kumar Goenka. It is claimed that the petitioner was given documents of the charge sheet dated 5.12.2002 by the Inquiry officer in the Court of Sh. M.C. Gupta,

Metropolitan Magistrate. They included documents pertaining to the Award. It is also urged that the record of the arbitration was seized from the third respondent on 9.9.2002 and it is part of the judicial record pending before the Metropolitan Magistrate, later summoned by this Court, in the present proceedings.

11. It is claimed that the petition is not supported by an affidavit of Kanti Bhai Damani. The respondents dispute the authority of Hetal Damani, daughter of the petitioner to file the present proceedings. It is also averred that the entire record of the charge sheet in the criminal proceedings were furnished to the petitioner on 5.12.2002. He applied through his counsel on 13.3.2003 for inspection of the record. The record included the seizure memo dated 9.9.2002 along with the original record of the Arbitrator. It is, therefore, alleged that the petitioner had full knowledge of the award and could have taken effective steps to approach the Court in a timely manner.

12. It is also alleged that the petitioner and his wife i.e. the second respondent continue to live as husband and wife and that the sureties for grant of bail to the petitioner, at Police Station, Tilak Marg were his wife's brother. It is alleged that if indeed the relationship were strained, as alleged, such surety would not have appeared to have him released.

13. Mr. S.B. Upadhyay, learned senior counsel submitted that late Ashwini K. Goenka was Managing Director of Savitri Metal Pvt. Limited. He had criminal antecedents and several cases were pending against him. He

developed intimacy with the second respondent i.e. the petitioner's wife. On 29.4.1993 an agreement was executed between the second respondent and Savitri Metal Private Limited whereby she was appointed as authorized agent of the company. Counsel further stated that the petitioner's conduct and business were not liked by his wife and Ashwini K. Goenka and they attempted to oust him from their life and business. As a result, the second respondent got the petitioner implicated in a matrimonial dispute and filed FIR 83/2002 alleging offences under Sections 498-A/406 I.P.C. It is also claimed that the petitioner left Delhi in October 2001 and settled in Ahmedabad. He filed a writ petition seeking the quashing of the First Information Report (FIR). He was arrested upon a visit to New Delhi on 6.9.2002 and detained in police custody for 14 days. He was later remanded to judicial custody till 31.10.2003 when he was eventually released on bail. Its counsel submitted that during police custody, the petitioner was taken to a room in Qutub Hotel where the late Ashwini Kumar Goenka, respondents 2 and 3 and others tortured him physically on one pretext or the other. Counsel also relied upon an affidavit filed in W.P.(C) 1026/2002 alleging that he was forced to sign various papers including documents belonging to arbitration proceedings.

14. Learned counsel submitted that the falsity of the so called arbitration proceedings is evident from no mention of it in the First Information Report or in the charge sheet filed in the criminal proceedings lodged by Ashwini K.

Goenka. It is claimed that the complicity of the Ashwini K. Goenka and the second respondent is clear from the fact that though the second respondent who is the petitioner's wife was named as an accused in the FIR, yet he bequeathed 50% of his property in her favour in a Will. Probate proceedings are pending in this Court in respect of the said Will.

15. Counsel invited a reference to the original award and submitted that its false and fabricated nature is apparent, on a bare glance as some typed sheets are stuck to stamp paper. It was also alleged that the falsity of the Award is further apparent from the fact that the second respondent had named the petitioner as an accused and despite this the petitioner is alleged to have consented to having the matter referred to arbitration by her father i.e. the third respondent. It is submitted that the said FIR alleging commission of offences under Section 498A I.P.C. was lodged on 8.2.2002. It was submitted that even in the FIR there is no mention of the Award although the second respondent alleged that the petitioner had cheated or mis-appropriated funds of Ashwini K. Goenka and had compromised with him to pay money of which he got premature bonds of RBI encashed. Learned counsel submitted that upon an overall conspectus of the sequence of the events it is very clear that there was no arbitration agreement and that no arbitral proceedings were ever held; the so called proceedings were not arbitration proceedings in the eye of the law since no copy of the Award was ever received by the petitioner and he came to know about the same when his counsel met him in jail on 17.7.2003.

Learned counsel also submitted that the reliance placed on the postal receipt dated 7-9-2001 *ipso facto*, establishes nothing as the third respondent's affidavit itself discloses that the award was not disclosed. The petitioner never received it; indeed the late Ashwini Goenka never even asserted any rights in relation to the award, even though it purported to award him the amount of Rs. 6.5 crores with interest at 20% p.a; it was only after the petitioner was taken into custody and subjected to torture and also made to sign several sheets of paper, that were misused to create fabricated documents, that the award surfaced, in the form of an execution petition. In fact there was no arbitration proceeding, or award and no such document was sent to the petitioner, ever.

16. Learned counsel submitted the present petition has to be construed within time. He relied upon the decision reported as *Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd. Kanpur*, 1999 (1) RAJ 378 SC as well as *Pramod Chiman Bhai Patel vs. Lalit Constructions & Anr.*, 2003(4) RAJ 171 Bombay to say that in the absence of a valid arbitration agreement, further proceedings and award said to have been taken or made further to it are a nullity. He adverted to the document dated 5.8.2001 and submitted that it never can be construed as an arbitration agreement because Ashwini K. Goenka was not a party to it, even assuming the petitioner to have signed it, though it was not so signed. He also submitted that there is absolutely no proceeding before the Court indicative of any compliance with the mandatory provisions of the Act showing that the petitioner and Ashwini K. Goenka ever

submitted their disputes for reference and decision to the third respondent D.P. Jain in accordance with law.

17. It was also submitted that a delivery of an arbitral award under Section 31(5) is not a idle formality and is a matter of substance. It was contended that for delivery of the arbitral award to a party affected it should be received by him. This sets into motion several period of limitation prescribed under the Act. He relied upon the decision reported as *Union of India vs. Tecco Trichy Engineers and Constructions*, 2005 (4) SCC 239. Learned counsel submitted that apart from not mentioning about the Award in the FIR lodged by the second respondent even Ashwini K. Goenka made no mention about it in FIR 316/2002 dated 10.7.20902. Learned counsel placed reliance on the contents of the said FIR and submitted that these circumstances go to show that the so-called arbitral proceedings and Award cannot be construed to be so in the eyes of law. The affidavit of Sh. D.P. Jain a certified copy of which has been placed on the record was filed in the criminal proceedings. It clearly states that he had not despatched the Award to Ashwini K. Goenka.

18. It was submitted that the entire circumstances in which the award was procured are shrouded in extremely suspicious circumstances. It is also unreasoned, and therefore illegal, being contrary to Section 31 and the public policy in India. It does not disclose compliance with any form of legal or other proceeding, as mandated by Section 24; for these reasons, it has to be set aside as patently illegal.

19. Learned counsel for the first respondent Ms. Malvika Rajkotia submitted that the Award has assumed the force of a decree and consequently execution proceedings were filed for its enforcement. Ashwini K. Goenka died and is legal representative i.e. the mother had been substituted in the present proceedings. Counsel submitted that the petitioner has no-where spelt out how he became aware of the Award. Even the present petition was not filed with his affidavit. The precise date on which the petitioner became aware of the Award is also not disclosed. It was contended that the statement that the Award was not received at the address, cannot be accepted at the face value because the second respondent i.e. petitioner's wife continues to reside there.

20. Learned counsel contended that this Court should not on the basis of the pleadings and lack of particulars, go into details as to whether the notice of the Award was served and whether the parties were bound by an arbitration agreement. The criminal proceedings, learned counsel submitted led to seizure of the original award as well as the receipt dispatching the same to the petitioner and Ashwini K. Goenka. These are part of the judicial files, since the criminal proceedings were summoned for consideration by the Court.

21. Learned counsel submitted that the entire story about matrimonial discord between the petitioner and the second respondent cannot be accepted since there no divorce proceedings are pending between them. She relied upon the letter dated 5.8.2001 showing that an arbitral agreement existed

between Ashwini K. Goenka and petitioner. The petitioner and the second respondent referred the same to the third respondent. The respondent after considering the points of view of both parties made his Award on 25.8.2001. This was subsequently dispatched to the parties, on 1.9.2001. If the petitioner was aggrieved, he would have preferred objections immediately upon receipt of the Award. He did not do so and has now come forward giving all kinds of excuses for the delay.

22. Learned counsel contended that while there is no doubt about certain facts such as the petitioner's arrest and his release in October 2003 yet there is ambiguity or no explanation about important and material aspects such as no express authorization to file the present proceedings; no separate pleading indicating the details as to how the petitioner became aware of the award; no explanation as to why the petitioner could not have been aware of the award, even if he is deemed not to have received it in September – October 2001, at least in December 2002 when copies of documents were furnished to him. Learned counsel submitted that the respondent No.2 has not denied the receipt of the Award. She too was a party to the proceedings and she continued to live in the premises. Her relationship with the petitioner cannot be considered as a strange since no divorce proceedings or any other matrimonial proceedings are pending between them

23. Learned counsel relied upon a judgment of this Court reported as *Delhi cantonment Board vs. Daulat Rai & Sons*, 2001 (60) DRJ 167 and stated that this

Court has no discretion in the matter of entertaining a petition under Section 34 once the period prescribed under Section 34(3) i.e. the outer limit of 120 days from the receipt of arbitral award lapses.

24. A factual narrative discloses a very peculiar and if one may so express, unique set of facts. Before dealing with the discussion on the merits of the submission, it would be necessary to extract the letter dated 5.8.2001 which is has acted as reference to arbitration in this case:

*"To,
Shri D. P. Jain (Arbitrator)
C/o K.D. Saga & Co.
D-1, Punjabi Basti,
Nangloi,
Delhi*

*Reg: Arbitration in respect of dispute between Kanti Bhai
Damani, Kusum Damani & Ashwini Kr. Goenka.*

Respected Sir (Babuji),

*This is reference to the above and discussion held with you
with me alongwith Kusum and proceeding held on various
dates.*

*In this connection I would like to inform you that Shri
Ashwini Kr. Goenka has demanded a sum of more than Rs.12
Crores but I am not in position to make payment of the entire
12 crores as I have already spent a sum of Rs.3.5 crores on
various heads including Income Tax payment of Rs.2 crores
and rest of the amount is invested by me in the name of your
grand children and relatives and different financial
institution.*

*As such I would request you to get the case settled at a sum
which is reasonable and which I have indicated to you
verbally. Further I request you to kindly grant at lest one
year's time to me to make the payment.*

I hope you will do the needful in the interest of your daughter (Kusum) and Grand children.

Thanking you,

Yours truly,

*(Kanti Bhai Damani & Kusum Damani)
FU-42, Pitampura, Delhi-110085"*

25. A schedule containing list of items has been annexed to the said document. The Award in this case bears the date 25.8.2001 on which day the third respondent signed it. The same reads as follows:

*"BEFORE SRI D.P. JAIN, NO. D-1, Punjabi Basti,
Nangloi, New Delhi.*

BETWEEN

Sri Kanti Bhai Damani son of Sri P.O. Damani and Smt. Kusum Lata Damani w/o Kanti Bhai Damani, Residing at No. FU-42, Pitampura, New Delhi (hereinafter referred to as "the First Party")

AND

Sh. Ashwini K. Goenka residing at No. H -538, RIICO Industrial Area, Bhiwadi (hereafter referred to as "the Second Party")

AND WHEREAS Kusum Damani is my daughter. Sri Kanti Bhai Damani is my son-in-law are carrying on business jointly and / or severally as brokers and commission agents in aluminium trade having their place of business at No. FU-42, Pitampura, New Delhi and they did the business as broker and commission agent for Ashwini Kumar Goenka and his companies during the last 7 years i.e. from 1992-1999.

AND WHEREAS the first party while working as agent/broker of the second party has collected huge amount of more than Rs.12 Crores by selling of Aluminium and its products to various

existing and non-existing firms by setting and collecting payment from buyers of second party, during the period 1995 to 1999 when the second party was suffering from various diseases and sale of metal was totally looked after by the first party. And the first party has kept huge amount with them on account of the second party and the financial position of the second party has deteriorated and he has come to know about the above fact and in this process approximately Rs.12 crores are lying with the first party.

AND WHEREAS the second party had made various enquiries and investigations and came to know that the first party has kept with them an amount of more than Rs.12 crores in the manner detailed above. Therefore, the disputes between the parties have arisen and the second party have asked for return of the said money from the first party. To resolve such disputes among the parties I Sri D.P. Jain son of Late Sri K. M. Jain was appointed as Arbitrator by mutual consent of all the parties to settle all the differences between the parties once for all. The parties hereto agreed that the decision of Sri D.P. Jain shall be final and binding on all the parties.

AND WHEREAS I Sri. D.P. Jain held various meetings among the parties to adjudicate the disputes and difference between the parties and after discussing the matter at length with both the parties I am giving the following Award in the following manner:-

AWARD

- a) It has been represented by the First Party that out of the total sum of Rs.12 Crores he has spent approx. Rs. 3.5 Crores on various heads including Income Tax payment of Rs.2 Crore and other amount has been deposited and invested in the name of their children in various banks/financial institutions and relatives etc.*
- b) The first party has submitted that in full and final settlement they are ready to pay a sum of Rs.6.5 Crores and asked for six months time to do the same. The Second party has accepted if subject to condition that the entire amount to be paid within six months from the date of award failing with which first party will pay a sum of Rs.12 Crores.*
- c) Although the second party is not agreeable to receive any amount less than Rs.9 crores, but I, on considering the submissions made by the respective parties and after obtaining the*

consent of all the parties pass the following Award.

(i) The first party shall refund in aggregate the Sum of Rs.6.5 Crores to the second party within a period of 6 months from the date of Award after encashing all the RBI Bonds lying with him and selling the properties except the properties purchased before 1994 and / or transferring the properties in the name of the second party as well as recovering the deposits lying with his parties, relations, banks, financial institutions, etc.

(ii) It is recorded that all the ornaments lying with the first party shall remain with them and the second party shall not make any claim against their ornaments.

(iii) In case the first party fails to repay the said money within the aforesaid agreed period of 6 months, the second party shall be entitled to recover the whole amount of money as per law and the first party shall be liable to pay interest also to be calculated @ 20% with yearly rest.

*D.P. JAIN
Arbitrator"*

26. Copies of letters which are in dispute, allegedly enclosing the award, written to Ashwini Goenka on 1.9.2001 and to the present petitioner are also on the record. The postal receipts bear the date 7.9.2001 and are attached to it. These documents were seized from the residence of the third respondent, the arbitrator, who is also the Petitioner's father-in-law, in the criminal proceedings arising out of FIR 316/2002. The petitioner alleges that whilst he was in custody, signatures were obtained from him. during the police remand on several blank sheets of papers which were subsequently used by the respondents 2 and 3 in connivance with Ashwini K. Goenka in support of the theory that an Award was made. The FIR by the second respondent against

the petitioner alleging commission of offences under Sections 498-A and 406 was lodged in early 2002. The FIR naming the petitioner and others including the respondent No.2 emanated from a complaint dated 13.5.2002 by Ashwini K. Goenka. The FIR was eventually lodged on 10.7.2002 and the charge sheet, filed on 4.12.2002. A copy of the charge sheet is part of the record. It has fully extracted the complaint by Ashwini K. Goenka. An interesting feature of this document is that the complainant, Ashwini K. Goenka alleged that the petitioner and the respondent No.2 confirmed that they cheated him and siphoned away money and in the presence of D.P. Jain promised to return his money. The relevant part of the said FIR reads as follows:

"The said Kanti Bhai Damani and Kusum Damani in connived and conspired with the above named persons have cheated & deceived me fraudulently and dishonestly by inducing me to hand over my goods to them and misappropriate the goods for their wrongful gain and to cause wrongful loss to me. Their such acts have caused irreparable loss damage and harm in my body, mind, reputation as well as loss of my property. Their said acts have caused wrongful loss to me and wrongful gain to them.

The said Kanti Bhai Damani and Kusum Damani and in collusion & conspiracy with each other have also committed offence for forgery and fabricating false bills, vouchers, invoices and money receipts and thereby they made wrongful gain causing wrongful loss to me. They forged the documents for the purpose of cheating me and criminal breach of trust and fraudulently and dishonestly used the same for the purpose of committing aforesaid criminal offences.

During various discussions, the said Kanti Bhai Damani and Kusum Damani have confirmed to have cheated me and siphoned away the money and from time to time in the prersence of Sri. D.P. Jain and promised me to return my money. Kanti Bhai Damani and Kusumlata Damani tendered their apology for their above acts and promised to refund my money. However, when I demanded my money both Kanti Bhai Damani and Kusumlata Damani on one pretext or the other did not pay my money I was regularly visiting their residence. I am in possession of casssette recorded conversation

with Kusum Damani, D.P. Jain and Hetal Jain regarding the above. They now threaten me that they are powerful, influential and wealthy people and they can purchase every body/anybody and they do not care for me. They even threaten me to evaporate me from this world if I would dare to demand my money from them or to lodge this FIR with police. He is also threatening me that he will implicate me in various false cases and shall put me in trouble. "

27. From the above it would appear that at least till the date of the lodging of the charge sheet in December 2002, Ashwini K. Goenka was unaware of the existence of the Award. His version about the petitioner's liability was that the latter promised to return moneys to him (Goenka) in the presence of the third respondent, i.e D. P. Jain. The Award became part of the criminal proceedings under FIR 316/2002 when it was recovered from the premises of the third respondent. The copy of an affidavit filed in Court by D.P.Jain, the third respondent, is also on record. The material portion of the same reads as follows:

"That in the third / last week of May, 2001 , I received a letter from my daughter Kusum Late Damani, when I cam to know about the misappropriation of money by my son-in-law using my daughter as a tool. That I and my daughter tried to persuade him to settle the dispute and save the entire family. My son-in-law used to beat my daughter on petty issues.

4 . However, my son-in-law agreed to appoint me as arbitrator to settle the dispute between my daughter, son-in-law and Ashwini K. Goenka as per the request of my son-in-law, I acted as an Arbitrator and settle the dispute after hearing both the parties and passed an Award dated 25.8.2001. As my son-in-law came to know that I have passed an Award he threatened me not to communicate the same to Sh. Ashwini K. Goenka, otherwise, consequences would be better. As such I did not give the copy of Award to Mr. Ashwini K. Goenka and kept it with me but informed him subsequently."

28. As against the above, it is contended on behalf of the first respondent that the petitioner has not disclosed vital facts such as his counsel applying for inspection on 13.3.2003 in the criminal Court and that the second respondent's relationship with the petitioner at best is ambiguous. It was also contended that the petition is not maintainable since Kanti Bhai Damani did not affirm an affidavit in its support; the supporting affidavit was executed by his daughter, who is not authorized to do so.

29. The first question which arises is whether there is any substance in the petition of the respondents that the petitioner was aware of the proceedings and has approached the Court belatedly. The judgment in *Delhi Cantonment Board's* case and the text of Section 34(3) made it clear that any objection to an Award has to be filed within the time prescribed i.e. 90 days and if for some reasons deemed sufficient by the Court beyond the such period but within an extended period 30 days. There is no dispute that if these rules were to be applied strictly in this case, petition is facially barred. The petitioner has however, relied upon the judgment reported in *Tecco Trichy Engineers & Constructions* for the submission that the date of publication is with reference to knowledge of the Award. In that judgment the Supreme Court held that the delivery of an arbitral award is not a matter of mere formality and is one of substance. This would imply that the arbitral award has to be received by the party, upon which several period of limitation including an application for setting aside the Award is set into motion. It was held crucially that delivery

of the copy of the Award has the effect of conferring certain rights on the party as also entitling a litigant, the right to exercise those rights on expiry of period of limitation. The delivery of copy and receipt of it, by each party constitutes an important stage in the arbitral proceedings.

30. It is, therefore, necessary to decide whether the petitioner's submission that he became aware of the award only in July, 2003 has some substance. Before proceeding with that it would be necessary to deal with one submission about the maintainability of proceedings. It is no doubt true that the affidavit in support of the present petition, was sworn by Hetal Damani; yet one cannot unmindful of the fact that as on that date the petitioner was in custody; he had been arrested on 6.9.2002 in connection with FIR 316/2002 lodged by Ashwini K. Goenka. The subsequent pleadings such as applications filed in the case and the replication has been signed by him.

31. On a consideration of the allegations contained in the FIR against the petitioner in FIR 316/2002, extracted in the charge sheet filed in December 2002, it is apparent that Ashwini K. Goenka even if aware of the submission of disputes to reference and subsequently the Award, maintained a studied silence in that regard, about its existence. He specifically adverted to the third respondent and the role played by him, in his complaint. Nevertheless, he omitted any mention of the Award. Equally, the second respondent had also not adverted to the Award in her complaint or First Information Report. The judicial records contained in both the FIRs as well as the documents in the

criminal proceedings were summoned by order dated 15th December, 2006, and have been considered by this court.

32. The affidavit by Sh. D.P. Jain the third respondent—Arbitrator also bears out the fact that the Award was not made known to Ashwini K. Goenka; yet from amongst the documents seized from his premises, a letter identical to the one written to the petitioner on 1.9.2002 along with the postal receipt dated 7.9.2001 was taken into custody. If the said postal receipt in respect of the petitioner's letter were to be given credence there is no doubt a similar notice could have been received by Ashwini K. Goenka about the award. A bare perusal of the Award would also show that it is a piece of paper stuck on stamp paper. Though it adverts to proceedings, as a matter of fact no other documents exist in the record of the criminal proceedings or before this court indicating of any arbitral proceedings.

33. From a conspectus of the above facts, this Court is of the opinion that even though some doubts about the possibility of the petitioner's knowledge of the Award and the maintainability of the proceedings have been raised, such as the absence of his affidavit filed at the initial stage the fact that his counsel inspected the record of criminal proceedings on 13.3.2003 etc. on a balance of probabilities, it can be held the Award was not published or made known to Ashwini K. Goenka as well as the present petitioner. In the circumstances, on a proper application of the law in *Tecco Trichy Engineers and*

Construction it had to be held that the petitioner became aware of the Award in the circumstances, described by him in the present petition, in July 2003, after the late Ashwini Goenka filed the execution proceeding. The present petition under Section 34 is, therefore, maintainable.

34. The second issue which arises for consideration is whether the document dated 5.8.2001, can be described as a valid arbitration agreement. Section 7 of the Arbitration and Conciliation Act, 1996 defines what is an arbitration agreement. Section 7(3) states that an arbitration agreement shall be in writing. Section 7(4) states that an arbitration agreement is in writing if it is contained either:

- a) in a document signed by the parties;
- b) an exchange of letters, telegrams or other means of

communication which provide record of the agreement; or the exchange of statement of claims and defence in which existence of agreement alleged by one party is not denied by the other.

35. The decisions of the Supreme court in *K.K. Modi Vs. K.N. Modi* (1998) 3 SCC 573 and *Jagdish Chander Vs. Ramesh Chander*, (2007) 5 SCC 719 are authorities on the point that any proceeding in order to qualify the description of arbitral proceedings must be founded on an agreement which complies with Section 7. In the latter case the Court specifically held that the mere use of the word "arbitrator" or "arbitration agreement" in a clause will not make document on arbitration agreement, if it does not otherwise amount to one

under Section 7. In this case the sole document relied upon by the respondent – of which there is no advertence through any contemporaneous writing by the Ashwini K. Goenka during his life time, is the one dated 5.8.2001. Genuineness apart even if it is accepted at face value, what is apparent that it is signed by the petitioner and the second respondent; it requests the third respondent to get the case settled at reasonable sum indicated to him verbally and further requests a year's time to make the payment. The only indication as to arbitration is to the mention to that expression in the subject reference contained in the letter. This document was not signed by Ashwini K. Goenka. There is not a single document written by Ashwini K. Goenka concurring to any arbitration agreement or even treating the letter dated 5.8.2001, written to the third respondent as an arbitration agreement. In fact the letter was not even marked to him. In these circumstances, the Court is of the opinion that the letter dated 5.8.2001 cannot be construed as an arbitration agreement.

36. The relevant provisions of the Act, dealing with the arbitration agreement, and regularity of proceedings reads as follows:

"7 ARBITRATION AGREEMENT.

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in -

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

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24 HEARINGS AND WRITTEN PROCEEDINGS.

(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials :

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party; and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

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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.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is

stated.

(3) The arbitral award shall state the reasons upon which it is based, unless -

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(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.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

(8) Unless otherwise agreed by the parties, -

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify -

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Explanation : *For the purpose of clause (a), "costs" means reasonable costs relating to -*

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and
(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award."

37. The most peculiar feature of this case is that no proceedings or their record is available. As held in the earlier part of the judgment, the parties did not enter into an arbitration agreement, valid and answering to the description under Section 7 of the Act. The question is whether the award discloses any infirmity of the kind, mentioned in Section 34. Serious exception was taken to the legality of the award, on behalf of the petitioner. It was urged that though a colossal liability of Rs 6.5 crores has been fastened upon him, the award was never preceded by any hearing; no records or proceedings as mandated by Section 24 took place. The arbitrator, who is a party before the court, has not chosen to file an affidavit. The second infirmity, said to attach itself to the award, is the absence of reasons.

38. The hallmark of every judicial, or quasi judicial proceeding, is its regularity. Unlike an administrative act, such proceedings have to conform to a modicum of regularity, where the parties presence (or absence) is noted, the dates of the tribunal assembling to transact its business are recorded, and the proceedings too are appropriately minuted or recorded. Of course, if the proceedings assume formality, there has to be a greater degree of elaborateness in the record keeping. This lends transparency and avoids the odium of secrecy and clandestine transactions. Section 24 assures certain

minimum standards of what should be contained in arbitral proceedings. Section 31 on the other hand, embeds a non-negotiable standard in that every arbitrator has to disclose the reasons for the award. This is in striking departure to the previous law, which did not enact such a requirement. These essential ground rules were enacted as mandatory because the arbitral mechanism replaces the more formal method of dispute resolution; the parties are left free to refer their disputes to a chosen adjudicator. Yet, the function discharged by the arbitrator is no less crucial; though the proceedings are less formal, nevertheless there have to be proceedings. The standards imposed by the Act are absolute and unalterable; some provisions may not be mandatory in the sense that their breach would not render the award a nullity; but some fundamental conditions, integral to the integrity and regularity of the proceedings are mandatory; their breach would invalidate the award and the adjudicatory process itself.

39. Intervention of courts with awards of arbitral tribunals is confined to grounds enacted under Section 34. The Supreme Court, in *Oil & Natural Gas Vs, Saw Pipes Ltd.* 2003 (5) SCC 705 scrutinized this provision, and held that interference was permissible on grounds of public policy, which in turn was explained as the award being contrary to:

- (a) Fundamental policy of Indian Law;
- (b) the interest of India; or
- (c) Justice or morality;

(d) in addition, if it is patently illegal.

40. *Saw Pipes* was affirmed in *Hindustan Zinc Ltd. Vs. Friends Coal Carbonization* 2006 (4) SCC 445 and *Mc Dermott International Inc Vs. Burn Standard Co. Ltd.* 2006 (11) SCC 181. It is not every error, even egregious, whether it is factual or legal, that can be the basis of judicial interdiction with the award of an arbitrator. The threshold for a challenge is considerably high; certainly, it is higher than what was contemplated in the old Arbitration Act, 1940. The four indicators mentioned in *Saw Pipes* is a pointer to something striking, and prominent, which should impel the court to use its jurisdiction. Otherwise, the challenge mechanism would add a layer of substantive litigation in the judicial system – a result perhaps contrary to the intention of the law-makers.

41. An award made on the basis of an invalid agreement would be a nullity. Such an award would be *coram non judice*. The law in this behalf in India is clear and explicit. An order passed by a Tribunal lacking inherent jurisdiction would be a nullity. Where such a lack of jurisdiction is established, the same goes to the root of the matter. [*Balvant N. Viswamitra and Others v. Yadav Sadashiv Mule (Dead) Through LRS. and Others*, (2004) 8 SCC 706]. In *Dharma Prathishthanam v. Madhok Construction Pvt. Ltd.* [(2005) 9 SCC 686] the Supreme Court held that where the appointment of an arbitrator and the reference of a dispute to him is *void ab initio*, and the resulting award would also be liable to be set aside being totally incompetent or invalid.

42. The question of regularity of proceedings, and the validity of awards which were not preceded by provisions mandating the manner of conducting proceedings, and unreasoned awards, was dealt with expressly in the *Saw Pipes* decision, in the following terms:

"The question, therefore, which requires consideration is - whether the award could be set aside, if the arbitral tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties ? Under sub-section (1)(a) of Section 28 there is a mandate to the arbitral tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be - whether such award could be set aside ? Similarly, under sub-section (3), the arbitral tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the arbitral tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered ? Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside ? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the arbitral tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34."

43. In this case, there are absolutely no documents indicating if, and whether any procedure was followed by the arbitrator; the documents produced before him and considered by him, or even the dates of hearing. As is evident from the award, it is bereft of reasoning. Therefore, little is left to

discern that it is contrary to provisions of Section 24 and 31(5) of the Act. It seeks to cast a huge liability on the petitioner, to the extent of Rs. 6.5 crores. No reasons which persuaded the arbitrator to award such an amount, with 20% interest p.a are apparent. The circumstances in which it was drawn are shrouded in mystery, to say the least. Sustaining a document which facially does not answer the description of an award, or even a legally enforceable document would be giving judicial shelter to an unsupportable transaction. Therefore, on the basis of materials existing on the record, the court is of the opinion that the award is contrary to public policy, embodied in provisions of the Act; it cannot pass the judicial muster.

44. The petition, OMP. 284/2003 is accordingly allowed. All pending interlocutory proceedings are hereby disposed of in the above terms. The records of the Criminal proceedings shall be returned to the concerned Courts.

Order Dasti.

MARCH 31st 2008

(S. RAVINDRA BHAT)
JUDGE