

(2010) 12 CAL CK 0046

Calcutta High Court

Case No: A.P. 484 of 2010

Amrik Singh

APPELLANT

Vs

Magma Fincorp Ltd.
and OthersRESPONDENT

Date of Decision: Dec. 3, 2010**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 3, 31(5), 34, 34(3)
- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 9(5)
- General Clauses Act, 1897 - Section 27
- Limitation Act, 1963 - Section 5

Citation: (2011) 2 CALLT 314 : (2011) 2 CHN 684**Hon'ble Judges:** I.P. Mukerji, J**Bench:** Single Bench**Advocate:** Chanchal Nag Chowdhury, for the Appellant; Mainak Bose and K.K. Tiwari, for the Respondent**Final Decision:** Dismissed

Judgement

I.P. Mukerji, J.

An application u/s 34 of the Arbitration and Conciliation Act, 1996 (hereafter called "the Act") was filed by the Petitioner challenging an award made and published by the arbitrator on 17th December 2009. According to the records, this application was filed on 26th August 2010. Prima facie, it appeared to this Court to be barred by limitation. Therefore, I did not admit it when it was moved on 14th September 2010. I asked the parties to file affidavits to ascertain whether the application was filed within time. Such an exercise became necessary because of Section 34 of the Act. It says that an application to set aside an award has to be made within three months from the date of its receipt by the party making the application. It can be made within a further period of 30 days on satisfying the court that the applicant had sufficient cause for not making the application

within that time, "but not thereafter". Now, it is well settled that once, the period of 30 days after the initial period of three months has expired, the court has no power to condone any further delay u/s 5 of the Limitation Act. The language of the Section is such that this time period is absolute and un-extendable.

2. The Petitioner is a borrower of money from the Respondent No. 1. He says in paragraph "8" of the petition that on 28th May 2010 he received "a bunch of papers" from M/s. Sinha & Company, advocates along with a letter dated 24th May 2010, apprising him of an order dated 20th May 2010 passed by this Court in Execution Case No. 132 of 2010 appointing a receiver to take physical possession of some of his assets. Therefore, time is to run from that date. Hence, the setting aside application was made on time.

3. Affidavits have been duly exchanged between the parties. The relevant records are before the court.

4. Before proceeding further with this judgment it is very relevant to note that the award was sent by the Arbitrator through the Indian Postal Authorities by "Registered Post with Acknowledgement Due" to the borrower Petitioner, the Respondent No. 2 being or described as co-hirer by the first Respondent, financier and the Respondent No. 3 being or described by them as the guarantor. All three despatches were made on the same day, that is, 6th of January 2010. Postal receipts are annexed to the Respondent No. 1's affidavit-in-opposition. The packet addressed to the Petitioner, borrower has not been returned undelivered by the postal authorities. But the Acknowledgement Due card showing its receipt by him has not been received by the Arbitrator from the postal department. The Respondent No. 2 according to records did receive the packet. The packet addressed to the Respondent No. 3 has been returned with the remark "un claimed".

5. How is the court to deal with the question of limitation on such facts?

6. Since, only the borrower makes this application, I will only consider the legality of service upon him. Sub-Section 3 of Section 34 says that an application to set aside the award has to be made within three months from the date of its receipt. Now, the questions are: Who is to send the award? Who is to receive it? and how are such sending and receiving to be made? Section 3 of the Act is a pointer. According to Sub-section (a) "any written communication" under the Act has to be delivered "personally" at the place of business or residence of the addressee. An Award is undoubtedly a written communication of the Arbitrator. Sub-Section 5 of Section 31 of the Act says that after the arbitral award is made a signed copy of it shall be delivered to each party. Sub-section (b) of Section 3 says that if either the place of business or place of residence cannot be found there is deemed receipt if any communication is sent to the last known address by registered letter or by any other means which provides record of the time of its delivery.

7. It is not the Respondent/ financier's case that the address could not be found. So the case does not come u/s 3(b).

8. The case on facts is that the document was sent by registered letter but the Acknowledgement card has not been returned by the postal authorities. As I have already said, there are receipts to show such sending, issued by the postal authorities.

9. Therefore, the said Respondent has to satisfy the court that the Arbitrator fulfilled the requirements of Section 3(a) of the Act. To answer this question some interpretation has to be given to the expression "delivered to the addressee personally" in that Sub-section. Now, does deliver to the addressee personally mean that in each and every case the arbitrator or his clerk has to personally visit a party to an arbitration and handover the award? My answer is, "no". An award may be sent by post and in that case the postman is the agent of the arbitrator to deliver such an award.

10. Now, the question is: Can the court hold on the existing evidence that the award was so delivered?

11. The only evidence before the court is regarding posting of documents. Section 27 of the General Clauses Act, 1897 says that service shall be presumed to have been effected by post by properly addressing, pre paying and posting by registered post a letter containing the document concerned. Therefore, one who alleges otherwise has to rebut the presumption. Order V. Rule 9 Sub Rule 5 of the CPC introduces a further presumption. If the acknowledgement due card is "lost or mislaid" or for any other reason has not been received by the court within thirty days from the date of issue of summons, presumption of service is made.

12. In my opinion, both these presumptions are applicable in case of service of awards. The Petitioner has shown nothing to rebut the above presumption.

13. I presume u/s 27 of the General Clauses Act, 1897 that the Award was received by the Petitioner in the usual course for receipt of ordinary letters shortly after 6th January 2010. Moreover, the Respondent No. 2 being co-hirer has admittedly received the award. He did not take any steps. The execution application was posted to the Petitioner to the same address as in this petition. That application was duly received by him, admittedly on 28th May, 2010. Even after receiving such application he waited till 26th August 2010 to make this application, a period of nearly three months. Even after making this application not even a rupee of the Respondent No. 1's awarded claim is admitted by him.

14. From the surrounding circumstances also as stated above I am quite convinced that the Petitioner had received the award and had deliberately not taken any steps.

For all those reasons this application is dismissed as being barred by limitation. The question of going into the merits does not arise.

15. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.