

# Dispute Resolution Hotline

January 05, 2013

## NEW SUPREME COURT RULES, SERVE AWARD UPON PARTY NOT ADVOCATE

In the recent decision of the Supreme Court, Benarsi Krishna Committee v. Karmyogi Shelters Pvt. Ltd<sup>1</sup> delivered on September 21, 2012, which was a Special Leave Petition (SLP) the specific question was whether an Award served on a party's counsel / advocate would amount to good service within the meaning of Section 31 (5) of the Arbitration and Conciliation Act (the "Act").

Section 31(5) provides that after an Award has been made a signed copy will be delivered to each party. The question before the Hon'ble court was as to whether the word "party" would mean to include an advocate of the party.

### FACTS

The Petitioner comprised of a committee of "managing landlords" that co-owned an estate. The Respondents were estate developers. The parties entered into an agreement for developing the said estate and disputes arose over certain payment issues. The Respondent filed a Section 11 application for the appointment of an arbitrator and after the arbitrator was appointed an Award was passed in favour of the Petitioners. Counsels for both the parties received duly signed copies of the Award. Although the Respondent's counsel received the Award, no application for setting aside the Award was made within the time limit of three months prescribed in Section 34 of the Act. Over a year after the Award the Respondent filed an application under Section 34 of the Act. The Petitioner objected that there was thus a delay of over 9 months in filing the set aside application. This objection was accepted by a single judge of the High Court wherein service to the counsel of the party was deemed a good service under the Act. On appeal the division bench reversed holding that service to advocate was not good service under Section 31 (5) of the Act and remanded the matter back to the single judge. This SLP was filed against the said order of the division bench. The Hon'ble Supreme Court examined the meaning of the expression "party" as it appears in Section 34 (3)<sup>2</sup>, 2 (1) (h)<sup>2</sup> and Section 31(5)<sup>4</sup> of the Act.

### HOLDING

The Hon'ble Supreme Court relied on its previous decision of Union of India (UOI) v. Tecco Trichy Engineers and Contractors<sup>5</sup> where it was held that the meaning of "party to an arbitration agreement" as provided in Section 2 (1)(h) and Section 34 (3) would mean "in the large organizations like Railways, "party" as referred to in Section 2(h) read with Section 34(3) of the Act has to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before the Arbitrator."<sup>6</sup> The Court had also held in the Tecco Trechy decision that delivery of the award to a party was a substantive right and not a mere formality since it set in motion several limitation periods such as application for correction, making an additional award or setting aside an award under Section 34(3) of the Act.

The Court in the present case accordingly relied on its previous decision in Tecco Trechy and held, "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(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."<sup>7</sup> The Court in this case also observed that as one having complete knowledge of the proceeding, a party would be in the best position to determine whether any applications for correction or setting aside need to be made.

### ANALYSIS AND CONCLUSION

The result of this decision was that the Section 34 application was taken to be in time and accordingly allowed.

This case has interesting implications in that it allows for a substantive right of setting aside to survive once bad service is proved by way of service to a pleader instead of the party itself.

- In an ordinary suit scenario of Order III of the Code of Civil Procedure which discusses recognized agents and pleaders, service to an advocate is sufficient. The decisions quoted by the Petitioner in the present case as well as other decisions discuss the right of an advocate to sign a consent decree on behalf of a party or the right to apply for a restoration when a suit is dismissed for default<sup>8</sup> or to set aside an ex parte decree<sup>9</sup>. This suggests that the power of an advocate to perform acts on behalf of the client does not summarily end and is contingent on the contents of the vakalatnama and the power of attorney. One could compare this with an arbitral proceeding. Although an arbitral tribunal becomes functus officio once the Award has been passed, this does not preclude it from serving parties with the Award. Similarly, the authority of the advocate ought not to be construed as restricted after the arbitration proceedings have ended. Therefore the Court may not have been entirely right in coming to the

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conclusion that it did.

- Under the scheme of the Act and in an arbitration, a "party" undertakes several actions such as for instance filing a statement of claim and defence, exchange of correspondence, applying to a court in a judicial proceeding to refer the matter to arbitration, applying for interim reliefs. It is nobody's case that in such contexts "party" means only the parties and not their advocates. Therefore the service to an advocate which allows for a consequent set-aside application would also be a legal proceeding in which "party" ought to be construed to include the advocate. If the premise of the power of attorney is wide enough to include acceptance of service and the power to file appeals such a power ought not to be curtailed by a constrained reading as applied by the Court.
- It is for the advocate to devise strategies as to what would be the best steps to take in an arbitral proceeding from a procedural and substantive legal standpoint. The client makes commercial decisions and decisions relating to whether it would be practical to proceed against the opposite party. On the other hand questions such as limitation to file an application or an appeal, whether a set aside application is likely to be successful on the grounds existing are all questions best answered by an Advocate. Indeed it is the advocate who would ultimately file all the applications following the Award. Therefore even from a practical standpoint an advocate may be better placed to receive an Award on behalf of a party.
- The decision has its merits when say limited power is given to an advocate to act on behalf of a client. Or as in Tecco Trechy service was made in a labyrinth government department to a person other than one dealing with the case. This is very different from a case where in fact an advocate is easily available and service to the party is in fact cumbersome. Another important shortcoming of this arrangement is that the substantive right of enforcement to the winning party will be denied since a party in a remote location will make it difficult to serve as a result extending the set aside limitation and consequently the finality of the Award!

In any event the take away from the case is that as arbitration lawyers, counsels would have to be careful in ensuring that going forward Award copies are served on the parties directly and not their lawyers alone.

– Shalaka Patil & Vyapak Desai

You can direct your queries or comments to the authors

<sup>1</sup> Benarsi Krishna Committee v. Karmyogi Shelters Pvt. Ltd. Special Leave Petition (Civil) No.23100% of 2010, Sep 21, 2012.

<sup>2</sup> Section 34 ... (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

<sup>3</sup> Section 2 (1) (h): Definitions. (1) In this Part, unless the context otherwise requires,- ... (h) " party" means a party to an arbitration agreement

<sup>4</sup> Section 31 (5) Form and contents of arbitral award: ... (5) After the arbitral award is made, a signed copy shall be delivered to each party.

<sup>5</sup> AIR 2005 SC 1832

<sup>6</sup> Union of India (UOI) v. Tecco Trichy Engineers and Contractors AIR 2005 SC 1832

<sup>7</sup> At para 15.

<sup>8</sup> Baro Bai v. Ramsunder 177 IC 409

<sup>9</sup> Jwala Devi v. Brigunath AIR 1944 All 238

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