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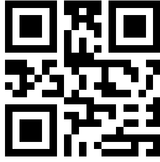

THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP/71/2022

MUKUT KALITA
S/O- LATE KHAGENDRA KALITA, R/O- HOUSE NO. 22, JANAPATH NO.1, NORTH JYOTI NAGAR, NEAR JYOTI NAGAR L.P. SCHOOL, P.O. BAMUNIMAIDAM, GUWAHATI-21.

VERSUS

HDFC BANK LIMITED
A COMPANY INCORPORATED AND REGISTERED UNDER COMPANIES ACT, 1956 HAVING ITS REGISTERED OFFICE AT HDFC BANK HOUSE, SENAPATI BAPAT MARG,LOWER PAREL (W), MUMBAI- 400013 AND HAVING ITS BRANCH OFFICE AT HDFC BANK LIMITED, PIBCO BUILDING, FIRST FLOOR, G.S. ROAD, RUKMINIGAON, KHANAPARA, GUWAHATI-22.

Advocate for the Petitioner : MR. I CHOUDHURY

Advocate for the Respondent : Mukesh Sharma

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER

Date : 20-07-2022

Heard Mr. I Choudhury, the learned senior counsel assisted by Mr. A Chowdhury, the learned counsel appearing on behalf of the petitioner and Mr. M Sharma, learned counsel appearing on behalf of the respondent, HDFC Bank Ltd.

2. This is an application under Article 227 of the Constitution challenging the order dated 27.04.2022 passed by the Court of the Additional District Judge No.1, Kamrup (M) in Money Execution Case No.241/2016, whereby the objection filed by the petitioner was rejected. By way of the instant proceedings, the petitioner had also challenged the Money Execution Case No.241/2016.

3. The facts of the instant case is that the one Santanu Narayan Bora (since deceased) had taken a loan from the respondent Bank on 28.08.2012 amounting to Rs.9,50,000/- for purchase of a vehicle i.e., Eicher 11.10 HD RHDH bearing Registration No.AS-01-EC-0592. For the purpose of securing the said loan, late Santanu Narayan Bora had requested the petitioner to be the guarantor for the said loan. The petitioner being acquainted with late Santanu Narayan Bora agreed to such request and accordingly became the guarantor of the loan amount of Rs.9,50,000/-. Accordingly, an agreement was executed between late Santanu Narayan Bora and the respondent Bank on 28.08.2012, wherein the petitioner stood as a guarantor.

4. It is the further case of the petitioner that the petitioner lost contact with late Santanu Narayan Bora and was completely unaware about any dealings with late Santanu Narayan Bora and the respondent Bank. In the year 2018, the petitioner received a notice dated 06.11.2017 issued by the Additional District & Sessions Judge No.4, FTC Kamrup Metro,

Guwahati in Money Execution Case No.241/2016, whereby the petitioner was directed to appear before the said Court. The petitioner on receipt of the said notice entered appearance in the said Money Execution Case. Upon entering appearance in the said case, the petitioner alleges that for the first time he came to learn about the fact that late Santanu Narayan Bora had defaulted in making payment of the loan in respect to which the petitioner was the guarantor. The petitioner also came to learn for the first time that upon such default made by late Santanu Narayan Bora, the respondent Bank had appointed an arbitrator and an arbitral award dated 23.05.2012 was passed, which directed payment of a sum of Rs.6,98,325.64 to the Respondent Bank jointly and severely by the petitioner and the late Santanu Narayan Bora. The petitioner thereafter tried to contact late Santanu Narayan Bora however, without any success. The petitioner thereafter upon further enquiry came to learn that the vehicle in question was infact stolen on 25.03.2014 and accordingly, an FIR was also lodged in West Police Station, Dimapur on 25.03.2014.

5. Thereafter, the petitioner filed an application under Section 47 read with Order XXI Rule 26 of the CPC in Money Execution Case No.241/2006. In the said objection filed on 31.06.2018, it was the specific case of the petitioner that no copy of the award as is mandatorily required under Section 31 (5) of the Arbitration and Conciliation Act, 1996 (in short, “the Act of 1996”) was served upon the petitioner for which the petitioner was not in a position to file an application under

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section 34 for setting aside the award. It was the further contention of the petitioner that the award could be put to execution and/or enforced only after the lapse of 3 (three) months from the date of receipt of the said award in terms with Section 31 (5) of the Act of 1996 and in the instant case as the said award was not furnished to the petitioner, the filing of the application under Section 36 of the Act of 1996 read with Order XXI by the respondent was premature and not maintainable. On the basis thereof, the petitioner sought for rejection of the application filed by the respondent under Order XXI on being defective and premature in nature.

6. To the said objection-cum-application filed by the petitioner, a written objection was filed by the respondent as decree holder, stating inter alia, that a Loan Agreement dated 28.08.2012 was executed by and between late Santanu Narayan Bora and the Respondent Bank and in respect of which the petitioner was the guarantor. Both the borrower as well as the guarantor who were the judgment debtor in the said proceedings, grossly failed to abide by the terms of the Loan Agreement for which the respondent Bank had made several request or reminders to the judgment debtors. Even on repeated request made by the respondent Bank as there was no effort to regularize the Loan Account for which a letter dated 14.08.2014 was issued thereby appointing one Mr. Rajesh Kumar Batra, Advocate as the Sole Arbitrator in the matter. It was further mentioned that cursory reading of the award itself would go to show that the sole arbitrator had issued notices on

26.09.2014 and 15.11.2014 but the judgment debtors did not appear before the Arbitrator. Consequently, the Arbitrator issued the last meeting notice on 21.03.2015 with a direction to appear in person or by a pleader, duly instructed, and answer all material questions relating to the claim. It was further mentioned that the learned arbitrator had fulfilled the requirement of Section 31(5) of the Act of 1996 which would be apparent from the fact that the sole arbitrator after passing the Arbitral Award sent a letter dated 23.05.2015 attaching the certified copy of the arbitration award to both the judgment debtors. The postal receipt along with the registered AD card would clearly show that the learned arbitrator after passing the Arbitral Award dated 23.05.2015 in Arbitration Case No.1179/2014 had posted signed copies of the Arbitration Award to the provided address of the judgment debtors No.1 & 2. It was further mentioned that the residential address of the judgment debtor No.2 who is the petitioner herein matches with the address as mentioned in the arbitration petition, postal receipt as well as the execution petition and as such, it is clear that the requirement under Section 31(5) of the Act of 1996 have been fulfilled by the Sole Arbitrator and the Decree holder. It was further mentioned that Section 3(1)(a) of the Act of 1996 clearly mandates that unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address. Under such circumstances, it was clear that service upon the

petitioner/judgment debtor No.2 was duly affected in the proper address in accordance with Section 3 of the Act of 1996. It was further mentioned that the judgment debtors if were aggrieved ought to have challenged the said proceedings before the competent court which was not done so within the period of limitation. Under such circumstances, the maintainability of the execution petition cannot be questioned under the provisions of Section 47 of the C.P.C.

7. The learned court below vide the order dated 27.04.2022 had rejected the said objection filed by the petitioner. In doing so, the Court below had come to a finding that the service upon the petitioner was made in terms with the Section 31 (5) of the Act of 1996 and there was compliance to the Section 3 of the Act of 1996. Under such circumstances, the question of the Execution Petition being premature does not arise in the facts and circumstances of the case. The Court therefore, issued the Writ by dismissing the said objection. It is against this order dated 27.04.2022 that the petitioner who was the judgment debtor No.2 in the execution proceedings is before this Court under Article 227 of the Constitution.

8. Mr. I Choudhury, learned counsel for the petitioner had submitted that the petitioner had come to learn about the arbitration proceedings as well as the award so passed in the year 2018 when the petitioner received the notice dated 06.11.2017 issued by the Additional District & Sessions Judge No.4, FTC Kamrup (M) at Guwahati in Money Execution Case

No.241/2016. It was the specific submission of the learned senior counsel that the petitioner was not served a signed copy of the Award as is mandatorily required in terms with Section 31(5) of the Act of 1996. Referring to the judgment of the Supreme Court rendered in the case of ***State of Maharashra Vs. ARK Builders Private Ltd.*** reported in ***(2011) 4 SCC 616***, the learned senior counsel further submitted that the Section 31(5) of the Act of 1996 is correlated with Section 34(3) of the said Act of 1996 inasmuch as, the expression "party making that application had received the Arbitral Award" as appearing in Section 34(3) has to be read with Section 31(5) of the Act of 1996 which mandates that the signed copy of the award to be delivered by the arbitrator to each of the party. The learned senior counsel further submitted that the period of limitation for filing an application for setting aside an arbitral award in terms with Section 34(3) of the Act of 1996 would only commence from the date a signed copy of the award is delivered to the party. In the instant case as till date no signed copy of the Award had been furnished, the petitioner is not in a position to prefer the Application under Section 34 of the Act of 1996. He further submitted that the Court below ought to have taken into consideration the said aspect of the matter and without taking into account the provisions of Section 31(5) in the proper perspective had come to a finding that the said provisions have been duly complied with.

9. On the other hand, Mr. M Sharma, learned counsel for the Respondent Bank submits that the Act of 1996 is self

contained Code and the provisions of section 5 of the said Act makes it further clear that no judicial authority shall intervene except where so provided in Part-I which deals with domestic arbitration. He further submits that the Act of 1996 provides a mode of challenge to the Arbitration Award which has been clearly spelt out in Section 34 of the Act. Section 36 of the Act deals with enforcement of Arbitral Award. Referring to Clause 24 of the Agreement for Loan dated 28.08.2012, the learned counsel for the respondent Bank submitted that communication/notices/correspondences have been specifically dealt with in the said clause. He submitted that in terms with clause 24.1(a)(iii), notice, payment and/or other communications provided for in the agreement shall be in writing and shall be transmitted in case of notice to the guarantor to the address as per the schedule. Drawing the attention of this Court to said agreement, the learned counsel for the Respondent Bank submitted that the address mentioned therein is the same address which is there in the various notices issued by the respondent Bank as well as by the Arbitral Tribunal. He further submitted that the notices as well as the certified copy of the award were sent to the same address in respect to which the petitioner had received service of the notice from the Executing Court.

10. After hearing the learned counsel for the parties and on perusal of the materials on record, it appears that by way of the application/objection filed by the petitioner, the very jurisdiction of initiating the execution proceedings had been

put to challenge. The grounds on which the proceedings had been put to challenge is on the basis that Section 31(5) of the Act of 1996 mandates that after the Arbitral Award is made, a signed copy has be delivered to each party. It is only after a signed copy of the arbitral award is delivered to each of the parties, the said arbitral proceedings stands terminated and then only a party aggrieved can resort to proceedings under Section 34 of the Act of 1996. It is only after the expiry of the period for making an application to set aside the Arbitral Award under Section 34 of the Act of 1996 subject to the provisions of Sub-section (2) of Section 36, such award shall be enforced in accordance with the provisions of the Code of Civil Procedure in the manner as if it was a decree of the Court. Sub-Section (2) of Section 36 is also relevant to the effect that mere filing of an application under Section 34 of the Act of 1996 would not make the award unenforceable unless the court grants the order of stay of the operation of the Arbitral Award in accordance with the provisions of Sub-Section (3) of the Section 36 on a separate application so made. But the question which arises before this Court is as to whether there was termination of the arbitration proceedings in the instant case and consequently, upon such termination of the arbitration proceedings, the Arbitral Award can be enforced.

11. Section 2(1)(c) of the Act of 1996 defines "the Arbitral Award to include an interim award. The phrase "arbitral award" had been used in several provisions of the Act of 1996.

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The statute recognizes only one arbitral award being passed by the arbitral tribunal which may either be a unanimous award or an award passed by the majority in the case of panel of arbitrators. An award is binding decision made by the arbitrator(s) on issues referred for adjudication. The award contains the reasons assigned by the tribunal on adjudication of the rights and obligations of the parties arising from underlying commercial contract. The legal requirement of the signing of the arbitral award by the sole arbitrator or by the members of the tribunal is found in Section 31 of the Act of 1996 which itself provides the form and the contents of an arbitral award. Sub-section (1), (2), (4) & (5) of Section 31 of the Act of 1996 clearly shows the necessity/legal requirement of signing the award. The said Sub-Sections of Section 34 are quoted herein below:

> *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.*
>
> *(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.*

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12. From a conjoint reading of the above quoted provisions it would show that Section 31 (1) is couched in mandatory terms and provides that an arbitral award shall be made in writing and signed by all members of the arbitral tribunal. If the arbitral tribunal comprises of more than one arbitrator, the award is made when the arbitrators acting together finally expresses their decision in writing and is authenticated by their signatures. An award takes legal effect only after its signed by the arbitrators, which gives its authentication. The making and delivery of the award are different stages of an arbitral proceeding. An award is made when it is authenticated by the person who makes it. The statutes make it obligatory for each of the member of the tribunal to sign the award to make it a valid award. The use of the word “shall” makes it a mandatory requirement. It is also not merely a ministerial act or an empty formality which can be dispensed with.

13. Sub-section (1) of Section 31 read with Sub-Section (4) makes it clear that the Act of 1996 contemplates a single date on which the arbitral award is passed i.e., the date on which the signed copy of the award is delivered to the parties. Section 31(5) of the Act of 1996 therefore enjoins upon the arbitrator/tribunal to provide the signed copy of the arbitral award to the parties. The receipt of a signed copy of the award is the date from which the period of limitation for filing objections under Section 34 is to commence which would be very much evident from the language of Sub-Section (3) of

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Section 34 of the Act of 1996 which is quoted herein under:

> *(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.*

14. The Supreme Court in the case of ***Union of India Vs. Tecco Trichy Engineers & Contractors***, reported in ***(2005) 4 SCC 239*** held that the period of limitation for filing an application under Section 34 of the Act of 1996 would commence only after a valid delivery of the award takes place under Section 31(5) of the Act of 1996. Paragraph 8 of the said judgment being relevant is quoted herein below:

> ***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*

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> *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.*

15. The judgment in the case of ***Union of India Vs. Tecco Trichy Engineers & Contractors (supra)*** was again followed by the Supreme Court in the case of ***State of Maharashtra Vs. ARK Builders (P) Ltd*** reported in ***(2011) 4 SCC***, wherein the Supreme Court held that Section 31(1) obliges the members of the arbitral tribunal to make the award in writing and signing. The legal requirement under Sub-Section (5) of Section 31 is the delivery of a copy of the award signed by the members of the arbitral tribunal/arbitrator and not any copy of the award. It was further held that on a harmonious construction of Section 31(5) read with Section 34(3) of the Act of 1996, the period of limitation prescribed for filing objections would commence only from the date when the signed copy of the award is delivered to the party making the application for setting aside the award. It was further observed that if the law prescribes that the copy of the award is to be communicated,

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delivered, dispatched, forwarded, rendered or sent to the party concerned in a particular way and since the law sets a period of limitation for challenging the award in question by the aggrieved party, then the period of limitation can only commence from the date on which the award was received by the party concerned in the manner prescribed by law. The said judgment in the case of ***Union of India Vs. Tecco Trichy Engineers & Contractors*** (supra), was again followed by another judgment of the Supreme Court in the case of ***Anilkumar Jinabhai Patel Vs. Pravinchandra Jinabhai Patel*** reported in ***(2018) 15 SCC 178***. In a recent judgment of the Supreme Court in the case of ***Dakshin Haryana Bijli Vitran Nigam Limited Vs. Navigant Technologies Private Limited*** reported in ***(2021) 7 SCC 657***, the Supreme Court in paragraphs 34 to 36 held that the date on which the signed award is provided to the parties is a crucial date in the arbitration proceedings under the Act of 1996. It was further observed that it is only from the said date the period of 30 days for filing an application under Section 33 for correction and interpretation of the award or additional award can be filed; the arbitral proceedings would terminate as per provided under Section 32 (1) of the Act of 1996 and the period of limitation for filing objection to the award under Section 34 would commence. Paragraph 34 to 36 of the said judgment being relevant is quoted herein below:

> *34. There is only one date recognized by law i.e. the date on which a signed copy of the final award is received by the parties, from which the period of limitation for filing objections*

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would start ticking. There can be no finality in the award, except after it is signed, because signing of the award gives legal effect and finality to the award.

35. The date on which the signed award is provided to the parties is a crucial date in arbitration proceedings under the Indian Arbitration and Conciliation Act, 1996. It is from this date that:

35.1 the period of 30 days' for filing an application under Section 33 for correction and interpretation of the award, or additional award may be filed;

35.2 the arbitral proceedings would terminate as provided by Section 32(1) of the Act;

35.3 the period of limitation for filing objections to the award under Section 34 commences.

36. Section 34 provides recourse for judicial scrutiny of the award by a Court, upon making an application under sub-sections (2) and (3) for setting aside the award. The period of limitation for filing the objections to the award under section 34 commences from the date on which the party making the application has "received" a signed copy of the arbitral award, as required by Section 31(5) of the 1996 Act. Section 34(3) provides a specific time limit of three months from the date of "receipt" of the award, and a further period of thirty days, if the Court is satisfied that the party was prevented by sufficient cause from making the application within the said period, but not thereafter.

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16. In the said case, the Supreme Court taking into account that although the award was pronounced on 27.04.2018 but as the signed copy of the award was provided to the parties only on 19.05.2018, held that the period of limitation can be reckoned on the date on which the signed copy of the award was made available to the parties i.e., on 19.05.2018. It would therefore be seen that it is only upon the compliance to Section 31(5) of the Act of 1996, the arbitral proceedings would terminate as provided under Section 32(1) of the Act. Therefore, the winning party in the arbitration proceedings can file proceedings under Section 36 of the Act of 1996, provided the arbitral proceedings are terminated and as already stated herein above, the arbitral proceedings shall only terminate on the date on which the signed copy is provided to the parties.

17. Now the crucial question therefore arises as to whether there was compliance to Section 31(5) of the Act of 1996. Section 31(5) as quoted herein above uses the words "a signed copy shall be delivered to each party". The said words have due significance, inasmuch as the arbitral award which is to be sent to the party, has to be a signed copy of the arbitral award either by the arbitrator or by the tribunal. Secondly, the said arbitral award has to be delivered to each party. Now therefore the question arises what is meant by the phrase "delivered to each party". In this regard this court may take reference to Section 3 of the Act of 1996 which deals with the heading "Receipt of written communications" which is quoted herein below:

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3. Receipt of written communications.—

(1) Unless otherwise agreed by the parties,—

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority.

18. A reading of the above quoted section stipulates that unless otherwise agreed by the parties, when a written communication would be deemed to have been received. Sub-Clause (a) & (b) of Section 3(1) of the Act of 1996 would only come into play if there is no agreement by the parties as regards the receipt of the written communication. Sub-Clause (a) of section 3(1) mandates that any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address. Therefore, in order that communication is

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received, there has to be a delivery. Sub-Clause (b) of Section 3(1) would come into play when none of the places referred to in sub clause (a) can be found after making reasonable enquiry. It is only after making the said reasonable enquiry and a satisfaction being reached that none of the places referred to in sub clause (a) is found then a written communication would be deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it. Therefore, sending of a communication by way of a registered letter or by any other means which provides a record for attempt to deliver to the last known address would only be permissible upon the satisfaction being reached after making a reasonable enquiry to the effect that none of the places referred to in sub clause (a) can be found. Sub-section (2) of Section 3 further mandates that the communication would be deemed to have been received on the day it is so delivered. Hence, it would be seen that the question of delivery of the communication is of paramount importance and more so, taking into account when Section 31(5) of the Act of 1996 mandates that a signed copy shall be delivered to each party. At this stage it may be relevant to take note of the submissions of the learned counsel appearing on behalf of the respondent who submits that section 3 would not apply taking into account Clause 24 of the Loan Agreement. In view of the said submission, it would be relevant to take note of Clause 24 of the Loan Agreement which

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is quoted herein below:

24. COMMUNICATIONS/NOTICES/CORRESPONDENCE

24.1. Notice, payment and/or other communication provided for in this Agreement shall be in writing and shall be transmitted.

(a) by postage prepaid, registered airmail or by internationally recognized courier service or (b) telex, cable or facsimile transmission to the parties as follows, as elected by the party giving such notice

(i) In the case of notice or payments to the Bank, to the Banks lending office address as per the schedule with at caption "Manager – Asset finance".

(ii) In the case of notice or payments to the borrower, to the borrower address as per schedule.

(iii) In case of notices to guarantor(s), to the guarantor(s) address as per schedule.

24.2. All notices, payments and/or other communications shall be deemed to have been validly given on (a) the expiry of 21 days after posting if transmitted by airmail, or (b) the date of receipt if transmitted by courier, or (c) the date immediately after the date of transmission with confirmed answer back if transmitted by cable, telex or facsimile transmission, whichever shall occur first.

24.3. Either party may, from time to time, change its address or representative for receipt of notices or other communications provided for in this agreement by giving to the other not less than 21 days prior written notice to the party.

24.4. In all correspondence, the Loan Account Number and

complete vehicle/equipment details i.e., also the vehicle/equipment registration number engine number and chassis number should be quoted by the borrower & guarantor(s).

19. A perusal of the said Clause 24 stipulates that there are various clauses with the heading "communication /notices/correspondence". Clause 24.1 stipulates that notice, payment and/or other communications provided for in this agreement shall be in writing and shall be transmitted by postage prepaid, registered air mail or by internationally recognized courier service or by telex cable or facsimile transmission to the parties as elected by the party giving such notice in the manner provided in sub clauses (i), (ii) and (iii). Sub-Clause (iii) relates to notice to the guarantor. In the case of the guarantors, the said notice, payment and or other communication has to be sent to the guarantor's address as per the schedule. Clause 24.2 stipulates that all notices, payments and or other communications shall be deemed to have been validly given on (a) the expiry of 21 days after posting if transmitted by airmail or (b) the date of receipt if transmitted by courier, or (c) the date immediately after the date of transmission with confirmed answer back if transmitted by cable, telex or facsimile transmission whichever shall first occur. Clause 2.3 and 2.4 is however, not relevant for the purpose of the instant dispute. It would show therefore that clause 24.1 and 24.2 has to be read in together. If the said

clauses are read in together, it would be seen that the said notices, payment and/or other communications has to be provided in the agreement and the manner has to be chosen by a party to the Agreement. Now therefore the question arises as to whether the arbitration award which is required to be sent by the arbitrator would come within the ambit of a communication to be provided for in the agreement and whether the Arbitrator can be taken as a party to the Agreement to elect the manner of transmission. In the opinion of this Court, the answer has to be in the negative inasmuch as though the Loan Agreement in question encompasses within itself an Arbitration Clause but a reading of the Arbitration Clause as mentioned in Clause 31 of the Loan Agreement do not in any manner show that the Arbitration Award is to be sent by the arbitrator in terms with Clause 24. It is further relevant to mention that the said arbitration clause on the other hand shows that the dispute or the differences shall be referred to arbitration in accordance with the provisions of the Act of 1996 as may be amended or its re-enactment. Further, the Arbitrator cannot by any stretch of imagination be construed to be party to the Agreement to exercise the option as regards the manner of transmission Under such circumstances, this Court is therefore of the opinion that Sub-Clause (a) & (b) of Section 3(1) does not stand excluded in view of Clause 24 of the Loan Agreement.

20. It is also further relevant herein to take note of Section

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19 of the Act of 1996 which relates to the determination of the Rules of Procedure. The said section 19 is quoted herein below:

> *19. Determination of rules of procedure.—*
>
> *(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*
>
> *(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*
>
> *(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*
>
> *(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

21. From a perusal of the said quoted section it would appear that while Sub-Section (1) of Section 19 of the Act of 1996 stipulates that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act 1872. But Sub-Section (2) of Section 19 stipulates that subject to Part-I, the parties are free to agree on a procedure to be followed by the Arbitral Tribunal in the conduct of its proceedings. Sub-Section (3) further stipulates that failing any agreement referred to in Sub-Section (2), the arbitral tribunal may, subject to the Part-I conduct the proceedings in the manner as it considers appropriate. Therefore the arbitral

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proceedings have to be conducted in terms with Part-I of the Act of 1996. Section 3 as well as Section 31(5) of the Act of 1996.

22. The words '**deliver**', '**delivered'** or '**delivery**' have not been defined in the Act of 1996. Taking into account the **context** in which the word '**delivered'** has been used in the Act of 1996, it may be relevant to take note of the definition of the word 'deliver'. In ***Oxford Advanced Learner's Dictionary 9th Edition*** the word 'deliver' has been defined to be to take goods, letters, etc to the person or people they had been sent to. In the ***Oxford Dictionary of English Third edition,*** the word 'deliver' has been defined to be bring and handover 'a letter, parcel or goods' to the proper recipient or address. It has also been defined to mean provide (something promised or expected). In ***Wharton's Law Lexicon, 16th Edition*** the word 'delivery' in the case of negotiable multimodal transport document, delivering of the consignment to, or placing the consignment at the disposal of the consignee or any other person entitled to receive it. It has been also mentioned that in the case of non negotiable multimodal transport document, delivering of consignment to, or placing the consignment at the disposal of the consignee or any person authorized by the consignee to accept delivery of the consignment on his behalf.

23. In ***Chambers 21st Century Dictionary, Revised Edition***, the word 'delivery' has also been defined as to carry (goods,

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letters etc) to a person or place. The word 'delivery' has also been defined as carrying of (goods, letters etc) to a person or place. It has also been defined to mean thing or things being delivered**.** ***The Major Law Lexicon 4th Edition***, defines the term 'deliver' to mean to give or transfer; to handover possession of; to hand over to another; to give forth in action to discharge; to solemnly announce (as) to deliver an award.

24. From the above, it would be clear that for the purpose of Section 31(5) of the Act of 1996, the phrase "a signed copy shall be delivered to each party" shall mean that a signed copy of the award handed over to each party so that the parties to the arbitration proceedings, upon receipt of the signed copy of the award and can take necessary steps as is required under the Act of 1996 in respect to the award in question. Section 3 of the Act of 1996 therefore assumes pivotal importance to the dispute involved herein as it creates a legal fiction as to when a written communication is deemed to have been received. The phrase "deemed to have been received" as would be seen in both sub clauses (a) & (b) of Section 3 (1) of the Act of 1996 creates a legal fiction for assuming existence of a fact that the communication have been received which does not really exist. It is well settled principle of interpretation of a provision creating legal fiction, the Court is to ascertain for what purpose the fiction is created and after ascertaining, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. There is a

major difference between sub clause (a) and sub clause (b) of Section 3(1) of the Act of 1996. In sub clause (a), the legal fiction that the communication has been received is created when the written communication is delivered to the addressee personally or at his place of business, habitual residence or mailing address. However, as already stated hereinabove, sub clause (b) would only come into play when upon reasonable enquiry; it has been found that none of the places referred to in sub clause (a) is found. In the case of sub clause (b), the legal fiction that the written communication has been received is created when the written communication is sent to the addressees last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it. The words "by registered letter or by any other means which provides a record of the attempt to deliver it" as appearing in sub clause (b) of Section 3(1) of the act of 1996 is a pointer to the Legislative intent that even in respect to a case falling within the ambit of sub clause (b) of Section 3(1) of the Act of 1996, there is a requirement of evidence to be tendered to show that the written communication was delivered or there was attempt to deliver at the last known address. Merely sending would not suffice.

25. At this stage this Court finds it appropriate to refer to a judgment of the Supreme Court rendered in the case of ***Kailash Rani Dang Vs. Rakesh Bala Aneja and Another*** reported in

(2009) 1 SCC 732. In the said case, the facts relevant are looked into, it would be seen that an ex-parte award was passed and the copy of the award was sent by the arbitrator to both the parties through speed post. The said copy of the award in the case of the respondent therein was sent to his business address at Alka Cinema, P-2, Sector 15, Noida. The postman visited the cinema premises on 30.08.1999 but the respondent was no present. The postman went to the address again on the next day but the respondent refused to receive the registered envelope, though the name of the arbitrator was mentioned in the said envelope. The postman accordingly returned the envelope to the sender with an endorsement of the refusal dated 31.08.1999. In the said case when an application was filed for execution by the party in whose favour the award was passed, the respondent in the arbitration proceedings filed an application under Order XXI Rule 26 of the Code before the Executing Court seeking stay of the execution proceedings, denying any knowledge of the passing of the award dated 25.08.1999. In the said case, it was also mentioned that the respondent in the arbitration proceedings had received the copy of the award only on 07.10.2000 during the course of the execution proceedings and accordingly, on 28.11.2000 filed an application under Section 34 of the Act of 1996. In the said case, the statement of the postman who tendered the envelope on 30.08.1999 and 31.08.1999 was brought on record. The Supreme Court in paragraphs 22 and 23 observed that a presumption that the document had indeed been delivered was

writ large on the facts of the case. Paragraphs 22 and 23 of the said judgment are quoted herein below:

> ***22.*** *We have heard the learned counsel for the parties and gone through the record. We reproduce hereinunder Section 3 of the Act:*
>
> *"3. Receipt of written communications.—(1) Unless otherwise agreed by the parties,—*
>
> *(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and*
>
> *(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.*
>
> *(2) The communication is deemed to have been received on the day it is so delivered.*
>
> *(3) This section does not apply to written communications in respect of proceedings of any judicial authority."*
>
> *(emphasis supplied)*
>
> *A bare perusal of the aforesaid provisions would reveal that if a written communication is delivered to the addressee personally at his place of business, it shall be deemed to*

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have been received by him on the day it was delivered.

23. *Admittedly, a copy of the award had been sent to Subhash Chander at Alka Cinema which was, in fact, the property which was the subject-matter of the partnership business between the parties. In this view of the matter, the statement of the postman Dharam Pal becomes extremely relevant wherein he deposed that on 30-8-1999, Subhash Chander had not been present in the cinema premises and that on the next day he had refused to receive the communication even when tendered to him which fact had been endorsed by him on the envelope which had then been returned to the sender. We are, thus, of the opinion that by virtue of sub-clause (a) of Section 3(1) read with Section 3(2), a presumption that the document had indeed been delivered is writ large on the facts of the case.*

26. In the backdrop of the above, let this Court take into consideration the impugned order passed. A perusal of the impugned order would show that neither side adduced any evidence. The learned Executing Court had taken into consideration from a perusal of Annexure – F series that the sole arbitrator after passing the arbitral award attached the certified copy of the arbitration award and provided the same to both the judgment debtor and the postal receipt and the AD card shows that the same has been posted to the provided address of the judgment debtor No.1 and 2 as on the basis thereof, the Court below was of the opinion that Section 31(5) of the Act of 1996 has been fulfilled by the sole arbitrator and

the decree holder.

27. Further to that, the learned Court below held that as per Section 3(1)(a) of the Act of 1996, the service is deemed to have been made since signed copies of the arbitration award was delivered to his place of residence or mailing address. It is surprising to note that the Court below did not take into consideration Section 31(5) of the Act of 1996 as well as Section 3 of the said Act in the right earnest while arriving at the aforementioned findings. As already observed hereinabove, Section 31(5) of the Act of 1996 mandates that the signed copy shall be delivered to each party and the manner of delivery of the signed copy has been stipulated in section 3. The use of the word 'delivered' in Section 3(1)(a) is of vital importance, inasmuch as the Court below ought to have taken into consideration as to whether the award in question was delivered and only when it is delivered the legal fiction that the petitioner herein have received the said award can be assumed. There has been no evidence placed on record to show that the said award was delivered to the petitioner or there was any attempt to make delivery of the said award upon the petitioner either personally or to his place of business, habitual residence or mailing address.

28. Sub-clause (b) of Section 3(1) of the Act as already observed herein above, would only come into play when upon a reasonable enquiry, none of the places referred to in clause (a) can be found. It is not the case of the respondent herein that

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the places mentioned in clause (a) of Section 3(1) was not found after making reasonable inquiry, inasmuch as, it has been the specific case of the respondent herein that the award in question sent by way of a registered letter by the Arbitrator to the address mentioned in the Schedule to the Loan Agreement. Neither there was anything shown that the Arbitrator made any inquiry in terms with Section 3(1)(b) of the Act of 1996 nor evidence of the Arbitrator was brought on record to that effect.

29. The evidence of the postal Department was also not adduced to show that the said communication so sent on 23.05.2015 by the arbitrator was delivered or an attempt was made to deliver or the petitioner refused to accept the communication. Merely sending a copy of the award, in the opinion of this Court would not amount that the award has been delivered unless and until evidence is led to the effect to show that the award in question was delivered or there was an attempt to deliver which was refused. Sub-Section (2) of Section 3 makes it clear with the stipulation that the communication is deemed to have been received on the day it is so delivered. Therefore, this Court is of the opinion that the learned Court below failed to take into consideration that Section 31(5) read with Section 3 of the Act of 1996 in arriving at a finding that section 31(5) as well as Section 3(1)(a) has been duly complied for the reasons above mentioned.

30. Before concluding this Court also finds it necessary to take note of the submission made by the learned counsel

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appearing on behalf of the respondent to the effect that the Executing Court is not the proper Court to decide on the question as to whether there was compliance to Section 31(5) of the Act of 1996. Mr. Sharma submitted that it is the well settled principles of law that the Executing Court cannot go behind the decree and has to execute the award as a decree. In the opinion of this Court the said submission is totally misconceived. The judgment of the Supreme Court rendered in the case of ***Dakshin Haryana Bijli Vitran Nigam Ltd Vs. Navigant Technologies Private Limited*** (supra), wherein it has been categorically mentioned that the arbitral proceedings would stand terminated as provided under Section 32(1) of the Act of 1996 on the date on which the signed copy of the award is provided to the parties. Therefore, non compliance to Section 31(5) of the Act of 1996 would touch upon the jurisdiction of the Executing Court to execute the award as a decree of the Court, inasmuch as, if there is non-compliance to Section 31(5) of the Act, the arbitral proceedings would be deemed to be pending could not stand terminated and in consequence thereof, the award cannot be put into execution. Therefore, in the opinion of this Court, the Executing Court can very well go into the question as to whether there was compliance to Section 31(5) of the Act of 1996.

31. Taking into consideration that the Court below did not address the issues as required under law and had merely on the ground that the document was sent had opined that Section 31(5) of the Act of 1996 was duly complied with, this Court is of the view that this is a fit case for remand to the Executing Court i.e., the

Court of the Additional District Judge No.1, Kamrup (M) at Guwahati to decide afresh the objections filed by the petitioner herein under Order XXI Rule 26 read with Section 47 of the Code in the light of the observations made hereinabove.

32. The impugned order dated 27.04.2022 is set aside. If necessary, the learned Court below shall permit the parties to adduce evidence in support of their contentions.

33. With the above observations and directions, the instant petition stands disposed of.

JUDGE

Comparing Assistant

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