

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

Date of Reserve: 19.5.2009

Date of Order: July 02, 2009

OMP No. 165/2006

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02.07.2009

BSES Rajdhani Power Ltd.

... Petitioner

Through: Mr. Achin Garg, Advocate

Versus

R.C.Gupta & Bros.

... Respondent

Through: Mr. Arjun Singh, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

This appeal/petition has been preferred under Section 37 of the Arbitration & Conciliation Act, 1996 (in short "the Act") against an order of the Arbitrator dated 27.2.2006 passed on an interim application under Section 17 of the Act.

2. The facts in nutshell are that during the pendency of dispute before the learned Arbitrator, petitioner herein had come out with a scheme in December, 2005 called Late Payment Surcharge (LPSC) Waiver Scheme. Under the scheme, those consumers who were having disputes and whose claims were under litigation were

given an opportunity to apply to the petitioner and avail the scheme of the petitioner for waiver of late payment surcharge under the scheme. As per the scheme, the consumer was to pay full principal dues and get 100% waiver of LPSC without prejudice to the pending litigation. Option was also given to the consumer that the consumer may withdraw the cases pending before the Court/Legal forums and pay full amount as per the scheme and in case consumer did not wish to withdraw the cases but only wish to mitigate the liability in the event of an adverse outcome, he may pay the entire principal amount under the dispute and obtain waiver of LPSC on an understanding that depending upon the outcome of the case any differential between the amount paid by the consumer under the waiver scheme and the amount finally decreed by the Court/forum shall be adjusted after the decree. The respondent herein wrote a letter dated 5.1.2006 to the petitioner stating as under:

- 1. Please refer to your letter dated 29.12.22005 wherein you have as a prerequisite to re-energizing our premises at 221, Okhla Industrial Estate sought payment of Rs.75,65,321.70/- which according to you is the principal amount outstanding against K.No. XI-378-BS. As per our records the said amount above mentioned is subjudice and is subject to the final outcome of pending litigation.*
- 2. However keeping in mind our urgent need for electricity the undersigned has no choice but to accept your proposal for payment of Rs.75,65,321.70/- in the mode and manner mentioned herein after as a prerequisite to re-energizing. The said payment shall be subject to any further orders/directions of the court and/or arbitrator and without prejudice to the rights of the undersigned as may be finally decided by the appropriate adjudicatory authority and BRPL will be solely liable to refund any amounts due to us. This is consistent with the third terms and condition mentioned in overleaf in your LPSC waiver scheme application form, already submitted by us.*

3. *It is agreed that the aforesaid amount shall be paid in 5 equated installments of Rs.15,13,064.34 (Rupees Fifteen lakhs, thirteen thousand sixty four and paise thirty four only) each payable monthly. As per the LPSC waiver scheme, we are paying the first installment, payable on / before 6th Jan. 06, vide enclosed cheque no. 092678 dated 5th Jan 06, payable to BRPL. For the further four equated installments, we are enclosing four post dated cheques bearing nos. (i) 092680 dated 6.5.06 and drawn on Standard Chartered Bank, NDSC-II, New Delhi, all payable to BRPL. However, we are authorizing you to encash Post Dated Cheques only after the K.No. XI-378-BS has been erngeized.*
4. *It was stated by you, during our meeting on 28th Dec 2005, that all costs incurred on re-energizing will be borne by BRPL with the possible exception of cable cost.*
5. *The undersigned shall be provided a commercial connection instead of the industrial connection.*

In view of this letter, the petitioner's officer made a note on the letter itself that "the proposal given in paras 1-4 shall be subject to assessment and for equipment of consumer refurbishment/replacement cost shall be payable by the consumer/BRPL as per norms". It was also noted that five cheques each of Rs.15,13,064/- were received from the consumer.

3. After availing the scheme and after encashment of first cheque only, the respondent moved an application before the learned Arbitrator that the petitioner should be stopped from encashing remaining cheques but should be directed to energize the commercial connection without encashment of the remaining cheques and the petitioner should also bear the cost of energization. The learned Arbitrator allowed the application and directed that the petitioner should get only second cheque dated 6.2.2006 cleared and on second cheque being cleared, the petitioner shall re-energize the electric connection within 15 days on encashment of second

cheque and the cost of the installation and re-energization shall also be borne by the petitioner. The petitioner was restrained from presenting the rest of the three cheques till further orders. It is this order which is subject matter of the present appeal.

4. The first objection of the respondent is that the appeal was not maintainable under Section 37 of the Arbitration & Conciliation Act, 1996 since the proceedings before the learned Arbitrator were under Arbitration Act, 1940 and there was no provision of appeal under the old Act of 1940.

5. There is no doubt that the present Arbitrator was appointed by this Court vide order dated 29.9.2005 in CS(OS) No. 1844/1991 and the dispute between the parties was of year prior of 1996 and the matter was referred to the Arbitrator on 30.4.1993 itself. However, when the arbitration proceedings were pending before the then Arbitrator Ms. Santosh Duggal, J. (retd.), the respondent took the matter to permanent Lok Adalat and the matter remained pending before permanent Lok Adalat for quite some time. Ultimately, permanent Lok Adalat returned the matter as it could not be settled. In the meantime, the learned Arbitrator Ms. Santosh Duggal expired and a need arose for appointment of another Arbitrator and the present Arbitrator was appointed. Obviously, the present Arbitrator was a continuation of the earlier Arbitrator and the arbitration proceedings were continuation of earlier arbitration proceedings started in 1993. Thus, the Arbitration Act, 1940 would be applicable on the proceedings. Under the Arbitration Act of 1940, the Arbitrator had no power to entertain an application of the nature of Section 17 of Arbitration and

Conciliation Act, 1996. However, in this case the Arbitrator unfortunately entertained an application under Section 17 of the Arbitration & Conciliation Act, 1996. Since, the Arbitrator had no power to entertain such an application, the order passed by the Arbitrator on such an application itself is a non-est and can be treated by the respondent as null and void and non operative. The present appeal filed by the petitioner can be treated as a Writ Petition (C) and the order dated 27.2.2006 passed by the learned Arbitrator is liable to be declared as null and void being without jurisdiction.

6. Coming on merits, I consider that the respondent in this case had acted smart. During the pendency of the matter before the present Arbitrator, the respondent filed an application before the petitioner for availing the scheme. Under the scheme he agreed for re-energization of commercial connection on payment of certain principal amount and gave 05 cheques and made petitioner to pass an order for re-energization in accordance with the scheme. Once he availed the benefit of the scheme, he approached the Arbitrator with an application, which was not maintainable before the Arbitrator. Under the Arbitration Act 1940, only the Court could pass interim order under Section 41 of the Act. The Arbitrator under the old Act could only pass interim award and the present order of the Arbitrator is not in the nature of interim award but is in the nature of interim order restraining the petitioner from encashing the cheques, given to the petitioner by the respondent under a scheme of re-energization of electricity connection on waiver of LPS Charges. Obviously, the learned Arbitrator stepped outside his jurisdiction and passed an

illegal order. The respondent neither informed the Arbitrator nor did tell the Arbitrator that he was acting under the old Act of 1940 and he had no power to entertain such an application. Neither the learned Arbitrator told the respondent that he should approach the Court under Section 41 of 1940 Act.

7. Be that as it may. The present order passed by the learned Arbitrator does not stand scrutiny of law either under 1940 Act or 1996 Act. If the order is to be considered under 1940 Act, it is a non-est order, if it is considered under 1996 Act, the learned Arbitrator could not have given benefit to the respondent when the respondent had approached the petitioner directly without leave of the Arbitrator or without leave of the Court to avail the benefit of scheme. He sought to gain the benefit of the scheme without fulfilling his obligations under the scheme. The scheme of the petitioner was not the subject matter of the Arbitrator's reference. The respondent was free to avail or not to avail the scheme. The respondent sought to avail the scheme for his own benefit. The respondent was having a large commercial establishment in Okhla Industrial Area and wanted this establishment to give him rental at market rate, which he could get only if the premises was having proper commercial electricity connection. He had agreed to the scheme for his own benefits to earn more rentals from his premises. He had not shown charity to the petitioner and there was no compulsion with him except the compulsion of earning market rent from the premises. Since he could not wait the outcome of the award and wanted to avail the scheme, he could not have told the Arbitrator that though he wanted to avail the scheme, the benefit under the Scheme should be allowed to him

but the petitioner should be prevented from encashing the cheque which he had given to the petitioner independent of arbitration proceedings.

8. I, therefore consider that the order passed by the learned Arbitrator is liable to be set aside, since it was passed on an application under Section 17 of the Arbitration & Conciliation Act, 1996. If this order is to be considered under the old Act i.e. the Arbitration Act, 1940, this order is otherwise non-est as the Arbitrator had no power to pass such an order under the old Act.

July 02, 2009
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SHIV NARAYAN DHINGRA, J.