

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.07.2009

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W.P.(C) 9745/2009

BHARTI INFRATEL LTD

..... Petitioner

- Versus -

**REGISTRAR OF COOPERATIVE
SOCIETIES & ORS.**

..... Respondent

Advocates who appeared in this case:-

For the Petitioner	: Mr Sanjeev Ralli
For the Respondents 1-3 & 6	: Mr Rajeev Sharma
For the Respondent No. 4	: Mr B. B. Gupta with Mr B. S. Arora
For the Respondent No. 5	: Mr Anil Kumar

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MS. JUSTICE VEENA BIRBAL

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

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the order dated 05.06.2009 passed by the Delhi Cooperative Tribunal in appeal No. 127/2009-DCT. The impugned order also decided the appeal filed by the respondent No. 4 (Adarsh Cooperative Group Housing Society Ltd), which was appeal No. 47/2009-DCT. Both the said appeals arose out of the Award of Mr T. C. Rana, who was the Arbitrator nominated by the Registrar of Cooperative Societies, Government of NCT of Delhi,

to decide the disputes which had arisen pursuant to a claim filed by the respondent No. 5.

2. The present controversy relates to the installation of a cellular tower on the roof of one of the buildings of the society (respondent No. 5). The cellular tower is directly above the roof of flat No. 48 which belongs to the respondent No. 5 herein. After considering the arguments advanced by the parties, the learned Arbitrator directed that the society should remove the cellular antenna. The operative portion of the order reads as under:-

“I have considered both the arguments and records placed on file, I feel that installation of cellular Antenna should have certificate from the architect because:

1. Digging of hole in the roof to install/ platform for the vertical iron antenna.
2. Pay load of the roof.
3. Vibration from the generator can damage the structure that is column/ pillar and roof.
4. Oil leakage from the generator.
5. NOC from the Architect and Fire Department.
6. Fuel hazard.

In view of the above requirements, the Society has to remove the Cellular Antenna.”

3. This Award is undated. According to the petitioner, it came to know about the passing of the Award towards the end of November, 2008 through a letter dated 25.11.2008 sent by the respondent No.4

Society. It is pertinent to note that the petitioner was not impleaded as a party in the arbitration proceedings. It is also pertinent to note that the petitioner had installed the said cellular tower after entering into an agreement with the respondent No. 4 Society. The said agreement was entered into on 28.06.2005 and within a week or so thereafter the tower was installed.

4. The learned counsel for the petitioner also stated that the respondent No. 5 purchased the said flat No. 48 on 27.07.2005, by which time the cellular tower was already in place. Of course, the learned counsel for the respondent No. 5 disputes this and states that when the respondent No. 5 purchased the flat, there was no cellular tower and it is only when she was away for a week shortly thereafter that the cellular tower was installed. These are disputed questions of fact and we are not entering into this arena of controversy. However, the admitted position is that the claim was preferred by the respondent No. 5 after about three years sometime in the year 2008. This is also apparent from the copy of the Award which has indicated the case number to be — Arbitration Case No. 55/DR/ARB/08-09 and the fact that the summons were issued to the respondent No. 4 and the respondent No. 5 to appear before the Arbitrator on 13.09.2008,

5. We are at present concerned with the impugned order dated 05.06.2009 whereby the appeal filed by the Society as well as the

appeal filed by the petitioner herein were both dismissed on the ground of limitation. It is alleged that the Society had filed the appeal after two months' delay. The petitioner herein had also filed the appeal after an alleged delay of about seven months. However, the petitioner had sought to explain the delay by virtue of its condonation of delay application filed before the Tribunal. In the said application it had clearly indicated that it had obtained knowledge of the passing of the Award through the letter dated 25.11.2008 received by it from the respondent No. 4 Society. Thereafter, the petitioner did not file any appeal because the respondent Society had assured that they would be filing an appeal. However, vide letter dated 09.01.2009 the petitioner was informed by the respondent No. 4 Society that the appeal had not been filed because the relevant case file containing the papers had been misplaced in the office of the counsel to whom the papers had been handed over for preparing the appeal. The respondent Society, however, assured the petitioner that all efforts were on to trace the misplaced papers and the appeal would be filed as soon as the same were found. The respondent No. 4 Society informed the petitioner by a letter dated 25.02.2009 that the appeal had been filed by them and that the Appellate Tribunal had also issued notice to the opposite party (respondent No. 5 herein) for 06.03.2009.

6. Another important point that has to be kept in mind is that from 27.02.2009 till 14.05.2009, the functioning of the Tribunal had been stopped by virtue of an order passed by a Division Bench of this Court in Writ Petition 7718/2007 on 27.02.2009. The functioning of the Tribunal was restored only pursuant to the Supreme Court order dated 14.05.2009 in SLP 12098-12099/2009 and it is on the very next day, that is, on 15.05.2009 that the petitioner filed this appeal. However, both the appeals, one filed by the respondent Society and the one filed by the petitioner were rejected by the Tribunal vide its impugned order dated 05.06.2009 on the ground of delay.

7. We find that the Tribunal had dismissed the petitioner's appeal on the ground of limitation in the following terms:-

“As regards the delay on the part of Bharti, it is obvious and actually has been admitted that the company was very well aware of the arbitration proceedings but it never tried to make an effort to get impleaded in the arbitration proceedings. The company did not even ensure that the society presented itself before the arbitrator and put forth its case in convincing terms so as to ensure that the tower stays. Though the company and the society have denied the receipt of a legal notice even before the claim was filed this notice alongwith the speed post receipts is available on record. There is therefore a strong probability that this notice was received by them but they have failed to reply. Even after coming to know about the award in November, 2008 the company did not take any action to even file an application for a certified copy but waited for the society to take all actions like obtaining a copy of the award and filing the appeal. It was only when the execution proceedings were taken up by the respondent and a notice was issued by the executing authorities for the removal of the tower that the company woke up and decided to file its appeal; after a very long delay. Just like the society Bharti

has failed to show that the delay has occurred despite due diligence and therefore we are not convinced that there are sufficient grounds to condone the delay in filing of the appeal, by either of the appellant.”

Apart from this, we also find that the Tribunal, despite dismissing the appeals on the ground of limitation, has ventured into considering the case on merits, which it could not do.

8. Insofar as the question of dismissal on the ground of limitation is concerned, we find that the Tribunal has misguided itself in the sense that it had not considered the explanation given by the petitioner in the proper perspective. First of all, the notice that has been referred to in the above extracted portion, is one issued by the lawyer for the respondent No. 5 prior to the initiation of the arbitration proceedings. From that notice the only thing that can be discerned is that the petitioner was asked to remove the cellular tower and failing which the respondent had indicated to the petitioner that the appropriate legal action would be taken. However, no notice with regard to the initiation of the arbitration proceedings was ever received by the petitioner. In fact, it could not have, because the petitioner was not a party to the proceedings. The Tribunal has also indicated that even after coming to know about the Award in November, 2008, the petitioner did not take any action to file an application for a certified copy but waited for the Society to take all actions like obtaining a copy of the Award and filing

the appeal. The circumstance which the Tribunal failed to consider is whether the explanation for the delay in filing the appeal was plausible or not. The petitioner had clearly indicated that it had not filed the appeal because the Society had assured that it would be taking up the matter in appeal. The circumstance of the Society not having filed the appeal in time was also explained by the fact that the papers had been misplaced and that full efforts were being made to locate the same. We do not find any finding on this aspect of the matter. In any case, the delay in the filing of the appeal by the petitioner would be of a much lesser period in view of the fact that the Tribunal itself was not functioning between 27.02.2009 to 14.05.2009. In fact, if we look at the dates, we find that the petitioner acquired knowledge of the passing of the Award only on 25.11.2008. Sixty days' time is permitted for filing of an appeal. The 60-day period would expire sometime around 25.01.2009. Therefore, the delay in filing the appeal would be only of about a month and the observation of the Tribunal that the appeal was filed after a very long delay would, by no means, be an accurate description of the extent of the delay.

9. For all these reasons, we feel that the impugned order ought to be set aside, which we hereby do. We also restore the appeal of the petitioner before the Delhi Cooperative Tribunal to be disposed of on merits. Till the Tribunal takes a decision on the stay application, which

is now pending before the Tribunal in view of the restoration of the appeal directed by this Court, the execution of the Award shall remain stayed.

This writ petition stands disposed of.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

JULY 06, 2009
SR