

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

% **Judgment reserved on: 05.03.2009**
Judgment delivered on: 30.03.2009

+ **FAO(OS)No.445 OF 2008**

D.M. JAWHAR MERICAN Appellant
Through: Mr. Anil K. Kher, Senior Advocate
with Mr. Rishi Manchanda,
Advocate

versus

ENGINEERS INDIA LIMITED Respondent
Through: NEMO.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VIPIN SANGHI

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

J U D G M E N T

VIPIN SANGHI, J.

1. This appeal under Section 37(1) (b) of the Arbitration & Conciliation Act 1996 (The Act) is directed against the order dated 26.08.2008 passed by the learned Single Judge in OMP No. 232/2005 whereby the objections preferred by the appellant to the arbitral award dated 18.01.2005 were dismissed on the ground that the objections were barred by limitation.

2. The claimant / appellant is a Malaysian national. He, inter alia, provides consultancy and engineering services to the oil, gas and fertilizer industry. The appellant's services were engaged by the respondent. Disputes arose between the parties and litigation followed. During the pendency of litigation the parties agreed to appoint Mr. Justice B.P. Jeevan Reddy(retd.) Judge of Hon'ble Supreme Court of India as the sole arbitrator to adjudicate the disputes between the parties. The learned Arbitrator announced his award dated 18.01.2005, which was communicated vide proceedings dated 16.1.2005. We may note that this award was preceded by an interim award dated 23.04.2004. In the interim award, the learned Arbitrator observed that the issue of limitation could not be decided unless the dates of receipt of monies under the contract, in respect of which the appellant had made his claims, was made known. The final award was a confirmation and completion of the interim award, and it was stated in the final award itself that the interim award, and final award together constitute "the award" and must be read and understood as such.

3. The appellant was awarded Malaysian ringet (MR) 211,250 against the respondent with interest @ 18% per annum from the date of the award and further award of Rs. 5 lacs was made in favour of the appellant and against the respondent by way of costs.

4. While communicating the award dated 18.1.2005 to the parties, the learned Arbitrator directed the claimant to ascertain the

amount of stamp paper payable on the award and to send the stamp papers at the earliest so that the award could be transcribed on the stamp papers and the original award could be sent to the claimant.

5. Though it was initially submitted by learned counsel for the appellant that the copy of the award dated 18.01.2005 sent to the parties was not a signed copy, upon the production of the copy of the final award by the respondent, as was circulated to the parties by the learned Arbitrator vide proceedings dated 16.1.2005, this argument was given up by learned counsel for the appellant, who did not dispute thereafter that the copy sent by the learned Arbitrator was indeed signed by him.

6. On 12.12.2005 the appellant moved an application styled as one under Section 33 of the Act before the learned Arbitrator. This application was disposed off by the learned Arbitrator on 20.02.2005, and the order was forwarded to the learned counsels for the parties. It appears that thereafter the appellant supplied the stamp papers to the learned Arbitrator. The learned Arbitrator engrossed the award on the stamp paper and sent the same to the appellant on 13.03.2005. The objections to the award were filed by the appellant before the Court on 04.07.2005

7. The respondent raised a preliminary objection that the objections as filed were barred by limitation under Section 34(3) of the Act. This preliminary objection of the respondent was allowed and, as

aforesaid, the objection petition was dismissed as being barred by limitation.

8. The submission of learned counsel for the appellant is that the final award duly engrossed on stamp paper was received by the appellant's counsel on or after 13.03.2005 and the same was received by the appellant only on 13.04.2005. He submits that the objections to the award could be preferred within three months from the date on which the appellant received the final award duly engrossed on stamp paper. Even if the date of receipt of the final award on stamp paper is assumed to be 13.03.2005, which is the date on which learned Arbitrator sent the final award duly engrossed on stamp paper, the objections preferred on 04.07.2005 could not be said to be barred by limitation. He submits that from 13.03.2005 the time for filing the objections was three months which would expire on 13.06.2005. On that date the Court was closed for summer vacations and the same re-opened for purposes of filing of petitions only on 04.07.2005, on which date the objections were duly filed. He also submits that the learned Single Judge had erred in observing that in the year 2005 the Court re-opened after the summer vacations on 02.07.2005. Mr. Kher relies on the decision of the Hon'ble Supreme Court in ***Union of India V. Tecco Trichy Engineers & Contractors***, (2005) 4 SCC 239 to submit that the date of delivery of the award to the appellant was crucial as substantive right of the appellant are dependent on the date of delivery of the award. Accordingly, the same should be liberally construed in favour of the appellant.

9. In view of the factual controversy raised by the learned counsel for the appellant with regard to the date of re-opening of the Court after summer vacations for the purposes of computation of limitation, the relevant notification was called for from the registry and it transpired that, as a matter of fact, the Court had re-opened after summer vacations on 04.07.2005 and not 02.07.2005 as observed by the learned Single Judge. Consequently, to that extent there is a factual error in the judgment of the learned Single Judge.

10. That however, in our view, does not come to the aid of the appellant and we are satisfied that the objections preferred by the appellant were indeed barred by limitation.

11. Section 34 (3) of the Act which is relevant for our purpose reads as follows:

“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:

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.”

12. The aforesaid provision merely talks about the receipt of “*the arbitral award*” by the party, who makes an application for setting

aside of the award. The expression “*arbitral award*” does not necessarily mean the award engrossed on stamp paper. As rightly observed by the learned Single Judge, in ***Anusuya Devi & Another Vs. M. Nanik Reddy & Others***, (2003) 8 SCC 565, the Supreme Court had rejected a similar argument while holding:

“The question as to whether the Award is required to be stamped and registered, would be relevant only when the parties would file the Award for its enforcement under Section 36 of the Act. It is at this stage the parties can raise objections regarding its admissibility on account of non-registration and non-stamping under Section 17 of the Registration Act. In that view of the matter the exercise undertaken to decide the said issue by the Civil Court as also by the High Court was entirely an exercise in futility. The question whether an Award requires stamping and registration is within the ambit of Section 47 of the code of Civil procedure and not covered by Section 34 of the Act.”

13. The learned Single Judge has also taken note of the decision of Supreme Court in ***Dr. Chiranji Lal (D) By L.Rs., Appellant Vs. Hari Das (D) by L.Rs.*** AIR 2005 SC 2564. A similar argument arose in that case in the context of a decree. The question considered by the Supreme Court was stated in para 2 which reads:

“2. The question that arises for determination in this matter is when would the period of limitation for execution of a decree passed in a suit for partition commence. In other words, question is when such a decree becomes enforceable - from the date when the decree is made or when the decree is engrossed on the stamp paper which, out of these two, would be the starting point of limitation.”

14. The Supreme Court rejected the argument similar to the one raised by the appellant herein, and held that the period of limitation begins from the date when the decree is passed and not from the date when it is engrossed on the stamp papers supplied by the parties, in the following words:

“18. Thus, even if there is direction by the court for furnishing of stamp papers by a particular date for the purposes of engrossing of the decree, the period of limitation begins to run from the date when the decree is passed and not from the date when the decree is engrossed on the stamp papers supplied by the parties.

19. The Court also held that the period of limitation prescribed in Article 136 of the Act cannot be obliterated by an enactment wholly unconnected therewith, like the Indian Stamp Act. Legislative mandate as sanctioned under Article 136 of the Act cannot be kept in abeyance unless the selfsame legislation makes a provision therefore. The Indian Stamp Act, 1899 has been engrafted in the statute book to consolidate and amend the law relating to stamps. Its applicability thus stands restricted to the scheme of the Indian Stamp Act.

20. It was held that though the decree may not be received in evidence or be acted upon but the period of limitation cannot be said to remain under suspension at the volition and mercy of the litigant. The period of limitation starts by reason of the statutory provisions as prescribed in the statute. Time does not stop running at the instance of any individual unless, of course, the same has a statutory sanction being conditional.

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23. Learned Counsel for the respondents contends that Section 35 of the Indian Stamp Act, 1899 provides that an instrument not duly stamped cannot be acted upon. Therefore, a

decree passed in a suit for partition cannot be acted upon which means it cannot be enforced until engrossed on stamp paper. It is further contended that Article 136 of the pre-supposes two conditions for the execution of the decree. Firstly, the judgment has to be converted into a decree and secondly, the decree should be enforceable. It is further submitted that a decree becomes enforceable only when the decree is engrossed on the stamp paper. Therefore, the period of limitation begins to run from the date when the decree becomes enforceable i.e. when the decree is engrossed on the stamp paper.

24. Such an interpretation is not permissible having regard to the object and scheme of the Indian Stamp Act, 1899. The Stamp Act is a fiscal measure enacted with an object to secure revenue for the state on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue.

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26. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain purview and control of a party. No date or period is fixed for furnishing stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity.

27. Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. As above noted,

there is no statutory provision prescribing a time limit for furnishing of the stamp paper for engrossing the decree or time limit for engrossment of the decree, on stamp paper and there is no statutory obligation on the court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree.”

15. The learned Single Judge, in our view, correctly drew a clear distinction between enforceability and executibility of award. Para 13 from the judgment of the learned Single Judge reads as follows:

“13. The above decision is a clear pointer to distinguish between enforceability and executibility of an award. Its enforceability i.e. the legal validity or correctness has to be decided in the Court of law in accordance with the procedure prescribed. In the case of a decree, the validity is challenged by way of an appeal. The decision in Dr.Chiranjilal case (supra) was concerned with that question. Analogically in the case of an arbitral award the validity can be questioned in proceedings under Section 34 (3) of the . The awards executibility, is postponed in such cases as is evident on reading of Section 36 of the Act. However, in both instances (i.e. award and decree) and since the effect of an award is that it amounts to a decree under the New Act - is the same. Therefore, this Court is unpersuaded by the arguments on behalf of the petitioner that the correct date for considering it receiving the award (under Section 31 of the Act, to enable it to file the petition under Section 34 of the Act) was 13.04.2005. It was in fact 18.01.2005.”

16. Reliance placed by the appellant on the decision in **Tecco Trichy Engineers & Contractors (supra)** in our view, is misplaced. As observed by the learned Single Judge the said decision has no application in the facts of this case. That was a case where the

Supreme Court interpreted the expression “party” in the context of the Government. That decision does not say that even though the party has been served with the award, that fact has to be ignored, and only when the original of the final award engrossed on stamp paper is served, the time to file objections would begin to run.

17. We find the conclusion drawn by the learned Single Judge on the aforesaid proposition to be sound, and we see no reason to upset the same. Consequently, the date of dispatch of the final award engrossed on stamp paper is not of any relevance for purposes of computation of limitation under Section 34(3) of the Act.

18. The next submission of Mr. Kher, learned senior counsel for the appellant is that since the appellant had preferred an application under Section 33 of the Act, the time for filing the objections to the award, in any event, could not have begun to run till the disposal of the said application. The appellants application under Section 33 was decided by the learned Arbitrator only on 20.2.2005.

19. This submission of Mr. Kher is countered by Mr. Ashok Mathur, learned counsel for the respondent, by submitting that the application preferred by the appellant though styled as one under Section 33 of the Act was, in fact, an application in the nature of a review. He submits that in the facts of this case, the appellant is not entitled to the benefit of extension of time under Section 34(3) on account of the application under Section 33 being disposed off on 20.02.2005 since, according to him, the said application was not, pure

and simple, an application to seek correction of *“any computation error, any clerical or typographical error or of any other error of similar nature occurring in the award.”*

20. In support of his argument, learned counsel for the respondent has relied on ***State of Arunachal Pradesh Vs. Damani Construction Co.,*** (2007) 10 SCC 742. In this case the learned Arbitrator had made an interim award dated 12.10.2003 which was final to the extent of the claims decided thereby. The appellant sought review of the interim award and also sought clarification thereof, on 02.04.2004. On 10.04.2004, the Arbitrator stated that he had no jurisdiction to entertain the request for review of the award and also stated that the award dated 12.10.2003 was the final award pertaining to the issues involved. On 06.08.2004, the appellant filed an application under Section 34 of the Act for setting aside of the said award along with an application under Section 5 of the Limitation Act read with Section 34 (3) of Act for condoning the delay in filing the application for setting aside the award. The Supreme Court held that the objections were barred by limitation. In para 8 and 9 of the judgment, the Supreme Court observed as follows:

“8. Firstly, the letter had been designed not strictly under Section 33 of the Act because under Section 33 of the Act a party can seek certain correction in computation of errors, or clerical or typographical errors or any other errors of a similar nature occurring in the award with notice to the other party or if agreed between the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the

award. This application which was moved by the appellant does not come within any of the criteria falling under Section 33(1) of the Act. It was designed as if the appellant was seeking review of the award. Since the Tribunal had no power of review on merit, therefore, the application moved by the appellant was wholly misconceived. Secondly, it was prayed whether the payment was to be made directly to the respondent or through the Court or that the respondent might be asked to furnish bank guarantee from a nationalized bank as it was an interim award, till final verdict was awaited. Both these prayers in this case were not within the scope of Section 33. Neither review was maintainable nor the prayer which had been made in the application had anything to do with Section 33 of the Act. The prayer was with regard to the mode of payment. When this application does not come within the purview of Section 33 of the Act, the application was totally misconceived and accordingly the arbitrator by communication dated 10.4.2004 replied to the following effect.

“However, for your benefit I may mention here that as per the scheme of the Act of 1996, the issues/claims that have been adjudicated by the interim award dated 12.10.2003 are final and the same issues cannot be gone into once again at the time of passing the final award.”

9. Therefore, the reply given by the arbitrator does not give any fresh cause of action to the appellant so as to move an application under Section 34(3) of the Act. In fact, when the award dated 12.10.2003 was passed the only option with the appellant was either to have moved an application under Section 34 within three months as required under Sub-section (3) of Section 34 or within the extended period of another 30 days. But instead of that a totally misconceived application was filed and there too the prayer was for review and with regard to mode of payment. The question of review was totally misconceived as there is no such provision in the Act for review of the award by the arbitrator and the clarification sought for as to the mode of payment is not contemplated

under Section 33 of the Act. Therefore, in this background, the application was totally misconceived and the reply sent by the arbitrator does not entitle the appellant a fresh cause of action so as to file an application under Section 34(3) of the Act, taking it as the starting point of limitation from the date of reply given by the arbitrator i.e. 10-4-2004."

21. We find merit in the aforesaid submission of learned counsel for respondent. In our view, merely because an application is styled as one under Section 33 of the Act the objector would not be entitled to the extension of limitation under Section 34(4) of the Act till the disposal of such an application, if otherwise the application, as filed, does not in fact constitute an application to *"request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award"*. We have been shown the application preferred by the appellant as one under Section 33 of the Act dated 12.02.2005. The crux of the appellant's submission in this application was that he was entitled to the award of higher amount of compensation than that awarded by the learned Arbitrator. In the application the appellant had stated as follows:

"8. The learned Arbitrator while passing the Final Award dated 18.01.2005, in para 39 at page 53 has committed an error by restricting the award amount to MR 211,250 on an alleged observation that the Claimant himself has restricted the claim in a sum of MR 211,250.

9.

10. It is submitted that according to the Claimant he is entitled to MR 418,750 for EIL Job

No.3623 by splitting the same into 2 equal halves and MR 1,875 for EIL Job No.3606 and US\$ 15,390 for EIL Job No.3371. The same also finds reference at page 12 of the Interim Award dated 23.04.2004.

11. The Claimant had correctly set out the same amounts in the Claim Petition dated 16th September, 2002 by claiming MR 209,375 being 50% of the commission payable for EIL Job No.3623 being MR 209,375 plus MR 1875 for EIL Job No.3606 totaling to MR 211,250 under the 1st head and another sum of MR 209,375 being the balance 50% commission being MR 209,375 for EIL Job No.3623 under the 2nd head. But an error occurred in the penultimate para in the claim petition dated 16th September, 2002 in so far as while adding up the claim amount in US\$, the 50% of commission amount for EIL Job No.3623 being MR 209,375 was not taken into account. But soon thereafter the error was noticed and the Claimant filed a revised claim petition to correct the claim amount by claim petition dated 9th April, 2003 and the penultimate para was corrected. But at all times the Claimant claimed commission in a sum of MR 420,625 towards commission for EIL Job Nos.3623 and 3606 and US\$ 15390 for Job No.3371 as commission. Apart from the commission amount the Claimant also claimed another sum in MR 420,625 and US\$ 15390 towards interest at 20% for 5 years on the claim amount. The modified Claim petition dated 9th April, 2003 was allowed.

The error apparent in the Final Award, wherein it has been recorded that the Claimant has restricted his claim to MR 211,250 needs to be corrected and the full amount in the sum of MR 389,275 which the Hon'ble Arbitrator has found the Claimant to be entitled to, may kindly be awarded in favour of the Claimant.

Under these circumstances as stated herein above it would be just and proper and as such it is prayed that the Hon'ble Arbitrator may be pleased to correct/modify the Final Award dated 18.01.2005 [under Section 33 of the Arbitration & Conciliation Act, 1996] and pass an Award thereby holding that the Claimant is entitled to a sum of MR 389,275 as commission in respect of EIL Job

Nos.3623 and 3606 as observed and concluded by the Hon'ble Arbitrator in para 39 of the Final Award dated 18.01.2005."

22. The above extract shows that far from pointing out a clerical computational or typographical error, the appellant sought to re-assert his claim for higher amount of damages by reference to his averments and documents. The said application was disposed off on 20.02.2005 by the learned arbitrator. The material part of the order dated 20.02.2005 reads as follows:

"When I stated in para 39 of my final Award that the claimant has limited his claim on to MR 211,250, I meant and referred to the various claims made by the claimant prior to the institution of the present arbitration proceedings. I may now refer to them one by one:

(1) In his legal notice dated 25th February, 1998, sent through Cochhar & Co., the claim was only "an amount of MR 211,250 and US \$ 15390 ('amount')". In the said notice, claim was made in respect of three contracts viz., contract Nos.1, 2 and 3 mentioned in the invoice dated 15-5-1997 (at page 50 of the material papers filed by the claimant). The sum of US \$ 15390 was in respect of "technical services for the revamp of Kerteh Refinery PP(A) SB (EIL Job No.3371). The claim in respect of this third contract has been rejected by me in the final Award. Therefore, the amount claimed in respect of contract Nos.1 and 2 (mentioned at page 50 of the material papers – annexure 11) is MR 211,250 only. There was no claim for any other or further payment. It is evident that if the respondents had paid the amount so claimed, the matter would have ended there.

(2) Again, in the other legal notice dated 10-8-1998, sent through Albar Zulkifly and Yap, the claim is again for the very same amounts viz., MR 211,250 and US \$ 15390 in respect of the aforementioned three contracts. It may be reiterated that if this amount had been paid by the respondents, the matter would have ended there.

(3) It may also be mentioned that in clause (a) of para 47 of the claim petition, the claimant has asked for a sum of MR 211,250 under the following claim:

“Commission amount payable in Malaysina ringitt against job Nos.3623 and 3606 of the respondents, as claimed in claimant’s invoice dated 15-5-1997”.

Another claim has been made for MR 209,375 under the following claim:

“The remaining 50% of the commission amount payable in Malaysian ringitt against job No.3623 (418,750 – 209,375), (details as per invoice dated 15-5-1997 as above)”.

The invoice dated 15-5-1997 (annexure 11 at page 50 of the material papers) does not provide any details of the said amount of MR 209,375. The only claim is for MR 211,250 under contract Nos.1 and 2, (Besides the claim of US 15390 towards the third contract, which has been rejected by me).”

23. In our view, a bare reading of the appellants submissions made in the application dated 12.02.2005 and the order passed thereon by the learned arbitrator shows that the application had not been filed merely to seek correction of any computation error, any clerical error or typographical errors or errors of similar nature, occurring in the award. The award as passed by the learned arbitrator

itself recorded in paragraph 5(f) (at page 11 of the award) that the appellant had sent a legal notice dated 25.02.1998 claiming MR 211,250 plus US\$ 15,390 along with 20% interest. The learned arbitrator while awarding the amount of MR 211,250 observed in para 39 of the award as follows:

“39. The result of the above discussion is that the claimant is found entitled to MR 3,89,275. However, out of this amount, certain part payments were received by the claimant. In any event, he has limited his claim only to MR 211,250 and I cannot award more. Hence, there shall be an award in favour of the claimant in a sum of MR 211,250. As per the rate of exchange prevailing on the date of this Award (Rs.11.50 ps for one MR), it means Rs.24,29,375/- in Indian currency.”

24. It is, therefore, clear that the learned arbitrator was fully conscious of the fact that though the appellant was found entitled to MR 389275, since he had limited his claim only to MR 211,250 he could not award more. Hence, an award of MR 211,250 was made in his favour. This could not be said to be either a clerical or a typographical or a computational error under any circumstance and this is also evident from the order dated 20.02.2005 passed by the learned arbitrator. The award of MR 211,250 was consciously made by the learned Arbitrator for reasons stated in the award itself. Consequently, the appellant cannot take the starting point of limitation as 20.2.2005. The same has to be 18.1.2005.

25. While in no way diluting our conclusion that the starting point of limitation for filing objections to the award was 18.1.2005, even if

we were to proceed on the basis that the said application dated 12.2.2005 fell within the ambit of Section 33 of the Act, the fact of the matter is that the same stood rejected on 20.02.02005. Even if the starting point of limitation is taken to be 20.02.2005, the period of three months expired on 20.05.2005. As noticed above, the objections were preferred only on 04.07.2005. The appellant had not preferred any application to seek condonation of delay from 20.05.2005 and up till the 04.07.2005. The period of 30 days for which the Court can condone the delay, from 20.5.2005 onwards expired on 19.06.2005. Since 19.06.2005 fell during the summer vacations of the Court, and the Court re-opened on 04.07.2005, it was incumbent for the appellant to have sought the condonation of delay from 20.05.2005 to 19.06.2005 which was admittedly not done by the appellant. From the wording of the proviso to Section 34 (3) it is clear that it is for the applicant to satisfy the Court that he was prevented from making the application under Section 34 within the period of three months. It is not for the Court, of its own to condone the delay of up to 30 days.

26. To satisfy our conscience we have even otherwise examined the award rendered by the learned Arbitrator and we find the same to be well reasoned and founded upon correct legal principles. The learned Arbitrator has substantially agreed with the appellant and it is for that reason that the appellant has been awarded MR 211,250 along with interest at the rate of 18% per annum from the date of the award apart from costs of Rs. five lakhs. However, the learned Arbitrator has restricted the amount awarded to the amount claimed by the appellant

in his notice sent prior to the initiation of arbitration. Unless the enhanced claim made in the course of arbitration pertains to a cause of action which may have arisen subsequent to the staking of the original claim made in the course of exchanging correspondence, it is plausible to take a view that the award would be limited to the extent of the claim originally made by the claimant in its correspondence with the opposite party. There is nothing unreasonable or illegal in the approach of the learned Arbitrator.

27. For the aforesaid reasons, we dismiss this appeal with costs quantified at Rs.10,000/-.

(VIPIN SANGHI)
JUDGE

(MUKUL MUDGAL)
JUDGE

March 30, 2009
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