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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: August 21, 2009
Date of Order: December 18, 2009

+OMP 35/2008

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M/s Prime Telesystem Limited

Through: Mr. Pradeep K. Bakshi with Mr. Rajat Navet, Advocates

18.12.2009

...Petitioner

Versus

Sasken Communication Technologies

Ltd. & Ors.

Through: Mr. Neeraj Sharma with Ms. Archana Lakhota and Ms. Roopali Sharma, Advocates

...Respondents

AND

+OMP 9/2008

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Ajit Sarin

Through: Mr. Harish Malhotra, Sr. Adv with Mr. Lovkesh Sawhney and Mr. Durgesh Kumar Pandey, Advocates

...Petitioner

Versus

Intel Capital Corporation & Ors.

Through: Mr. Neeraj Sharma with Ms. Archana Lakhota and Ms. Roopali Sharma, Advocates

...Respondents

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

1. By way of above two petitions, the petitioners have assailed an arbitration award dated 3rd September 2007 awarding a sum of Rs.11.8 crore to the respondents.
2. Brief facts relevant for deciding maintainability of these petitions are that the

petitioner in OMP 35 of 2008 i.e. M/s Prime Telesystem Limited, a company incorporated under the Companies Act, 1956, had entered into a Subscription-cum-Shareholding agreement dated 28th February 2001 with Intel Capital Corporation (respondent in OMP 9 of 2008), Citicop Finance India Limited, Sasken Communication Technologies Ltd.(hereinafter referred to as “the Investors”). As a result of entering into this agreement, three companies brought in an amount of Rs.11 crore into M/s Prime Telesystem Limited. The investment made were Rs.479,99,992/- by Citi Cop, Rs.460,00,018.40 by Intel and Rs.2,39,99,996.30 by Sasken. Mr. Ajit Sarin (petitioner in OMP No.9 of 2008) was one of the directors of M/s Prime Telesystem Limited (PTL). Several misleading representations were made to the investors in the Subscription-cum-shareholding agreement about PTL, its directors and the interest of directors in other firms and companies.

3. It was one of the conditions of the said agreement that the entire proceeds of Rs.11 crore would be transferred to a separate bank account and details of money utilized out of the issue would be disclosed headwise under the annual report of the companies indicating the purpose for which such money had been utilized.

4. PTL was a closely held company and its shares were previously held by its two directors mainly viz. Mr. Anil Sarin and Mr. Satish Mehta or their family members. Mr. Ajay Satsanghi being a director of the company at the relevant time was also a party to the arbitration proceedings. However, he was removed from the directorship of PTL on 9th March 2001 i.e. before the amount of Rs.11 crore was invested by the investors and he filed a civil suit and criminal proceedings against other directors. His name was struck off from the arbitration proceedings on an application made by him.

5. The Investors soon after investing the amount discovered that they had been taken for a ride and the information given by the petitioners herein and Mr. Satish Mehta, before entering into the agreement were false and cooked up. The directors of the company had also not disclosed their interest in other business entities of the firm. The investors discovered that the two directors namely Mr. Ajit Sarin and Mr. Satish Mehta clandestinely diverted huge funds out of Rs.11 crores into their pocket companies i.e. either in favour of sole proprietary concern of Mr. Ajit Sarin and Mr. Satish Mehta and their family members or to the limited companies which were completely under the control and management of both of them. The investors collected details of these transfers and found that the funds have been siphoned off by playing fraud and misrepresentation, to the proprietary concerns and companies directly and closely concerned with Mr. Ajit Sarin and Mr. Satish Mehta and their family members. The chart of siphoned off is as under:

PRIME TELESYSTEMS LTD.

Rs. 32 lac	Rs.45 lac	Rs.9.5 lac	Rs.30 lacs	Rs.29 lac	Rs. 22 lac
Remi Engineering: Sole Proprietor Ajit Sarin	H. Packers Sole Proprietor Ajit Sarin Bank Statement Enclosed	Future Electronics Sole Proprietor Ajit Sarin Bank Statement Enclosed	Sam Products Sole Proprietor Ajit Sarin Bank Statement Enclosed	Royal Rampore Sole Proprietor Ajit Sarin Bank Statement Enclosed	Arrow Electronics Sole Proprietor Ajit Sarin Bank Statement Enclosed
- Rs.85000 (Ajit Sarin) - Rs.25 lac (daughter of Ajit Sarin)	Rs.20 lac (Satish Mehta) Rs.25 lac (brother of Satish Mehta)	Rs.8.5 lac (Ajit Sarin)	Rs.55000 (Satish Mehta) Rs.5.50 lac (Ajit Sarin) Rs.20 lac (wife of Ajit Sarin)	Rs.1 lac Ajit Sarin Rs.7 lac (father of Satish Mehta) Rs. 3 lac (brother of Satish Mehta) Rs.18 lac (wife of Ajit Sarin)	Rs.20 lac (Ajit Sarin)

Rs.40 lac Optimum System Sole Proprietor Satish Mehta Bank Statement Enclosed	Rs. 48 lac Computex Services Sole Proprietor Satish Mehta Bank Statement Enclosed	Rs.25 lac Sole Proprietor Satish Mehta Bank Statement Enclosed	Rs.50 lac (OEPL) Director Satish Mehta Bank Statement enclosed	Rs.80 lac SMG Corporate Service Pvt. Ltd. Director Satish Mehta Bank Statement enclosed	
Rs.4 lac (Ajit Sarin) Rs.35 lac Satish Mehta	Rs.3 lac (Satish Mehta) Rs.3 lac (brother of Satish Mehta) Rs.10 lac (father of Satish Mehta) Rs.32 lac (mother of Satish Mehta)	Rs.5 lac Ajit Sarin	Rs.15 lac (father of Satish Mehta) Rs.21 lac (Satish Mehta)	Rs.75 lac (Ajit Sarin)	

6. Thus, an amount of more than Rs.4 crore was siphoned off out of the designated account by the above concerns directly and indirectly through either direct transfer or transfer made in the name of first company and then in the name of second concern. The details of transfers made and modus operendi of the transfers of the amount were produced before the Arbitral Tribunal.

7. After discovery of siphoning off of the amount and after discovery of the fact that a fraud was played with the investors, the investors invoked the arbitration clause contained in the agreement dated 28th February 2001 and appointed arbitrator from their side and requested PTL and its directors to appoint an arbitrator of their side and the two arbitrators were together to appoint an umpire. Serving of legal notices in terms of Subscription-cum-shareholding agreement on PTL and its directors, calling upon them to purchase their equity shares in terms of the agreement is undisputed. Since these notices were not replied to, the investors in terms of the arbitration clause, from their side appointed Justice M.L. Padse (retired) as an arbitrator and asked PTL and its directors to

similarly nominate their arbitrator in terms of clause 36 of the agreement. This notice was also not replied by PTL and its directors. Ultimately, investors moved Supreme Court for nomination of arbitrator on behalf of PTL and its directors so that an arbitral tribunal was duly constituted and claim of the claimant could be decided on merits. Notice of this application was served upon PTL and other directors and the application was contested by PTL and its directors. The Supreme Court vide order dated 21st May, 2003 allowed the application and appointed Justice V.R. Dhanuka as the arbitrator for the respondent and Justice V.R. Dhanuka and Justice Padse together appointed Justice R.S. Panta (retired) as the third arbitrator. Thus, the arbitral tribunal was constituted in terms of the agreement after an application made by investors was allowed by the Supreme Court.

8. Before the arbitral tribunal, investors filed their claim but despite opportunities, the petitioner and two directors did not respond to the claim filed by the investors neither filed their version of facts. The arbitral tribunal proceeded to record evidence. Witnesses were produced before the arbitral tribunal and were cross examined on behalf of PTL and its directors. The arbitral tribunal after considering entire evidence and documents passed an award in favour of investors which has been challenged by the two petitioners herein. The grounds of challenge as stated by the petitioner Mr. Ajit Sarin in his petition under Section 34 are:

- (a) That the agreement dated 28th February 2001 as produced before the arbitral tribunal was a forged document since some of its pages have been changed and there were no signatures of the representatives of Intel Technologies.
- (b) The plea of fraud as taken by the investors could not have been gone into by the arbitral tribunal and only a Civil Court was competent to go into the

plea of fraud. Thus, the subject matter before the arbitral tribunal was beyond its jurisdiction in terms of Section 34(2)(6) of the Arbitration & Conciliation Act, 1996.

- (c) That the petitioner was not allowed to effectively present the case and the proceedings before the arbitral tribunal were conducted ex parte. The petitioner came to know of the proceedings at the final stage only. He appointed his advocate to represent him but the advocate was not permitted to participate in the proceedings nor was allowed to address the arbitral tribunal or to file reply.
- (d) That the award was against public policy since the restitution as ordered would render the jurisdiction of the Company Law Board nugatory and the provisions of the Companies Act would be rendered superfluous. The arbitral tribunal could not have forced PTL or its directors to buy back the shares. The investors who were shareholders by virtue of the agreement should have approached Company Law Board for the redressal of their grievances.
- (e) That since the investors had pleaded that the agreement dated 28th February, 2001 was hit by fraud and misrepresentation, the arbitral tribunal could not have ordered for refund of money as it would amount giving relief which was not even asked for by claimants.
- (f) The petitioner had not made any misrepresentation to claimants/ investors since the investors acted on a report of Ernst and Young which was to perform due diligence in respect of PTL and one Ms. Sita Khosla, advocate had done legal due diligence.

9. In its petition PTL had assailed the award on following grounds:

- (a) The award was not as per public policy of India as the award has ordered petitioner to buy back its shares which was barred in terms of Section 77(B)(c) of the Companies Act.
- (b) The petitioner company was under severe financial constraints and unable to present its case as it was not allowed to withdraw funds for payments to litigations and arbitrator's fee.
- (c) The award suffers from patent illegality as it orders grant of stay quo ante contrary to statutory provisions viz. Sections 64 and 65 of Contract Act.
- (d) The appointment of the arbitral tribunal by Supreme Court was contrary to law as PTL had no contract with any foreign entity and the arbitral tribunal had no jurisdiction.
- (e) The award was contrary to Section 18 and 20-B of the Arbitration & Conciliation Act, 1996 since the arbitral tribunal has drawn adverse inference against PTL for not filing statement of defence. The arbitral tribunal also wrongly relied upon affidavit filed by a person on behalf of respondent no.3, who was not authorized by defendant no.3 and who was not even authorized to act on behalf of corporation.
- (f) The decision in the award was beyond the scope of the agreement between the parties and submissions to the arbitral tribunal.

10. One of the common grounds of challenging to award taken by the petitioners in the two petitions is their incapacity to contest. I think this ground is not available to the petitioners. PTL had allowed its funds worth more than Rs.4 crore to be siphoned off by its two directors into the accounts of various proprietary firms or pocket companies. PTL had liberty to call back this amount from its two directors even if there was an injunction

issued by the Court against use of other funds of PTL. Thus, there was no dearth of funds with PTL. If PTL had called back this amount it would have got Rs.4 crore from those persons to whom funds were transferred. There is no contention of PTL that it had made efforts to call back the amount. The siphoning off of the funds is proved by documents and bank statement. This contention of not having financial capacity, therefore, must fail. Even otherwise, while PTL had not been appearing before the arbitral tribunal on the ground that it had no funds. It had been filing one petition after another before the High Court and had been filing appeals and SLPs. Various petitions FAOs, LPAs and SLPs filed by PTL reveal that there was no dearth of funds with PTL when it wanted to move High Court or Supreme Court. The plea of dearth of funds or its inability to pay the legal charges to the counsel or fees of the arbitral proceedings is a baseless plea. Similarly, Mr. Sarin also had no dearth of funds, either in his personal capacity or as a director. As director of PTL he could have called back Rs.4 crore of amount which was transferred from PTL to his proprietary concerns or concerns of his family members.

11. I find no force in the plea taken by petitioner that they were under financial incapacity to contest the proceedings before the arbitral tribunal.

12. The other common ground raised in these two petitions is regarding jurisdiction of the arbitral tribunal. Both the petitioners have urged that the arbitral tribunal had no jurisdiction since it was not an international commercial arbitration. To my view, this plea must fail. One because the arbitral tribunal has devolved upon this plea at great length and rejected this plea on merits. Secondly because this plea should have been raised before the Supreme Court when an application under Section 11 of the Arbitration & Conciliation Act made by the investors was contested tooth and nail by the petitioners.

Once the Supreme Court had considered that it was a case of international commercial arbitration and appointed the arbitrator in terms of the agreement entered into between the parties, it is not open to the petitioners to raise or re-agitate this issue again.

13. The other common ground taken by two petitioners is that the award was contrary to public policy since the award was contrary to the provisions of the Companies Act, as by the award the learned arbitral tribunal had ordered petitioners to buy back all the shares. This plea also must fail. The arbitral tribunal by its order has restored status quo ante as if there was no agreement. It is well settled law that fraud vitiates all actions. The action of allotment of shares done by PTL in favour of investors was vitiated by fraud and therefore it cannot be said that there was valid allotment of shares. The arbitral tribunal has only asked for refund of the amount obtained from investors by PTL by playing fraud and payment of interest thereon. The arbitral tribunal has specifically observed that it was not asking for buying back of the shares in terms of the agreement between the parties.

14. The petitioners submitted that since the contract has been held to be vitiated by fraud the arbitration clause itself also would go with the contract. It is settled law that the arbitration clause is a separate contract in itself from the main contract and it is severable from the main contract. The arbitration clause is a contract of settlement of disputes. Although it normally forms part of the main contract but it forms a separate contract regarding settlement of disputes. Even if the main contract is vitiated by fraud, the contract regarding settlement of disputes and the arbitration clause shall survive.

15. The plea taken by petitioners about the subject matter of dispute being beyond the scope of arbitration and it could only be adjudicated by the Civil Court is not tenable.

Here the subject matter before the arbitral tribunal was the claim of claimants/ investors who had invested about Rs.11.8 crore in PTL. The petitioners had not only played fraud while entering the contract by misrepresentation, but committed breach of contract as well. The fraud played by its two directors and PTL to lure the investors by concealing vital information is one aspect, the breach of contract by siphoning of funds is other aspect. The siphoning of the huge funds by the petitioners made them liable for civil as well as criminal acts. The civil action for restoring status quo ante can be entertained not only by the Civil Courts but also by the arbitral tribunal. There is no legal impediment on the arbitral tribunal considering the claim of a party who had pleaded that a fraud was played upon it. The petitioners have relied upon *Abdul Kadir Shamsuddin Bubere vs. Madhav Prabhakar Oak and another AIR 1962 SC 406 (V 49 C 63)* to plead that where there were serious allegations of fraud that would be sufficient cause for the Court not to order the arbitration agreement to apply and not to make reference. This judgment would not come to the rescue of the petitioners. The petitioners ought to have raised this plea before the Supreme Court when the Supreme Court was deciding an application under Section 11 of the Arbitration & Conciliation Act, 1996 made by the investors. It is not the case of the petitioners that they had raised this plea. If this plea was not raised by the petitioners before the Supreme Court, the petitioners are now barred from raising this plea by constructive res judicata and if petitioners had raised this plea and the plea had been rejected by the Supreme Court, the petitioners cannot raise this plea now because of res judicata itself. Even otherwise, the relevant part of the judgment of *Abdul Kadir (supra)* relied upon by the petitioner reads as under:

“17. There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and

not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen.....”

16. The above observation of the Supreme Court makes it clear that it is not that every allegation imputing dishonesty, particularly in matters of accounts, would be enough to dispose Courts to take the matter out of arbitration. The Supreme Court relied upon *Russell’s case (1880) 14 Ch D 471* wherein it was observed that merely because there are allegations of accounts not being correct or certain items have been exaggerated it was not enough to induce the Court refusing to make a reference to arbitration and the Courts may refuse to make a reference to arbitration only in case of allegations of fraud of a serious nature. As already observed in this case the arbitral tribunal was concerned with the rights of the investors to claim back their monies because of inducement done to the investors by mis-representation and subsequently playing fraud by the petitioners and other directors of PTL.

17. PTL had raised a ground that the award was bad because the arbitral tribunal recorded that it was drawing adverse inference against the petitioners for not filing their response to the claim and for not producing or adducing any evidence. The petitioners have relied upon Section 25(b) of the Arbitration & Conciliation Act, 1996 to press this point.

18. Section 25 of the Arbitration & Conciliation Act, 1996 reads as under:

“25. Default of a party. Unless otherwise agreed by the parties, where, without showing sufficient cause,-

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegation of the allegation by the claimant;

(c) a party fails to appear at an oral hearing or to produce documentary evidence. the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.”

19. A perusal of the above provisions of the Arbitration & Conciliation Act, 1996 only shows the anxiety of the Legislature that where the respondent does not file any response to the claim of the claimant, the claim should not be straightway allowed by the arbitrators and the arbitrator must go into the merits of the claim irrespective of the fact whether a response has been filed or not and the arbitral tribunal shall not consider the failure to file response as an admission to the allegations of claimant. In the case in hand, the arbitral tribunal did not close the proceedings after petitioners failed to file the response to the claim. The arbitral tribunal not only proceeded with the matter in fair manner but framed issues and thereafter asked the claimant to lead evidence on the issues and gave opportunities to the petitioners at every stage and witnesses of the claimant were cross examined. Therefore, it is not a case where there was violation of Section 25 ((b) and (c) of the Arbitration & Conciliation Act, 1996. Nor it can be said that it was a case where equal treatment was not given to the parties as envisaged under Section 18 of the Arbitration & Conciliation Act, 1996. You can take a horse to the pond but you cannot make a horse to drink water unless horse wants to drink the water. The petitioners in this

case were provided ample opportunities by the arbitral tribunal but the petitioners had deliberately chosen not to answer the claims. There were serious allegations made against the petitioners of siphoning off the funds. The petitioners could have at least explained in their written response about transfer of these huge funds of more than Rs.4 crore from the account of PTL to different concerns by its two directors or family members. It is in this context that the arbitral tribunal had observed that an adverse inference was to be drawn against the petitioners who deliberately did not file their response. Even then, the arbitral tribunal did not decide the claim on the basis of just adverse inference and the claim has been adjudicated and decided on the basis of documents and oral evidence after satisfying itself about the genuineness and justification of the claim of the claimants. I, therefore, find that the petitions have no force and are liable to be dismissed.

20. It is settled law that while deciding a petition under Section 34 of the Arbitration & Conciliation Act, 1996, the Court does not sit in appeal and cannot act as a Court of appeal. This Court has jurisdiction to set aside the award only and it only the case of petitioner falls within the scope and ambit of Section 34. In my view the petitioners have miserably failed in showing that there was an infirmity in the award passed by the arbitral tribunal in terms of Section 34 of the Arbitration & Conciliation Act, 1996.

21. In view of my foregoing discussion, both the petitions are hereby dismissed being without merits.

December 18, 2009
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SHIV NARAYAN DHINGRA J.