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IN THE HIGH COURT OF DELHI AT NEW DELHI
O.M.P. No.721/2009

Reserved on: December 4, 2009.

Pronounced on: December 16,2009

WORLD MEDIA LTD.

...Petitioner

Through: Mr. T.K.Ganju, Senior Advocate with
Mr. Sanjeev Malhotra, Advocate.

VERSUS

PRASAR BHARTI

....Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the 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 the Digest?

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JUDGMENT

VALMIKI J. MEHTA, J

1. This objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the final Award passed by the sole Arbitrator on 28.8.09. By the impugned Award, the Arbitrator has passed an Award for a sum of Rs.46,85,295/- in favour of the respondent and against the petitioner

being the sum owed to the respondent by the petitioner on account of telecast by the respondent of the programmes of the petitioner such as “Aaj Tak” and “Subah Aaj Tak” between the period October and December, 2000.

2. Before I proceed to consider the two main contentions which have been urged by the counsel for the petitioner I may note that against the first Award dated 01.2.08, objections were filed under Section 34 and which objections were dismissed by the order dated 20.8.09 of a learned Single Judge of this Court in O.M.P. 96/2009. An appeal has been filed against the said order of the learned Single Judge and in the appeal numbered as FAO(OS) No.432/09, though notice has been issued, the present petitioner has been directed to deposit the principal amount of Rs.83 lacs alongwith interest @ 9% per annum. I am stating this fact at the outset because the order of the learned Single Judge was not filed alongwith present petition, and, one of the arguments advanced is covered by the decision dated 20.8.2009 in the said OMP 96/2009.

3. The learned Senior counsel for the petitioner has urged two main contentions. The first contention is that the Arbitrator has committed an error in dismissing the application for amendment filed by the petitioner vide his order dated 04.4.2009 by which application, the petitioner sought to make a claim of set off. The second contention is that there was no arbitration agreement

between the parties and therefore the arbitration proceedings could not take place and nor could the Award have been passed.

4. Taking the second objection first, before I proceed, firstly I would seek to reproduce para 3 of the Award and which runs as under:-

“3. In the Reply to the Claimant’s claim the Respondent has not disputed the claim of the Claimant on merits at all. The entire defence of the Respondent is focused on submitting that the Claimant ought to have made a claim against TV Today, a division of another company called Living Media India Limited, with whom the Claimant had entered into a separate agreement for the telecast of the same programmes produced by them. I have already dealt with this argument of the Respondent in my Interim Award dated 1st December 2008 and in my Order dated 27th February 2008 in respect of the Respondent’s application under Section 16 of the Arbitration and Conciliation Act, 1996 and will therefore not repeat it here. Suffice it to say that the contention has no merit and it already stands rejected. Apart from the said reason the Respondent has said nothing as to why it should not be asked to pay the Claimant.”

It is quite clear that this issue was dealt with and was a subject matter of decision of the first Award and objection against which Award have also been dismissed vide judgment dated 20.8.2009 in OMP 96/2009. This issue therefore of there being no arbitration agreement between the petitioner and the respondent is barred by res judicata. Nothing further needs to be said further on this objection of the petitioner.

5. The second objection was that the Arbitrator wrongly dismissed the amendment application vide order dated 04.4.2009 whereby the claim of set off was sought to be made. The learned senior counsel for the petitioner contended

that though admittedly there were no details of set off in the original written statement filed, he stated that in the heading of the written statement it was however mentioned that there is a set off. He further contended that the Arbitrator was not justified in not granting the adjournment on 04.4.09 when the application for amendment was dismissed. Before I advert to the order dated 04.04.09 passed by the Arbitrator I would at this stage seek to reproduce para 12 of the impugned Award which read as under:

“12. On the issue of costs my view is that the conduct of the Respondent was largely responsible for several avoidable hearings to have taken place. Though the order dated 26th October 2004 of the Hon’ble Delhi High court by which the disputes were referred to arbitration contemplated that the final award be rendered within six months, owing to several machinations of the Respondent that are duly recorded in my various orders the arbitration has lasted a nearly five years. In this regard my orders are self-explanatory and I will not repeat them or the events recorded therein for explanatory and I will not repeat them or the events recorded therein for the sake of brevity. Further, I have found that the Respondent’s application under Section 16 of the Arbitration and Conciliation Act, 1996 as also its defence was without any merit at all. I am of the opinion that the Respondent has needlessly compelled the Claimant into these proceedings and in the meanwhile has enjoyed the Claimant’s money. The Respondent never had any valid defence to the Claimant’s claim and the effort appears to have been to delay the resolution of the dispute as much as possible. The conduct of the Respondent has been most unfair. In the totality of circumstances I would therefore award 9/10 of reasonable costs of this arbitration to the Claimant, keeping in mind that initially even the Claimant did not co-operate for the expeditious disposal of the proceedings. I would therefore keep this proceedings open only for the limited purpose of awarding costs and request the Claimant to submit to me its bill of costs latest by 19th September 2009. In the event that the Claimant fails to submit its bill of costs by the said date, I will regard these proceedings as closed. (Emphasis added)

6. In addition to the above para, I would also seek to refer para 5 of the impugned Award and which reads as under:

“5. Though such is the stand taken in the letter dated 19th December 2001, the Respondent has not asserted any of it in its Reply to the Claimant’s claim. In fact despite several opportunities given to the Respondent it failed to submit any counter-claim and finally there right to file a counter- claim was closed by the order dated 29th May 2006. Not only that the Respondent has not even submitted anything to show that:

a. owing to the change of timing from 10.00 pm to 10.05 pm its advertisers withdrew the booking and did not pay for the advertisement shown during the programme; or

b. the viewership of the programme dropped drastically thereby drastically affecting the advertisement bookings for the said time slot which resulted in drop in revenue earnings; or

c. as a result of a 5 minute change (delay) in the telecast of the programmes the Respondent suffered loss of Rs.1,70,00,000 or any part thereof; or

d. that the Accreditation Agreement contemplated any notice to the Respondent if there was to be a change in the time of telecast; or

e. that payment to the Claimant was dependent on the Respondent receiving the payment from its Client.”

7. A reference to the aforesaid paras 5 and 12 clearly show that the present petitioner was guilty of malafidely delaying the conduct of the arbitration proceedings and avoiding payment of the dues of the respondent/Parsar Bharti. The petitioner has also failed to establish its counter claim that the advertisers withdrew the booking or that the viewership of the

programme dropped drastically or that the present petitioner suffered a loss of Rs.1,70,000,00 as alleged.

8. So far as the order dated 4.4.09 is concerned, though the same is a detailed order, I have no option but to reproduce the same in totality because I can do no better:

“4.4.2009

ORDER

1. By this Order I propose to deal with the Respondent's Application dated 6th March, 2009 seeking to amend its Reply dated 29th / 30th May 2006 to the Claimant's claim.

2. I made my Interim Award in the matter on 1st December 2008 and had fixed 6th December 2008 as the next date of further directions in the matter. On 6th December 2008 it was agreed that the Claimant will submit their affidavit by way of evidence by 22nd December 2008 and the Respondent will do the same by 6th January 2009. Both parties were requested to intimate me in writing whether they will wish to cross-examine any of the witnesses of the other party. The matter was fixed for 10th January 2009. That date was subsequently postponed to 17th January 2009.

3. On 17th January 2009 counsel for the Claimant stated that he did not wish to file any further evidence and that he would prosecute his case on the basis of pleadings and evidence on record. In view of the said statement of the Claimant, I closed his evidence. The respondent, appearing through a new counsel, Mr. Sanjeev Malhotra sought three weeks time to file his affidavit by way of evidence. The said request was acceded to and the Respondent was granted the three weeks as requested. It was clarified in the said Order, inter alia, that if the Respondent did not file any affidavit by way of evidence, the next date i.e. 21st February 2009, would be treated as the date for final arguments in the matter. For the sake of completeness I may record here that Mr. Sanjeev Malhotra, Advocate had appeared without any power of attorney and, on my query on the issue, had stated that he would file one within two days. That was not done despite the fact that the 21st February date was extended to 14th March 2009.

4. Just four days prior to 14th March 2009 i.e 10th March, 2009 at 4.00 p.m. the Respondent caused to be delivered at my office by hand an Application under Section 23(3) of the Arbitration and Conciliation Act, 1996 ('the said Act') alongwith annexures and supporting affidavit of one Mr. Chander Prakash Vohra, Director of the Respondent praying that the Respondent be allowed to amend its Reply dated 29th /30th May 2006 and supplement its defence alongwith particulars of set off set out in Annexure 'A'. A copy of the said Application was also sent to Mr. Rajeev Sharma, Counsel for the Claimant.

5. On 14th March 2009 Mr. Sharma submitted that he would not wish to file any reply to the said Application and would argue straightway on the basis of materials already on record. Mr. Sharma submitted that the purpose of the Application was merely to delay the final hearing and that the same was not only malafide but amounted to a gross abuse of the process.

6. On being asked to make his submission on the application, Mr. Sanjeev Malhotra, Advocate prayed for time. He sought an adjournment on the ground that he had engaged Mr. T.K.Ganju, Senior Advocate to appear on behalf of the Respondent and that Mr. Ganju was not available on that date to make his submissions.

7. The said request was vehemently opposed by Mr. Sharma.

8. Given the fact that 14th March 2009 was the date fixed for final arguments (since the Respondent had not filed any affidavit by way of evidence) I was of the view that the Application as well as the final arguments ought to be argued straightway. Accordingly I rejected the prayer for adjournment.

9. Mr. Malhora made the following submissions in support of his application seeking amendment of the reply.

a. That in its reply dated 19th December 2001 (Exhibit C-17) to the Claimant's notice dated 20th November 2001 (Exhibit C-16) the Respondent had claimed that it had suffered losses and damages to the extent of Rs.1.7 crores and was therefore not liable to pay the amount claimed by the Claimant. He relied upon paragraph 5 of the said reply. That the Respondent was under the "bonafide impression" that the details and particulars of set off has been raised in the reply and set off. However, "it appears that by inadvertence, although the plea of set off has been raised, the details of the set off were not furnished".

b. That the Respondent was therefore seeking leave to supplement its defence by seeking leave to amend.

c. That no prejudice would be caused to the Claimant because the plea of set off had already been communicated to the Claimant vide its reply dated 19th December 2001.

d. That the plea of set off already existed in the reply and that it was the details and particulars of set off what were being furnished by way of the present application.

e. That the proceedings were at the initial stage as “evidence of the parties have not commenced”.

10. Opposing the prayer for amendment Mr. Rajeev Sharma, relying upon Section 23(3) of the said Act, submitted that the Application for amendment should be rejected on the ground of inordinate delay in making it. Mr. Sharma relied upon the records of the proceedings to point out the various landmarks that had already occurred and the Respondent had never even thought of claiming a set off. In his submission the Application has been made as an afterthought.

11. Record of the proceedings, to the extent relevant, would show that as early as 8th August 2005 i.e. at the third meeting, the Respondent had expressed its desire to submit a counter claim against the Claimant. Accordingly, the Claimant was given six weeks time i.e. upto 28th September 2005 to file the same. The next date of hearing was fixed for 8th December 2005.

12. On 8th December 2005 also no counter claim was filed and, at the request of the Respondent a last opportunity was accorded to them to file one by 19th January 2006. The next date was slated for 30th March 2006.

13. On 30th March 2006 once again the Respondent did not file any counter claim and accordingly the arbitral proceedings insofar as they related to the counter claim of the Respondent were terminated. The Respondent was nevertheless provided an opportunity to submit its Reply to the Claimant's claim on or before 20th April 2006. The matter was fixed for 29th May 2006.

14. On 29th May 2006 though the Respondent filed its Reply, it was not supported by any affidavit. The Counsel for the Claimant stated that he did not object to the Reply being taken on record provided the necessary affidavit was furnished by the next date. That affidavit was filed with me on 30th May 2006.

15. On the same date i.e 29th May 2006 the Respondent made an Application under Section 16 of the said Act submitting that the Arbitral Tribunal had no jurisdiction to entertain the Claimant's claim.

16. Between 29th May 2006 and 11th November 2006 the Respondent created a lot of confusion over carrying out admission/denial of documents which led me to pass my order dated 11th November 2006 by which I ordered that several documents would be deemed to have been admitted by the Respondent. On the same date i.e 11th November 2006 the parties also concluded their arguments on Section 16 Application.

17. In my order of 6th December 2006 I recorded that the Respondent had made an Application for the recall of the order of 11th November 2006 and accordingly I issued directions to the parties to file their replies, rejoinder etc. The next date was fixed for 22nd December 2006. That date was postponed to 27th December 2006 and thereafter to 6th January 2007. The dates continued to get postponed. Arguments on the said Application were eventually concluded at the 11th meeting held on 3rd March 2007. On the same date Mr. Sharma for the Claimant filed his application praying for an interim Award in his Client's favour. Appropriate directions with regard to filing of reply, rejoinder were issued to the parties.

18. By my Order of 11th June 2007, I rejected the Claimant's Application for recall of my Order dated 11th November 2006. The next date was fixed for 7th July 2007 as the parties desired to make further submissions on the Section 16 Application.

19. Owing to various requests for adjournment, the hearing could take place only on 8th November 2007. On this date oral arguments on Section 16 Application were formally closed and I reserved my order thereon.

20. By my Order dated 27th February 2008, I rejected the Respondent's Application under Section 16 of the said Act and concluded that the Tribunal had jurisdiction to decide upon the disputes submitted before it. Parties were informed that further proceedings would take place on 15th March 2008.

21. On 15th March 2008 Mr. Sharma, Counsel for the Claimant requested the Tribunal to decide on the Claimant's Application dated 3rd March 2007 for making an interim Award. Owing to the fact that the Respondent had not filed its reply to the said Application despite an order made in that behalf, at the request of the Respondent, the Respondent was given further four weeks time to file its reply. The matter was listed for 3rd May 2008.

22. In my order of 3rd May 2008 I noted as follows:

“1. Vide my order dated 15th March, 2008 the Respondent was given 4 weeks time to file its reply to the Claimant's application dated 3rd March, 2007 for

making an interim award. The 4 weeks time expired on 19th April, 2008. However, no reply has been filed. This was the third opportunity given to the Respondent.

2. This morning, Mr. Ajay K. Dutta, Advocate, appearing on behalf of the Respondent has submitted that owing to lack of availability of personnel in the Respondent's organization, he was not able to receive instructions for preparing a reply and he has prayed for further time to do so.

3. In my order of 15th March, 2008 it was made quite clear that if no reply is filed by the Respondent within the time allowed, the application will be heard. Accordingly, Mr. Rajiv Sharma, Counsel for the Claimant commenced his arguments on his application. The arguments have been partly heard today.

4. The matter may be taken up for further arguments on 10th May, 2008 at 10:30 AM in my office.”

23. Eventually the arguments on the Application for Interim Award dated 3rd March, 2007 were concluded on 26th July 2008 and I made my Interim Award on 1st December 2008. The next hearing was slated for 6th December 2008.

24. On 6th December 2008 the parties agreed to a time-table with regard to submission of their respective affidavits by way of evidence. The Claimant stated that they would file their affidavit by 22nd December 2008 and the Respondent stated that they would do the same by 6th January 2009. Both parties were requested to intimate me in writing whether they would wish to cross-examine any of the witnesses of the other party. The next date was fixed for 10th January 2009 which, owing to my unavailability, was postponed to 17th January 2009.

25. On 17th January 2009 Mr. Sharma appearing for the Claimant stated that he would not be filing any affidavit by way of evidence and would prosecute his case on the basis of pleadings and evidence on record. In this view of the matter I closed the Claimant's evidence. The Respondent sought further three weeks time to file its affidavit by way of evidence. It was recorded in the said order that “if the Respondent do not file any affidavit by way of evidence of Mr. Sharma does not wish to cross-examine them, the next date of hearing will be treated as the date for final arguments in the matter.” The next date was fixed for 21st February 2009, which was later postponed to 14th March 2009.

26. At this stage, on 6th March 2009 the Respondent filed an Application under Section 23(3) of the said Act praying that it be permitted to amend its Reply dated 29th / 30th May 2006.

27. On being asked to explain the inordinate delay in making the Application after so much water had flown under the bridge, Mr. Malhotra respondent by saying that the Respondent was under the bonafide impression that they had already given the details of set off in the Reply since in the heading of the Reply they had stated “Reply to the Statement of Claim and Set Off on behalf of the Respondent”. He submitted that the person who had signed the Reply (Mr. Sridhar) was under the impression that the details of Set Off had been included in the Reply.

28. I consider this explanation rather strange. The Application for seeking amendment of the Reply is supported by an affidavit of one Mr. Chander Prakash Vohra, who asserts that he is well conversant with the facts and circumstances of the case and that the Application under Section 23(3) has been drafted under his instructions. Prior to this Application Mr. Vohra has not submitted any affidavit in these proceedings and nor has he been present at any hearing in the matter. It appears to me that prior to this Affidavit , Mr. Vohra was not even dealing with this case. Even the Application does not contain any averment as to who in the Respondent Company entertained the “bonafide impression” that the details and particulars of Set Off had been raised in the Reply. Though during oral submissions Mr. Malhotra submitted that it was Mr. Sridhar who was under the said impression, the Respondent chose not to file his affidavit. The Application also does not contain any such averment. **In any case, the Reply dated 29th /30th May 2006 was submitted in these proceedings through a reputed firm of lawyers and from time to time the Respondent has been represented by several counsel as well as by its in-house legal representatives. It is therefore unbelievable that between 29th May 2006 (when the Respondent filed its Reply) and 6th March 2009 i.e. nearly three years no one (i.e the Counsels and the in-house legal representatives involved in the proceedings)noticed that no Set Off had been pleaded in the Reply even though the claim has been hotly contested.**

29. The fact that in a reply dated 19th December 2001 to the Claimant’s notice dated 20th November 2001 the Respondent had alluded to a ‘claim’ against the Claimant only goes to show that the Claimant was conscious of the existence of its claim. It is therefore surprising that the absence of the ‘claim’ by way of Set Off in the Reply was noticed for the first time nearly three years after the submission of their Reply in these proceedings even though several eminent and learned lawyers (Mr. Sanjeev Puri, Senior Advocate, Mr. Rohit Puri,

Advocate and Mr. Ajay K. Dutta, Advocate) and at least two in-house legal representatives (Mr. S.N.Sridhar-GM Legal and Mr. Ankit Singhal-Corporate Legal Officer) were involved in the drafting of the replies and in the prosecution of the case on behalf of the Respondent.

30. It is also noteworthy that the present Application has been made after crossing several important landmarks in the proceedings and, in fact nearly at the end of the proceedings when the matter was listed for final arguments-since the Respondent had chosen not to file any affidavit by way of evidence. The Respondent has participated in the proceedings throughout and infact willingly submitted to the time-table for filing affidavits by way of evidence, cross-examination of the witnesses etc. on 6th December 2008 and 17th January 2009. In my opinion, having regard to the fact that the Claimant's evidence already stood closed and, in the absence of any affidavit by way of evidence filed by the Respondent, the date of 14th March 2009 was the last date for the parties to make their oral submissions on the Claimant's claim.

31. I am of the opinion that not only the Application dated 6th March 2009 belated but tantamount to a gross abuse of the process. The said Application, if allowed, would cause severe prejudice to the Claimant, inasmuch as it would virtually amount to re-opening the whole case and setting the clock back to the stage of filing of pleadings itself. It would also mean filing of fresh documents and evidence, which right of the Respondent stood closed on 11th November 2006. This, in my opinion, is wholly unacceptable. I also find it odd for the Respondent to contend that "the proceedings are at the initial stage as evidence of the parties have not commenced" in the face, inter-alia, of my Order dated 17th January, 2009 closing the Claimant's evidence.

32. I may further add, that though in the heading of the Reply "set off" was mentioned, there was no pleading at all that effect in that document. Further, had the Respondent's impression been "bonafide" that the plea of set off had been included in the Reply, they would have taken care at least to file some evidence/documents to back up their claim of set-off. In my opinion the case now sought to be made out is nothing but an afterthought.

33. For the aforesaid reasons and having regard to the unexplained delay of nearly three years in making the application to amend its defence, the Respondent's Application deserves to be dismissed with costs. Accordingly, the same is hereby dismissed. The issue of cost will be adverted to in the final Award."

9. It is, therefore, quite clear that there were delaying tactics by the present petitioner before the Arbitrator. Amendment which is granted is not a matter of right but the bonafides of the applicant who seeks for amendment has also necessarily to be examined. This becomes all the more relevant in the facts of the present case in view of the scathing indictment of the petitioner by the Arbitrator in the order dated 04.4.09. Clearly the amendment application was wholly without merit and there was no basis of any set off as was being urged by the respondent and the application was simply filed malafidely to delay the proceedings before the Arbitrator. I, therefore, do not find any ground whatsoever to hold that the order dated 04.4.09 is in any manner erroneous. Lastly, I may state that it was contended that an adjournment ought to have been granted by the Arbitrator on 04.4.09, since the same was asked for. An adjournment is not a matter of right because an adjournment also necessarily affects the other party to the proceedings. The facts of the case shout loud and clear as to the ulterior motives in filing of the amendment and the consequential prejudice to the respondent herein and thus the adjournment was rightly refused by the Arbitrator and no fault can be found with such action of the Arbitrator.

10. The Arbitrator has given proper reasons for awarding of the claim and which is pithily stated in paras 7 to 10 which are reproduced hereunder:

“7. Insofar as the Claimant is concerned it has clearly established:

a. That the Claimant duly telecast the programmes 'Aaj Tak' and 'Subah Aaj Tak'. In fact there is no plea of the Respondent that the telecast did not take place. On the contrary the Respondent's letter dated 8th March 2001 and 26th March 2001 (Exhibit C-14) establish that the telecast did take place though instead of 10.00 pm they were telecast at 10.05 pm.

b. That the Respondent is liable to pay to the Claimant for the said telecast @ Rs.1,33,875 per telecast (i.e. Rs.1,57,500 less Rs.23,625 being the Respondent's commission @ 15%). The said figure has been arrived at upon reference to the Commercial Contract executed by the Respondent for the period 1.10.2000 to 31.10.2000 and from 1.11.2000 to 30.11.2000 being Exhibits C-2 & C-3.

c. That there is nothing in the Accreditation Agreement or in the Commercial Contracts that makes the payment to the Claimant dependant upon the Respondent receiving payment from its Clients.

8. In these circumstances I am of the view that the Respondent is liable to pay to the Claimant the sum of Rs.46,85,295 being the sum owed to the Claimant for a period of 15 days in October of 2000 and for 20 days in the month of November 2000 which it has referred to in its letter of 8th March 2000. The said sum is calculated as follows:

a. October 2000: 15 days X 1,33,875= 20,08,125

b. November 2000: 20 days X 1,33,875= 26,77,500

Total: a + b = Rs.46,85,625.

9. I am also of the view that the Claimant has wrongfully withheld the said sums from the date they became due.

10. I therefore award to the Claimant the sum of Rs.46,85,625 with interest thereon at the agreed contractual rate of interest i.e. 18% per annum. For the sake of convenience, the 18% interest on the sum of Rs.20,08,125 is calculated from 1st November 2000 till the date of this Award i.e. Rs.31,89,782.78 and on the sum of Rs.26,77,500 is calculated from 1st December 2000 until the date of this Award i.e. Rs.42,13,431.37."

11. The right to challenge an Award under Section 34 is a limited one.

The petitioner has to show a clear cut illegality or violation of the provisions of the contract between the parties or an ex-facie perversity in the Award. I do not find any illegality or perversity whatsoever in the Award in view of the

aforesaid discussion and there is also no issue of violation of any contractual provision by the Arbitrator.

12. The present objection petition is therefore dismissed with costs of Rs.25,000/- payable by the petitioner in favour of the Registrar General of this Court for being utilized towards Juvenile Justice Fund within a period of four weeks from today.

VALMIKI J.MEHTA, J

December 16, 2009

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