

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

+ **Date of Decision: 08.07.2010**

% **O.M.P 266/2004**

CMI LIMITED Petitioner
Through: Mr. S.K. Gupta and Mr. Manish
Gupta, Advocates

versus

BHARAT SANCHAR NIGAM LTD. & ANR. Respondents
Through: Mr. Vivek Kishore, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J. (Oral)

1. The challenge in this petition under section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") is to the arbitral award dated 28.08.2003 of Sh. S. Maity, sole arbitrator. The challenge is limited to the rejection of the petitioners claim for interest.

2. The petitioner and the respondent no.1 had entered into an agreement contained in purchase order dated 08.11.1996, where under the petitioner agreed to supply PIJF underground cable to the respondent, BSNL.

3. Disputes arose between the parties, which were referred to arbitration of Sh. S. Maity, General Manager (Planning), Calcutta Telephones, BSNL. The learned arbitrator rendered his award dated 28.08.2003, whereby he awarded certain amounts in favour of the petitioner/claimant. However, the award provided that no interest needs to be paid to the petitioner by W.B. Telecom Circle. The petitioner received the said award soon after its making and the respondent also made payment to the petitioner in terms of the award.

4. After nearly six months of the making of the award, vide letter dated 09.02.2004 the petitioner invoked section 33 of the Act to seek interpretation of the award dated 28.08.2003 passed by the learned Arbitrator. The said interpretation was sought in respect of the award of the learned Arbitrator, whereby he had held that *"no interest needs to be paid to M/s CMI Ltd. by W. B. Telecom Circle"*.

5. The said application moved by the petitioner was rejected by the learned Arbitrator on 06.05.2004, whereby he observed that no interest is awarded to CMI at all. After receipt of the said communication, the petitioner has preferred the present petition dated 04.08.2004.

6. I have heard learned counsel for the parties. In my view, the present petition is barred by limitation inasmuch, as, it has not been filed within the period of three months from the date on which the petitioner had received the arbitral award dated 28.08.2003. It has also not been filed within the extended period of thirty days thereafter.

7. Learned counsel for the petitioner submits that since the petitioner had preferred the application under Section 33 to seek clarification of the award and the said application was rejected by the learned Arbitrator on 06.05.2004, and the present objections have been filed on 04.08.2004, they were filed within the period of limitation. This submission of the learned counsel for the petitioner is without any merit for more than one reason.

8. Firstly, the petitioner has failed to point out that it had been agreed by the parties that either of them may request the arbitral tribunal to give interpretation of a specific point or part of the award. Such an agreement is necessary to move an application before the arbitral tribunal under section 33(1)(b) of the Act. This is so evident from the opening words of clause (b), which reads "*if so agreed by the parties*". Pertinently, the requirement of a specific agreement to invoke section 33(1)(b) stands out in contradistinction with the absence of any such requirement for a party to invoke clause (a) of section 33(1) of the Act. The arbitration agreement between the parties has not been placed before me. However, I have called for the record of Arbitration Application No.135/1999 (preferred under Section 11 of the Act by the petitioner) and perused clause 20 of the General (Commercial) Conditions of Contract, which contains the Arbitration Agreement between the parties. No right has been conferred on the parties to invoke Section 33(1)(b) of the Act. No subsequent agreement in terms of Section 33(1)(b) has been pleaded or produced by the petitioner. Consequently, the application preferred by the

petitioner before the arbitral tribunal under section 33(1)(b) of the Act was not maintainable at all.

9. Secondly, the award of the learned Arbitrator whereby he denied interest to the petitioner was amply clear and left no room for any doubt whatsoever. The learned Arbitrator in his award dated 28.08.2003 had clearly stated that “*no interest needs to be paid to M/s CMI Ltd. by W.B. Telecom Circle*”. The plain and simple meaning of the said sentence was that there was no award made in favour of the petitioner in respect of its claim for interest. There was no question of seeking any interpretation in respect of this part of the award from the learned Arbitrator. There was no ambiguity about it. Consequently, Section 33 of the Act could not have been invoked by the petitioner at all.

10. A party cannot seek a review of the award made by the Arbitrator by resort to Section 33(1)(b) of the Act. Under the garb of an application to seek interpretation of a specific point or part of the award, a party cannot seek to reargue its claim which has clearly been disallowed by the Arbitrator. However, the endeavour of the petitioner, when it moved the application under Section 33 of the Act, was precisely that.

11. Paragraphs 3 to 7 of the said application demonstrate the aforesaid position. The same are therefore reproduced herein below:

“3. It is submitted that the claim of the Claimant CMI relates to a purely commercial transactions. The claimant had

claimed interest @ 18% per annum from June 1997 till the date of the award and thereafter till the actual payment.

4. It is submitted that it needs to be clarified and interpreted as to whether the interest is not payable to CMI Ltd., only after the date of the award or no interest is payable to CMI Ltd., at all under the award.
5. The Respondents have withheld approximately Rs.50.06 Lacs from the claimant with effect from June-1997 which is over a period of Six & Half Years and the claimant is entitled to receive interest due to the illegal withholding of the said payment which has been subsequently awarded by this Hon'ble Arbitral Tribunal.
6. That this being in the nature of commercial transactions once the award has held that the payment was wrongfully withheld from the claimant, there has to be an award of interest on the amount wrongfully withheld.
7. In the light of the aforesaid this Hon'ble Arbitral Tribunal may be pleased to clarify as to whether the interest is not paid to CMI Ltd., from the date of the award or no interest awarded at all to CMI Ltd., under the award."

12. As aforesaid, there was no question of the award being clarified or interpreted on the aspect as to whether interest was not payable to CMI Ltd. only after the date of the award or no interest was payable to CMI Ltd. at all under the award. No other part of the award dealt with the aspect of payment of interest for any period, either before the date of the award or after the date of the award. The application moved by the petitioner was therefore wholly misconceived and by moving such an application, the petitioner cannot seek to take umbrage under section 34(3) of the Act.

13. Secondly, even the said application filed under Section 33 of the Act before the learned Arbitrator was filed after much delay. The said application, in any event, could have been filed within 30 days from the receipt of the arbitral award as, admittedly, the parties had not provided for any other time period within which such an application could be moved. The award dated 28.08.2003 had been received by the petitioner soon after its being made. The application under section 33 was moved only on 09.02.2004. There was a delay in the moving of the said application of more than 4 months.

14. Learned counsel for the petitioner submits that the period of 30 days prescribed under Section 33 for moving an application under that provision is not mandatory and the same could have been extended.

15. A perusal of the application moved by the petitioner by resort to Section 33 of the Act shows that the petitioner did not seek to explain the delay in moving the said application. Even if the submission of the learned counsel for the petitioner, that the limitation provided for under Section 33 is not mandatory and that the same can be extended were to be accepted, the party moving such an application beyond the period of 30 days would certainly have to explain the reasons for the delay in moving the application. However, the petitioner has not offered any explanation whatsoever for the said delay. The petitioner did not even seek the condonation of the said delay.

16. Even otherwise, I have difficulty in accepting the submission of the learned counsel for the petitioner that the period of 30 days prescribed under Section 33 of the Act can be relaxed and the delay can be condoned by the Arbitrator. Neither Section 33 nor any other provision of the Act gives the power to the arbitral tribunal or even the Court to condone the delay in moving an application under Section 33(1)(b) of the Act. Pertinently, the absence of the power to condone the delay in the moving of an application under section 33(1)(b) of the Act stands out when one notices that the period within which the arbitral tribunal may make the correction or interpretation (which is also 30 days under section 33(2) of the Act) may be extended by the arbitral tribunal under section 33(6) of the Act.

17. The scheme of the Act, on a conjoint reading of Section 34(3) and Section 33 of the Act, does not support the submission of the petitioner. The application for setting aside the award should be made within three months from the date of receipt of the award. The power of the Court to condone the delay beyond the period of three months is limited to a further period of 30 days only and no more. The only exception carved out in Section 34(3), which enables a party to file the objections beyond the period of three months is where a request has been made to the Arbitrator under Section 33 to correct computational, clerical or typographical errors or errors of similar nature or to give an interpretation of a specific point or part of the award. An application for setting aside of award may be made within three months from the date on which the request has been disposed of by the arbitral tribunal.

18. A party cannot seek to extend the period of limitation for preferring the objections merely by filing a belated application under Section 33 of the Act before the Arbitrator, or by filing an application under Section 33 of the Act which is not maintainable in the facts of a given case. If the submission of the learned counsel for the petitioner were to be accepted, it would lead to an absurd result, as is evident from the facts of this case as well. A party who has failed to file its objections within the period of limitation prescribed under Section 34(3) of the Act, would then move an application under Section 33 of the Act before the learned Arbitrator even when there may be no justification for it and wait for its disposal and soon after its disposal, the party may move an application for setting aside the award, which otherwise has got time barred, as has been done in the present case. Therefore, the aforesaid submission of the learned counsel for the petitioner is rejected.

19. The objections to the denial of interest should have been raised within the period of limitation prescribed under Section 34(3) of the Act, after the receipt of the award dated 28.08.2003. The same has admittedly been raised only on 04.08.2004. Consequently, the present objection petition is barred by limitation and is therefore, dismissed.

VIPIN SANGHI, J.

JULY 08, 2010
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