

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

+ **O.M.P. No.160/2010**

Date of decision : March 19, 2010

M/S SHYAM TELECOM LTD.

... Petitioner.

Through: Mr. Krishnan Venugopal, Sr. Advocate with
Mr. Siddarth, Ms. Shuchi Jain and Mr.
Karun Prakash, Advocates

VERSUS

ICOMM LTD

...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? Yes
3. Whether the judgment should be reported in the Digest? Yes

% **JUDGMENT(ORAL)**

VALMIKI J. MEHTA, J

1. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996 the petitioner challenges the order dated 1st December, 2009 passed by the

sole arbitrator. By the impugned order, the amendment application which was filed by the petitioner was dismissed. It is contended that in spite of the fact that it is only an amendment application which has been dismissed by the impugned order, this order amounts to an interim or partial Award.

2. It is trite that objections under Section 34 would be filed only if there is an Award. No doubt the Award need not be a final Award but it can also be an interim or partial Award, but, all the same it has to be an Award. An interim or partial Award, in my opinion would take colour from Section 2(2) of the Code of Civil Procedure, 1908, in that the said order must decide finally, on merits, a particular part of the disputes between the parties. Section 2(2) of the CPC reads as under:-

“ 2. Definitions—In this Act, unless there is anything repugnant in the subject or context,—

xxx

xxx

xxx

(2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, **conclusively determines the rights of the parties** with regard to all or **any** of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within ¹[* * *] Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

*Explanation.—*A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

Section 31(6) of the Act is also relevant and the same reads as under :-

“31. Form and contents of arbitral award—

xxx

xxx

xxx

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.”

Clearly an interim Award has to be on a matter with respect to which a final Award can be made i.e. the interim Award is also the subject matter of a final Award. Putting it differently therefore an interim Award has to take the colour of a final Award. An interim Award is a final Award at the interim stage viz a stage earlier than at the stage of final arguments. It is a part final Award because there would remain pending other points and reliefs for adjudication. It is therefore, that I feel that an interim Award has to be in the nature of a part judgment and decree as envisaged under Section 2 (2) of CPC and the same must be such that it conclusively determines the rights of the parties on a matter in controversy in the suit as done in a final judgment. An interim order thus cannot be said to be an interim Award when the order is not in the nature of a part decree. In my opinion the impugned order in view of what I have said hereinabove, is not an interim Award as it is not in the nature of a part decree being only an interim order.

3. In interpreting the meaning to be ascribed to an interim Award, it is necessary to keep in mind Section 5 of the Act and the same reads as under:-

“5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

4. The Supreme Court has now repeatedly held that arbitration is a chosen forum between the parties and the functioning of which should not ordinarily be interfered with. The Supreme Court has said the mechanisms in the new Act are to further one of the main objects of the Act and which is to avoid delay in the conduct of the arbitration proceedings. This aspect should always be kept in mind by the Courts when dealing in cases arising under the 1996 Act. In fact Section 5 of the Act makes it clear that the extent of judicial intervention is therefore limited and it not permissible to interfere except to the extent of matters provided for. Thus unless the impugned order is an Award this petition under Section 34 will not lie, and I have already held that the impugned order is not an interim Award. If this Court interferes with the impugned order then it would amount to interference/intervention in matters not provided for and hence prohibited by Section 5.

5. In support of the proposition that the impugned order disallowing the application for amendment, would amount to an interim Award, the learned senior counsel for the petitioner relied upon in ***McDermott International Inc. Vs. Burn***

Standard Co. Ltd. & Others, 2006 (11) SCC 181 and *National Thermal Power Corpn. Ltd. Vs. Siemens Atkeingesellschaft, (2007) Vol. 4 SCC 451*. None of the two judgments would apply to the facts of the present case because in none of these two judgments it has been held that an interim order can be said to be an interim Award. Further, these judgments do not deal with the issue that if an application under Order 6 Rule 17 of the CPC is disposed of, the same would or would not amount to an interim Award. Having held and keeping in mind that the impugned order is not an interim Award let us otherwise examine the arguments as raised by the petitioner.

6. Mr. Venugopal, learned senior counsel who appeared for the petitioner raised the following contentions :-

(i) The amendment application which was filed could not have been dismissed except on the ground that the amendment application was delayed. He contended that this is so by virtue of Section 23 (3) of the Arbitration & Conciliation Act, as per which an application for amendment can only be dismissed by the arbitrator if it is delayed, and on no other ground.

(ii) It is contended that the arbitrator in fact has decided the contentions of the applicant/petitioner/respondent in the arbitration proceedings, on merits and therefore, this amounts to an interim Award deciding the matters between the parties.

(iii) He finally contended that the arbitrator has fallen into an error in deciding the disputed questions of facts as averred in the amendment application which could only have been decided after trial. He also urged that the arbitrator has further erred in holding that there is no merit in the application for amendment because it would not serve any useful purpose and would be an exercise in futility.

7. In my opinion, the first contention of the learned senior counsel for the petitioner that an application for amendment if moved before the arbitrator shall and must be allowed and can be dismissed only if there is delay, this is an argument, in fact, in my opinion of desperation. It is inconceivable that the arbitrator should allow an application for amendment only on the basis and only on the ground whether such an application is delayed or not. If this argument is accepted that no other plea should be considered by the arbitrator, except the plea of delay, in my opinion, the same would cause unnecessary indiscipline in the arbitration proceedings because one after another amendment applications, which may have no bearing at all on matters of controversy and which may be mala fide or not bona fide may be moved before the arbitrator and then it can be contended to allow such applications merely because there is no delay in filing the same. Thus, this plea is misconceived and is rejected. I must hasten at this stage to clarify that this argument has been considered by me assuming the impugned order is subject to challenge by this petition and which I already have held that it is not.

8.(i) The second and third contentions as raised by the counsel for the petitioner are that the impugned order amounts to an interim Award, in that the arbitrator has decided issues on merits viz of fraud as alleged in the amendment application and that too without first allowing the amendment application and setting down the cases for trial. At first blush, this argument may appear to be attractive, however, if this plea is accepted in its extreme position, then the same would mean that once disputed questions of fact by means of an amendment application are raised, the arbitrator is bound to allow the application because until and unless the facts which are asserted in the application under Order 6 Rule 17 CPC are not decided in trial, such an application has to be compulsorily allowed although the facts do not fall within the parameters of allowing such application. This argument in my opinion cannot and should not be countenanced. Even a Civil Court, no doubt considers an application for amendment liberally, however, it is settled law that if the Court finds an application to be not bona fide in the facts and circumstances of a particular case, the Court also dismisses the said application and it cannot be contended that merely because the application for amendment would contain disputed factual aspects the application necessarily ought to be allowed on the ground that unless trial takes place on the disputed facts of case the applicant should not be denied opportunity to place such amended pleadings on record. No doubt ordinarily merits of facts ordinarily are not considered at the time of

allowing amendment, but it does not debar the adjudicating authority from dismissing and amendment application if the application is not bona fide and as per the other facts and circumstances of the case. By such a decision the impugned order however does not become an interim Award. The arbitrator in the facts of the case has in effect held that the facts sought to be brought in by amendment are not bona fide being not true. By doing so the arbitrator has exercised a discretion which I don't think ought to be interfered with merely because two views are possible.

(ii). As regards the aspect that the impugned order decides the case of the respondent on merits by deciding the pleas of fraud and other aspects, all I need state is that an interim order when it makes observations, they are only necessary and made for the purpose of disposal of that application. It is not as if these observations will in any manner bind the parties with respect to the existing issues and the existing pleadings which would in any case have to be decided on merits de hors the observations made in the impugned order. Observations made in any interim order cannot and does not bind the parties at the final stage of the proceedings. In my opinion the arbitrator was further justified in taking one plausible view that the amendments would not serve any purpose. By holding so and exercising such discretion the order does not become an interim Award which has to be a final judgment on the existing issues. All this ultimately depends on

facts of each case and in my opinion there is no gross illegality so as to persuade this Court to interfere in these proceedings.

9. I must admit that one of the main reason which had pursued me not to entertain the present petition is that by dismissal of this petition the petitioner is not left remediless and the entitlement of the petitioner to challenge this interim order dated 1st December, 2009 will very much be there when the petitioner will challenge the final Award in this case if passed by the arbitrator against it. I have also kept in mind the intention of the 1996 Act that there should not be unnecessary judicial intervention in the arbitration proceedings which must be allowed to proceed and progress of which should not be allowed to be scuttled by the parties. In my opinion since the petitioner is otherwise fully secured because not only would the observations made in the impugned order not affect his existing case on merits, but with respect to the new pleas which were sought to be raised including the plead of fraud can well be challenged by the petitioner after passing of the final Award in the case, I am not inclined to entertain this petition.

10. No other point was urged or argued by the counsel for the petitioner.

11. Accordingly, this petition is dismissed and disposed of by holding that the impugned order would not amount to an interim Award and it is always open to the petitioner to challenge the impugned order in its challenge which would made to the final Award which may be passed against it in the present case. If the Courts

would start interfering in interim orders, the intendment of the 1996 Act that there should be expeditious disposal of the arbitration proceedings by a forum which is a chosen forum of the parties would be defeated. The petition is dismissed with costs of Rs.25,000/- payable to the Registrar General of this Court for being utilized towards Juvenile Justice. The costs shall be paid within a period of two weeks from today.

I.A. No.3550-3552/2010

12. Since the main petition is disposed of, no orders are required in these applications which are accordingly disposed of.

VALMIKI J. MEHTA, J

March 19, 2010
J