

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

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FAO(OS) 356/2009

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Date of decision: 14th January, 2010

S.P.S. RANA

..... Appellant

Through: Mr. Manjit Singh, Advocate

Versus

MTNL & ORS.

..... Respondents

Through: Mr. Ravi Sikri with Mr. Karan Maini &
Mr. Vaibhav Kalra, Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 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 the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. This appeal under Section 37 of the Arbitration Act, 1996 along with an application being CM No.11790/2009 for condonation of delay of 33 days in preferring the appeal has been filed against the order dated 15th May, 2009 of the Single Judge dismissing the petition of the appellant under Section 34 of the Act with respect to the arbitration award dated 9th August, 2007 as barred by time. The learned Single Judge held that the award having been published on 9th August, 2007, the petition under Section 34 filed on 12th March, 2008 was not maintainable.

2. The counsel for the appellant has urged that the learned Single Judge did not consider that the appellant had on 7th December, 2007 preferred an application under Section 33 of the Act and rejection of which application was communicated to the appellant only on 31st December, 2007. It is contended that counted from 31st December, 2007, the 90 days prescribed under Section 34(3) of the Act for preferring the petition with respect to the award had not expired.

3. Undoubtedly, Section 34(3) provides that if a request has been made under Section 33, the time for filing the application under Section 34 for setting aside the award would commence from the date when such request had been disposed of by the Arbitral Tribunal. It is also correct that the learned Single Judge has in the order impugned in this appeal not dealt with the said aspect of the matter. However, even on consideration of the same, we are unable to hold the petition under Section 34 of the Act to have been preferred within time.

4. Section 33(1) of the Act prescribes a time of 30 days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties, for a party to apply to the Arbitral Tribunal for correction of any computation errors, clerical or typographical error or other similar errors in the award or for giving an interpretation of a specific point or part of the award. The Arbitral Tribunal under Section 33 (2) of the Act is required to make the correction or give an interpretation, if the request under Section 33(1) of the Act is found to be justified, within 30 days from the receipt of such request. The Arbitral Tribunal under Section 33 (3) of the Act is empowered to of its own initiative also, within 30 days from the date of the award make such correction. The Arbitral Tribunal alone and not the parties, under Section 33 (6) of the Act has been empowered to extend, if necessary, the period of time within which it shall make correction or give an interpretation as aforesaid. It is not the case of the appellant that in the

present case any period was agreed between the parties to apply under Section 33(1) of the Act. Thus, the appellant was required to apply within 30 days of the receipt of the arbitral award.

5. The appellant has in the petition under Section 33 of the Act, copy whereof has been filed before this Court, admitted that the Arbitrator forwarded the award to the Registrar of the Indian Council of Arbitration (ICA) for publication on 9th August, 2007 and the ICA vide its letter dated 10th August, 2007 informed both the parties of the making of the award with further direction to deposit Rs.4,875/- each towards further fee / other charges of arbitration. It is further the case of the appellant in the said application that it deposited not only its share of Rs.4,875/- but also the share of the respondent of Rs.4,875/-, on 10th August, 2007 itself and also intimated to the respondent vide its letter dated 13th August, 2007 of the said deposit and also made demand for reimbursement of the said amount. Thus, it would appear that the copy of the award was made available to the appellant on 10th August, 2007 itself. The period of 30 days there-from for applying under Section 33 of the Act would expire on 9th September, 2007. However, admittedly, the application dated 20th November, 2007 under Section 33 of the Act was filed on 7th December, 2007. The application under Section 33 was thus not within time. The Arbitrator vide order dated 18th December, 2007, copy whereof has been handed over in the Court, held that since the Arbitrator had become functus officio, no application could be entertained. The said decision of the Arbitrator was communicated to the petitioner vide letter dated 31st December, 2007 of the Indian Council of Arbitration, copy whereof has also been handed over in the Court.

6. The first question which arises for consideration is, whether the time of 30 days provided under Section 33(1) of the Act, in the absence of any agreement

between the parties of any other time, is extendable.

7. Section 28(1) of the Act provides for the Arbitral Tribunal to decide in accordance with the substantive law for the time being in force in India. The said substantive law would cover the law of limitation. Section 43 (1) of the Act expressly applies it to arbitrations. Even otherwise, it has been held in ***United India Assurance Co. Ltd. Vs. J.A. Infrastructure Pvt. Ltd.*** 2006(8) SCC 21 that the law of limitation applies to arbitration as it applies to the proceedings in Court. Admittedly, no application for condonation of delay in filing the application under Section 33 of the Act before the Arbitral Tribunal was filed. The questions which arise for consideration are, whether the said time of 30 days is extendable? Can the Arbitral Tribunal, upon reasons being shown for condonation of delay, condone the delay in applying under Section 33 of the Act?

8. The Supreme Court in ***Union of India Vs. M/s Popular Construction Co.*** (2001) 8 SCC 470 held the time provided under Section 34(3) of the Act for setting aside of the award to be not extendable. However, it was so held owing to the peculiar language of the proviso to Section 34(3) which empowers the court to entertain the petition within a further period of 30 days, “but not thereafter”. Else it has been held in ***Gulbarga University Vs. Mallikarjun S. Kodagali*** 2008 (11) SCALE 79 that Section 14 of the limitation Act applies to Section 34(3) of the Act.

9. Section 33 of the Act does not use the words “but not thereafter”. However, the period of 30 days is subject to “unless another period of time has been agreed upon by the parties”. In our view the said expression has to be read in the same manner as the expression “but not thereafter” was interpreted in ***M/s Popular Construction Co.*** (supra). Also, Section 32 inter alia provides for termination of the arbitral proceedings by the final award. Section 32 (3) lays

down that the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings, subject inter alia to Section 33. It will thus be seen that unless a case is covered by Section 33, the mandate of the Arbitral Tribunal is terminated. Thus, unless an application/petition under Section 33(1) of the Act is preferred within 30 days of the making of the award, the mandate of the Arbitral Tribunal terminates. Once the mandate of the Arbitral Tribunal terminates, it is not possible to file the application / petition under Section 33 of the Act.

10. The Supreme Court recently in ***Commissioner of Customs & Central Excise Vs. Hongo India (P) Ltd.*** (2009) 5 SCC 791 has held that it is well settled that it is the duty of the Court to respect the legislative intent and further that by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act. It was further held that the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act (with which the court was concerned in that case) relating to filing of reference application in the High Court. Similarly in ***Katari Suryanarayana Vs. Koppiseti Subba Rao*** MANU/SC/0545/2009, it was held that the extent or degree of leniency to be shown by a court depends on the nature of the application and the facts and circumstances of the case. One of the main purposes for the re-enactment of the arbitration law was to allow adjudication of disputes by arbitration expeditiously. Seen in this light, it will be found that the period of 30 days provided for preferring the application under Section 33 of the Act is not extendable inasmuch as unless the application is so preferred, there is no Arbitrator thereafter. We find that the same conclusion has been reached in ***UOI Vs. Saboo Minerals Pvt. Ltd.*** 106 (2003) DLT 92 and in ***Ircon International Ltd. Vs. Budhreja Mining & Constructions Ltd.*** MANU/DE/8647/2007 by Single

Judges of this Court.

11. That being the position, the petition purportedly preferred by the petitioner under Section 33 of the Act was in fact no petition. Thus the order dated 18th December, 2007 of the Arbitrator holding the petition under Section 33 preferred after 30 days to be not maintainable and the Arbitrator having become functus officio cannot be said to have disposed of the said application. The said order has to be read as an order only intimating that the application did not lie, the Arbitrator having become functus officio. The petitioner is thus not entitled to the benefit of the part of Section 34(3) providing for commencement of the period of three months for applying for setting aside of the order from the date of disposal of the application under Section 33; as such disposal has to be on an application preferred within 30 days provided under Section 33 (1) of the Act. If the application under Section 33 is preferred after 30 days, the order of the Arbitral Tribunal to the effect that it cannot entertain the application, being functus officio, is not a “disposal” from which a fresh period of limitation would accrue. If such an interpretation were to be given, it will easily permit the unscrupulous litigants to, notwithstanding the expiry of the period of three months prescribed under Section 34(3) apply for setting aside of the award at any stage by merely prior thereto filing a application under Section 33 of the Act.

12. The application under Section 33 of the Act in the present case was preferred not only beyond 30 days but also beyond 90 days, which is the period prescribed for applying for setting aside of the award. As noticed above, the copy of the award was furnished to the appellant on 10th August, 2007; the period of three months there-from for applying for setting aside of the award would expire on 10th November, 2007. No petition under Section 34(1) was however preferred. It appears that the application under Section 33 was filed merely to get over the

expiry of the period prescribed for filing the petition under Section 34(1). This is also apparent from the application not disclosing any ground under Section 33(1)(a) of the Act. The claim in the said application was for a direction to the respondent to pay to the appellant the sum of Rs.4,875/- (supra) towards balance arbitration costs deposited by the appellant on behalf of the respondent. The only other submission in the application was that the various documents and submissions in writing of the appellant had not been considered by the Arbitrator. Such pleas do not fall within the ambit of Section 33(1)(a) or (b) of the Act.

13. We, therefore, do not find any merit in the appeal. The same is dismissed with costs of Rs.10,000/- to the respondent.

CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J

JANUARY 14, 2010

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