

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24 / 10 / 2016

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

ORIGINAL PETITION NO.677 OF 2013

Nimbus Communications Ltd.,
a Company incorporated under the
Companies Act, 1956, having its
registered office at Nimbus Centre,
Oberoi Complex, Off New Link Road,
Andheri (West)
Mumbai - 400 053. ... Petitioner

Versus

Board of Control for Cricket in India
a Society registered under the Tamil Nadu
Societies Registration Act and having its
address at: Cricket Center,
Wankhede Stadium,
Mumbai - 400 020. ... Respondent

PRAYER: Original Petition filed under Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 with prayer that the Honourable Chief Justice of this Court be pleased to appoint some fit and proper person as the Arbitrator for the respondent in terms of Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 and to pay cost of this petition.

For Petitioner : Mr.Krishna Srinivasan

For Respondent : Mr.A.L.Somayaji
Senior Counsel for
Mr.Adithya Reddy

ORDER

The present petition is filed under Section 11(6) (a) of the Arbitration and Conciliation Act, 1996 read with Clause 12 of the Appointment of Arbitrators by the Chief Justice of Madras High Court Scheme, 1996.

2. The petitioner is a Company carrying on business as producers of Television programmes, motion pictures, live sports events and a special marketing agency for television programmes and air time sponsored shows. The respondent is the Board of Control for Cricket in India and is a Society registered under the Tamil Nadu Societies Registration Act. It is the apex governing body for cricket in India.

3. It is the case of the petitioner that the parties had entered into a Media Rights Agreement dated 28.02.2006 (*hereinafter referred to as "2006 MRA"*) which came to be amended vide addendum agreement dated 29.03.2007 and a second addendum agreement dated 02.06.2007. It is stated that the respondent had committed various breaches of the said 2006 MRA including the breach of Media Rights exclusivity, breaches in relation to sharing of the test matches with Doordarshan, Internet Piracy, Hospitality, Tickets and Functions, Changes on Schedule of Matches and

Regulatory Changes, which have been pointed out by the petitioner to the respondent as early as on 05.01.2008. Despite several reminders by the petitioner, the respondent failed to provide any concrete proposals and indemnify the petitioner for such breaches committed by the respondent. Therefore, invoking Clause 19.3 of the 2006 MRA, the petitioner issued a legal notice on 30.08.2012 calling upon the respondent to consent to nomination of a Sole Arbitrator in lieu of 3-Member Tribunal as provided for in Clause 19.3. However, there was no response forthcoming from the respondent though the legal notice was received on 31.08.2012. Therefore, the petitioner nominated Mr. Justice F.I. Rebello (Retd.) (Former Chief Justice, Allahabad High Court and Former Judge, Bombay High Court) vide letter dated 20.11.2012, as the petitioner's Nominee Arbitrator and called upon the respondent to nominate the second Arbitrator within 30 days from the date of receipt of the said letter. The said letter was received by the respondent without any response. Therefore, the petitioner has invoked the provisions of Section 11(6)(a) of the Arbitration and Conciliation Act, 1996, for appointment of a Second Arbitrator, as the petitioner had already nominated the First Arbitrator, in terms of Section 11(6)(a) of the

Arbitration and Conciliation Act, 1996.

4. It is also mentioned that the petitioner had filed an application in A.No.88 of 2013 before the Bombay High Court and the same was withdrawn with liberty to approach this Court.

5. The above application is opposed by the respondent. The respondent does not dispute the Media Rights Agreement dated 28.02.2006 followed by the first and second addendum agreements dated 29.03.2007 and 02.06.2007 respectively. It is stated that subsequent to that, the parties had entered into another agreement called Media Rights License Agreement on 15.10.2009 (*hereinafter referred to as "MRLA Agreement"*). Under the said agreement, the petitioner had consented to pay the respondent all the sums owed by it under the earlier agreement dated 28.02.2006. It was also agreed that the disputes, if any, between the petitioner and the respondent with respect to the agreement dated 28.02.2006 shall be decided by the respondent only and such a decision would be binding on both parties. It was also specifically mentioned that the subsequent agreement dated 15.10.2009 would supersede all earlier agreements and arrangements between the parties. While so, the petition seeking appointment of an Arbitrator to resolve the alleged

disputes between the parties based on the agreement dated 28.02.2006 is unsustainable.

6. It is further stated by the respondent that the issues under the 2006 MRA were resolved between the parties by letter dated 15.08.2011, whereunder the petitioner had agreed to pay the respondent a sum of Rs.5,50,00,000/- and acknowledged that such payment will be in full and final settlement of various disputes under the 2006 MRA. In fact, the addendum agreement dated 15.10.2009 was entered into between the parties on 22.08.2011 recording the settlement between the parties. In view of the above said letter and agreement, the claim under 2006 MRA stood fully discharged. Therefore, the invocation of arbitration under 2006 MRA does not arise. In fact, the MRLA Agreement dated 15.10.2009 was terminated by the respondent on 12.12.2011 resulting in arbitration proceedings, which is pending adjudication.

7. It is further contended by the respondent that 2006 MRA is barred by limitation, as the alleged breaches by the respondent are all in 2008 and the arbitration was invoked in 2013. It is stated that by any stretch of imagination, it cannot be treated as a continuous cause of

action. Therefore, the invocation of arbitration clause under 2006 MRA has to be dismissed as invalid in law.

8. The question for determination in the present Original Petition is whether the petitioner can seek the remedy of appointment of an Arbitrator in view of the MRLA dated 15.10.2009.

9. The learned counsel for the petitioner referred to Exhibit "A" - Media Rights Agreement dated 28.02.2006 (2006 MRA). As per the same, the rights period was commencing from 01.03.2006 to 31.03.2010. Clause 19.3 based on which the present petition is filed refers to arbitration clause, which reads as follows:

"19.3. Any dispute, which has not been resolved, as provided herein within 21 days of the initiation of such procedure, shall be settled exclusively by arbitration in Chennai India, in accordance with ARBITRATION AND CONCILIATION ACT, 1996. The arbitration tribunal shall consist of 3 arbitrators, with each party designating one arbitrator and the said chosen arbitrators designating the third arbitrator. The place of arbitration in India shall be Chennai, and the language of arbitration shall be English. The arbitrators are not empowered to award damages in excess of compensatory damages and each party hereby irrevocably

waives any right to recover such damages with respect to any dispute resolved by arbitration."

10. The first addendum agreement dated 29.03.2007 was marked as Exhibit "B". The first addendum agreement was with respect to the limited extent of determining the revenue impact on the Licensee's exercise or exploitation of the Media Rights on account of any rulings, orders, etc., issued by the Government of India as set out in the Licensee's letter dated 28.02.2006, due to compulsory sharing of signals with Prasar Bharathi, the lack of encryption by Doordarshan, the broadcast of BCCI events on free to air DD DTH.

11. The second addendum agreement dated 02.06.2007 was entered into between the parties for the purpose of recording the settlement reached between the parties with regard to the evaluation process set out in the addendum agreement dated 29.03.2007.

12. Clause 6 of the second addendum agreement refers to waiver clause, wherein it is specifically stated that the Licensee, namely, the petitioner, waives its claim to a refund in respect of the cancelled Guwahati ODI vs. England in April 2006 and BCCI also waives its claim to an

additional rights fee in respect of additional ODI Vs. Sri Lanka in February 2007.

13. In Clause 9, the petitioner had acknowledged that if despite the sincere best efforts, BCCI / respondent is not able to procure as agreed in Clause 9, then the petitioner cannot make a claim on the issue.

14. In Clause 14, jurisdiction of the Mumbai High Court exclusively was agreed to by the parties in the event of dispute under this addendum agreement and appointment of a sole Arbitrator.

15. The notice under Exhibit - D dated 30.08.2012 was issued by the petitioner to the respondent claiming compensation for the several breaches including (i) Breach of Media Rights exclusivity (ii) Internet Piracy (iii) Sharing of tests with Doordarshan (iv) Hospitality, Tickets and Function (v) Changes on Schedule / Matches (vi) Regulatory Changes.

16. According to the respondent, as seen from the first and second addendum agreements, all these breaches have been covered. Regarding, Internet piracy, there is no correspondence and the specific dates, as to when was the piracy and what action has been taken etc., are all not mentioned.

17. With respect to the Media Rights and sharing with the Doordarshan, the second addendum agreement has covered the same in Clause - 9.

18. With respect to the Hospitality, Tickets and Functions also, the learned counsel for the petitioner fairly conceded not to claim. Even otherwise, there is no correspondence in this regard.

19. With respect to Changes in Schedule of Matches, the same are also covered by Clause 7 of the second addendum agreement.

20. It was further contended that when the second addendum agreement has superseded the 2006 MRA, without challenging the said agreement or the clauses, the Original Petition filed, as such by the petitioner, is not maintainable. The second addendum agreement specifies the exclusive jurisdiction of Courts at Mumbai in the event of any dispute arising under this addendum agreement. With respect to the inconsistency between the 2006 MRA, first addendum agreement and the second addendum agreement, only the second Addendum agreement will prevail. This should be only with respect to the revenue impact on the licensee's exercise or exploitation of media rights and the second

addendum agreement is with respect to the evaluation process.

21. Mr.A.L.Somayaji, learned Senior Counsel for the respondent also specifically pointed out that the issue now sought for to be resolved is no longer a live claim, as it is superseded by the addendum agreements and the Media Rights Agreement period expired as early as on 31.03.2010. Admittedly, for those alleged claims that arose in the year 2008, the Original Petition has been filed in the year 2013, which is clearly barred by limitation. The endeavour of the respondent is that the claims that have been made in the legal notice dated 30.08.2012 are all waived in view of Clause 6 of the addendum agreement and when the claim of the petitioner is no longer a live claim, the remedy of arbitration is not available to the petitioner.

22. Reliance was placed on the decision of the Honourable Supreme Court in **SHREE RAM MILLS LTD. VS. UTILITY PREMISES (P) LTD. [2007 (4) SCC 599]** which following **SBP & CO. VS. PATEL ENGG. LTD. [2005 (8) SCC 618]** held as follows:

" 27. We shall take up the last contention raised by the appellant regarding the scope of the order passed by the Chief Justice or his Designate Judge.

It was contended that since the Designate Judge has already given findings regarding the existence of live claim as also the limitation, it would be for this Court to test the correctness of the findings. As against this it was argued by the respondent that such issues regarding the live claim as also the limitation are decided by the Chief Justice or his Designate not finally but for the purpose of making appointment of the Arbitrators under [Section 11\(6\)](#) of the Act. In our opinion what the Chief Justice or his Designate does is to put the arbitration proceedings in motion by appointing an Arbitrator and it is for that purpose that the finding is given in respect of the existence of the arbitration clause, the territorial jurisdiction, live issue and the limitation. It cannot be disputed that unless there is a finding given on these issues, there would be no question of proceeding with the arbitration. Shri Salve as well as Shri Venugopal invited our attention to the observations made in para 39 in *SBP & CO. vs. Patel Engineering Ltd. & Anr.* [(2005) 8 SCC 618] which are as under:

"39.It is necessary to define what exactly the Chief

Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be

appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

A glance on this para would suggest the scope of order under Section 11 to be passed by the Chief Justice or his Designate. In so far as the issues

regarding territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his Designate has to decide those issues because otherwise the arbitration can never proceed. Thus the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the Arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record

his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that their remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the

parties have not become barred by limitation."

23. What is the effect of the first and second addendum agreements and what is the effect of waiver mentioned therein would be for the arbitral tribunal to decide.

24. Mr.A.L.Somayaji, learned Senior Counsel had specifically contended that (a) no live issue to be decided as per MRA 2006; (b) as per Clause 14, only the Court in Bombay has jurisdiction; and (c) the claim is time barred as there was no demand / claim made till / when the first or second addendum agreements were made or even when the MRLA was executed between the parties.

25. It was also clarified that as per Clause 6 of the second addendum agreement, no sum is due to other party which is a waiver. Finally, the petitioner had not come to Court with clean hands as in the Original Petition, there is no reference about the addendum agreements.

26. To buttress the above mentioned submissions, the learned Senior Counsel placed strong reliance on the judgment of the Supreme Court in **THE UNION OF INDIA VS.**

KISHORILAL GUPTA AND BROS. [AIR 1959 SC 1362 (1)]. Paragraph nos.7 and 8 are extracted hereunder:

"7. If so, the next question is whether the arbitration clause of the original contracts survived after the execution of the settlement contract dated February 22, 1949. The learned Counsel for the appellant contends that the terms of the arbitration clause are wide and comprehensive, and any dispute on the question whether the said contract was discharged by any of the ways known to law came within its fold.

8. Uninfluenced by authorities or case-law, the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was none the less an integral part of the contract, which had no existence de hors the contract. It was intended to cover all the disputes arising under the conditions of, or in connection with, the contracts. Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. The fact that the new contract

not only did not provide for the survival of the arbitration clause but also the circumstance that it contained both substantive and procedural terms indicates that the parties gave up the terms of the old contracts, including the arbitration clause. The case-law referred to by the learned Counsel in this connection does not, in our view, lend support to his broad contention and indeed the principle on which the said decisions are based is a pointer to the contrary."

27. Reliance was also placed on the judgment of the Supreme Court in ***SPEECH AND SOFTWARE TECHNOLOGIES (INDIA) PRIVATE LIMITED VS. NEOS INTERACTIVE LIMITED [2009 (1) SCC 475]***. Para 11 of the same is extracted hereunder:

"11.By now it is well settled that exercise of power under Section 11(6) of the Act is judicial power. After the decision of this Court in *SBP and Company vs. Patel Engineering Ltd.* (2005) 8 SCC 618, the Designated Judge has to consider the claim of both the parties to the matter and pass a reasoned order. It is also well settled that existence of arbitration agreement is a condition precedent before exercise of

powers under [Section 11\(6\)](#) of the Act. The preliminary matters to be considered by the court are (1) existence of arbitration agreement, (2) territorial jurisdiction, (3) whether there are live issues to be referred to the arbitrator, and (4) whether application is filed within the period of limitation prescribed by the law. If the court finds that the arbitration agreement does not exist or is rescinded then the prayer for referring the dispute to the arbitrator will have to be rejected. "

28. The petitioner pressed into service the decision in **AGARWAL ENGINEERING CO. VS. TECHNOIMPEX HUNGARIAN MACHINE INDUSTRIES FOREIGN TRADE CO.** [1977 (4) SCC 367] wherein it is held that the principle that the last deed must govern superseding the earlier one is inapplicable. The facts in the said case are inapplicable to the case on hand.

29. The next decision on which the reliance was placed was that **VELUGUBANTI HARI BABU VS. PARVATHINI NARASIMHA RAO AND ANOTHER** [2016 SCC ONLINE SC 699] in which following the earlier decision including SBP & Co., the Honourable Supreme Court had held as follows:

"24. Justice Raveendran, speaking for the Bench in Bharat Rasiklal Ashra's case (supra) which also involved the same question, took note of law laid down in earlier two decisions of SBP & Co. (Supra) and National Insurance Co. Ltd. (supra) and succinctly explaining the ratio of these decisions laid down the following proposition of law in paras 10 to 13 which read as under:

"10. Therefore, the following question arises for consideration in this appeal:

"Where the arbitration agreement between the parties is denied by the respondent, whether the Chief Justice or his designate, in exercise of power under Section 11 of the Act, can appoint an arbitrator without deciding the question whether there was an arbitration agreement between the parties, leaving it open to be decided by the arbitrator?"

11. The question is covered by the decisions of this Court in SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 and National Insurance Co. Ltd. v. Boghara

Polyfab (P) Ltd., (2009) 1 SCC 267 In *SBP & Co.*(supra) a Constitution Bench of this Court held that when an application under *Section 11* of the Act is filed, it is for the Chief Justice or his designate to decide whether there is an arbitration agreement, as defined in the Act and whether the party who has made a request before him, is a party to such an agreement. The said decision also made it clear as to which issues could be left to the decision of the arbitrator.

12. Following the decision in *SBP & Co.*(supra) this Court in *National Insurance Co. Ltd.* (supra) held as follows: (*National Insurance Co. Ltd. Case* (supra), SCC p. 283, paras 22 & 22.1-22.3) "22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under *Section 11*, the duty of the Chief Justice or his designate is defined in *SBP & Co.* This Court identified and segregated the preliminary issues that may arise for

consideration in an application under [Section 11](#) of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under [Section 11](#) of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract / transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration." (emphasis supplied)

13. It is clear from the said two decisions that the question whether there is an arbitration agreement has to be decided only by the Chief Justice or his designate and should not be left to the decision of the

Arbitral Tribunal. This is because the question whether there is an arbitration agreement is a jurisdictional issue and unless there is a valid arbitration agreement, the application under Section 11 of the Act will not be maintainable and the Chief Justice or his designate will have no jurisdiction to appoint an arbitrator under Section 11 of the Act. This Court also made it clear that only in regard to the issues shown in the second category, the Chief Justice or his designate has the choice of either deciding them or leaving them to the decision of the Arbitral Tribunal. Even in regard to the issues falling under the second category, this Court made it clear that where allegations of forgery or fabrication are made in regard to the documents, it would be appropriate for the Chief Justice or his designate to decide the issue. In view of this settled position of law, the issue whether there was an arbitration agreement ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative, he could have proceeded to appoint the arbitrator." (emphasis supplied)"

30. In the instant case, the MRA 2006 agreement was admittedly superseded by the subsequent two addendum agreements. It is also stated in Clause 14 of the second addendum agreement that in the event of any inconsistency between the MRA and / or the second addendum of 29.03.2007, only the second addendum agreement will prevail. In the event of any dispute arising under the addendum agreement Courts at Mumbai shall have exclusive jurisdiction.

31. The petitioner herein had earlier filed Arbitration Application No.88 of 2013 on the file of the High Court of Bombay. The same was withdrawn by the petitioner on 14.06.2013 with liberty to file fresh petition.

32. While consciously avoiding the risks of dangers involved in deciding an issue relating to the tenability of the claim made by the petitioner without necessary pleadings and documents, in my opinion, the petitioner ought to have continued with the petition filed before the Bombay High Court. The parties having rescinded the contract mutually and substituted the same with second addendum agreement are bound only by the second addendum agreement. Consideration of an application under Section 11 of the Act does not warrant consideration of the merits of the claim or even the chances of success of the claim. As

held earlier, when this Court is dismissing the petition on the ground of territorial jurisdiction, the other issues with respect to barred claim, etc. are not decided.

33. In view of the above discussions, the second addendum agreement alone will prevail and any claim of the petitioner is only based on the same. However, in view of the specifically agreed jurisdiction in Mumbai, the petition filed in this Court is not maintainable.

34. For all the above said reasons, the Original Petition is dismissed. No costs.

sd/.M.S.N.J

24.10.2016

//Certified to be a true copy//

Dated this the day of 2016.

R.s/07.12.2016

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COURT OFFICER

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