IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 03.07.2017

Pronounced on : 17.08.2017

CORAM

THE HON'BLE DR. JUSTICE ANITA SUMANTH

O.P.No.581 of 2015 &
A.No.3124 of 2017

M/s. Redington (India) Limited,
SPL Guindy House, 95-Mount Road,
Guindy, Chennai 600 032 ... Petitioner

vs

1.M/s.Defodill Mobiles Marketing
Private Limited,
40 Feet Road, NearNamdev
Gurudwaran, Bathinda - 151 001 (Pb)
through its authorised Director
Puneet Bansal

2. AppleIndia (P) Limited,
19th Floor, Concorde Tower C,
UB City No24, Vittal Mallaya Road,
Bangalore 560 001.

3. Mr.Naresh Garg,
Sole Arbitrator,
Chamber No.343, 2nd Floor,
District Courts,Bathinda,
PBNo.151001 .. Responents.

Prayer: Petition filed under section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 15.4.2015 recieved by the petitioner on 25.4.2015 .

For Petitioner : Mr.S.S.Rajesh

For Respondents : Mr. Sanjay Pinto

ORDER

This Original Petition challenges an Award passed by the sole Arbitrator in terms of Section 34 of the Arbitration and Conciliation ACt 1996 (in short 'Act') dated 15.4.2015.

2. Heard the detailed submissions of Mr.S.S.Rajesh, learned counsel appearing for the petitioner and Mr. Sanjay Pinto, learned counsel appearing for the respondents.

3. A preliminary objection is raised by Mr.Pinto to the maintainability of the original petition. His arguments in brief are as follows:

(i) An objection u/s 34 of the Act is liable to be filed within 90 days from date of receipt of the Award under section 34(4) of the Act extended by 30 days in terms of the proviso thereunder. The date of Award is 15.04.2015 and the date of receipt of the same is stated to be 25.4.2015. The objection u/s 34 of the Act was filed on 22.7.2015.

(ii) Mr. Pinto would point out that the Award has, infact been recieved by the petitioner not on 25.4.2015, but on 20.4.2015. He would file proof of delivery from the postal department to this effect. It is only upon his filing of a preliminary counter dated 02.02.2017 that the petitioner filed an affidavit on 08.04.2017 after 631 days from the date of filing of the original petition revealing that there was a delay of 3 days in filing the Original Petition and seeking condonation of the same.

(iii) Thus, according to Mr. Pinto, the petition u/s 34 is delayed and the petitioner has not come to the Court with clean hands. He would thus urge that the original petition be rejected in limine.

4. In defence, Mr.Rajesh would state that the Award was recieved by the then authorised signatory and whole time Director, Mr. M. Ragunanthan on 25.4.2015. Since he was the person responsible to deal with the Award, the date for limitation has been reckoned from the time when the Award reached his hands and the petition was filed on 22.7.2015 within the time frame set out in terms of section 34 of the Act.

5. Upon receipt of the counter questioning the mainainability of the original petition, the petitioner was alerted to the situation of possible delay in filing the same. Thus, by way of abundant caution, the petitioner sought condonation of the delay of 3 days in filing the objection u/s 34 if the limitation was to be reckoned from 20.4.17 and not 25.4.17.

6. Both counsel would rely on various judgments to support their respective stands, Mr.Rajesh, (i) *Union of India Vs. Tecco Trichy Engineers and Contractors* (2005) 4 SCC 239 and (ii) *Esha Bhattacharjee Vs. Managing Committee of Raghunathpur, Naar Academy and others* 2013 (5) CTC 547 and Mr.Pinto, (i) *Oil and Natural Gas Corpn Ltd Vs. Gujarat Energy Transmission Corpn. Ltd and others* in Civil Appeal No.1315 of 2010 and (ii) *Chattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and others* in Civil Appeal D.No.37598 of 2007.

7. Having heard the learned counsel, I believe the delay, if at all, of 3 days, is liable to be condoned for several reasons. The provisions of section 34(3) of the Act and the proviso thereunder read thus:

34. Application for setting aside Arbitral Award

> An *application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*
>
> *Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may .... the application within a further period of thirty days, but not thereafter.*

8. An objection in terms of section 34(3) of the Act is, as seen above, liable to be filed within 90 days from the date of receipt of the award by the person challenging the same. The award in this case, has been received on 20.4.15 by the petitioner company and the limitation in terms of section 34(4) would thus expire on 19.7.15. The objection has been filed on 22.7.2015 beyond the period of 90 days as provided in terms of section 34(3) of the Act but within the extended period under the proviso to section 34 whereunder delay, restricted to 30 days only, is liable to be condoned only if the court believes that the petitioner had 'sufficient cause' to have caused the same.

9. Much has been made of the fact that the petition for condonation has been filed only after 631 days and that too, only after a preliminary counter was filed by the 1st respondent. I do not believe that this is fatal to the admission of the original petition. The language of section 34(3) requires the time for limitation to be reckoned from the date on which the Award was recieved by the party making the objection. In the present case, the party making the objection was the then Managing Director, who has infact, filed the present Original Petition.

10. No doubt the Managing Director was filing the objection only on behalf of the Petitioner company and as such the limitation would commence from the date when the award was received by the person authorised to do so on its behalf. The petitioner does not dispute that the award has in fact, been received by it on 20.4.15. The only explanation put forth is that in the understanding of the petitioner, limitation would commence only when the *'party making the objection'*, in this case, the MD, received the award, i.e. on 25.4.2015. The resultant delay of 3 days in filing the present petition, appears to me to be bonafide and condonable, though arising from a flawed interpretation of section 34(3) of the Act.

11. The conduct of the petitioner in filing the present petition without seeking condonation of the delay and doing so only after the delay has been pointed out by the respondent has been highlighted and motives sought to be attributed. Mr.Pinto would labour on the fact that the petition for condonation has been filed only after the elapse of 631 days and this delay, beyond the

statutory period of 120 days is, according to him, not liable to be condoned. I disagree. Condonation of the 3 days delay was sought after 631 days for the reasons explained by the petitioner, that it was only upon receipt of the counter filed by the respondent, that the petitioner was alerted to the possibility of delay. Records reveal that the service of the original petition on the respondent had been time consuming. It was after servive was effected by way of paper publication that the respondent entered appearance and filed the counter affidavit challenging maintainability of the present petiiton. The elapse of 631 days is explained by the aforesaid events.

12. In the present case, the only delay to be condoned is the delay in filing of the objection u/s 34, of 3 days. This delay is within the period of extended statutory limitation provided under the proviso to section 34 of the Act. The affidavit filed explaining the delay and seeking condonation of the delay is acceptable and the delay is liable to be condoned.

13. Moreover, the petitioner does not stand to gain by reason of the belated filing of the petition and it does not stand to reason that a party who has been diligent in pursuing its remedies for resolution of disputes should be found guilty of a negligent or careless approach. Reliance was placed on the decision of the Supreme Court in *Chattisgarh State Electricity Board V. Central Electricity Regulatory Commission and others in Civil Appeal D.No.37598 of 2007 dated 15.04.2010*, wherein, quoting the decision in *Patel Naranbhai Marghabhai V. Dhulabhai Galbabhai (1992) 4 SCC 264*, the Supreme Court held as follows:

'13.Section 34(3) of the Arbitration and Conciliation Act, 1996, which is substantially similar to Section 125 of the Electricity Act came to be interpreted in Union of India v. Popular Construction Company (2001) 8 SCC 470. The precise question considered in that case was whether the provisions of Section 5 of the Limitation Act are applicable to an application challenging an award under Section 34 of the Arbitration and Conciliation Act, 1996. The two-Judge Bench referred to earlier decisions in Mangu Ram v. Municipal Corporation of Delhi (1976) 1 SCC 392, Vidyacharan Shukla v. Khubchand Baghel AIR 1964 SC 1099, Hukumdev Narain Yadav v. L.N. Mishra (supra), Patel Naranbhai Marghabhai v.

Dhulabhai Galbabhai (1992) 4 SCC 264 and held:

"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.

16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that *"where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court".*

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

14. The Supreme Court, in the above matter deals with the condonation of delay beyond a period of 120 days provided under the Electricity Act and equates the same to the limitation provided under Section 34 of the Act and the provisio thereunder, where a cap on limitation is set by statute and the provision is inflexible for periods beyond that stipulated therein.

15. In the present case, the delay of 3 days is within the period of 120 days and the rationale of the judgement aofresaid cannot thus be pressed into service. The judgments of the Supreme Court in *Oil & Natural Gas Corp. Ltd. V. Gujarat Energy Transmission Corporation Ltd. & Ors. (*Civil appeal No.1315 of 2010 dated 01.03.2017) and *M/s.Consolidated Engineering V. The*

Principal Secretary in (Appeal (Civil) No.2461 of 2008 dated 03.04.2008) are to the same effect and do not, for the aforesaid reasons, advance the case of the respondent challenging maintainability.

16. The case law relied upon by learned counsel are distinguishable and the preliminary objection raised by the respondent on the aspect of limitation stands rejected.

17. Coming to the merits, learned counsel appearing for the petitioner would submit that disputes arose between the petitioner and the respondent emanating from the termination of a business partnership arrangement dated 2.7.2014. The petitioner is engaged in the business of distribution of IT software and hardware. It was appointed as the National Distributor of Apple products by Apple India Private Limited, the 2nd respondent herein. Pursuant thereto, the 1st respondent was appointed as a non-exclusive business partner for re-sale/re-marketing of Apple products at Bhatinda, State of Punjab.

18. The agreement dated 2.7.2014, set out the terms that governed the parties and provided inter alia, for the resolution of disputes, by arbitration, at Article 25 thereof, to be conducted by a panel of three arbitrators. The proceedings were to be conducted at Chennai, Tamilnadu. Article 25 is extracted hereunder:

> *'Any and all disputes, controversies or differences arising from or in relation to or in connection with this Agreement shall be conducted in English and settled by mutual consultation between the parties hereto in good faith as*

promptly as possible, but failing an amicable settlement within thirty (30) days, shall be settled by arbitration in English before a panel of three arbitrators (unless a single arbitrator can be agreed upon by the parties) at Chennai, Tamilnadu, in accordance with the Arbitration and Conciliation at, 1956 of India. The arbitrator(s) shall render a final opinion and award in writing stating the reasons therefor and the award shall be final and binding upon the parties hereto. The costs of arbitration shall be borne equally by the Parties, except that each Party shall bear its own attorney, witness and preparation costs.'

19. The respondent was the claimant in the proceedings for arbitration. Notice of arbitration was issued on 28.2.2015 by the Arbitrator posting the matter for hearing on 18.3.2015 at Bhatinda, State of Punjab. The second respondent was also arrayed as a party to the arbitration. One, Gaurav Bhadri appearing on behalf of the petitioner, sought termination of the proceedings on the ground that the seat of Arbitration was agreed to be Tamil Nadu whereas the proceedings were being conducted in Bhatinda, Punjab. An application seeking termination of arbitration proceedings came to be filed by the petitioner. The Arbitrator noticed that the said Gaurav Badri produced neither a letter of authority from the company nor a copy of the agreement between the parties. The second respondent was set expartie since there was no appearance on its behalf.

20. The matter was next posted for hearing on 28.3.2015. In the meantime, an e-mail appears to have been recieved on 18.3.2015 from the petitioner attaching the same application as filed at the hearing on 18.3.2015 and reiterating the request to terminate the proceedings. Separately, the company also forwarded a copy of the Board Resolution dated 22.5.2013 and a letter of authority authorising Gaurav Badri dated 17.3.2015, vide e-mail. The Arbitrator, having duly received the same, observes that the original of the documents were not produced. He thus once again issued notice to the petitioner herein to be present on 24.3.2015 with the original of the documents sent by e-mail. The originals documents were sent under cover of registered post, acknowledgment due and recieved by the Arbitrator on 24.3.2015. But since there was no physical representation on behalf of the petitioner, he proceeded to set it exparte. The Arbitrator then proceeded to hear the matter exparte based on the submission of the respondent.

21. One of the issues, Issue No.3, framed by the Arbitrator relates to the specific dispute raised by the petitioner herein relating to the seat of arbitration being Bathinda, State of Punjab and not Chennai, State of Tamil Nadu as agreed to between the parties in Agreement dated 2.7.2014.

22. The Arbitrator proceeds to hold that the parties could not have, by way of agreement, conferred jurisdiction upon a place where no part of the cause of action arose and concludes that Chennai did not have any territorial jurisdiction in the matter. He relies on the decision of the Supreme Court in *Kanwar Singh Saini vs High Court of Delhi* (2011(5)RAJ 278) to the effect that

conferment of jurisdiction is a legislative function and cannot be by consent of parties.

23. The agreement between parties is that the seat of arbitration would be Chennai, Tamil Nadu. There is no averment to the effect that this agreement has been modified or changed in any way. In fact, and on the other hand, the petitioner specifically objected to the seat of arbitration being unilaterally fixed at Bhatinda, contrary to the agreement between the parties. The provisions of Section 20 of the Act dealing with place of arbitration read thus:

> '***20. Place of arbitration*** *– (1) The parties are free to agree on the place of arbitration.*
>
> *(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.*
>
> *(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at anyplace it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."*

24. A reading of Section 20 makes it apparent that what is critical to determine the choice of the place of arbitration, as with all other parameters set out in the scheme of the Act, is the agreement between the parties. The conclusion of the Arbitrator to the contrary, despite the specific clause in the agreement and the objections of the petitioner in this regard is without any basis in law.

25. In the result, this Original Petition is allowed leaving the parties to bear their own costs. Consequently, the connected application is closed.

msr/sl 17.08.2017

Index: Yes/No

Speaking order/non-speaking order

Dr.ANITA SUMANTH,J.

msr/sl

Pre-Delivery order in

O.P.No.581 of 2015 &
A.No.3124 of 2017

17 .08.2017