

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 4th July, 2011

OMP 378/2009

MAHANAGAR TELEPHONE NIGAM LIMITED

..... Petitioner

versus

M/S UNIBROS & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr C.S. Vidanathan, Sr. Adv. with Ravi Sikri
and Mr Vaibhav Kalra, Adv.

For the Respondents : Mr Madan Bhatia, Sr. Adv. with Mr Jagdish
Vats, Adv.

CORAM:-

HON'BLE MR JUSTICE MANMOHAN SINGH

1. Whether 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 Digest ? Yes

MANMOHAN SINGH, J

1. Mr Madan Bhatia, counsel appearing on behalf of the respondent No.1 has raised the preliminary objection that the objections filed by the petitioner under Sections 30 and 33 of the Indian Arbitration Act, 1940 are not filed within the prescribed time provided under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The main contentions of the learned senior counsel is that the objections filed by the petitioner under Sections 30 and 33 of the Indian Arbitration Act, 1940 (Old Act) are not maintainable as the said Act does not apply. The said objections which were filed under Section 30 and 33 of the Indian Arbitration Act, 1940 cannot be entertained under Section 34 of the Arbitration and Conciliation Act, 1996 (New Act) as the scope and jurisdiction of two set of provisions are entirely different. The objections were not filed within the prescribed time as per the mandatory provision which provides that “recourse to a Court against an arbitral award may be made only by an application for setting aside the award”.

3. The other contention is that this Court has no inherent jurisdiction to treat the objections under Section 30 and 33 of the Old Act, 1940 as a petition under Section 34 of the Act, 1996. It is stated that even if the objections are treated as a petition under Section 34 of the Act, 1996, none of the conditions prescribed under Section 34 of the Act, 1996 is attracted on merit. Therefore, the same are liable to be dismissed. Even otherwise, the same have not been filed within three months of the receipt of the award by the petitioner and the same are time barred as the copy of the award was received by the objector in January 2001 and the objections were filed on 05.09.2001.

4. The learned counsel for both the parties have made their submissions. Some of the facts are necessary to be mentioned in order to decide the objections raised by the respondent No.1.

5. It is the admitted position that the parties entered into an agreement on 13.07.1990 and the disputes arose between the petitioner and the respondent No.1 in the year 1991, i.e., much before the Arbitration and Conciliation Act, 1996 came into force. When the first dispute arose Mr N.N. Chakravorty was appointed as the arbitrator, who gave his interim award on 13.03.1992, i.e., also much before the new Act came into existence. The said interim award given by Mr N.N. Chkravorty was set aside and remanded back for appointment of respondent No.2 herein, Mr K.D. Bali, vide order dated 24.05.1999.

6. Sh K.D. Bali, respondent No.2 herein, was appointed the Sole Arbitrator to adjudicate the matter afresh upon all the disputes, claims and counter-claims pending before Mr N.N. Chakravorty. The arbitration commenced on 11.9.1991 when the respondent No.1 by its notice invoked arbitration agreement.

7. As per petitioner, the arbitration was governed by the Indian Arbitration Act, 1940 (X of 1940) notwithstanding repeal of the said Act by the Arbitration and Conciliation Act, 1996 by Section 85 (2) thereof and no notice of filing the Award was sent, therefore, the petitioner was

denied the opportunity to contest the award and the said arbitration proceedings culminated in the impugned award dated 29.12.2000.

8. The petitioner, thereafter, filed a petition in this Court, being suit No.266-A/2001 on 27.01.2011 under Sections 14 and 17 of the Indian Arbitration Act, 1940, for directing the respondent No.2/arbitrator to file his award dated 29.12.2000 along with entire proceedings/record in the Court.

9. The said arbitration suit was listed for hearing on 13.02.2001. The Court issued notice to respondent No.2/arbitrator for filing the award and the case was adjourned for 08.08.2001.

10. On 08.08.2001, the counsel for the petitioner appeared and stated that he came to know about the filing of the award and asked for time to file objections to the said award.

11. The award was filed in court by the respondent No.2 on 07.05.2001 vide Diary No. 6317. The factum of filing of the award was first time noticed by the court on 08.08.2001.

12. The petitioner filed objections to the said award on 05.09.2001. Earlier to that, the respondent No.1 filed Execution Petition No. 163/2001 against the petitioner under the Arbitration and Conciliation Act, 1996, for issuance of attachment order in terms of the award passed by the respondent No.2. The said execution petition was

listed for hearing on 31.07.2001, on which date the warrant of attachment order was issued against the petitioner.

13. On coming to know about the passing of the attachment order, the petitioner moved an application being E.A. No. 306/2001 for stay of the execution proceedings and vacation of the attachment order dated 31.07.2001. The said application was listed for hearing on 10.08.2001 and this Court passed an order not to disburse the attached amount to the decree holder/respondent No.1.

14. By order dated 05.05.2003, the petitioner's petition, i.e., suit No.266A/2001 under Section 14 and 17 of the Indian Arbitration Act, 1940 was dismissed as not maintainable, inter alia, on the grounds that in view of the Arbitration Clause contained in the contract between the parties, the 1996 Act regulated all proceedings after its promulgation and the Arbitration and Conciliation Act, 1996 alone applies to the dispute.

15. However, in the objections numbered as I.A. No. 3170/2002 already filed under Sections 30 and 33 of the Act, 1940, the Court passed the following order in that regard:

“It has already been held that this statute has no further applicability to the disputes between the parties. Does this mean that the Objections have to be dismissed on this precise premise, leaving the Objector without remedy. I prefer to eschew a narrow and pedantic approach in favour of a holistic treatment of these Objections which, in essence, assail the Award dated 29.12.2000. An envisaged in the 1996 Act such Objection can be filed under

Section 34 and in order to ensure substantial justice I shall treat the application as having been moved under this statutory provision. The Registry is directed to place this application in the file of execution proceedings viz. Ex. No.163 of 2001.”

16. By separate order on the same day passed in E.A. No. 306/2001 and Ex. P. No. 163/2000, the Hon’ble Judge had also passed the following order:

“This petition has been filed on 30th July, 2001 and warrants of attachment have been ordered to issue on 31.7.2001. Objections to the Award have been filed on 5.9.2001 albeit under the Arbitration Act, 1940. By judgment of even date I have held that the Arbitration and Conciliation Act, 1996 applies to the present dispute. As a necessary corollary and in the interest of justice I have ordered that the Objections filed earlier, being IA No.3170/2002 in Suit No.266-A/2001 be placed in this file and be numbered if essential. Reply to the Objections be filed within one week, as last opportunity. MTNL is directed to file an affidavit of its Managing Director stating therein the date on which it received the Award dated 29.12.2000. Rejoinder, if any, within three days thereafter.

List the matter for consideration along with E.A. No.306/2001 and the Objections on 19.5.2003. The maintainability of the Objections shall also be considered on that date.

Interim order to continue.”

17. When the execution was listed before the Court on 21.05.2003, upon the objection raised by the decree holder, it was observed by the Court that objections filed by the petitioner against the award has been registered separate OMP in compliance with the order

dated 05.05.2003. The reply was filed by the respondent No.1 herein and was placed on record.

18. The order dated 05.05.2003 passed in CS(OS) No.266-A/2001 was challenged by the petitioner by filing appeal under Section 39 of the Indian Arbitration Act, 1940. The said appeal was dismissed, inter alia, on the ground that the learned Single Judge had not dismissed the application, being IA No.3170/2002 filed under Sections 30 and 33 of the Act, 1940 rather, the learned Single Judge had treated the appellant's application under Section 30 and 33 of the Act, 1940 as having been filed under Section 34 of the Arbitration and Conciliation Act, 1996. In view thereof, the Division Bench found that since the objections were not refused, thus, appeal was not maintainable.

19. It was also observed in the order while disposing of the appeal that the respondents were to raise the plea that the appellant's objections under Section 34 of the new Arbitration Act, 1996 were beyond limitation, the petitioner would be well advised to take all its defences including the plea that the issue of limitation already stood settled by the learned Single Judge's order by converting or treating the appellant's objections filed by way of IA No.3170/2002 under Section 34 of the new Arbitration Act, 1996.

20. Admittedly, the order dated 05.05.2003 has not been challenged by the respondent No.1 whereby the Single Judge treated the

petitioner's application filed under Sections 30 and 33 of the old Act as having been filed under Section 34 of the New Arbitration Act, 1996 nor has the respondent No.1 challenged the order passed by the Division Bench on 17.12.2008.

21. The fact remains that there is a specific order passed by the learned Single Judge which was confirmed by the Division Bench to the effect that the objections filed by the petitioner by way of IA No.3170/2002 filed under Sections 30 and 33 of the old Act to be treated as having been filed under Section 34 of the new Arbitration Act, 1996. Therefore, after having considered the orders passed as well as the rival submissions of the learned counsel for the parties, I am of the same view which was taken by my respected brother judge on 05.05.1991.

22. Under these circumstances, the dispute left is about the limitation as raised by the respondent No.1 that even if the objections be treated as petition filed under Section 34 of the New Act, the same have not been filed within three months of the receipt of the award by the petitioner and same is hopelessly time barred. The learned counsel for the respondent has also referred to the judgment of Hon'ble Supreme Court in Union of India v. Popular Construction Co.: (2001) 8 SCC 470.

23. There is no dispute that the Arbitration and Conciliation Act, 1996 is a special law and there is a prescribed period of limitation provided under Section 34 which reads as under:

“34. Application for setting aside arbitral award.-

(1) 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).

(2) An arbitral award may be set aside by the Court only if---

(a) the party making the application furnishes proof that-----

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the

agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-----

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.---Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) 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 entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section

(1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

24. As far as the proposition of law laid down by the Apex Court regarding the limitation is concerned, this court totally agrees with the argument made by the respondent that if the objections are not within time provided in Section 34 of the Act, the delay under no circumstances can be condoned in view of the decision of *Popular Construction* (supra) by the respondent.

25. Section 34 clearly provides for a period of limitation which is different from the prescribed limitation under the Limitation Act, 1963. In view of the judgment passed by the Apex Court, the objections under Section 34 of the Arbitration and Conciliation Act, 1996 have to be filed within the maximum period of three months which can be enlarged by 30 days and as per the settled law, the said period cannot be further enlarged under any circumstances.

26. Considering the decision referred to by the respondent No.1, in case the said objections are not filed within the prescribed time provided under the New Act, 1996 or even under the Old Act of 1940, the same cannot be entertained.

27. Let me now examine this aspect of the matter.

28. The date of the award in the matter is 29.12.2000. The petitioner filed the petition under Section 14 and 17 of the Act, 1940 which is registered as CS(OS) No.266-A/2001 for direction to the arbitrator to file the award. The said suit was listed for hearing on

13.02.2001. The Court issued notice to respondent No.2/arbitrator for filing the award and the case was adjourned for 08.08.2001. On 08.08.2001, the counsel for the petitioner appeared and stated that he came to know that the award had already been filed and therefore, he took time to file objections to the said award.

29. The objections under Sections 30 and 33 of the old Act, 1940 were filed by the petitioner on 05.09.2001. It is recorded in the order dated 08.08.2001 passed by the Joint Registrar in Suit No.266-A/2001 that the petitioner came to know that the award had been filed and therefore, time was granted to the petitioner to file the objection, if any, within the prescribed period. The extract of the order dated 08.08.2001 reads as under:

“Award and proceedings has been filed. Notice be issued to defendant No.1 on filing of PF and RC within two weeks for 28.2.2002. Counsel for plaintiff states that he has now come to know that award has been filed and objection if any shall be filed by him within the prescribed period.”

30. The limitation was to start from the date of notice of filing of Award under the Old Act, 1940. In the present case, it came to the notice of the petitioner about the filing of the award on 08.08.2001 and the objections were filed on 05.09.2001, i.e., before the period of thirty days. Therefore, it is clear that the objections were filed within the prescribed time.

31. It is also argued that none of the grounds taken by the petitioner in the objections filed under Sections 30 and 33 of old Act are covered by any provision of Section 34 of the New Arbitration Act, 1996.

32. For the aforesaid reasons, preliminary objection raised by the respondent No.1 is not tenable in law and is, therefore, rejected.

33. As regards the merit of the objections filed by the petitioner is concerned as alleged by the respondent No.1, that none of the grounds taken by the petitioner is covered under the provision of Section 34 of the New Arbitration Act, 1996. The said objections have to be considered at the time of hearing of the matter. In case the respondent would make out a case in this regard on merit, then the objections to be dismissed, however, the said objection cannot be determined at this stage.

34. Reply to the objections has already been filed by the respondent No.1. Let rejoinder be filed within four weeks. List the matter for consideration on 09.09.2011.

35. No costs.

MANMOHAN SINGH, J

JULY 04, 2011

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