

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
17~06~2019	25~06~2019

CORAM

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.18 of 2009

The Principal General Manager,
Tele Communications
Bharat Sanchar Nigam Limited
Coimbatore Telecom District,
Bharathi Park – 2nd Street,
Coimbatore – 641043.

Petitioner

.Vs.

1. GETIT Infomediary Ltd.,
(Formerly M & N Publications Ltd.,)
Represented by its
Deputy General Manager
Mr.R.Srikanth
25, Radhakrishnan Salai,
Chennai 600004.

2. Mr.Justice P.R. GokulaKrishnan
Sole Arbitrator
No.14/7 Bhakthavachalam Nagar Extn.,
Anna Avenue,
Chennai 600020.

.. Respondents

Prayer: Petition filed under Section 34(1) of the Arbitration and

Conciliation Act, 1996 to set aside the Award dated 03.12.2008 passed by the Sole Arbitrator in O.P.No.145 of 2003.

For Petitioner : Mr. S. Udayakumar

For Respondents : Mr. P. Neelakantan
for M/s. Menon, Karthik, Mukundan
and Neelakantan

ORDER

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award passed by the sole Arbitrator rejecting the counter claim made by the Petitioner.

2. The claimant in response to the advertisement made by the respondent inviting bids for printing and publication of Telephone Directories with Yellow pages for Coimbatore Telecom District was awarded a contract and an agreement was entered into between the claimant and the respondent on 03.08.1998. The contract was for compiling, printing, binding and supplying copies of Coimbatore Telecom District main Telephone Directory numerical supplementary Directory and Billing information for a total five consecutive annual

issues, commencing with the 1998 issue. As per clause 4 of the Agreement, the number of copies to be furnished is 2.4 plus 20% lakhs for the year 1998; 3.3 plus 20% lakhs for the year 2000; 3.8 plus 20% lakhs for the year 2001 and 4.5 plus 20% lakhs for the year 2002. As per clause 9 of the agreement, a supplementary issue will be released six months after the release of the main Annual issue and will include additions, deletions and changes which took place after the release of the annual issue and other matters of public interest as required by the principal General Manager, Telecom.

3. It is the case of the claimant that the Circular No.1-3/98 PHB dated 19.11.1999 the Department altered the policy. As per the altered policy, the telephone directories shall be printed every alternate year and in the intervening period a supplementary directory shall be made available to the subscribers. The said policy also underwent a further change on 12.01.2004. As per this policy the main directory will be printed and published in the first year and that will be followed by supplementary directories in the following two years. Subsequent to the contract with the claimant there is a change in the

contract entered into by the respondent. As per the change, the printing contract given by the respondent in all Metros are only on negative royalty basis that means the respondent pays for every Directory obtained by it and hence the number of copies of the Directories printed has come down drastically. Therefore, the claimant has claimed Rs.3,75,25,000/- towards loss due to the breach committed by the Respondent.

4. Department refuted the claim and submitted that there is no breach of contract on the part of the Respondent. Only the claimant has violated the terms and conditions and caused irreparable loss to the image of BSNL. Payment of Penalty on the two occasions by the claimant shows that he had committed the breach of terms and conditions of the agreement. According to the respondent, they incurred a loss of Rs.3,76,29,064/-. Further they have also filed counter claim for the above amount. In addition to that amendment was allowed. The respondent prayed for an Award amount of Rs.4,90,42,814/- as a counter claim.

5. The learned Arbitrator considered the entire evidence, dismissed the claim of the Petitioner as well as the Counter claim of the respondent. As against the dismissal of the counter claim the petitioner has filed the present petition challenging the award on the ground that the learned Arbitrator has rejected the counter claim on the ground of limitation and other aspects.

6. Learned Counsel appearing for the petitioner mainly attacked the finding of the Arbitrator with regard to the limitation aspect only. It is the contention of the learned counsel that the learned Arbitrator has dismissed the counter claim as barred by limitation, which is fundamentally wrong. The finding of the Arbitrator that the counter claim has not filed within the period of three years, is against law. In support of his submission he relied upon the following judgments:

- 1. *State of Goa v. Praveen Enterprises* [2011(4) R.A.J. 1 (SC)]**
- 2. *Rolta India Ltd., v. Voltas Ltd.*, [2014(5) R.A.J.527(BOM)]**

7. Learned counsel appearing for the Respondent submitted that the counter claim was not rejected only on the ground of limitation.

The learned Arbitrator has analysed the entire facts and found that the claim of the respondent merely based on the assumption and has not been proved besides the contract Ex.C.1 was novated subsequent change in condition under Ex.R.38. All these facts have been considered entirely by the Arbitrator. Therefore, the well reasoned order cannot be interfered under Section 34 of the Act. When the Arbitrator considered the entire aspect and found that the respondent's counter claim has not been established, such Award cannot be interfered and there is no circumstances whatsoever shown to interfere the well reasoned order. The scope of interference of the Award is dealt by the Apex Court in the following judgments:

7(a) Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is discussed in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honourable Apex Court has held that an Award can be set aside if it is contrary to:

- a) fundamental policy of Indian law; or
- b) the interest of India; or
- c) justice or morality; or
- d) if it is patently illegal

Award could also be set aside if it is so unfair and

unreasonable that it shocks the conscience of the court.

7(b). The power of the Court to set aside the Award would be exercised only in cases where the Court finds that the Arbitral Award is on the face of it erroneous or patently illegal or in contravention of the provisions of the Act. In the case on hand, considering the entire findings of the Arbitrator this court do not find any materials to show that this case requires interference under Section 34 of the Act. In **Swan Gold Mining Ltd., v. Hindustan Copper Ltd reported in 2015(5) SCC 739** the Honourable Apex Court has held as follows:

"12. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or

patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal."

"13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him."

"21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is

contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words “public policy” or “opposed to public policy”, find reference in [Section 23](#) of the Contract Act and also [Section 34 \(2\)\(b\)\(ii\)](#) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.”

7(c). The Honourable Apex Court in ***McDermott International Inc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]*** explained the term patent

illegality and held that patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

7(d). A Division Bench of this Court in ***Puravankara Projects Limited v. Mrs. Ranjani Venkatraman Ganesh and Another* [2018 (6) MLJ 588]** also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

8. Though the present petition relates to the counter claim alone, the main argument of the petitioner is that the Arbitrator rejected the counter claim on the ground of limitation which is against law. Of course learned Arbitrator in his finding in para 133 has held that “the

counter claim should have been filed within three years from the date on which the right to sue accrues for the respondent. In this case, the right to sue accrued when the amount became due and payable by the claimant. If that be so, the counter claim filed by the respondent is hopelessly barred by limitation." Such a finding in view of this Court is against the law for a simple reason that no notice was issued either respondent before filing the counter claim. It is relevant to refer the judgment of the Apex Court in **State of Goa's case** (supra) in which it is held as follows:

"17. As far as counter claims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of Limitation Act, 1963 provides that in regard to a counter claim in suits, the date on which the counter claim is made in court shall be deemed to be the date of institution of the counter claim. As Limitation Act, 1963 is made applicable to arbitrations, in the case of a counter claim by a respondent in an arbitral proceedings, the date on which the counter claim is made before the arbitrator will be the date of "institution" in so far as counter claim is concerned. There is, therefore, no need to provide a date of 'commencement' as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counter claims. There is however one exception. Where the respondent against whom a claim is

made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under [section 11](#) of the Act, the limitation for such counter claim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim."

9. The above judgement makes it clear that only when the respondent made a claim against the claimant and sought arbitration by serving notice to the claimant but subsequently raises that claim as counter claim in the arbitration proceedings initiated by the claimant, the limitation for such counter claim should be computed as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim. Admittedly, as per the contention of the counsel and other observations of the learned Arbitrator, no notice was separately sent claiming the counter claim prior to the arbitration. Therefore, the counter claim made by the respondent in the arbitral proceedings certainly maintainable and arbitral as held in para 22 of the above judgment. In para 24 of the above judgment the Honourable Apex Court has held as follows:

"24. Section 23 of the Act enables the claimant to file a statement of claim stating the facts supporting his claim, the points at issue and the relief or remedy sought by him and enables the respondent to state his defence in respect of those claims. Section 2(9) provides that if any provision [other than section 25(a) or section 32(2)(a)], refers to a "claim", it shall apply to a "counter claim" and where it refers to a "defence", it shall also apply to a defence to that counter claim. This would mean that a respondent can file a counter claim giving the facts supporting the counter claim, the points at issue and the relief or remedy sought in that behalf and the claimant (who is the respondent in the counter claim) will be entitled to file his defence to such counter claim. Once the claims and counter claims are before the arbitrator, the arbitrator will decide whether they fall within the scope of the arbitration agreement and whether he has jurisdiction to adjudicate on those disputes (whether they are claims or the counter claims) and if the answer is in the affirmative, proceed to adjudicate upon the same."

The above observation of the Apex Court makes it clear that the respondent can make a counter claim in the petition.

10. In the judgment reported in ***Rolta India Ltd., case*** (supra) the Honorable Supreme Court has held that the application under

Section 11 of the Act pending before the Court for almost for a period of four years (2006 – 2010) and disposed only in the year 2010. The period of limitation to the respondent for the purpose of filing counter claim must be excluded. Admittedly arbitral proceedings commenced only on 6.10.2005. counter claim was filed in 2007. The same was filed well within the period of three years as per Article 137 of the Limitation Act. The claim has been filed within three years from the date of the dispute referred to the arbitration. Therefore, the learned Arbitrator's view that the counter claim is barred by limitation is not according to law.

11. It is to be noted that the learned Arbitrator has not rejected the counter claim only on the ground of limitation. In fact the learned Arbitrator has considered the entire evidence of both sides and held that the counter claim in Claim No.5 is only on the basis of assumption without any evidence. In fact the above view was also fairly admitted by the counsel appearing for the Respondent. In para 97 of the Award the learned Arbitrator clearly noted that the counsel appearing for the Respondent has admitted the claim under Sl.No.5 of paragraph No.7 of

the counter claim is only on the assumption and the claim in Sl.No.3 and 4 of paragraph 7 also refers to the share of the respondent from the release of Directories for the years 2001 and 2002. Learned Arbitrator considering the above submission and also referring Ex.R.30 the delay in release of 2000 Directories is due to departmental reason and finally held that the claim of Rs.2 crores is not only based on the assumption without any details but also due to the default committed by the respondent as revealed by Ex.R.30. It is further held that the respondent has not established the claim of Rs.2 crores and rejected the claim on that ground. Further, the Learned Arbitrator considered the fact that in Ex.C.1 agreement there is novation of contract in respect of certain conditions of contract and the entire conditions have been changed subsequently modifying Ex.C.10 and Ex.C.11 and held that in bringing out the supplementary issue for 2001-2002 issue will amount to violation of agreement and also contradictory to the guidelines issued by the Ministry of Communications and held that the Respondent certainly bound by the novation of the conditions contained in Ex.C1 with regard to the printing of 2001 issue as spelt out in Ex.C10 and Ex.C11 and held that only the Respondent had

committed breach of contract by insisting that 2001 issue will be as per Ex.C1 contract.

12. In para 108 the Learned Arbitrator has discussed and found that the breach is only on the part of the Respondent. Further, in the counter claim in para 7(5) the period of contract is given. Rs.2 crores claimed for the year 2003-2004 and 2004-2005 being outside the agreement and also considered that subsequent to Ex.C1 agreement, there were revised guidelines issued from time to time by the Government of India regarding royalty and terms and conditions for printing directories and held that without particulars or data that the respondent would have earned by way of royalties etc., for the years in question. The claim of Rs.2 crores cannot be sustained on the basis of of assumption and presumption without any evidence to substantiate the same and further held that since Ex.C1 is novated counter claim cannot be ordered. When the learned arbitrator has considered the entire evidence and factually found that the counter claim has not been established and no evidence has been adduced, ordered rejecting the counter claim does not require any interference. Except the limitation

ground other aspects discussed by the Arbitrator is reasonable based on the evidence adduced before him. Therefore, this Court cannot re-appreciate the evidence as a court of First Appeal. Hence, I do not find any circumstance enumerate under Section 34 of the Arbitration Act to interfere the Award passed by the learned Arbitrator rejecting the counter claim. In view of the above the petition is dismissed.

13. In the result, the Original Petition is dismissed, no costs.

25.06.2019

Index : Yes / No
Internet: Yes
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To

GETIT Infomediary Ltd.,
(Formerly M & N Publications Ltd.,)
Represented by its
Deputy General Manager
Mr.R.Srikanth
25, Radhakrishnan Salai,
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