IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
and
THE HONOURABLE MS.JUSTICE P.T.ASHA

W.P.No.39218 of 2003
&
W.P.M.P.No.47462 of 2003

N.Maniraj .... Petitioner

-vs-

1.The Union of India,
by Ministry of Telecommunication,
New Delhi.

2.The General Manager,
Telecom, BSNL, Trichy

3.The Accounts Officer,
(Telephone Revenue),
Telecom District, Trichy - 1.

4.The Sub Divisional Officer,
Telephones, Karur.

5.The Deputy General Manager,
Telecom, Telephone Exchange,
Pollachi - 642 001. .... Respondents

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records from the fifth respondent leading to pass the impugned proceedings in No.DE/E10B/ARB/KRU 330474/15, dated 31.10.2003 served on the petitioner on 04.11.2003 and quash the same.

For Petitioner : Mr.N.C.Ashok Kumar

For Respondents: Mr.S.Gopinathan

O R D E R

[Order of the Court was delivered by P.T.ASHA,J.]

This Court has been called upon to give its authoritative pronouncement on the substantial question of law herein below reproduced on the basis of a reference made by the learned Single Judge and pursuant to the order passed by the Hon'ble Chief Justice.

> "(i) Whether the remedy of an application under Section 34 of the Arbitration and Conciliation Act, 1996, is available to set aside an arbitral award passed under Section 7-B of the Indian Telegraph Act, 1885?
>
> (ii) If the answer to the earlier question is in the affirmative, whether petitioner who has filed Writ Petition before this Court against the arbitral award passed under Section 7-B of the Indian Telegraph Act, 1885, ought to be relegated to pursue the remedy of an application under Section 34 of the Arbitration and Conciliation Act, 1996, or on the Writ Petition which has been pending for long, be proceeded to be decided on merits?"

2. The Writ Petition which has given rise to the above reference has its genesis in the dispute raised by the writ petitioner under Section 7-B of the Telegraph Act, 1885 regarding the excessive bills received by him in respect of his Telephone bearing No.2330474 (previously 30474). The Arbitrator after hearing the parties had passed an award on 31.10.2003 granting a rebate of 1000 calls on the bill in question. This award is the subject matter of challenge in the present Writ Petition.

3. Before proceeding to answer the reference it is necessary to extract Section 7-B of the Indian Telegraph Act, 1855 and the relevant provisions of the Arbitration and Conciliation Act.

Section 7-B of the Indian Telegraph Act:

> "7-B. Arbitration of disputes.—(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an

arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this section.

(2) The award of the arbitrator appointed under sub-section (1) shall be conclusive between the parties to the dispute and shall not be questioned in any court.]"

4. The following provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 1996 Act) which are relevant for the issue on hand are hereinbelow extracted:

Section 2 (4) reads as follows:

"(4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except insofar as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder;"

Section 2 (5) reads as follows:

"(5) Subject to the provisions of sub-section (4), and save insofar as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."

5. Under the Arbitration Act 1940 (hereinafter referred to as the 1940 Act) Section 46 had brought within its ambit statutory arbitration. Section 46 would read as follows:

"46. Application of Act to statutory arbitrations.- The provisions of this Act, except sub-section (1) of section 6 and sections 7, 12, [1][36] and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is in consistent with that other enactment or with any rules made thereunder.

6. Section 47 therein made the Arbitration Act, 1940 applicable to all arbitrations and would read as under:

> "47.Act to apply to all arbitrations.-Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:"

Section 2(4) of the 1996 Act is analogous to Section 46 of the 1940 Act.

7. Apart from the Indian Telegraph Act 1885 some of the following Acts also have an arbitration clause read into the Act.

(a) The National Highways Act, 1956:

> "3-G (5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government--
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> (6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act."

(b) The Micro, Small & Medium Enterprises Development Act, 2006.

> "18. Reference to Micro and Small Enterprises Facilitation Council.—(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.
>
> (2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.
>
> (3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the

Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

"19. Application for setting aside decree, award or order.—No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent. of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose."

8. Unlike the Indian Telegraph Act, the National Highways Act and the Micro, Small and Medium Enterprises Development Act which spells out in very clear terms the applicability of the 1996 Act to the disputes arising under those Acts, Section 7-B of the Indian Telegraph Act gives a finality to the Award passed under the said Act.

9. A reading of Section 46 of the 1940 Act and its analogous provision in Section 2(4) in the 1996 Act would clealry indicate that the respective Arbitration Acts would apply to every arbitration under any another enactment which is in force then. However an exception has been carved out wherein it has been

made clear that where the provisions of the Arbitration Act is inconsistent with that other enactment then the provisions of the other enactment and its rules would apply to the particular proceedings. An analysis of the above provisions would therefore indicate the situations/instances under which the Arbitration Act would apply/not apply:

(a) Where the other enactment contemplates the application of the Arbitration Act as a whole including the provisions relating to the challenge, enforcement etc then the Arbitration Act alone will apply.

(b) Where the other enactment contemplates resolution of disputes through Arbitration but is silent about the challenge, enforcement etc then also the Arbitration Act would apply.

(c) Where the other enactment adopts the process Arbitration only for the dispute resolution and in very clear terms brings about a finality to the award, then in such a case the application of the provisions of the Arbitration Act would come to an end with the passing of the award since it falls within the exception contemplated under Section 46 of the 1940 Act and Section 2 (4) of the 1996 Act.

10. Under the Indian Telegraph Act, unlike the case of the National Highway Act or the Micro, Small and Medium Enterprises Development Act, Section 7-B (2) brings about a finality to the award passed by the Arbitrator in as much as Section 7-B (2) would read that the award of the Arbitrator shall not only be conclusive between the parties but cannot be called into question before any Court of law. Section 34 of the 1996 Act contemplates a challenge to the Award before a Court of law. Therefore Section 7 B(2) makes it clear that challenge to the award cannot be before a Court of law. However the person aggrieved by the award cannot be left remediless. The princple of Ubi Jus Ibi Remedium - "For every wrong, the law provides a remedy" would step in and therefore the challenge to the award under Section 7-B can be by way of a Writ Petition since the Arbitration in question is a statutory Arbitration.

11. The Judgements in (1996) 3 SCC 119 - M.L.Jaggi Vs. Mahanagar Telephones Nigam Ltd and 1999 (4) SCC 506 - Union of India and another Vs. M/s. Jagajit Industries and another, were no doubt passed prior to the 1996 Act coming into force. However it is to be borne in mind that Section 46 of the 1940 Act which is analogous to Section 2(4) of the 1996 Act was very much in force when the said judgements were pronounced. The Honourable Supreme Court in both the cases had upheld the challenge to the award by way of Writ proceedings. In M.L.Jaggi's case the Honourable Supreme Court had observed as follows:

"Under Section 7-B, the award is conclusive when the citizen complains that he was not correctly put to bill for the calls he had made and disputes the demand for payment. The statutory remedy open to him is one provided under Section 7-B of the Act. By necessary implication, when the arbitrator decides the dispute under Section 7-B, he is enjoined to give reasons in support of his decision since it is final and cannot be questioned in a Court of law. The only obvious remedy available to the aggrieved person against the award is judicial review under Article 226 of the Constitution of India."

12. The Judgement of the Honourable Supreme Court in (2009) 1 SCC 644 - Saji Geevarghese Vs. Accounts Officer (Telephone Revenue) and others, which relates to a dispute that has arisen after the promulgation of the Arbitration and Conciliation Ordinance, 1996 and the arbitral proceedings had commenced after the enactment of the 1996 Act has once again reiterated this position. The Hon'ble Supreme Court has observed in the said Judgement as follows:

"10.Section 7 – B of the Telegraph Act, 1885 makes the awards of the arbitrators final and conclusive between parties. The only remedy available to a subscriber aggrieved by an award is to seek judicial review by way of a Writ Petition."

13. On a conspectus of the above, We answer the reference in the negative by holding that the remedy available under Section 34 of the Arbitration and Conciliaiton Act, 1996 is not available to set aside the award passed under Section 7–B of the Indian Telegraph Act, 1885 in view of the language of Section 7–B (2) of the Telegraph Act read with the exception described in Section 2 (4) of the Arbitration and Conciliation Act 1996 which is analogous to Section 46 of the Arbitration Act, 1940. Therefore judicial review is available under Article 226 of the Constitution of India. The Registry is directed to post the Writ Petition before the learned Single Judge for disposal on merits.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To,

1.The Union of India,
by Ministry of Telecommunication,
New Delhi.

2.The General Manager,
Telecom, BSNL, Trichy

3.The Accounts Officer,
(Telephone Revenue),
Telecom District, Trichy - 1.

4.The Sub Divisional Officer,
Telephones, Karur.

5.The Deputy General Manager,
Telecom, Telephone Exchange,
Pollachi - 642 001.

+1cc to Mr.J.Madanagopala Rao, Advocate Sr.66762

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srg 16/09/2019