

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.12.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.443 of 2020

M/s.Bharat Sanchar Nigam Limited
Rep. By its Chief General Manager
Southern Telecom Projects
No.25, BSNL Towers, Greenways Lane
Raja Annamalaipuram
Chennai – 600 028

... Petitioner

vs.

1. Micro and Small Enterprises Facilitation Council
Jaipur (Third)
Office of Commissioner of Industries
Government of Rajasthan, Udyog Bhavan
Tilak Marg, Jaipur
Rajasthan – 302 005

2. M/s.Purma Plast Private Limited
Rep. By Sri Raghuveer Sharma
B-494, RIICO Industrial Area, Phase-I
Bhiwadi, Alwar, Rajasthan

... Respondents

Original Petition filed under Section 34(2)(a)(iii)(iv) of the Arbitration and Conciliation Act, 1996, read with Section 19 of Micro, Small and Medium Enterprise Development Act, 2006 to set aside the impugned award dated 23.10.2019 made in the Case No.RJ/02/S/00619 in the Arbitration of the disputes arising of the Agreement in Tender No.CGMP/CH1/MM/NT-1/2014 dated 19.05.2014 passed by the 1st respondent and pass such other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.Haja Nazirudeen
Senior Counsel
for Mr.S.Gopinathan

For Respondents : Ms. Aparjitha Viswanathan
for Caveator

ORDER

From the case file placed before this Court it comes to light that captioned OP arises out of 'The Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006)' (hereinafter 'MSME Act' for the sake of brevity) and an arbitral award dated 23.10.2019 made by the MSEF Council has been called in question.

2. At the out set, counsel for caveator pointed out that captioned OP is barred by limitation, it ought not to have been taken on file and it deserves to be dismissed on the ground of limitation. Therefore, following proceedings came to be made on 02.11.2020:

'Mr.S.Gopinathan, learned counsel on record for sole petitioner (BSNL) and Ms.Aparajitha Vishwanath, learned counsel who has lodged caveat on behalf of second respondent in captioned OP are before me in this web hearing on a video conferencing platform.

2. Read this in conjunction with and in continuation of earlier proceedings dated 28.10.2020.

3. Adverting to earlier proceedings, learned counsel for petitioner submits that he has since filed (on 29.10.2020) an

affidavit with supporting annexures demonstrating that 75% of the impugned award amount has been deposited in accordance with MSME Act.

4. To be noted, short forms and abbreviations used in the previous proceedings continue to be used.

5. Be that as it may, learned counsel for caveator points out that captioned OP has not been filed within three months and thirty days from the date of receipt of impugned award. It is also submitted that counsel for caveator has written to MSEF council/postal authorities (1st respondent in captioned OP), obtained necessary responses and submission is being made based on such written responses. A request is made by caveator counsel to file these responses by way of a typed set to assist the Court regarding limitation issue as notice has not been issued. Permitted.

6. Be that as it may, learned counsel for petitioner submits that the original impugned award was received from MSEF Council only on 26.06.2020 and therefore, captioned OP presented on 09.07.2020 is within time. As limitation goes to the root of the matter and rigour of the limitation under Sub-Section (3) of Section 34 of A and C Act is very high, this Court deems it appropriate to direct Registry to requisition all the records of Arbitral Tribunal qua impugned award in a sealed envelope. Registry to send communication to first respondent MSEF Council through available electronic modes of communications (besides conventional modes of communication). Requisition records in a sealed envelope which shall be sent to the office of the Registrar General of this Court and thereafter, the same shall be placed before this Court with the case file in the next listing.

7. Registry to also put up typed set if filed by learned counsel for caveator regarding limitation.

8. List under the same caption on 23.11.2020'

3. Thereafter, proceedings made on 23.11.2020 are also of significance and the same reads as follows:

'Read this in conjunction with and in continuation of earlier proceedings dated 02.11.2020.

2. Today, Mr.S.Gopinathan, learned counsel on record for sole petitioner (BSNL) and Ms.Aparajitha Vishwanath, learned counsel who has lodged caveat on behalf of second respondent in captioned OP are before me in this web hearing on a video conferencing platform.

3. In continuation of earlier proceedings dated 02.11.2020, a typed set of papers dated 28.10.2020 filed by caveator counsel regarding the limitation aspect has been placed before me as part of case file.

4. As far as requisition of records of Arbitral Tribunal from MSEF Council, Registry has put up a note saying that communication has been sent vide ROC No.3574/2020(O.S) dated 10.11.2020, but records have not been placed before me. Both aforesaid learned counsel are permitted to communicate these proceedings to MSEF Council for the limited purpose of expediting the submission of records of the Arbitral Tribunal in a sealed envelope to the office of the Registrar General of this Court.

5. Be that as it may, today, learned counsel on record for sole petitioner seeks an adjournment stating that Senior Counsel

Mr.Haja Nazurudeen, who is leading him is indisposed.

6. At request of petitioner, list this matter under the same caption on 03.12.2020.'

4. From paragraph 4 of 23.11.2020 proceedings it will be clear that records have been requisitioned from MSEF Council, but the same are yet to be sent to this Court. However, for the purpose of limitation, certified copies from the postal authorities and others concerned have been obtained, compiled as a typed-set being typed-set dated 28.10.2020 by caveator and placed before this Court pursuant to earlier proceedings i.e., proceedings dated 02.11.2020, more particularly paragraph 5 thereat. In the light of these certified copies issued by Governmental authorities and there being no dispute about the documents enclosed in the caveator's typed-set dated 28.10.2020, with the consent of learned senior counsel for petitioner and learned counsel for caveator, this Court heard out the matter on limitation. This is owing to indefeasible principle that limitation goes to the root of the matter. It is in this view of the matter and under such circumstances that caveator counsel was given audience, though under normal circumstances caveator counsel's say would be restricted to interim orders.

5. For the sake of convenience, petitioner in captioned OP shall be referred to as 'BSNL' and second respondent in captioned OP, who has lodged a caveat shall be referred to as 'supplier'. To be noted, BSNL is 'buyer' within the meaning of Section 2(1)(d) of MSME Act and second respondent is 'supplier' within the meaning of Section 2(1)(n) of MSME Act.

6. Before this Court proceeds further, some undisputed dates are critical and a list of those undisputed dates are as follows:

Sl.No.	Description	Date
(i)	Impugned award was made by MSEF Council on	23.10.2019
(ii)	Impugned award was despatched to petitioner (BSNL) on	30.10.2019
(iii)	Impugned award was received by BSNL on	04.11.2019
(iv)	Three months from the date of receipt of impugned award by BSNL (within the meaning of sub-section (3) of Section 34 of A and C Act) elapsed on	05.02.2020
(v)	Condonable period of 30 days thereafter [vide proviso to Section 34(3)] elapsed on	06.03.2020
(vi)	As per case file placed before instant OP was presented in this Court on	09.07.2020

7. Learned senior counsel for petitioner, advertng to Paragraph 5 of the affidavit filed by BSNL {deponent is Assistant General Manager (MM & Legal) of BSNL (STP), in the office of Chief General Manager, Southern Telecom Projects}, being an affidavit dated 07.12.2020 submitted that on 04.11.2019 impugned award was received by the Despatch Section, as it was in Hindi, despatch employee, who did the segregation, handed over the same to Hindi Section instead of delivering it to the Legal Section. In this regard, attention of this Court was drawn to Paragraphs 5 and 6 of this affidavit of BSNL dated 07.12.2020 and the same read as follows:

'5. In connection with the second respondent's submission of record of delivery of the award, I submit the following:

It is an unexpected surprise to the applicant that the award was received by this office on 4.11.2019. To check the veracity of the facts, the applicant Chief General Manager STP BSNL formed an internal committee consisting of 3 members. The committee consists of a Deputy General Manager as the Chairman and two Asst. General Managers as the members to investigate the matter regarding receipt / non-receipt of notices/correspondences from the first respondent.

The committee has carried out the search/enquiries and found out that the photocopy of the said award written in Hindi was received in November 2019 by this office despatch section. This office rarely

receives letters in Hindi. For the best of my knowledge, this is the first time, a letter involving a legal issue has been received by this office in Hindi alone. The despatch section employee, segregates the letters section wise and hands over the same to the respective sections. Since the award is fully in Hindi, the despatch section employee, unable to decipher its contents, has handed over the award to the Hindi Section, instead of delivering it to the Legal section. The Legal/Material Management Section Heads only have the complete knowledge of the dispute and its implications and they only provide necessary inputs to the applicant to act on the award.

Since BSNL is a Public Sector Unit, official language Hindi has to be implemented in the daily correspondence. To comply with this requirement, the applicant's office incorporates a Hindi Section wherein a Hindi Translator was available to facilitate Hindi correspondences. The other section officers avail the services of the Hindi section for translation purpose. This is to say that the Hindi section does not normally receive any letters of significance or letters that need to be acted upon immediately. The Hindi translator has received the photocopy of the award and not knowing the significance of it, has assumed that it was yet another letter given for translation. She had no knowledge of its legal implications. She has failed to understand that the award has directly reached her, without the knowledge of the section officers concerned. If only the award was brought to notice of the Legal/MM section Heads, they would have followed up with Hindi Translator to get the translated copy. This does not happen under normal circumstances, when letters are received in English. The despatch employee's lack of

knowledge of Hindi kept the officers who were dealing with the case, in darkness about the receipt of the award.

6. During October 2019, the Hon'ble Government of India has announced a Voluntary Retirement Scheme (VRS) for BSNL employees above the age of 50. The VRS was to be effected on 31.1.2020. Vide order dated 4.11.2019, BSNL Corporate Office has issued a Notification inviting options from employees eligible under the scheme seeking voluntary retirement. It may please be noted here that the date of Notification of VRS and the date on which the Hindi section received the award are same, ie.4.11.2019. This sudden announcement of VRS and its quick implementation created lot of chaos among BSNL employees. This VRS scheme was availed by nearly 80000 employees all over India and hence all the BSNL offices were handling massive workload with VRS related works like preparing the pension related papers, settlement of personal claims of VRS optees like their medical/travel etc., completion of assigned works, training the next coming officers, making over and taking over of works, arranging for funds to settle the benefits of VRS optees etc. The Hindi translator, being the only employee in her section and being a VRS optee was apparently busy preparing her papers for pension claim and other settlements and has ignored the translation of the award and failed to submit it to the respective section officers (Legal section/Material Management section), who are supposed to act on the award. Taking a final decision would be possible only if the subject matter of challenge namely, the arbitral award is known to the section Head, who is directly concerned with the subject matter as well as arbitral proceedings.'

8. Besides the aforesaid submission, learned senior counsel submitted that a letter dated 02.03.2020 from the supplier counsel was received by BSNL on 05.03.2020 and thereafter the whole matter got activated. Post getting activated, BSNL counsel in Jaipur obtained a certified copy of impugned award from MSEF Council on 13.06.2020. Thereafter, the requisite pre-deposit under MSME Act was made and captioned OP was filed.

9. In this regard, it is to be noticed that a submission was made that it was e-mail filed on 04.06.2020, but the case file placed before this Court very clearly indicates that date of presentation is 09.07.2020. Scanned copy of the same is as follows:

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10. This Court now proceeds to set out how the three months under Section 34(2) and 30 days condonable period were computed. Following ***Himachal Techno Engineers*** case [***Himachal Pradesh and Another Vs.***

Himachal Techno Engineers and another reported in (2010) 12 SCC 210], the date of receipt of award i.e., 04.11.2019 was excluded and 3 months was computed from 05.11.2019. With regard to three months, as unit of time has been given in terms of months, corresponding date in the third month was taken based on the principle laid down in *Dodds Vs. Walker* reported in (1981) 2 All ER 609 (HL), an English case law, which was followed by Hon'ble Supreme Court in *Bibi Salma Khatoon v.State of Bihar* reported in (2001) 7 SCC 197. Therefore, three months elapsed on 05.12.2020 as set out supra. Thereafter, 30 days condonable period was calculated and to be noted 30 days is in terms of the unit days. It has become necessary to set out the mode of computation as the prescribed period of limitation and the condonable period vide Section 34(3) and proviso thereto, have been given in two different measures i.e., two different units. While prescribed period is given in terms of months, the condonable period is given in terms of days.

11. This Court having set out the manner in which computation has been made, now deems it appropriate to set out the obtaining legal position with regard to delay condonation qua OPs under Section 34 of A and C Act. This Court has no hesitation in holding that the expression 'but not thereafter' occurring in proviso to Section 34 (3) of A and C Act

is non-derogable. To put it differently, even one day delay beyond thirty days cap cannot be condoned owing to the rigour in the language in which proviso to Section 34(3) is couched. In this regard, law laid down/declared by Hon'ble Supreme Court in *Simplex Infrastructure Limited Vs. Union of India* reported in (2019) 2 SCC 455 and *Union of India Vs. Popular Construction Company*, reported in (2001) 8 SCC 470 are elucidative and instructive. This principle is now indisputable.

12. Therefore, what falls for consideration is whether captioned OP was presented in this Court within the three months 30 days time frame or not. If answer to this is in the affirmative, the OP will have to be proceeded with further. If the answer to this is in the negative, the OP will have to find its end here and it has to be dismissed as barred by limitation.

13. Having set out the mode of computation, obtaining legal position and having set out the neat question which this Court has addressed itself to, this Court now embarks upon the exercise of examining the rival contentions.

14. With regard to the submission that BSNL woke up only on receipt of 02.03.2020 letter from supplier counsel (received on 05.03.2020), the same does not hold water in the light of paragraphs 5

and 6 of the affidavit dated 07.12.2020 wherein it has been clearly admitted by BSNL that the impugned award was received on 04.11.2019. Thereafter what happened, as narrated in paragraphs 5 and 6 and other paragraphs of the said affidavit is a internal matter of BSNL and that cannot be pressed into service for expanding statutorily prescribed period of limitation or for lifting the cap qua condonable period. In this view of the matter, the submission that OP was e-mail filed on 04.06.2020 also gets doused as even if that be so, that is also beyond the 30 days condonable period which elapsed on 06.03.2020. In any event, the case file placed before me as mentioned supra shows that the date of presentation is 09.07.2020. Be that as it may, as both dates are outside the 30 days cap, this Court deems it unnecessary to burden this order with any further dilation qua enquiry in this regard. The question otherwise is, whether the captioned OP was presented on or before 06.03.2020 beyond which even one day's delay is not condonable (going by *Simplex Infrastructure* and *Popular Construction Company* principles supra). Learned senior counsel pressed into service a judgment of Hon'ble Supreme Court in *Union of India Vs. Tecco Trichy Engineers and Contractors reported in (2005) 4 SCC 239* for the principle that delivery of arbitral award under sub-section (5) of Section

31 is not a matter of mere formality, but a matter of substance. It was submitted that Hon'ble Supreme Court has held vide ***Tecco Trichy Engineers*** case that delivery of arbitral award and receipt of the same by parties set in motion several periods of limitation, such as an application for correction, interpretation of an award under Section 33, an application for setting aside an award under Section 34 and so on. It was also pointed out that in a large organization, copy of the award has to be received by the person who has knowledge of proceedings and who would be the best person to understand and appreciate the arbitral award to take a decision in the matter and moving an application under Section 33 or under Section 34. ***Tecco Trichy Engineers*** case does not come to the aid of BSNL in the case on hand as that was a case where delay was within the condonable period or within the tolerance period of 30 days i.e., delay of 27 days was sought to be condoned. That is the not the position here. This is a case of presentation beyond the 30 days cap qua condonable period. Therefore, ***Tecco Trichy Engineers*** case does not come to the aid of BSNL in the case on hand. ***Ark Builders Private Limited*** case [*State of Maharashtra and Others Vs. Ark Builders Private Limited* reported in (2011) 4 SCC 616] was also pressed into

service to say that the expression 'party making that application had received the arbitral award' occurring in Section 34(3) has dynamics and dimensions set out therein. To be noted, *Tecco Trichy Engineers* (supra) was reiterated in *Ark Builders*. is explained. *Ark Builders* case also does not come to the aid of BSNL as that was a case where an application under Section 34 could not be made for want of a copy of the award from the arbitrator and a messenger was sent to the arbitrator with a letter asking for a copy of the award. The arbitrator made an endorsement on the letter sent to him stating that on the request of the claimant, the original award was given to him and a photo copy of the award was being certified by him as true copy of the award. There are no such issues in this case.

15. This takes us to another argument advanced on behalf of BSNL. That argument is, what was received on 04.11.2019 is a photocopy and not the original. A copy of what has been received by BSNL has been annexed to the aforementioned affidavit dated 07.12.2020 and a perusal of the same makes it clear that it bears the signature of all three noblemen, who constituted MSEF Council. As long as it is a signed copy, Section 31(5) mandate is satisfied, as rightly pointed out by learned counsel for supplier/caveator. Learned counsel for caveator drew the

attention of this Court to ***Living Media*** case law [***Postmaster General and Others Vs. Living Media India Limited and another*** reported in (2012) 3 SCC 563] and paragraph 29 thereat, which reads as follows:

'29.In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.'

16. This Court, respectfully follows this principle laid down by Hon'ble Supreme Court in ***Living Media*** case. It was submitted that ***Ashok Kumar*** case [***P.Radha Bai and Others Vs. P.Ashok Kumar and another*** reported in (2019) 13 SCC 445] is also relevant for the principle that delay beyond cap is not condonable. This being an indefeasible principle qua case on hand there shall be no further dilation on this point,

17. Be that as it may, there was a reference to ***Sagufa Ahmed*** case being an order made by Hon'ble Supreme Court dated 18.09.2020 in

Civil Appeal No.003007-003008 of 2020 in **Sagufa Ahmed and others Vs. Upper Assam Plywood Products Pvt. Ltd.** It may not be necessary to advert to **Sagufa Ahmed** in the case on hand, as that is an authority for the broad proposition that when the prescribed period of limitation (3 months in this case) falls on a Court holiday, the benefit of next working day principle will be available, whereas when the 30 days condonable period cap falls on a holiday, a similar benefit will not be available to the party concerned.

18. As already alluded to supra, vide **Simple Infrastructure and Popular construction**, it was held that owing to 'but not thereafter' expression occurring in proviso to sub-section (3) of Section 34, the rigour of limitation is very high in a challenge to arbitral awards. This is owing to strict time lines drawn at all stages including arbitral proceedings and challenge to the award. This is *inter alia* the legal philosophy qua A and C Act. In this regard, sub-section (6) of Section 34 is of relevance and the observation made by Hon'ble Supreme Court in **Bhumi Vikas Bank** case law [**State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti** reported in (2018) 9 SCC 472] is of relevance. This is contained in Paragraph 26 of **Bhumi Vikas Bank** case law, which

reads as follows:

'26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.'

(Underlining made by this Court to supply emphasis and highlight, besides ease of reference)

19 . This Court is conscious of the fact that ***Bhumi Vikas*** case is an authority for the broad proposition that pre-application notice under subsection (5) of Section 34 is directory and not mandatory, but the observation made by Hon'ble Supreme Court in aforementioned paragraph 26 is of significance. This is mentioned in this order to highlight the position that liberal views in matters of this nature will dilute the strict time lines and that will lead to dilution of the sublime philosophy and salutary principle underlying 'Alternate Dispute

Resolution' mechanism ('ADR' mechanism) qua A and C Act. This Court also reminds itself that owing to Hon'ble Supreme Court having held that pre-application notice under sub-section (5) of Section 34 is directory, the one year period under sub-section (6) of Section 34 has to be computed from the date of presentation of Section 34 applications in cases where Section 34 applications are presented without issue of pre-application notice.

20. In the light of the narrative thus far, this Court has no hesitation in coming to the conclusion that captioned OP is barred by limitation and the same deserves to be dismissed on this ground.

Captioned OP stands dismissed and there shall be no order as to costs.

10.12.2020

Speaking order: yes
Index: yes

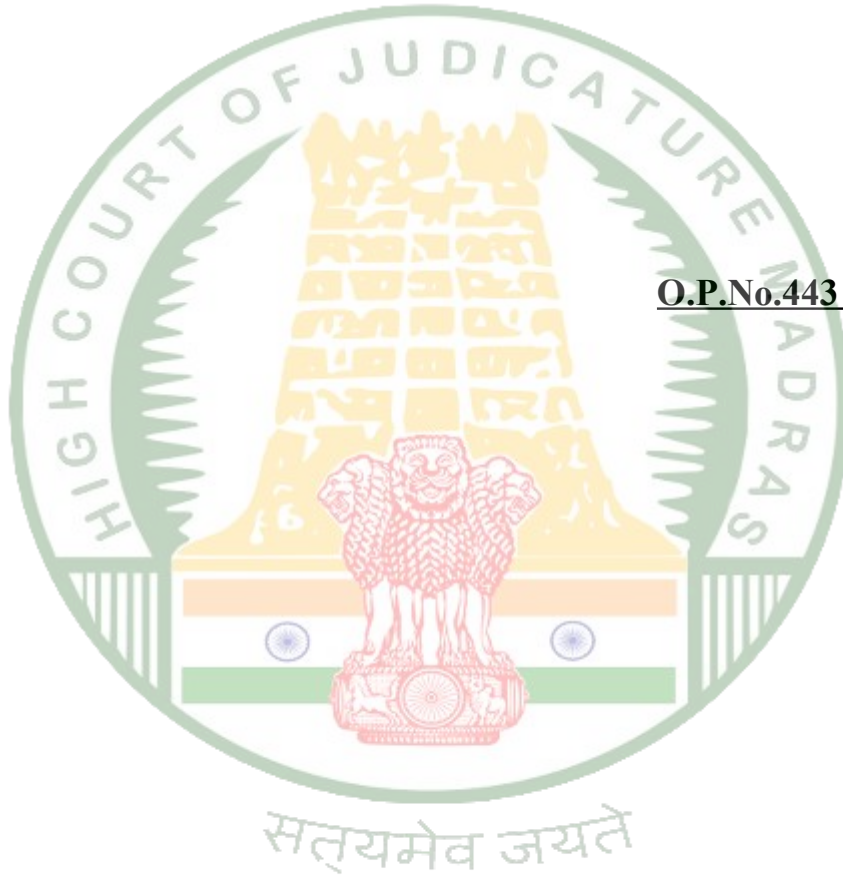
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