* **HIGH COURT OF DELHI : NEW DELHI**

O.M.P. 120/2004

Judgment reserved on: 16th February, 2009

% Judgment decided on : 31st July, 2009

DR. INDERJIT SINGH MANN ..... Petitioner
Through Mr. Amit Kumar, Adv.

versus

CHARANJIT SINGH GREWAL ..... Respondent
Through Mr. B.A. Mahanti, Sr. Adv. with
Ms. Mamta Tripathy, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment? No

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN SINGH, J.

1. By this order I shall dispose of OMP No. 120/2004 which has been filed under Section(s) 34 and 37 of the Arbitration and Conciliation Act, 1996 against the impugned award dated August 31, 2003 passed by the learned sole arbitrator Justice S. Ranganathan (Retd.).

2. The brief facts of the case are that the parties had entered into a Memorandum of Understanding and agreement dated April 9, 1997 as regards the sale of shares of M/s Trilaium Technologies Ltd. The two relevant clauses of this agreement are clauses 6 and 7 which are reproduced as under :-

"(6) That in the event of any party defaulting on the terms of the agreement the other party will have the right to enforce execution of the agreement from court of law.

(7) That in the event of any difference arising out of the interpretation of any clause of the agreement, the same shall be referred to a mutually agreeable sole arbitrator."

3. Due to differences between parties, a petition being No. 146/2001 under Section 11 of the Arbitration and Conciliation Act, 1996 was initiated by the petitioner on March 31, 2001. The said application was disposed of with the consent of the parties vide order dated November 9, 2001 with the direction that all the claims and counter-claims of the parties be referred to the appointed sole arbitrator.

4. The claim of the applicant before the arbitrator was as under:-

(i) Rs. 1,39,00,000/- towards unpaid balance of pre sale situation of sale of shares.

(ii) Rs. 1,36,22,000/- towards accrued interest as on May 1, 2002.

(iii) Rs. 2,79,05,413/- towards liability to be discharged and paid to Punjab & Sind Bank.

(iv) Personal Guarantees to be furnished by the respondents so that existing guarantees of the claimants and their associates are released.

5. The Respondent challenged the admissibility and maintainability of the aforesaid claims on the basis that as per Clause No. 7 of the agreement, only differences arising out of the interpretation

of any clause in the agreement shall be referred to a mutual agreeable sole arbitrator and the present differences had nothing to do with interpretation of any clause. However, inspite of this objection, the Respondent still made the following counter claims:

(i) Refund of Rs.161 lacs plus interest @ 24% p.a.

(ii) Rs.155 lacs plus interest, being the amount spent in running of the Company M/s Trillenium Technologies Ltd. and including other advances made to the same.

(iii) Other claims against the abovementioned Company.

6. The Learned Arbitrator terminated the arbitration proceedings by impugned order dated August 31, 2003 on the ground that reference of arbitration cannot be sustained as the disputes referred are out of the purview of the arbitration clause in the agreement between the parties.

7. The Learned Arbitrator cited **AIR 1999 SC 3627** wherein it has been stated that the agreement containing arbitration clause must contemplate that substantial rights of the parties will be determined by an arbitral award. The Learned Arbitrator also cited **KK Modi V. KN Modi 1998 (3) SCC 573** and **Bharat Bhushan Bansal V. U.P Small Industries Corporation AIR 1999 SC 899** and noted that the latter case draws a distinction between a provision for seeking an expert determination and a provision in the nature of an arbitral reference. An arbitration clause should leave no doubt as to the intention of the parties

to have disputes between them referred to an arbitrator whose decision will then be treated as binding.

8. In view of the above, Learned Arbitrator noted that Clause 7 of the agreement only invites the opinion of a third party in case some dispute should arise between them as to the interpretation of any clause of the agreement whereas Clause 6 is more direct as it states that in the event of any party defaulting on the terms of the agreement, the other party would have the right to enforce the execution of the agreement only through a court of law. The Learned Arbitrator held that the nature of relief sought by the Claimant falls within this clause and not clause 7 as the Claimant is seeking to enforce execution of the agreement and not interpretation of any clause of said agreement.

9. The Learned Arbitrator further held that the fact that transfer of pledged shares was not completed by the delivery of transfer deeds without share certificates is not a difference of interpretation but a matter that requires consideration of the factual issue as to whether the transfer deeds in respect of these shares had been delivered or not, which is not an interpretational question but a contractual one. Further, the Claimant has not raised this question in the arbitral proceedings and even if this issue is addressed, the Claimant shall have to take recourse to a Civil Court for enforcement of his rights under the contract.

10. As a result of the above award, the present application under Section(s) 34 and 37 of the Arbitration and Conciliation Act, 1996 was filed by the petitioner on the following grounds :-

(i) Intention of the parties was to invoke arbitration in case of any differences between them with regard to implementation of the agreement between them.

(ii) Learned Arbitrator erred in interpreting the arbitration clause as restrictive.

(iii) Learned Arbitrator erred in law by stating that the agreement does not contemplate adjudication of substantive rights of parties by Arbitral Tribunal.

(iv) Learned Arbitrator failed to appreciate the general nature of Clause 7 of the agreement. The Petitioner avers that this clause does not pertain to adopted procedure only but also to substantive adjudication of the rights of parties.

(v) Learned Arbitrator failed to appreciate that due to Respondent's inaction, omission and non-compliance, the pledged shares remained with the Bank instead of being liquidated.

(vi) The Petitioner avers that according to the Respondent's reading of the terms of the agreement, non-transferability of pledged shares is a difference raised before the Arbitrator which is the outcome of interpretation of the terms of the agreement. It is the interpretation of this document which makes a real dispute.

(vii) The Petitioner submits that existence of contract and of arbitration clause is not disputed by the Respondent. The Respondent consented to the appointment of arbitral tribunal for his own counter claim to be adjudicated, the same being made out vide order dated November 9, 2001.

11. The petitioner has stated in his submissions that the learned arbitrator decided the maintainability of the arbitration proceedings only on the basis of the agreement dated April 9, 1997 without considering the order of this court dated November 9, 2001. Further, the petitioner submits that the respondent consented to appointment of the arbitrator which culminated in the order dated November 9, 2001 and that he even presented several counter claims for adjudication by the said arbitrator. In lieu of the above-mentioned acts on behalf of the respondent, the petitioner submits that the former is stopped from raising a plea as to maintainability of the arbitration proceedings as the same is not permissible in law.

12. The Petitioner also submits that the scope and ambit of the arbitration clause as stated in Clause 7 of the agreement was enlarged by the consent order dated November 9, 2001. In view of the consent order mentioned above, the petitioner submits that the impugned order dated August 31, 2003 is patently illegal as it is contrary to the consent order.

13. The Respondent claims that filing of the OMP is barred by limitation as the impugned order of Justice S. Ranganathan was passed

on August 31, 2003 and communicated to the parties by letter dated September 7, 2003 and presumably received by the parties within one week thereafter. Hence as per the respondent the OMP should have been filed by the middle of December 2003 though it was filed on April 6, 2004. The Respondent states that the OMP dated November 29, 2003 which was originally filed and stated to have been returned by the Registry on December 2, 2003 is not the same as the OMP presently filed and hence this OMP is for all purposes a new filing on April 6, 2004, and is therefore ex facie barred by limitation.

14. The Respondent in his reply to these objections has stated that in terms of Clause 6 of the agreement dated April 9, 1997 the Respondent herein qua the Petitioner has already filed Civil Suit O.S No. 99 of 2003 which is pending adjudication before this Hon'ble Court. The Respondent in that case is seeking a decree of Rs. 15,58,11,163/- along with pendent lite and future interest. The Court fee of the same of approximately Rs. 16 lacs is claimed to be paid in lieu of this petition by the Respondent.

15. The Respondent avers that the applicant's case comes within Clause 6 of the agreement as the latter is claiming that the Respondent had defaulted in honouring his commitments as stated in the agreement.

16. The Respondent further avers that the impugned Award dated 31st August, 2003 does not fall within the scope and ambit of Section(s) 34 and 37 of the Arbitration and Conciliation Act, 1996.

17. I have considered the objections of the petitioner as well as the submissions of both the parties. There is a distinction between deciding a question of arbitrability of a dispute, i.e. whether a dispute can be referred to arbitration and the jurisdiction to decide that question and whether the dispute is within the scope of the agreement, viz., whether it falls within the terms of the particular arbitration agreement. The first goes to the root of substantive jurisdiction while the latter is a matter of interpretation of the arbitration agreement. In either case, the matter, in the first instance, has to be decided by the arbitral tribunal and not the court.

18. Learned Arbitrator has given his findings in favour of the respondent on the reasons mentioned in paras 15 and 16 of the Award which read as under :

> "15. Counsel for Mann contends that the respondent is estopped from raising this objection at this stage as he had submitted before the High Court in reply to the application under Section 11 of the Arbitration Act, that he had no objection to the appointment of an arbitrator by the court and the reference of the disputes to him for arbitration. This contention is without force as the order of the High Court dated 9.11.2001 itself makes it clear that the respondent had reserved the right to raise before the arbitrator all grounds available to him including the admissibility/maintainability of the claims mentioned in the petition. He cannot, therefore, be precluded from contending that the claims raised are not admissible/maintainable being beyond the purview of Section 6 and 7 of the agreement of 09.04.1997.
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> 16. In my opinion, the preliminary objection raised by the respondent has to be upheld. As pointed out in Rajasthan State Mines and Minerals Limited and Eastern Engineering Enterprises (AIR 1999 SC 3627), an arbitrator would be acting in excess of jurisdiction

in cases where there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant. It is not sufficient if the arbitration clause merely makes mention of an arbitrator or an arbitration; it should further provide that the arbitrator will be competent to enter upon the disputes between the parties and decide them. The agreement must contemplate that substantive rights of the parties will be determined by an arbitral tribunal and the language of the agreement should make it clear that the reference to the arbitration is intended to be enforceable in law. The necessary elements considered for an agreeement to be considered as an arbitration agreement have been set out by the Supreme Court in K.K. Modi vs. K.N. Modi 1998 (3) SCC 573 followed by the decision in Bharat Bhushan Ms. Prem Lata Bansal, Adv. vs. U.P. Small Industries Corporation, AIR 1999 SC 899. The observation in the latter case specifically draws a distinction between a provision for seeking an expert determination and a provision in the nature of an arbitral reference. No doubt the facts in the two cases in which observations were made by the Supreme Court were somewhat different but they make it clear that the arbitration clause should leave no doubt that it is the intention of the parties to have certain disputes arising between them referred to an arbitrator whose decision will be treated as binding. In the present case, Clause 7 of the agreement which purports to be an arbitration clause is very limited and restricted in its language. It only provides for the reference of differences regarding differing interpretations by the parties to any clause of the agreement. In other words, it is in the nature of a provision enabling the parties to seek the opinion of a third party, if some dispute should arise between them as to the interpretation of any particular clause of the agreement. It is difficult to spell out in the circumstances of this case that this is the kind of situation that arises here. Counsel for the claimant has not been able to draw my attention as to the manner in which any difference has arisen between the parties regarding the interpretation of any particular clause of the agreement."

19. In **McDermott International Inc. V. Burn Standard Co. Ltd. and Ors. (2006) 11 SCC 181** the Hon'ble Apex Court held that

"the jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the Arbitrator would be subject matter of challenge under Section 34 of the Act. In the event that the arbitrator opined that he had no jurisdiction in relation thereto an appeal there against was provided for under Section 37 of the Act." Hence the appeal of the petitioner under Section 34 of the Act is prima facie not maintainable.

20. What remains to be considered is whether the petitioner's appeal under section 37 of the Act has any merit or not. Section 37 of the Act provides:

> (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-
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> (a) granting or refusing to grant any measure under section 9:
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> (b) setting aside or refusing to set aside an arbitral award under section 34**.**
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> (2) An appeal shall also lie to a court from an order of the arbitral tribunal-
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> (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
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> (b) granting or refusing to grant an interim measure under section 17**.**
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> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or taken away any right to appeal to the Supreme Court**.**

21. In the present case, the Award of the arbitral tribunal has not been passed accepting the plea referred to in Section 16 (2) or (3).

Though the respondent had objected to the reference to arbitration in the beginning, he had submitted various counter-claims as mentioned above. In view of the reasons mentioned in the Award, this Court is of the opinion that present objections filed by the petitioner have no force and do not fall within the scope of Sections 34 and 37 of Arbitration and Conciliation Act, 1996 and none of the grounds raised are sustainable in law.

22. Besides considering the matter on merits, this court is of the opinion that it ought to deal with the objection of the respondent as regards the question of limitation. The impugned order was passed by the learned Arbitrator on August 31, 2003 and was communicated to the petitioner by letter dated September 7, 2003. At the latest it can be assumed to have reached the petitioner by September 15, 2003.

23. An OMP was filed by the petitioner initially on November 29, 2003 vide diary no. 15116 which was returned by the Registry on December 2, 2003 with several objections. The said objections were removed and the OMP was re-filed by the petitioner on April 6, 2004 alongwith IA No.2273/2004 under Section 148 and Section 151 CPC for condonation of delay in refiling. It is the contention of the respondent that the OMP thus re-filed in April is barred by limitation.

24. In the said application, the petitioner has submitted that the OMP could not be filed within the permissible time limit due to "bona fide inadvertence" on its part. This "bona fide inadvertence" has

occurred due to misplacement of papers in the office of the petitioner's counsel.

25. A bare reading of Section 34(3) with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in Sub-Section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the Court.

26. In the present case the impugned order of the learned arbitrator was passed on August 31, 2003, a period of 90 days from then would be till November 29, 2003. Under Section 148 of the CPC, a further period of thirty days can be granted by the court in its discretion, if it thinks it fit to do so. After the objections were raised by the Registry the petitioner filed the present OMP on April 6, 2006, i.e. more than 100 days after the said objections were taken.

27. The ground of condonation of delay has to be looked into in the backdrop of the fact that this court is dealing with the objections for challenge of Award under section 34 of the Arbitration and Conciliation Act, 1996. This Act is a special law, consolidating and amending the law relating to arbitration and matters connected therewith or incidental thereto. The Act does not prescribe the period of limitation, for various

proceedings under that Act, except where it intends to prescribe a period different from what is prescribed in the Limitation Act. The interference of the court in setting aside the arbitral award has been limited by prescribing the period of limitation under Section 34 of the Act.

28. Having considered the application filed by the petitioner for condonation of delay under Section 148 and 151 CPC, it appears that there is a delay of 100 days by the petitioner in refiling. The reason for delay is mentioned in para 2 of the application, i.e. that the papers were misplaced in the office of the counsel for the petitioner and therefore, on account of bona fide inadvertence the petition could not be refiled within the permissible time period. As per law, each and every day's delay has to be explained. It appears that the petitioner has adopted a very casual approach by not refiling the petition in time. The explanation given in the application is marked by are lack of necessary details. It is not mentioned in the application when the papers were misplaced in the office of the counsel of the petitioner and how and when the papers were traced after a period of four months. The explanation given by the applicant under the said circumstances is not acceptable. No valid reason for delay has been assigned by the petitioner in the application under Section 148 CPC. If the delay in refiling the present application is condoned then the purpose of prescribing the limitation period in filing of objections under Section 34 of the Arbitration & Conciliation Act, 1996 would be defeated. Under these

circumstances, the present objections are dismissed on this account as well as on merits of the case.

29. No cost.

MANMOHAN SINGH, J

July 31, 2009
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