* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ FAO(OS) No.290/2010 & CM No.7824/2010

BHARAT SANCHAR NIGAM LTD. .....Appellant through
Mr.Dinesh Agnani with
Ms. Leena Tuteja, Advs.

versus

HARYANA TELECOM LTD. .....Respondent through
Mr.Narendra M. Sharma,
Mr. Abhishek Sharma, Advs.

WITH

FAO(OS) No.385/2010

BHARAT SANCHAR NIGAM LTD. .....Appellant through
Mr.Dinesh Agnani with
Ms. Leena Tuteja, Advs.

versus

HARYANA TELECOM LTD. .....Respondent through
Mr.Narendra M. Sharma,
Mr. Abhishek Sharma, Advs.

% Date of Hearing : August 02, 2010

Date of Decision : August 06, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether reporters of local papers may be allowed to see the Judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

1. These Appeals assail the Judgment of the learned Single Judge dated 15.3.2010 dismissing the Appellants' Objections under Section 34 of the Arbitration & Conciliation Act, 1996 (A&C Act for short) on the ground that they could not be entertained having been filed beyond the prescribed period of prescription set-down in third sub-section of that very Section. The learned Single Judge has applied *Union of India –vs- Popular Construction Co.*, (2001) 8 SCC 470 wherein their Lordships have clarified that "Section 34(1) itself provides that 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). Sub-section(2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section(3) would not be an application 'in accordance with' that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbital award cannot be made beyond the period prescribed". Considerations analogous to Section 5 of the Limitation Act, 1963 (Limitation Act) would palpably be available in terms of proviso to Section 34(3), that is, for the period spanning 30 days after three months have elapsed from the date on which the concerned

party had received the Arbitral Award. We may immediately revert to Section 31(5) of the A&C Act which mandates that after the Arbitral Award is made, a signed copy shall be delivered to each party. The case of the Appellants is that a signed copy of the Arbitral Award was not delivered to them by the Arbitrator, although a photocopy thereof had been provided to it by the Respondents/Claimants. There is considerable controversy even with regard to the date on which the said photocopy was made available by the Respondents to the Appellants.

2. The Award in FAO(OS) No.290/2010 (in Arbitration Case No.113/98 arising out of Suit No. AA164/1997) is for a sum of ₹ 1,16,37,288/- together with interest at the rate of eighteen per cent per annum, in the event that the Appellants fail to make the payment within two months of the Award which was pronounced on 7.8.2000. The Award in FAO(OS) No.385/2010 (in Arbitration Case No.114/1998 arising out of Suit No. AA 163/1997) is for a sum of ₹ 1,49,78,142/- with interest at the rate of eighteen per cent per annum in the event that the Appellants fail to make the payment within two months of the Award which was pronounced on 7.8.2000. Although it is a matter of speculation whether the Objections filed by the Appellants would have found favour with the learned Single Judge, the fact remains that by declining to

consider the Objections on the premise that they had been preferred beyond the prescribed period of prescription, the Union of India would become liable to discharge the principal sum of ₹ 2,66,15,430/- together with interest of ₹ 4,79,07,774/-. Negligent or egregiously incorrect legal action seems to have become the preserve of the Government and/or Corporations held or controlled by it. This is obviously because of lack of answerability of its officers, as the present case will make manifest.

3. The wisdom expressed by the Privy Council over a century ago in ***Nazir Ahmad*** *–vs- King Emperor*, AIR 1936 PC 253 continues to remain contemporarily contextual. The Privy Council observed that if an action has to be taken in a particular manner, it must be carried out in that manner only, else it may be held not to have been effected at all. The wisdom of this pronouncement is manifestly evident in the facts of the present case. This abiding reasoning in respect of strict compliance with the procedural requirement of a statute had been applied by the Hon'ble Supreme Court in ***Ramchandra*** *Keshav Adke –vs- Govind Joti Chavre* (1975) 1 SCC 559; *Shiv Bahadur Singh –vs- State of Uttar Pradesh*, AIR 1954 SC 322 and ***Deep Chand*** *–vs- State of Rajasthan*, AIR 1961 SC 1527. In ***Ramchandra***, the Court was called upon to decide whether Section 5(3) of

Bombay Tenancy and Agricultural Land Act, 1948, which deals with verification of the alleged surrender of possession by the tenant was compulsory, and the effect of its non-compliance. The Court opined that "the imperative language, the beneficent purpose and importance of these provisions for efficacious implementation of the general scheme of the Act, all unerringly lead to the conclusion that they were intended to be mandatory. Neglect of any of these statutory requisites would be fatal. Disobedience of even one of these mandates would render the surrender invalid and ineffectual. .... The rule will be attracted with full force in the present case because non-verification of the surrender in the requisite manner would frustrate the purpose of this provision". In ***Deep Chand***, the Supreme Court adverted to the rule in ***Nazir Ahmad*** to hold that a statement of account which has not been recorded in strict compliance of Section 164 of Code of Criminal Procedure, 1973 would not be admissible as a confession. In *Ram Phal Kundu –vs- Kewal Sharma*, (2004) 2 SCC 759, the Court declined to look into any extrinsic evidence to inquire into the question as to who shall be deemed to have been set up as a candidate by a political party and would only look at the paragraphs delineated by the Symbols Order of Election Symbols (Reservation and Allotment) Order, 1968 which lay down the mechanism for ascertaining

when a candidate shall be deemed to be set up by a political party and the procedure for substitution of a candidate.

4. We mention these decisions since we perceive it is poignant to point out that if the statutory necessity of delivering a signed copy of the Arbitral Award is not rigorously complied with, it will, more often than not, pregnant with pernicious potentialities. This is particularly so since the A&C Act has ordained that Objections preferred after 120 days, of the delivery [under Section 31(5)] or the receipt [under Section 34(3)] of the Arbitral Award, cannot be considered by the Court. Scope to condone delay after this period has not been vested in the Court. The word 'party' has been defined in Section 2(h) of the A&C Act to mean a party to an arbitration agreement. We may, therefore, be pardoned if we repeat, reemphasize and reiterate the ***Nazir Ahmad*** dictum. If the fasciculus of Section 31 is read holistically, it will be crystal clear that all the actions postulated in that provision pertain to the powers and responsibilities of the Arbitral Tribunal. The Section does not envisage any role of the Claimant. Inasmuch as sub-section 31(5) speaks of 'each party', the delivery/receipt of the Arbitral Award has to be strictly effected on each party itself in contradistinction to its agent or officers etc. In **FAO(OS) No.578/2009** titled **Karmyogi Shelters Pvt. Ltd. –vs-**

Benarsi Krishna Committee, a Division Bench of this Court was concerned with the controversy whether the onerous obligations of the statute had been adequately met by the service of Arbitral Award on the Advocate of one of the party concerned. The Division Bench lamented that considerable judicial time had been wasted in entertaining arguments surrounding sufficiency of service simply because the statute has not been strictly complied with. It was further held that Section 2(g) of the A&C Act does not take within its sweep the service of the Arbitral Award on an agent of any of the parties to the arbitration. The Bench had also found it inappropriate to extrapolate the ratio in *Nilkantha Sidramappa Ningashetti –vs- Kashinath Somanna Ningashetti,* AIR 1962 SC 666 on the premise that whilst condonation of delay in filing the Objections under the earlier and repealed Arbitration Act, 1940 could be prayed for before the Court, this indulgence is available only for a comparatively short period of 30 days under the A&C Act. **Karmyogi** applied an earlier decision of the Division Bench in *National Projects Constructions Corporation Limited –vs- Bundela Bandhu Constructions Company,* AIR 2007 Delhi 202:139 (2007) DLT 676 which, in turn, applied, as it was bound to, the dictum in *Union of India –vs-* ***Tecco Trechy*** *Engineers & Contractors,* (2005) 4 SCC 239*.* We should immediately

differentiate the case before us from the earlier case since the delivery/receipt of the Arbitral Award by the Advocate of the Appellants has remained unsubstantiated. The factual matrix in *Reshma Construction –vs- State of Goa*, 1998(3) Bombay CR 837 : 1999(1)MhLJ 462 is strikingly similar to the case before us. An amendment in the Award had been prayed for and the Court observed that it was the duty of the Applicant to collect a corrected and signed copy of the amended Award. The Court also observed that it was the mandatory duty of the Arbitrator to issue a copy of the Award to each and every party to the proceedings. In *Kempegowda –vs- National Highway Authority of India*, 2008(2) ALR 393 Karnataka the High Court has held that Section 31(5) of the A&C Act required the Arbitrator to ensure delivery of a copy of the Award on the parties to the arbitration proceedings. The compensation in accordance with the Award dated 21.2.2003 was disbursed on 27.10.2003. Limitation, however, was held to have started to run only on 8.12.2003 when the Appellant was delivered with a copy of the Award. In *Ramesh Pratap Singh –vs- Vimala Singh*, 2004(2) ALR 147 (MP), the Jabalpur Bench of the said Hon'ble High Court found service of an unsigned/photocopy of an Award to be wholly irrelevant and held that the period of limitation should be

counted from 27.7.1998, on which date a signed copy of the Award has been furnished to the Appellant/Objector.

5. It also seems to us that it is imperative that delivery/ receipt of the Arbitral Award should be at the instance, responsibility and authority of the Arbitral Tribunal. In the case in hand, the Arbitral Award appears to have been dispatched under 'Certificate of Posting' and not recorded delivery, and that too to the Advocate of the Appellants. 'UPC' merely evidences the posting of a letter/envelope and not its service. In matters of moment, such as delivery/receipt of an Arbitral Award, the Arbitral Tribunal is duty-bound to ensure that the Award is actually delivered directly to the party concerned. It is our fervent hope that the Arbitrators and Arbitral Tribunals shall henceforward consider their judicial contract to have culminated only upon their being satisfied that each of the parties before it has actually been served with the Arbitral Award. If the recorded delivery is returned undelivered, the Arbitral Tribunal must dispatch it once again until it is served or there is sufficient reason to assume that it stands served.

6. Learned counsel for the Respondent has laid great store on the alleged service of the Arbitral Award at the instance and the initiative of the Claimant/Respondent on the Chairman/Secretary, Department of Telecommunication (DoT)

on 29.9.2000 and 4 days later on the Central Registry of the DoT. It has also been emphasized that there has been an admission with regard to these asseverations in the Petition. On a complete and not a piecemeal reading of the pleadings, this is not correct. Furthermore, reliance has been placed on remarks on the file of the Appellants. These would be relevant as evidence of actual service only if steps for service on the Appellants had been initiated in consonance with the statutory provisions, viz. by the Arbitral Tribunal itself. What had transpired in the present case, however, is that due to an error in the numbering of the matter, an amendment in the Arbitral Award was necessitated and a copy of the corrected Award is stated to have been served by the Respondent on the Appellants on 6.11.2000. The application was moved by the Respondents under Section 33 of the A&C Act and facially, therefore, the period of 90 days would have to be computed from the date on which that application was disposed of and not prior thereto. Learned counsel for the Respondent is, therefore, entirely wrong in adverting to any alleged event prior to 6.11.2000, on which date the application for correction was disposed of by the learned Arbitrator. Had the Appellants not filed the application, time for filing Objections would commence, uncontestably, from 6.11.2000. In any event, receipt of a photocopy of the Arbitral

Award prior to this date, when amendments to the Arbitral Award were carried out, would be an anachronistic error. If the arguments of the Respondent are to be accepted, then the requirement of limitation to be calculated only from the date on which a certified copy of a judicial order sought to be impugned before the Appellate Forum would become otiose. Till date, no Court has adhered to this opinion, and for good reason, since a truncated or edited copy of a decision could be supplied by an adversary and if actions taken thereon are held to be binding, alarming and dangerous repercussions may ensue.

7. Since there has been a complete infraction of the statutory provisions so far as service of the Arbitral Award on the Appellants is concerned, we hold that the period of limitation had not started to run when the Objections were filed in the various Courts by the Appellants. As a general proposition, therefore, the period of 90 days for filing Objections, as stipulated in Section 34 of the A&C Act, would have to be computed from the date on which the concerned party was served or received the singed copy of the Arbitral Award from the Arbitral Tribunal. This, however, does not entirely solve the conundrum which has arisen before us.

8. So far as FAO(OS) No.290/2010 arising out of OMP No.251/2001 is concerned, the Appellant/BSNL appears to have

filed Objections under Section 34 of the A&C Act on 12.12.2000, but in the Court of the District Judge, Ambala, Haryana, by the Haryana Circle Department of Appellant. These Objections came to be rejected on 16.5.2001 on the ground that the appointment of the Chairman having been made by the High Court of Delhi this Court alone should exercise jurisdiction in respect of any further *lis* under the A&C Act including the entertainment and decision on Objections. Certified Copy of these Orders was received by the Appellant on 22.5.2001. The learned District Judge, Ambala, *inter alia*, relied on Section 42 of the A&C Act. The Objections eventually came to be filed in this Court on 9.7.2001. The Objections, OMP No.215/2001, were accompanied by an application filed by the Appellant/BSNL seeking condonation of delay, which was supported by an affidavit dated 30.8.2001 of the Assistant General Manager, Telecom, Haryana Circle, Ambala, BSNL. The first hearing in the High Court of Delhi was held on 31.8.2001. We will have to consider whether, assuming that the time spent in the Court not possessing jurisdiction (in the Ambala Court) can be excluded while computing the period of 90/120 days, there is sufficient explanation for the subsequent period, that is, 16.5.2001 to 9.7.2001.

9. The submission of the Appellants in both the Appeals is that the delay should be condoned because the Appellants had initiated proceedings bona fide in a Court not possessing jurisdiction. We have also perused an Order of the High Court of Himachal Pradesh, Shimla passed on 16.7.2001 in terms of which the Objections filed by the Appellant before us were rejected while considering an application filed by the Respondents under Section 42 of the A&C Act read with Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC for short); later application was allowed. The wanton, ill-advice and reckless action of the BSNL in approaching Courts in Ambala, Chandigarh and the High Court of Himachal Pradesh at Shimla has completely confounded the confusion.

10. In FAO(OS) No.385/2010, arising from OMP No.17/2002 Objections under Section 34 of the A&C Act came to be filed on 30.1.2001 in the Court of the District Judge, Union Territory, Chandigarh which returned them by Orders dated 19.11.2001. Meanwhile, the Respondent/Decree Holder had initiated execution proceedings in this Court which attached the Bank Accounts of the Appellant to the extent of ₹ 1,56,52,158/-. Objections in this Court were filed on 3.1.2002.

11. We have expressed the opinion, hereinabove, that since the Arbitral Award was not delivered by the Arbitral Tribunal

[as envisaged in Section 31(5) of the A&C Act] to the party, the period for filing of Objections must be held not to have commenced. Would this view remain steadfast even in circumstances where Objections have actually been filed by the concerned party *albeit* in the wrong Court. This is the legal nodus which remains to be answered. It is axiomatic jurisprudence that there is no estoppel against the statute. In this case, however, this principle would not apply for the reason that the party concerned, upon having filed Objections, has exercised a right vested and bestowed upon it by virtue of a statute. Moreover, law unhesitatingly and unquestionably acts on admissions made by a litigating party. In this case the Appellant has itself stated that copies of the Award were received by it (from the Respondent/Decree Holder) on 6.11.2000, and thus, we find good reason to take this date as the commencement of the period of limitation. On principles analogous to Section 14 of the Limitation Act, 1963, the period expended in a Court not possessing jurisdiction would have to be excluded. Exclusion of time is an exercise totally distinct from condoning the delay in filing an action. On the rejection or return of the Plaint/Objections, the period for refiling cannot be left open-ended. High Courts have taken the position that the Court rejecting the plaint/petition is not possessed with powers

to fix a date within which the action must be filed in another Court. By the introduction of Section 10(a) in Order VII, by Act 104 of 1976, this position has been changed and the vacuum has been filled. It is now open to the Plaintiff/Petitioner to move an application in the First Court, thereby specifying the Court in which he proposes to present the plaint or refile the action after its return, and pray that the First Court may fix a date for the appearance of the parties. If the First Court passes such orders, Sub-rule(4) clarifies that in this event the transferee Court would not be required to once again issue notice to the Defendant/Respondent.

12. It is trite that the Plaintiff/Petitioner may consider it expedient or prudent to challenge the return or rejection order before the Appellate forum; or it may decide to abide and comply with the Order. In the first case, the time spent before the Appellate Court may also have to be excluded. In the latter case, the question that arises is how much time should be reasonably allowed to the Plaintiff/Petitioner to file the rejected Plaint in the Court which it considers rightly possesses territorial jurisdiction. It seems incongruent to us that if the Petitioner stands restricted to an initial period of 90+30 days, a larger period can be allowed for the purpose of such refiling. So far as this is concerned, we are in virgin legal territory as no

statutory provision appears to have been prescribed by any legislation. We would, in these circumstances, hold that the refiling must be carried out within the total span of 90 days, leaving the Court with the discretion to condone any delay restricted to a further period of 30 days provided sufficient cause has been disclosed. The date of rejection in Ambala Court was 16.5.2001; in Chandigarh on 19.11.2001 and in the High Court of Himachal Pradesh on 16.7.2001. As already noted above, the Objections were initiated in this Court in OMP No.215/2001 on 31.8.2001 and in OMP No.17/2002 on 3.1.2002 respectively.

13. Mr. Sharma, learned counsel for the Respondent/Decree Holder, has contended that since the Objections were rejected under Order VII Rule 11 of the CPC in the Ambala Court, the relief permitted by Section 14 of the Limitation Act would not be available. After the filing of the Objections in this Court, the Appellant avowedly preferred a Review before the Ambala Court praying that the Objections ought to have been returned under Order VII Rule 10 and not rejected under Order VII Rule 11 of the CPC. Where a Court arrives at a conclusion that it does not possess jurisdiction, it should not proceed further and should only pass orders which would consequentially ensue; in most cases for the rejection of the plaint/petition/Objection or with

the dismissal thereof, with liberty for filing them in a competent court in accordance with law. The Review was dismissed on the ground that it had been preferred beyond the period of limitation; secondly that the High Court of Delhi was already seized of the Objections and no prejudice was shown to have been caused. Therefore, the Review was not dismissed on merits. This being the situation, we think that there is no alternative but to treat the action of the Ambala Court as one standing and predicated on Order VII Rule 11 of the CPC, thereby rejecting the Objections and not dismissing them.

14. Learned counsel for the Appellants has submitted that the legal action taken in the High Court of Himachal Pradesh at Shimla may be discounted as totally irrelevant since it has no further bearing on the Issues that have arisen before us.

15. However negligent and ill-advised the action taken by the Appellants may be, we do not see them as not *bona fide*. Therefore, the period spent by the Appellants in the Court at Ambala and Chandigarh ought to be excluded while computing the period of limitation. As has already been disclosed above, in the case in hand, because of the admissions of the Appellants before us, the starting point of limitation is 6.11.2000. The Objections were filed in Ambala on 12.12.2000. Keeping in view the proviso to Section 14(3), remission, allowance or exclusion

is allowable to the Appellants from 12.12.2000 till the rejection of the Objections on 16.5.2001 and also from 16.5.2001 till 22.5.2001 since a Certified Copy was available only on 22.5.2001. The Objections were eventually filed on 9.7.2001, thereby exhausting 47 days. So far as Objections are concerned, a total of 82 days have been exhausted from the date of receiving Award and filing Objections in Delhi, excluding the time spent in Ambala. The Objections were, therefore, filed within 90 days prescribed under Section 34 of the A&C Act and should be entertained on merits.

16. We shall now deal with the Objections filed in Chandigarh. Since they were filed on 30.1.2001, the Appellant had exhausted 84 days commencing from 6.11.2000. The Appellant would be entitled to exclusion of the period from 30.1.2001 till 23.11.2001 when the certified copy of the Order, along with the entire file, was received by it. The Appellant had exhausted 84 days from 6.11.2000 to 31.1.2001, leaving 6 days available to it for refilling in the appropriate Court. If 30 additional days are condoned, the filing should have been carried out in this Court with 36 days from 23.11.2001. Since this period had expired when this Court was in Winter Vacation, the Appellant, if it had filed the Objections on the reopening day, would have the benefit of the entire period of Winter Vacation. The first day of

reopening was 3.1.2002, on which the Objections were actually filed in Delhi. Hence, the filing of Objections would be deemed to have been done within 120 days. Keeping the convoluted facts of the filing in the Chandigarh in view, we think it appropriate to exercise powers reserved to the Court under Section 34 of the A&C Act to condone a delay of 30 days for the period between 91st day and the 120th day which expired on the day of reopening. Since the filing occurred within this period, these Objections also would have to be heard on merits.

17. For these reasons, the Appeals are allowed but with costs of ₹ 1,00,000/-, out of which ₹ 50,000/- will be made payable to the Prime Minister's Relief Fund and the balance be paid to the Respondents. Subject to payment of costs to be paid within two weeks, both Objections are remanded to the learned Single Judge for their determination on merits.

(VIKRAMAJIT SEN)
JUDGE

(MUKTA GUPTA)
JUDGE

August 06, 2010
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