

Misc Case No- 14/2019(CC)
Misc Case No- 327/2018

Present: Sri. S.S. Bhatta
Judge, Commercial Court

13/10.12.2019

Both the Ld. Counsels appearing for the respective parties to the Misc case file hazira separately.

Today is fixed for passing order upon the application u/s.34(3) of the Arbitration & Conciliation Act, 1996 read with section 14 of the Limitation Act, 1963 filed by the petitioner on 21.12.2018.

Perused the application and the written objection thereto filed by the respondent Bharat Sanchar Nigam Limited on 14.11.2011.

Perused also the documents of the respective parties filed as per fhiristi.

Considered the submissions of the respective Ld. Counsels advanced on 08.11.2019, 14.11.2019, 19.11.2019 and 27.11.2019.

By dint of the present application the petitioner M/s.N.C. Telecom Pvt. Ltd. has contended that they have instituted the present Misc case u/s.34 of the Arbitration & Conciliation Act, 1996(hereinafter referred to as the said Act)challenging the impugned Award dated 12.02.2018 published by Hon'ble Mr. Justice Tapan Kumar Dutt, former Judge, High Court, Calcutta as sole arbitrator. It has been alleged that there are cogent and satisfactory grounds to set aside the impugned Award. It has been categorically alleged that the impugned Award is virtually non-speaking; that the sole arbitrator did not consider the claim of the petitioner and remitted the matter to the respondent authority for consideration;

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there is neither any Award nor there is any effective decision in the matter; that the Award is contrary to the Act itself and as such cannot be sustained in the eye of law. On all such grounds the petitioner has challenged the Award.

The petitioner has further contended that the application u/s.34 was initially filed before the Hon'ble High Court at Calcutta on or about 18.05.2018 being the re-opening day of the Hon'ble court. It has been stated that the petitioner could not come out from the house due to prolong illness and had to be treated initially by the local Doctor and thereafter by a senior doctor and had been in his care for quite some time. After such treatment and medication the petitioner recovered from the illness. The impugned Award dated 12.02.2018 was served upon the petitioner on that very date but the petitioner could not file proper application for setting aside the Award within the period of 3(three) months as stipulated in the statute due to health ground. Immediately after recovering from the illness the petitioner contacted the Ld. Advocate on record who opined to attend his chamber for the purpose of challenging the Award. Accordingly the petitioner came to the chamber of the Ld. Advocate on record on 04.05.2018. On perusal of the relevant documents Ld. Advocate advised the petitioner to come his residential chamber on 09.05.2018 for conference and also told that some time would be required to draft the matter. Thereafter, Ld. Advocate advised the petitioner to come to his chamber on 13.05.2018 but the petitioner fell ill and as such he met the Ld.Counsel on 14.05.2018. The draft was made ready by 15th and 16th May, 2018 and the same was engrossed on 17.05.2018 and

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filed on 18.05.2018. According to the petitioner there are delay of 4(four) days in filing the application before the Hon'ble High Court at Calcutta.

The petitioner has also contended that due to his physical illness he could not file the application within the stipulated period. The petitioner has prayed for condonation of delay of 5(five) days in filing the application.

It is the further case of the petitioner that he instituted A.P No.347/18 u/s.34 of the said Act, challenging the impugned Award before the Original Side, High Court at Calcutta with the impression that the Hon'ble Court has jurisdiction to hear and dispose of the application since the application under section 11 of the said Act was filed before the Hon'ble High Court, Calcutta.

On 17.12.2018 Hon'ble Mr. Justice Ashish Kumar Chakraborty was pleased to hold that this original side of the High Court, Calcutta has no territorial jurisdiction and as such rejected the said application. It has been categorically contended that the impugned Award was passed on 12.02.2018 and the application u/s.34 of the said Act was filed on 18.05.2018 before the Hon'ble Court and there was delay of 5(five) days in filing the application.

It has also the case of the petitioner that the matter remained pending before the Hon'ble Court from 18.05.2018 to 17.12.2018. According to the petitioner there was further loss of 2 (two) days being 18.12.2018 & 19.12.2018 as the petitioner had to wait for obtaining the copy of the order of the Hon'ble court. Subsequently, the petitioner instituted the present Misc Case u/s.34 of the said Act on 21.12.2018 before the court of Ld.District Judge at Barasat, North 24 Parganas assailing the impugned Award. The petitioner has prayed for condonation of delay $(5+2)=7$ days in filing the present Misc Case.

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Respondent B.S.N.L has contested the present application by filing affidavit in opposition wherein they have candidly denied the averments made in paragraph nos.1 to 15 of the application. It has been specifically stated that the petitioner has no cause of action to bring the present application, that the present application of the petitioner is not maintainable in the eye of law; that the application is barred by the principles of estoppel, waiver and acquiescence; that the said application is malafide and has no legs to stand upon.

It has been specifically contended that the petitioner filed A.P No.527/2016 before the Hon'ble High Court at Calcutta u/s.11 of the Arbitration & Conciliation Act against respondent BSNL for appointment of an arbitrator for the alleged dispute arising out of contract. Hon'ble Mr. Justice Soumen Sen was pleased to allow the said application on 02.08.2016 and sent matter to the Arbitrator. In the said application address of the respondent B.S.N.L was shown as " Bharat Sanchar Limited, a Government of India Enterprises, Office of the Divisional Engineer, Telecom Sattellite Communication Project, 1st floor, DLC Exchange Building, Buniyadabad, Haddo, Port Blaire-744102 with the claim of Rs.37,95,733/-. Pursuant to the order of the Hon'ble High Court, Calcutta the matter in dispute was referred to the Hon'ble Justice Tapan Kumar Dutt, sole arbitrator for arbitration and the Hon'ble Arbitrator passed an award on 12.02.2018. Challenging the said Award the petitioner filed the application u/s.34 of the said Act before the Hon'ble High Court at Calcutta being A.P No.347/2018 and the said case was ultimately dismissed with the observation

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“ Accordingly, the application, AP No.347/2018 stands rejected on the ground of lack of territorial jurisdiction of this court”. It has been also stated that the respondent’s address (BSNL) in A.P No.527/2016 (u/s.11 of the said Act.), Award dated 12.02.2018 and AP No.347/2018 (petition u/s.34 of the said Act.) is same i.e “ Bharat Sanchar Limited, a Government of India Enterprises, Office of the Divisional Engineer Telecom, Sattellite Communication Project, 1st floor, DLC Exchange Building, Buniyadabad, Haddo, Port Blaire-744102 and the said address of B.S.N.L is outside the jurisdiction of this Ld. Court. It has been alleged that the petitioner has intentionally changed the address of the respondent BSNL at his sweet will for creating a new jurisdiction. It has been stated that the claimant petitioner is a Company having a separate identity and as such any authorised person of the company can file the said litigation on behalf of the company. The grounds taken by the petitioner in the petition for condonation of delay are concocted and baseless.

Respondent B.S.N.L has also contended that they could not file proper application on the ground of maintainability and lack of jurisdiction before the Ld. District Judge, Barasat, North 24 Parganas as they did not receive the copy of the application u/s.34 from the Court of Ld.District Judge. The answering respondent (B.S.N.L) came to learn about the application for the first time from the Ld. Commercial Court. According to the respondent Ld. Court of Andaman & Nicobar Island has the jurisdiction to entertain the subject in dispute. On all such grounds the respondent has prayed for outright rejection of the application for condonation of delay with costs.

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During the course of hearing Ld. Counsel appearing for the petitioner has drawn my attention to section 34(3) of the Arbitration & Conciliation Act, 1996 along with section 14 of the limitation Act and vehemently argued that there was delay of only $(5+2)=7$ days in presenting the application u/s.34 of the said Act and there was no laches or negligence on the part of the petitioner. Drawing my attention to the xerox copy of prescription dated 10.08.2018 Ld.Counsel has submitted that due to prolong illness the petitioner could not file the application within the stipulated period. In support of his contention Ld. Counsel has cited the following decisions cited in;

1) M/s. Consolidated Engg. Enterprises – Appellant.

-Vs-

Principal Secretary, Irrigation Department & Ors – Respondent.

Civil Appeal No.2461/2008(Arising out of SLP (c) No.10311/2005.

2) Civil Appeal No.1457/2004 State of Goa – Appellant.

-Vs-

M/s. Western Builder – Respondent.

3) Civil Appeal No.4516/2006 Union of India – Petitioner

-Vs-

M/s.Shring Construction Company Pvt. Ltd. - Respondent.

4) Civil Appeal No.3870/2006 United India Insurance Company Ltd. – Appellant.

-Vs-

JA Infrastructure Pvt. Ltd. - Respondent.

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On the contrary Ld. Counsel appearing for the respondent (B.S.N.L) has drawn my attention to section 9 and 15 of the Civil Procedure Code and vehemently argued that this Commercial Court has no jurisdiction to hear the application for condonation of delay. Ld. Counsel has also drawn my attention to the cause title of the application and advanced a marathan argument on the point of jurisdiction of the court. It has been argued that the address of the respondent (B.S.N.L) in AP No.527/16, AP No.347/18 and Award dated 12.02.2018 is same and identical i.e “ Bharat Sanchar Limited, a Government of India Enterprises, Office of the Divisional Engineer Telecom, Sattellite Communication Project, 1st floor, DLC Exchange Building, Buniyadabad, Haddo, Port Blaire-744102 which is totally outside the jurisdiction of this Commercial Court. According to the Ld. Counsel the present petitioner willfully and intentionally changed the address of the respondent (B.S.N.L) at his sweet will in the Cause Title of the application u/s.34 of the said Act for the purpose of inclusion of jurisdiction of this court. He has also argued that the petitioner is a Company having a separate identity and as such any authorised person of the company can file the litigation on behalf of the Company. The grounds taken by the petitioner in the application for condonation of delay are concocted and baseless. He has prayed for outright dismissal of the application with exemplary costs.

In support of the above contention Ld. Counsel appearing for respondent (BSNL) has cited the decision reported in LAWS (SC)2009 page 32 Commissioner of Customs and Central Excises -Vs- HONGO INDIA P LTD.

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Here in the present case the following facts are admitted by both the parties :-

(1) That the present applicant/petitioner M/s.N.C.Telecom Private Limited filed an application under section 11 of the Arbitration and Conciliation Act, 1996 against the respondent Bharat Sanchar Nigam Limited being A.P.No. 527 of 2016 before the Hon'ble High Court at Calcutta having ordinary original civil jurisdiction and prayed for appointment of Ld. Arbitrator and for further order/orders as the Hon'ble Court may deem fit and proper.

(2) That Hon'ble Mr. Justice Soumen Sen was pleased to allow the said application under section 11 of the said Act on 02.08.2016 and appointed Hon'ble Justice (Retd.) Tapan Dutt as Arbitrator for arbitration of the matter.

(3) That the Ld. Arbitrator published the Award in the said arbitration proceeding on 12.02.2018.

(4) That the applicant claimant filed an application assailing the said Award of the Ld. Arbitrator before the Hon'ble High Court under section 34 of the said Act being A.P. No. 347 of 2018. On 17.12.2018 Hon'ble Mr. Justice Asis Kumar Chakraborty was pleased to hold that the original side, High Court, Calcutta has no territorial jurisdiction and as such rejected the said application of the claimant petitioner.

It is the case of the petitioner claimant that the Award was published on 12.02.2018 and the application assailing the said Award was filed on 18.05.2018 under section 34 of the said Act and as such there was a delay of 5 (five) days in filling the application before the Hon'ble Court. Further case of the petitioner is that the matter remained pending before the Hon'ble High Court, Calcutta from 18.05.2018 to 17.12.2018 and the petitioner had to wait for obtaining the copy of order of the Hon'ble Court and as such there

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was further loss of 2 (two) days. The petitioner claimant has prayed for condonation of delay for those 5+2 =7 days in filing the application. In support of the contention the petitioner has filed xerox copy of doctor's prescription and the order of the Hon'ble Court passed on 17th December, 2018 in A.P. No. 347 of 2018.

On the other hand the respondent BSNL has contested the application and categorically stated that this Commercial Court has got no jurisdiction to consider the present application towards condonation of delay. The main contention is that the address of the respondent (BSNL) in A.P. No. 527 of 2016, A.P. No. 347 of 2018 and the award dated 12.02.2018 is same and identical i.e Bharat Sanchar Nigam Limited, A Govt. of India Enterprise, Office of the Divisional Engineer Telecom, Satellite Communication Project, Ist Floor, DLC Exchange Building, Buniadabad, Haddo, Port Blair – 744102 which is outside the jurisdiction of this Ld. Court. It has been alleged that the petitioner has intentionally and willfully impleaded the respondent BSNL with a changed address in order to include the jurisdiction of this court. It has also been alleged that the petitioner is a company having separate identity and as such any authorized person of the company can file the litigation on behalf of the company.

Section 34 (3) of the Arbitration and Conciliation Act, 1996 provides as follows :-

“ An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the Arbitral Award or, if a request has been made under section 33, from the date on which that request had been disposed of by the arbitral Tribunal :

PROVIDED that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter”.

Sub-section(3) uses the word “**three months**” while prescribing the period of limitation and the proviso uses the word “**thirty days**” while referring to the outside limit of condonable delay. Neither section 34 (3) nor

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any other provision of the Act excludes the application of section 14 of Limitation Act, 1963 and the provisions of section 14 of Limitation Act would apply too applications under section 34 of the Act. A bare reading of sub section (3) of section 34 read with the proviso makes it abundantly clear that the application for setting aside the Award on the ground 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. Thus being the position it can be safely concluded that the application for setting aside the Award is concerned, the period of limitation prescribed in the Act is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court.

Section 14 of the Limitation Act deals with the exclusion of time of proceeding bona fide in a Court without jurisdiction. In order to press into service of section 14 certain conditions as detailed in the section must be satisfied.

I have meticulously gone through the judgments of the Hon'ble Apex Court passed in Civil Appeal No. 2461 of 2008 M/s. Consolidated Engineering Enterprises- appellant vs. Principal Secretary, Irrigation Department and others- respondents, Civil Appeal No. 1457 of 2014, State of Goa – Appellant vs. M/s. Western Builders- Respondent, Civil Appeal No. 4516 of 2006, Union of India – petitioner vs. M/s Shring Construction Company Private Limited- Respondent and Civil Appeal No. 3870 of 2006, United India Insurance Company Limited- appellant vs. J.A. Infrastructure Private Limited – respondent.

The petitioner has prayed for condonation of delay for $5 + 2 = 7$ days in filing the application under section 34 of Arbitration and conciliation Act, 1996. It is apparent from the contention of the parties that in the first phase the petitioner filed the application challenging the Award on 18.05.2018. There was a delay of 5(five) days in filing the application. In the 2nd phase the petitioner filed the present Misc. Case before the Court of Ld. District Judge, Barasat on 21.12.2018 assailing the impugned Award.

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Admittedly, the matter remained pending before the Hon'ble Court from 18.05.2018 to 17.12.2018. There was further loss of 2(two) days. The petitioner has prayed for condonation of delay of $5 + 2 = 7$ days. On this score proviso of section 34(3) is very much explicit and exhaustive. The period can further be extended on sufficient cause being shown by another period of 30 days but not thereafter. Thus, it can be safely said that the 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.

Considering the facts, circumstances and documents on record and having considered the submissions of the respective Ld. Counsels I hold and firmly hold that the cause shown by the petitioner in filing the application under section 34 of the said Act is sufficient and the contention of the petitioner has merit and should be allowed to meet the justice. With my utmost respect to the decisions of Hon'ble Apex Court I am constrained to hold that section 14(2) of the Limitation Act, 1963 is certainly applicable to a proceeding in a Court under the Arbitration and Conciliation Act and time taken diligently pursuing the remedy in the wrong forum will be excluded. Practically, I do not find much substances in the argument advanced by the Ld. Counsel for the respondent (BSNL). In my considered view the argument on the point of maintainability of the application under section 34 of the said Act and the point on the ground of lack of jurisdiction cannot be and should not be considered at this juncture. The respondent BSNL has filed the application on the point of maintainability of the proceeding on 07.11.2019 and the same pending for decision.

Considering all aspects from all angles and keeping in mind the position of law and my utmost respect to the above decisions of the Hon'ble Apex Court I hold and firmly hold that the application dated 21.12.2018 under section 34 (3) of the said Act read with section 14 of the Limitation Act filed by the petitioner should allowed to meet the justice.

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Hence, it is,

ORDERED

that the application dated 21.12.2018 filed by the petitioner under section 34(3) of the Arbitration and Conciliation Act, 1996 read with section 14 of the Limitation Act, 1963 is allowed on contest without any order as to costs. Consequently, the delay in filing the application under section 34 of the said Act is condoned.

Fixed **06.01.2020** for hearing the application dated 07.11.2019 filed by the respondent BSNL on the ground of maintainability.

Judge
Commercial Court
North 24 Parganas
Rajarhat.