

(2008) 04 DEL CK 0178

Delhi High Court

Case No: O.M.P. 185 of 2002

Sasken Communications Tech.
Ltd.

APPELLANT

Vs

Prime Telesystems

RESPONDENT

Date of Decision: April 23, 2008

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 36, 9
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 2A

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: Neeraj Sharma, for the Appellant; Pradeep Bakshi, for the Respondent

Final Decision: Dismissed

Judgement

S. Ravindra Bhat, J.

The petitioner had sought for reliefs u/s 9 of the Arbitration and Conciliation Act, 1996 by the present proceedings. The following reliefs were claimed:

(a) pass ex-parte ad interim order injuncting the respondent Nos. 1, 2, 3 from operating, conducting and withdrawing any amounts from all the bank accounts standing in the name of the Respondent No. 1;

(b) pass ex-parte ad interim order injuncting the Respondent Nos. 1, 2, 3 from transferring, disposing or creating any encumbrances, liens, charges, third party interest or otherwise dealing with its moveable, Immovable and intellectual properties and assets of the Respondent No. 1 in their possession or control,

(c) pass an ex-parte ad interim order injuncting Respondent Nos. 2, 3 and 6 from parting with, dealing with, disposing off, transferring, encumbering or otherwise alienating any of the funds received/transferred to them from Respondent No. 1 Company and/or from any moveable or immovable assets acquired by the

Respondent Nos. 2, 3 and 6 with these funds;

(d) pass an ex-parte ad interim order directing Respondent Nos. 2, 3 and 6 to take all such steps as are necessary to forthwith recall and/or replenish all such funds/assets and properties of Respondent No. 1 as may have been transferred from the Respondent No. 1 either to Respondent No. 6 or to any other Associate Company or to any of them individually through the medium of such Associate Companies or Affiliates;

(e) pass an ex-parte ad interim order restraining Respondent Nos. 1, 2 and 3 from selling, licensing, alienating, parting or otherwise dealing with any intellectual property or technology relating to internet access and convergence communications developed by or belonging to or claimed to be held by the Respondent No. 1 Company or in the control of Respondent Nos. 2 and 3;

(f) pass an ex-parte ad interim order to freeze all bank accounts of Respondent Nos. 2, 3 and 6, their affiliates, persons connected to them, their agents etc. to which monies from Respondent No. 1's accounts have been transferred in violation of the Agreement and Articles of Association of Respondent No. 1 and further injunct all such persons from dealing with any moveable or immovable assets acquired by them from such monies of the Respondent No. 1 in their possession and control; and

(g) pass such other or further orders as may appear to the Hon"ble Court to be just and convenient in the facts and circumstances of the case to restore the Respondent No. 1's monies and assets that have or may in the interim be siphoned out of the Respondent No. 1.

2. This Court had, by its order dated 31.5.2002, restrained the respondents through injunction in terms of prayers (a), (b) and (c). After the above date, the proceedings continued to remain pending on 3.7.2002, since a submission was made on behalf of the respondent No. 6 that it was not a party to the arbitration agreement or proceedings, and no orders could be made, the petitioner did not press for continuation of the previous order dated 31.5.2002. Subject to that, the interim order made on 31.5.2002 has subsisted.

3. In the meanwhile, the parties went into arbitration, in respect of the disputes raised. By the award dated 3.9.2007, the arbitral tribunal rendered findings in favour of the present petitioner. The operative portion of the award reads as follows:

51. Operative Part of the Award:

In view of the above, the Arbitral Tribunal makes the following Award":

(a) The Respondent Nos. 1, 2 and 3 do pay jointly and severally to the Claimant a sum of Rs. 46,000,018.40 (Rupees Forty Six Millions and Eighteen and Paise Forty only) i.e. Intel Capital Corporation along with interest at the rate of 18% per annum

from 23rd March 2001 onwards, interest on principal sum, pendente lite, as well as further interest on above-referred principal sum from the date of the Award at the same rate till payment" plus Rs. 25,00,000/- (Rupees Twenty Five Lac) towards "costs awarded" to the Claimants;

(b) That in view of the Award for restitution of status quo ante i.e. the award for return of amounts with interest and costs in terms of Clause (a) hereof, Intel Capital Corporation shall return 751880 equity shares of Respondent No. 1 held by it bearing Distinctive Nos. 2344571 to 3096450 vide Share Certificate No. 68 dated 28th March 2001 to Respondent No. 1 within two weeks after receipt of the above-referred amounts as directed in clause(a) hereof;

(c) Intel Capital Corporation shall deposit the Share Certificates in respect of the said shares in the Hon"ble Court if so directed;

(d) The Claimants shall retain the said Share Certificates as and by way of security till the Award is satisfied as directed;

(e) The Respondents Nos. 1, 2 and 3 are hereby restrained from alienating, encumbering or otherwise dealing with or creating any third party rights in respect of the shares referred to in Clause 2 of the Award until the amounts awarded are first paid by Respondents Nos. 1, 2 and 3 to the Claimants as condition precedent. The Arbitral Tribunal hereby clarifies that this provision is made in the Award so as to secure the monetary claim of the Claimants as awarded;

(f) The Respondents Nos. 1, 2 and 3 shall not dispose of or encumber or otherwise deal with any of its assets or create third party rights therein until the awarded amount is first paid to the Claimants herein;

(g) Messrs. Dua Associates shall be at liberty to forward copy of this Award to the Registrar of Companies having jurisdiction over the Respondent No. 1 and shall furnish necessary information to all the statutory authorities in respect of the Award made by the Arbitral Tribunal herein. We authorize M/s. Dua Associates, Advocates for the Investors to forward copy of this Award to the authorities concerned;

(h) The Arbitral Tribunal is not issuing any direction to Respondent No. 1 and/or Respondent No. 2 to purchase the shares of Respondent No. 1 held by the Claimants, that is, Intel Capital Corporation, in terms of the put option exercised by the Claimants under Clause 32.2 of the Agreement by its purchase notice on payment of Rs. 59,992,505.20 (Rupees Fifty Nine Million Nine Hundred Ninety Two Thousand Five Hundred and Five Paise Twenty) or otherwise. The Arbitral Tribunal is of the view that an award directing payment of the amounts mentioned in the earlier clauses is adequate and sufficient for rendering substantial justice and it is not necessary for the Arbitral Tribunal to consider claim of the Claimants for buy back of the shares or for direction to Respondent No. 1 and/or Respondent No. 2 to repurchase the said shares. Since the Claimants are seeking restitution of amounts

already paid to Respondent No. 1 with interest and costs and also as compensation for breach of warranty and we have accepted the said claims, we do not consider it appropriate to award any claim under this head although the breaches of obligations set out in the Statement of Claim are duly proved.

4. Learned Counsel for the petitioner contended that the respondent has challenged the award u/s 34 of the Act by filing OMP No. 35/2008, which is pending consideration on the file of this Court. He submitted that in view of the clear and categorical findings in favour of the petitioner, it would be in the interest of justice that the interim order made on 31.5.2002 is continued and directed to bind the parties till the disposal of the said proceedings u/s 34 of the Act.

5. Learned Counsel for the respondent, on the other hand, submitted that the interim order is wider than the actual award. He placed reliance on paragraphs 51(e) and 51(f) of the award to contend that the respondents have been directed not to dispose of, nor to encumber, or otherwise deal with any of its assets or create third party rights until the awarded amount is first paid to the Claimants, i.e. the present petitioners. In the circumstances, the other reliefs such as the ones described in Clause 9 of the relief clause in the petition, enjoining the respondents from withdrawing amounts from the Bank Accounts, should not be granted.

6. This Court has considered the submissions. The Court was, in the very first instance, persuaded from the materials on record to grant an ex-parte ad-interim relief in terms of Clause (a), (b) and (c) of the petition. That interim order has continued and subsisted for almost six years. The Arbitrators, after considering the materials on record, rendered elaborate findings in a detailed award and found all the issues in favour of the petitioner. It also appears from the award that the respondents did not contest the proceedings by filing any substantive pleadings.

7. Section 9 of the Arbitration Act is cast in its wide terms. It enables the party before or during arbitral proceedings or at any time after the making of the arbitral award (but before it is enforced in accordance with Section 36 of the Act) to approach the Court for interim measures. In this case, undeniably the interim order has subsisted and continues to bind the parties even after the adjudication on the merits took place. The award has rendered findings in favour of the petitioner and against the defendant. Parliament has enabled post-award interim measures (before enforceability of such awards) to cater to contingencies where the decisions of arbitrators are not rendered meaningless, by arming Courts with power u/s 9 ([Bhatia International Vs. Bulk Trading S.A. and Another](#), No doubt, exercise of such power should be based on application of sound principles. In the circumstances of this case, interests of justice clearly lie in continuing the said interim order.

8. Accordingly, the order dated 31.5.2002, as amended, is confirmed and shall bind the parties till the disposal of the proceedings challenging the award u/s 34 of the Act.

O.M.P. 185/2002 and all pending applications, i.e. IAs 5679/2002, 5894/2002, 7991/2002, 9183/2002, 10391/2002, 3014/2003, 5507/2003, 7164/2003, 7261/2003, 8236/2003, 9758/2003, 11407/2003, 2184/2004, 2185/2004, 5698/2005, 11044/2006 and 1957/2008 are disposed of in the above terms.

I.A. 11151/2002 (under Section 9 of Arb.Act and Order 39 Rule 2A CPC)

Heard learned Counsel for the parties.

I.A. 11151/2002 is an application under Order 39 Rule 2A CPC seeking initiation of contempt proceedings against respondent No. 2 for violation of Court's order dated 31.5.2002. By the said order, the Court had enjoined the respondents from inter alia, disposing of the assets of the first respondent - Company or, in any manner, operating the account of the said defendant No. 1.

The averments in this application disclose that withdrawals were made from Saving Bank Accounts No. 8110 and 8112, opened by respondent No. 2. It was urged by the learned Counsel for the petitioner that having regard to the terms of the order dated 31.5.2002, the respondents, who were duly served on 6.6.2002, were bound to honour it and not withdraw amounts lying in their accounts but belonging to their Company. It was also contended that the findings of the arbitral tribunal in this regard have been in favour of the petitioner as the amounts, said to have been misappropriated or siphoned by respondents Nos. 2 and 3 from respondent No. 1 were traced and these included such amounts. The order dated 31.5.2002 had restrained the respondents in terms of prayers made in the petition. The same reads as follows:

(a) pass ex-parte ad interim order injunctioning the respondent Nos. 1, 2, 3 from operating, conducting and withdrawing any amounts from all the bank accounts standing in the name of the Respondent No. 1;

(b) pass ex-parte ad interim order injunctioning the Respondent Nos. 1, 2, 3 from transferring, disposing or creating any encumbrances, liens, charges, third party interest or otherwise dealing with its moveable, Immovable and intellectual properties and assets of the Respondent No. 1 in their possession or control,

(c) pass an ex-parte ad interim order injunctioning Respondent Nos. 2, 3 and 6 from parting with, dealing with, disposing off, transferring, encumbering or otherwise alienating any of the funds received/transferred to them from Respondent No. 1 Company and/or from any moveable or immovable assets acquired by the Respondent Nos. 2, 3 and 6 with these funds;

(d) pass an ex-parte ad interim order directing Respondent Nos. 2, 3 and 6 to take all such steps as are necessary to forthwith recall and/or replenish all such funds/assets and properties of Respondent No. 1 as may have been transferred from the Respondent No. 1 either to Respondent No. 6 or to any other Associate Company or to any of them individually through the medium of such Associate

Companies or Affiliates;

(e) pass an ex-parte ad interim order restraining Respondent Nos. 1, 2 and 3 from selling, licensing, alienating, parting or otherwise dealing with any intellectual property or technology relating to internet access and convergence communications developed by or belonging to or claimed to be held by the Respondent No. 1 Company or in the control of Respondent Nos. 2 and 3;

(f) pass an ex-parte ad interim order to freeze all bank accounts of Respondent Nos. 2, 3 and 6, their affiliates, persons connected to them, their agents etc. to which monies from Respondent No. 1's accounts have been transferred in violation of the Agreement and Articles of Association of Respondent No. 1 and further injunct all such persons from dealing with any moveable or immovable assets acquired by them from such monies of the Respondent No. 1 in their possession and control; and

(g) pass such other or further orders as may appear to the Hon'ble Court to be just and convenient in the facts and circumstances of the case to restore the Respondent No. 1's monies and assets that have or may in the interim be siphoned out of the Respondent No. 1.

It is clear from the above that the respondents Nos. 1, 2 and 3 were restrained from operating, conducting and withdrawing amounts from any Bank account standing in the name of the respondent No. 1. However, in this case, the amounts were withdrawn, from the Saving Bank Accounts of respondent No. 2. The reliance placed by counsel for respondents, on the order of Court dated 21.5.2003 is of no avail. The Court had directed evidence to be led; however, the essential fact about withdrawal of sums of money from the personal savings account of the respondent went unnoticed. In the circumstances, this Court is of the view that no grounds to proceed under Order 39 Rule 2A CPC has been made out. Notice discharged.

I.A. 11151/2002 is accordingly dismissed.