(2008) 09 DEL CK 0232

Delhi High Court

Case No: O.M.P. No. 351 of 2003

Nalini Singh Associates		APPELLANT
	Vs	
Prime Time - IP Media Services Ltd.		RESPONDENT

Date of Decision: Sept. 10, 2008

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34
- Contract Act, 1872 - Section 41, 43, 62, 63

Citation: (2008) 4 ARBLR 29 : (2008) 153 DLT 174 : (2008) 106 DRJ 734

Hon'ble Judges: Sanjiv Khanna, J

Bench: Single Bench

Advocate: A.J. Bhambani, Ranjita and Lakshita, for the Appellant; Shridhar Y. Chitale and Shankar N., for the Respondent

Final Decision: Dismissed

Judgement

Sanjiv Khanna, J.
The present Petition u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act, for short) is filed by M/s. Nalini Singh Associates (hereinafter referred to as the Objector, for short) challenging the interim Award dated 31st May, 2003.

2. The Objector is engaged in production of news and current affairs related television programmes and had entered into a business relationship with M/s. Prime Time-IP Media Services Limited (hereinafter referred to as the respondent, for short). By Memorandum of Understanding dated 1st November, 1996, the respondent was appointed as an exclusive agent for sale of advertisement time also known as "free commercial time" for news based programme titled Aankhon Dekhi on Doordarshan channel. Subsequently, the respondent was also appointed as an exclusive agent for selling advertisements or free commercial time for the news programme called Dopahar Aankhon Dekhi.

3. The Memorandum of Understanding dated 1st November, 1996 contained an arbitration clause. The Objector invoked the said arbitration clause and in consequence thereof, Mr. Justice Avadh Behari Rohtagi (retd), former Judge of this Court was appointed as the sole Arbitrator.

4. The Objector had made a claim of Rs. 1,96,47,954/- against the respondent on account of minimum guarantee charges for the period between 2000 and 30th April, 2001.

5. The respondent, on the other hand, had submitted that w.e.f. 2000 they found it difficult to sell air time on the two programmes and payment of minimum guarantee amount became commercially unviable. It was stated that the respondent was suffering loss of Rs. 16 lakhs per month and the commercial prospects of the programmes were bleak. There was settlement in terms of the letters dated 15th March 2001, 16th March 2001 and 9th May 2001 and Rs. 26.81 lacs was payable towards minimum guarantee charges. The Memorandum of Understanding had a termination clause and by notice dated 24th April, 2001, the respondent gave two weeks time to terminate the agreement for marketing of the two programmes.

6. It is an admitted case that letter dated 15th March, 2001 was written by the respondent to the Objector and states that there was a protracted correspondence of commercial viability of the two programmes. It also records that there was a meeting and mutual agreement was arrived at on 14th March, 2001. The letter thereafter purports to record, the mutual agreement. As per the said letter, the respondent was to pay Rs. 50 lakhs to the Objector in case the programmes were given PSB status by Doordarshan w.e.f. 4th September, 2000 and in case PSB status was not granted, the respondent would be liable to pay Rs. 26.81 lakhs to the Objector.

7. Letter dated 16th March, 2001 is addressed by the Chartered Accountant of the Objector to the respondent. It records that the sum offered was a small portion of Rs. 105 lakhs that was due. It was stated that the Objector expects that the amount would be revised to a reasonable figure keeping in view totality of the situation. It was further stated that in view of continued business relationship and spirit of discussion and coordination, the Objector expects the respondent to offer a more reasonable amount and better terms and conditions. It was also pointed out that the Objector was under grave financial burden which was causing mental pressure and agony to the proprietor.

8. After exchange of these two letters dated 15th March, 2001 and 16th March, 2001, for about two months the matter continued to fester though there was exchange of correspondence between the parties. On 24th April, 2001 the respondent wrote a letter stating, inter alia, that in spite of their best efforts and due to prevalent Doordarshan policies and market conditions, they were not in a position to continue with marketing of the two television programmes. Accordingly, the respondent gave two weeks notice to terminate the agreement for marketing of the two programmes. The letter further states

that the respondent would like to discuss payment flow schedule keeping in view the letter dated 16th March, 2001 written by the respondent. This letter was acknowledged by the Objector in their letter dated 8th May, 2001. In this letter the Objector recalled the efforts put in by them in increasing production capacity specially in view of the new election related programmes which were shot in West Bengal and other States. In this letter it is also mentioned by the Objector as under:

In the mean time we are available to settle all matters concerning the total amount/compensation payable by you towards the period relating to the payment/terms and date of payment for the same.

9. In response the respondent wrote a letter dated 8th May, 2001 in which it was stated as under:

Dear Nalini,

This is in response to your letter dated today, asking us to extend the notice period by another 3 days.

The matters concerning the total amount/compensation payable to you was confirmed vide our letter dated 15th March'' 01 and your confirmation vide letter dated 16th March'' 01. This reflects the amount payable as per our mutual discussions and agreement.

Please acknowledge and accept this letter and we will as per your request extend the notice period by 3 days.

10. Thereafter on 9th May, 2001, the Objector wrote a letter to the respondent which is reproduced below:

Dear Mr. Rai,

Thank you for providing a fax copy of your letter dated 15.3.2001 which arrived in my office 5-minutes ago. Despite our best efforts to convince you of our inability to bear such heavy losses, you have kindly decided to stand by your terms contained in your letter of 15.3.01 (and our letter dated 16.3.01). I accept the terms stated in your letter dated 15.3.01 and our letter dated 16.3.01, and request you to continue with the programme. Kindly schedule a meeting to discuss the cash flow to our organization which has been rendered bankrupt due to starvation of funds. We cannot survive another day without funds owed to us for the period 27th July 2000 onward.

11. Learned arbitrator after examining the correspondence in form of the three letters came to the conclusion that the letter dated 9th May, 2001 records a binding settlement between the parties and as per the said settlement, the Objector is entitled to Rs. 26.81 lakhs from the respondent and nothing more. The said finding is purely factual. Learned Arbitrator has examined the question of intention of the parties and on consideration

thereof has decided the said aspects in favour of the respondent.

12. The findings given by the learned Arbitrator are as under:

1) The third letter dated 9th May, 2001 addressed by the Objector to the respondent constitutes an Agreement between the parties and settles their claim and disputes in respect of minimum guarantee charges upto the period 1st March, 2001. He has observed and held that the intention of the parties was to square up and settle their claims by the said correspondence i.e. letters dated 15th March, 2001, 16th March, 2001 and 9th May, 2001.

2) The petitioner cannot rely upon the original memorandum of understanding and base her claim upon the said memorandum in view of the binding settlement in letters dated 15th March, 2001, 16th March, 2001 and 9th May, 2001.

3) The binding settlement in terms of the three letters did not have a penal clause so as to make the respondent liable to pay any penal sum other than the amounts specified in the letters dated 15th March, 2001, 16th March, 2001 and 9th May, 2001. There is no penalty clause in the binding settlement. The settlement was final and binding and the petitioner cannot rely upon and base her claim upon the original memorandum of settlement.

4) The Objector has accepted part performance of the mutual settlement by encashing the two cheques dated 11th May, 2001 and 28th May, 2001 both for Rs. 6,71,250/- on 30th July, 2001 after month of June had expired. The said cheques were paid pursuant to the settlement and the two cheques and settlement were inseparable. The Objector having accepted part payment cannot wriggle out and claim that there was no settlement.

5) It was further observed that time of payment in terms of the three letters was not essence of contract. Even if third and fourth installments were paid belatedly, the settlement did not fall through, so as to resurrect and permit the Objector to raise original claim on the basis of the Memorandum of Understanding. Further the respondent was ready and willing to pay the third and the fourth installments though belatedly. The Objector, however, was trying to ignore the said settlement and wriggle out of the same. The Objector can be compensated by way of interest on the delay in payment and payment of interest @ 18% p.a. of Rs. 13,38,250/- between the period July 2001 and 31st March, 2003 of Rs. 3,81,401/- plus cost of Rs. 2 lakhs would be just and adequate.

6) Depending upon programmes" commercial viability, the minimum guarantee was increased from Rs. 35,000/- per episode in 1996 first to Rs. 42,000/- 48,000/- in 1997 and then to Rs. 52,000/- on 30th March, 1998 but was reduced to Rs. 35,000/- w.e.f. 8th September, 1998. The commercial viability of the programmes had come down subsequently. Ultimately the agreement between the parties was terminated.

13. Learned Counsel for the Objector has impugned the said Award on the following grounds:

(i) Learned Arbitrator has misinterpreted the letters dated 15th March, 2001, 16th March, 2001 and 9th May, 2001 and there was no concluded contract.

(ii) The respondent had failed to abide by the terms and conditions mentioned in the three letters dated 15th March, 2001, 16th March, 2001 and 9th May, 2001 as payments of third and fourth installments (total Rs. 13,42,250/-) were not made in the month of June 2001 and therefore the Objector is entitled to the original minimum guarantee amount specified under the Memorandum of Understanding.

(iii) The alleged contract of one time settlement of Rs. 26.81 lakhs is vitiated on the ground of force and coercion as it is inconceivable that a party who had a claim of Rs. 1.96 crore founded on a written contract would agree to a full and final settlement of her claims on payment of Rs. 26.81 lakhs only.

(iv) Principle of accord and satisfaction is not applicable as the so called settlement was without consideration in form of additional benefit or possibility of additional benefit. Reliance in this regard was placed in the case of D & C. Builders Ltd v. Rees reported in 1965 (3) All. ER 837 and decision of the Calcutta High Court in New Standard Bank Ltd., by B.K. Dutta, Managing Director Vs. Probodh Chandra Chakravarty, . Reference was also made to paragraphs 7 and 9 of the judgment of the Supreme Court in United Bank of India Vs. Ramdas Mahadeo Prashad and Others,

14. Scope of review u/s 34 of the Act is limited and not as wide as that of an Appellate Court. This Court cannot reappraise and re-examine finding of facts laid and found by the learned Arbitrator. Learned Arbitrator in paras 23 and 25 of the impugned Award has referred to and quoted the three letters dated 15th March, 2001, 16th March, 2001 and 9th May, 2001. It is trite law that a the scope of judicial intervention in an award is limited. (Refer Associated Construction v. Pawanhans Helicopters Pvt. Ltd. reported in AIR (2008) SCW 4893). The arbitrator in the instant case has made findings of fact, to the effect that the letters dated 15th March, 2001, 16th March, 2001 and 9th May, 2001 resulted in novation of the earlier contract, the learned arbitrator has also noted that there was no clause in the said new contract that would result in the revival of the earlier contract. His decision is based on facts, intention and conduct of the parties. The Court cannot go into the merits and demerits of the factual findings by the arbitrator, unless the findings are perverse. Even in case of interpretation of contractual clauses, there is limited scope and ground to interfere. In the case of McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, the Supreme dealt with issue of the arbitartor''s power of interpreting the terms of the contract, the Court referred to the decision in the earlier cases of Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission, and D.D. Sharma Vs. Union of India (UOI), and it was held that that the interpretation of a contract is a matter for the arbitrator to determine even if the said act gives rise to the determination of a question of law. The Court held as under:

112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC and D.D. Sharma v. Union of India.)

15. Faced with this factual and legal position the learned Counsel for the Objector drew my attention to para 75 of the decision of the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., and submitted that the Award in question suffers from patent illegality. In this regard, reference was also made to paragraphs 14 and 31 of the said judgment and it was submitted that illegality which goes to the root of the matter would vitiate and make an Award contrary to public policy. It was further stated that when reference is made to an arbitrator and the arbitrator on the face of it misconstrues and erroneously misinterprets terms of a contract, or wrongly applies principles of law, he commits patent illegality. Reliance was placed on paragraph 56 in the case of O.N.G.C. (supra) wherein it was held that if an award is erroneous on the face of record with regard to the proposition of law or its application, Courts have jurisdiction to set aside an award u/s 34 of the Act.

16. In this connection, learned Counsel for the Objector had also referred to the decision of the Court of Appeal in the case of D & C. Builders Ltd. (supra) and Calcutta High Court P.C. Chakraborty (supra). Relying upon these decisions it was submitted that Principle of Accord and Satisfaction as applicable to an executed contract had been wrongly understood and applied by the learned Arbitrator. It was submitted that accord and satisfaction in an executed contract; requires additional benefit or legal possibility of an additional benefit to the creditor to have a valid agreement. Original consideration is not sufficient to have accord and satisfaction. An agreement by a creditor to accept a smaller sum in lieu of ascertained amount without any additional or new benefit or possibility thereof is nudum pactum. It is only when there is new or additional benefit that the subsequent agreement will be valid and will satisfy requirement of law. An agreement to be binding in law should have good and valuable consideration. Part payment of money under the original contract is not a valuable consideration. For accord and satisfaction, there should be a new contract and the said contract should be supported by a new and valuable consideration or at least possibility thereof.

17. The principal contention of the Objector overlooks the distinction between the technical law of accord and satisfaction in England and the statutory provisions of the Indian Contract Act, 1872, namely, Sections 62 and 63. In India in a given case, accord and satisfaction may be based upon a mutual agreement or by unilateral act and

acceptance by the promisee. In both cases, courts will have to examine whether conditions mentioned in Sections 62 and 63 of the Contract Act are satisfied. It may also be noted that the words "accord and satisfaction" have not been specifically used in the two Sections and as these are statutory provisions, on each occasion, the Court or the arbitrator will have to examine whether the statutory requirements of the two Sections are satisfied.

18. In India, law of contract is a codified law and the provisions of the said Act govern and apply. Section 62 and 63 of the Contract Act read as under:

62. Effect of novation, rescission and alteration of contract.-If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

63. Promisee may dispense with or remit performance of promise.-Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

19. Section 62 of the Contract Act allows novation, rescission, modification and alteration of an earlier contract with a new agreement or even alteration of an earlier agreement. It gives rights to parties to put a contract to an end or terminate it. Under the new agreement or upon amendment of an earlier contract, prior rights of the parties are extinguished and new rights and obligations come into existence. Original contract is discharged or modified and substituted by the new obligations under the new contract or as a result of amendment. Unless the new contract is void or unenforceable or the amended terms are unenforceable, a party cannot revert back to the original contract. Original contract can get revived in two cases : firstly, when the new contract is unenforceable or void and secondly, when the terms of novation itself provide that original contract can be revived and the said clause becomes applicable. In case these two conditions are not satisfied, the original contract gets obliterated or wiped out. It dies and cannot confer any cause of action. Section 62 is based upon the principle that a contract is the outcome of a mutual agreement and it is equally open to the parties to mutually agree to bring the said contract to an end, enter into a new contract or modify the earlier contract. Contractual obligations can be modified by mutual consent. Parties can vary the terms of the contract and absolve a party from the original obligations. Once Section 62 of the Contract Act applies, parties are bound by the terms and conditions mentioned in the second contract or the amended terms and not by the first contract. Breach of the subsequent contract will not revive the original contract, unless intention of the parties is to the contrary. The question is of intention of the parties, when they enter into second contract or modify earlier terms.

20. Section 62 of the Contract Act does not require additional or new consideration or possibility thereof by any party, to be a valid and enforceable contract. Discharge of the

original contract is regarded as consideration in the new contract. Release from the past consideration is a good consideration to enter into a new contract. No further consideration is required. Privy Council way back in 1943 in AIR 1943 147 (Privy Council) has held that novation constitutes good consideration for the fresh/new contract and a compromise between a creditor and a debtor operates as satisfaction of debts and affords an answer to an action of the creditor based on original liability.

21. Some Courts have drawn a distinction between executed and executory contracts for application of Section 62 of the Act. However, majority of the courts and the Law Commission have favoured the approach that Section 62 of the Contract Act will apply to both executed and executory contracts. I may have gone into this question in greater depth and detail but I find that the said issue was not specifically raised before the learned Arbitrator. The Objector did not draw any distinction between the executed and executory contract and raise the contention that Section 62 of the Contract Act did not apply. The Objector cannot be permitted and allowed to raise this plea in oral arguments u/s 34 of the Act.

22. Section 63 of the Contract Act applies when a creditor or a promisee by his unilateral act discharges or partly discharges the promisor. Unlike Section 62 of the Act which requires mutual agreement between both the parties, Section 63 of the Act applies in case of unilateral act of the promisee. A promisee is at liberty to accept part performance or condone non performance, if he is satisfied. It requires and implies intention on the part of the promisee to discharge the promisor in spite of his failure to meet his obligations or part obligations.

23. In view of the above reasoning, reliance placed by the Objector on the decision of the D&C. Builders Pvt. Ltd. (supra) is held to be misplaced. It is also held that the said decision does not apply and is not good law in India.

24. In the case of New Standard Bank of India (supra) cited by the Objector, the Calcutta High Court has referred to the wide difference between the English law and Section 63 of the Contract Act and it was noticed that the said provision does not refer to any agreement and valuable consideration. Relying upon the judgment of the Privy Council in the case of AIR 1928 99 (Privy Council) the Court applied Section 63 read with Sections 41 and 43 of the Contract Act and held that the payment made in the said case had resulted in "accord and satisfaction" and therefore the entire liability of the debtors was discharged. In this case, the Calcutta High Court had also noticed difference of opinion on interpretation of Section 62 of the Contract Act and whether the said section applies to executory contracts or executed contracts where there is a breach of the original contract. 1888 judgment of the Calcutta High Court in the case of Manohar v. Thakur Dass reported in (1888) 15 Cal. 319 was referred to and it was noticed that one of the judges of the Madras High Court in the case of Ramihba Gavathar v. Somasiambalam reported in AIR 1916 Mad. 832 had dissented from the said view on the ground that principles of common law cannot be introduced without considering provisions of the Contract Act.

This view was approved later on by the Madras High Court in K.M.P.R.N.M. Firm merchants carrying on business Vs. P. Theperumal Chetty a Merchant carrying on business, As already stated above, I am not required to examine and go into this controversy as this plea was never raised before the learned Arbitrator and the Objector cannot be permitted and allowed to raise this plea now.

25. Learned Counsel for the Objector had also referred to the decision of the Supreme Court in the case of United Bank of India v. Ram Dass Mahadev Prashad and Ors. (Supra). In the said case while proceedings were pending before the Debt Recovery Tribunal, the parties had entered into a Memorandum of Understanding. The Appellate Tribunal allowed the Appeal of the debtor holding that the Memorandum of Understanding had resulted in novation of the earlier contract. The Supreme Court on interpreting and reading the Memorandum of Understanding held to the contrary, inter alia, holding that the three conditions stipulated in the said Memorandum were conditions precedent to novation and no concluded contract had resulted out of the Memorandum of Understanding and thus there was no novation. The said judgment is not applicable to the facts of the present case. The factual findings of the arbitrator are to the contrary. There was no condition precedent.

26. The Objector has contended that the agreement that was reached to settle the account of the Objector on payment of Rs. 26.81 Lakhs was on account of economic duress and coercion. The said contention has been dealt with by the learned arbitrator in detail and he has refused to accept the said contention. Economic duress is not to be accepted lightly. Learned Arbitrator has applied the said principles to the facts found and has decided this aspect against the Objector. The finding of learned Arbitrator cannot be gone into in a petition u/s 34 of the Act. There is nothing on record that shows that the Objector has been subjected to a decree of "duress" to vitiate the agreement. On the contrary it was the respondent"s case that they were hard pressed to sell free commercial time for a programme which was falling in popularity. The concept of "duress" and "economic coercion" has been explained in the case of Double Dot Finance Ltd. v. Goyal Mg Gases Ltd. reported in ILR (2005) Del 161; in the said case it reference was made to the decision in the case of Pao On and Ors. v. Lau Yiu and Anr. reported in 1979 (3) England Reporter 65; it was held that mere financial pressure is not enough to show commercial duress. The learned single judge of this Court observed as under:

...Therefore, the "coercion" or "duress" required for vitiating "free consent" has to be of the category under which the person under "duress" is left with no other option but to give consent and is unable to take an independent decision, which is in his interest. Bargaining and thereafter accepting an offer by give and take to solve one"s financial difficulties cannot be treated as "coercion" or "duress" for the reason that in trade and commerce every day such situations arise and decisions are taken by parties some of which they might not have taken but for their immediate financial requirements and economic emergencies....

27. I may also note here that the Award dated 31st May, 2003 which is subject matter of the Petition u/s 34 of the Act is an interim award. It deals with the period upto 1st March, 2001. While examining the disputes and the contentions of the parties, the learned Arbitrator has gone into the question whether the three letters in question had resulted in a concluded contract which had the effect of novation of the earlier contract. The said plea has been accepted. Learned Arbitrator thereafter had made and published the final Award dated 21st November, 2003 for the period after 1st March, 2003. While examining the claims of the parties after 1st March, 2003, one of the issues that arose for consideration and was examined by the learned Arbitrator was the effect of the three letters including letter dated 9th May, 2001 and whether the same had resulted in a concluded contract and had the effect of novation of the earlier contract. Learned Arbitrator in the final award dated 21st November, 2003 has again reiterated his earlier findings made in the first interim Award dated 31st May, 2003. Partly allowing the claims made by the Objector in para 46 of the award it has been observed by the learned arbitrator that he had followed the same principle while passing the final award as while making the interim award. The reason why I have referred to the final Award dated 21st November, 2003 is that none of the parties have challenged the said award and the same has been accepted. Thus the Objector has accepted the reasoning and the findings given by the learned Arbitrator in the final award dated 21st November, 2003 including the finding on the question whether the said three letters including letter dated 9th May, 2001 had resulted in novation of the earlier contract and amendment of its terms. An incongruous situation would result in case the interim award is set aside accepting the objections of the Objector in respect of the interim award, while the final award remains untouched. The findings given by the learned Arbitrator in the interim award and the final award in respect of the three letters including letter dated 9th May, 2001 are the same. The interim award and the final award may pertain to different period but the underlying principle, reasoning and the ratio for making payment is interlinked and inseparably connected. The Objector admittedly has not filed objections to the final Award dated 21st November, 2003 and has accepted the same while she is objecting to the same reasoning and grounds given by the learned Arbitrator in his interim Award dated 31st May, 2003. In this connection, I may refer to the decision of the Supreme Court in the case of Satwant Singh Sodhi Vs. State of Punjab and Others, In the said case, there was an interim award and a final award. Interim award was in respect of item No. 1. The interim award was challenged after the final award was given and the question arose whether the interim award dated 26th November, 1992 could be challenged after the final award dated 28th January, 1994 passed under the Arbitration Act, 1940. The Supreme Court explained distinction between an interim award which is final in nature and determines and decides controversies and an interim award which is to have the effect as long as the final award is not delivered. It was held that interim award which is a complete award in itself and has effect even after the final award is delivered, is a complete award which adjudicates respective rights of the parties and therefore can be challenged. To that extent an interim award is a final award. Reference was also made to the principle of functus officio and it was observed that where an arbitrator has already made and

published his award he cannot make fresh adjudication and re-determine a claim already decided.

28. In equity also both the parties had suffered losses as the two programmes had lost their popularity and ceased to be commercially viable. The respondent has been directed to pay balance consideration of Rs. 13, 38, 250/- along with interest @ 18% per annum for the period from July 2001 to 31st January, 2003. The Objector has also been awarded cost of Rs. 2 lakhs by the learned Arbitrator. As a result the respondent shall be liable to pay a total of Rs. 5,81, 401/- along with interest.

29. In view of the reasoning given above, I do not find any merit in the present objection petition and the same is accordingly dismissed. In the facts and circumstances of the case there will be no order as to costs.