TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 26th JULY, 2010

PETITION No.33 OF 2009
(M.A. No. 39 of 2010)

Idea Cellular Limited …Petitioner
Versus
Mahanagar Telephone Nigam Limited … Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G.D.GAIHA, MEMBER
HON'BLE MR. P.K.RASTOGI, MEMBER

For Petitioner : Mr. Puneet D. Tyagi, Advocate
Mr.Ajay K. Saroya.Advocate

For Respondent : Mr. Arun Kathpalia, Advocate
Mr.Virender Singh Thakur,
Advocate

JUDGMENT

S. B. Sinha

Interpretation and/or application of Article 1 of the Schedule appended to the Limitation Act, 1963 (The Act), in the facts and circumstances of the case, is the core question involved in this Petition which has been filed by the Petitioner for

the following reliefs:-

(a) Direct the Respondent to pay a sum of Rs.36,63,073 to the Petitioner;

(b) Direct the Respondent to pay interest @ 18% p.a. on the aforesaid principal sum of Rs. 21,86,909/- from February 1, 2009 till the actual date of payment;

(c) Award costs to the Petitioner.

2. The admitted fact of the matter is as under.

A roaming agreement was entered into by and between ESCOTEL Mobile Communications Ltd (ESCOTEL), the predecessor in interest of the petitioner and the Respondent for establishment of a bilateral National Roaming Service between their GSM Networks.

We may notice some of the terms of the said agreement:-

"8.1 Charging and tariffs

8.1.1 Both Parties agree that when a Roaming Subscriber uses the Services of the VPLMN Operator, the Roaming Subscriber's HPLMN Operator shall be responsible for payment of charges for the Services so used in accordance with the tariff of the VPLMN Operator stated in Annex 1.3.1.

8.1.2 However, the HPLMN Operator shall not be liable for the payment of charges for chargeable services provided by VPLMN Operator without Subscriber Identity Authentication as defined in GSM MOU Permanent Reference Documents, except to the extent that the HPLMN Operator actually recovers all charges due in

relation to the Roaming Subscriber. In the case of Reauthentication malfunction, procedures are further detailed in Annex. 1.5.2.

8.1.3 Either party shall have the right at any time to vary its tariff stated in the Annex 1.3.1 or subsequent variation thereof. In any such event, a Party shall make best endeavors to give not less than four (4) weeks' prior written notice of any variation to its tariff in which event any such variation shall automatically be deemed to be incorporated into the Agreement.

8.2 Implementation of TAP

The implementation of TAP shall be done according to the GSM MOU Permanent Reference Documents and the provisions set out in the Annex C.3.1.

8.3 Billing and Accounting

The implementation of billing and accounting shall be done according to the GSM MOU Permanent Reference Documents and the provisions set out in Annex C.3.2."

3. The term 'VPLMN' indicates an **operator** which may be MTNL in a given case and HPLMN would be a service provider. The term 'TAP' denotes 'Transfer Accounts Procedure'.

Annexure C.3.2 appended to the said agreement provides for the details of the settlement procedure, the relevant part whereof is as under:-

"Each Party as VPLMN Operator shall prepare a monthly invoice for calls registered during the invoice period made by the visiting subscribers in the visited PLMN. The invoice period shall in general be the calendar month.

However, a single transfer covering a month end shall not be divided between two invoices. **Invoice to be sent by the 15th of the month.** A fax can serve as a first information.

Each party will issue as appropriate credit notes and correction invoices to compensate for agreed changes to or agreed errors in the basic inter PLMN invoices.

The invoice amounts (and credit note amounts if appropriate) for the two directions shall be offset against each other and the net SDR balance shall be paid by the debtor.

Payment shall be made in the creditors national currency (INR) calculated from the net SDR balance obtained by the netting process. Conversion from SDR into the currency of payment shall be made at the **SDR rate quoted by the IMF on the 23rd of the preceding month, or in case this is a public holiday in USA the previous business day.**

Payment by the debtor shall be made within 30 days from the date of the invoice with the later date.

If the debtor does not pay the net balance by the due date for payment then the creditor shall have the right to charge its penal interest on the overdue amount from the due date for payment until payment is made."

4. As the maintenance of the datas involved application of software not available with the respective operators, and, thus, having regard to the technical aspects of the matter, the Petitioner entered into an agreement for conversion and transfer of TAP with the Multinational Automated Clearing House (India) Pvt Ltd (MACH).

Inter alia on the premise that it had not received the relevant datas in its system for May, 2004 in respect of the Haryana Circle and for the months of May and October, 2004 in UP(West) Circle, the Respondent herein, admittedly, did not pay the roaming charges to the Petitioner herein amounting to Rs. 6,53,692/- and Rs.15,33,217/- respectively.

5. It is not in dispute that according to the Petitioner, MACH had sent the relevant informations for the said period but for one reason or the other, the Respondent did not receive the same in its system.

The roaming agreement admittedly was terminated by the respondent sometime in April, 2004 with effect from October, 2005.

6. The Petitioner raised invoices but by a letter dated 17.7.06, the respondent refused to pay the amount in question, stating –

> "Under the terms and conditions of the agreement (copy of relevant provisions attached) the Tap files must be received within 3 days but we accept the files even in 30 days. Since the files have been sent to us much later than the above said period it was not possible for us to account for these files.
>
> Therefore, we regret to inform you that the Competent Authority has decided that the payment of invoice for the Tap files for the month of May, 2004 and October 2004 cannot be made."

7. The Petitioner approached MACH by an E-mail dated 10.8.06, to which, MACH by its E-mail dated 31.8.06 responded as under:-

"With respect to your below mail, kindly note the specified files have been processed and sent in time by MACH to MTNL, as per the attached excel. For your ready reference we attached preceding and following sequence files that were also processed in the similar fashion to establish the timely processing by MACH.

We also did not receive any missing file information with respect to files in contention from MTNL. We hope this clarification assists you to resolve the matter with MTNL amicably.

You are kindly requested to deal the matter with concerned at MTNL to avoid any misinterpretation from any side and to arrest any delays further."

8. The said information was forwarded to the Respondent on or about 11.9.06. The agreement between the parties contained an arbitration clause. A notice was served upon by the Respondent to the Petitioner on 11.2.2008 but as the Respondent did not respond thereto, an application before the Delhi High Court was filed purported to be under Section 11(6) of the Arbitration and Conciliation Act, 1996 (1996 Act). The Respondent herein in the said proceeding raised an objection with regard to the maintainability thereof stating that only this Tribunal can determine the issues between the parties, whereupon, the Petitioner withdrew the said application on or about 21.1.2009.

This Petition was filed on 20.2.09.

9. The Petitioner inter alia contends that the Respondent having not denied and/or disputed its liability to pay and having merely refused to pay the due amount to the Petitioner only on the premise that the datas had not been received by it in time, the Petition should be allowed.

10. On the question of limitation, it was urged that keeping in view the terms of the contract, the account being open, mutual and current, the provisions of Article 1 of the Schedule appended to the Act would apply.

11. It was submitted that in view of the fact that the agreement having been terminated in April, 2005, the time had begun to run from the close of the year and the period of limitation being three years, the same had expired only in December, 2008.

As in the meanwhile, namely, 11.2.08, the Petitioner had filed the aforementioned application under Section 11(6) of the 1996 Act and having withdrawn the same on 21.1.09, the said period, it was argued, must be excluded from computation of the period of limitation in terms of Section 14 of the Limitation Act, 1963.

12. The contention of the Respondent, on the other hand, is that the account being not open, Article 1 of 'the Act' will have no application.

13. On the merit of the matter, it has been submitted that the datas relating to the roaming charges were to be supplied by the Petitioner through MACH within a period of three days only and having regard to the fact that the parties were to raise bills on their customers who have used the roaming facilities, time must be held to be of the essence of the contract.

14. Article 1 of the Limitation Act reads as under:-

Description of suit	Period of	Time from which period

	limitation	begins to run
(1) For the balance due on a mutual, and current account, there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

15. A bare perusal of the said provision would clearly go to show that it applies in a case where balance amount is due on mutual, open and current account on the closure thereof and when there had been reciprocal demands between the parties.

The test of mutuality evidently would be that the dealings between the parties are such that the balance is sometimes in favour of one party and sometimes in favour of the other,

16. For the aforementioned purpose, requisite pleadings are required to be made in the Petition. The account to be mutual, open and current account, it is necessary that the parties enter into independent transactions, pursuant whereto, reciprocal demands and shifting balances are made and in any event, there should have been a possibility therefor.

Before, however, application of the aforementioned provisions is taken into consideration, we may notice the definition of 'open account' and 'running account'.

17. In Black's Law Dictionary, 7th Edn., Page 19, the said terms are defined as under:-

"**Open account. 1.** An unpaid or unsettled account. **2.** An account that is left open for ongoing debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a

single liability.

Running account. An open, unsettled account that exhibits the reciprocal demands between the parties.

18. Mr. Tyagi, the learned counsel appearing on behalf of the petitioner placed strong reliance upon a decision of the Supreme Court of India in Kesari Chand Jaisukh Lal v. Shillong Banking Corporation Ltd., wherein referring to a decision of the Madras High Court with approval Hirada Basappa v. G. Muddappa, 6, Mad HC, 142, the law was laid down the following terms :-

> "To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."
>
> It was held—
>
> "In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, ,and the appellant made deposits. The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of the obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual.

This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 20, 1950 when the last entry in the account was made. It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to S. 46(O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative."

(Emphasis supplied)

19. Reliance has also been placed by Mr. Tyagi on a decision of the Delhi High Court in Era Constructions (India) Ltd v. D.K. Sharma reported in 2008(1) Arb. L.R. 205(Delhi), wherein a learned Single Judge of the said Court opined as under:-

"In other words, a running account is one which is unsettled and is open. It is distinct and different from a stated and/or liquidated account where the amount stands crystalised. In this context, it would be fruitful to refer to Article 1 and Article 26 of the Schedule to the Limitation Act, 1963. Article 1 relates to suits in respect of balance due on a mutual open and current account, where there have been reciprocal demands between the parties. The period of limitation prescribed is three years from the close of the year in which the last item admitted or proved is entered in the account and such years is to be computed as in the account. If the statement of account between the parties is to be regarded as a mutual open and current account, then the period of limitation of three years would begin from the close of the year in which the last item admitted or proved is entered in the account. It was contended on behalf of the claimant that the last admitted item in the account between the parties was the payment made by the petitioner to

the respondent on 3.4.99 and, therefore, the start of the period would be the close of the year in which this payment was made. He submitted that the financial year ending on 31st March was taken as the accounting year and, therefore, in point of fact, the period of limitation would begin nor from 3.4.99 but from 31.3.2000 which is the close of the year in which the last payment (i.e. on 3.4.99) was made. This would be the position, if Article 1 of the Schedule to the Limitatin Act, 1963 were to apply."

It was furthermore held:-

"What the learned arbitrator failed to consider was that for Article 1 of the Schedule to the Limitation Act, 1963 to apply, it was necessary to establish that the account was not only open and current but also mutual where there have been reciprocal demands between the parties. This aspect of the matter has clearly escaped the attention of the learned arbitrator. Article 1 of the Schedule to the Limitation Act, 1963 falls in Part I which pertains to suits relating to accounts."

20. In the matter of Kesari Chand Jaisukh Lal v. Shillong Banking Corporation Ltd., (supra), the Respondent was a Banking Company. The appellant therein had a combined overdraft and deposit account. Two cheques were handed over to the Bank for collection on 9.12.46 which were credited. They were sent to another bank for collection. Instead of obtaining cash, the respondent obtained a cheque on one Nath Bank Ltd. It was done without consulting the appellants. The said cheque was returned by Nath Bank. The respondent contacted the appellant for the instructions. Under instructions on 13.12.46, a Demand Draft from the Bharati Central Bank was accepted for an identical amount which was sent to the Bank's Calcutta Branch for collection. The Calcutta Branch asked Bharati Central Bank to present it to the

Shillong Bank, which was complied with. In the meanwhile, Bharati Central Bank had applied for moratorium and the Demand Draft was not encashed. In the proceedings for reconstructing the Bharati Central Bank the respondent asked to be treated as preferential creditors in respect of the amount for which the draft had been made out. The respondent thereafter was ordered to be wound up. An application for settlement of list of debtors was filed under Sec. 45-D of the Banking Companies Act, 1949. The appellant resisted the claim on the ground that the respondent having credited the appellant's account with the amount of the two cheques on the Bharati Central Bank having accepted on its own responsibility from the Bharati Central Bank the cheque dated December 9. 1945 on the Nath Bank ought not to be allowed to show that it received the cheque on account of and as agent of the appellant.

It was in the aforementioned situation, a finding of fact was arrived and held that the respondent therein owed a duty to the appellant to take steps in the liquidation proceedings for the realization of the amount of draft as there was no substance in the contention that by preferring a claim as mediator in respect of the draft in the liquidation of the Bharati Central Bank. The respondent accepted the draft in satisfaction of its dues from the appellant. It was on the basis of the said findings that the dealings were held to be mutual between the parties and a last entry in the account having being made on 29.12.1950 and the suit having been filed within three years from the close of the year, it was held to be not barred by limitation, in view of Article 85 of the Old Limitation Act.

21. Keeping in view the aforementioned ratio laid down by the Apex Court, let us consider the case in hand.

It is true that in terms of the National Roaming Agreement, both the parties were required to raise invoices against the other. Such invoices, however, were to be prepared on a monthly basis. The invoice for one month was required to be

sent by the 15th of the next month which was payable within 30 days thereafter. Out of the aforementioned period of 30 days, the debtor, while upon taking off-set of it's credit, was required to remit the balance amount to the creditor on the net SDR. In the event such payment was not made within 30 days, interest thereon was to accrue.

22. In view of the aforementioned arrangement between the parties, it is difficult to hold that the account was open and current, as the date specified for payment failing which interest was to accrue on the amount under invoice in question. The debt, thus, must be held to be a settled one.

Invoices, moreover, were required to be raised separately. The amounts were not required to be adjusted from time to time.

23. In a case of this nature, where the transactions were independent, the mutuality doctrine shall not apply. It is not a case where the parties had entered into transactions after transactions. In this case, each transaction is on a monthly basis. The petitioner has not filed this Petition for a decree for the balance amount of the accounts settled between the parties on closure thereof. Even no statement of account had been produced. We may notice that the nature of transaction has been admitted by the plaintiff's witness, Mr. Rajesh J. Khanna, in the following terms:-

> "As and when the invoices were raised by each operator to other operator payment used to be matched with invoice amount and some payment were to be made from one operator to other operator which is called upon to do so.

Time for making payment on the monthly invoice was on monthly basis.

I am not in a position to state as to when invoice for the month of May 2004 was issued.

It should have been raised in month's time.

It would be correct to say that if a payment is not made, the invoice raised at the end of the month, the operator would be a defaulter. It would be known to us.

I am not in a position to state the exact date as to when the demand for invoice for the month of May, 2004 was raised.

There were no definite dates for settlement of the accounts if it was running account but it was possible having regard to nature of accounts maintained that the invoice raised monthly could not be settled within the prescribed time.

I am not aware as to whether the accounts used to be settled annually.

Q. I put it to you that the account used to be settled on monthly basis?

A. It is true that accounts were to be settled as and when the invoices were raised by each of the party on other party."

24. To create an open, mutual and current account, there must be an intention. Such intention must be deducible from the course of dealings, to have mutual dealings, create the reciprocal obligations which are independent of each other, with the intention that these transactions are to continue and are not so closed until the parties decide to close their accounts. In this case parties were not maintaining any common account. The petitioner has claimed a money decree for non-payment of the roaming charges for particular month(s). The dues of the month(s) in question were not to be carried forward to the next

month as interest was to be paid on the invoiced amount of the creditor minus the invoiced amount of the debtor and, thus, the transaction must be held to have come to a close on the happening of the said event. This Petition is not based on account but on invoice.

25. In any event, the agreement was terminated in April, 2005. Once it was terminated, the account between the parties would not be current. Thereafter, there would be no transaction. There would be no expectation of any transaction.

26. The period of limitation, therefore, would run from 1.1.06 for a period of three years.

27. A division Bench comprising of Braumont, C.J. and Rangnekar, J., in Karsondas v. Surajbhan [AIR 1933 Bombay 450] considered a case where a suit has been filed by a principal against an agent for accounts and for money that may be found due. Holding that Article 85 will have no application, the learned Judges held as under:-

> "In determining whether the suit falls within Art. 85, the first question to be decided is whether there was at any time a mutual, open and current account between the parties, and if so, when it was closed. As I have already said I think that at any rate down to April 1997 there was a mutual, open and current account between the parties, but, there being no general agency agreement, it would only remain an open and current account with the consent of both the parties. Whether that consent was withdrawn or not at any particular time is a question of fact. In my opinion the fact that all dealings between the parties ceased from April, 1992, coupled with the fact that in the following July the defendants sent in an account showing the amount due and made an unconditional offer to pay that

amount, shows that it was the intention of the defendants to close the account, and I hold as a matter fact that the account was closed at any rate from 28.7.1922.

Now whether an account is mutual, open and current so as to attract the application of Art. 85 is a pure question of fact and must depend upon the nature of the dealings between the parties, nature of the entries and other relevant circumstances. In order that an account should be mutual there must be dealings between the parties and such dealings must be capable of giving rise to independent obligations on each side of the account at any given period or stage. One test commonly applied is the possibility of shifting balances sometimes in favour of one party and sometimes in favour of the other. But as observed in several reported decisions that the test is not decisive or conclusive of the matter. The real test is whether the dealings between the parties are of such a nature that the balance might so shift. An account current means a running account, that is an account which is continued and not stopped or closed. If the account is running, that is to say if it is unclosed, then it is open and current. It is open either because the balance remains to be drawn or struck, or because it is to be carried forward because of some contemplated future dealings between the parties. If the account is not closed by settlement or otherwise, it is open. Of course mere cessation of the dealings between the parties does not mean that the account is closed. The real question in each case would be what is the intention of the parties, and that must be inferred from the surrounding circumstances.

Suppose there is a mutual, open and current account between the parties and the dealings close in July and the plaintiffs draw a balance against the defendants and then demand the sum from them intimating that no further dealings will take place between them, I am unable to see how it can be said that after July the account still remained a mutual, open and current account and continued to bear that character right up to the end of the year. There is

nothing in law which prevents a party from saying to the other, "I am closing your account today. This is what is due to you. I shall have nothing to do with you in future."

It is difficult to see how it can be contended after this that the account still remained open and current."

It was furthermore observed—

"It must follow therefore that if the account in question was closed prior to the suit, the suit cannot be said to be for the balance of an open and current account. In order to bring the case under Art. 85, it is in my opinion necessary for the plaintiff to show that he is suing for the balance due on a mutual and open account. If at the time the suit was brought the account was closed, then I think the article would not apply. In other words, the account must be open down to the suit."

This decision applies to the fact of the present case in all fours.

28. A Division Bench of the Madras High Court in Bitla Rajalingam and Sons and Another v. C.P.V. Kotia Cheti and Co. and Others, [AIR 1962 Madras, Page 74] upon considering the decision of the Bombay High Court in ILR 58 Bombay with regard to the question as to whether an account is mutual, open and current so as to attract the application of Article 85, stated that the same is a pure question of fact and must depend upon the nature of dealings between the parties, nature of the entries and other relevant circumstances.

It was opined :—

"We are in respectful agreement with the observations contained in this passage and applying the tests laid down there we would make the following comment. The dealings between the parties here did not come to an end on 31.3.1951, because the goods of the defendants continued to remain with the plaintiffs after that date to enable the receiver to dispose of them in March 1953. The defendants never expressed any intention to sever the business dealings ever after the suit was filed for dissolution of the partnership by one of the partners."

29. In Swarna Paper Cutting Works v. M/s Indian Express (Madurai) Pvt Ltd [1999(3)CTC167], it was stated—

"The accounts produced before court would show a number of debit entries against the defendants, each corresponding to the value of the goods sold and delivered under each bill and all the credit entries shown in the accounts represent various payments made by the defendants, each towards the particular bill. In other words each of the payments made by the defendants was to discharge a separate distinct liability covered under each bill followed by a debit entry and the money stated to be due under the accounts as on 1.12.1981. is not the money due on that day and if at all it is due, it dates back to a period of three years prior to the filing of the suit itself. Therefore the suit filed as such after a period of three years from the date of the money fell due, is definitely barred by limitation."

30. In Attadi Venkati v. Bharatan Ramula & Sons [1984(Orissa)page 226], it was stated—

"8. In the present case, the plaintiff's suit is not based on mutual, open and current account so as to attract the provisions of Art.1 The averments in the plaint are to the effect that the defendant used to take cloths on credit and remit money towards the dues. There was no reciprocity of dealings and there are no independent obligations. What in fact had

happened was that the plaintiff had supplied goods and the defendant had agreed to pay for them and had made payments towards the plaintiff's dues. Thus, it was a case of supply of goods for a price to be paid. Payments were made in discharge of the obligations created by the delivery of goods made to the defendant and did not create any obligation on the plaintiff in favour of the defendant. The trial Court was, therefore, justified in holding that there was no mutual, open and current account between the parties and Art.1 did not govern the suit."

31. In State Trading Corporation v. Jayshri Chemicals [1999 Calcutta 347 at 379], a learned Judge held:-

"11. This case also does not help the plaintiff. The account in the present suit, does not reveal that there were independent dealings between the parties or there were independent obligations arising out of the independent dealings and transactions. What it reveals is that in, terms of the transaction between the parties, there is a possibility of having a shifting balance in favour of one party or the other at times. The ingredients to make an account mutual, open and current are independent dealings giving rise to independent obligations which are totally absent in the present case. I am unable to accept the submissions on behalf of the plaintiff that the account in the present case is mutual, open and current or current and continuous. The defendant's counsel, submits that each transaction being separate and distinct transaction, they would give rise to independent causes of action in respect of each case. There being no mutual, open and current account between the parties the plaintiff's claims are barred by limitation. The Article 1 of the Limitation Act of 1963 (old Article 85) will have no application on the facts of this case. I agree with the defendant on this point."

32. In V.K. Abraham v. N.K. Abraham [AIR 1978 Madras page 56 at 60**],** the law is stated in the following terms:-

"11. Briefly stated in order that an account may be called a mutual, open and current account, there must be independent transactions resulting in possibility of reciprocal demands and shifting balances. The entries should not be mere repayments of advances already received. The accounts must be open and continuing. Examined in this light, we consider that the account between the plaintiff end the defendant here can be said to be a mutual, open and current account. The plaintiff has been paying moneys from time to time as required by the defendant and the payments were not actually advances against future supplies. The plaintiff has been supplying estate stores for which the defendant had to pay and these supplies were not intended to square up even in part the value of rubber supplied. The defendant on his part was supplying the rubber to the plaintiff."

33. In G. Gopal Chettiar v. V.V. Shanmuga Nadar & Bros [AIR 1967 Madras page 360], a learned Judge opined:-

"6. Another vital aspect, concerning which again, there is difficulty in the finding of the learned Judge (page 17 of the printed papers) that the account was open, mutual and current because "the plaintiffs had sold the defendant's goods on commission basis, and credited him with the sale proceeds of such goods". Indisputably, if there were such mutual obligations the account would be open, mutual and current. But Sri Thiruvenkatachari contends that, apart from the

Pollachi branch, this observation of the learned Judge is factually incorrect, if it is intended to apply to the Coimbatore and Kumbakonam accounts. This again is a matter on which evidence is essential, and, it is equally essential that the original accounts should be produced and marked for this purpose. The truncated schedule marked as Ex. D. 1 cannot at all suffice for this purpose."

34. In view of the aforementioned authoritative pronouncements, we are of the opinion that the Petition is barred by limitation.

35. There is another aspect of the matter which must also be taken note of. The Petitioner has not filed any application for condonation of delay. No statement had been made in the Petition as is required under Order VII Rule 6 of the Code of Civil Procedure. The Petitioner has not invoked Sec. 14 of the Act.

Even the Delhi High Court having been approached only after February, 2008 and it having withdrawn the said application on 21.1.2009 without any finding that the arbitration application was not maintainable, we are of the opinion that there is nothing on record to show that the Petitioner had been pursuing the said application bonafide.

36. Had the petitioner intended to take recourse to Sec. 14 of the Act, it was required to show that it had been prosecuting a civil proceeding with due diligence. The respondent in that event was entitled to show that the proceedings

carried out by the petitioner were not with the due diligence. The prosecution of the said proceeding was required to be bonafide.

37. We, therefore, are of the opinion that the Petition is barred by limitation.

38. In view of our findings aforementioned, we are of the opinion that it is not necessary to enter into the merit of the matter.

39. The Petition is, therefore, dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

……..
(S.B.Sinha)
Chairperson

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(G.D.Gaiha)
Member

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(P.K. Rastogi)
Member