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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: April 01, 2009
Date of Order: May 21, 2009

+OMP 306/2005

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21.05.2009

Modi Telecommunication

...Petitioner

Through : Mr. Rajiv Nayyar, Sr. Adv. with Mr. Darpan Wadhwa, Mr. Diwakar Maheshwari and Mr. Ajay, Advocates

Versus

Union of India

...Respondent

Through: Mr. P.P. Malhotra, ASG with Mr. Veerappa & Ms. Sonia Kumar, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. The petitioner has assailed the award dated 20th May 2005 passed by learned Arbitrator whereby the claims of the petitioner were dismissed.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner was the successful bidder of the tender for grant of license for providing Radio Paging Services in State of Rajasthan Circle, excluding Jaipur. A letter of intent was sent to the petitioner on 27th October 1995 and the petitioner was to convey acceptance by 27th November 1995. The petitioner was also to furnish 10% of the license fees by way of bank draft and to furnish financial bank guarantee and performance bank guarantee in terms of the tender documents. The petitioner requested the respondent to change the name of company from "Modi Korea Telecommunications Limited" to "Modi

Telecommunications Ltd” and requested for extension of time for furnishing bank guarantees and completing necessary formalities. At the request of petitioner, the time for communication of acceptance and completion of formalities was extended up to 27th February 1996 subject to the condition that the effective date of license shall be 27th November 1996. The petitioner submitted financial bank guarantees and performance bank guarantee on 28th February 1996 and the license agreement was executed between the parties on 27th February 1996. The due date of starting the services was 27th November 1996.

3. In order to commission Radio Paging Services, the petitioner was required to obtain allocation of appropriate Radio Frequencies from DoT and a separate license from Wireless Planning and Coordination (WPC) Wing of Ministry of Communication and site clearance in respect of the Fixed Stations and its Antenna from Standing Advisory Committee of Frequency Allocation (SACFA). All these permissions etc were to be obtained by the petitioner before the date of commencement of services i.e. 27th November 1996. By a letter dated 18th November 1996, the petitioner informed respondent about progress in implementation of Radio Paging Services in the circle and stated that due to pre-occupation of the petitioner in activities in West Bengal and Madhya Pradesh Circles, few activities in Rajasthan Circle were delayed. The petitioner sought extension of 12 months time to implement and commence Radio Paging Services in Rajasthan Circle.

4. It is to be noted that in terms of the contract, the license fees was to become payable with effect from 27th November 1996 irrespective of the fact whether the petitioner had started Radio Paging Services from the due date

or not. It was obligatory on the part of the petitioner to obtain all permissions from the different authorities before the due date of start of service. After receipt of letter dated 18th November 1996 from the petitioner, the respondent asked the petitioner vide a letter dated 30/31st December 1996, the status in respect of the different steps towards providing service and other matters mentioned in the letter and progress made District Headquarters Wise/Important Town-Wise. The petitioner vide letter dated 6th January 1997 while furnishing the required information stated that all activities in order to make the services operational will start after SACFA Clearance and frequency allocation. The respondent vide its letter dated 31st January 1997 intimated the petitioner that 15% of the license fees pertaining to first quarter had fallen due but had not been paid. The petitioner was requested to remit the dues of license fee immediately but not later than 7th February 1997 along with penal interest failing which respondent would invoke the financial bank guarantee in terms of the license agreement. The petitioner, however, resisted the move of the respondent of demanding license fee and informed about constraints it was facing in implementation of Radio Paging Services.

5. The respondent informed the petitioner that petitioner had not acted in accordance with the terms of license agreement. The Radio Paging Service was to be commissioned by 27th November 1996 while the petitioner had taken 9 months from the date of signing of license agreement in merely applying for frequencies and SACFA clearance.

6. The petitioner did not pay the license fees as demanded by respondent and the respondent invoked the financial bank guarantee furnished by the

petitioner to the tune of Rs.99, 62,454/- as dues towards quarterly license fees with penal interest. The petitioner moved Telecommunication Regulatory Authority of India (TRAI) and obtained an interim injunction against encashment of bank guarantee. This order, however, was subsequently vacated. The petitioner then moved this Court and obtained an interim stay against encashment of Bank Guarantee which was later on vacated. An appeal was preferred by the petitioner before the Division Bench of this Court. During pendency of this appeal, an amount of Rs.25 lac and an amount of Rs.52.98 lac were recovered by the respondents on 13th March, 2001 by encashment of performance bank guarantee and financial bank guarantee. The claimant thereafter paid a sum of Rs.63.61 lac to the respondent on 25th May 2001 and the financial bank guarantee for Rs.151.83 lac on Indusind Bank was returned duly discharged. In the meantime, license of the petitioner was terminated by respondent vide letter dated 10th February 2000 with effect from 18th March 1997 on account of failure on the part of petitioner to deposit the license fee for two quarters commencing from 27th November 1996 in terms of the contract. The petitioner raised disputes which were referred to the learned Arbitrator and the award in question is the result of adjudication of disputes between the parties.

7. The petitioner before the Arbitrator raised following claims:

- “a) Refund by the Respondent of Rs.151.49 lakhs appropriated by the Respondent by way of encashing the Financial Bank guarantees and the Performance Bank Guarantee on March 13, 2001 and May 26, 2001;*
- b) Payment of a sum of Rs.41.36 lakhs by the Respondent as interest @ 20% per annum*

compounded monthly, on the said amount from March 13, 2001 and May 26, 2001 till the date of filing of the Statement of Claim, i.e. June 28, 2002;

- c) Refund by the Respondent of Rs.23.65 lakhs paid by the Claimant towards 10% advance of license fee paid at the time of signing of License Agreement along with interest amounting to Rs.62.64 lakhs, thereon @ 20% per annum compounded monthly, from the date of payment till the date of filing of the Statement of Claim;*
- d) Payment by the Respondent of Future interest @ 20% per annum compounded monthly from the date of filing of the Statement of Claim till final realization of the amounts referred to in claims (a), (b) and (c).*
- e) The claim of the Respondent for liquidated damages as per clause 13.1 of the License Agreement is illegal.*
- f) Award in favour of the Claimant for a sum of Rs.31.77 lac for losses suffered by it due to illegal act of invocation of Financial Bank Guarantees."*

8. The petitioner also raised an issue that the termination of license agreement by respondent vide letter dated 10th February 2000 was illegal and all actions of the respondent were illegal.

9. The learned Arbitrator devolved upon this issue and found that the termination of the license agreement by respondent was in accordance with the terms of the contract. The petitioner was supposed to commission the Radio Paging Service by 26th November 1996. The petitioner in its letter dated 18th December 1996 had admitted that since it was pre-occupied by the activities in West Bengal and Madhya Pradesh Circles, the commissioning of Radio Paging Service in Rajasthan Circle was getting delayed. The

Arbitrator also found that while the Radio Paging Service was to be commissioned on 26th November 1996, the petitioner had submitted applications for site clearance to SACFA as late as 23rd October 1996 and 27th December 1996. First application for few sites was submitted about a month prior to the due date of commissioning and other application for remaining sites was submitted a month after the due date of commissioning. The Arbitrator came to conclusion that this act of the petitioner showed that the petitioner had not acted in accordance with the terms of the contract and pre-occupation of the petitioner in activities in West Bengal and Madhya Pradesh was no ground for not seeking SACFA clearance from the necessary authorities before the due date of commissioning. The Arbitrator rejected the plea of the petitioner that non commissioning of Radio Paging Service was on account of non clearance of site by SACFA. The learned Arbitrator observed that this non clearance of site by SACFA was on account of default on the part of claimant /petitioner in not taking steps for obtaining frequencies and the clearance of site from SACFA in time. The arbitrator concluded that the respondent was entitled to recover license fees which had become due and payable by invocation of bank guarantee and the respondent was entitled to terminate the license agreement in terms of the contract. The Arbitrator found that condition 13 prescribed that date of commissioning of Radio Paging Service was essence of license agreement and in the event of service being brought into commission after expiry of the stipulated date of commissioning, without prior consent of licensing authority, such commissioning would not deprive the authority of its right to recover liquidated damages and such liquidated damages were recoverable @ Rs.1 lac for each week of delay subject to maximum of Rs.20 lac for each service area. In the event of delay of more than 20 weeks, the license was liable to

be terminated in terms of condition 14. The Arbitrator came to conclusion that the liability of the petitioner to pay the license fee and the liquidated damages was thus crystal clear under the contract, in the event of default on the part of petitioner in commissioning Radio Paging Service. The termination of contract by respondent was in accordance with condition 14.1 of the contract which reads as under:

“14.1 Termination for Default:

The Authority, may, without prejudice to any other remedy for breach of conditions of license, by written notice of default given to licensee at its registered office 90 days in advance, terminate this license in whole or parts under any of the following circumstances:

- (a) if the licensee fails to provide any or all of the Services within the time period(s) specified in Schedule B, Part II Clause 1.1 of this license or in any extension thereof granted by the Authority.*
- (b) If the Licensee fails to perform any other obligation(s) under the license including timely payments due to the Authority as mentioned in clause 18.*
- (c) If the Licensee, in either case of the above circumstances, does not rectify the failure within a period of 90 days (or such longer period as the Authority may authorize in writing) after the receipt of the default notice from the Authority.”*

10. The Arbitrator found that the termination of the license agreement was perfectly legal. The Arbitrator also found that the recoveries made by the respondent out of the performance bank guarantee and financial bank guarantee was as per law and all the claims made by the petitioner in the claim filed before the Arbitrator were liable to be dismissed.

11. The petitioner has assailed the award on the ground that the learned Arbitrator, while allowing the claim of licensor for liquidated damages, misconduct himself and travelled beyond the scope of agreement between the parties. Thus, the award was vitiated. It is submitted that clause 18 of Appendix B to the License Agreement was the appropriate clause for claiming license fees and under this clause, the petitioner was to open a bank account after starting of Radio Paging Service and the respondent was to have in lien of this bank account to the tune of quarterly license fee.

12. I consider that this plea of the petitioner must fail. Clause 18 of Appendix B only provides an additional security to the respondent for ensuring due payment of the license fee after start of operations by creating a lien over 30% of the revenue earned by the petitioner. Clause 18 comes into operation after start of service when petitioner would have started earning revenue. If clause 18 had been the only clause for ensuring due payment of the license fee, there was no necessity for respondent to ask for performance bank guarantee specifically securing the payment of quarterly license fee by the petitioner. The learned Arbitrator thus acted in accordance with the contract and the award is not liable to be set aside on this ground. The other ground taken is that the liquidated damages could not be claimed by respondent apart from claiming license fee. The contract in respect to this is very clear. The liquidated damages are provided in the contract apart from license fee. Thus plea taken by the petitioner must fail in view of specific provision in the contract dealing with liquidated damages.

13. The next ground taken by the petitioner is that the respondent had

claimed interest @ 20% which was clearly a penal rate of interest and was not in accordance with the interest rate applicable at that time.

14. It is not disputed that the petitioner had agreed under the contract to pay the penal interest of 20% in the event of non-payment of license fee beyond the period of prescribed under the contract. It is settled law that if the agreed rate of interest, as given in the contract is upheld by the arbitrator, the same does not tantamount to misconduct.

15. The other plea taken by the petitioner to challenge the award is that the amounts were recovered by the respondent by encashment of bank guarantee on 13th May 2001 and 26th May 2001 whereas the contract was terminated vide letter dated 10th February 2000 effective from 18th March, 1997. Thus, the encashment of bank guarantee was beyond the period of three years from the date of termination of the contract and consequently time-barred.

16. It is not disputed by the petitioner that the bank guarantees were encashed during the period same were alive. The financial bank guarantee was invoked by the respondent on 18th March 1997. It is only because the petitioner obtained a stay from TRAI and thereafter obtained an interim injunction order against invocation of bank guarantee from this Court that respondent had to wait till injunction order was vacated. Subsequently the respondent invoked financial bank guarantee and performance bank guarantee in March 2001. The plea of recovery being time barred is therefore not tenable.

17. The next ground taken by the petitioner is that the damages as provided under the contract were penal in nature and there could not be two deductions on account of delay, one on account of liquidated damages and other by way of penal interests on the amount due. It is also submitted that the respondent could only recover the damages maximum to the tune of Rs.20 lac and no recovery of damages could go beyond Rs.20 lac.

18. The learned Arbitrator has dealt with this issue and has come to conclusion that in case of non-commissioning of Radio Paging Service, the respondent has not only lost the license fee but it also lost the other revenues as specified in the contract. The damages were provided in the contract keeping in view the losses ought to be suffered by respondent on account of non-commissioning of Radio Paging Service. Once the liquidated damages had been provided in the contract and the same has been agreed to by petitioner with open eyes, the petitioner cannot now say that the damages were not justified or were in the form of penalties.

19. It is settled law that while considering the objections under Section 34 of the Arbitration &- Conciliation Act, 1996, this Court does not act as a Court of appeal and cannot reappreciate the facts and the contentions. The objections raised by the objector must fall within the purview of Section 34 of the Arbitration & Conciliation Act, 1996. The petitioner has failed to show how the award was not tenable in view of Section 34. I find no merits in the objections. The petition is hereby dismissed being meritless. No orders as to costs.

May 21, 2009
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SHIV NARAYAN DHINGRA J.