

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 235/2004

Reserved on: November 24, 2011

Decision on: December 20, 2011

UNION OF INDIA

..... Petitioner

Through Ms. Geeta Sharma with
Ms. Priya Singh, Advocates.

versus

MICROWAVE COMMUNICATIONS LTD. Respondent

Through Mr. Jasbir Singh, Advocate

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

20.12.2011

1. Union of India ('UoI') in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenges an Award dated 13th February 2004 to the extent it rejects the Petitioner's claim against the Respondent to recover a sum of Rs. 1,21,42,490/- together with interest from 1st January 2003 till the date of payment.

2. The Respondent Microwave Communications Ltd. ('MCL') applied to the Department of Telecommunications ('DoT') for grant of licence for operation of Voice Mail Service ('VMS') on their Radio Paging Network in Mumbai, Delhi, Calcutta, Ahmedabad and Surat. The Petitioner DoT issued to the Respondent a letter of interest ('LOI') on 30th January 1996 granting licences for the said five Service Areas.

3. As per the terms of the LOI, the Respondent MCL furnished to the Petitioner 10% licence fee for all the five Service Areas, Financial Bank Guarantee (`FBG`) for a sum of Rs. 22.5 lakhs towards 90% of the balance minimum licence fee payable for the five Service Areas and two Performance Bank Guarantees (`PBGs`) of Rs. 5 lakhs each. Five separate licences for each of the five cities were signed between the Petitioner and Respondent on 17th May 1996.

4. In terms of the LOI, the minimum licence fee payable in respect of the Service Areas was as under:-

Sl. No.	Service Area	Minimum Licence Fees Payable per annum
1.	Delhi	Rs. 7.5 Lacs
2.	Mumbai	Rs. 7.5 Lacs
3.	Calcutta	Rs. 5 Lacs
4.	Surat	Rs. 2.5 Lacs
5.	Ahmedabad	Rs. 2.5 Lacs
	Total	Rs. 25 Lacs

5. According to the Petitioner, the above licence fee would be doubled if the Respondent provided service to the other customers besides their own registered radio paging subscribers. The schedule of payment of

licence fee, interest/penalty on the late payment of the licence fee was also specifically indicated in the licence agreement.

6. According to condition 1.1 of Part II Schedule C of the Licence agreements, MCL was to instal and commission the service within 12 months from the date of signing of the licence agreement in all the five Service Areas. As per condition 6 of Part II, Schedule C of the licence agreement, in the event MCL failed to bring the service of any part thereof into commission within the prescribed period, the DoT would be entitled to recover liquidated damages ('LD') from the licensee for each Service Area at Rs. 5,000/- for each week of the delay or part thereof, subject to a maximum of Rs. 1 lakh for each Service Area. By a letter dated 24th September 1996 the Respondent informed the DoT that VMS had been commenced in the Calcutta and Ahmedabad Service Areas from 26th August 1996 and 22nd August 1996, respectively. By a further letter dated 17th January 1997, MCL informed the DoT that the VMS at Calcutta and Ahmedabad had been offered to the subscribers. By a letter dated 17th February 1997 MCL submitted to the DoT a TEC Certificate for testing of the installation at Surat and Delhi and requested the DoT to give it permission to commission the service in Delhi in view of the conditionalities in TEC Certificate. TEC Certificates dated 16th January 1997 and 30th January 1997 were issued pursuant to the said letter stating that prior to the

commissioning of service, approval had to be obtained from the licensing authority. In its letter dated 15th April 1997 written to MCL, the DoT pointed out that 90% licence fee was still to be paid by it in four Service Areas, i.e., Ahmedabad, Calcutta, Surat and Delhi and as a result of the delay in payment of the said licence fee, a total amount of Rs. 1,34,339/- was due towards interest. As regards Mumbai City, 90% of the licence fee for Rs. 6,75,000/- plus 25% licence fee of the first quarter in the second year (Rs. 1,87,500) was due and payable on 7th May 1997. MCL was asked to inform the DoT whether the service had started in the Mumbai area, and if so to also pay the licence fee. By its letter dated 4th June 1997 MCL requested the DoT to grant it approval to launch the services in the five cities.

7. In its letter dated 13th May 1997 the DoT reminded MCL about the outstanding licence fee. Thereafter, on 30th October 1998 a notice was issued informing MCL that its reply to the show cause notice dated 14th August 1997 was not found satisfactory and, therefore, the competent authority had decided to terminate the Licence agreement at the risk and cost of MCL. It was also mentioned that the termination of the licences was without prejudice to the rights of the licensor. The notice required MCL to pay DoT the outstanding dues as on that date amounting to Rs. 52,13,475/-, i.e. licence fee of Rs. 36,45,833/- and interest of Rs. 15,67,642/- including LD of Rs. 1 lakh as per condition

6 Schedule C, Part II of the licence agreement. A further reminder was sent to the MCL by the DoT on 30th November 1998.

8. It is stated that meanwhile the DoT encashed the FBG in the sum of Rs. 22.5 lakh. A request made to MCL to furnish fresh FBG in the sum of Rs. 25 lakh was not complied with. It is stated that even after the encashment of the FBG, a sum of Rs. 31.25 lakhs plus interest etc. still remained outstanding. The PBG was invoked by the Petitioner to the tune of Rs. 10 lakh.

9. MCL filed Suit No. 1684 of 1998 in this Court, *inter alia*, seeking stay of encashment of the PBG. A statement was made on behalf of the DoT during the hearing of the said suit that the said PBG would not be encashed subject to the MCL agreeing to keep it renewed from time to time. However, according to the DoT, MCL failed to keep the PBG valid beyond 30th June 2001. After the notices of termination of licence agreement was sent by the DoT, MCL filed Suit No. 1603 of 1998 seeking to recover from DoT a sum of Rs. 22.5 lakhs together with interest @ 18% per annum. While filing a reply in the said suit, the Petitioner reserved its right to invoke Section 8 of the Act and seek reference of the disputes to arbitration. Thereafter DoT invoked the arbitration clause and one Shri O.P. Nahar was appointed as the Sole Arbitrator.

10. The learned Arbitrator, who was a Legal Adviser and Ex Officio Additional Secretary (Conveyancing) Department of Legal Affairs, Ministry of Law and Justice delivered his Award dated 13th February 2004. The learned Arbitrator rejected the three preliminary objections raised by MCL. One concerned the validity of the appointment of the Arbitrator; the second challenging the appointment on account of there being no prior notice issued to MCL by the Petitioner and third that the Petitioner's claim was barred by limitation. The learned Arbitrator also rejected the Respondent's request for framing issues and leading oral evidence. The arbitral reference was confined to the three components, viz., (i) licence fee (ii) liquidated damages and (iii) interest thereon.

11. As regards the case of the Mumbai licence, learned Arbitrator held that although the licensee (MCL) never started service in Mumbai, the licensor, i.e. the DoT, did not cancel the licence nor issued MCL any notice for non-performance. It was held that DoT had not shown any positive action to mitigate the loss. On the other hand, it allowed the losses to multiply. It was held that DoT could at best claim the licence fee for the period from the effective date till the expiry of one year and LD as agreed between the parties for non-performance. Even as regards the other licence agreements in relation to the other Service Areas, the learned Arbitrator found that the DoT continued to await the start of the provision of service by the Respondent and never really

issued any notice for non-performance either on the expiry of twelve months or even prior thereto. Judicial notice of the fact was also taken that the service was not remunerative and DoT, after a certain time, allowed the said service without payment of any licence fee. It was held that MCL was entitled to the same treatment although the licence agreements had been signed at an earlier point in time. Since DoT had already recovered one year's licence fee in respect of each of the licence agreements and accepted 10% in cash apart from invoking FBG in respect of the remaining 90% amount, it was held that DoT would be entitled at best to Rs. 5 lakhs as LD along with one year's licence fee. In the circumstances, it was held that the Petitioner was entitled to Rs. 5 lakhs and nothing more. As regards the payment of interest, since there was no clause in the contract permitting such payment, it was disallowed.

12. Ms. Geeta Sharma, learned counsel appearing for the Petitioner referred to the letter dated 15th April 1997 from the DoT to MCL which clearly mentioned the amounts of licence fee which were yet to be paid by MCL as well as the penalty for late payments. According to her, there was no failure by the Petitioner to take positive steps to recover the amounts due. It was submitted that the learned Arbitrator erred in holding that the Petitioner had not taken steps to mitigate the losses and was therefore not entitled to recover the arrears of licence

fee. It was further submitted that the learned Arbitrator had gone beyond the licence agreement in holding that if the service itself was made free of charge the same facility should be extended to MCL as well. Mr. Jasbir Singh, learned counsel for the Respondent on the other hand defended the impugned Award. He submitted that it was based on evidence led by the parties and that given the limited scope of the powers of interference by the court under Section 34 of the Act, it was not open to the court to re-appreciate the evidence as a court of appeal.

13. It appears to this Court that the view taken by the learned Arbitrator on the basis of the documents placed before him was a plausible one to take. There is no valid explanation offered by the DoT to the contention of the Respondent that unless the performance tests required for the successful commissioning of the service was carried out by the Petitioner, the offering of services could not commence. There were indeed several obligations cast on the DoT in terms of the licence agreement, which were not met by it. Added to this was the fact that the services themselves had begun to be offered free of charge. In the circumstances, no exception can be taken to the conclusion arrived at by the learned Arbitrator that at highest the Petitioner was entitled to only one year's licence fee in regard to the five licence agreements and LD in the sum of Rs. 1 lakh for every Service Area. The finding of the learned Arbitrator was a factual one

based on the evidence led before the Arbitrator. It cannot be said that the rejection of the DoT's claim by the Arbitrator was vitiated by any 'patent illegality'. As rightly observed by the learned Arbitrator, DoT had already invoked the FBG as regards the 90% amount. In the circumstances, this Court is not persuaded to interfere with the impugned Award of the learned Arbitrator.

14. The petition is accordingly dismissed.

S. MURALIDHAR, J.

DECEMBER 20, 2011
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