

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No.199/2009

Reserved on: January 10, 2012

Decision on: January 17, 2012

PRASAR BHARATI

..... Petitioner

Through: Mr. Rajeev Sharma with
Mr. Sahil Bhalaik and
Mr. Uddyan Mukherjee, Advocates.

versus

B4U MULTIMEDIA INTERNATIONAL LTD.

..... Respondent

Through: Mr. Chetan Sharma, Senior Advocate
with Mr. Sudhanshu Chaudhary,
Mr. Ashutosh Dubey and
Mr. Parag, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

17.01.2012

1. Prasar Bharati (Broadcasting Corporation of India) challenges the Award dated 17th December, 2008 passed by the Sole Arbitrator in the dispute between it and THE Respondent, B4U Multimedia International Ltd., arising out of an Agreement dated 15th November, 2000 between the parties.

Background facts

2. The Petitioner states that in the year 2000 negotiations took place between the parties during which the Respondent offered to the Petitioner films in which it owned right for telecast on its Doordarshan Worldwide ('DD Worldwide') Channel. According to the Petitioner the Respondent stated that since it had rights in the films only for territories outside the Union of India, the Petitioner would have to encrypt the signals of DD Worldwide so that the

films were not available to viewers in India.

3. An agreement was entered into between the parties on 15th November, 2000 under which the Respondent granted to the Petitioner “exclusive, and except as hereunder provided, irrevocable right to broadcast the Titles on DD Worldwide Services (DD Worldwide) Channel in all the territories except in Union of India on terms and conditions contained herein, provided, however that, any downlinking and broadcasting of the encrypted signal of the telecast by any unauthorized persons/companies/entities shall not constitute a breach of this Agreement whatsoever by Prasar Bharati” . The ‘Titles’, i.e. the films offered for telecast, were listed in Schedule I and II to the Agreement. For the Titles in Schedule I, the Petitioner had to pay the Respondent a lump sum consideration of Rs.3 lakhs per film whereas for the Titles in Schedule II it had to pay a lump sum amount of Rs.6 lakhs per film.

4. Clause 2 of the Agreement provided for sourcing and supply of Titles. Under Clause 2(b), the Respondent was required to have in its library “readily available for supply to Prasar Bharati all the Titles listed in the Schedule hereto as periodically updated along with copyrights/broadcast rights thereof in respect of territories, except in the Union of India”. Under Clause 2 (c), supply of Titles under the Agreement was to be preceded by ‘sourcing orders’ issued by the Petitioner on a monthly/quarterly basis. The sourcing order was to mention the month to which it pertained and was to list the Titles proposed to be telecast, three from Schedule I and one from Schedule II during that month in the order of their tentative dates of telecast. This was to be issued at least 30 days prior to the telecast of the first of the Titles listed in the sourcing order. In case the Respondent was unable to supply the sourced Titles, it would supply alternate Titles acceptable to the Petitioner at least six weeks in advance. Under Clause 2 (e) where the Petitioner on a preview of the Titles supplied found any of them unsuitable for telecast either due to content or

technical reasons, the Respondent was to replace them with Titles chosen by the Petitioner. The Petitioner was to return to the Respondent the Beta cassettes of the Titles within ten days after the telecast dates for the Titles.

5. Clauses 3 and 4 of the said Agreement are significant for the dispute in the present petition and they read as follows:

“3. TELECAST

- a. Prasar Bharati shall have the right but not the obligation to telecast the Titles, which are sourced from B4U only on the DD World Services (DD Worldwide) channel. Prasar Bharati further agrees that such telecast shall only be for the overseas satellite in an encrypted mode and that the titles shall be telecast in territories except the Union of India, only once with one natural repeat within a seven day period thereafter provided however that, any downlinking and broadcasting of the encrypted signal of the telecast by any unauthorized person/companies/ entities in India shall not constitute a breach of this Agreement whatsoever by Prasar Bharati.
- b. Prasar Bharati shall have the right in respect of all the Titles sourced from B4U to repeat the telecast once within the seven-day period immediately following the original telecast without any obligation to pay additional Consideration for such repeat telecast.
- c. Prasar Bharati shall have the right at all times before the proposed telecast date for any Title supplied by B4U to reject and refuse to telecast a Title at its sole discretion and ask for replacement of such title.
- d. It is understood by the Parties that Prasar Bharati shall telecast the Titles by uplinking the signal in an encrypted mode from India which signal shall be downlinked and decrypted in the various countries and territories covered by this Agreement by such person/entities/companies directly authorized by Prasar Bharati. A list of such authorized persons/entities/ companies will be provided by Prasar Bharati to B4U from time to time. The signal so donwlinked and decrypted by the duly authorized person/entity/company shall be broadcast by each such person/entity/company for viewing in the respective country and/or territory at times suitable for such broadcast in the respective country and/or territory at times suitable for such

broadcast in the respective country and/or territory within a 24 hours period of its telecast on DD World.

- e. It is further understood and agreed to by the Parties that the telecast period under Clause 3.b shall begin to run in respect of each country and/or territory covered by this Agreement from the date a Title was first broadcast for viewing in that particular country and/or territory.

4. CONSIDERATION

- a. Prasar Bharati shall have an obligation to pay to B4U a lump sum Consideration or Rs.3.0 Lakhs (Rupees Three Lakhs) per Title that Prasar Bharati telecast under this Agreement, from the Schedule I list and a lump sum of Rs.6.0 Lakhs (Rupees Six Lakhs) per title from the Schedule II list provided however that, Prasar Bharati shall not be under any obligation to pay the Consideration hereunder in respect of any Title which may have been supplied by B4U but not telecast by Prasar Bharati for any reason whatsoever.
- b. B4U shall raise an invoice for the total Consideration payable by Prasar Bharati on account of the Total Telecast for each calendar month by 14th of the following month. Prasar Bharati shall pay on the invoice raised by B4U within 45 days of receipt thereof by Prasar Bharati.
- c. All taxes/levies/charges/duties whatsoever relating to or rising out of the payment of Consideration under this Clause by Prasar Bharati to B4U shall be totally on the account of and shall be solely borne by B4U, provided however that, Prasar Bharati shall deduct from the Consideration paid any and all applicable taxes/levies/ duties required to be so deducted under any law for the time being in force.”

6. Clause 6 (a) provided that the Agreement would be for a period of three years subject to earlier termination by either of the parties. Clause 6 (b) provided as under:

“6. TERMS AND TERMINATION.

(b) Parties’ right to terminate this Agreement shall be as follows:-

- i) either Party shall have the right to terminate this Agreement if the other Party is in breach of any of the provisions herein and such breach remains uncured for more than 90 days after the receipt of notice of the breach by the party who is not in breach;
- ii) either Party shall have the right to terminate this Agreement without assigning any cause whatsoever by giving a notice in writing of 60 days to B4U/Prasar Bharati.
- iii) either Party shall have the right to terminate if the other Party becomes insolvent, proceedings are instituted by or against it in bankruptcy, insolvency or dissolution, or it makes a general assignment for the benefit of its creditors.”

7. Under Clause 5 (b) the Respondent warranted that for the period of one month during which the Petitioner was given exclusive broadcast rights over the sourced films, the said rights would not be sold or licenced to any third party except in the Union of India. Clause 8 stated that if the disputes were unable to be resolved by mutual consultation, they would be referred to a Single Arbitrator in accordance with law.

8. During the month of December 2000 meetings were held between the parties whereby it was agreed that the Respondent would send the Petitioner 30 films from Schedules I and II for telecast on the DD Worldwide channel after encryption of the signals. In January 2001 nine films were delivered by the Respondent to the Petitioner. They were however not telecast on account of the problems concerning encryption. According to the Petitioner, although in terms of the contract it was to get the DD Worldwide channel encrypted by 30th November 2000, it was unable to do so due to technical reasons. It is stated that the process of telecast of encrypted signals involved transmission of signals in a coded/scrambled format to a satellite, reception of the said signals by the satellite and their downward transmission. For receiving the signals, a device known as Integrated Receiver Decoder (‘IRD’) was needed to decode the signals wherever received. Since the Agreement was for territories other

than Union of India, IRDs were to be installed in 146 countries where signals were to be received. It is stated that the procurement of decoders, their distribution and installation in 146 countries after obtaining permissions for downlinking of signals obviously could not be completed in a short time. In the circumstances, encryption of the signals by 30th November 2000 was not considered feasible. In addition, it was realised that encryption could have resulted in a technical problem of the channel being blacked out in India. In view of the above constraints, the Petitioner addressed a letter dated 2nd January, 2001 to the Respondent seeking permission to telecast the films in an unencrypted format with the caption that the same was not meant for viewers in India. The Respondent in its reply dated 15th January, 2001 informed the Petitioner that it did not hold copyright in the films for telecast in India. Further, if there was any objection by the producers to the telecast with the rider as proposed, the Petitioner would have to discontinue it.

9. On 20th April 2001, the Respondent wrote to the Petitioner claiming payment for the first lot of films delivered to the Petitioner. A sum of Rs.54 lakhs in respect of nine films was claimed. On 30th April 2001, the Petitioner wrote the following letter to the Respondent.

“Subject: Telecast of B4U films on DD-World.

Dear Sir,

This is with reference to the agreement signed on 15th November, 2000 between M/s. B4U and Doordarshan regarding telecast of Hindi Feature Films on DD World.

In this connection we have to inform you that due to technical reasons, the agreement cannot be implemented and hence may please be treated as terminated. Please advice your local representative to collect back the tapes of some of the Hindi Feature Films from Mr. Isaac, Deputy Controller of Programme of DD-World.

Thanking you for your interest in our source.”

10. On 2nd May 2001, the Respondent wrote to the Petitioner lodging its protest. Thereafter, by letter dated 22nd June, 2001, the Respondent invoked the arbitration clause. By letter dated 25th July, 2001 it requested the Petitioner to reconsider the termination of the contract. A meeting was held on 26th July between the representatives of the Petitioner and the Respondent. In the month of September 2001, the Petitioner shifted its telecast of the DD International Channel (i.e. DD World) to a new satellite, PAS-10.

11. Before the learned Arbitrator, the Respondent filed a statement of claim in which it sought specific performance of the Agreement dated 15th November, 2000. It sought, in the alternative, damages in the sum of Rs.5.4 crores with interest at the rate of 18% per annum from 12th May 2002 till the date of payment. The Petitioner, in its written statement, denied its liability to pay the Respondent any amount by way of damages or otherwise. It also denied that the Respondent could seek specific performance.

The impugned Award

12. The impugned Award dated 17th December, 2008 could be summarized as under:

- (1) On collective reading of Clauses 1(a), 2(b) and 5(b) of the Agreement, the position that emerged was that the Respondent had committed itself to maintain its library of the Titles listed in Schedules I and II, make them available at all times during the continuity of the Agreement, and not to give the said Titles to any other party during the one month period of sourcing and supply to the Respondent. This was in consideration of the Petitioner agreeing to take a certain minimum number of titles from the Respondent for screening on the DD Worldwide channel.
- (2) Clauses 2(c), 2(e) and 3(c) of the Agreement established “a contractual obligation” on the part of the Respondent to preserve all the titles in the

Schedule for the Petitioner. There was no clause in the Agreement which provided that the Petitioner had a right not to telecast the four Titles per month. The Petitioner's contractual obligation to telecast four Titles per month was absolute. Even Clause 3(a) of the Contract did not absolve the Petitioner of this contractual obligation. The obligation to have the DD Worldwide channel encrypted by 30th November 2000 and commence telecast from 1st December 2000 was that of the Petitioner and no fault could be attributed to the Respondent.

- (3) Although the Petitioner was not required to pay for all the Titles sourced by it, it was not absolved of the obligation to telecast an aggregate of four Titles per month. There was no explanation in the letter dated 30th April 2001 for termination of the Agreement. There was nothing to establish the alleged impossibility of encryption of the DD Worldwide channel. Had there been any impossibility of encryption, the Petitioner would not have shifted in September 2000 the telecast to a new satellite PAS-10 eliminating the technical problem regarding encryption. Consequently, by not getting the DD Worldwide channel encrypted and by serving a notice of termination, the Petitioner had committed a breach of the contract resulting in non-screening of the films and consequent loss of revenue to the Respondent.
- (4) The Petitioner not having served upon the Respondent the requisite advance notice of 60 days for termination of the Agreement, the termination became effective after the expiry of the 60 day period on 30th June, 2001. Consequently, the Petitioner was bound to pay the Respondent for four films, three from Schedule I and one from Schedule II per month from 1st December 2000 to 30th June, 2001. Since the agreed rate was Rs.3 lakh per film from Schedule I and Rs.6 lakh per film from Schedule II, the aggregate amount that the Respondent would

have earned was Rs.1.05 crores. This amount had to be paid to the Respondent together with interest at 12% per annum from 12th March, 2002 till the date of payment. The Petitioner was asked to pay Rs.3 lakhs to the Respondent for the costs of arbitration.

Submissions of counsel

13. Mr. Rajeev Sharma, learned counsel for the Petitioner, submitted that the learned Arbitrator misinterpreted Clauses 3(a) and 4(a) of the Agreement and thereby rendered them redundant. He submitted that the Arbitrator erred in holding that there was an obligation on the Petitioner to telecast four Titles per month and even pay for the films not telecast. This was contrary to the express terms of the contract. In holding that the Petitioner did not have a right not to telecast four films per month the learned Arbitrator read into the contract an implied term which did not exist. Reliance was placed on the decisions in ***Steel Authority of India v. J.C. Budharaja (1999) 8 SCC 122***, ***Food Corporation of India v. Chandu Construction (2007) 4 SCC 697*** and ***Oil and Natural Gas Corporation Ltd. v. Schlumberger Asia Services Ltd., 2006 (3) ArbLR 610 (Delhi)***. The Award was, therefore, contrary to the express provisions of the contract and, therefore, contrary to the public policy of India.

14. In reply, Mr. Chetan Sharma, learned Senior Counsel for the Respondent, submitted that the clauses in the Agreement had to be interpreted in a manner that made commercial sense. It is submitted that by failing to have the signals encrypted by 30th November 2000 the Petitioner could not take advantage of its own wrong which resulted in frustration of the contract. Reliance was placed on the decisions in ***Kusheshwar Prasad Singh v. State of Bihar (2007) 11 SC 447*** and ***Commissioner of Customs (Preventive) Mumbai v. M. Ambalal and Company (2011) 2 SCC 74***. According to Mr. Chetan Sharma, a conjoint reading of Clauses 2, 3 and 4 of the Agreement would show that there was indeed a binding obligation on the Petitioner to not only source three Titles

from Schedule I and one Title from Schedule II per month for telecast on DD Worldwide but also in fact telecast them. If this was not to be treated as a binding obligation, then the entire contract would be meaningless. Also since for one month the Petitioner had exclusive rights to the films sourced from the Respondent, the Respondent was deprived of the use of those films for that period. Therefore, the Petitioner was bound to compensate the Respondent for the loss on account of the failure of the Petitioner to telecast the films. It is submitted that the view of the learned Arbitrator was a plausible one and could not be held to be perverse. Lastly, it was submitted that if the latter portion of Clause 4(a) rendered it unworkable, it could be severed and the remaining portion given effect to. Reliance was placed on the decision in ***Shin Satellite Public Co. Ltd. v. Jain Studios Ltd. (2006) 2 SCC 682.***

Impossibility of performance

15. The Agreement between the parties, whereby films to be provided by the Respondent were to be telecast on the DD Worldwide channel by the Petitioner, was premised on the Petitioner having to encrypt the signals. This was because the Respondent held copyright in the films only for the territories outside India. It was clear, therefore, that without such encryption the Petitioner would not be able to ensure that the signals were not received in India. Otherwise, there would be breach of the copyright. Therefore, the very basis of the Agreement was the encryption of the signals.

16. The fact that the Petitioner was unable to proceed with the encryption was known to the Respondent. This was primarily on account of the fact that the Petitioner could not set up IRDs in as many as 146 countries within a short span of time. It is obvious that the Petitioner could not have possibly met the deadline of 30th November 2000 for encryption of signals. The learned Arbitrator concluded that the encryption was not an impossibility since the Petitioner was in September 2001 able to shift the telecast to a new satellite,

PAS-10, thus eliminating the problem regarding encryption. The learned Arbitrator failed to appreciate that this happened ten months after 30th November 2000 which was the deadline that the Petitioner had set for itself under the Agreement. It is nobody's case that as of that date encryption was possible. If on account of the impossibility it faced in complying with the said essential requirement of encryption, the Petitioner invoked the termination clause in the Agreement, it cannot be held to have acted in deliberate breach of the contract. This was in fact the reason given by the Petitioner in the letter dated 30th April 2001 to the Respondent informing that the Agreement could not be implemented.

17. In ***Satyabrata Ghose v. Mugneeram Bangur & Co. AIR 1954 SC 44***, the Supreme Court explained that “the performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view and if an untoward event or change of circumstances totally upset the very foundation upon which the parties rested their bargain, it can very well be said that the promisor to do.” Referring to Section 56 of the Contract Act, the Supreme Court held that in those circumstances it could well be said that the Agreement itself was void and that the performance of the contract being rendered impossible, “the parties are absolved from further performance of it as they did not promise to perform an impossible act.” The conclusion of the learned Arbitrator in the impugned Award that there was a breach of the contract committed by the Petitioner by failing to have the signals encrypted by 30th November 2000 cannot be sustained in law.

No binding obligation on the Petitioner to telecast four films per month

18. The conclusion of the learned Arbitrator that there was an absolute obligation on the Petitioner to telecast four films sourced from the Respondent

per month and pay for them was based on an erroneous interpretation of the relevant clauses of the Agreement. Clause 3(a) of the Agreement, which has been extracted hereinbefore, opens with the words: “Prasar Bharati shall have the right but not the obligation to telecast the Titles which are sourced from B4U only on the DD Worldwide Services (DD Worldwide) Channel...” In view of the express wording of Clause 3(a), it is not possible to read into it an obligation, much less an absolute one, on the Petitioner to telecast every film sourced by it from the Respondent. This position becomes clearer on a reading of Clause 4(a) which sets out the terms of payment for the films sourced. The proviso to Clause 4(a) makes it clear that the “Petitioner shall not be under any obligation to pay the consideration in respect of any of the Titles which may have been supplied by B4U but not telecast by Prasar Bharati for any reason whatsoever.” Even the earlier portion of Clause 4(a) requires the Petitioner only to pay “for the Title that Prasar Bharati telecasts under this Agreement”. In other words, the latter part of Clause 4(a) is not unworkable or severable as suggested by the learned Senior Counsel for the Respondent. Clause 4(a) has to be read as a whole. It is consistent with Clause 3(a) which makes it clear that there is no obligation on the Petitioner to telecast any of the films sourced by it from the Respondent. The obligation to make payment arose only when a sourced film was telecast. This is evident from a plain reading of the above clauses, whether collectively or separately. The wording of the clauses is unambiguous and no two interpretations are possible. In holding that there was no clause in the Agreement that gave the Petitioner the ‘right not to telecast a film’, the learned Arbitrator misdirected himself in posing the wrong question. The correct question to ask was whether there was a positive obligation on the Petitioner to telecast four films every month and the answer to that was plainly in the negative. The learned Arbitrator’s conclusion that there was an absolute obligation on the Petitioner to telecast four films every month is contrary to the clauses of the Agreement.

19. The other conclusion that the Petitioner was obliged to pay for four films every month even if such films were not telecast is plainly contrary to and based on an erroneous interpretation of Clauses 3 (a) and 4 (a) of the Agreement. The obligation to pay arose only where a film was in fact telecast and not otherwise. Consequently, the learned Arbitrator also erred in determining the compensation payable by the Petitioner to the Respondent as Rs.1.05 crores based on the consideration payable for the films in terms of Clause 4(a) of the contract.

20. In ***Steel Authority of India v. J.C. Budharaja***, the Supreme Court held as under (SCC, pp.130-132):

“15.... It is settled law that arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs. 11 lakhs and more for the alleged lapses or delay in handing over work site is, on the face of it, against the terms of the contract.

....

17. It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. Arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must.”

21. Further in *Food Corporation of India v. Chandu Construction*, the Court observed as under (SCC, pp.702):

“11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error.”

22. Applying the law explained in the above decisions to the case on hand, there is no difficulty in concluding that the impugned Award is vitiated by a patent illegality as the learned Arbitrator “has acted beyond the terms of the contract” and has committed a jurisdictional error. The impugned Award is contrary to the express provisions of the contract between the parties.

23. For the aforementioned reasons, the impugned Award dated 17th December, 2008 is set aside. The petition is allowed with costs of Rs.10,000/- which shall be paid by the Respondent to the Petitioner within four weeks.

S. MURALIDHAR, J.

January 17, 2012

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