

.* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: February 6, 2013

+ OMP No.417/2005

UNION OF INDIA Petitioner
Through Mr. Girish Kumar, Adv.

versus

Elnet Technologies Ltd. & Anr. Respondents
Through Mr. K.S. Mahadevan, Adv. for
Respondent No.1

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J. (Oral)

1. This petition has been filed under Section 34 of Arbitration & Conciliation Act, 1996 against the Award dated 13th June, 2005.
2. Brief facts of the abovementioned petition are that the petitioner and respondent No.1 entered into License Agreement dated 13th November, 1995 for operation of electronic mail service on certain terms and conditions, inter alia, on payment of license fee as provided in the said agreement. The validity of the license was for a period of 5 years from the effective date of the License i.e 13th November, 1995. The License Agreement contained an arbitration clause (clause No.15) which provided that in case of any dispute the same shall be referred to the sole Arbitrator. Respondent No.2 was appointed as sole Arbitrator vide letter dated 30th January, 2004 who passed the impugned award dated 13th June, 2005, whereby only a sum of

₹5,48,288/- along with interest rate @ 6 % p.a from 26th September, 1997 till the date of final payment was awarded against the claim of the petitioner for an amounts of ₹20,82,233/- plus further clearance of the dues.

3. It is the case of the petitioner that the learned sole Arbitrator has travelled beyond the jurisdiction while passing the impugned Award and committed gross illegality by way of re-determining the date of termination of license of respondent No.1. The petitioner issued a show cause notice dated 26th June, 1997 (under clause 8.1.1) to the respondent for making payment of the outstanding license fee and interest thereupon amounting to ₹11,05,327/- within 30 days from the receipt of the notice and also directed the licensee to furnish a fresh financial bank guarantee of ₹25,00,000/- failing which the license agreement will be terminated. In response to the show cause notice, the respondent sent a letter dated 1st August, 1997 communicating its intention of getting the license terminated. The license agreement got terminated on 16th December, 1997 after the approval of competent authority, not in term of the letter of the licensee but, pursuant to the petitioner's show cause notice issued to respondent No.1. As per clause 8.3 the respondent was bound to give a clear 365 days notice for such termination/surrender of the license. Accordingly, if the licensee's letter dated 1st August, 1997 is to be taken cognizance of, the license would be terminated on 1st August, 1998 only. This letter dated 1st August, 1997 is an undisputed fact of failure of the respondent to make the payment of the outstanding dues. Due to the quantum of dues of the license, the petitioner issued the termination orders on 16th December, 1997. The learned sole Arbitrator therefore had no locus standi in determining an alternative date of termination of the license agreement. The learned Arbitrator misconducted

himself while passing the Award, as on one hand he admitted the factum of breach of contract on the part of respondent No.1 and on the other hand denied to accept the claim of the petitioner with respect to the due license fee upto the date of termination of license i.e 16th December, 1997 and interest on the overdue license fee.

4. The learned Arbitrator has also failed to apply the correct proposition of law while re-determining the date of termination of the license agreement as 26th September, 1997. The learned Arbitrator had substantially rejected the claim of the petitioner with respect to the interest on the overdue amounts of the license fee on the ground that the claimant failed to encash the bank guarantee. The respondent paid ₹10,00,000/- as the license fee for the first two quarters alone against the due amount of ₹25,00,000/- and the second quarter payment of ₹5,00,000/- was paid with a delay of 5 months and 18 days. Also, the respondent licensee didn't make any payments beyond the second quarter of the first year. But, opportunity was given to the licensee to clear the payments and not encash the available bank guarantees on 9th April, 1997 in order to realize due license fees. But, since the respondent did not do so, the petitioner had no option but to encash the financial bank guarantee. However, accumulated interest could not be liquidated. On accumulation of another quarters due on 13th May, 1997 a show cause notice under clause 8.1.1 was served on the licensee on 26th September, 1997. This was responded by the licensee with their request to terminate the license. In order to realize part of the license fees which had fallen due on 19th August, 1997 performance bank guarantee was encashed. The learned sole Arbitrator in contravention of terms and conditions of the license agreement took the view that the bank guarantee encashed by the

petitioner on 9th April, 1997 and 19th August, 1997 was immediately after the payment became due. Ironically, learned Arbitrator allowed interest where licensee eventually paid the quarterly amounts albeit late but, did not allow the same where the petitioner was forced to enforce the bank guarantee in the face of persistent non-payment. Moreover, no time is prescribed in the license agreement that before expiry of such time, the bank guarantee shall be encashed. The learned Arbitrator has erroneously formed an opinion that bank guarantee encashed be taken as a payment on the due date itself. Also, it is illegal to consider money to have been received on a date, prior to its actual receipt has been received on a date, prior to its actual receipt. The learned Arbitrator has exceeded his jurisdiction by holding that after the termination of license, the rate of interest provided in the agreement cannot be applied. The learned Arbitrator further misconceived that no agreed rate of interest existed between the parties after the termination of agreement and thus committed illegality for not considering and accepting the agreed rate of interest as per the agreement. The petition is valued @ ₹20,82,233/-. Through this petition the petitioner seeks the setting aside of Award dated 13th June, 2005.

5. The respondent denies the allegations contained in paragraph 2 of the petition and submits that the petitioner, in order to cover up its latches raised a dispute when all the amounts due to the petitioner had either been paid or recovered through encashment of the bank guarantees. With regard to ground A(i) of the petition, the respondent submits that petitioner has not pointed out any specific portion in the Award which could be said to be beyond the jurisdiction of the learned Arbitrator. He submits that grounds A(ii) & (iii) of the petition which make reference to clause 8.1.1 of the

license agreement are in fact contrary to the contention raised by the petitioner, so he cannot contend that the show cause notice dated 26th June, 1997 was not the notice as contemplated under clause 8.1. Therefore, the petitioner having invoked clause 8.1 in the notice dated 26th June, 1997 cannot postpone the date of termination of the agreement unilaterally and contrary to the terms and conditions of the license agreement. Hence, the petitioner cannot contend that the license agreement was terminated only on 16th December, 1997. The respondent No.1 further submits that with regard to ground A(iv) letter dated 1st August, 1997 the show cause notice cannot be construed as one falling under clause 8.3 and the termination of the license agreement was accepted by the respective letter. The respondent submits that ground A(v) is erroneous both in law and in fact. By virtue of the notice dated 26th June, 1997 clause 8.1 was invoked, license agreement was terminated w.e.f 26th September, 1997. Moreover, all further correspondences alleging termination thereafter would have no legal consequences as termination couldn't be done twice over. The respondent submits that ground raised in A(vi) is misleading as the respondent company vide letter dated 1st August, 1997 merely requested the license agreement to be terminated and same cannot be construed as surrender of the license so as to extend the license agreement by 365 days thereof. Therefore, petitioner cannot seek to lay a new interpretation of the letter dated 1st August, 1997. The respondent further submits that ground A(vii) is misleading as the agreement had been terminated w.e.f 26th September, 1997 and the liability could at best be only upto that date, not beyond. The ground under reply attempts to extend the period upto 16th December, 1997 which is neither factually nor legally correct. Therefore, the question of payment of interest

for such period does not arise. The respondent denies the ground raised in paragraph B(i) of the petition and submits that mere rejection of the claim of the petitioner would not render an Award passed illegal. The respondent denies the ground C(iii) as the failure to encash the bank guarantees immediately when the payments fell due only expose the laches on the part of petitioner for which the respondent company be made liable to pay the interest for the said period. The respondent denies ground C (iii),(iv), (v), (vi), (vii), (viii) as these grounds are nothing but self serving pleas and petitioner cannot contend that only after continues follow up method have failed, the bank guarantees can be invoked. The respondent submits that ground (ix) ,(x), (xi) doesn't stand to reason, as the petitioner ought to have invoked the bank guarantee as and when the payment fell due so as to mitigate the loss which wasn't done in the present case. The respondent No.1 denies ground raised in para D as the learned Arbitrator was right in holding that the petitioner didn't point out any specific clause in the agreement which makes reference to the rate of interest payable after agreement stood terminated. In the absence of such a clause, a normal rate of interest could be made applicable.

6. The petitioner filed the objections under Section 34 of the Arbitration and Conciliation Act, 1996 against the Award dated 13th June, 2005. Along with the objections, the petitioner also filed an application under Section 5 of the Limitation Act, 1963 for condonation of delay of 30 days. The notice was issued to the respondent. The delay was condoned by order dated 24th March, 2008.

7. When the matter was taken up for final disposal on 22nd August, 2012, no one appeared on behalf of either party and the petition was dismissed for

non-prosecution. Thereafter, I.A. No.21476/2012 was filed by the petitioner for restoration of the petition.

It is stated in the application that when the matter was put in the category of 'final matters' on 15th April, 2009, the counsel was appearing on behalf of the Union of India. Thereafter, counsel ceased to be a counsel for the petitioner due the change of panel. It is further stated in the application that since the instant petition was not listed in the dairy of the counsel, he was not aware about the pendency of the petition and therefore, he could not appear in the matter on 22nd August, 2012 and the matter was dismissed for non-prosecution. Thereafter, on 6th September, 2012 the petitioner enquired from him about the status of the present petition. He checked the status and came to know that the petition was dismissed on 22nd August, 2012. Therefore, the counsel submitted that non-appearance was not intentional. The petitioner filed two more applications being I.A. No.21477/2012 (for condonation of delay of 44 days) as well as I.A. No.21478/2012 (for condonation of delay of 38 days in refilling).

8. When the matter is taken up today, the counsel appearing on behalf of the petitioner was asked to argue the case on merit, but no submissions are made by him. Considering the overall facts and circumstances of the matter and after having gone through the case on merit, this Court is not inclined to interfere with the Award passed, in view of the settled law. The pending applications filed by the petitioner are also accordingly, dismissed. No costs.

FEBRUARY 06, 2013

**(MANMOHAN SINGH)
JUDGE**