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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on 12.07.2019

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Judgment pronounced on 19.03.2020

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O.M.P. (COMM) 469/2018

NATIONAL BOARD OF EXAMINATIONS Petitioner

Through: Mr. Kirtiman Singh, Ms. Shruti Dutt,
Mr. Prateek Dhandha and Mr. Waize
Ali Noor, Advs.

versus

PROMETRIC TESTING PVT. LTD. Respondent

Through: Mr. Jay Savla, Sr. Adv. with Mr.
Vishal Malhotra and Mr. Rajpal
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

1. This petition is directed against award dated 06.07.2018 passed by the sole arbitrator. The petitioner before me is the National Board of Examinations (hereafter referred to as "NBE"). *Via* the impugned award, the learned arbitrator has answered the reference in favour of the respondent i.e. M/s Prometric Testing Pvt. Ltd. (hereafter referred to as "PTPL").

1.1. The reference made, jointly, to the learned arbitrator by NBE and PTPL (hereafter unless the context requires otherwise both entities will be collectively referred to as "parties") concerned a singular issue, which is, whether server logs/proxy server logs fall within the ambit of the expression "candidate data" as defined in Clause 1.2 of Master Service Agreement (in

short “MSA”)? Notably, there was no monetary claim or counter claim made by the parties before the arbitrator.

1.2. Furthermore, parties chose not to lead evidence in the matter. Therefore, before I proceed further, it may be necessary to etch out, broadly, the backdrop in which parties made a reference to the arbitrator.

2. In May 2012, NBE was given the mandate to conduct competitive examinations in the field of medicine. Since then, NBE has engaged the services of PTPL.

2.1 Towards this end, parties executed an agreement (i.e. the MSA) on 23.05.2012. Alongside the MSA, parties also executed a Statement of Works (SOW) on the same date i.e. 23.05.2012.

3. Based on the aforesaid arrangement, PTPL conducted Computer Based Tests (in short "CBT") on behalf of NBE between 2012 and 2016. Notably, *qua* CBT, the content was provided by NBE, while PTPL rendered technical assistance/support.

4. It is in this background that PTPL was called upon to conduct a National Eligibility-cum-Entrance Test for postgraduate courses between 05.12.2016 and 13.12.2016 (in short NEET-PG 2017). Pursuant to the NEET-PG 2017 being held, the result was declared on 13.01.2017.

5. It appears that since a piece of information was received by the Delhi Police, on 01.02.2017, regarding tampering with the computer systems, an FIR bearing No.13/2017 was registered by its Crime Branch under Section 419, 420, and 120B of the Indian Penal Code, 1860 along with Section 66D of the Information Technology Act, 2000.

5.1 It is the registration of the FIR and issuance of the letter dated 26.05.2017 which spurred NBE to call upon PTPL to submit the server

logs/proxy server logs of all the examination centres whereat NEET-PG 2017 was conducted.

6. Given the request made by the Crime Branch, NBE, on 29.05.2017, wrote to PTPL to submit the server logs/proxy server logs to the Crime Branch.

6.1 Apparently, PTPL via a communication dated 02.06.2017 informed the crime branch that it would require time till the middle of July 2017 to comply with the request made by the petitioner on its behalf to submit the server logs/proxy server logs.

6.2 It may be pertinent to note that while seeking time to comply with the request of the crime branch to furnish the server logs/proxy server logs, PTPL outlined in the very same communication the assistance which it had rendered from time to time to the Crime Branch upon notices being served on it under Sections 91 and 160 of the Code of Criminal Procedure, 1973. The relevant extract of this communication is set out hereafter:

Date of Notice	Particulars	Whether replied to or not	Remarks
02 February 2017	Notice under Section 91 For providing details of NEET PG Examination Centers of Delhi NCR and Chandigarh	Yes	Acknowledgement issued by Crime Branch on 02 February 2017.
16 March 2017	Notice under Section 160 CRPC and Section 91 CRPC for [the] appearance of the Company representative and to supply of documents.	Yes	On 16 March 2017, the representatives of the Company appeared and submitted the response in person. 26 HDD with complete CCTV footage of all requested venues was

			provided on 28-Apr-2017
25 March 2017	Notice under Section 91 CRPC for [the] supply of documents and login files	Yes	On 03 April Candidate Details, all Log files were supplied to, 4 DVD footage containing DVR Footage of the candidates were also supplied.
12 April 2017	Notice under Section 91 CRPC, wherein [the] list of 17 questions were [<i>sic: was</i>] listed.	All replied to	A detailed Response dated 12 May 2017 submitted.
25 April 2017	Notice under Section 91 CRPC asking for CCTV footage of the Centers below 1. Jamshedpur (Netaji Subhash Institute of Business Management) 2. Bangalore (All centers) 3. Delhi (Centre-On Line Education, Kalkaji).	Yes	All CCTV footage supplied on 28 April 2017
03 May 2017	Notice under Section 91 CRPC	Yes	All documents supplied on 12 May 2017.

6.3 The record shows that NBE reiterated its request made to PTPL to submit the server logs/proxy server logs vide its letter dated 03.07.2017 after its Director was asked vide communication dated 29.06.2017 to appear before the concerned officer of the Crime Branch for furnishing various information/documents connected with the NEET-PG 2017 exam. Notably, the Director, NBE, was asked, *inter alia*, via this very communication to provide the server logs/proxy server logs for all examination centers.

6.4 This time around though, on 07.07.2017, PTPL, wrote to NBE that it would not be possible for it to furnish the server logs/proxy server logs, *inter*

alia, for the reason that it installs a “specific packaged” and “pre-configured” set of proprietary software to conduct the exam and that once the exam is concluded, the equipment which is provided at the venue is returned to the same state in which it existed before the installation of the proprietary software.

6.5 PTPL, thus, conveyed to NBE that server logs/proxy server logs including those which are used to isolate the testing environment have no value after the end of a testing day as they did not contain data specific to an individual candidate’s test events.

6.6 It was emphasized by PTPL that these logs were not retained once the equipment was returned to its prior state.

6.7 Furthermore, PTPL went on to stress that the logs did not contain any information regarding either the candidates or their work stations, and therefore, perhaps, for these reasons had not been sought in the past by NBE.

6.8 Pertinently, it is in this communication, that PTPL took the stand that logs concerning server logs/proxy server logs or hard disks of server logs/proxy server logs were not “***candidate data***” as defined in Clause 1.2 of the MSA and that these logs provided no useful information after the conclusion of a test-administration.

6.9 As per PTPL, it had never felt a need to archive server logs/proxy server logs or hard disks, and therefore, they were not retained.

7. It may be important to note that pursuant to the information sought by the Crime Branch from Director, NBE, *via* its communication dated 29.06.2017, the NBE responded to the same and furnished whatever information it could vide letter dated 30.06.2017.

8. Pertinently, insofar as the Crime Branch directive to NBE to furnish server logs/proxy server logs pertaining to all examination centers vis-à-vis NEET-PG 2017 was concerned, NBE directed the Crime Branch to PTPL.

8.1 It was stated that since the servers were deployed and maintained by PTPL, the information in that behalf would be available with PTPL.

9. The record shows that the Crime Branch filed the charge sheet in the concerned court on 09.07.2017. Pertinently, neither NBE nor PTPL or even their employees/officers were arrayed as accused.

10. Since parties were unable to reach an agreement as to whether or not it was the responsibility of PTPL to retain server logs/proxy server logs and furnish the same to NBE, they chose to refer the dispute, *albeit*, jointly, to the sole arbitrator.

11. It is in this background that the impugned award came to be rendered. The NBE, being aggrieved, has preferred the instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (in short “1996 Act”).

Submissions of Counsel

12. In support of NBE’s case, arguments were advanced by Mr. Kirtiman Singh, while on behalf of PTPL, submissions were made by Mr. Jay Savla, Senior Advocate, instructed by Mr. Vishal Malhotra, Advocate.

13. Mr. Kirtiman Singh made the following broad submissions on behalf of the NBE:

(i) PTPL was engaged by NBE to conduct CBT. It was, therefore, the responsibility of PTPL to ensure that the CBT was conducted without a glitch, inasmuch as, the integrity of the exam was not compromised. This being the obligation placed on PTPL, it was incumbent upon PTPL to retain

the relevant information concerning the subject exam and to furnish the said information in the form of documents or otherwise in case of a breach.

(ii) The stand taken by PTPL that it was not obliged to furnish the server logs/proxy server logs as they did not fall within the ambit of the expression “candidate data”, as defined in Clause 1.2 of the MSA, was untenable.

(iii) It was submitted that a careful perusal of the definition of the expression “candidate data” provided in Clause 1.2 of the MSA would show that it brought within its ambit every such data which concerned the candidate or was provided by the candidate. Thus, the finding returned by the sole arbitrator that server logs generated by the candidates did not fall within the ambit of the expression “candidate data” was, plainly contrary to the wordings of Clause 1.2 of the MSA.

(iii)(a) In support of this plea, reference was made to Clause 13 of the SOW which dealt with “Candidate Result Reporting”. Besides the aforementioned clauses, reference was also made to Clauses 1.1, 11.2, 11.3, 11.6, 11.8, 11.9 and 23.1 of the SOW.

(iv) In the alternative, it was argued that if as held by the sole arbitrator, server logs/proxy server logs fell within the ambit of “candidate result reporting” then PTPL was obliged to retain the data for at least 180 days. In support of the contention that the arbitrator had held so, reference was made to paragraphs 48 and 49 of the impugned award.

(iv)(a) In this connection, it was emphasized that NBE had requested PTPL to furnish the server logs/proxy server logs before the expiry of 180 days. In this behalf, reference was made to letter dated 29.05.2018 addressed by NBE to PTPL and the letter dated 02.06.2017 addressed by PTPL to the concerned officers in the Crime Branch.

(iv)(b) In this context, it was also emphasised that the perusal of the letter dated 02.06.2017 would show that NBE had made the same request as early as in April 2017.

13.1 In a nutshell, the contention advanced on behalf of NBE was that the impugned award was flawed and hence, deserved to be set aside. In support of the aforementioned submissions, reliance was placed on the judgment rendered in *Mahanagar Telephone Nigam Ltd. v. Finolex Cables Ltd.*, 2017 SCC OnLine Del 10497.

14. On the other hand, Mr. Jay Savla made the following submissions:

(i) The reference made to the learned arbitrator was confined to the interpretation of the clauses of the MSA read with the SOW.

(ii) The parties had not sought any consequential relief or monetary compensation. Therefore, under Section 34 of the 1996 Act, this court would have no jurisdiction to interfere with the award as the construction of the terms of the agreement obtaining between the parties would essentially fall within the domain of the learned arbitrator. The courts have a very limited leeway in cases involving the interpretation of terms of a contract. In support of this submission, reliance was placed on the following judgments:

(a) *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181;

(b) *Steel Authority of India Limited v. Gupta brother Steel Tubes Ltd.*, (2009) 10 SCC 63;

(c) *Sumitomo v. ONGC*, (2010) 11 SCC 296;

- (d) *National Highways Authority of India v. ITD Cementation India Ltd., (2015) 14 SCC 21;*
- (e) *Chennai Metropolitan Water Supply and Sewerage Board v. Subhash Projects and Marketing Ltd. and Ors., (14.06.2017 - MADHC);*
- (f) *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*
- (iii) Furthermore, it was contended that the ***candidate data*** as defined in Clause 1.2 of the MSA includes the data concerning the candidate which was provided to PTPL by NBE or that which was collected by PTPL from the candidates.
- (iii)(a) This data would also include personal identification data, test results, test registration, and other data which concerned or was provided by the candidates. Insofar as personal identification data is concerned, the definition given in Clause 1.7 of the MSA makes it clear that it adverts to data that concerns identification or is related to the contact information of a candidate.
- (iv) As per Clause 7.3 of the MSA, only candidate data is to be treated as NBE owned material.
- (v) Besides this, Clause 13 of the SOW, adverts to “Candidate Result Reporting”. Under Clause 13.5 of the SOW, PTPL’s obligation to store or retain answers generated by the candidate or candidate’s record was only for 180 days commencing from the date of termination or expiration of the SOW.
- (vi) There is no provision in the MSA which would require PTPL to retain data other than candidate data. PTPL has been working with NBE since

2012 and it has never up until July 2017 called upon PTPL to furnish information *qua* server logs/proxy server logs.

(vii) To lend clarity as to the information which is contained in server logs/proxy server logs, PTPL had relied upon temporary site data alongside the complete technical installation manual.

(vii)(a) A perusal of the details of logs generated during testing events would show that the proxy server data contained generic logs and not the information concerning any test taker or testing work station machine. It also demonstrates that troubleshooting data is used to help test sites run smoothly during the duration of the exam and after the exam is completed, the temporary test site work station machines are restored to their original state.

(vii)(b) At this stage, proxy server data file logs are eliminated. These logs do not contain any data specific to individual candidate test events and as such are not retained when the equipment is returned to its pre-existing state. No information concerning the candidate, contents or testing work station is captured or stored in the server logs/proxy server logs.

Reasons

15. I have heard learned counsel for the parties and perused the record. What emerges from the record and *qua* which there is no dispute is as follows:

(i) PTPL had been working alongside NBE to conduct post-graduate medical exams since 2012.

(ii) Since a complaint was received vis-à-vis NEET-PG 2017 exam, NBE called upon PTPL to provide server logs/proxy server logs for all exam centers, *albeit*, at the behest of the Crime Branch. The Crime Branch

independent of NBE had been issuing notices to PTPL under Section 91 and 160 of the Cr.P.C. calling for information and documents since February 2017. The fact that PTPL had been co-operating with the Crime Branch is quite evident upon perusal of the contents of the letter dated 02.06.2017 addressed to the concerned officer in the Crime Branch.

(iii) That PTPL had sought time from the concerned officer in the Crime Branch to furnish the server logs/proxy server logs also emerges upon a perusal of the letter dated 02.06.2017.

(iv) Furthermore, PTPL's stand that it had no obligation under the MSA to furnish the server logs/proxy server logs comes through upon perusal of its letter dated 07.07.2017 addressed to NBE.

(v) The Crime Branch/the prosecutor without waiting for receipt of the server logs/proxy server logs filed the charge sheet in the concerned court on 09.07.2017.

(vi) Pertinently, neither NBE nor PTPL or any of its officers/employees, are arrayed as accused in the charge sheet filed with the concerned court. This fact was affirmed by the counsel for the parties at the hearing held on 24.01.2019.

(vii) It is this aspect i.e. as to whether or not PTPL was obliged to retain and furnish the server logs/proxy server logs to NBE which spurred the parties into making a joint reference to the sole arbitrator.

16. Given the aforesaid circumstances, two issues arose for consideration before the learned arbitrator. First, as to whether the server logs/proxy server logs would contain information concerning the candidates. Second, as to whether the expression "candidate data" as defined in Clause 1.2 of the MSA would bring within its ambit server logs/proxy server logs.

17. Insofar as the first aspect is concerned, PTPL generated temporary site data to demonstrate as to the kind of information which is contained in server logs/proxy server logs. The learned arbitrator noted this aspect of the matter in paragraph 23 of the impugned award. For the sake of convenience, the relevant observations are extracted hereafter :

“Insofar as the Prometric is concerned, its stand is very clear. It has denied that prometric was bound to provide proxy server log files to NBE. It has reiterated that proxy logs did not contain any information relating to a candidate; Proxy server logs contain generic service operating software whose purpose is to restrict communication within testing site to the external sites according to a pre-defined "white listing". Prometric has relied upon "temporary test site data management overview" along with complete technical installation manual of Prometric in order to explain and provide clearly on the logs generated during examinations and their relevance.”

(emphasis is mine)

18. In the course of the arguments, a reference in this behalf was also laid by Mr. Jay Savla on the logs generated during the testing events. An extract of this document which, I am told, formed part of the record, *inter alia*, reads as follows:

“The proxy server data file logs, however, are not sent back to the Prometric data centre because these generic logs do not contain information for any test taker or testing workstation machine. Specifically, they contain only the operational troubleshooting test site data (not the test taker ID or test-taking movement/response data) captured during the actual testing time. This troubleshooting data is used to help test sites run smoothly for the duration of the exam providing a stable environment for the test takers. After completion of the test administration window, the process Prometric uses to restore temporary test site workstation machines to their original state

also eliminates the proxy server data file logs.”

(emphasis is mine)

19. The NBE has not placed before me anything which would contradict the assertion that proxy server data file contains only generic logs and not information concerning any test taker or testing workstation machine. It is, perhaps, for this reason, that the Crime Branch or the prosecutor did not feel the need to press ahead with its request that they are furnished information concerning the server logs/proxy server logs.

20. Insofar as the argument advanced on behalf of NBE that PTPL was required to store or maintain tests, answers or candidate records for 180 days after the effective date of termination or expiration of the SOW, the same would have weight if it was able to demonstrate that this information was available in the server logs/proxy server logs. Even if one were to assume that such information was available, as contended on behalf of NBE, then, it should have at the appropriate stage taken recourse to the remedy available in law for the preservation of the said data.

21. Therefore, to my mind, the petitioner, at this stage, can gain no mileage by adverting to the observations made by the learned arbitrator in paragraphs 48 and 49 of the impugned award. If anyone is to blame, for the matter to come to this pass, it is the NBE. As noted above, NBE's interest arose only upon Crime Branch seeking access to server logs/proxy server logs. Between February 2017 and 28.05.2017, NBE did not attempt to retrieve the server logs/proxy logs. What was an arguable stand was, perhaps, lost on account of NBE's procrastination.

22. This brings me to the second aspect as to whether the information contained in the server logs/proxy server logs falls with the ambit of the expression “candidate data”.

23. A perusal of the impugned award would show that after referring to several clauses of the MSA, the learned arbitrator has answered the reference in the following manner :

“49. Various clauses as have been quoted above clearly makes a distinction between candidate data and the logs generated by the candidate in the test lab, during the test. Logs created by the candidate during the test in the test lab, by no stretch of imagination can be considered to be a part of candidate data. Neither expressly nor by necessary implication logs generated by a candidate during the tests in the test lab is a part of candidate data. There is no obligation on the part of Prometric to store such logs generated by a candidate in the test lab relating to the test beyond 180 days whereas candidate data has to be retained by Prometric on its system for a period of three years from the date of tests or other services provided by Prometric to the candidates.

50. Clause 23.1 of the Statement of Works permits NBE or a candidate to seek review of the fairness or accuracy of the tests due to equipment or software failure or disruptive conditions in a Prometric test centre. On such a review having been sought, Prometric is obliged to promptly furnish NBE with relevant discrepancy report, technical data and analysis.

51. Reading the entire Master Service Agreement and Statement of Works, by no stretch of imagination, it can be assumed or inferred that the logs generated by a candidate in the test lab, while taking tests will fall in the definition of candidate data. Candidate data is merely to identify candidate's personal particulars. As such the Second Party was fully justified in not providing the logs generated by a candidate in the test lab, while taking tests since its stand is that such candidates' logs

generated by a candidate in the test lab, while taking tests are not retained and are not available.”

24. To my mind, apart from the fact that interpretation of a document (in this case various clauses of MSA and SOW) falls within the domain of the arbitrator, no case has been made out by the NBE which would have me conclude that the view taken by the learned arbitrator is not a plausible view.

25. A careful perusal of Clause 1.2 would show that candidate data is that data which concerns a candidate that is provided to PTPL by NBE or is collected by PTPL from the candidate in connection with the work entrusted to PTPL under the MSA. This data also includes personal identification data, test results, test registration or any other data concerning or provided by a candidate.

26. The personal identification data which is defined in Clause 1.7 of the MSA also includes any information that is either provided to PTPL by NBE or collected by PTPL in connection with the work entrusted under the MSA. The information which falls within the ambit of personal identification data includes all such information which identifies or that which can be used to identify or contact the person to whom such information relates or such information from which identification or contact information of an individual can be derived.

26.1 Thus, personal identification data includes information such as a person's name, address, phone number, fax number, e-mail address, social security number, credit card information or other government-issued identifiers. It is this data i.e. the candidate data which is owned by NBE as per the provisions of Clause 7.3.1 of the MSA.

26.2 Furthermore, PTPL is obliged to retain the data for three years which commences from the date of the test, assessment or other service provided by PTPL to a candidate.

27. There is, to my mind, nothing stated in Clauses 11.2, 11.3, 11.6, 11.8, 11.9 and 23.1 of the SOW which suggests that PTPL was required to retain and furnish the information contained in the server logs/proxy server logs. Clause 11 along with such relevant clause deals with test delivery, while Clause 23.1 of the SOW adverts to the steps that PTPL is required to take if NBE or a candidate requests to review the fairness or accuracy of the test conducted on account of equipment or software failure or due to disruptive conditions obtaining in the exam centre/venue. The information furnished by PTPL is used, if necessary, by NBE to either allow the test score to stand, or adjust the test score or allow the candidate to retake the test.

28. Thus, given the foregoing discussion, I find no merit in the petition. The petition is, accordingly, dismissed.

29. It is, however, made clear that the dismissal of the petition will not come in the way of the prosecution seeking any information that may be available with PTPL for taking its case forward against the accused before the concerned court, *albeit*, as per law.

30. There shall, however, be no order as to costs.

RAJIV SHAKDHER, J

MARCH 19, 2020

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