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

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Date of Decision: 08.04.2024

+ **FAO (COMM) 62/2024 CM APPL. 20715/2024 (for
condonation of delay of 70 days in refiling) CM APPL.
20716/2024 (exemption)**

AVINASH SACHDEVA (PROP)
M/S DIMPLE LODGE

..... Appellant

Through: Mr Samrat Nigam, Mr Mohd.
Qamar Ali, Ms Aprita Rawat,
Mr Cyril Ignations and Mr
Pushpender Sachdeva,
Advocates.

versus

MAHANAGAR TELEPHONE NIGAM
LTD. (MTNL)

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J. (Oral)

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning the judgment dated 28.11.2023 (hereafter *the impugned judgment*) passed by the learned Commercial Court in OMP (COMM) No. 27/2022 captioned *Avinash Sachdeva v. Mahanagar Telephone*



Nigam Limited.

2. The appellant had filed the said petition [OMP (COMM) No. 27/2022] under Section 34 of the A&C Act impugning the Arbitral Award dated 16.12.2020 (hereafter *the impugned award*) rendered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter *the Arbitral Tribunal*).

3. The impugned award was rendered in the context of the disputes that had arisen between the parties in connection with an agreement dated 02.08.2006 (hereafter *the Agreement*). In terms of the Agreement, the respondent, Mahanagar Telephone Nigam Limited (hereafter *MTNL*), had engaged the appellant as an authorized distributor for sale and distribution of its products and services namely, “VCC, Bol-Anmol (*Internet telephone card*), Dolphin (*cellular postpaid*), Trump (*Cellular-prepaid*), ISDN, INET, IN, CD-ROM Directory, ECS, NTC, CUG, Internet, Broadband, Phone Plus STD-ISD code book etc.”

4. In terms of the Agreement, the appellant had submitted a bank guarantee of ₹5,00,000/- being Performance Bank Guarantee of ₹3,00,000/- and security deposit of ₹2,00,000/-.

5. The appellant being party to the Agreement also agreed in terms of Clause 22 of the Agreement, to indemnify MTNL against all losses suffered due to his acts or acts of his agents and representatives. The appellant also agreed to fully indemnify and keep MTNL indemnified against damages or any other claims which would be brought against



the MTNL by any third party owing to the actions attributable to the appellant. The appellant also executed a Deed of Indemnity dated 02.08.2006 to the aforesaid effect.

THE DISPUTE

6. The dispute between the parties relates to the claims raised by the appellant for payment of incentives in terms of the Agreement and wrongful encashment of the bank guarantee of ₹5,00,000/-. The appellant filed Statement of Claim, claiming a sum of ₹10,20,500/- towards incentives; an amount of ₹5,00,000/- recovered wrongfully by MTNL by invoking the bank guarantee; costs of ₹1,00,000/-; and *pendente lite* and future interest at the rate of 18% per annum.

7. MTNL also raised a counterclaim for a sum of ₹20,55,000/- on account of penalty imposed by Department of Telecom, Government of India (hereafter *DoT*) relatable to non-compliant Customer Application Forms (hereafter *CAFs*) furnished by the appellant.

8. The appellant's entitlement to incentives is not in dispute. However, the controversy in this regard largely related to the quantification of the said amount and the principal dispute related to MTNL's claim for damages on account of penalty imposed by DoT.

9. The appellant contested MTNL's counterclaim for damages primarily on five grounds. First, that it is in the nature of penalty and therefore, unsustainable. Second, that the levy of penalty was a matter *inter se* the DoT and MTNL, therefore, the appellant was not liable to



compensate MTNL against any such penalty levied by the DoT. Third, that the amounts sought to be recovered were beyond the period of six months from the date of activation and in terms of the communications issued by MTNL, no claim relating to CAFs could be raised beyond the period of six months from the date of activation. Fourth, that MTNL had invoked the bank guarantee as well as imposed damages upon the appellant without issuance of any prior show cause notice. Lastly, that the appellant had no obligations to verify the CAFs and therefore, could not be held liable for penalty in respect of CAFs. The appellant contended that he had rectified all CAFs that were flagged by MTNL and there was no *inter se* issue on that account. However, if there was any issue regarding any of CAFs, MTNL could have called upon the appellant to rectify the same but there was no ground to levy penalty.

10. The quantum of penalty levied was also contested by the appellant. MTNL, while reiterating its counterclaim, contested the quantum of incentives claimed by the appellant.

IMPUGNED AWARD

11. The Arbitral Tribunal examined the dispute and the extensive material placed before the Arbitral Tribunal including the *inter se* communications issued from time to time.

12. The Arbitral Tribunal did not accept the appellant's claim that the scope of work under the Agreement did not extend to verification of CAFs. The Arbitral Tribunal noted that the Agreement expressly



provided that the scope of work could be extended by MTNL at its sole discretion to include the work like getting the application forms filled from customers, due verification, and completion of other formalities for requests received by MTNL on telephone for supply / provision of its various retail products / services.

13. The Arbitral Tribunal noted that, in fact, within a week of entering into the Agreement, MTNL had issued instructions / guidelines to all distributors including the appellant, setting out the matters to be certified by the distributors. It was expressly provided that the CAFs were required to be signed by the subscribers in the presence of the distributor. The photographs of the subscribers were required to be matched with the person signing the CAFs. The distributors were further required to verify that they have seen the original documents. It is important to note that the said instructions also expressly stated that the *“distributors being a representative of MTNL will have to ensure that the numbers are activated only after being satisfied about the authenticity of the documents attached”*.

14. The Arbitral Tribunal examined the communications issued by MTNL and the circulars and instructions issued by DoT and found as under:

- i. “CAFs were to be filled and signed by the subscriber in the presence of the Claimant-distributor;
- ii. The Claimant-distributor were to match the photo of the subscriber with the person;



- iii. The Claimant-distributor were to see and verify the document submitted with the CAFs with the originals;
- iv. Signature of the applicant of the subscriber to be matched with the ID/document attached to the CAF by the Claimant-distributor.
- v. Numbers were to be activated by the Claimants-distributors only after they being satisfied with the completeness and authenticity of the documents attached to CAFs;
- vi. Verification of all connections activated to be verified within 14 days of activation;
- vii. Cases of activation without due verification; Original CAFs being tampered; Non-complaint CAFs to be made complaint as it being a matter of national security;
- viii. Where the CAFs are found to be non-complaint, proper CAFs should be produced within 24 hours providing for additional 1-year window period for re-verification of CAFs.”

15. In view of the aforesaid findings, the Arbitral Tribunal held that the appellant’s scope of work was expanded in terms of Clause 5 of the Agreement. Accordingly, the Arbitral Tribunal rejected the appellant’s contention that the work of verification of CAFs was not covered within his scope of work under the Agreement.

16. The Arbitral Tribunal rejected the appellant’s contention that no claim could be made in respect of CAFs after six months of activation of the numbers. The Arbitral Tribunal examined the terms of the Deed of Indemnity as well as the communications issued by MTNL and DoT, and concluded that the appellant was not absolved from his liability for



damages on account of non-compliant CAFs.

17. Insofar as the encashment of the bank guarantee is concerned, the Arbitral Tribunal held that MTNL was required to account for the amount recovered.

18. The Arbitral Tribunal evaluated the rival contentions; the material placed on record; and the evidence led by the parties. The appellant's claim for incentive related to a period November 2009 to June 2010. However, in his cross-examination, the appellant (who had examined himself as CW-1) admitted that incentives, prior to March 2010, had been received from MTNL. Thus, the controversy was narrowed down to the incentives payable for the period March 2010 to June 2010.

19. MTNL had produced a tabular statement indicating the calculation of the incentive payable for the period March 2010 to June 2010. After evaluating the material on record, the Arbitral Tribunal accepted the amounts as mentioned in the said tabular statement. MTNL established that it had paid incentives for the month of March 2010, April 2010 and June 2010. The details of the said payment are set out below:

- “i. March 2010 – Rs. 23,397/- (₹25,997/- – 10% TDS)
- ii. April 2010 – Rs. 67,716/- (₹75,240/- – 10% TDS)
- iii. June 2010 – Rs. 83,147/- (₹92,385/- – 10% TDS)”

20. However, MTNL could not establish payment of incentive for the



month of May 2010. The aforementioned tabular chart indicated that the total incentives payable for the period March 2010 to June 2010 was ₹3,76,502/-. Against the said amount, the Arbitral Tribunal found that MTNL had established that it had paid an aggregate amount of ₹1,93,622/-. Accordingly, the Arbitral Tribunal held that a sum of ₹1,82,880/- (₹3,76,502/- – ₹1,93,622/-) was payable to the appellant against his claim for incentives.

21. MTNL also claimed that it was entitled to set off a sum of ₹30,380/- in respect of non-compliant CAFs (434 in number) for the period March 2010 to June 2010. In addition, MTNL also claimed set off for a sum of ₹89,390/- in respect of 1227 non-compliant CAFs for the period November 2009 to February 2010. MTNL claimed a set off for an aggregate sum of ₹1,28,940/- on the basis of non-compliant CAFs.

22. The Arbitral Tribunal accepted MTNL's claim for a set off in respect of 434 number of CAFs for the period March 2010 to June 2010. The Tribunal was of the view that on account of the appellant's claim for incentive related to the said period, MTNL was entitled to claim set off in respect of non-compliant CAFs for the said period. However, the Arbitral Tribunal did not accept MTNL's claim in respect of 1227 number of non-compliant CAFs for the period between November 2009 to February 2010. Since the incentives payable to the appellant did not relate to the said period, the claim for set off relating to that period was disallowed. The Arbitral Tribunal also held that the claim in respect of



these 1227 CAFs relating to the period November 2009 to February 2010 was barred by limitation.

23. The Arbitral Tribunal found that the appellant is entitled to a sum of ₹1,52,500/- against its claim for outstanding incentives [₹3,76,502/- less ₹1,93,622/- (amount already paid) and ₹30,380/- (set off amount)].

24. The Arbitral Tribunal examined MTNL's counter claim in respect of loss/damage arising from penalty imposed by DoT in respect of non-compliant CAFs. MTNL had claimed an amount of ₹20,55,000/- in respect of 169 non-compliant CAFs. However, during the course of the proceedings, MTNL had scaled down its claim. It acknowledged that an amount of ₹2,00,000/-, which was claimed in respect of 16 CAFs was not payable as the said CAFs were found to be compliant on re-checking. Similarly, 11 CAFs in respect of which a penalty of ₹1,15,000/- was claimed, were found to be non-traceable. The Arbitral Tribunal proceeded to examine the claim in respect of 142 non-compliant CAFs (169 CAFs – 16 found compliant and 11 CAFs found to be untraceable). There is apparent inadvertent error in recording the figures in Paragraph 52 of the impugned award as the number of non-compliant CAFs are mentioned as 11 and untraceable CAFs are mentioned as 5. However, the remaining non-compliant CAFs are mentioned as 142. Whilst the total member of non-compliant CAFs is correct, the numbers of untraceable and non-compliant CAFs are incorrect and not in conformity with the figures as mentioned in Paragraph 51 of the impugned award.



25. The Arbitral Tribunal carefully examined 142 allegedly non-compliant CAFs and found that there was an error in MTNL's calculation as penalty in respect of some CAF forms had been included twice. DoT had imposed penalty of ₹6,70,000/- in respect of some CAFs, details of which were provided by MTNL. Additionally, MTNL had also provided the details of CAFs in respect of which aggregate penalty of a sum of ₹7,05,000/- was recoverable. The Arbitral Tribunal found that a number of CAFs were common to both the lists and the penalty in respect of those CAFs amounted to ₹3,00,000/-.

26. Accordingly, the Arbitral Tribunal computed the aggregate amount payable to MTNL against penalty imposed by DoT as ₹10,75,000/- (₹6,70,000 plus ₹7,05,000/- less ₹3,00,000/-).

27. Thus, an aggregate amount of ₹10,75,000/- was found to be payable by the appellant to MTNL in respect of MTNL's counter claims. The Arbitral Tribunal held that against the said amount, the sum of ₹5,00,000/- recovered by MTNL by invoking the bank guarantee, was required to be reduced. The Arbitral Tribunal further adjusted the amount payable by MTNL to the appellant in respect of his claims for incentives and thus, rendered an award of ₹4,22,500/- in favour of MTNL (being ₹10,75,000/- less ₹5,00,000/- the amount recovered by MTNL by encashment of bank guarantee, less sum of ₹1,52,500/- payable to the appellant after setting off the amount of ₹30,380/-). The Arbitral Tribunal also awarded interest at the rate of 9% per annum from the date of commencement of arbitration (that is, 07.12.2011, till the



date of payment).

REASONS AND CONCLUSION

28. Mr. Nigam, learned counsel appearing on behalf of the appellant had confined the challenge in the present appeal to the sole question whether MTNL could claim a loss based on the penalty imposed by DoT. He contended that the Agreement between the appellant and MTNL did not contain any provisions for imposition of penalty on the basis of any claim raised by DoT. He contended that the Arbitral Tribunal had grossly erred in not appreciating the terms of the Agreement. We find no merit in the said contention.

29. It is apparent from a plain reading of the impugned award that the Arbitral Tribunal had examined the terms of the Agreement and had also noted that a deed of indemnity had been furnished by the appellant in terms of Clause 22 of the Agreement.

30. A plain reading of Clause 22 of the Agreement does indicate that the appellant had undertaken to indemnify MTNL against all losses due to his acts. Further, the appellant had also agreed to indemnify MTNL “*against damages or any claims for damages or any other claim or whatsoever nature*” brought against the company by a third party owing to deeds attributable to the appellant. Clause 22 of the Agreement is set out below:

“22. Indemnification:



- 22.1 The distributor indemnifies the company against all losses due to the acts of distributor, its servants, agents, retailers or its representatives.
- 22.2 The Distributor hereby agrees to well and sufficiently protect and keep harmless and indemnify the Company, against all types of embezzlement, misappropriation or misapplication of money.
- 22.3 The Distributor agrees to fully indemnify and keep indemnified the Company against damages or any claims for damages or any other claims of whatsoever nature are brought against Company by any third party owing to deeds entirely attributable to the Distributor. The Company shall be vested with the sole discretion to determine such claims / damages and have the right to adjust the same from any dues payable to the Distributor.
- 22.4 The Company shall not be liable to the Distributor or any other party consequent upon termination of the Agreement for any reason whatever for any claim for loss of profits or for any anticipated booking for Company or on account of any expenditure, investments, leases or any other commitments made by the Distributor in connection with the Agreement made in reliance upon or by virtue of the Distributor's appointment under the Agreement.
- 22.5 The Company's acceptance of any booking from the Distributor after the termination / expiry of this Agreement shall not be construed as a renewal or extension of the Agreement nor a waiver of termination."

31. The Arbitral Tribunal had construed the terms of the Agreement. It is well settled that the question regarding construction of a contract falls squarely within the jurisdiction of the Arbitral Tribunal (reference



MSK Projects India (JV) Ltd. v. State of Rajasthan: (2011) 10 SCC 573. In Assam State Electricity Board v. Buildworth Private Limited: (2017) 8 SCC 146, the Supreme Court had observed that “*matters relating to the construction of a contract lie within the province of the Arbitral Tribunal*”.

32. We also note that the Arbitral Tribunal had considered a similar dispute in connection with the contract, which is identical to the Agreement. The arbitral award rendered by the Tribunal in the said matter was subject matter of consideration by this Court in ***Pushpender Sachdeva (Prop.) M/s Nobel Electronics v. Mahanagar Nigam Telecom Ltd. through its Chairman cum Managing Director: Neutral Citation No. 2024:DHC:2392-DB***. This said decision squarely covers the controversy raised in the present appeal in favour of MTNL.

33. We find no infirmity with the decision of the learned Commercial Court rejecting the appellant’s challenge to the impugned award. The present appeal is unmerited and accordingly, dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

APRIL 08, 2024
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