

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 255 OF 2013

Bharat Sanchar Nigam Ltd.)
A statutory body incorporated under the)
provisions of Companies Act having its)
Mumbai office at 6th Floor, B-Wing,)
BSNL Administrative Building,)
Juhu Danda (Road), Santa Cruz (W),)
Mumbai 400 054)
(Through their Authorized Representative) **Petitioners**

VERSUS

Media Marketing Services (MMS))
14, Ground Floor, Himalaya House,)
79, Palton Road, Mumbai 400 001)
(through its Proprietor)) **Respondents**

Ms.Heena Mody, a/w. Ms.Martina Sapkal, i/b. Arun Sapkal & Co. for the
 Petitioners.

Mr.D.U.Mirajkar for the Respondents.

CORAM : R.D. DHANUKA, J.

DATED : 5th JANUARY, 2015

JUDGMENT

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the said Act'), the petitioners have impugned the arbitral award dated 22nd January, 2013 directing the petitioners to pay an amount of Rs.17,07,517/- inclusive of interest and service tax with further interest of 24% on the said amount to be calculated as and by way of compound interest from the date of award till realization. The learned arbitrator has also awarded cost of Rs.2,35,000/- in favour of the respondents. Some of the relevant facts for the

purpose of deciding this petition are as under :-

2. Prior to June 2007 the petitioners had entrusted the work of putting up advertisement on behalf of the petitioners to the respondents for a period of one year for display of route map in 12 cars in 50 local trains. The respondents agreed to avail the contract at the rate lower than which was fixed in the year 2006 and 2007 and agreed to accept the rate of Rs.10,500/- plus sales tax for one local train of 12 cars. The contract period commenced from 18th December, 2007. The validity period of contract was for 12 months w.e.f. 18th December, 2007. The total estimated value of the contract was Rs.63 lacs.

3. On 3rd December, 2007 the petitioners issued work order upon the respondents. Under the said work order, the validity of the contract was 12 months. The petitioners had agreed to pay a sum of Rs.10,500/- plus service tax as applicable per month per local train. The total cost mentioned in the work order was Rs.63 lacs plus taxes as applicable. The payment was required to be made on quarterly basis after successful completion of each quarter and on submission of bill in duplicate to the Assistant General Manager (Marketing) of the petitioners alongwith photographs and proof of execution of work as per work order duly certified by Marketing Nodal Officer. It was agreed that the payment to be made in accordance with the agreement after ensuring that the displays were physically verified by the competent authority. Under clause 8(g) of the of the said work order, the petitioners reserved the right to terminate the contract anytime of the performance of the agency if not found satisfactorily during the contract period.

4. It is the case of the petitioners that on sample check carried out by the petitioners of the route maps, the petitioners found various lapses such as logos appearing on advertisements of Rs.9/- and plan 550 were wrong. The correct logo

of the BSNL mobile was not printed and as against that the logo printed was of BSNL landline. The maps were not affixed firmly and neatly. Route maps were not affixed firmly. By a letter dated 14th February, 2008 addressed to the respondents, the petitioners placed on board all these alleged lapses and requested the respondents to take necessary corrective action immediately and sought compliance by 16th February, 2008 making it clear that in case of failure, the purchase order would be cancelled without any further notice. It is also mentioned that the date of commencement of the activity will be the date of joint inspection after incorporation of the corrections in response to the points mentioned therein.

5. It is the case of the petitioners that on 16th January, 2008 the inspection was carried out by the petitioners in the presence of the representatives of the respondents and various lapses were found. By letter dated 5th March, 2008 the petitioners placed all these allegations on record and conveyed that the work had not been done at the reasonable time and the work done was only partial and whatever work had been done was not upto the mark. By the said letter, the work order stood cancelled in accordance with clause 8(g) of the work order.

6. Being aggrieved by the letter of termination, the respondents invoked arbitration agreement and applied for appointment of an arbitrator by letter dated 14th November, 2009. Pursuant to the said request the learned arbitrator came to be appointed.

7. The respondents herein filed statement of claim before the learned arbitrator inter alia praying for an amount of Rs.3,06,12,603/- under various heads. The respondents also challenged the termination of contract effected by the petitioners. The said claim was resisted by the petitioners by filing written statement. The

parties also led oral evidence before the learned arbitrator.

8. During the pendency of the arbitration proceedings in the month of July 2011, the petitioners paid a sum of Rs.6,78,295/- to the respondents which according to the petitioners were to be paid by the petitioners to the respondents.

9. By the impugned award, the learned arbitrator directed the petitioners to pay an amount of Rs.17,07,517/- which is inclusive of compensation amount of Rs.15,57,000/-, interest at the rate of 24% per annum thereon compounded at monthly rests from 24th November, 2010 till the date of award after adjusting interest for payment of Rs.6,92,138/- made on 28th February, 2011, the service tax on the compensation amount of Rs.15,57,500/- in the sum of Rs.1,90,638/-. The learned arbitrator gave credit of the amount of Rs.6,92,138/- which was paid by the petitioners during the pendency of the arbitration proceedings and directed to pay further interest of 24% on the said amount of Rs.17,07,517/- to be calculated at the compound rate with monthly rests from the date of award till payment and awarded cost of Rs.2,35,000/-. The said award is impugned by the petitioners in this petition.

10. Learned counsel appearing for the petitioners submits that though under the provisions of the work order, the petitioners were not liable to give any notice to the respondents for rectification of the defective work and had absolute authority to cancel the contract in the event of the respondents committing any breach of the work order, the petitioners had granted an opportunity to rectify the breaches. It is submitted that admittedly there was a joint inspection carried out by the parties. Some of the work carried out by the respondents was admittedly found defective and was brought to the notice of the respondents. It is submitted that under clause 8(g) of the work order, the petitioners had reserved the rights to terminate the

contract any time as the performance of the respondents was found unsatisfactorily during the contract period. It is submitted that the petitioners were thus justified in terminating the contract. In the letter of termination, the petitioners had rendered reasons for termination.

11. It is submitted that the learned arbitrator however has proceeded on the premise that the petitioners were under an obligation to give proper opportunity to the respondents to rectify the alleged breaches which opportunity was not satisfactorily rendered. It is submitted that the learned arbitrator has applied Article 14 of the Constitution of India to the contract in question in arbitration proceedings.

12. It is submitted by the learned counsel that though the learned arbitrator has rendered a finding in the impugned award that the respondents had not carried out the work strictly as per requirement of the petitioners and had not raised the bill as per terms of the contract, the learned arbitrator has contrary to such finding has awarded compensation to the respondents. It is submitted that the conclusion of the learned arbitrator is contrary to the findings rendered by the learned arbitrator.

13. It is submitted by the learned counsel that in any event, the respondents ought to have proved the claim for damages/compensation which the respondents failed to prove and thus no amount could have been awarded by the learned arbitrator towards compensation to the respondents.

14. It is lastly submitted that since no amount was due and payable to the respondents, the question of awarding any interest to the respondents did not arise. In the alternate submission, it is submitted that even if this court comes to the conclusion that the learned arbitrator has rightly awarded the claim for

compensation, the learned arbitrator could not have awarded interest at the compound rate under section 16 of the Micro, Small and Medium Enterprises Development Act, 2006 on the claim for damages awarded. Claim awarded was not for any services alleged to have been rendered by the respondents under section 15 of the said Micro, Small and Medium Enterprises Development Act, 2006. It is lastly submitted that the learned arbitrator has awarded interest on interest in the impugned award and that also at the rate of 24% per annum at the compound rate which is illegal and also exorbitant.

15. Learned counsel appearing for the respondents on the other hand invited my attention to the various findings rendered by the learned arbitrator and supported the findings and would submit that no case is made out under section 34 of the Arbitration and Conciliation Act, 1996 for interfering with the impugned award.

16. It is submitted that though there was no provisions for rectification of the alleged breaches in the work order issued by the petitioners, since the petitioners had issued a letter purportedly giving an opportunity to the respondents for such rectification and since the petitioners could not prove the delivery of the said letter termination of the contract was illegal. In any event, the said letter did not give any sufficient opportunity to the respondents to rectify the alleged breaches. It is submitted that the learned arbitrator has rendered a finding that the inspection was not carried out in respect of all cars and thus termination effected by the petitioners was illegal. This court cannot interfere with the findings of fact rendered by the learned arbitrator.

17. It is submitted by the learned counsel that the learned arbitrator has not awarded any compensation to the respondents but has awarded payment for the work done on the quantum meruit basis. It is submitted that since the respondents

falls under the definition of Micro Enterprises as defined under section 2(h) of the said Micro, Small and Medium Enterprises Development Act, 2006, the petitioners were liable to make payment at the compound rate i.e. three times of the bank rate notified by the Reserve Bank. It is submitted that thus no fault can be found in the award rendered by the learned arbitrator.

18. A perusal of the work order dated 3rd December, 2007 clearly indicates that the petitioners had reserved right to terminate the contract anytime if the performance of the agency was found unsatisfactorily during the contract period. It is common ground that there was no provisions in the work order for giving any opportunity to the respondents for rectification of any alleged breaches.

19. It is an admitted position that on 16th January, 2009 there was a joint inspection carried out. The respondents in their letter dated 14th November, 2009 for appointment of arbitrator has admitted that on 16th January, 2009 joint inspection was conducted by Mr.Pradeepan at CSTM for two hours and pointed out some more lapses.

20. A perusal of the award indicates that the learned arbitrator has rendered a finding that the respondents have not carried out the work strictly as per the requirement of the petitioners and has not raised the bill as per terms of the contract. In the impugned award, the learned arbitrator has given a summary of the claims made by the respondents i.e. break up of total claim of Rs.3,06,12,603/-. The learned arbitrator has rejected the said claim of Rs.3,06,12,603/- in the impugned award.

21. A perusal of the award however indicates that the learned arbitrator has applied Article 14 of the Constitution of India in the contract in question. In my

view, the parties were governed by the terms of the contract. The petitioners had an absolute authority to terminate the contract under clause 8(g) issued by the petitioners in case of unsatisfactory work. The learned arbitrator having rendered a finding that there were some defects in the work carried out by the respondents, in my view the petitioners were justified in terminating the contract awarded to the respondents.

22. A perusal of the award indicates that in so far as quantification of the claim considered by the learned arbitrator while deciding issue no.7 is concerned, the learned arbitrator has rendered a finding that the amount claimed by the respondents was in the nature of damages and was required to be proved and that the respondents herein however did not lead any evidence to prove the factum of any such loss suffered by them on that account on the quantum thereof. In paragraph (29) of the impugned award, the learned arbitrator has held that no proof was produced on record regarding payments to railways or other ancillary costs. No damages as a consequences for the non-performance of the contract could be granted in the absence of such evidence. After rejecting the claim as made by the respondents, the learned arbitrator has however in paragraph (30) of the impugned award has held that the respondents herein would be entitled, limited to the actual benefit received by the petitioners herein for the period 20th December, 2007 till 17th March, 2008 which has to be calculated at the agreed contract rate of Rs.10,500/- per train per month. The learned arbitrator in the said award has awarded interest at the rate of 24% to be calculated at the compound rate with monthly rests on the amount of Rs.17,07,517/- from the date of award till realization again at the compound rate with the monthly rests.

23. In my view since the termination of contract in the facts and circumstances

of this case effected by the petitioners was valid, the question of awarding any compensation to the respondents did not arise. Be that as it may, even if there was wrongful termination of the contract on the part of the petitioners, the respondents would not have become entitled to claim any compensation unless the respondents would have suffered loss in view of such wrongful termination and such loss would have been proved by the respondents by leading appropriate evidence before the learned arbitrator. There is no automatic award of compensation even if there was finding of wrongful termination rendered by the learned arbitrator in absence of any proof of such loss alleged to have been suffered by the respondents.

24. In my view the findings of the learned arbitrator that the contract was wrongfully terminated is contrary to the record, in ignorance of clause 8(g) of the work order issued by the petitioners and contrary to the finding that respondents have not carried out the work strictly as per requirement of the petitioners.

25. Be that as it may, since the respondents have failed to prove any compensation as found by the learned arbitrator in paragraph (29) of the impugned award, in my view, the learned arbitrator could not have awarded any claim for compensation for the period from 20th December, 2007 till 17th March, 2008. The conclusion drawn by the learned arbitrator is contrary to the findings rendered by the learned arbitrator in the earlier paragraphs of the impugned award including paragraph (29). The learned arbitrator in any event could not have awarded the said claim for compensation without any proof. The said part of the award is also totally vulnerable and shows total illegality on the face of the award which deserves to be set aside.

26. Since no amount was due and payable by the petitioners to the respondents, the question of awarding any interest on the said amount did not arise. Be that as it may, on conjoint reading of sections 15 and 16 of the Micro, Small and Medium Enterprises Development Act, 2006, in my view the rate of interest provided under section 16 of the said Act is attracted only in case of default in payment required to be made by the buyer for supply of any goods or services by not making payment within 45 days from the date of acceptance or the day of deemed acceptance. In my view, the compound rate of interest is not payable on the claim for damages as the damages awarded is not for the unpaid payment of services rendered by the respondents to the petitioners. The award of interest is liable to be set aside on that ground also being contrary to sections 15 and 16 of the said Micro, Small and Medium Enterprises Development Act, 2006 and is accordingly set aside.

27. A perusal of the award also indicates that the learned arbitrator has awarded interest on interest. Since no amount was due and payable by the petitioners to the respondents, no interest could have awarded by the learned arbitrator. Be that as it may, in my view under section 31(7) of the Arbitration and Conciliation Act, 1996 the learned arbitrator cannot award interest on interest from the date of cause of action till payment. The award on interest deserves to be set aside on this ground also.

28. In my view the award shows patent illegalities as aforesaid. I am respectfully bound by the judgment of the Supreme Court in case of ***P.Radhakrishna Murthy vs. National Buildings Construction Corporation Ltd.*** **2013(4) Mh.L.J.11** in which the Supreme Court has held that the learned arbitrator cannot ignore law or misapply it, nor can he act arbitrarily, irrationally, capriciously or independent of the contract while passing the award. Paragraph 15

of the said judgment read thus:-

15. The High Court has rightly held that the Arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider to be fair and reasonable. The High Court has further rightly made observation in the impugned judgment that an Arbitrator cannot ignore law or misapply it, nor can he act arbitrarily, irrationally, capriciously or independent of the contract while passing the award. Courts of law have a duty and obligation to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in the minds of litigants while adjudicating the claims of the parties by resorting to alternate dispute redressal method of arbitration under the provisions of the Arbitration Act.

29. In my view, the learned arbitrator has decided contrary to the terms of the contract and has acted arbitrarily, irrationally and capriciously while awarding the claim for damages and interest. The impugned award accordingly deserves to be set aside. I, therefore, pass the following order :-

- (a) The impugned award dated 22nd January, 2013 is set aside.
- (b) The arbitration petition is allowed.
- (c) There shall be no order as to costs.

[R.D. DHANUKA, J.]