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

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DECIDED ON: 26.11.2015

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FAO (OS) 283/2009

MODI TELECOMUNICATION LTD. Appellant
Through: Mr. Darpan Wadhwa, Advocate.

versus

UOI Respondent
Through: Mr. Anuj Aggarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J. (ORAL)

1. The appellant is aggrieved by the judgment and order of the learned Single Judge dismissing its objections under Section 34 of the Arbitration and Conciliation Act, 1996 ("The Act"). It contends that the learned Single Judge overlooked the patent errors and illegalities committed by the Arbitral Tribunal in the Award dated 20.05.2005.

2. Briefly, the facts are that the appellant was awarded with the letter of intent on 27.10.1995 for providing radio paging services in the State of Rajasthan. The date of the common license agreement executed by the public agency, i.e., the Ministry of Communication was 27.02.1996; however, the effective date of the contract was 25.11.1995. The appellant was granted 12 months' time to start the radio paging services - in the present case the services were to begin on or before 26.11.1996. As a

prelude to commencement of these services, the appellant had to apply and obtain various approvals. These included siting approvals, WPC approvals and certain other technical clearances. As a matter of fact, the radio paging services agreed to by the parties did not commence. The appellant alleged that siting approvals by SACFA (The Standing Advisory Committee on Frequency Allocation) was forthcoming much later - on 18.05.1998 in respect of 23 sites. It, therefore, invoked dispute resolution and demanded the payment. In the meanwhile, the respondent/Union of India invoked the bank guarantee furnished by the appellant under Clause 18 of the license agreement. The parties referred their disputes for adjudication by a sole arbitrator.

3. The Arbitral Tribunal by the Award impugned before the Single Judge was of the opinion that the delay alleged and attributed to the respondent/UOI by the appellant had not been established. In other words, the Arbitral Tribunal concluded that the appellant was responsible for the delay. The Tribunal upheld the termination and also the invocation of the bank guarantee. The Arbitral Tribunal also upheld the invocation of the bank guarantee premising the findings on clause 18.6 of the conditions in part 2 of the license agreement entered into by the parties.

4. The appellant had contended before the learned Single Judge that the Award of sums in excess of what was provided in the liquidated damages clause, i.e., clause 13.2 (payment of Rupees One lakh per week beyond the agreed date of commencement subject to an outer limit of ₹20 lakhs) was unwarranted. This submission was negated.

5. The appellant's counsel Mr. Darpan Wadhwa made two submissions in support of the appeal. It is contended that the grant of any amount in excess of ₹20 lakhs (stipulated as an outer limit by clause 13.2) falls afoul of Section 74 of the Indian Contract Act, 1872. It is urged that the provision is explicit (injured party entitled to only a reasonable damages upon proof of injuries not exceeding the amount agreed as liquidated damages). It is next contended that the Arbitral Tribunal placed a strained interpretation on clause 18.6 to uphold the invocation of bank guarantee to the proportionate extent of the license fee payable as on the date of termination of the contract from the date of its scheduled commencement of services. It was submitted that once the Union of India was aware that the contract was not capable of performance, the utmost it could claim in terms of clause 18.6 - was the proportionate amount which could have been paid for a maximum period of three months from the date it was due in the present case. By upholding the Award beyond that period, the learned Single Judge overlooked that the Award was contrary to the terms of the contract and, therefore, liable to be set aside under Section 34 of the Act.

6. This Court has carefully considered the submissions; the Court has also gone through the conditions of the contract. Clause 13.2 and 18.6 to the extent they are relevant, read as follows: -

“13.2 In case the Licensee fail to bring the Service or any part thereof into commission within the period prescribed for the commissioning, Authority shall be entitled to recover Rs.1 lakh (Rupees: One Lakh) for each week of the delay or part thereof, subject to maximum Rs.20 lakhs (Rupees: TWENTY lakhs), for each service area. For delays of more than 20 weeks the license will be terminated as per Condition 14.”

“18.6 If the due payment is not received in time for a maximum period of three months, an adjustment will be made through Bank Guarantee and notice for termination of Contract would be deemed to have been served from the date the payment becomes due. DOT will retain option to discontinue the use of its facilities by the vendor immediately thereafter. Telecom Authority may also withdraw the facility under Clause 18.1 (d) (ii) and only permit further operation as per Clause 18.1 (d) (i). This is without prejudice to any other remedy the Telecom Authority may decide to resort to.”

7. This Court holds that there is no substance in the argument that the Award could not have directed payment of anything in excess of ₹20 lakhs - the maximum provided for in clause 13.2. Clause 18.6 is distinct and separate. The authorities on Section 74 are clear that there can possibly be conditions independent of the liquidated damages clause where the parties envision payment of additional amounts in the event of omission by one party to fulfill the contractual obligation or performance contrary to the terms of the contract. In this regard, the decisions right from *Fateh Chand vs. Balkishan Dass (1964) 1 SCR 515* onwards to the recent decision in *Kailash Nath Associates vs. Delhi Development Authority and Anr. (2015) 4 SCC 136* have emphasized that there are eventualities in which the proof of actual evidence or damages is dispensed with if it is impossible for the party to prove damages. In such an eventuality, parties are free to provide for payment of amounts to the injured party by stipulations independent of those for liquidated damages. As a result, the directions by the Arbitrator in this Court's opinion to award amount in excess of ₹20 lakhs cannot be termed as illegal or contrary to the contract. With respect to the

second or rather alternative submission made, i.e., that arguendo the Award cannot be set aside on the ground that it exceeds the amount provided for in clause 13.2 nevertheless the terms of the contract obliged the respondent/UOI to recover a smaller amount. As to this submission, the Court notices that in upholding the UOI's claim for invoking the bank guarantee in a proportionate manner, the Arbitral Tribunal took into consideration not only clauses 13.2 and 18.6 (which provides for payment of license fee and the date and dates when they fall due) but also other stipulations such as clause 14.1 which envisioned issuance of notice. One of the well established legal principles is that interpretation of contract by an Arbitrator - *sans* patent illegality or factual findings are incapable of correction under Section 34.

8. In view of the forgoing discussion, this appeal is groundless and the same is accordingly dismissed . In the circumstances, the appellant shall bear the cost of ₹75,000/- (Rupees seventy five thousand) payable to the respondent.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

NOVEMBER 26, 2015
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