

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

Decided on: 26.11.2015

+ **FAO (OS) 281/2009**

MODI TELECOMMUNICATION LTD.Appellant
Through: Sh. Darpan Wadhwa with Sh. Shalok
Chandra and Sh. V. Gupta, Advocates.

Versus

UOIRespondent
Through: Sh. Anuj Aggarwal and Sh. Shubhanshu
Gupta, Advocates.

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CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. These appeals arise from the two orders of the learned Single Judge in the connected cases, (i.e. OMP 350/2005 and OMP 351/2005 filed under Section 34 of the Arbitration and Conciliation Act, 1996 or “the Act”) dated 21st May 2009 that set aside the arbitral awards concerning Madhya Pradesh Circle and West Bengal Circle respectively. Except certain dates and

amounts, the material facts of both these appeals are the same. By the judgment of the learned Single Judge in OMP 350/2005 (hereinafter “the impugned judgment”), the Arbitral Award passed by the learned Arbitrator on 20th May 2005 (hereafter “the Arbitral Award”) was set aside.

2. Briefly the facts with respect to FAO (OS) 282/2009 are that based on technical bid and financial bid, the Appellant (hereafter “Modi”) was selected for providing Radio Paging Services in the circle of Madhya Pradesh excluding Bhopal. The Respondent served the Letter of Intent on Modi, on 30th October 1995. Modi was to convey its acceptance by furnishing 10% of the first year’s license fee in the form of a bank draft and 90% of it in the form of a financial bank guarantee. On 15th January 1996, the License Agreement was executed between Modi and the Respondent in terms of which the former was granted the right to establish, maintain and operate Radio Paging services in Madhya Pradesh for a period of 10 years on non-exclusive basis. As per Clause 6.3 of the License Agreement, Modi had to commence the services on or before 29th November 1996. The License Agreement required that in order to commission the services, Modi had to acquire clearance from Standing Advisory Committee on Frequency Allocation (hereinafter “SACFA”).

3. Modi applied for SACFA clearance on 17th April 1996. However, SACFA clearance was granted only on 9th April 1997. Therefore, it could not commence the services on the date mandated in the License Agreement i.e. 29th November 1996. On 10th February 2000, the Respondent terminated the License Agreement on the ground of non-commissioning of services, the termination being effective from 18th March 1997. Subsequently, the

Respondent also demanded the license fee. Thereafter, the Respondent encashed the bank guarantee of the sum of ₹75.14 Lakhs furnished by Modi at the time of entering into the Agreement.

4. With respect to FAO (OS) 281/2009 concerning West Bengal Circle, briefly the facts are that the Respondent issued the Letter of Intent on 14th December 1994. In furtherance of this, the same parties entered into the License Agreement on 5th June 1995 whereby Modi was granted on a non-exclusive basis, the license for providing Radio Paging Services in the West Bengal Circle excluding Kolkata. As per the License Agreement, Modi was to commission the services on or before 4th June 1996. This expiry date was extended to 15th October 1996. The License Agreement required that in order to commission the services, Modi had to acquire SACFA clearance. Here again, Modi applied for SACFA clearance on 7th December 1995, the SACFA clearance was given only on 24th April 1997. Therefore, it could not commence the services on the extended date i.e. 15th October 1996. On 5th February 1998, the Respondent terminated the License Agreement with immediate effect on the grounds of non-commission of services. Subsequently, it demanded the license fee. Thereafter, the Respondent encashed the bank guarantee of the sum of ₹67.47 Lakhs furnished by the Appellant at the time of entering into the Agreement. The material facts and Modi's contentions with respect to both these appeals are the same.

The Arbitral Award and the Impugned Judgment

5. The disputes that arose between the two parties pertained to validity of the termination, and encashment of the bank guarantee. These were referred

to the learned Arbitrator. The Arbitral Tribunal, in the Award held that the termination of the Agreement by the Respondent was invalid, as the Agreement had already frustrated due to delay on part of the Respondent in granting the SACFA clearance. *A Fortiori*, the encashment of bank guarantee was also held to be invalid. Aggrieved by the Arbitral Award, the Respondent approached this Court by petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act”). The learned Single Judge in the impugned judgment, set aside the Award on the ground that the findings of the learned Arbitrator on frustration of contract were in clear error of law, and that the learned Arbitrator ‘misconducted’ the proceedings by holding that the termination was invalid.

Submissions of the Appellant

6. Modi challenges the judgment of the learned Single Judge on several grounds. Essentially, the claim of the Appellant rests on the limitations of jurisdiction of this Court under Section 34 of the Arbitration and Conciliation Act, 1996 (Hereinafter “the Act”). Modi submitted that the impugned judgment goes beyond the scope of the Court’s powers in setting aside an arbitral award under Section 34 of the Act. It is further submitted that the learned single judge erred on many counts in its decision of setting aside the Arbitral Award. Broadly, Modi’s main contentions pertain to the following findings of the learned Single Judge: (i) the reference to the Arbitrator was limited to the question of ‘termination’ of contract and that the question of ‘frustration’ of contract is beyond the terms of reference to the Arbitrator; (ii) Modi was responsible for the delay caused in SACFA clearance, and hence the doctrine of frustration is not applicable, and (iii)

there was no frustration of contract since there was an extension clause (Condition 13.1) and a termination clause (Condition 14.1) in the License Agreement, and therefore, the termination by the Respondent was valid.

7. With respect to (i), Modi urges that the question of frustration is *not separate* from the question of termination. The learned Arbitrator held that the termination was invalid *because* the contract was already frustrated due to its inability in commencing the services. Modi further argues that while (ii) pertains to factual findings, (iii) pertains to the interpretation of contractual terms. Modi contends that both – overturning the interpretation of contractual terms, and overturning factual findings - are beyond the scope of the powers of this court under Section 34 of the Act.

8. Learned counsel for the respondent, Mr. Anuj Agarwal, on the other hand, supports the findings of the learned single judge. It is urged that the award, inasmuch as it was contrary to the record, leading to plainly erroneous findings about Modi not being responsible for the delay in obtaining clearance or that it defaulted in its contractual obligations, could well have been and were correctly set aside. He argued that the scope of this appeal is extremely limited and that the Court should not interfere with factual findings, based on which the learned single judge reached his conclusions.

Analysis and Conclusion

9. This Court notices that the core issue of this appeal concerns the extent and scope of powers under Section 34 of the Act. Before we foray into the specific facts of this case, it is important to discuss the law declared by

the Supreme Court and by this Court in its earlier decisions. In **McDermott International Inc. v. Burn Standard Co. Ltd. And Ors** [(2006) 11 SCC 181] the Supreme Court emphasized on the need for caution that the High Court should exercise while exercising its jurisdiction under Section 34:

“Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law... Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.” (emphasis supplied)

The Supreme Court in **Associated Builders v. Delhi Development Association** [(2015) 3 SCC 49] further emphasized on the limited jurisdiction under section 34:

“An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.” (emphasis supplied)

In **MSK Projects Ltd. v. State of Rajasthan** [(2011) 10 SCC 573], the Court further held, *“[i]f the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction”*. This proposition was further reiterated in **Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.** [(2009) 10 SCC 63], where it was held that such error is not amenable to correction by courts as such error is not an error on the face of the award. In **Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran**, [(2012) 5 SCC 306], following its approach of least intervention, the Court

further held that if two interpretations of a contract are possible, an arbitrator can choose any interpretation that is “possible if not a plausible one”. Similarly, in **Sumitomo Heavy Industries Ltd. v. ONGC Ltd.** [(2010) 11 SCC 296], the Supreme Court further held,

“The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one’s own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal...Nor can one substitute one’s own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal...The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement.” (emphasis supplied).

In **Associate Builders v. Delhi Development Association** (*supra*), the Court had clarified that pure factual findings of the Arbitrator cannot be interfered with:

“It is clear, therefore, that the Division Bench obviously exceeded its jurisdiction in interfering with a pure finding of fact forgetting that the Arbitrator is the sole Judge of the quantity and quality of evidence before him...

As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the Arbitrator’s view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench

has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”(emphasis supplied)

10. The question that arises is whether the learned Single Judge travelled beyond its powers under Section 34. The learned Single Judge set aside the Arbitral Award mainly on three grounds: *first*, that the learned Arbitrator travelled beyond the terms of reference; *second*, that Modi was responsible for the delay caused and hence, the frustration of the contract was self-induced and *third*, that the contract could not have been frustrated due to presence of Clause 13 and Clause 14 of the Agreement.

11. As regards the *first* ground, the learned Single Judge held that the learned Arbitrator travelled beyond the terms of reference, as the question of frustration did not form part of the reference. The learned Single Judge held:

“[T]he Arbitrator was referred the issue of validity of the termination of the contract, but the learned Arbitrator derailed himself and held that termination was of no consequence due to frustration of contract.”(emphasis supplied)

In holding so, the learned Single Judge separated the questions of termination and frustration. On the other hand, the Arbitrator held:

“In the circumstances, it has to be concluded that the contract stood frustrated since it could not be possible for the Claimant to perform its obligations under the License Agreement till November 29, 1996 on account of the absence of clearance of sites by SACFA which was necessary for establishing and commissioning the Radio Paging Service under the License Agreement and the contract, therefore, stood discharged by frustration on November 29, 1996 on account of impossibility of performance. Since the contract stood discharged by frustration on November 29 1996, the termination of the License Agreement by the Respondent by letter dated February 10, 2000 is of no

consequence and the termination of the License Agreement by the Respondent by letter dated February 10, 2000 cannot be held to be valid.”(emphasis supplied)

12. It is not disputed that the issue concerning validity of termination was within the four corners of the terms of reference. The learned Arbitrator decided on the issue of frustration *in order to* decide the issue concerning validity of termination. Therefore, the question of termination *cannot be separated* from the question of frustration. As a result, this Court is of the opinion that the learned Single Judge erred in holding that the Arbitrator travelled beyond terms of reference.

13. With respect to the *second* ground concerning the responsibility of delay, the impugned judgment held that Modi was responsible for the delay caused in SACFA clearance. Further, since this is a ‘self-induced’ impossibility, Modi could not claim frustration of contract. The learned Arbitrator relied on the following reasons for holding Modi was *not* responsible for the delay:

“This leads to the conclusion that as a result of the grant of clearance of the sites by SACFA being delayed till March 11, 1997, for which delay the claimant was not responsible, the claimant could not take the necessary steps, viz., installation of the equipment at the fixed stations, for commissioning of the Radio Paging Services till November 29, 1996 as per the License Agreement. The failure on the part of the claimant to install and commission the Services within the period prescribed under the License Agreement or under the extended period was on account of circumstances beyond the control of the Claimant, namely, non-availability of the SACFA clearance of sites, which was a condition precedent for establishment and operation of the Radio Paging Services under the License Agreement.” (emphasis supplied)

14. The learned Single Judge, however, disagreed with the finding of the Arbitrator and relied on the following reasons for holding that Modi was responsible for the delay:

“The respondent had no time to loose and he was supposed to make the applications for clearance forthwith. This was again emphasized to the respondent while granting the second extension on 18th December 1995. Since the respondent had expressed his desire to accept the offer given in letter of intent and wanted time only for submission of bank guarantees and deposit of 10% of the license fee, there was no hindrance on the respondent in starting the work on the project of commissioning Radio Paging Service from 30th November 1995, when it was made clear to the respondent that the effective date of license will be considered as 30th November 1995. The agreement between the parties specifically notified to the respondent what will be the different types clearances required by respondent, who will be the authorities to whom the respondent will have to apply, what will be the conditions which would be required to be fulfilled by respondent while seeking clearances.” (emphasis supplied)

15. Attribution of responsibility of delay was held to be a pure factual finding by the Supreme Court in the case of **Associate Builders v. Delhi Development Association** (*supra*). In this case as well, as apparent from the paragraph quoted above, the learned Single Judge overturned certain factual findings. Further, it is clear that the Arbitral Tribunal arrived at this conclusion after considering all the relevant materials placed before it, including the details of the entire SACFA clearance procedure. The jurisdiction under Section 34 is not appellate in nature. The view of the learned Single Judge may be another plausible view of the facts of the case. However, that is not a ground for setting aside an arbitral award. Therefore, it is clear from this decision of the learned Single Judge that he travelled

beyond the scope of the jurisdiction under Section 34 in reversing the factual finding of the Arbitral Tribunal with respect to attribution of responsibility for delay.

16. As regards the **third** ground concerning interpretation of contractual clauses, the learned Single Judge emphasized on the absence of any contractual provision to the effect of frustration of contract. Further, reliance was placed on interpretation of Condition 13 and Condition 14 of the License Agreement in coming to the conclusion that there was no frustration of contract:

“There was no provision in the contract that in case of non grant of clearance by SACFA, WPC or other authorities before the due date of starting service, the contract shall stand frustrated...”

Clause 13.1 of the contract had envisaged permitting a delay in grant of clearance and it provided that in case the commissioning of Radio Paging Service was brought after expiry of the stipulated date without prior concurrence of the licensing authority, then it will be accepted by it but such commissioning will not deprive the authority of its right to recover the liquidated damages under this condition. It is apparent from this clause that the contract was not supposed to come to an end on 30th November 1996 if the clearance had not been granted by that date due to any reason...

Clause 14.1(a) provides that if licensee failed to provide any or all the services within the time period specified in the license or any extension thereto granted by the authority, the license may be terminated. When there is a provision for grant of extension by the authority for commissioning of Radio Paging Service with or without damages, the contract cannot be said to be frustrated only because the commissioning was not possible on the due date

because of non-granting of clearance by SACFA before due date.” (emphasis supplied)

17. Modi has contended that though there was a provision of extension, since the extension was never actually granted, Clause 13.1 does not bar the application of doctrine of frustration. The slight difference with respect to FAO (OS) 281/2009 (West Bengal Circle) is an extension which was granted for commissioning of services. However, the SACFA clearance was not granted even on the extended date. Therefore, even in the case of FAO (OS) 281/2009, mere grant of extension does not prevent the application of doctrine of frustration.

18. Similarly, it is also contended that since Modi was prevented from performing his obligations due to delay caused by the Respondent in providing SACFA clearance, Clause 14.1(a) could not have been invoked. Further, the presence of this Clause 14.1(a) or Clause 13.1 does not in itself bar the application of doctrine of frustration to the facts of this case. Therefore, the interpretation of the clauses adopted by the learned Arbitral Tribunal is not completely unreasonable or arbitrary. As long as the interpretation of contractual terms by an arbitral tribunal is a reasonable one, an award cannot be set aside. It is possible that there may be multiple interpretations of a contractual term that may be reasonable. However, as far as the Arbitrator's interpretation of a contractual term is one of the reasonable constructions, this Court cannot substitute its views for that of the learned Arbitrator for setting aside the Arbitral Award.

19. For the foregoing reasons, this Court is of the opinion that the Learned Single Judge fell into error in interfering with the Arbitral Tribunal's Award.

The impugned orders are accordingly set aside. The awards are accordingly restored and the appeals are allowed.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

NOVEMBER 26, 2015

