

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO. 516 OF 2013

M/s.Aastha Telecom

...Petitioner

vs

Mahanagar Telephone Nigam Ltd.

...Respondent

Mr.Prakash Shah with Durgaprasad Poojari and Viraj Bhate I/b. PDS Legal for Petitioner.

Ms.S.I. Shah I/b. S.I. Shah & Co. for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 3 DECEMBER 2018

P.C. :

This arbitration petition challenges an award passed by a sole arbitrator in an arbitration reference arising out of disputes between the parties under a distributorship agreement.

2 By a distributorship agreement dated 14 May 2007, entered into between the Respondent, Mahanagar Telephone Nigam Ltd. and the Petitioner, Aastha Telecom, the former appointed the latter as a distributor for distribution and sale of its products and services including phone cards and internet cards. The range of products to be distributed and sold was described in the agreement. The agreement provided for a defined territory allocated to the distributor, within which to operate and set up a retail network and provide services for sale of the Respondent's specified products and services. Under the agreement, the distributor was entitled to

compensation/commission for sales brought by him at such rates as were to be notified by the Respondent from time to time. (The current rates of commission for products were described in Annexure-F to the agreement.) Under the agreement, the Respondent had the option to fix/vary the distributor's commission or the share or minimum share of it which the distributor might pass on to the retailers. Disputes arose between the parties as a result of withholding the Petitioner's commission for sales effected by it. It was the case of the Petitioner that having sold, supplied and delivered about 71,439 cards, the Petitioner was entitled to receive commission of Rs.1,19,59,346/-; out of this commission, the Respondent had paid only a sum of Rs.46,61,596/-, leaving a balance of Rs.72,97,750/- as due and payable to the Petitioner. In its statement of claim, the Petitioner sought an award in the sum of Rs.72,97,750/- along with interest at the rate of 12% per annum, or such other rate as the arbitrator may deem fit and proper with effect from the due date of the commission until payment or realisation. The learned arbitrator, by his impugned award dated 6 October 2012, partly allowed the Petitioner's claim, whilst partly rejecting it. The rejection forms the subject matter of the present challenge.

3 It is seen from the record of the case that the sum of Rs.72,97,750/- claimed by the Petitioner comprises of three elements, the first being what are described as “no recharge cases”. A sum of Rs.24,73,050/- had been withheld from the commission payable to the Petitioner against these no recharge cases. It is the case of the Respondent that by communications dated 21 May 2008 and 22 May 2008, the commission structure for a particular product known as “Trump” was

revised on introduction of a new category in the product range, namely, Trump Sim-75; a slab-wise commission, according to sales effected per month, was introduced with a condition of minimum recharge of Rs.100/- on activation for entitlement of the commission. It was the case of the Petitioner that by a circular dated 24 May 2008, this condition of minimum recharge of Rs.100/- was withdrawn, and, in the premises, no recovery could be made on account of non-fulfillment of the condition. The second component of the claim related to the slab-wise payment itself. It was the case of the Respondent before the arbitrator that slab-wise payment introduced by the circulars of 21 May 2008 and 22 May 2008 was unauthorised. It was submitted that these circulars were issued without the approval of Executive Director of MTNL, who was the competent authority for fixing of the commission structure/s, and were in fact contrary to the approval granted by Executive Director of MTNL for commission payable to the distributors, the approved rate being Rs.150/- for Trump Sim-75 and Trump Sim-150. It was submitted that there was a CBI inquiry ordered against the particular officers, who had issued the two circulars altering commission structure. This case accounted for a recovery of Rs.21,10,150/-. The third component of the total claim of the Petitioner concerned what are described as IDLE and IMEI cases. IDLE cases were those, where sims were not inserted in mobile handsets and not even first calls were made by customers, whereas IMEI cases were those where multiple sims were activated through the same mobile handset. It was the case of the Respondent that the Petitioner had recorded multiple bookings in the same name and address in these IDLE/IMEI cases and that no commission was payable for these cases. A total amount of Rs.24,04,550/- was withheld from the commission payable to the Petitioner towards these

cases.

4 So far as the withholding of commission of Rs.24,73,050/- is concerned, by the impugned award dated 4 April 2013, the learned arbitrator, after noting waiver of the condition of compulsory recharge vide order dated 24 May 2008, held that sims sold subsequent to 24 May 2008 being entitled to the benefit of withdrawal of the condition, the Respondent should recalculate the commission to be paid and recovery based on it for the period from 24 May 2008 onwards upto the date of subsistence of the contract. The Petitioner's entire claim of Rs.24,73,050/- being in respect of sims sold subsequent to 24 May 2008, this part of the Petitioner's claim was, thus, effectively awarded by the learned arbitrator. There is no grievance of the Petitioner so far as this part of the award is concerned.

5 Coming now to the deduction of Rs.21,10,050/-, namely, recovery against slab-wise payment of commission, from the arguments and counter arguments of advocates for both parties, the arbitrator noted that the particular point was confusing and it was not possible to decide on the commission structure till the final outcome of the CBI case. The arbitrator, in the same breath, strangely, however, held that till that was done commission eligibility of Rs.75/- should be considered for Trump-75 cards, whilst Rs.150/- could be considered for commission towards Trump-150 cards and directed recalculation of the commission payable to the Petitioner on that basis. In the first place, it is impermissible for the arbitrator not to decide the commission structure till final outcome of the CBI case. It is important to remember that the arbitrator, in a case like this,

exercises jurisdiction, which otherwise would have been exercised by a civil court. When a civil court is approached for a claim in respect of which a criminal case is pending before another court, it is not permissible for the civil court to throw its hands up and await the outcome of the criminal trial or, worse still, to make its order conditional upon the outcome of the criminal case, which is what in effect the learned arbitrator has done in the present case. Secondly, and equally strangely, the learned arbitrator has asked for recalculation of the commission on the basis that commission eligibility should be Rs.75/- for each Trump Sim-75 card and Rs.150/- for each Trump Sim-150 card. The Respondent's own case, in its communication dated 18 July 2011, and which forms part of the record of the case and on the basis of which submissions were advanced by the Respondent before the learned arbitrator, was that for each Sim-75 as well as Sim-150 card, the commission was to be restricted to Rs.150/-. There is no justification for different rates, as noted above, ordered by the arbitrator; there is no whisper on the part of the Respondent for restricting the commission of Sim-75 cards to Rs.75/- per card.

6 Coming now to the third component of the Petitioner's case, namely, the sum of Rs.24,04,050/- withheld from its commission from IDLE/IMEI cases, the Respondent's own case was that there were specified number of cases where these conditions obtained and for which no commission was payable. In the first place, there is nothing in the contract to justify this recovery. Secondly, and at any rate, the arbitrator himself has come to a conclusion that there were in all 4488 cases which should be treated as IDLE and IMEI cases as far as the Petitioner was concerned and yet, in the same breath, the arbitrator has held that no decision could be

taken on the point because of the pending prosecution in the CBI court and that the decision of the CBI (CBI court?) should be taken as final for this component of the claim.

7 In other words, whilst the first component of the Petitioner's claim was effectively allowed by the learned arbitrator, the other two components sounding in Rs.21,10,050/- and Rs.24,73,050/- were not adjudicated at all and left to be decided by the CBI court, and pending final verdict of the CBI court in that behalf, the recovery was directed to be restricted to 50% of commission simply as an ad-hoc measure. This approach of the learned arbitrator is clearly contrary of the fundamental policy of Indian law. The very first juristic principle, which forms the fundamental policy of Indian law is the principle of "judicious approach". As explained by the Supreme Court in **Associate Builders vs. Delhi Development Authority**¹, judicious approach demands that a decision be fair, reasonable and objective; on the obverse side, anything arbitrary and whimsical would obviously not be a determination that is fair, reasonable or objective. As a substitute for a civil court deciding a claim of money, the arbitrator was expected to adjudicate the claim one way or the other. He could not have either refused to adjudicate the claim or made his adjudication dependent on the outcome of a criminal prosecution, which may or may not have a bearing on the issue before the arbitrator. It is one thing to say that a circular unauthorisedly issued by an officer of a corporation may invite criminal prosecution so far as the officer is concerned, but quite another to say that such circular will not apply to, or have a bearing on, the contractual relationship between the corporation

1 2015 (3) SCC 49

and third parties, who act on the circular issued by the officer in the course of his duties and enter into a binding commercial relationship or arrangement with the corporation on the basis thereof. Whereas the criminal court may decide the former case, it is essentially for the civil court to decide the latter, even if the former, by itself, may have some bearing on the latter. The arbitrator's refusal to adjudicate is neither fair nor objective; it is plainly and simply arbitrary. It constitutes an outright denial of justice.

8 Besides this central feature of challenge to the impugned award, the award suffers, as noticed above, from various fundamental contradictions and arbitrary rulings. As we have noticed above, there is no basis whatsoever for recalculation of the amount of commission on the basis of the rate of Rs.75/- for Trump Sim-75 cards and Rs.150/- for Trump Sim-150 cards in the face of the Respondent's own contention, whilst contesting slab-wise commission, that the commission was to be at a uniform rate of Rs.150/- per piece of both Trump-75 and Trump-150. Besides, there is no reason why pending the verdict of the criminal court, only 50% of recovery should be stalled and not 100%. No reasons are discussed for the same. This arbitrariness unequivocally discloses want of a judicious approach.

9 The award, in the premises, suffers on more than one grounds bearing on the fundamental policy of Indian law and is, thus, liable to be interfered with.

10 The arbitration petition is, accordingly, allowed by setting

aside the impugned award to the extent it denies the claims of Rs.21,10,050/- and Rs.24,04,050/- towards excess commission, and IDLE and IMEI cases.

(S.C. GUPTE, J.)