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

+ **FAO(OS) (COMM) No. 148/2018**

Date of decision: 20th July, 2018

XL ENERGY LIMITED

..... Appellant

Through Mr. Abhijit Mittal, Mr. Abinav Sharma &
Mr. Dhruv Rohtagi, Advocates.

versus

MAHANGAR TELEPHONE NIGAM LIMITED Respondent
Through Nemo.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

CM No. 28598/2018

Exemption application is allowed, subject to all just exceptions.

FAO(OS) (COMM) No. 148/2018

XL Energy Limited in the present appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (A&C Act, for short) has challenged order dated 7th May, 2018 passed by the single Judge in O.M.P. (COMM.)

No. 339/2017, *XL Energy Limited versus Mahanagar Telephone Nigam Limited*.

2. Impugned order dismisses objections filed by the appellant under Section 34 of the A&C Act and upholds the Arbitral Award dated 3rd June, 2017.

3. Respondent, a telecom service provider, had purchased 60,000 (Sixty Thousand) CDMA phones from the appellant vide three purchase orders dated 27th March, 2003 , 23rd May, 2003 and 7th August, 2004. Respondent had sold/transferred these phones to their subscribers. Respondent had also entered into three Annual Maintenance Contracts ('AMCs') with the appellant dated 5th June, 2004, 24th November, 2004 and 3rd November, 2005 for repair of the phones. Respondent had paid fixed consideration as per the AMC agreements to the appellant. In terms of these AMC agreements, the appellant had furnished performance guarantee for three years amounting to Rs.1,13,99,500/-.

4. Respondent on account of delay in repair and delivery of faulty phones/handsets by the appellant to the concerned MTNL offices within the stipulated period of 14 days, as per the AMC agreement had raised a claim a of Rs.2,47,43,500/-. Consequent to the delay, customers/ subscribers were denied and deprived of their phones for the said period. The respondent had relied upon the following clause of the AMC agreements:-

“TERMS AND CONDITIONS OF THE
AGREEMENT:

1. If the contractor fails to repair the faulty WLL terminals (Handheld Type) and deliver the same in the concerned MTNL office within stipulated period of 14 days as mentioned above, the contractor shall be liable to pay penalty for the entire period counted from the date of making over the faulty terminals in his repair center to the actual date of repair and delivered including Saturdays, Sundays, and holidays as under

Rs.100/- per day per terminal.”

5. Arbitral award dated 3rd June, 2017 partly accepts the claim and the appellant has been held liable to pay to the respondent Rs.1,13,99,500/- with interest @ 9% per annum from the date of filing of the claim on 3rd November, 2011. Balance claim of Rs. 1,33,44,000 was held to be barred by limitation.

6. Appellant do accept and admit their failure to repair and deliver faulty phones/handsets within the stipulated period of fourteen days. Computation of damages @ Rs. 100 per day per terminal is not questioned. Facts and calculations are not disputed.

7. Appellant submits that the clause stipulating damages @ Rs. 100 per day per terminal was a penalty clause and not a clause prescribing liquidated damages. Further, the respondent was unable to prove and establish any loss for failure to repair and rectify faulty phones within 14 days. Therefore, the respondent was not entitled to damages as awarded. Reliance is placed on ***Kailash Nath Associates versus Delhi Development Authority and Another***, (2015) 4 SCC 136.

8. In *Kailash Nath Associates* (supra), the principles summarized read :-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

9. Learned arbitrator in the factual context with reference to relevant clause has held that damages @ Rs. 100 per day per terminal for the period of delay was reasonable compensation mutually agreed by the parties to be paid as liquidated damages. The amount specified was a genuine pre-estimate of damages and not a penalty clause. Thus, principle 1 in ***Kailash Nath Associates*** (supra) was applicable. Aforesaid findings are as per law and do not merit interference under Section 37 of the A & C Act.

10. On the question of proof of loss suffered, learned single Judge affirming the view expressed by the arbitrator and has referred to statement of witness and findings recorded in the award, to observe:-

“18. A perusal of the above cross-examination of Shri Ramesh Singh shows that he has clearly

pointed out that the customers of the respondent had to suffer as there was delay in return of the handsets. It is manifest that the reputation of the respondent suffered. In an industry disgruntled customers do not help in expansion of business. It is quite clear that when a manufacturer of mobile telephones is unable to speedily repair defective telephones supplied to its customers it is bound to cause a loss of reputation/image. Such loss of reputation/image would lead to loss of revenue. Such damages/loss of revenue cannot easily be quantified as is sought to be argued.”

11. In the context of the present case, principle 6 in *Kailash Nath Associates* (supra) would apply as the respondent had suffered loss and damage to reputation and consequently business, on failure to repair and deliver mobile phones to the customers of the respondent within 14 days. It was difficult if not impossible to prove precise loss of reputation, which is intangible. However, reasonable amount of loss that the respondent would suffer was ascertainable and was mutually agreed and fixed in the AMC agreements. Compensation in form of liquidated damages of Rs. 100 per day per terminal for delay beyond 14 days is certainly reasonable, given the fact that the respondent had purchased the phones/handsets and had additionally paid consideration under the AMC agreements. Customers/subscribers who had purchased the mobile phones had suffered and respondent had faced their wrath and consequently had lost goodwill and reputation in the market.

12. The appellant had also pleaded novation under Section 62 of the Contracts Act, as the parties had entered into a new arrangement with effect

from 14th February, 2007. This argument and contention was rejected, in our opinion rightly, for the letter dated 30th March, 2007 of the respondent had stated that performance guarantees would abide by the AMC agreements. This stipulation and condition was accepted by the appellant. Thus, learned arbitrator has held that the respondent had not waived and given up their claim for damages for delayed repair and delivery. The said finding is reasonable and cogent. Learned single Judge has agreed with the finding, observing that the original AMC agreements were not entirely novated.

13. Decision in FAO(OS) No. 227/2017, ***Mahanagar Telephone Nigam Limited versus Finolex Cables Limited*** dated 18th September, 2017 is distinguishable in view of the different nature of the contract and factual matrix. In ***Finolex Cables Limited*** (supra), there was a default in supply of cables, a product available in the market. Language of the clause was different.

14. In view of the aforesaid discussion, we do not find any merit in the present appeal, which is dismissed, without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JULY 20, 2018
VKR