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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 4.4.2019

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O.M.P. (COMM) 83/2018

BHARAT SANCHAR NIGAM LTD (BSNL) Petitioner
Through Mr. Ajit Kumar Singh, Adv.

versus

MAHARASHTRA KNOWLEDGE CORPORATION LTD

..... Respondent
Through Mr. Abhinav Mukerji and Mr.
Siddharth Garg, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL):

Preface

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') qua the award dated 9.10.2017.

2. The challenge in the award is restricted to claim no. III whereby the petitioner's counterclaim in the sum of Rs.2.7 crores was disallowed.

2.1 For the purposes of this judgment, I would be referring to the petitioner as BSNL and the respondent as MKCL. Collectively BSNL and MKCL will be referred to as parties unless the context requires them to be mentioned separately.

3. It may be relevant to note that MKCL was the original claimant before the learned Arbitrator while BSNL had filed nearly nine (9) counterclaims.

3.1 Out of nine (9) counter claims, the learned Arbitrator vide the

impugned award has allowed counterclaims no. I, IV and V as also disallowed counterclaim nos. II, III, VI, VII, VIII and IX.

3.2 For the present, as indicated right at the outset, BSNL is aggrieved by the fact that the learned Arbitrator has disallowed its counterclaim no. III.

4. This counterclaim arose on account of the fact that BSNL had encashed proportionately the performance bank guarantees worth Rs.2.70 crores upon failure of MKCL in launching subject services in twelve (12) cities.

5. Via the impugned award, the learned Arbitrator has come to the conclusion, for reasons given therein, that since BSNL had failed to give notice of termination of the agreement for alleged failure to launch services in twelve (12) cities, its claim for retaining a sum of Rs.2.70 crores was not tenable.

5.1 More specifically, the finding given by the learned Arbitrator with regard to the same is set forth hereafter:

“....The respondent (i.e. BSNL) is demanding forfeiture of bank guarantee for twelve (12) cities (Nellore, Rajamundry, Tirupati, Warrangal, Mehsana, Aurangabad, Kalyan, Kohlapur, Nagpur, Solapur, Bhopal, Gwalior) under clause 2.2.5 of the Franchise Agreement (FA) which reads as: “The services in other cities shall be launched after AT within 9 months of signing the FA. Failure to comply with this may lead to forfeiture of BG for that city..” If the services were not launched in these 12 cities within 9 months of signing of FA the respondent should have given notice(s) to the Claimant for termination of Agreement. No details of such action(s) of the Respondent was produced during arbitration proceedings.

From the above it is apparent that the Claimant was allowed to proceed with their activities for launch of Services in these 12 cities. The Respondent has also indicated the number of IPTV connections provided in 12 cities that establishes that services in these cities were launched.

Since Respondent never indicated its intention to cancel the Agreement for the reason of not launching the Service within 9 months it can be concluded that the Claimant proceeded in good faith for installation of their equipment.

In view of above the claim of the Respondent for Rs.2.7 Cr for forfeiture of Bank Guarantee for 12 cities is not justified and hence disallowed...”

(emphasis is mine)

5.2 However, if one were to read an earlier part of the award which relates to the learned Arbitrator’s observations *vis-a-vis* claim no.III, MKCL’s stand that it could not provide services in the twelve (12) cities on account of failure on the part of BSNL to provide necessary infrastructure did not impress him. The learned Arbitrator seems to conclude that this stand of MKCL was not supported by conclusive documentary evidence.

5.3 The learned Arbitrator, in fact, goes on to state that as per Clause 1.3.1 of the Franchise Agreement dated 7.7.2008, the MKCL is deemed to have studied the network architecture of BSNL in respect of cities qua which the said agreement was executed between the parties.

5.4 This part of the reasoning of the learned Arbitrator is reflected in the following part of the award:

“The Claimant has made allegations that Respondent has failed to provide the infrastructure which is not supported by any conclusive documentary evidence. In any case as per clause 1.3.1 of FA of dated 07.07.2008, the franchisee is deemed to have studied the network architecture (Of BSNL) in the cities for which the agreement was signed. It is also mentioned therein that connectivity/bandwidth as required shall be provided by BSNL, subject to technical feasibility and availability, as per terms and conditions contained in the agreement.”

Background Facts

6. Before I proceed further, I may only indicate as to the background

in which the aforementioned dispute has arisen between the parties.

6.1 It appears that in and about 2005, BSNL decided to enter the market relating to the field of IPTV, Video on Demand, interactive gaming etcetera.

6.2 For this purpose, BSNL floated two Expression of Interests (EOIs). Against the EOIs, MKCL submitted its bids. MKCL was declared a successful bidder in both EOIs.

6.3 MKCL was, thus, appointed as a franchisee for the city of Pune and for other twenty (20) cities in India.

6.4 Insofar as the Pune city was concerned, the Franchise Agreement dated 17.03.2006 (in short '1st F.A.')

was executed between the parties. Insofar as the other twenty (20) cities were concerned, the Franchise Agreement dated 7.7.2008 (in short '2nd F.A.')

was executed between the parties.

6.5 Admittedly, MKCL under the 2nd F.A. was required to launch services within nine (9) months of its execution.

6.6 It is important to note that the instant petition concerns only the 2nd F.A.

6.7 It was BSNL's case that MKCL was unable to discharge its obligations both under the 1st as well as the 2nd F.A. MKCL on the other hand contended to the contrary.

6.8 BSNL, in order to precipitate the matter, had sought to invoke the performance bank guarantees furnished by MKCL.

6.9 This led to MKCL approaching the Civil Court, Junior Division, Pune, with a suit for injunction.

7. This suit action was filed by MKCL, with the Civil Court, in and about 8.6.2011.

7.1 In view of the fact that an arbitration agreement obtained in the two

F.A.'s referred to hereinabove, the suit proceedings were stayed and parties were referred to arbitration.

7.2 It is in this background that BSNL appointed an Arbitrator in the matter who has rendered the impugned award.

8. As noticed at the very outset, MKCL which was the original claimant had all its claims rejected by the learned Arbitrator. On the other hand, as noticed above, BSNL's counter claims were partially allowed.

8.1 The claims instituted by MKCL were the following:

<u>Sr.No.</u>	<u>Description</u>	<u>Amount (Rs.)</u>
a)	<i>The amount of Performance Bank Guarantee</i>	<i>5,90,00,000/-</i>
b)	<i>Cost</i>	
	<i>1. Stamp Duty for filing suit against BSNL</i>	<i>3,00,000/-</i>
	<i>2. Legal and incidental expenses</i>	<i>2,00,000/-</i>
c)	<i>Total (Rs.)</i>	<i>5,95,00,000/-</i>
d)	<i>Plus Interest @ 7.50% p.a. on Rs.5,90,00,000/- from June 27, 2011 till the date the amount of Rs. 5,90,00,000/- is deposited in MKCL's Bank Account by BSNL.</i>	
	<i>a) Liquidated compensation of Rs. 50,00,000/- on account of financial damages and loss of opportunities.</i>	

9. The net monetary effect of the award, as set out by the learned Arbitrator in the operative portion of the award, reads as follows;

“A) The Respondent (BSNL) is allowed Rs. 3,25,33,627/- out of their seven claims (Claim -I to Claim- VII) of Rs. 6,23,11 ,017/-.
B) The Respondent (BSNL) has encashed total Bank Guarantees of Rs.5,90,00,000/- of the Claimant(MKCL). Therefore Respondent (BSNL) to return Rs. 2,64,66,373/- to the Claimant (MKCL) within three months from the date of Award.”

10. BSNL, thus, being aggrieved by the direction contained in the impugned award concerning return of Rs.2,64,66,373/- in favour of MKCL articulated the same when the matter came up for hearing before the Court for the first time i.e. 21.2.2018. At the hearing of 21.2.2018 the Court noted the following:

“...4. The petitioner has filed the present petition impugning an arbitral award dated 09.10.2017 to a limited extent that it directs refund of the amount recovered by encashment of performance bank guarantees submitted by the respondent in respect of the twelve cities. The Arbitral Tribunal had come to the conclusion that the respondent had launched the services in the twelve cities and, therefore, the petitioner would not be entitled to encash the bank guarantee. The learned counsel appearing for the petitioner has drawn the attention of this Court to the counter affidavit filed on behalf of the respondent, wherein it is admitted that the respondent was unable to launch the services in five cities on account of failure on the part of the petitioner to perform its reciprocal promise. Thus, there was no dispute that the respondent had failed to launch the services in five of the cities in question and the Arbitral Tribunal fell in error holding otherwise...”

11. As would be evident from the aforesaid extract of the Court’s order, notice was issued with regard to the aspect that MKCL had failed to provide services in five cities, *albeit*, on account of failure on the part of BSNL to fulfil its reciprocal promises.

12. On behalf of BSNL, the award was assailed on this short ground, which is, that services were not provided by MKCL in five cities and therefore, relief of refund of bank guarantee amount could not have been directed by the learned Arbitrator.

12.1 For this purpose and in order to buttress this argument, Mr. Ajit Kumar Singh, who, appears for BSNL, has relied upon paragraph 4 of the Statement of Claim (‘SOC’) filed by MKCL and also on paragraph 4 of

the reply to BSNL's Counterclaim.

12.2 In addition thereto, learned counsel has also sought to place reliance on the answer given by MKCL's witness to question no.94.

12.3 In sum, it is the contention of the learned counsel that insofar the following five cities were concerned i.e. Gwalior, Mehsana, Rajkot, Nellore and Warrangal, it was MKCL's own stand in pleadings that it had not provided the necessary services as contemplated under the 2nd F.A.

12.4 It needs to be highlighted that while the grievance in the petition was, to begin with, for non-provisioning of services in twelve cities, at the time of issuance of notice it was scaled down to five cities.

13. On the other hand, Mr. Mukerji, who appears for MKCL, relies upon two documents i.e. letter dated 10.12.2008 and 12.3.2010, both of which are addressed to BSNL to demonstrate that services in the aforementioned five cities could not be launched on account of failure on the part of BSNL to provide the necessary infrastructure facilities and address inadequacies articulated therein.

14. As noted above, the learned Arbitrator on this score, in particular, on the ground of non-provisioning of infrastructure facilities by BSNL, has rejected the stand taken by MKCL.

14.1 However, while rejecting the stand, the learned Arbitrator has also observed that no conclusive material whatsoever was placed before him to demonstrate that infrastructure facilities was not made available by BSNL.

14.2 A perusal of the letter dated 10.12.2008 cited before me by counsel for MKCL would show that, for whatever it was worth, there is a reference in the letters that BSNL had failed to upgrade the link qua the five cities in issue to STM 16 or 1 Gig.

14.3 MKCL did try and convey to BSNL in December 2008 and thereafter in March 2010 that it was unable to provide the necessary

service on account of failure on the part of BSNL to put in place the requisite infrastructure facilities and address the stated inadequacies.

15. The learned Arbitrator, in particular, appears to have overlooked the letter dated 10.12.2008, which, to my mind, was a vital piece of evidence.

16. On being queried, learned counsel for BSNL says that out of a sum of Rs.2,64,66,373/-, the amount encashed by way of bank guarantee qua the five cities would be a sum of Rs.1 crore, which, in fact, conveys to the Court that the remaining amount, even according to BSNL, would have to be paid in view of the finding returned by the learned Arbitrator based on the record placed before me.

17. Thus, in fact, this would lead to a situation where the award can be sustained only partially at this moment.

18. I am, thus, inclined to dispose of the petition with the following directions:

(i) The impugned award is sustained partially which, in effect, would mean that the aspect which concerns the five cities referred to above in respect of which BSNL says that services were not provided will have to be re-visited by the learned Arbitrator. In other words, BSNL should pay, for the moment, a sum of Rs.1,64,66,373/- (i.e. Rs.2,64,66,373 minus Rs.1,00,00,000/-) to MKCL.

(ii) As regards the issue as to whether the failure on the part of MKCL to provide services with regard to the aforementioned five cities occurred on account of the alleged breach of reciprocal promise on the part of BSNL to provide the necessary infrastructure, is an aspect which the learned Arbitrator will have to re-visit in view of the vital evidence having been completely overlooked by him.

18.1 Learned counsel for the parties are agreed qua this aspect that the matter could be remanded to the learned Arbitrator in order to enable him to render a finding on the issue as to whether, if the material sought to be placed before me by MKCL, in particular, the two letters, which I have referred to hereinabove, are taken in account the stand taken by MKCL before me that BSNL did not provide the necessary infrastructure facility could be sustained.

19. Thus, as indicated above, the petition is allowed in part.

20. The finding in the award that there was no conclusive material on record which pointed in the direction that BSNL had failed to provide the necessary infrastructure facilities is set aside to enable the learned Arbitrator to re-visit the issue bearing in mind the material placed before this Court qua that aspect of the matter only.

21. Therefore, BSNL will pay the remaining amount as per the impugned award within four (4) weeks from today.

22. The parties and their counsel will appear before the learned Arbitrator on 13.5.2019 at 4:00 p.m.

23. In case the date given by the Court is not suitable, the learned Arbitrator will fix another date with the consent of the parties and their counsel.

24. The learned Arbitrator is requested to render an award within the shortest possible time not exceeding eight (8) weeks.

25. It is made clear that arguments will be addressed in the matter based only on the material which is already before the learned Arbitrator.

26. The Registry will, immediately, despatch the record to the learned Arbitrator.

27. Learned counsel for the parties are also given the liberty to obtain

soft copies of the arbitration record and, if necessary, place the same before the learned Arbitrator.

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28. In view of the fact that the present petition is disposed of with the aforesaid observations, the captioned application is rendered infructuous.

29. Accordingly, the captioned application is closed.

RAJIV SHAKDHER, J.

APRIL 04, 2019/rb

