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

% *Date of Decision: 3rd June, 2022*

\+ **FAO(OS) (COMM) 156/2022 & CM APPL. 28207/2022**

CONCEPT COMMUNICATIONS LTD. ..... Appellant
Through: Mr. Kunal Tandon, Mr. Aman Varma & Ms. Niti Jain, Advs.

Versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. ***(ORAL)***

1. The appellant (hereafter **CCL**) has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an order dated 20.01.2022 (hereafter '**the impugned order**') passed by the learned Single Judge, whereby CCL's application under Section 34 of the A&C Act, seeking to set aside an arbitral award dated 22.09.2021 (hereafter '**the impugned award**'), was rejected.

Factual Background

2. The respondent (hereafter '**BSNL**') had issued a notice dated 12.02.2009, inviting Expression of Interest to empanel agencies for its

Out-of-Home (OOH) Media and Advertising activities. CCL, amongst other agencies, submitted its bid. The bids were evaluated and as CCL emerged as the successful bidder, BSNL issued a Letter of Intent (LOI) dated 29.05.2009 in its favor. Thereafter, the parties entered into an agreement dated 17.09.2009 (hereafter '**the Agreement**'), whereby the appellant was empaneled to provide OOH advertising services in several Territorial Circles in India (viz. Maharashtra, Tamil Nadu, Andhra Pradesh, Chennai and Andaman & Nicobar). The said Circles comprised of various Secondary Switching Areas (**SSAs**).

3. Thereafter, BSNL issued a Release Order dated 18.09.2009 and awarded the work of "*Brand Visibility of BSNL PCO Glow Sign Board (Double Sided) – Backlit & PCO Signage (Flange Double sided) – Nonlit to ensure uniform branding*" at a value of Rs. 10,78,73,400/-, to CCL. The said Sign Boards are hereafter referred to as "**PCO Sign Boards**".

4. On 23.09.2009, BSNL issued a letter to various Head Offices of the concerned Territorial Circles indicating circle wise allocation of the PCO Sign Boards.

5. Disputes have arisen between the parties in connection with the Agreement and the Release Order dated 18.09.2009.

6. It was CCL's case that the respective offices of the Territorial Circles were antagonistic towards it and had created various hurdles and impediments in executing the work contracted to it. CCL also alleges that officers of various Circles had orally informed its representatives that they would not permit CCL to carry on the work

as the same had been directly entrusted to other candidates.

7. Performance of the Agreement / Release Order was delayed and CCL had also sought extension of time for completing the same. CCL claims that it finally completed the task assigned and installed the PCO Sign Boards in each of the Territorial Circles of BSNL and relevant SSAs. CCL stated that it raised bills for installing the PCO Sign Boards from time to time. Whilst some payments were made a large invoiced amount was withheld.

8. According to CCL an amount of ₹13,04,14,219.95 remained unpaid.

9. CCL invoked the Arbitration Agreement and sought reference of the said disputes to arbitration. Before the Arbitral Tribunal, CCL filed a Statement of Claim claiming an amount of ₹13,04,14,219/- along with interest at the rate of 24% per annum from 16.07.2013 till the date of payment. CCL also claimed an amount of ₹10,00,00,000/- (Rupees Ten Crores) towards loss and damages suffered by it and in addition, costs of the legal proceedings.

10. BSNL contested the claims raised by the appellant. BSNL claims that a substantial number of PCO Sign Boards, claimed to have been installed by the appellant, were not available on verification. BSNL had paid the amount for PCO Sign Boards,which were found to be installed on verification, after deducting liquidated damages in terms of the Agreement.

11. The essential controversy before the Arbitral Tribunal was twofold. First, whether the appellant had in fact installed the PCO

Sign Boards as claimed and consequently was entitled to payment for the same; and second, whether BSNL was entitled to deduct the liquidated damages.

12. The appellant claimed that the Verification Reports relied upon by BSNL were highly delayed. In terms of the Agreement, the bills were required to be verified within a period of fifteen days of its submission, however, BSNL did not do so. BSNL carried out the verification after a delay of several months. CCL claimed that it was thus possible that certain PCO Sign Boards had been either stolen or destroyed by a cyclone. Further, the relevance of PCO's had reduced significantly on account of a higher reliance on mobile telephony and therefore several PCO's were not functional.

13. The Arbitral Tribunal evaluated the material and evidence produced by the parties and rejected the contentions advanced on behalf of the appellant. The Arbitral Tribunal found that appellant was paid for the PCO Sign Boards that were found to exist on verification. It rejected the contention that the appellant was entitled to be paid for the PCO Sign Boards, as claimed, notwithstanding that they were not found on physical verification.

14. As is apparent from the above, the dispute whether CCL had in fact installed the PCO Sign Boards, as claimed by it, is a factual one. The Arbitral Tribunal had carefully considered the appellant's claim for various Territorial Circles and the SSAs included within the said circles. And, had decided the disputes after evaluating the material available before it.

15. It is well settled that the decision of the Arbitral Tribunal on a question of fact is final. The same would not warrant any interference in a proceedings under Section 34 of the A&C Act, unless it is established that the same is *ex facie* erroneous and vitiates the arbitral award on the ground of patent illegality or on the ground of being in conflict with the Public Policy of India.

16. The learned Single Judge did not find merit in CCL's challenge to the impugned award. The Learned Single Judge concurred with the conclusion of the Arbitral Tribunal to reject CCL's explanation regarding non-availability of the PCO Sign Boards at the time of verification. The court found that the impugned award is based on the material produced before the Arbitral Tribunal and there was no ground to interfere with the said finding in a proceeding under Section 34 of the A&C Act.

17. Mr. Kunal Tandon, learned counsel appearing for CCL, does not dispute the well settled proposition that an arbitral award cannot be interfered with unless any of the grounds as set out in Section 34 of the A&C Act are established. He, however, submits that the impugned award is vulnerable on the ground that the Arbitral Tribunal had discarded a vital piece of evidence. He submits that the impugned award can be impeached under Section 34(2)(b)(ii) as well as Section 34(2A) of the A&C Act on the ground of non-consideration of a vital evidence. He submitted that the Status Report of installation of 'PCO Sign Boards' marked as Ex.RW1/9 was completely disregarded. He submitted BSNL's witness (RW1) was cross examined and had

admitted the said document and its contents. He contended that Section 92 of the Indian Evidence Act, 1872 was inapplicable.

18. The aforesaid contention is premised on the basis that the Arbitral Tribunal had not evaluated or considered the said document (Ex.RW1/9). Paragraph 84 of the impugned award is relevant and reads as under:

> "84. The entire Claim seeks the corroboration from Ex.RWI/9 a document produced showing the number of bills submitted by the Claimant vis a vis the number of boards installed. The Claimant seeks to rely upon it and the Respondent seeks to discard the same as the previous Arbitrator had discarded the cross examination of the witness RWl. The present proceeding being under Section 29B of the Act and hence the same cannot be discarded, the document has to be read and interpreted in conjunction with the remaining documents."

19. It is clear from the above that the Arbitral Tribunal did not ignore Ex.RW1/9. However, that was not the only document available on record. In ***Associated Builders v Delhi Development Authority: (2015) 3 SCC 49****,* the Supreme Court has authoritatively explained that *"A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts"*

20. It is material to note that, *sensu stricto*, the Indian Evidence Act, 1872 does not apply to arbitral proceedings. Section 1 of the said Act makes it amply clear that it would not apply to proceedings before an arbitrator. Section 19(1) of the A&C Act also expressly provides that an Arbitral Tribunal would not be bound by the Indian Evidence Act, 1872. Clearly, the decision of the Arbitral Tribunal to evaluate the material placed before it cannot be faulted.

21. This Court finds no infirmity with the decision of the learned Single Judge in declining to interfere with the impugned award on the ground that the disputes involved are largely on questions of fact and the finding returned by the Arbitral Tribunal in regard to these questions warranted no interference. The learned Single Judge had rightly concluded that none of the grounds as set out in Section 34 of the A&C Act were established in the present case.

22. The appeal is unmerited and accordingly dismissed. All pending application(s) are also dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JUNE 3, 2022
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