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

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Date of Decision: 22.03.2024

+ **FAO (COMM) 55/2024 & CM No. 18116/2024**

PUSHPENDER SACHDEVA (PROP)

M/S NOBLE ELECTRONICS

..... Appellant

Through: Mr. Samrat Nigam, Mr. Pushpinder
Sachdeva and Mr. Cyril, Advs.

versus

MAHANAGAR TELEPHONE NIGAM LTD.THROUGH

ITS CHAIRMAN-CUM-MANAGING DIRECTOR Respondent

Through:

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****VIBHU BAKHRU, J. (ORAL)****CM APPL. 18115/2024(condonation of delay in re-filing)**

1. For the reasons stated in the application, the delay in re-filing the above appeal stands condoned.
2. The application stands disposed of.

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3. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning the judgment dated 28.11.2023 (hereafter *the impugned judgement*) passed by the learned Commercial Court in OMP (COMM) No.16/2022 captioned *Pushpender Sachdeva v. Mahanagar Telephone Nigam Limited & Anr.*
4. The appellant had filed the said petition [OMP (COMM) No.16/2022] under Section 34 of the A&C Act impugning the Arbitral Award dated



16.12.2020 (hereafter *the impugned award*) rendered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter *the Arbitral Tribunal*).

5. The impugned award was rendered in the context of the disputes that had arisen between the parties in connection with an agreement dated 02.08.2006 (hereafter the *Agreement*). In terms of the Agreement, the respondent, Mahanagar Telephone Nigam Limited (hereafter *MTNL*), had engaged the appellant as an authorised distributor for sale and distribution of its products and services namely, “VCC, Bol-Anmol (*Internet telephone card*), Dolphin (*cellular postpaid*), Trump (*Cellular-prepaid*), ISDN, INET, IN, CD-ROM Directory, ECS, NTC, CUG, Internet, Broadband, Phone Plus STD-ISD code book etc.”

6. In terms of the Agreement the appellant had submitted a bank guarantee of ₹5,00,000 – Performance Bank Guarantee of ₹3,00,000/- and security deposit of ₹2,00,000/-.

7. In terms of Clause 22 of the Agreement, the appellant also agreed to indemnify MTNL against all losses suffered due to his acts or acts of his agents and representatives. The appellant also agreed to fully indemnify and keep MTNL indemnified against damages or any other claims which would be brought against MTNL by any third party owing to the actions attributable to the appellant. The appellant also executed a Deed of Indemnity dated 02.08.2006 to the aforesaid effect.

THE DISPUTE

8. The dispute between the parties relates to the claims raised by the appellant for payment of incentives in terms of the Agreement and wrongful



encashment of the bank guarantee of ₹5,00,000/-. The appellant filed Statement of Claim, claiming a sum of ₹18,65,000/- towards incentives and an amount of ₹5,00,000/- recovered by MTNL by wrongfully invoking the bank guarantee along with interest at the rate of 18% per annum.

9. MTNL also raised a counterclaim for a sum of ₹36,85,000/- on account of penalty imposed by Department of Telecom, Government of India (hereafter *DoT*) relatable to non-compliant Customer Application Forms (hereafter *CAFs*) furnished by the appellant.

10. There is no serious dispute as to the appellant's entitlement to incentives. The controversy in this regard largely related to the quantification of the said amount. The principal dispute related to MTNL's claim for damages on account of penalty imposed by DoT.

11. The appellant raised several defences to contest MTNL's counterclaim for damages. First, that it was in the nature of penalty and therefore unsustainable. The appellant also claimed that the levy of penalty was a matter *inter se* the DoT and MTNL and the appellant was not liable to compensate MTNL against any such penalty levied by DoT. Second, that the amounts sought to be recovered were beyond the period of six months from the date of activation and in terms of the communications issued by MTNL, no claim relating to CAFs could be raised beyond the period of six months from the date of activation. Third, that no prior show cause notice for invocation of bank guarantee and imposition of damages was issued by MTNL. Lastly, that the appellant had no obligation to verify the CAFs and therefore, could not be held liable for penalty in respect of non-compliant CAFs. The appellant contended that he had rectified all CAFs that were



flagged by MTNL and there was no *inter se* issue on that account. It was further contended that if there was any issue regarding any of CAFs, MTNL could have called upon the appellant to rectify the same but there was no scope for levy of penalty.

12. The appellant also contested the quantum of penalty as levied.

13. MTNL had asserted its counterclaim and also contested the quantum of incentives as claimed by the appellant.

IMPUGNED AWARD

14. The Arbitral Tribunal examined the dispute and the extensive material placed before the Arbitral Tribunal including the *inter se* communications issued from time to time.

15. The Arbitral Tribunal did not accept the appellant's claim that the scope of work under the Agreement did not extend to verification of CAFs. The Arbitral Tribunal noted that the Agreement expressly provided that the scope of work could be extended by MTNL at its sole discretion to include the work like getting the application forms filled from customers, due verification, and completion of other formalities for requests received by MTNL on telephone for supply / provision of its various retail products / services.

16. The Arbitral Tribunal noted that, in fact, within a week of entering into the Agreement, MTNL had issued instructions / guidelines to all distributors including the appellant, setting out the matters to be certified by the distributors. It was expressly provided that the CAFs were required to be signed by the subscribers in the presence of the distributor. The photographs

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of the subscribers were required to be matched with the person signing the CAFs. The distributors were further required to verify that they have seen the original documents. It is important to note that the said instructions also expressly stated that the *“distributors being a representative of MTNL will have to ensure that the numbers are activated only after being satisfied about the authenticity of the documents attached.”*

17. The Arbitral Tribunal examined the communications issued by MTNL and the circulars and instructions issued by DoT and found as under:

- i. “CAFs were to be filled and signed by the subscriber in the presence of the Claimant-distributor;
- ii. The Claimant-distributor were to match the photo of the subscriber with the person;
- iii. The Claimant-distributor were to see and verify the document submitted with the CAFs with the originals;
- iv. Signature of the applicant of the subscriber were to be matched by the Claimant-distributor with the ID/document attached to the CAFs;
- v. Numbers were to be activated by the Claimants-distributor only after they being satisfied with the completeness and authenticity of the documents attached to CAFs;
- vi. Verification of all connections activated were to be done by the Claimants-distributors within 14 days of activation;
- vii. Cases of activation without due verification; Original CAFs being tampered; Non-compliant CAFs to be made compliant as it being a matter of national security;
- viii. Where the CAFs are found to be non-compliant, proper CAFs should be produced and accordingly further providing for additional 1 year window period for re-verification of CAFs.”

18. In view of the aforesaid findings, the Arbitral Tribunal held that the appellant’s scope of work was expanded in terms of Clause 5 of the Agreement. Accordingly, the Arbitral Tribunal rejected the appellant’s



contention that the work of verification of CAFs was not covered within his scope of work under the Agreement.

19. The Arbitral Tribunal rejected the appellant's contention that no claim could be made in respect of CAFs after six months of activation of the numbers. The Arbitral Tribunal examined the terms of the Deed of Indemnity as well as the communications issued by MTNL and DoT, and concluded that the appellant was not absolved from his liability for damages on account of non-compliant CAFs.

20. Insofar as the encashment of the bank guarantee is concerned, the Arbitral Tribunal held that MTNL was required to account for the amount recovered.

21. The Arbitral Tribunal further examined the rival contentions regarding quantification of claims and counterclaims. MTNL had furnished details of certain payments made by it from February, 2010 to August, 2010. The details of the said payments are set out below:

- “i. February 2010 – Rs.1,18,667/-
- ii. March 2010 – Rs.38,932/-
- iii. April 2010 – Rs.81,933/-
- iv. June 2010 – Rs.73,700/-
- v. July 2010 – Rs.2,25,792/-
- vi. August 2010 – Rs.2,27,122/-”

22. The Arbitral Tribunal found that the documents furnished along with the supporting affidavit established that the incentives to the aforesaid extent were paid to the appellant. Thus, the Arbitral Tribunal concluded that an aggregate payment of ₹7,66,146/- was paid towards incentives and the same



was required to be accounted against the claim of incentives made by the appellant. Accordingly, the Arbitral Tribunal held that a sum of ₹10,98,854/- [₹18,65,000/- being the total incentive claimed by the appellant less ₹7,66,146/- received by the appellant towards incentives] was payable.

23. The Arbitral Tribunal also carefully examined MTNL's claim for set off in respect of non-compliant CAFs. MTNL had alleged that there were 1842 non-compliant CAFs, however, copies of only 508 non-compliant CAFs had been placed on record. MTNL's claim for set off in respect of the said CAFs was accepted and the Arbitral Tribunal held that MTNL was entitled to set off ₹34,230/- against the incentive amount.

24. Accordingly, the Arbitral Tribunal entered an award of ₹10,64,624/- [₹18,65,000/- as claimed by the appellant less ₹7,66,146/- paid by MTNL less ₹34,230/- set off amount].

25. Insofar as the counterclaim is concerned, the Arbitral Tribunal examined the details of the same and found that the penalty amount in regard to certain CAFs required to be deducted as they were found to be compliant. In addition, the penalty in respect of certain CAFs was not attributable to the appellant but to other distributors. The Arbitral Tribunal also did not accept the claim in respect of CAFs that were not traceable.

26. The Arbitral Tribunal found that a total penalty of ₹11,15,000/- could be related to non-compliant CAFs attributable to the appellant. After adjusting an amount of ₹5,00,000/- recovered by MTNL from encashment of bank guarantee, the Arbitral Tribunal awarded an amount of ₹6,15,000/- in respect of MTNL's counter-claim.



27. Thus, an aggregate amount of ₹4,49,624/- was awarded in favour of the appellant along with interest at the rate of 9% per annum from the date of commencement of the arbitration (that is, 07.12.2011) till the date of payment.

REASONS & CONCLUSION

28. The appellant challenged the impugned award by filing a petition under Section 34 of the A&C Act [being OMP (COMM) No.16/2022] which was rejected by the impugned judgment. Before the learned Commercial Court, the appellant had raised several contentions, which were rejected.

29. Mr. Nigam, learned counsel appearing for the appellant confined the challenge in the present appeal to a singular issue. He contended that the levy of penalty by DoT on MTNL could not be construed as entitling MTNL to recover the said amount from the appellant. He submitted that the Agreement between the appellant and MTNL did not provide for imposition of any such penalty and that the Arbitral Tribunal has grossly erred in not appreciating the terms of the Agreement.

30. We are unable to accept that any challenge to the impugned award could be entertained on the aforesaid ground. The Arbitral Tribunal had examined the terms of the Agreement and the Deed of Indemnity dated 02.08.2006 furnished by the appellant in terms of Clause 22 of the Agreement. As noted above, the Arbitral Tribunal had found that the appellant is liable to compensate for the losses suffered by MTNL due to any deficiency in the work attributable to the appellant. Clause 22 of the Agreement is relevant and is set out below:

“22. Indemnification:

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- 22.1 The distributor indemnifies the company against all losses due to the acts of distributor, its servants, agents, retailers or its representatives.
- 22.2 The Distributor hereby agrees to well and sufficiently protect and keep harmless and indemnify the Company, against all types of embezzlement, misappropriation or misapplication of money.
- 22.3 The Distributor agrees to fully indemnify and keep indemnified the Company against damages or any claims for damages or any other claims of whatsoever nature are brought against Company by any third party owing to deeds entirely attributable to the Distributor. The Company shall be vested with the sole discretion to determine such claims / damages and have the right to adjust the same from any dues payable to the Distributor.
- 22.4 The Company shall not be liable to the Distributor or any other party consequent upon termination of the Agreement for any reason whatever for any claim for loss of profits or for any anticipated booking for Company or on account of any expenditure, investments, leases or any other commitments made by the Distributor in connection with the Agreement made in reliance upon or by virtue of the Distributor's appointment under the Agreement.
- 22.5 The Company's acceptance of any booking from the Distributor after the termination / expiry of this Agreement shall not be construed as a renewal or extension of the Agreement nor a waiver of termination."

31. We find no infirmity with the decision of the Arbitral Tribunal in finding that the appellant is liable to compensate MTNL in respect of any loss or damage suffered by it on account of non-compliant CAFs forwarded by the appellant. It is also well settled that the question regarding construction of contract is clearly within the jurisdiction of the Arbitral Tribunal [See: ***MSK Projects India (JV) Ltd. v. State of Rajasthan & Anr.: (2011) 10 SCC 573***]. Unless the interpretation of the contract is found to be patently erroneous and



perverse, no interference with the impugned award would be warranted.

32. The contention that the Agreement between the parties did not permit levy of penalty and therefore MTNL could not levy the same is also unmerited. The Arbitral Tribunal had found that MTNL had not imposed any penalty on the appellant. Its claim was confined to the damage suffered by it on account of penalty imposed by DoT. Since the penalty imposed by DoT was attributable to non-compliant CAFs forwarded by the appellant, the appellant would be liable to compensate MTNL for the loss / damage suffered by it. In any view of the matter, the Arbitral Tribunal's decision on the merits of the claim cannot be held to be implausible. Given the limited scope of examination under Section 34 of the A&C Act, we are unable to accept that the impugned award falls foul public policy of India or is vitiated by patent illegality on the face of the record. Accordingly, we find no fault with the decision of the learned Commercial Court in rejecting the appellant's petition under Section 34 of the A&C Act.

33. The appeal is unmerited and, accordingly, dismissed. All pending applications are also dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MARCH 22, 2024

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