

(2020) 09 DEL CK 0160

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 103 Of 2020

Bharat Sanchar Nigam Limited

APPELLANT

Vs

Aksh Optifibre Limited

RESPONDENT

Date of Decision : 23-09-2020

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Arbitration And Conciliation Act, 1996 — Section 5, 9, 34, 37, 37(2)

Citation : (2020) 09 DEL CK 0160

Hon'ble Judges : Hima Kohli, J; Subramonium Prasad, J

Bench : Division Bench

Advocate : Dinesh Agnani, L B Rai, Amit Bansal, Vivek Gupta, Yash Sanchiher

Final Decision : Dismissed

Judgement

Subramonium Prasad, J

1. By way of the present appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short "the Act"), the appellant seeks to challenge the judgment and order dated 04.03.2020 passed in OMP.(COMM).No.131/2017. By the judgment impugned herein, the learned Single Judge has affirmed the Award dated 27.10.2016 passed by the learned Arbitrator.

2. The facts, in brief, leading to this appeal are as under:

(a) The appellant invited Request for Expression of Interest (for short "EOI") from parties for provision of content to its Broadband Customers through a Content Delivery Network (for short "CDN") which the appellant wanted to provide to its customers internet based services at affordable rates. The bidder was not required to give any financial offer or revenue share percentage which had been determined by the appellant. The tariff to be charged from the customer was to be fixed by the appellant.

(b) The respondent was declared as the successful bidder. A Franchise

Agreement for providing services in 20 cities listed in the Notice Inviting the EOI was entered into between the appellant and the respondent on 02.06.2008. The agreement was for a period of 10 years. The respondent was, therefore, to make available the CDN Infrastructure and also to operate and maintain the same. The appellant was to provide Broadband access and connectivity of the CDN Equipment to its customers. The revenue sharing formula was prescribed in the Franchise Agreement and the respondent was to give adequate performance guarantee under the Franchise Agreement.

(c) The services under the Franchise Agreement started in the city of Jaipur in August, 2008. It is pertinent to note that under the Franchise Agreement, no charges were payable by the respondent for intra-city usage. Since the respondent was only using intra-city bandwidth in the city of Jaipur, no charges were to be paid by it. It is the claim of the appellant that for inter-city bandwidth usages, respondent was to pay the charges which were to be within the "competitive port tariff" for the bandwidth/MPLS services from time to time.

(d) The respondent launched its services at Chandigarh on 06.02.2009 using inter-city bandwidth. The appellant raised its demand against the respondent for inter-city bandwidth charges by its letter dated 30.09.2008 claiming Rs.1.12 Crores annually in 20 locations. According to the appellant, it was only a tentative demand. Another demand of Rs.40.16 Crores per annum for 20 cities was raised by letter dated 11.12.2008. On 20.01.2009, the appellant wrote a letter to the respondent demanding payment for inter-city bandwidth usages stating that failure in making the payment would result in disconnection of the connectivity.

(e) The respondent by its letter dated 11.02.2009 proposed a one-time fee of Rs.30.0 Lacs, i.e., Rs.6.0 Lacs per annum for all locations. By letter dated 11.02.2009, the respondent suggested that bandwidth charges @ Rs.5/- per commercial connection per month will be paid by it to the appellant.

(f) There were a series of correspondence exchanged between the parties which need not be gone into as the same is not material for this case. Finally, the appellant issued a demand note dated 26.10.2012 claiming a sum of Rs.17,84,13,410/- from the respondent towards inter-city bandwidth charges for all 20 cities.

(g) The respondent approached the High Court by filing a petition under Section 9 of the Act (OMP.No.1012/2012) for an order restraining the appellant from enforcing the demand of Rs. 17,84,13,410/- mentioned in the demand note dated 26.10.2012 or any other amount towards Multi Protocol Label Switching (MPLS) bandwidth charges issued by the appellant and also for an order restraining the respondent from disconnecting the MPLS bandwidth provided to it under the Franchise Agreement. The respondent also prayed for an order restraining the appellant from encashing the bank guarantee given by the appellant under the Franchise Agreement.

(h) An interim order was passed on 02.11.2012 in the captioned petition restraining the appellant from taking any coercive action against the respondent pursuant to the demand note.

(i) Steps were also taken for appointment of an Arbitrator and a Sole Arbitrator was appointed to adjudicate the dispute between the parties.

3. In the arbitration proceedings, it was claimed by the respondent that as per the agreement between the parties, there was no agreed parameter on which inter-city bandwidth charge to be paid by it to the appellant herein, could be determined. It is stated that the provisions in the EOI as well as the Franchise Agreement relating to payment of inter-city bandwidth charges are neither certain, nor are they capable of being made certain and hence, are void. It was contended in the Claim Statement filed by the respondent herein that the contract does not provide the start in time for levy of inter-city bandwidth charges. It is stated that due to uncertainty of the provisions relating to payment of inter-city bandwidth charges, there is no consistency between the provisions contained in the EOI and the Franchise Agreement; that while the EOI contemplated provision of inter-city bandwidth at competitive rates, Schedule 3 of the Franchise links the bandwidth charges to the fact that Franchisee is expected to locate separate Video on Demand (VOD) server for the additional city; that without prejudice to the contention that the provisions of the EOI and Franchise Agreement relating to payment of inter-city bandwidth charges are void, the claimant (respondent herein) stated that any such charges could not be determined without mutual consultation and concurrence of the parties keeping in mind various commercial and circumstantial realities and were to be within the overall parameters of commercial viabilities of transaction and feasibilities. The respondent, therefore, claimed that the demand of the appellant for Rs.17,84,13,410/- or any other sum towards MPLS/inter-city bandwidth charges for the inter-city connectivity from it was excessive and bad in law. The respondent also prayed for Rs.10.0 Lacs as costs.

4. The appellant herein, who was the respondent before the Arbitrator, denied the aforesaid claims/contentions of the respondent. The appellant contended that the MPLS STM bandwidth charges chargeable/or BSNL MPLS service are available, published over market/and competitive rates are subject to change from time to time depending with the marking conditions. The appellant stated that contention of the respondent that the Franchise Agreement did not have parameters on bandwidth charges, is not correct.

5. The learned Sole Arbitrator framed the following three issues:

"(i) if, (sic) as per the Franchise Agreement, parties had agreed that intercity MPLS/bandwidth connectivity was to be provided by the Respondent to the Claimant on chargeable basis and

(ii) if parties had agreed that the intercity MPLS/bandwidth connectivity was to be provided on chargeable basis, was there any agreement between the parties

about rates payable by the Claimant to the Respondent for the same? and

(iii) if there is no agreement between the parties regarding the rates payable by the Claimant to the Respondent for intercity bandwidth connectivity, can such rates be fixed by the arbitral tribunal?"

6. In the Award made on 27.10.2016, the learned Sole Arbitrator held that the parties had agreed under the agreement that inter-city bandwidth connectivity would be provided to the claimant/respondent on charges basis. On the second issue as to whether, was there any agreement between the parties about rates payable by the respondent/claimant to the appellant herein, the Arbitrator held as under:

"13. As regards the second question is concerned, i.e. was there any agreement between the parties about rates which intercity bandwidth connectivity charges were payable by the Claimant to the Respondent, provisions of the Franchise Agreement are required to be examined. During the course of arguments, parties have referred to Clause 3.6.3 and Clause 4.5.2 of the Franchise agreement, as the relevant clauses for inter-city bandwidth connectivity. The said two clauses provide as under:

3.6.3. Inter-city bandwidth shall be provided to the Franchise on competitive rates of BSNL as the Franchise is expected to locate a separate VoD server for the additional city. BSNL shall be given first right of refusal by the bidder for providing the intercity bandwidth requirement of the Franchise.

4.5.2. For provision of VoD & IP TV/Broadcast TV services to the customers. Inter-city bandwidth shall be provided, provided on chargeable basis at the competitive port tariff for MPCL service from time to time.

14. The above two clauses refer to competitive rate/competitive port tariff as the basis for payment of bandwidth charges for intercity connectivity. Franchise Agreement neither defines the said term nor contain any parameter on the basis of which such competitive rate/tariff could be ascertained. It is this issue, which appears to be the main point of controversy between the parties. In its Statement of Claim, Claimant submitted that these clauses are neither certain nor capable of being made certain and hence are void. Respondent, on the other hand, contended in its Statement of Defence that Bandwidth charges chargeable for BSNL MPLS services were available on the internet, the competitive rates refers to rates being charged by the BSNL and the prevailing rates in the market by other services providers. From the correspondences exchanged between the parties it will become clear that both were acting on the basis of their own different interpretations and could not come to any consensus on the issue of calculation of bandwidth charge till issue got converted into dispute.

15. Respondent raised its first ad-hoc demand vide letter dated 30.9.2008 demanding a sum of Rs.1.12 crores for all the 20 cities. Another provisional demand was raised by the Respondent on 11.12.2008 for Rs.40.16 crores per

annum for all the 20 cities. Thereafter, Respondent vide its letter dated 20.1.2009 requested the Claimant to pay Rs.1.12 crores as demanded in its letter dated 30.9.2008. First ever final demand from the Respondent's side was made on 12.7.2010 where Respondent demanded for each of the cities a sum of Rs.1.0308 + tax on IRU basis for 10 years or Rs.19.13 lakhs + tax on annual basis. This demand was repeated in Respondent's letter dated 31.8.2012. The final demand was made by the Respondent vide its letter dated 26.10.2012 of Rs.17.84 crores for all the 20 cities.

16. Claimant, on the other hand, kept requesting the Respondent through its various letters, to decide the bandwidth charges on reasonable basis. Reference can be to Claimant's letter dated 11.2.2009 where Claimant proposed for levy and collection of one-time fee of Rs.30 lakhs or annual charges of Rs.6 lakhs for all the locations subject to the conditions mentioned in the said letter. Claimant emphasized that Respondent should treat the Claimant as its business partners and should calculate the charges considering how much would BSNL be able to allocate towards bandwidth cost if BSNL was running the IPTV services on its own and still make profit. In its letter dated 11.5.2009, Claimant added one more proposal for consideration of the Respondent i.e. Rs.5 per commercial connection per month, towards bandwidth cost. In its email dated 4.2.2011, Claimant even agreed to increase revenue share of BSNL to 11.5% as against 10% mentioned in the Franchise Agreement in lieu of no charges for intercity bandwidth.

17. It is, therefore, clear that parties were adopting different basis for calculation of intercity bandwidth charges, which establishes that there was no parameter in the contract for deciding the bandwidth charges for intercity connectivity.

Respondent's contention that the competitive rates was a reference to the rates available on the internet is not correct as if that was so, contract clauses would have been differently worded. Claimant has pointed out that wherever bidders were required to make reference to BSNL's website, a specific reference was made in the bidding document. Secondly it has come on record that prior to tune 2008 BSNL was not providing IPTV service, therefore, there was no possibility of any rates to be charged from IPTV Franchise being available on internet. Furthermore, there was a vast difference between the demands made by the Respondent at different points of time. If the rates were so available, as stated by the Respondent, nothing prevented the Respondent from making the final demand forthwith. What is also relevant to note here is that as per the Franchise Agreement, Claimant was not buying bandwidth from the Respondent. Such a bandwidth was to be used by the Claimant for providing IPTV service, exclusively to BSNL's customers under the Franchise Agreement. Therefore, even if any rate for intercity bandwidth was available on Respondent's website, the same would not have been relevant for the bandwidth charges to be paid by a Franchise under the Franchise Agreement. Respondent has placed reliance on its tariff circular dated 14.11.2008 based on which provisional demand dated 11.12.2008

was raised. However, it was admitted by its witness during the cross-examination that the final demand dated 26.10.2012 was not based on tariff circular dated 14.11.2008.

Respondent's contention is also not acceptable in view of the fact that till 12.7.2010, Respondent could not raise any final demand towards bandwidth charges, which was not possible if there was any tariff available on Respondent's website as payable by a Franchise, like the Claimant for using intercity bandwidth.

18. During cross-examination, Respondent's witness agreed that contract contained no parameter for deciding the competitive rate for intercity bandwidth connectivity. (Q.33)

Respondent's witness also expressed ignorance about the manner in which different demands raised by the Respondent, were arrived at. Respondent's witness refused to answer the question as to how the demand dated 26.10.2012 was based on competitive rate.

19. For the reasons stated above, I hold that there was no agreement between the parties regarding the rates of intercity MPLS/bandwidth payable by the Claimant to the Respondent. Contract contains no provision on the basis of which competitive rate/tariff for intercity bandwidth could be calculated."(emphasis added)

7. On the amount to be paid, the learned Sole Arbitrator records as under:

"20. With respect to the third issue i.e. if there is no agreement between the parties regarding the rates payable by the Claimant to the Respondent for intercity bandwidth connectivity can such rates be fixed by the arbitral tribunal. I hold that in such a situation, Tribunal can decide reasonable rates as has been held by the Hon'ble High Court of Orissa in the case of Rajkishore Mohanty and Anr. Vs. Banabehari Patnaik and Ors: MANU/OR/0020/1951. Even otherwise, both the parties are in agreement that Tribunal can decide reasonable rate...." (emphasis added)

8. After recording the above consent, the learned Sole Arbitrator proceeded further to determine the rate at which the respondent herein was to pay for the inter-city bandwidth charges to the appellant. A perusal of the Award shows that the learned Sole Arbitrator considered as to what should be the reasonable rate for inter-city bandwidth connection and observed as under:

"23 ...Charges claimed by the respondent for intercity Bandwidth are much more than the total revenue earned. Thus these charges cannot be called competitive. Moreover it is seen that total cost incurred by the claimant on equipment and content is much more than the total revenue earned. If the Bandwidth charges claimed by the respondent are also added then the whole business becomes totally unviable.

Claimant has been representing to the respondent to arrive at bandwidth charges

on competitive rates immediately are signing the agreement.

Claimant has proposed payment of bandwidth charges on any of the following basis:

A. Once BSNL Broadband subscriber base reaches 1,00,000 or IPTV subscriber base crosses 15,000 in a city/town, onetime fee of Rs.30 lacs for 9 years or annual charges of Rs.6 lacs per year can be charged for upto 300 mbps MPLSVPN Bandwidth.

B. Rs.5/- per commercial coinnecction per month as bandwidth cost.

C. Increase of revenue share of BSNL to 11.5% in place of 10% as agreed under the agreement in lieu of no charges for intercity bandwidth...."

9. The learned Sole Arbitrator thereafter fixed Rs.5/- per connection per month and directed the respondent/claimant to pay inter-city bandwidth charges @ Rs.5/- per connection per month for the period of actual operations in all 18 cities to the appellant.

10. The Award was challenged by the appellant herein by filing a petition under Section 34 of the Act. Before the learned Single Judge, it was primarily argued by the appellant that the Tribunal has arbitrarily fixed rate of Rs.5/- per connection per month on the say of the respondent and the said figure has not been arrived at on the basis of any material.

11. After going through the material on record, the learned Single Judge upheld the Award and held that there is no patent illegality or perversity therein. The learned Single Judge found that the contract did not have any provision stipulating the actual rates chargeable. The criteria adopted by the Tribunal by fixing Rs.5/- per connection per month was upheld. The learned Single Judge found that the Tribunal has based its findings on common business sense as well as the proposals submitted by the respondent. Reliance has been placed on the judgment of the Supreme Court in the case of Associate Builders v. Delhi Development Authority, reported as (2015) 3 SCC 49 for the proposition that courts while exercising jurisdiction under Section 34 of the Act, do not re-appreciate evidence. It has been held that the Tribunal has given a well-reasoned finding and it is not open for the court to review the same. As a result, the petition filed by the appellant under Section 34 of the Act was dismissed vide order dated 04.03.2020. It is this order which is in challenge in the present appeal.

12. We have heard Mr. Dinesh Agnani, learned Senior Counsel appearing for the appellant.

13. The jurisdiction of an appellate court while exercising a jurisdiction under Section 37 of the Act is well settled. A Division Bench of this Court in National Highway Authority of India v. PNC-BEL(JV), reported as 2019 SCC Online Del 9461, (where one of us, namely, Hima Kohli, J., was a member), has held that

when the arbitral award has been upheld under Section 34 of the Act, in exercise of jurisdiction under Section 37 of the Act, the appellate court cannot proceed to independently assess the relative merits and demerits of the case and observed as under:

"7. To start with, a quick glance at the scope of interference by the Court in exercising the jurisdiction under Section 37 of the A&C Act. The structure of dispute resolution contemplated under the A&C Act is pyramidal in nature. At the first tier is the Arbitral Tribunal that has been held to be the master of the qualitative and quantitative evidence led before it. At the second tier is a Court that exercises powers vested in it under Section 34 of the Act. The said Court is not expected to sit in appeal over the Award of an Arbitral Tribunal and reassess or reappraise the evidence to find out as to whether a different conclusion could be arrived at and if so, substitute its view with that of the Arbitral Tribunal. The focus of the scrutiny at this stage is to examine whether the decision of the Arbitral Tribunal is based on a legitimate process, regardless of the errors on the application of law or on the determination of facts.

(Refer: Kwaliti Manufacturing Corporation v. Central Warehousing Corporation, (2009) 5 SCC 142, Sumitomo Heavy Industries Limited v. Oil & Natural Gas Commission of India, (2010) 11 SCC 296, P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594 and Sutlej Construction v. Union Territory of Chandigarh, (2018) 1 SCC 718) .

8. The provisions of Section 37 of the A&C Act entails a second round of scrutiny of the Arbitral Award, which is more in the nature of a judicial review, since the first round of scrutiny has already been undertaken by a Court under Section 34. At the third tier, while exercising jurisdiction under Section 37 of the A&C Act, the Superior Court is not to act as an Appellate Court and proceed to independently assess the relative merits/demerits of the Award. The limited scope of determination under the said provision is to assess as to whether the views expressed by the learned Single Judge falls within the parameters laid down under Section 34 of the Act. Only when the Court has taken a glaringly preposterous view or has overlooked a patent error in the Award, is interference called for under Section 37 of the Act. Another note of caution may be added here. In circumstances where the Arbitral Award has been upheld under Section 34 of the Act, while considering an appeal preferred under Section 37 of the Act against the decision taken, the Court should show circumspection and be slow to disturb the concurrent findings. In a nutshell, higher the tier of scrutiny under the Act, narrower becomes the scope of interference.

[Refer Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49 : AIR 2015 SC 620, CWHEC-HCIL(JV) v. CHPRCL, 2017 SCC OnLine Del 9074, Telecommunication Consultants India Limited v. Catvision Ltd., 2017 SCC OnLine Del 9235 and Container Corporation of India Ltd. through its Regional General Manager v. Kandla Cargo Handlers, through its Partner Shri B.L. Agrawal, 2019 SCC OnLine Bom 1245]."(emphasis added)

14. This above decision has been quoted with approval in National Highway Authority of India v. PCL Suncon(JV), reported as 2019 SCC Online Del 10933.

15. The Supreme Court in Deep Industries Limited. v. Oil and Natural Gas Corporation Limited and Another, reported as 2019 SCC Online SC 1602, has observed as under:

"15. Most significant of all is the non-obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)

16. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction." (emphasis added)

16. A perusal of the judgment would show that while exercising jurisdiction under Section 37 of the Act, the court must be extremely circumspect in interfering. In M.M.T.C. v. Vedanta Limited, reported as (2019) 4 SCC 163, the Supreme Court has held as under:

"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings." (emphasis added)

17. The only contention raised by Mr. Dinesh Agnani, learned Senior Counsel for the appellant is that the rates to be charged for the intercity bandwidth were determinable and are not ambiguous. He would draw our attention to the letter dated 12.07.2010 written by the appellant to the respondent contending that the appellant had informed the respondent about the charges payable for MPLS

bandwidth connectivity. The said letter reads as under:

"Your attention is drawn to charges payable for the intercity MPLS bandwidth connectivity of STM-4 capacity extended to your from (sic firm) for IPTV service offering. In exhaustion of the provision of the clause 3.6.3 of the Franchise agreement with M/s Akash, revised tariff for the STM-4 link per city (each city for which M/s Aksh has signed agreement with BSNL) is now offered to you as given below:

(iii) On IRU basis for 10 year: Rs.1.03808 Cr. + Tax

(iv) On annual basis: Rs.19.131 Lakh + Tax

M/s Aksh has an option for payment for the bandwidth charges either on annual basis or on IRU basis for a period of 10 years."

...

...

"In case this offer is not acceptable to M/s Aksh, the bandwidth charges as per rates issued vide circular no.111-1/2007-Comml Pt Dated 21.01.2009, i.e. 2.85 crores in IRU basis for 15 years pro rates for the period up to which connectivity is taken from BSNL, shall be leviable. In such a case, M/s Aksh may arrange for intercity bandwidth on its own. However, it may kindly be noted that any disruption in IPTV services due to non-availability of intercity bandwidth would be dealt as per the provisions in the agreement."

18. According to Mr. Agnani, learned Senior Advocate the amount to be paid was a definite amount and there was no ambiguity in the same. He would, therefore, argue that when the rate stood determined, the learned Sole Arbitrator has exceeded its jurisdiction in fixing the amount in the sum of Rs.5/- per connection and the Award should have been set aside on this ground alone.

19. We do not agree with the contention of Mr. Agnani, learned Senior Advocate. As noted by the learned Sole Arbitrator and affirmed by the learned Single Judge, the Franchise Agreement does not crystalize the rates regarding the inter-city charges. There is nothing in the Franchise Agreement which gives any indication as to on what basis the rates for inter-city bandwidth charges were to be calculated. In the absence of any fixed criteria under the contract for determining the charges, the Tribunal was justified in fixing the rate on the basis of common business sense.

20. At this juncture, it is to be noted that the appellant had, in fact, agreed that the Arbitral Tribunal can fix the rate for the intercity bandwidth charges, payable by the respondent. After agreeing to such a position, it is now not open to the appellant to state that the view taken by the learned Sole Arbitrator is wrong since the rates were fixed and agreed upon. The Arbitral Tribunal in its assessment found that the proposal of the respondent for payment of Rs.5/- per connection per month is reasonable and practical.

21. A perusal of the Award would show that in para 20, the learned Sole Arbitrator has categorically recorded that "Even otherwise, both the parties are in agreement that Tribunal can decide reasonable rate and from that point..." After recording the above submission, the Tribunal went on to decide the rate that is to be charged. After going through the demand of the appellant, the Tribunal came to the conclusion that the demand of bandwidth charges by the appellant is neither justified, nor reasonable and on the other hand, excess and bad in law. After considering various options available before it, the Tribunal chose the most viable option to fix the bandwidth charges.

22. We do not find anything perverse in the approach adopted by the Tribunal and nor do we find any infirmity in the order of the learned Single Judge, accepting the approach adopted by the Tribunal.

23. In view of the above, we do not find any merit in the appeal, which is, accordingly dismissed. There shall be no order as to costs.