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

% *Date of Decision: 12.07.2022*

\+ **FAO (COMM) 77/2022**

PRASAR BHARATI ..... Appellant
Through: Ms Shruti Sharma, Advocate.

versus

SHYAM SPECTRA PVT LTD ..... Respondent
Through: Mr Surender Kumar, Advocate.

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

VIBHU BAKHRU, J.

1. The appellant impugns an order dated 04.06.2021 (hereafter '**the impugned order**') passed by the learned Commercial Court in ***O.M.P.(COMM.) 43/2020*** captioned "***Shyam Spectra Pvt. Ltd. v. Prasar Bharti***". By the impugned order, the learned Commercial Court set aside an arbitral award dated 07.01.2020 (hereafter '**the impugned award**'), whereby the Arbitral Tribunal allowed the appellant's claim and awarded a sum of ₹14,50,502/- along with interest at the rate of 18% per annum till the date of payment. In addition, the Arbitral Tribunal also awarded costs, in favour of the appellant.

2. The learned Commercial Court found that the Arbitral Tribunal

had construed the contract between the parties as no reasonable person would. The claims made by the appellant were barred by limitation and the impugned award is vitiated by patent illegality.

3. It is contended on behalf of the appellant that the learned Commercial Court has exceeded its jurisdiction; it has re-appreciated the evidence and re-adjudicated the disputes, which is impermissible.

4. The dispute between the parties relates to the appellant's claim for recovery of an amount of ₹14,50,502/-, which according to the appellant was the excess amount paid to the respondent. The appellant claims that the respondent was required to provide a discount of 10% but had raised invoices without accounting for the said discount. The respondent disputes the said claim. According to it, the appellant is not entitled to any discount. In addition, the respondent claims that the appellant's claim is barred by limitation.

FACTUAL CONTEXT

5. The appellant had invited bids for obtaining Fibre Optic Links/Connectivity for Analog Video and Audio. A division of Punj Lloyd Ltd. (Spectranet) was successful in securing the said contract. Thereafter, the said parties entered into an agreement dated 25.09.2007 (hereafter '**the Agreement**').

6. The respondent is a successor in interest of Spectranet.

7. In terms of the Agreement, Spectranet agreed to provide facility (including Fibre Optic Links) and equipment as per the technical

specifications. The term of the Agreement was for a period of one year extendable by mutual consent. The appellant agreed to pay consideration for the same on a monthly basis on receipt of invoices.

8. Note 1 in Annexure - A to the Agreement stipulated that if the contract was renewed beyond the initial period of one year, a 10% discount would be provided on monthly charges.

9. Prior to expiry of the term of the Agreement, the appellant sent a letter dated 29.08.2008 calling upon the respondent to confirm whether it was ready to give a discount of 10%, if the contract was extended. The respondent replied, by a letter dated 20.08.2008, stating that it would offer a discount of 10%, if the contract was renewed for a period of one year.

10. The appellant did not agree to extend the contract for a period of one year; and, instead, by a letter dated 07.10.2008, the appellant extended the Agreement for a further period of two months (that is, up to 24.11.2008) on the same terms and conditions. The term of the Agreement was further extended from time to time.

11. Admittedly, the respondent raised its invoices without providing any discount. The said invoices were paid. The last payment was made on 13.01.2010.

12. The Controller and Auditor General (hereinafter '**CAG**'), in its report dated 06.04.2011, observed that the appellant had failed to enforce the provision of 10% discount, which was available for the

extended period October, 2008 to 2009. The same had resulted in an avoidable payment of ₹21.67 lacs to the contractors (Bharti Airtel and Spectranet). Thereafter, on 27.07.2012, the appellant sent a legal notice calling upon the respondent to refund the excess payment of ₹14,05,592/- along with interest within a period of two weeks from receipt of the said notice. The respondent did not make the payment as demanded.

13. In the aforesaid context, on 14.01.2013, the appellant filed a civil suit for recovery before the Additional District Judge, Patiala House Court, New Delhi. In that suit, the respondent filed an application under Section 8 of the A&C Act, 1996, which was allowed by an order dated 23.02.2016.

14. Thereafter, the appellant issued a notice dated 09.11.2016 under Section 21 of the A&C Act. The said notice was received by the respondent on 19.11.2016.

15. On 30.10.2017, the appellant filed a petition under Section 11 of the A&C Act seeking appointment of an arbitrator to adjudicate the disputes between the parties. The said petition was allowed and by an order dated 28.05.2018, this Court referred the matter to the Delhi International Arbitration Centre (DIAC) for appointment of an arbitrator.

16. The Arbitral Tribunal delivered the arbitral award (the impugned award) on 04.01.2020.

17. The respondent challenged the impugned award before the learned Commercial Court by filing an application under Section 34 of the A&C Act. As stated above, the same was allowed by the impugned order.

THE IMPUGNED AWARD

18. The Arbitral Tribunal held that the appellant's claim was not time barred. It accepted the appellant's contention that excess payment was made on account of a *bona fide* mistake on its part. The said mistake had come to light from the CAG Audit Report and the period of limitation would commence from the said date. The appellant had filed a suit for recovery within the period of limitation of three years and therefore, its claim was not barred by limitation. The Arbitral Tribunal also did not find that there was any delay on the part of the appellant after the learned ADJ had disposed of the suit (CS No. 194/2014) by directing the parties to arbitration.

19. Insofar as the merits of the claim are concerned, the Arbitral Tribunal held that the Agreement was renewable on mutual terms as agreed between the parties. The appellant (claimant), by its letter dated 19.08.2009, had sought renewal and confirmation of 10% discount. The respondent had accepted the renewal and confirmed that 10% discount would be offered, provided the Agreement is renewed for a period of one year and since the Agreement was renewed for a period of one year, the appellant was entitled to a discount of 10%. The Arbitral Tribunal found that an agreement existed between the parties for providing discount at the rate of 10% on the renewed terms.

REASONS AND CONCLUSION

20. As is apparent from the above, the controversy in the present appeal is twofold. First, whether the claims made by the appellant were within the period of limitation; and, second, whether the appellant was entitled to the discount of 10% on the agreed price.

21. The appellant's contention that its claims are within the period of limitation rest on the assertion that excess payment was made by mistake, which was discovered pursuant to the report submitted by CAG. As stated above, the Arbitral Tribunal had accepted the said contention. At this stage, it is pertinent to refer to the relevant extract of the CAG report, as relied upon by the appellant. The said extract reads as under:

> "**5.4 Avoidable payments to contractors**
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> ** ** ** ** **
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> The terms of the contract provided that in the case of renewal, beyond the initial one year period, per month charges would be provided at a discount of 10 *per cent* on the contracted amounts.
>
> Audit noted that after completion of the contract in September 2008, Doordarshan, while initiating the process of fresh tendering, extended the existing contracts upto 31st October, 2009.
>
> The fresh tenders for hiring these four OFC links were floated in February 2009 and the commercial bids were opened in June 2009.
>
> M/s Spectranet emerged as the lowest bidder for all the four links at the rate of ₹82.92 lakh (Link I-₹36.51 lakh, Link II-₹13.25 lakh, Link III-₹12.17 lakh and Link IV-

> ₹28.01 lakh) per year and was awarded the work with effect from I November 2009.
>
> Doordarshan did not enforce the provision of discount of 10 *per cent* allowable on the extended period i.e. from October 2008 to October 2009. The payments made to M/s Bharti Airtel and M/s Spectra Net during the extended period worked out ₹84.08 lakh and ₹1.29 crore respectively.
>
> Thus, the failure of Doordarshan to enforce the discount provision resulted inavoidable payment of ₹21.67 lakh[8] to the contractors.
>
> The Management replied (December 2010) that though the proposal forgetting 10 *per cent* discount during the extended period was submitted to Directorate Doordarshan, however, the same was not approved and hence the extension was given to the firms on the same terms and conditions."

22. It is material to note that that the CAG's observations are under the heading "*Avoidable payments to contractors*". The CAG pointed out that the payments had been made to certain contractors, which could have been avoided. It is not the opinion of the CAG that any payment was made by mistake; it points out an excess payment made that could have been avoided. The appellant had explained that the proposal for obtaining a discount of 10% during the extended period was submitted, however, the same was not approved and hence, an extension was granted to the concerned firms on the same terms and conditions.

23. The appellant's stand is, thus, clearly in conformity with the respondent's understanding. The respondent had offered a discount of 10% provided the Agreement was extended for a period of one year.

This offer was not accepted at the material time. The appellant did not extend the contract for a period of one year but did so only for a period of two months, on the same terms and conditions. The parties were *ad idem* as to the agreement between them.

24. A change in view regarding an agreement is not a 'mistake' as contemplated under Section 17 of the Limitation Act, 1963. Section 17(1)(c) of the said Act postulates that limitation for an action for relief from consequences of a mistake would not begin to run until the plaintiff/applicant has discovered the mistake or could "with reasonable diligence" have discovered it. The appellant had paid the invoices not by a mistake but on the basis of its understanding of the Agreement. It had also defended its view before the CAG. A mere change of opinion does not extend the period of limitation.

25. Clearly, the Arbitral Tribunal's decision that the limitation would extend from the date of the report of the CAG, is manifestly erroneous and this Court concurs with the decision of the learned Commercial Court that the said view is not a plausible one.

26. Invoices for monthly charges were raised by the respondent and duly paid without any reservation. The last such payment was made on 13.01.2010. The appellant had filed a suit beyond the period of three years from the last date of payment. Thus, even the claim in respect of the last invoice would be beyond the period of limitation of three years.

27. It appears that there were significant delays on the part of the

appellant even after its suit was disposed of by an order dated 23.02.2016. In terms of the order dated 23.02.2016, the learned ADJ had directed for the appointment of an arbitrator within a period of four weeks. However, the notice under Section 21 of the A&C Act was issued in the month of November, 2016 and received on 19.11.2016.

28. This Court concurs with the view of the learned Commercial Court that the appellant's claim was barred by limitation and the Arbitral Tribunal had grossly erred in concluding to the contrary.

29. The second question to be examined is whether the Arbitral Tribunal's view that appellant was entitled to the discount at the rate of 10%, is a plausible one.

30. Admittedly, the term of the Agreement was for a fixed period of one year but could be extended with the mutual consent of the parties. Clause 10.1 of the Agreement expressly provided that the Agreement would stand "*automatically terminated by end of the time, if the same is not renewed in writing between the parties*".

31. Concededly, the Agreement could not be extended without the consent of the respondent. The Arbitral Tribunal had found that the parties had, in fact, agreed to the renewal. The respondent had agreed to provide 10% discount provided the contract was renewed for a period of one year. The Arbitral Tribunal reasoned that since the contract was renewed for a period of one year, the appellant was entitled to the said discount. The relevant extract of the impugned

award is set out below:

> "The agreement dated 25.09.2007 stated that the agreement was renewable on mutual terms agreed between the parties. Both parties admitted to the letters of renewal. The Claimant's letter dated 19th Aug 2009 sought renewal and confirmation of the 10% discount. The Respondents through reply dated 20th Aug 2009 accepted the renewal and confirmed that the 10% discount would be offered to the Claimant provided the agreement was renewed for one year. Hence, all the ingredients of offer and acceptance of an agreement were completed between the parties. Admittedly, the agreement dated 25th Sept 2007 was renewed for one year and that the services were rendered by Respondent for a further period of one year from Sept 2008 up till 31 Oct 2009 and the payments were made by the Claimant as per the invoices raised by the Respondents. Thus, an agreement existed between the parties on the renewed terms of 10% discount. I hereby, state that once both parties had agreed to the 10% discount as per Note 1 in agreement dated 25th Sept 2007 and the letters of 19th& 20th Aug. 2008 and 7th Oct 2008, the Respondents were as much obligated as the Claimant to raise invoices as per the agreed discounted pricing. The Respondents have shown no reason for not granted the discount and raising the bills on previous rates. This also shows that the Claimants were actually under a mistaken belief as they continued to pay the invoices as is they were raised by the Respondents."
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> [underlined for emphasis]

32. The conclusion of the Arbitral Tribunal is premised on the basis that since the Agreement was extended for a period of one year, the

respondent's condition for providing the discount, as stated in the letter dated 20.08.2008, was fully complied with. The Arbitral Tribunal found that all ingredients of offer and acceptance to constitute an agreement were completed. The Agreement was renewed for a period of one year and therefore, the appellant was entitled to the discount of 10% as offered. This conclusion is, *ex facie*, erroneous because undisputedly, the appellant had not accepted the condition for renewing the Agreement for a period of one year.

33. The Arbitral Tribunal had rightly noted that the respondent's offer to provide a discount of 10% was subject to the provision that the Agreement be renewed for one year. However, the Arbitral Tribunal had erred in holding that the said condition was accepted. The appellant did not renew the Agreement for a period of one year. By its letter dated 07.10.2008, the appellant extended the Agreement for a period of two months and not for a period of one year. Further, the Agreement was extended on the "*same terms and conditions*".

34. The Arbitral Tribunal had proceeded on the basis that since the contract was subsequently renewed from time to time for a cumulative period of one year, the condition to provide the discount had been met. This is, *ex facie*, erroneous since the appellant had renewed the Agreement only for a period of two months on the same terms and conditions. The subsequent extensions of the Agreement were also on the same terms and conditions. The same did not constitute an acceptance of the offer made by the respondent. The assumption that notwithstanding the limited renewal for a period of two months, the

respondent's offer for providing the discount continued to stand and the appellant could have recourse to that offer is, *ex facie*, erroneous. Since the appellant had extended the Agreement for a period of two months (and not one year), the same was without any obligation to provide any discount. The respondent's offer to provide any discount stood exhausted. Subsequent extensions of the Agreement were also on the basis of mutual agreement and on the same terms and conditions.

35. The appellant's contention that the learned Commercial Court has re-appreciated and re-adjudicated the disputes, which is impermissible, is also unmerited. There was no dispute as to the facts of the present case. Further, none of the material documents were disputed by the parties. The learned Commercial Court had merely examined the conclusion of the Arbitral Tribunal in the context of admitted facts.

36. This Court concurs with the view of the learned Commercial Court that the decision of the Arbitral Tribunal, is manifestly erroneous and vitiates the impugned award on its face.

37. The appeal is unmerited and is, accordingly, dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 12, 2022
RK/gsr