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

Decided on: 20th March, 2024

\+ O.M.P. (COMM) 511/2023

M/S FORTUNA SKILL MANAGEMENT PVT. LTD. ..... Petitioner

Through: Mr. Ramesh Singh, Senior Advocate with Mr. Akshay Ringe, Mr. Ankur Chawla, Ms. Megha Mukherjee, Ms. Prerna Mahajan, Ms. Hage Nanya, Advocates.

versus

M/S. JAINA MARKETING AND ASSOCIATES ..... Respondent

Through: Mr. Mudit Sharma, Mr. Parvez Alam Khan, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner assails an Arbitral Award dated 19.08.2023 ["Award"] rendered by a three-member Arbitral Tribunal. The Tribunal has awarded a sum of ₹3,36,01,783/- and interest thereupon in favour of the respondent, and also made an order of costs against the petitioner.

A. Facts

2. The respondent is an importer, trader and distributor of mobile phones and related accessories. The petitioner [then known as iQor Global Services India Pvt. Ltd.] entered into an agreement dated

29.01.2016 ["Agreement"] with the respondent, a partnership firm, for provision of certain after-sale services related to mobile phones. The petitioner was to provide service centres to undertake service requests of the respondent or its customers. It claims to have set up service centres in several locations for this purpose.

3. The dispute between the parties principally arises out of a claim of the respondent for the cost of spare parts supplied by it to the petitioner. It is common ground that the services provided by the petitioner at the service centres was in respect of both, goods which were within the warranty period and those outside the warranty period. The petitioner used to order spare parts from the respondent for both kinds of services. However, it was entitled to credit from the respondent on account of spare parts which were used in repairs within warranty. To claim such credit, the petitioner was required to return the defective spare parts to the respondent, in order to establish that the corresponding replacement parts had been utilised for repairs under warranty. As far as the repairs which were not within the warranty period are concerned, the petitioner was entitled to charge agreed service charges from the customers, but was liable to pay the respondent for the spare parts consumed. The parties were unable to reconcile the accounts for the spare parts supplied.

4. On 15.11.2017, the respondent enchased a bank guarantee of ₹1,00,00,000/- furnished by the petitioner. The petitioner, on the other hand, claimed that a sum of ₹2,69,67,450/- was payable by the respondent to it, as stated in a notice dated 12.04.2018. Arbitration was ultimately invoked by the respondent's communication dated 18.03.2019, and the Arbitral Tribunal was constituted.

B. Proceedings before the Arbitral Tribunal

5. The respondent herein was the claimant before the Tribunal. In its statement of claim dated 31.05.2019, the respondent claimed that the petitioner had signed three "declaration letters" contemporaneously, upon reconciliation of accounts. The last one was for the period from 01.02.2017 to 30.03.2017, by which it acknowledged its outstandings to the tune of ₹8,03,87,690/-. The respondent also produced a chart, wherein the final balance amount payable as on 25.05.2019 was stated to be ₹3,36,01,783/- [after adjustment of the amount of ₹1,00,00,000/- recovered by encashment of the petitioner's bank guarantee]. The respondent also sought payment of interest at the rate of 18% p.a.

6. The petitioner filed a statement of defence and counter-claim, both dated 16.08.2019. It sought to rely upon data maintained in the "Customer Relation Management" ["CRM"] portal of the respondent, contending that the CRM data was used to reconcile the accounts between the parties. The petitioner asserted that all spare parts returned by it to the respondent, were accounted for in the CRM portal. The petitioner also placed on record a summary of the CRM data and invoices raised by it for the period of October 2015 to June 2017, alongwith a demonstration of the month-wise and total number of items/ products returned by it to the respondent, with corresponding delivery challan numbers of such returns. As the complete CRM data for this period was of approximately 30,000 pages, it was filed before the Tribunal in electronic form. As far as the declaration letters are concerned, the petitioner contended that these were unilaterally prepared by the

respondent, forwarded to the petitioner, and signed by employees of the Operations Department, in the belief that these were correct.

7. With the statement of defence, the petitioner *inter alia* annexed 5 delivery challans with the following averments:

> "*The products/ parts/ mobiles thereafter used to be dispatched the same day on generation of delivery challans. The same thereafter, used to be delivered to the warehouse of the Claimant physically and on physical delivery, the representatives of Claimant used to provide an acknowledgement by duly signing on the printout of the delivery challans. Some of such delivery challans are annexed herewith and marked as Annexure R-1(colly).*"

8. The petitioner's counter-claim was for a sum of ₹1,69,67,450/- due to it on the basis of the CRM data, in addition to refund of the amount of ₹1,00,00,000/- recovered by the respondent.

9. The respondent also filed a defence to the counter claim and both parties filed rejoinders.

10. By an order dated 23.10.2019, the Tribunal framed the following issues:

> "*1. Whether the Claimant is entitled to recover the outstanding amount of Rs.3,36,01,783/- along with interest thereon @ 18% from the Respondent, as claimed in the Statement of Claim?*
>
> *2. Whether the Respondent is entitled to recover the amount of Rs.2,69,67,450/- along with interest thereon @ 12% from the Claimant, as claimed in the Counter Claim?*
>
> *3. Whether the Statement of Claim has been filed by a person not duly authorised and the same is therefore not maintainable?*
>
> *4.Costs*
>
> *5.Reliefs.*"

11. The respondent examined its Accounts Officer, as its only witness. The petitioner examined a Senior Manager in its Operations Department and a System Engineer employed by it, as its two witnesses. The cross examination of the witnesses was completed between 01.10.2020 and

25.01.2022, after which the matter was taken up for arguments by the Tribunal.

12. During the course of arguments, the petitioner filed an application dated 03.09.2022, seeking to place on record further delivery challans generated from the respondent's CRM portal. It was stated in the application that the petitioner, during the course of arguments, had sought to rely on a tabulated comparison of the credits given to it by the respondent, with the values appearing on the corresponding delivery challans. According to the petitioner, the respondent had given less credit towards return of the spare parts to the petitioner, than due as per the delivery challans. It was stated that, since the delivery challans run into more than 30,000 pages, the petitioner had filed only 5 sample delivery challans alongwith its statement of defence. It sought permission to place on record "*some more delivery challans*" and contended that these find mention in the CRM data, but the physical copies had not been placed. The petitioner sought permission to file the remaining delivery challans at a later stage, if so directed.

13. The respondent opposed the application as belated and dilatory. It resisted filing of additional documents after completion of oral evidence, and at the stage of final arguments. It was contended that the documents were intended to fill in the lacunae in the testimony of the petitioner's witnesses.

14. The Tribunal disposed of this application by an order dated 10.10.2022. Although the order has not been placed on record by the petitioner, a copy was handed up in Court by Mr. Ramesh Singh, learned Senior Counsel for the petitioner. Its contents are not disputed. The

Tribunal noted that the delivery challans sought to be filed exceeded 1,000 in number and the petitioner's application was made after the arguments of the claimant [respondent herein] had already been concluded. The Tribunal rejected the application, holding that the delivery challans were in the knowledge of the petitioner at the stage of pleadings and filing of documents. The Tribunal found no justification for the challans not having been filed earlier, and observed that the proceedings would be relegated to the stage of trial if the documents were to be taken on record. It relied upon several judgments of this Court to reject highly belated applications for bringing additional evidence on record. Three judgments relied upon by the petitioner herein were found to be distinguishable on facts.

15. Having rejected the application, the Tribunal proceeded to dispose of the respondent's claims by the impugned Award. It took note of the aforesaid declaration letter for the period up to 30.03.2017, and the accounts filed by the respondent for the subsequent period showing a balance claim from the petitioner of ₹3,36,01,783/- as of 25.05.2019. The respondent had also filed the ledgers pertaining to all the service centres on the basis of which the account balance as of 25.05.2019 had been prepared.

16. The Tribunal found that the parties were subsequently at issue with regard to the validity and veracity of the declaration letters. It accepted the respondent's case that the declaration letters were valid and binding upon the petitioner. In doing so, it noticed that the petitioner has not produced its own ledgers and account books to dispel the contents of the declaration letters, and that it had not examined the witnesses who would

have been in a position to depose in respect of the declaration letters. The Tribunal rejected the contention of the petitioner that the CRM data was the only legitimate basis for reconciling the accounts, and held that the conduct of the parties and the correspondence between them shows that reconciliation of accounts, including at the stage of issuance of the declaration letters, was based upon the account books and evidence of physical delivery of spare parts from one to another.

C. Submissions of learned counsel

17. The principal submission advanced by Mr. Singh, learned Senior Counsel for the petitioner, was that the Award is vitiated by the Tribunal's failure to take on record relevant and material evidence offered by the petitioner, by its application dated 03.09.2022. He submits that the Tribunal itself found that the delivery challans would have been the best evidence of the transactions between the parties, but erred in disallowing the petitioner to place such evidence on record. Mr. Singh cited the judgment of the Supreme Court in *K.K. Velusamy v. N. Palanisamy*[1], in support of this contention.

18. Mr. Singh's second argument was that the Tribunal neglected crucial secondary evidence in the form of statement of the petitioner's witnesses, who deposed that the delivery challans corresponding to the material placed on record did exist. Mr. Singh submitted that this evidence ought to have been taken on record as secondary evidence under Section 65(g) of the Indian Evidence Act, 1872 ["the Evidence Act"]. Mr. Singh submitted that the discrepancy between the declaration in the sum of ₹8,03,87,690/- and the respondent's claim of ₹3,36,01,783/-, also

[1] (2011) 11 SCC 275.

demonstrates the error in relying upon the alleged admission of the contents of the declaration letters.

19. Mr. Mudit Sharma, learned counsel for the respondent, on the other hand, supported the Award on all counts. He contended that the Tribunal rightly rejected the petitioner's belated attempt to place evidence on record after conclusion of oral evidence by the parties. Mr. Sharma urged the Court not to permit the petitioner to resile from its evidence, on the basis of alleged documents which had not even been placed on record. He took me through the contents of the Award to submit that the findings of the Tribunal were entirely evidentiary and not susceptible to interference under Section 34 of the Act.

D. Analysis

i. Regarding dismissal of petitioner's application dated 03.09.2022.

20. As noted above, much turns upon the decision of the Tribunal dated 10.10.2022, dismissing the petitioner's application to place evidence on record. For reasons which follow, I am of the view that there is no perversity or unreasonableness in the view taken by the Tribunal, so as to warrant interference under Section 34 of the Act.

21. Factually, it is undisputed that the application was made only on 03.09.2022, more than three years after the petitioner had filed its statement of defence, counter claim and documents. In the interregnum, affidavits of evidence had been filed by the witnesses and their oral evidence had also concluded. Learned counsel for the respondent [claimant before the Tribunal] had completed his final arguments and the matter was at the stage of arguments of learned counsel for the petitioner herein. There was no suggestion in the application that the documents

sought to be placed were not within the knowledge and possession of the petitioner at any stage. In the application, in fact, the petitioner only contended that it had placed a limited number of challans, due to the volume of evidence [approximately 30,000 pages]. The petitioner's contentions in the application were as follows[2]:

> "*7. That the Respondent, during the course of arguments on 09.08.2022, demonstrated that the Claimant had recorded lesser value (and in some cases higher value) of the spare parts returned as compared to the original value of the delivery challan. For this purpose, Respondent referred to the five delivery challans which were already on record of this Hon'ble Tribunal as a part of the SOD, besides producing a copy of one more delivery challan, which was not on record. On realizing that the sixth delivery challan was not on the record, the Hon'ble Tribunal directed the Claimant to respond to the issue raised by the Respondent in respect of the five delivery challans which were already on record. At that stage it was brought to the notice of the Hon'ble Tribunal by the Respondent that as the delivery challan numbers were appearing in the documents filed by both the sides, the existence of the delivery challans, as appearing in the comparative statement filed by the Respondent, could never be a subject matter of dispute. Therefore, nothing prevents this Hon'ble Tribunal from examining the issue highlighted by the Respondent in its comparative statement, in its entirety.*
>
> *8.* ***That during the course of arguments, it was also enquired by the Hon'ble Tribunal as to whether physical copies of the delivery challans appearing in CRM data were available and the number of such delivery challans. In this respect it was explained by the Respondent that since there were very large number of delivery challans running in more than 30,000 pages, the Respondent had only filed 5 sample delivery challans along with its SOD in order to avoid the burdening of the record of this Hon'ble Tribunal and that the comparative analysis filed by the Respondent was enough to establish Respondent's contention****.*
>
> *9.* ***That, however, considering the query which fell from the Hon'ble Tribunal during the hearing on 09.08.2022, and in order to avoid non-consideration of Respondent's submissions due to non-availability of the copies of the remaining delivery challans, Respondent is filing the present application seeking permission of***

[2] It may be noted that the petitioner herein was the respondent, and the respondent was the claimant, before the Tribunal.

> ***<u>this Hon'ble Tribunal to file on record some more delivery challans</u>*** *which will establish that the Claimant has acted in the most unlawful manner and as per its own whims and fancies. It may not be out of place to submit that M/s Jaina Marketing & Associates being the Claimant in the present arbitration, the burden of proof was on them, and it was them who ought to have filed the delivery challans rather than relying on unilaterally prepared consignment delivery notes and the alleged ledgers. However, they avoided to do so for the obvious reasons.*
>
> *xxxx xxxx xxxx*
>
> *11. That, the abovementioned delivery challans are relevant, besides being admissible being bilateral and indisputable documents prepared contemporaneously by the parties to record return of the spare parts. Claimant cannot have any objection to production of the delivery challans in as much as Claimant's own documents, refer to these very delivery challans and seek to rely upon them. Hence, no prejudice to would be caused to anybody and the said delivery challans will only throw more light on facts already on record.*"[3]

22. It is clear from above that the application was made at the stage of arguments, only in order to meet queries raised by the Tribunal with regard to insufficiency of evidence led by the petitioner.

23. The importance of efficiency and expediency in the conduct of arbitral proceedings has been emphasised time and again by the Supreme Court. In *Union of India v. U.P. State Bridge Corpn. Ltd.*[4], the Supreme Court observed that the Act is based on four foundational pillars and that:

> "*First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. …*"[5]

This position has since been reaffirmed in several decisions of the Court, including recently in *Alpine Housing Development Corporation Pvt. Ltd. v. Ashok S. Dhariwal*[6], wherein it was held that, "*speedy resolution of the arbitral disputes has been the reason for enactment of 1996 Act and*

[3] Emphasis supplied.
[4] (2015) 2 SCC 52.
[5] Ibid., paragraph 16.
[6] 2023 SCC OnLine SC 55.

continues to be a reason for adding amendments to the said Act to strengthen the aforesaid object"[7].

24. Keeping these factors in mind, the Tribunal cannot be faulted for disallowing an application which, as it noted, would have taken the case back to the stage of trial and examination of witnesses. Mr. Singh's reliance upon the judgment of the Supreme Court in *K.K. Velusamy*[8] does not persuade me to the contrary conclusion. In that case, the Supreme Court was concerned with a civil suit. The Trial Court had dismissed applications filed by the defendant at the stage of arguments for reopening of the evidence, for further cross-examination of the plaintiff and one other witness. The High Court had dismissed a revision petition against this order, but the Supreme Court reversed, holding that the Court has the power under Section 151 of the Code of Civil Procedure, 1908, to permit additional evidence to be led if it would clarify the evidence on record, or assist the Court in rendering justice. However, the Court emphasised that such power was to be exercised sparingly, and in cases where the evidence sought to be produced has come into existence later, or could not have been filed earlier or the non-production was for valid and sufficient reasons. The application must otherwise be disallowed. It has been expressly stated that an application made to cover up the negligence and lacunae, or in a situation where the party had an opportunity to produce the evidence earlier, should be rejected with heavy costs. These observations[9] support the finding of the Tribunal, that the application in the present case deserves to be dismissed.

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[7] Supra (Note 6), paragraph 24.
[8] Supra (Note 1).
[9] Ibid., paragraph Nos. 15-20.

25. The present case does not fall within the limited circumstances elaborated by the Supreme Court in *K.K. Velusamy*[10]. Mr. Singh emphasised the Court's observations with regard to taking of evidence which would assist in coming to a just conclusion, but I do not read the judgment to suggest that in every such case, additional evidence should be permitted, whenever adduced. It may be noted that, in the present case, in any event, the petitioner intended to place only a fraction of the delivery challans, even at the stage of its application. The conclusiveness of the additional evidence is thus also a matter of some doubt.

26. For the aforesaid reasons, I do not find this objection merited in the limited scope of interference under Section 34 of the Act.

ii. On merits.

27. Having come to this conclusion, I find that the remaining observations and findings of the Tribunal are largely based upon an assessment of the evidence. Such an assessment can be interfered with, only if it is found to be based upon no evidence, to ignore material evidence, or so perverse that no reasonable person could have drawn the same conclusions. The matter of sufficiency of evidence and the weight to be attached to any particular evidence placed before an arbitral tribunal, is a matter within the domain of the arbitral tribunal.[11]

28. In the present case, the Tribunal has proceeded on the basis of the declaration letters by which the petitioner acknowledged dues to the respondent, the last one being for the period 01.02.2017 to 30.03.2017 in the sum of the ₹8,03,87,690/-. The declaration letters have been

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[10] Supra (Note 1).
[11] *Associate Builders v. DDA*, (2015) 3 SCC 49.

reproduced in the impugned Award. The Tribunal has found that the petitioner admitted the signatures of its officials on all three letters, two of which were signed by its Chief Operating Officer, and the third by an official designated as the 'Lead Invoicing and Correction'. The third declaration letter was also copied to the Chief Operating Officer and others. The Tribunal has disbelieved the petitioner's explanations that the declaration letters were signed *bona fide* without verification, but were contrary to the actual accounts maintained between the parties. In coming to this conclusion, the Tribunal has noticed that the petitioner did not produce its own ledger and account books which may have displaced the admissions.

29. The Tribunal has thus relied upon the evidence placed before it, to reject the petitioner's case of a discrepancy between the declaration letters and the claims finally made on the basis of the ledger documents. It has been held that the declaration was for the period ending 30.03.2017, whereas the ledger document was for a subsequent period and opened with the same outstanding figure of ₹8,03,87,690/- as of 30.03.2017. The Tribunal's rejection of the explanation offered by the petitioner for the declaration, does not fall within the limited category of cases in which the Court can interfere with an arbitral tribunal's appreciation of evidence.

30. Mr. Singh's reliance upon Section 65(g) of the Evidence Act is also untenable. It may be mentioned, at the outset, that the Evidence Act is not strictly applicable to arbitral proceedings. An arbitral tribunal is free to adjudge the weight of any evidence placed before it, by its own

assessment[12]. That said, Mr. Singh suggested that an affidavit of evidence filed by the respondent's Senior Manager, Operations, constituted secondary evidence of the transactions between the parties under Section 65(g) of the Evidence Act. The relevant clauses of Section 65(g) are reproduced below:

> "*65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition or contents of a document in the following cases—*
>
> *xxxx xxxx xxxx*
>
> *(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.*
>
> *xxxx xxxx xxxx*
>
> *In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.*"

31. Even assuming that the deponent was "*skilled in the examination of*" the delivery challans, Mr. Singh was unable to point to any averment in the affidavit referring to the delivery challans, their respective numbers, that the deponent had examined them or as to the contents thereof, including the general result of the entire bundle of delivery challans. I am therefore unable to accept Mr. Singh's contention that the Tribunal ought to have considered this evidence as secondary evidence of the transactions relied upon by the petitioner.

32. Before the Tribunal, the parties cited various contractual clauses to support their respective positions with regard to the importance and binding nature of the CRM data. The Tribunal accepted the contention of the respondent that the purpose of the CRM data was, firstly, to track the consumption of spare parts and thus to ensure that the petitioner had

[12] As held in *Associate Builders v. DDA* [Supra (Note 11)].

sufficient stock of spares, and secondly, to ascertain whether a customer was using the respondent's product, within or outside the warranty period. It was also accepted that the CRM is not a financial document for reconciliation of accounts, which is based upon actual receipt of defective spare parts by the respondent. These findings were rendered on the basis of Clauses 5.5.14 and 5.10 of the Agreement which read as follows:

> "*5.5.14 Service Provider shall ensure that the consumption of spares is properly captured and updated in CRM portal (www.karbonnklinic.com) for carrying out the repair activity on real time basis. In case of spare part consumption mismatch with the data entered in the CRM is detected, 100% deduction of an amount equivalent to the cost of mismatch spare will be applicable.*
>
> *xxxx xxxx xxxx*
>
> *5.10 Spare Parts*
>
> • *Service Provider shall maintain a Minimum Stock Level (MSL) of spare parts of various models of all Products serviced by Service Provider (the "Inventory") which shall be billed and delivered to Service Provider by JMA as per purchase order of Service Providerin sufficient quantities to meet the required service levels.*
>
> • *The billing of spare parts by JMA shall be done against the bank guarantee provided by the Service Provider. The Service Provider shall ensure that the bank guarantee is of adequate value as per JMA's advise to ensure smooth operations and billing of spare parts.*
>
> • *Service Provider shall ensure that safe storage for storing ESD and NON ESD Spares are provided for at each Location.*
>
> • *Service Provider shall maintain and monitor the stock inventory of spare parts as billed and supplied by JMA.*
>
> • *The Service Provider shall not sell the spare parts to any third party without prior consent from JMA in writing.*
>
> • *All in-warranty defective parts shall be returned by Service Provider with proper packing along with respective job sheet within timeline defined by JMA in Annex I. No claim including the logistics*

and other charges for spare parts returned by Service Provider will be entertained for spare parts received beyond JMA defined timelines.

• Non genuine / unauthorized (not supplied or approved by JMA and/or a JMA authorized seller) spare parts usage by Service Provider shall invoke JMA's right to make deductions of the value of the equivalent genuine spare part from any amount due to Service Provider as per Annexure II or terminate this Agreement with immediate effect.

• For in-warranty Product cases the price of spare parts as invoiced at the time of order, used to rectify the issue will be credited to the Service Provider post receipt and verification of the defective parts by JMA at its warehouse or such other location as maybe informed by JMA."

33. The Tribunal further found that data captured in the CRM portal does not include data with regard to credit notes, debit notes, credit goods return notes, consignment return notes, service claim invoices and data relating to TDS, which would form the basis of reconciliation of accounts.

34. These conclusions are based upon the terms of the Agreement, interpretation whereof is also within the arbitral domain.[13]

35. The remainder of the Award addresses the evidence based upon the ledger entries and comes to the conclusion that the ledger entries relied upon by the respondent were credible. Mr. Singh rightly did not invite the Court to enter into a reassessment of the detailed evidence considered by the Tribunal in this regard. He also did not challenge the findings of the Tribunal on the other issues.

36. The Tribunal's decision on merits is also therefore not susceptible to interference under Section 34 of the Act.

[13] *UHL Power Co. Ltd. v. State of H.P.*, (2022) 4 SCC 116.

E. Conclusion

37. For the aforesaid reasons, I find no ground to set aside the impugned Award dated 19.08.2023, under Section 34 of the Act. The petition is therefore dismissed.

PRATEEK JALAN, J

MARCH 20, 2024
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