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

Judgment pronounced on: 29.10.2024

\+ **O.M.P. (COMM) 121/2016**

M/S TRAVEL2 AGENT.COM & ORS .....Petitioners
Through: Mr. Gagan Chadha, in person.
versus
M/S SPICE JET LTD. .....Respondent
Through: Mr. Sanjay Gupta, Mr. Dipan Sethi, Ms. Roshi Surele, Advocates.

\+ **O.M.P. (COMM) 132/2016**
M/S SPICEJET LTD. .....Petitioner
Through: Mr. Sanjay Gupta, Mr. Dipan Sethi, Ms. Roshi Surele, Advocates.
versus

M/S TRAVEL2 AGENT.COM & ORS .....Respondents
Through: Mr. Gagan Chadha, in person.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') assails an arbitral award dated 31.10.2012. The arbitral proceedings were conducted under the aegis of DIAC pursuant to an order dated 02.12.2010 passed by this Court in ARB.(P) No.270 of 2010, whereby an arbitral tribunal comprising of a sole Arbitrator, was constituted to adjudicate the disputes between the parties.

2. The disputes between the parties arose in the context of an Agreement

dated 25.11.2006 (hereinafter '*the Agreement*') executed between the M/s Spice Jet Ltd. (hereinafter '*the respondent*') and M/s Travel 2 Agent.com (hereinafter '*the petitioner*').

3. The petitioner is a service provider which, *inter alia*, provides reservation management services, ticket distribution services to airline companies. The Agreement between the parties was for the purpose of creating a platform/channel for the respondent to enable travel agents to book the tickets through the said platform.

4. As per the assertions and averments in the arbitration proceedings, the respondent has violated and did not perform its part of the Agreement, as a result of which, the petitioner/claimant suffered losses. The details of the same have been set out in the Statement of Claim.

5. It was the case of the petitioner/claimant in arbitration proceedings that it made significant investments in hardware and related software and also incurred substantial expenditure under various other heads for the purpose of discharging its obligation under the Agreement. However, the respondent did not discharge its obligations under the Agreement. Consequently, disputes arose between the parties which were referred to arbitration.

6. In the arbitration proceedings, the petitioner sought an amount of Rs.1 Crore from the respondent *in lieu* of the amount spent by it pursuant to the understanding/Agreement between the parties.

7. The claim was resisted by the respondent who asserted that it was misled into entering into the Agreement with the petitioner/claimant, based on the misrepresentation that the petitioner/claimant had an established setup and the requisite knowledge and capability to provide the services

contemplated under the Agreement.

8. It was further contended that it was the petitioner/claimant which was in breach of the Agreement, particularly Clause 9 thereof inasmuch as the petitioner/claimant sought to resile from the agreed 'commission structure' and claimed higher amounts, which led to a breakdown between the parties.

9. It was further contended that the claim for recovery of investments allegedly made by the petitioner/claimant was untenable since the supporting invoices/bills relied upon by the petitioner/claimant were all dated prior to the date of the Agreement, from which it is evident that the said investments were not made for the purposes of providing the services to the respondent.

10. Further, it was submitted that contractually, the respondent has no obligation to bear any expenses of the kind claimed by the petitioner/claimant in the arbitration proceedings.

11. The impugned arbitral award framed the following issues :-

> *"ISSUES*
>
> *The parties thereto have signed above said document, issues are being reproduced herein below:*
>
> *1) Whether the claimant has repudiated the agreement dated 25th November 2006 through its conduct? OPR*
>
> *2) Whether the claimant, prior to contacting the respondent and proposing the business plan, had already an existing setup and business of distribution system/platform of travel inventory? OPR*
>
> *3) Whether under the agreement dated 25th Nov 2006 the claimants can seek recovery/compensation from respondent for any investment and expenditure incurred by it, if any? (OPC)*
>
> *4) Whether the investments and expenditures, which have been incurred by the claimant, if any, have been done voluntarily and without any obligation? OPR*
>
> *5. Whether the entire claim of the claimant is false, fabricated and without any merit? (OPR)*
>
> *6) Whether the claimant is entitled for damages/relief as claimed in the claim petition for breaching of the agreement, and if so, to what amount? (OPC)*

7) Whether the claimant is entitled to interest as prayed in the claim, if so on what amount and for what period? (OPC)
8) Relief"

12. The first issue was answered against the respondent and consequently, the learned Arbitrator rejected the contention that there was any repudiation of the Agreement by the petitioner/claimant.

13. Issue Nos.2 and 4 were decided in favour of the petitioner/claimant and against the respondent, and it was held that the expenditure in question was incurred by the petitioner/claimant only on the assurance of the respondent company. Further, even after signing of the Agreement, the petitioner/claimant continued to incur expenditure for implementation of the Agreement and consequently, the petitioner/claimant was held entitled to recover the same.

14. Issue No.5 was also decided against the respondent and it was noticed in the award that contention of the respondent that the claim was false and fabricated, was bereft of any merit.

15. Issue Nos.3, 6 and 7 were dealt with in the award collectively, and by placing reliance on the evidence on record, the learned Arbitrator concluded that the petitioner/claimant had been able to prove the expenses as elaborated by it in Paragraph 9 to 21 of its affidavit of evidence. The same amounted to a sum of Rs.29,30,937/-.

16. Further, the claimant was awarded damages to the tune of Rs.5 Lakhs and also interest on the said amount at the rate of 12% per annum from the date of filing of the claim petition till realization of the amount.

SUBMISSIONS ON BEHALF OF THE PETITIONER

17. The petitioner in OMP (COMM.) 121 of 2016, has confined to

assailing the impugned award on the ground that it omits/refuses to award a sum of Rs.20 Lakhs as claimed by the petitioner/claimant, and as elaborated in paragraph 22 of its affidavit of evidence, being the alleged expenditure for hiring operation, sales and technical staff for the purpose of implementing the Agreement. The authorised representative of the petitioner, who appears in person, submits that the same is altogether unjustified.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

18. Learned counsel for Spicejet Ltd. has also challenged the impugned award and has made the following submissions in O.M.P. (COMM) 132/2016:

(i) Firstly, it is contended that under the Agreement between the parties, the petitioner/claimant was entitled to an upfront, set-up fee of Rs.3.5 Lakhs. It is submitted that other than this upfront fees, the Agreement does not impose any obligation on the respondent to bear any portion of the expenses that was allegedly incurred by the petitioner/claimant in setting up the platform in question. In this regard, he further relies upon the Clause 8.3 of the Agreement between the parties, which reads as under :-

> *"8.3 Expenses: TRAVEL2AGENT shall bear all expenses incurred by their personnel in connection with travel to site(s) to prepare for and to implement the offered services or to provide training, consulting, support, or other services at TRAVEL2AGENT's site. Such expenses shall include, without limitation, reasonable and timely air travel, ground transportation, quality lodging, meals, and incidentals etc."*

(ii) Second, it is contended that the alleged expenses which have been reimbursed by the impugned award to the petitioner/claimant are not substantiated/established from the evidence on record and therefore,

the impugned award is contrary to the evidence and as such, liable to be set aside.

(iii) Third, it is contended that the findings regarding breach/repudiation in the impugned award are erroneous and perverse inasmuch as certain vital correspondence have not been taken note of by the learned Arbitrator while deciding the issue in favour of the petitioner/claimant.

ANALYSIS AND CONCLUSION

19. It is noticed that the arbitral award elaborately considers and deals with the material and evidence placed on record by the respective parties. It was concluded that the respondent was guilty of breach of certain fundamental terms of the Agreement, particularly, Clause 4 thereof, which is in the following terms:

> *"SECTION 4:PAYMENT, RESERVATI0N AND FAIR COMPUTATION*
> *a) All payments for tickets booked on TRAVEL2 AGENT shall be on cash basis/credit card/any other agreement method of payment directly to the company. TRAVEL2 AGENT shall use the payment gateway of the company for the payments made on credit cards.*
> *b).....*
> *c).....*
> *d).....*
> *e)....."*

20. It was found that the respondent failed to provide/make available any payment gateway for the purpose of the Agreement on the pretext that they were not providing the same to their other Application Programming Interface (API) partners. It was concluded as under :-

> *"As per Section 3 of the agreement Ex.CW1/3 the company shall provide the facility through its API which shall contain booking functionality using Web services. Taking this clause into consideration, the arguments addressed by the counsel for the respondent that the' claimants could have implemented the agreement by booking on the basis of cash*

payment also does not hold any merit as the agreement itself provide the booking through Web site which can only be done by using the credit card facility and not on the basis of cash payment. Not only this, the respondent company just before signing of the agreement has charged Rs.3,50,000/-^ (Rupees Three Lacs Fifty Thousand only) for providing API to the claimants and which has not been disputed or denied by the respondent company. So from above it is clear that the clause 4 (a) of the agreement was not honoured by the respondent company and the respondent company did not provide the payment gateway to the claimant company and in a way hindered the implementation of the agreement and it is the respondent who has repudiated the agreement and not the claimants."

21. The award further concludes that the respondent was in breach of Clause 9 of the Agreement which deals with the commission structure that was to be made applicable. Based on the elaborate evidence adduced by the parties, it was concluded that it was the respondent which was remiss in not prescribing an appropriate commission structure and in adhering to the other terms of the Agreement.

22. Having held that it was the respondent which was in breach of the Agreement, the Tribunal proceeded to consider whether the petitioner/claimant was entitled to restitution of the investments made by it.

23. The impugned award renders a finding of fact that the expenditure was incurred by the petitioner/claimant only on the assurance of the respondent company. In this regard it is apposite to refer to the following portions of the award :-

"In response to question 7 and 8, witness has clearly replied that it was only after assurance from the respondent the platform was setup and expenses were incurred. Apart form this, perusal of emails Ex.CW1/33, Ex.CW1/35 and Ex.CW1/37, clearly speaks about the sizeable financial investments and entering into public relations exercises, as well as very expensive full page media advertisements at the assurance of respondents company and there was no reply in any of the e-mails contradicting the expenses made or assurance given. Even In the cross-examination counsel for respondent did not put suggestion to the witness that no such

assurances were given.

Taking the undersigned to the conclusion that all the expenses were incurred by the claimants only on the assurance of the respondents company. Not only this, the claimants even after signing of the agreement believing respondents have been making expensive expenses like opening office at Hyderabad, appointing agents etc. only for the implementation of the agreement and only for the purpose of earning commercial benefit to both the parties. In view of the above, both the issues decided against the respondent and in favour of claimants."

24. As regards the quantum of expenditure to which the petitioner/claimant is entitled, the tribunal again, found as a matter of fact, that the expenditure claimed in paragraphs 9 to 21 of its affidavit was established. It was observed in the award as under :-

"Evidence filed by the claimants by way of affidavit clearly reflects and proves the expenses detailed hereinabove. The claimants have further examined two more witness in support of their claim. One is their Auditor Shri Arun Malhotra who appeared as CW2 and deposed that they have audited the account books of respondent company. He gave certificate Ex.CWl/46, regarding expenses incurred under different heads. He was asked in cross examination as to how many offices claimant company had in the year 2002, 2005, 2007 and 2009. He was asked question regarding traveling and conveyance expenses. He was asked that entries were made not only for business but for private use also. But the veracity of the entries were not questioned, no suggestion was given to the witness that certificate given by the witness is false and or that no such expenses has been incurred by the company.

Claimants further proved that the expenses incurred by it vide Ex.CWl/41 to Ex.CWl/55 which have been shown under different heads like, stationary, traveling, salary, purchase etc. in the account books maintained regularly in due course of business including ledger, bank statements. Most of the payments are by cheque having corresponding entry in the statement of account of bank.

Other witnesses produced by the claimants is CW3- Shri Parveen Kumar who was a software developer, who was engaged for maintenance of website Travel 2 Agent. Com, who has stated that he worked with them from "2006 to 2009 and since no right have been given by the Spice Jet to the claimants, therefore claimants dispensed his services. Surprising only one question was as to from which office he was maintaining the website. His testimony also remained unimpeached. No suggestion even was given that he was not employed

or that he is deposing falsely at the instance of claimants.
It is further, submitted by counsel for the respondents that whatever expenses the claimants had tried to prove through their Ex.CWl/42, Ex.CWl/43 and Ex.CWl/44 are only either the proposal or the Investment made by "Sphinx Travel Worldwide" (a third organization) and have been issued prior to April, 2006, i.e. much before the signing of the agreement which proves that said investments were not made by the claimants for providing service to the respondents and further no documents have been filed by the claimants with respect to expenses made in para No. 10 and 12 of the / claimant No.4's affidavit being Rs. 15,000/- and Rs.12,000/- respectively.
The counsel for the respondents has further submitted that as for as Rs.3.5 lacs is concerned the same has been received by the company but same being charged by the company from all its API partners in accordance with general policy and otherwise also same is a non-refundable amount as per the terms of agreement."

25. The award also notices that the evidence adduced by the respondent in support of its case was quite sketchy and inadequate inasmuch as the only witness who deposed on behalf of the respondent in the arbitration proceedings was the Assistant Manager of its Legal Department.

26. After analyzing and considering in totality the evidence adduced by the parties, the arbitral award concludes as under :-

"Here in this case execution of the agreement was never indispute, as both of the parties agreed regarding the execution of the document. The only issue was whether the expenses incurred by the claimants prior to signing of the agreement were based on the discussions and assurances given by the respondent company? In this case the discussion of the claimants company took place with the persons who were handling the sales department and since no witness from sales department was examined by the respondent company, it can be said that best evidence was withheld and or the RWl who appeared and deposed on behalf of the company was not best person to depose for the respondent company, as no discussionf. took place with him and it was only in November 2006 the legal department of the respondent company was approached by the sales department, probably when the agreement was to be executed. HereRW-1 was deposing on the basis of record, was not having personal knowledge regarding the- discussion that took place before signing of the agreement; Since the company was not having any record of the discussions, that took place prior to signing of the agreement, therefore,

the person with whom such discussion took place would have been the best person to answer. Accordingly it is held that the respondent failed to bring forward the best evidence. Therefore, in view of the above, all the above three issues are decided in favour of claimants and against the respondents. The claimants proved the expenses on record, as mentioned in para Nos. 9 to 21 of the affidavit. The. Claimants are entitled to claim a sum of Rs.29,30,937/- (Rupee Twenty Nine Lacs Thirty Thousand Nine Hundred Thirty Seven only) from the respondents. The claimants are entitled to damages to the tune of Rs.5,00,000/- (Rupees Five Lacs only) and are further entitled to interest on the above said amounts."

27. The findings rendered in the aforesaid award as regards the attribution of breach is based on an application/interpretation of the provisions of the Agreement particularly clause 4 and 9 thereof, and taking into account the factual matrix as emerged from the material and elaborate evidence adduced by the parties.

28. For the purpose of the present proceedings under Section 34 of the A&C Act, this Court does not find the view taken by the learned sole Arbitrator to be an implausible view, much less can it be considered to be an impossible view warranting interference under Section 34 of the A&C Act. Likewise, the finding of fact rendered in the arbitral award that significant expenditure was incurred by the claimant for the purpose of discharging its obligations under the Agreement and that the respondent is liable to reimburse the same on account of breach, calls for no interference being predicated on a plausible interpretation of the provisions of the Agreement by the learned Arbitrator, and based on the factual circumstances as brought out in the evidence adduced/ material placed on record by the parties.

29. The arbitral tribunal found, as a matter of fact and based on appreciation of evidence, that the petitioner/claimant had been able to establish its expenditure to the extent of Rs.29,30,937/-. The details of this

expenditure were clearly set out by the petitioner/claimant in its affidavit and its witness adduced in considerable details with regards thereto. The same has been adverted to in the award, which also notices the insufficiency in both the cross-examinations and rebuttal evidence of the respondent.

30. No ground is made out to interfere with the aforesaid findings in these proceedings.

31. For the same reason, this Court finds no reason to disturb the finding that the petitioner/claimant could not establish the expenditure referred to in Paragraph 22 of its evidence affidavit, allegedly towards hiring operations, sale and technical staff for the purpose of implementing the Agreement.

32. It is trite that an Arbitrator is the sole judge of the quality and quantity of evidence and that the Court while exercising jurisdiction under Section 34 of the A&C Act would not supplant the views of the arbitral tribunal as long as the view taken is not altogether perverse and untenable[1].

33. Hence, this Court rejects both the petitioner's and the respondent's challenge as regards (i) the finding rendered in the award as regards breach, (ii) quantum of expenditure/compensation assessed. This leaves us with the direction in the impugned award awarding damages to the extent of Rs.5 Lakhs to the petitioner/claimant. With regard thereto, all that the impugned award observes is as under :-

> *"……The claimants are entitled to damages to the tune of Rs.5,00,000/- (Rupees Five Lacs only) and are further entitled to interest on the above said amounts."*

34. No basis is disclosed for coming to the conclusion as to why the claimant is entitled to the aforesaid amount of Rs.5 Lakhs. It is well settled

[1]Union Of India Vs M/S Parishudh Machines Pvt. Ltd. 2024:DHC:6097-DB, Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited, (2019) 7 SCC 236, Reliance Infrastructure ltd. v. State of Goa 2023 SCC OnLine SC 604

that any award of damages, on the touch stone of Section 73 of the Indian Contract Act, must be predicated on actual loss suffered[2].

35. The arbitral award having already returned the finding that the expenditure/investment incurred by the claimant was to the tune of Rs.29,30,937/-, and having directed restitution of the same, no rationale is disclosed in the award for awarding any additional amount to the claimant. The pleadings/evidence on record before the learned sole arbitrator also does not disclose any basis for the same. The award on this count is, *ex facie*, contrary to settled law, and is also in manifest disregard of the material/ evidence on record.

36. As such, the impugned award is set aside only to the extent it awards damages to the claimant to the sum of Rs.5 Lakhs.

37. The other direction/s in the award *viz*. payment of Rs.29,30,937/- by the respondent to the claimant, alongwith interest at 12% per annum, is upheld.

38. Both the petitions are disposed of in the above terms.

SACHIN DATTA, J

OCTOBER 29, 2024/*r*

[2]Kailash Nath Associates vs Delhi Development Authority & Anr2015 (4) SCC 136