

Date of Decision: 2nd April, 2008

+ **O.M.P. 453/2006**

BHARAT SANCHAR NIGAM LIMITED Petitioner
Through Mr.Sukumar Patjoshi, Advocate.

versus

M/S SUDARSHAN TELECOM Respondent
Through Mr.Sakya Singha Choudhary with
Mr.Sapan Kumar Mashi, Advocate.

CORAM:**MR. JUSTICE S. RAVINDRA BHAT**

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat (Open Court)

1. The petitioner in these proceedings under Section 34 questions an Award made by the sole Arbitrator on 12.6.2006. The Arbitrator awarded Rs.37,15,330/- with interest pendente lite and future interest at the rate of 9% p.a. in favour of the claimant, i.e. the respondent.

2. The undisputed facts necessary deciding this case are that the petitioner published a tender, eliciting responses and seeking

supply of a length of 12F OFC cables of 60,000 Kms. and 24F OFC cables to the extent of 12,000 Kms. Since these were optical cables, "FC cables" implied "Fibre Kilometers". The respondent submitted a tender quoting its rates; it was opened on 10.8.2001. The petitioner eventually issued an Advance Purchase Order (APO) on 26.11.2001. The APO, stipulated in clause 3, as follows:-

"3. Any increase in taxes and other statutory duties/levies after the expiry of the delivery date shall be to the contractor's account. However, benefit of any decrease in these taxes/duties shall be passed on to the purchaser by the supplier.

(ii) in case delivery extension is considered for delayed supplies after expiry of schedule delivery period, the price shall be with reduction of tax/duty/and/or new tender prices is any, on whichever is lower basis."

3. The respondent signified its acceptance of the APO on 3.12.2001 and, thereafter, commenced its supplies. There is no dispute that the respondents supplied substantial quantity of the contracted product; apparently, it supplied the entire quantity of 24F cables and 984 Kms. of 12F cables by 31.3.2002, i.e. the scheduled delivery period. In respect of the balance of 60.63 Kms. of 12F, it sought extension which was undeniably granted. The respondent completed the delivery of this balance portion within the time granted, i.e. 28.4.2002. The respondent then raised a dispute alleging that the petitioner did not pay the contracted amount and was

withholding the sum of about Rs.37 lakhs. Since the disputes were arbitrable, they were referred to the decision of the sole Arbitrator Ms. Justice Usha Mehra. By the award, the sole Arbitrator held in favour of the respondent and also directed payment of post award at 9% p.a. interest. The petitioner has assailed the award on the ground that it is contrary to the terms of the contract and, therefore, opposed the public policy and has invoked Section 34 of the Arbitration and Conciliation Act, 1996. It has placed reliance on the judgment of Supreme Court in ***OIL AND NATURAL GAS CORPORATION LTD. VS. SAW PIPES LTD.***, (2003) 5 SCC 705.

4. It is argued on behalf of the petitioner by Mr.Sukumar Patjoshi that the award is unsustainable and is contrary to public policy because the Arbitrator has interpreted a stipulation contrary to the terms of the contract. It was submitted that the intention of the parties is manifest in clause 3(2) of the APO which clearly envisioned that in case of extension, the tender price, opened immediately after the submission of the tender by the respondent, was to govern supplies made during the extended period. Thus for all the supplies effected after 31.3.2002, the respondent could not claim more than last tendered price by the other party. It was contended by learned counsel that, in the present case, the immediately succeeding tender was opened on 29.9.2001 and after evaluation was finalized on

16.3.2002. It quoted a cost lower than the respondent's and had to prevail according to the terms of contract. In ignoring this stipulation, the Arbitrator committed an error which goes to the root of the matter; it results in an illegality. The Court should, therefore, govern and set aside the award.

5. On behalf of the respondent, it was contended that the petitioner's tender though furnished on 24.7.2001 was opened on 10.8.2001 and the APO issued on 26.11.2001. It was contended that if the intention of the petitioner was that the later tender price was applicable, nothing prevented it from spelling out the lower cost itself in the APO, issued on 26.11.2001. Counsel submitted, more importantly the interpretation which found favour with the Arbitrator, was based on an overall understanding of clause 3 itself and not merely sub-clause 2 of the said condition. He relied on the said stipulation to contend that the emphasis was more on the extended delivery period and if Arbitrator held that the tender referred to in clause 2 was necessarily relatable to one submitted during the extended period, that interpretation cannot be called illegal as it is one plausible view.

6. In support of the contention, learned counsel relied upon the decision of the Supreme Court in ***STATE OF RAJASTHAN VS. PURI CONSTRUCTION CO. LTD.***, (1994) 6 SCC 485 as well as

M/s. SUDARSAN TRADING CO. VS. GOVT. OF KERALA, AIR 1989

SC 890. The Supreme Court had reasoned that since an Arbitrator is the chosen adjudicator, conferred and jurisdiction by the parties, so long as his award, prefers a plausible though the most perfect view, the Court will refrain from setting it aside. Of course, in case of patent illegalities or other glaring infirmities, the , Court's jurisdiction to intervene and set aside the award is always available.

7. The finding of the Arbitrator in this case is extracted as below:-

"Since these issues are inter-related therefore taken up together for disposal. The decision of these issues is based on the interpretation of various provisions of the purchase orders as well as of letter dated 2.4.2002 vide which the period was extended for balance supply up to 28.4.2002.

Clause 3(ii) of the advance purchase order dated 26.11.2001 reads as under:

"3(ii) In case delivery extension is considered for delayed supplied after expiry of schedule delivery period, the prices shall be with reduced tax/duty and/or new tender prices, if any, on whichever is lower basis"

Clause 6(ii) and (iii) of the purchase order dated 5.12.2001 reads as under:

Delivery Schedule

(ii) "If the supplier fails to commence supplies during the original delivery period, the purchaser reserve the right to cancel the P.O.

(iii) In case delivery extension is

considered for delayed supplies after expiry of schedule delivery period, the prices shall be with reduction of tax/duty and/or new tender prices, if any, or whichever is lower basis.

Contractual rates for supply of cables was Rs.57,402/- per Kms. But the claimant was paid for the supply of cables during the extended period Rs.51,390/- per Kms. The provisional prices was finalized vide Annexure C-6 dated 28.4.2002 which stipulated that period of delivery would be subject to levy of liquidated damages (L.D.). Further, the prices given in the purchase orders were made 90% provisional and same were to be finalized after taking into effect of reduction in duties/taxes announced in the financial budget for the year 2001-02, 2002-03 over the P.O. prices or the approved prices against the tender opened in any circle which ever was lower. The provisional prices according to Respondent stood finalized and fixed at Rs.51,390/- per Kms.

Thus according to condition (b) quoted above, the price was to be worked out on the basis of new tender opened in any of the Respondent's circle during the extended period of delivery of the claimant. It is an admitted fact on record that no new tender was opened in any circle of the Respondent during the extended period of delivery.

Tender of NTP circle which was relied by the Respondent opened on 25.9.2001. It was finalized on 16.3.2002 as admitted by Mr.B.C.Soni A.D.G (MT) of the Respondent. Respondent cannot take advantage of the lower prices quoted by NTP because the said tender was not opened during the extended period of delivery of the claimant. The period for delivery was extended from 1.4.2002 to 28.4.2002. Claimant's tender was opened on 10.8.2001 and purchase order was issued on

5.12.2001 by which date price of NTP circle were available with the Respondent. NTP's prices were lower than that of the claimant even then claimant's prices were accepted and purchase order placed on the claimant on 5.12.2001. Prices of NTP circle was opened on 25.9.2001 i.e. prior to placing purchase order on the claimant & not during the extended period. Hence Respondent could not apply NTP's prices to the supply made by the claimant during the extended period. Prices which could have applied as per the terms of the contract would be of new tender opened during the extended period and not of the tender which had already been opened during the original period of contract of the claimant.

For the reasons stated above, I am of the considered view that the Respondent has miserably failed to justify reducing the contractual prices for the supply made by the claimant during the extended period. The Respondent is, therefore, liable to refund the amount of Rs.34,81,997/- withheld in respect of 606.73 Kms. of 12F cables supplied during the extended period."

8. This Court has carefully examined the contentions of the petitioner. A complete and overall view of clause 3 was adopted by the Arbitrator in this case. She did not view clause 3(2) in isolation and affirmed the opinion that the price referred to, as a condition for extension of the delayed supplied was necessarily the new tender price opened during that period. There is no denial to the finding that during such extended period, i.e. after 31.3.2003, no new tender was in fact opened.

9. The rationale adopted by the Arbitrator is nothing but an interpretation of the clause. The view can hardly be characterized as perverse and unreasonable. It certainly is a plausible one and it finds favour of this Court. It must be remembered that though the Supreme Court has outlined the scope for judicial intervention in the ***Saw Pipes' case*** (supra), the underlying intention of the legislature while enacting the 1996 Act was to avoid multiplicity of litigation and minimize the scope for lengthening litigation. *Sans* patent illegality or something which is manifestly contrary to contractual provisions, the threshold interference is extremely high, and judicial intervention, required to be minimalistic.

10. On an overall conspectus of the facts, this Court is not satisfied that the grounds made out are insubstantial. The award does not disclose any illegality or infirmity which would fall within the parameters declared in ***Saw Pipes' case*** (supra) as empowering the Courts to intervene with arbitral determinations.

11. The petition, therefore, has to fail. It is accordingly dismissed.

S. RAVINDRA BHAT,J

APRIL 02, 2008
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