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

Date of Reserve: March 31, 2009

Date of Order: April 23, 2009

**+ OMP 286/2005**

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**23.04.2009**

**MTNL**

**...Petitioner**

Through : Mr. Ravi Sikri and Mr. Dipesh Sharma, Advocates

Versus

**Vindhya Telelinks Ltd. & Ors.**

**...Respondent**

Through: Ms. Amrita Sanghi with Mr. D. Singh, Advocates

**JUSTICE SHIV NARAYAN DHINGRA**

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

**JUDGMENT**

1. The petitioner has filed this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (for short, "the Act") for setting aside the award dated 24<sup>th</sup> February 2005 passed by the Arbitrator (respondent No.2) directing petitioner to pay to the claimant a sum of Rs.7,86,261/- along with pendent lite and future interest @ 8% per annum on the principal amount from 1<sup>st</sup> April 2002 till the date of payment.

2. The grounds raised in the objections are that the learned Arbitrator failed to appreciate that the dispute with respect to the liquidated damages was outside the purview of the arbitration agreement and the award passed by the learned Arbitrator was quorum non judice and liable to be set aside.

3. The respondent in reply to the objections has stated that the objections were barred by limitation. On merits, it is submitted that the objections raised by the petitioner are not tenable.

4. Brief facts relevant for the purpose of deciding this petition are that the petitioner had placed a purchase order dated 12<sup>th</sup> October 1994 for supply of polythene insulated jelly tin telecom cables of different specifications on the respondent. A delivery schedule of the supply of cables was given in the Annexure-B to the order. The delivery schedule provided for supply of entire quantity of cables up to 15<sup>th</sup> February 2000. The claimant (respondent herein) vide letter dated 12<sup>th</sup> January 2000 requested for re-fixing the delivery schedule so as to enable it to supply the entire quantity of cables till 31<sup>st</sup> March 2000. Vide letter dated 28<sup>th</sup> February 2000, the petitioner extended the delivery period for 10 weeks from the date of issue of order, for supply of balance quantities, but only in respect of 7 sizes of cables out of 13 sizes. The petitioner's letter gave a tabular statement indicating the new/ extended delivery period of 7 sizes of cables ranging from 25<sup>th</sup> March 2000 to 15<sup>th</sup> April 2000. The delivery schedule in respect of rest of the sizes of cables was not provided. In fact, the petitioner had by a prior fax message told respondent/ claimant not to supply outstanding quantities in respect of 3 sizes cables namely 400/0.5A, 400/0.5UA, 1200/0.5UA. The respondent vide letter dated 13<sup>th</sup> March 2000 reminded the petitioner that it had not given extension in respect of remaining 6 sizes of cable and told that the quantities of cables of those 6 sizes were also lying ready with it awaiting delivery and if extension was given, the cables would be offered for inspection and delivery. No response was received. The claimant /respondent sent a reminder dated 26<sup>th</sup> April 2000 asking for re-fixing the schedule for rest of the 6 sizes of cables.

The petitioner vide their letter dated 16<sup>th</sup> May 2000 extended the delivery period in respect of 4 sizes of cables up to 31<sup>st</sup> May 2000 and did not extend the delivery schedule of 2 sizes of cables namely 2000/0.4(A)/2000/04(UA). The delivery schedule in respect of these two sizes was not extended despite reminders. On 26<sup>th</sup> June 2001, the petitioner sent a communication to the respondent short-closing the purchase order/ contract in respect of outstanding quantities and also informed that the liquidated damages of the amount of Rs.7,43,907/- had been imposed in respect of the quantities not supplied. The Claimant/respondent was asked to deposit this amount. Since this amount was not deposited by the respondent/claimant, the petitioner invoked the bank guarantee to the extent of Rs.7,43,907/- and called upon the bank to remit this amount. The Claimant learnt about the intended invocation of bank guarantee and moved an application under Section 9 before this Court. Vide order dated 12<sup>th</sup> October 2001, this Court directed the bank to withhold the payment against the bank guarantee. However it subsequently transpired that by the time this Court order was served on the bank, the bank had already remitted the amount to the petitioner. However, while finally deciding the application under Section 9 of the Act, this Court held that invocation of the bank guarantee was not in accordance with the terms of the bank guarantee and was bad in law.

5. The Claimant/ respondent later on invoked the arbitration clause and made a claim of Rs.1,49,76,134/- as damages on account of loss and a claim for refund of Rs.7,43,907/- recovered by the respondent by invocation of performance bank guarantee along with interest.

6. It is noted by the Arbitrator that during arguments, the claimant

/respondent did not advance arguments in respect of claim of Rs.1,49,76,134/- (claim No.1) and only made submissions for refund of Rs.7,43,907/-. However, since the claim No.1 was not formally withdrawn, the learned Arbitrator considered both the claims and found that claim for damages /profits for an amount of Rs.1,49,76,134/- was not tenable and allowed the claim for Rs.7,43,907/- along with 8% interest.

7. A perusal of award passed by learned Arbitrator would show that the Arbitrator had considered the provisions contained in the contract regarding levy of liquidated damages and rescission of contract and found that the petitioner had not imposed any liquidated damages in respect of cables where the quantity of cables were supplied with delay under rescheduled delivery period. The liquidated damages had been imposed on those quantities which had not been supplied. The Arbitrator observed that the question of invocation of clause 16 regarding imposition of liquidated damages does not arise in this case and the clause was not attracted in case of the material being not supplied. It was only attracted in case where the material was supplied beyond the time schedule and the petitioner had liberty to impose the liquidated damages because of delayed supply. The learned Arbitrator observed that in case no supply was made and the contract was short-closed on account of non supply, the question of imposition of liquidated damages would not arise. The Arbitrator also found that the petitioner had not served any notice under Clause 18(1) of the contract for termination of the contract and even termination of contract being in violation of clause 18 was bad in law.

8. It is settled law that this Court does not sit in appeal over the judgment

of the Arbitrator. If the Arbitrator has given plausible interpretation to the different provisions of contract, the Court cannot reject the interpretation because another interpretation was also feasible. There is no dispute to the fact that this court had passed order finally disposing of the earlier application under Section 9 of the Act holding inter alia that the invocation of the bank guarantee by the petitioner was contrary to the terms and conditions of the bank guarantee and was bad in law. This order was not assailed and had become final. This Court while passing order under Section 9 had considered the provisions of the bank guarantee as well as the provisions of the contract between the parties and after considering the provisions of the contract and the language of the bank guarantee, this Court came to conclusion that the performance bank guarantee was wrongly invoked by the petitioner and the bank guarantee did not include the instance of failure to make supply by the scheduled date to the petitioner. The invocation of bank guarantee was bad in law.

9. The contention of the petitioner that the issue of liquidated damages was beyond the purview of the Arbitrator is also not tenable. Whether the liquidated damages could be levied in case of short supply of cables is an issue which was required to be gone into on the basis of contract. It is not the case where the liquidated damages had been imposed by the petitioner for delayed supply. The petitioner though had in the extension letter written that the extension was being given subject to condition of liquidated damages but the petitioner did not impose liquidated damages in case of delayed supply and imposed liquidated damages for short supply of the cables, despite the fact that the respondent had been writing to the petitioner that the cables were ready and it should take the delivery of cables. The learned Arbitrator

had authority to decide the issue if in view of provisions of the Contract, petitioner could impose liquidated damages for short supply of cables in case of closure of contract. The learned Arbitrator did not exceed his jurisdiction.

10. In view of foregoing facts and discussion, I find no force in this petition. The petition is hereby dismissed. No orders as to costs.

11. Since I have dismissed the objections raised by the petitioner on merits, I consider that there was no necessity to deal with the issue of delay in refilling the objections.

**April 23, 2009**  
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**SHIV NARAYAN DHINGRA J.**