

* **HIGH COURT OF DELHI : NEW DELHI**

+ **OMP No.10/2006**

Reserved on: 19th February, 2009

% Decided on: 8th July, 2009

Bharat Sanchar Nigam Ltd. ...Petitioner
Through : Mr. Yashwant Das, Sr. Adv. with
Mr. Sukumar Pattjoshi and
Mr. S.K. Dubey, Advs.

Versus

Hughes Networks Systems Respondents
Through : Mr. Arvind Nigam, Sr. Adv. with
Mr. Dhamesh Misra and Mr. Ritesh
Sharma, Advs.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. The Petitioners herein filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the impugned award dated 16th September, 2005.

2. The brief facts of the case are that the objector/petitioner floated a tender enquiry bearing no.15-44/92-MMD inviting offers for supply of 64 kbps TDM-TDMA (VSAT) Data Network Equipment. The offer of the respondent was accepted by the Petitioner and an advance purchase order dated 27th September, 1994 was issued in favour of the

respondent.

3. The respondent furnished a performance security in the form of a bank guarantee dated October 7, 1994 bearing No.4558 for a sum of US \$ 4,74,092 issued by Citi Bank, New Delhi.

4. The Petitioner issued a Purchase Order dated 28th November, 1994 bearing no. 15-44/92-MMD/VOL-II for procurement of 64 kbps TDM-TDMA (VSAT) Data Network Equipment in favour of the respondent.

5. Under Clause 14 of the Purchase Order, the delivery of goods had to commence within three months and was to be completed within six months from the date of opening the operable Letter of Credit. The same was issued by the Bank of India on 3rd January, 1995. The goods were delivered as per Clause 14 on 8th September, 1995 by putting them on board and as per Clause 13 invoices and shipping document airway bills were submitted to D.O.T. on 25th September, 1995 i.e. within the extended delivery period specified by the Petitioner.

6. The goods reached the site on 25th November, 1995 and were installed by 3rd December, 1995. The Petitioner started acceptance testing and various defects were pointed out in D.O.T.'s letter dated 12th February, 1996 as a result of these inspections.

7. The Petitioner claimed that certain equipment was either defective as per specification. It also claimed that the Respondent accepted the said deficiencies and agreed to remedy these deficiencies at its own costs. The Respondent, on the other hand, claimed that the Petitioner demanded substitution of goods beyond specification and also

sought supply of additional equipment beyond the scope of supply. The Respondent further claimed that it agreed to do the above said for which the Petitioner is liable to make payment.

8. The Petitioner submits that as per clause 14.9, if the supplier fails to deliver any or all of the goods or perform the services within the time period(s) specified in the Contact, the purchaser shall deduct from the contract price a total of 2% of the delivered price of the delayed goods or unperformed services for each month of delay until actual delivery of performance. Since the billing software was delivered after the contracted period of 3 months, the petitioner after adjusting an outstanding bill of Rs. 30,00,540/- of the Respondent from Rs. 46,94,044/- which included the said liquidated damages amounting to Rs. 32,94,909/-, demanded Rs.16,93,504/- from the respondent by a letter dated 21st January, 2000. By letter dated January 9, 2003 the petitioner revised and enhanced the earlier demand of liquidated damages from Rs. 32, 94,909/- to Rs. 82,37,000/- (5% of the contract value) and after adjusting certain payments, made a demand for an amount of Rs. 66,35,595/-. Due to disputes with regard to the payment of liquidated damages and despite various letters by the petitioner to the respondent as regards the same, the same were not paid and the respondent sent a legal notice dated February 4, 2003 to the petitioner.

9. Before the petitioner could take any action, vide letter dated 20th February, 2003 the respondent appointed J. S.S. Chadha as its nominee Arbitrator and by letter dated 16th June, 2003 the petitioner appointed Sh. S.K. Sahrma as its nominee Arbitrator who appointed J.

B.N. Kirpal, former Chief Justice of India as Presiding Arbitrator in consonance with Section 11(3) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act').

10. Claim Nos.6 to 13 & 15 of the claimants along with counter-claim Nos. 1, 4, 5 6 & 8 of petitioners herein were dealt with in the impugned award passed by the Arbitral Tribunal dated 16th September, 2005.

11. The Petitioners contend that the Arbitral Tribunal has erred in deciding that the matter was an arbitrable dispute as the disputes submitted were not arbitral as the same had either been waived or had not been raised at an earlier appropriate stage by the respondent. Further, even if it was accepted for the sake of argument that they were arbitral, they were still at the outset barred by limitation.

12. The Petitioners submit that as per Clause 14.9 Part I of the Purchase Order they are entitled to liquidated damages from the respondents as there was delay in supply of Data Software which affected commercial use of the equipment. They further submit that the said Clause 14.9 is outside the purview of the arbitration clause.

13. The Petitioners also submit that the Arbitral Tribunal, without any documentary basis on the record, has come to the conclusion that the respondent had four instead of three months for delivery of billing software from the date of supply of tariff structure and hence there is no delay on part of the respondent.

14. The Petitioners state that the Arbitral Tribunal has erroneously come to the conclusion that there has been no delay in the

performance of the contract and that there has been no pleading with respect to the liquidated damages on behalf of the Petitioners. The Petitioners submit that the Arbitral Tribunal has erred in awarding Rs.25,69,255/- under Claim No.5 to the respondent as this claim has been awarded only on the basis of an alleged acknowledgment by the Petitioners.

15. The respondent submits that an arbitral award made by an Arbitrator is not open to challenge on the ground that the arbitrator on interpreting certain documents, evidence and the contract etc. has reached a certain conclusion.

16. The respondent also submits that this court is not a court of appeal and hence it ought not to interfere with the findings of fact and construction of clauses of the contract. The respondent claims that it is well settled that on appreciation of the facts of the case, if more than one view is probable and the arbitrator has taken a particular view, then this Court may not adopt another view by way of which it can interfere with the award.

17. The respondent avers that the objections made by the Petitioners in the application under Section 34 of the Act do not fall under any of the grounds of Section 34 of the Act and are thus liable to be rejected.

18. The respondent states that the arbitration clause of the Purchase Order, i.e. Clause 21, is very wide providing for adjudication of all disputes touching the agreement including the operation and construction thereof as also the rights, duties and liabilities of the

parties. Before the Learned Arbitrators, the Petitioner did not once raise the objection that Clause 14.9 Part I was outside the purview of the Arbitration Clause.

19. The respondent submits that ground No.2 of the objections is in the nature of memorandum of appeal and as such the conclusion of the Learned Arbitrators is not to be interfered with as the matters are within the exclusive domain of the arbitrators.

20. During arguments, various objections were raised by the petitioner against the arbitral award. The first of these is that the Arbitral Tribunal was wrong in construing the terms of the contract as providing four months time from the date of receipt of the tariff structure for the development and supply of billing software. The submission that the time period for development and supply of billing software was three months only is disputed as incorrect and misconceived by the respondent. The basis for the demand of liquidated damages is the alleged delay of 18 days by the respondent in providing the billing software. As it is, prior to 21st January, 2000 there was no demand for liquidated damages and a clean certificate was determined wherein respondent was not held liable for such damages. It appears that the Learned Tribunal has rightly constructed the relevant terms, i.e. Clause(s) 11.4, 11.5 and 14.4 of the contract, which are as follows :

- a) Clause 11.4 as per which the respondent had to develop and give billing software to the Petitioner within three months of initial delivery of the goods;
- b) Clause 11.5 as per which the Petitioner was to provide the tariff structure to the respondent within two months of opening of the Letter of Credit;

- c) Clause 14.4 as per which the initial delivery of the goods was to commence within three months of opening of the Letter of Credit and to be completed till three months thereafter.

21. In view of the above-stated clauses, contractually there was one month prior to and three months after initial delivery of the goods which were available to the respondent. Further, due to the 15 month delay on the Petitioner's part, time was set at large and had ceased to be of essence. Keeping all the above-mentioned circumstances in consideration, I find that the Learned Tribunal has correctly carried out finding of this fact. Further, this finding of fact by the Arbitral Tribunal that time was set at large due to the Petitioner's 15 month delay has not been challenged either in the objection petition or during arguments. I am of the considered opinion that time had indeed ceased to be of essence and hence, liquidated damages cannot be demanded.

22. The second objection taken up by the Petitioner is that the respondent has admitted its liability in letter dated 2nd March, 2000. It is to be noted that the respondent was being asked to keep the bank guarantee of USD 474,092 alive though the performance, for which it was actually given, was long over. In the said letter dated 2nd March, 2000 the respondent made no admission of liability as the statement was made without prejudice and was subject to adjudication as to the same. The bank guarantee was to be released pending adjudication. The said letter ought to be read in this context. I am of the opinion that the Arbitral Tribunal has assessed this material correctly.

23. The third objection of the Petitioner is that the respondent admitted its liability with regard to liquidated damages in the letter dated 26th June, 1999. However, it appears that the said letter itself states that Goods Item A to D were supplied within time. In fact, it was the Petitioner who pleaded that the demand for liquidated damages was due to late supply of the billing software by 18 days. In view of the statements above, the delay of 18 days as a basis for demanding liquidated damages is not available to the Petitioner as the respondent has four months to complete his side of the contract and in any event, time had ceased to be of essence. In light of these considerations, I find that neither was there any delay nor any admission of liability as regards the liquidated damages.

24. The fourth objection of the Petitioner is that the respondent's claim for recovery of payment of bill against its services is time barred. It appears that on 20th August, 1998 the Petitioner admitted that a payment of Rs.30,00,500/- was due to the respondent against service already carried out. The same was again admitted on 21st January, 2000 and on 9th January, 2003, but both times, the Petitioner stated that it wished to adjust the amount. It was on 4th February, 2003 that arbitration proceedings were initiated by the respondents. Therefore, under Section 18 of the Limitation Act, 1963 time began to run from the date of admission of liability and hence the Arbitral Tribunal's finding that the claim was well within the limitation period is clear and correct.

25. The last objection taken up by the Petitioner that the arbitral award is against public policy is erroneous and misconceived as there is

no question or issue of public policy that has arisen as regards the facts of the present case. The award is based on considered appreciation of material, assessment of evidence and construction and interpretation of the terms of the contract between the parties.

26. In my view, the scope of interference by this Court with an arbitrator's award under Section 34 of the Arbitration and Conciliation Act, 1996 has been extensively dealt with by the Hon'ble Supreme Court in **Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705**. The relevant observations of the Supreme Court in the said judgment are reproduced hereinbelow:

“31. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

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74. In the result, it is held that:

A. (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

- (i) a party was under some incapacity, or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i) (a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with :

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.”

27. The approach in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (supra) has been upheld and followed by the Apex Court in **State of Rajasthan and Ors. v. Basant Nahata, (2005) 12 SCC 77** and **Hindustan Zinc Ltd. v. Friends Coal Carbonisation, 2007 (1) SCALE 1.**

28. It is a settled position in law that the Court while exercising jurisdiction under Section 34 of the Act does not sit as a court of appeal to re-assess the material, evidence and the terms of the contract assessed and interpreted by the arbitrators. It is further a settled position in law that the court while exercising jurisdiction under Section 34 of the Act would not substitute its opinion for that of the arbitrators.

29. In view of the settled principles, I do not find any patent illegality in the award as the award is not against any of the principles of the law as enunciated by the Hon'ble Apex Court. The grounds for objections under Section 34 of the Arbitration and Conciliation Act, 1996 are limited. The objections ought to fall strictly within the four corners of Section 34 of the said Act. I find that the petitioner has not urged any valid ground within the meaning of Section 34 of the Act on which an award is liable to be set aside. Therefore, the petition for setting aside the award is liable to be rejected and dismissed.

No costs.

MANMOHAN SINGH, J

JULY 08, 2009
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