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M/S N.E. LINK EXPRESS

Through: Mr. C. Mukund, Mr. Ashok Jain & Mr.
Pankaj Jain, Advocates

MAHANAGAR TELEPHONE NIGAM LTD.... Respondent

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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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 |

RAJIV SAHAI ENDLAW, J.

1. The petition under Section 34 of the Arbitration Act, 1996 has come up for admission. The counsel for the petitioner was heard for some length on 21st July, 2009 when the hearing was adjourned to enable him to place on record portions of the arbitral record sought to be relied upon him for the purpose of issuance of notice of the petition. It is stated that the documents were filed after the last date. However, the same are not on record. The counsel for the petitioner has handed over another set of the said documents in the court and the same are taken on record. The counsel has been heard today also.
2. The challenge is to the portions of the arbitral award dated 28th March, 2009 of the General Manager (Marketing) of MP Circle,

Bhopal of the Department of Telecommunications, to the extent against the petitioner.

3. The disputes arose out of an agreement dated 15th June, 2009 between the petitioner and the respondent Mahanagar Telephone Nigam Limited (MTNL) whereunder the petitioner agreed to undertake the job of distribution/delivery of all the telephone bills and other letters to be handed over by the respondent to the petitioner for delivery, within the jurisdiction of West-II Area. A rate of Rs.2,100/- per one thousand bills was agreed. The agreement was for an initial term of one year w.e.f. 15th June, 1999 with an option to the respondent to extend the same for a further period of three months. The work under the agreement however admittedly continued till the month of November of the year 2000.

4. The petitioner raised the following claims before the arbitrator:-

i. **Release of Bank Guarantee in the sum of Rs.1,10,000/-.**

a) The case of the respondent was that in terms of the agreement between the parties, the bank guarantee could not be released unless & until the petitioner furnished a "No Demand Certificate". It was further the case of the respondent that under the agreement the bank guarantee could be held in abeyance for at least six months from the date of receipt of "No Demand Certificate". It was thus contended that till all the claims were settled, the bank guarantee could not be released.

b) The arbitrator has found that the bank guarantee could not be released till the petitioner furnishing the "No Demand

Certificate” and which the petitioner had not submitted. The claim has thus been disallowed.

ii. **For refund of deductions of Rs.16,41,129/- from the petitioner's bills on the respondent.**

- a) Out of the said amount, Rs.10,43,622/- was deducted for non-delivery of the bills, Rs.5,44,845/- was deducted as penalty for non-delivery Rs.52,381/- was deducted as penalty for non-satisfactory performance and Rs.481/- deducted towards amount due against wrongly addressed bills. The case of the respondent was that the said deductions had been made in accordance with the terms of the agreement and after the decision for recovery of the said amounts had been taken by two committees of high level officials. It was further contended that under Clause 10 of the agreement, the decision of the MTNL with respect to the said deductions/penalty was final and binding on the petitioner. It was further the case of the respondent that the penalty in the case of non-delivery of bills was provided in the agreement as surcharge payable by the customers plus 5% of the total amount subject to a minimum of Rs.100/-
- b) The arbitrator found that a number of complainants were received by the respondent with respect to non-receipt of bills, certain complaints were made to Lok Adalat as well, complaints were also received of burning of bills as well as finding of bundels of bills in public places; on investigation by the Vigilance Cell of MTNL it was found that the said bills had been handed over to the claimant for delivery to the subscribers but which the claimant had failed to deliver; notwithstanding the same claimant raised its own bill on the respondent for delivery of the said bills.

- c) It was the case of the respondent that payment of 40% of subscribers bills had been received by it after issuance of duplicate bills. The respondent held the petitioner liable for non-delivery of all the said 40% bills and made the deductions aforesaid as per the formula provided in the agreement itself.
- d) The arbitrator, however, found that the respondent in the evidence has not been able to fully prove that payment of 40% bills had been received after issuance of duplicate bills. The arbitrator, however, found that in spite of the respondent forwarding the complaints on non-delivery to the petitioner, the petitioner never submitted any compliance reports. The arbitrator also held that merely because the payments had been made by the subscribers after obtaining duplicate bills was not indicative of those many bills having been not delivered by the petitioner. It was held that there could be various other reasons/circumstances owing to which the subscribers had made payment by way of duplicate bills. The arbitrator, however, found that the respondent had established receipt of number of complaints from the subscribers of non-delivery. The arbitrator thus held that only 40% of the payment received by MTNL after issuance of duplicate bills could be because of non-delivery of bills by the petitioner. The arbitrator thus directed refund back of 60% of Rs.10,43,622/- deducted by the respondent on this account to the petitioner. However, the arbitrator held that since the satisfactory performance of the petitioner stood established, the deductions in the sum of Rs.5,44,845/- & Rs.52,381/- and Rs.481/- as penalty by the respondent was justified.

iii. **Claim of Rs.1,48,000/- for wrong calculations.**

This was sorted out during the arbitration proceedings and does not survive.

iv. **Claim of the petitioner of Rs.16,41,129/- by way of interest @ 18% p.a. for delayed payment of its bills.**

The arbitrator held that there was no provision in the agreement regarding interest to be paid on the bills and as such the said claim could not be considered. Accordingly, the claim was declined.

v. **Claim of Rs.3 lacs per month for notice period.**

a) The case of the claimant was that the agreement was for one year extendable by three months; however, the respondent continued to give work to the petitioner for the period beyond that also and then all of a sudden in November, 2000 terminated the agreement. The petitioner claimed to be entitled to a reasonable notice of three months of termination and claimed damages in lieu thereof.

b) The arbitrator found that Clause 11 of the agreement provided for one month's notice of termination during the continuity/currency of the contract. It was held that the contract in the present case having been terminated after the expiry of terms thereof, the petitioner was not entitled to any notice and hence the claim for damages in lieu thereof was declined.

vi. **Claim for additional work undertaken.**

a) The argument of the counsel for petitioner before this court is that in terms of the agreement, the petitioner was to deliver 90000 bills @ Rs.2100/- per 1000 bills; the contract permitted a variation of 25%; The bills

delivered by the petitioner were admittedly more than the said variation also. The petitioner claimed for the said excessive bills @ Rs.10 per bill i.e. instead of Rs.2,100/- per 1000 bills, Rs.10,000/- per 1,000 bills. The respondent paid for the said excessive bills also at the contractual rate of Rs.2100/- for every 1000/- bill or Rs.2.10p per bill.

- b) The arbitrator found that the agreement was to deliver all the bills in a particular territory irrespective of the number and at the price agreed between the parties. The arbitrator also found that the agreement nowhere provided that the petitioner shall not deliver STD/ISD bills of high value and the high value of the STD/ISD bills did not give any right to the petitioner to demand additional amount by calling it additional services; the value of the bill had nothing to do to establish the cost of delivery. The claim of the petitioner was thus not found tenable even in terms of the agreement and the claim was dismissed.

vii. **Claim for the salary of two senior officers @ Rs.50,000/- per month for over 18 months.**

The arbitrator found the said claim also to be without any basis and dismissed the same.

5. The counsel for the petitioner had on 21st July, 2009 concentrated the challenge to the finding of the arbitrator's as to the imposition of penalty and damages for non-delivery. It was argued that the arbitrator having found the claim of the respondent for Rs.10,43,622/- on the basis of 40% bills having not been delivered, to have not been established, has arbitrarily reduced the said claim by

60%. The award to that extent was stated to be arbitrary, untenable and without any reason whatsoever.

6. The parties had chosen their private forum of arbitration and made the same the final arbitrator of disputes of facts as well as law between them. The arbitrator has in the award not only dealt with the respective case/pleadings of the parties, their documents but also discussed the statements of the witnesses recorded before him. It is on that basis that the arbitrator though finding unsatisfactory performance of the petitioner, at the same time held that the case of the respondent of non-delivery of 40% of the bills had not been established. Undoubtedly, the arbitrator has apparently not given any reason for reducing the said claim of the respondent by 60%. However, it cannot be lost sight of that considering the nature of the disputes, and the evidence led before the arbitrator it is very difficult for any court or fora to find the precise number, out of thousands of bills per month, remaining undelivered. A generalization in this regard becomes necessary. Such generalization by a fora of the parties choosing cannot be interfered with. Neither in the OMP nor during arguments also, it has been shown/disclosed that on the basis of any material before the arbitrator, the exact number can be so determined or is less than that attributed by the arbitrator to the petitioner. In the absence of the same it cannot be said that the percentage should be something other than that arrived at by the arbitrator. The finding of fact of arbitrator of petitioner being otherwise guilty of non-delivery, is final and has not been challenged.

7. It cannot also be lost sight of that the only ground under Section 34 of the Act which can be attracted is that provided under Section 34 (2) (b) (ii) i.e. of the award being in conflict with the

public policy of India. In spite of the interpretation of the Supreme Court in **ONGC Ltd. Vs. Saw Pipes Ltd.** AIR 2003 SC 2629 of the same meaning contrary to the substantive law of India, I cannot find the award in this respect to be contrary to any substantive law. As far as the requirement in Section 28 of giving reasons is concerned, there can be straight jacket definition of reasons. Whether “reasons” exist or not for a particular finding/award, depends upon the nature of dispute and the facts and circumstances of each case. “Reason” is a ground or motive for a belief or course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded. “Reason” is the link between the materials by which certain conclusions are based and the actual conclusions. This aspect is dealt in detail in **Jai Singh Vs. DDA** 2008 (3) Arb. LR 667 (Delhi) and in **DDA Vs. Sunder Lal Khatri & Sons** 157 (2009) DLT 555. It is in this light that it is to be seen whether the award to this extent is without reasons.

8. In **Gujarat Water Supply & Sewerage Board Vs. Unique Erectors (Gujarat) Pvt. Ltd.** (1989) 1 SCC 532, it was held that sufficiency of reasons depends upon the facts and circumstances of the case.

9. Section 65 (g) of the Indian Evidence Act empowers the person who being skilled to do so, has examined the documents which are voluminous, to give secondary evidence of their effect and for general result. I find the position to be the same over here. The arbitrator who has gone into the entire record and before whom witnesses have been examined and cross examined has on the basis

thereof returned a finding of the number of bills remaining undelivered and with respect where to deductions could be made from the bills of the petitioner. Such finding, being factual cannot be set aside for the reason of being without any reasons. The Supreme Court recently in ***Kwality Manufacturing Corporation Vs. Central Warehousing Corporation*** (2009) 5 SCC 142, even though in relation of Sections 30 & 33 of the 1940 Act, restated that findings of facts recorded by the arbitrator ought not to be interfered, unless inconsistent.

10. In ***Madhya Pradesh Housing Board Vs. Progressive Writers & Publishers*** (2009) 5 SCC 678 also, the challenge to the arbitral award under the 1940 Act was inter-alia on the ground of same being based on conjectures and surmises. The Supreme Court however in spite of finding that the arbitrator took judicial note of certain facts which were in the realm of conjectures and surmises, posed the question as to what was the effect thereof held that the award even after ignoring the same continued to be valid and binding between the parties. It was held that issue of fact determined by arbitrator by taking into account the overall agreement was not interferable by the court.

11. The counsel for the petitioner has fairly stated that the imposition of penalty of Rs.5,44,845/- is also in terms of the agreement. He has however urged that no loss has been proved and which is essential for imposition of penalty. He has further urged that for the same non-performance i.e. of non-delivery of bills, deduction as well as penalty cannot be imposed. It is argued that the effect thereof would be that the petitioner would be left with no

earning whatsoever out of the contract and which would make the award unjust and unfair.

12. Once the agreement is found to provide for deduction from the bills for non-delivery as well as for penalty, it cannot be said that the view taken by the arbitrator is improbable which no reasonable person could have taken. Further, I do not find any inconsistency in the two deductions. While the first is for charging for the services proved to have been not rendered, the second is for the loss caused owing to such non-delivery. The said penalty has been arrived at in accordance with the formula in the agreement. As far as the contention of the counsel for the petitioner of the penalty being not leviable without proof of loss, I may notice that the Supreme Court in ***Saw Pipes Ltd.*** (Supra) has held that the conditions of proving of loss are different where public interest is involved; it is very difficult to prove the loss when there is a delay in construction of a road or a bridge. In such cases, the penalty mentioned in the agreement can be imposed even without proof of loss. In the present case, I do not find that even to be the position. From the formula for levying of penalty given in the agreement it is clear that the penalty is for the loss which would be occasioned to the respondent owing to delay in receiving payments owing to non-delivery of bills. Moreover, if such challenges are to be entertained in a proceeding under Section 34, the jurisdiction exercised by this court would be akin to appellate and which is not permitted.

13. The counsel for the petitioner has today challenged the award in so far as disallowing the interest and the claim for extra work.

14. As far as the claim for interest is concerned, it is stated that the award is perverse. Reliance is placed on ***Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa Vs. N.C. Budharaj*** (2001) 2 SCC 721 in paragraph 22 whereof it has been held by a five judge bench that deprivation of monies leads to interest. It is urged that the arbitrator has declined interest merely on the premises of there being no provision therefor in the agreement and has not considered that the petitioner otherwise in law is entitled to interest. It is further urged that there is no term in the agreement prohibiting payment of interest. Reliance is also placed on ***T.P. George Vs. State of Kerala*** (2001) 2 SCC 758; However, in this case all that has been held is that the arbitrator is empowered to grant interest.

15. The question which arises is, should this court interfere with the award declining interest. It is not as if any substantive law mandates the arbitrator to, in all circumstances award interest. The counsel for the petitioner during the hearing also agreed that even under the Interest Act, relied upon by him the award of interest is discretionary. Once that be the position, in my view Section 34 does not permit interference with such an award declining interest.

16. As far as the claim of the petitioner before the arbitrator for additional work was concerned, admittedly there was no agreement between the parties for the rate to be paid therefor. A perusal of the Tender Document pursuant to which the agreement was entered into between the parties, only in Annexure 'B' titled "Specifications" thereto mentions that the bills for delivery will be approximately 94000 per month. The agreement does not limit the number of bills which were to be delivered. The counsel for the

petitioner also during the hearing did not invite attention to any such clause. In the absence of any limitation on the number of bills which the petitioner was to deliver, nothing wrong can be found with the finding of the arbitrator of the petitioner being entitled to the same rate as agreed for all the bills and being not entitled to any higher rate for the bills over and above 94,000 per month.

17. The Division Bench of this court in ***Gyan Chand Totu Vs. Subhash Chand*** FAO (OS) No.1 of 2004, as quoted in ***NTPC Ltd. Vs. Wig Brothers Builders & Engineers Ltd.*** 160 (2009) DLT 642 has held that the pivotal principle while deciding the scope for interference with awards on ground of public policy is that the award can be set aside if it is patently illegal, but the illegality must go to the root of the matter and if the illegalities are of trivial nature, it cannot be held that the award is against public policy. It was further held that the award can be set aside, if it is so unfair and unreasonable, so as to shock the conscience of the court.

18. The necessary ingredient for exercise of jurisdiction under Section 34, i.e. of perversity shocking the judicial conscience is found to be missing in this case.

19. Resultantly, the petition is not found deserving of issuance of notice even and is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**August 4th, 2009
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