

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

+ **OMP No. 106/2002**

13th January, 2010

INDIRA GANDHI NATIONAL OPEN UNIVERSITY ...Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv with Mr. Aly
Mirza, Advocate

VERSUS

APTECH LTD. Respondent

Through: Mr. Arvind K. Nigam, Sr. Adv. With Mr.
U.A.Rana, Advocate and Ms.Mrinal
Mazoomdar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the Award dated 26.12.01 passed by the sole Arbitrator deciding the disputes between the Petitioner University, which promotes distance learning, and the respondent, which provided instructions in computer courses on behalf of the petitioner.

2. The only issue which was urged before this Court, was with regard to wrongfully awarding of the claim for alleged entitlement for higher fees, as awarded by the Arbitrator to the respondent, on the finding that since the petitioner University had raised its fees for the courses, the respondent also became entitled to higher fees. The challenge is laid to the Award on this aspect as the enhancement was subsequent to the commencement of an existing binding contract between the petitioner and the respondent which provided for lesser fees and which it is urged was the binding document between the parties and hence the lesser fees as provided in the same were payable. In other words, the issue was that whether the original contract dated 18.10.1997 stands novated and whether the respondent because of this novation is entitled to claim from the petitioner a large share of the fees which were charged by the petitioner from the students.

3. No doubt, the Award runs into 138 paragraphs and 50 pages, however, the issue which has been decided by the Award is that there is in effect a novation of the original contract, and as per which novation, the respondent has been held entitled to higher share of fees on account of conversion of the BCA yearly course into a course with two Semesters of six months. It is for this course offered by the petitioner that instructions and lectures were given by the respondent to the students. In arriving at this conclusion, the Arbitrator has relied almost entirely on one document. This

document is a Delivery Programme published by the petitioner in June, 1998 and it is titled as “Delivery Programmes through the partner institutions”. By this document, the petitioner University had informed its partner institutions of the charging of higher fees for the instructions imparted for the BCA Course, than as was originally fixed for the Courses which commenced from January, 1998. Even before this Court, except this Delivery Programme of June, 1998 no other document was relied upon by the counsel for the respondent to urge the case of novation. The Arbitrator in arriving at the conclusion of novation has also referred to an additional fact, viz of the respondent collecting the higher fees on behalf of the petitioner and remitting the same to the petitioner. The Arbitrator has therefore held that consequently by implication the respondent was entitled to a higher share of such fees which were collected by the respondent from the students.

4. In this case, on the conclusion of the arguments, I must admit that, I was in a dilemma, because, on one basis it appeared that equity was in favour of the respondent, inasmuch as, why should not the petitioner share higher fees with the respondent when it in fact had received higher fees for the course/ instructions which is imparted by the respondent. On deeper analysis, I have however come to the conclusion, that once the legal position is otherwise, equity cannot tilt the scales so as to overlook and breach the provisions of law, as contained in the Contract Act, 1872.

5. My dilemma was also further resolved by Mr. Sandeep Sethi, Sr. Advocate appearing on behalf of the objector/petitioner by referring to the delivery programme which was published for the partner institutions by the petitioner when the course initially commenced after entering into of the Contract dated 18.10.1997 between the parties, and which showed that, even originally the yearly course was divided into two semester of six months. The relevant portion of that programme reads as under:-

“ Eligibility- 10+2 or equivalent with Maths as distinct subject.

Programme structure:

1 year	I Semester		IIInd Semester	
	FEG-1	4 credits	MTE-1	4 credits
	FEG-2	4 credits	MTE-4	2 credits
	FHS-1	8 credits	MTE-5	4 Credits
			ECO-2	4 credits
II year	FST-1	8 credits	ECO-4	8 credits
	CS-2	6 credits	CS-1	6 credits
			CS-3	4 credits
	Particulars-60 hours for CS-1, CS-2 and CS-3			
III year	CS-4	6 credits	CS-6	4 credits
	CS-5	6 credits	CS-10	6 credits
	CS-9	6 credits	CS-11	4 credits
	Practicals-120 hours			

6. A reference to the aforesaid chart in my opinion, wholly negates the plea of the respondent, which was raised before the Arbitrator, that, by virtue of publication of the fresh delivery programme in June, 1998, there was a complete

overhaul in the system of instructions thereby making the yearly course as a two six monthly Semester Course. A reference to the aforesaid chart, which is part and parcel of the original instructions/education programme, makes it abundantly clear that even from the outset, the course of instructions may though be said to have been from year to year, but, the same was effectively of two six monthly Semesters. Therefore, when the new delivery programme was circulated to the partner institutions in June, 1998 by making a system of two Semesters, instead of one year with two Semesters, the difference can only be a nominal one and not of substance. I may further note that it has not been the stand of the respondent before the Arbitrator, or even before this court, that by any change of the delivery programme in June 1998, from what the programme was at the commencement in January, 1998, that the respondent has in any manner altered its position to its detriment in the sense that it had to conduct any extra classes or it had to employ any additional Instructors or it had to incur any additional expenditure (how and in what manner) or that it was caused any other prejudice, which consequently entitled the respondent in equity, if not in law, to get higher share of fees on account of it having been subjected to a greater burden. This being the position, the stand in equity of the respondent that merely because the petitioner was getting higher fees from June 1998, and therefore the respondent's share of the fees must also be increased, does not stand either to logic or to equity or to law.

7. That takes me to the aspect that in an Award, which is as detailed as the impugned Award, should I reproduce the paragraphs after paragraphs in which in effect all that has been held is that there is a novation of the contract or, should this court simply encapsulate the reasons given and the single conclusion arrived at. I have opted not to reproduce the detailed paragraphs of the Award because I feel that the arguments and conclusions referred by me above brings out the essence of the dispute decided by the Arbitrator in the present case. Suffice to say that, and I observe this after going through the Award in detail, that the Award relies upon general assumptions and presumptions and unaccepted legal principles in holding that there has taken place in fact a novation of the contract simply because a new delivery programme was circulated in June 1998. However, the Award is clearly to be faulted with, being against the law of the land, inasmuch as in arriving at the conclusion of a novation it has not been found by the Arbitrator that there either is an agreed written contract or even at least a documentary communication by the respondent to the petitioner that it has understood the novation in the particular manner as was agitated in the arbitration proceedings or even the least of all that there is an implied understanding specifically referable only to the respondent by virtue of the Delivery Programme of June, 1998. I note that the only relevant document referred to by the Arbitrator, being the Delivery Programme of 1998, is admittedly not addressed solely to the respondent, but is in fact meant for all the partner institutions who were to

impart courses after June 1998. If the respondent was the only institute which was imparting the course, then the Delivery Programme document would have solely referred to the respondent and helped in establishing the issue of an implied contract, however, admittedly, there were various other partner institutions to which this Delivery Programme of 1998 could be said to refer to. In such a scenario once there already is a written contract governing the present petitioner and the respondent which specifically provides apportionment of fees in a particular manner, I do not find that it is lawful for the Arbitrator to hold simply on the basis of the Delivery Programme of June 1998, that on circulation of the same to all partner institutions, including the respondent, that the same amounted to a novation of the binding contract of October 1997 existing between the parties.

8. In this view of the matter, I set aside the impugned Award dated 26.12.2001 passed by the sole Arbitrator whereby it has awarded higher fees to the respondent with respect to the courses from June 1998. I may add that no other issue or argument was urged or pressed before this court.

9. Finally, I may observe that the counsel for the respondent has rightly pointed out, and not disputed by the counsel for the petitioner, that the security deposit of Rs.18 lacs which is lying with the petitioner of the respondent, in view of termination of the legal relationship between the parties and in

accordance with the directions of the Award is liable to be and will stand refunded by the petitioner to the respondent.

10. With the aforesaid observations, the present objection petition is allowed and the impugned award is set aside and the claims of the respondent allowed by the Award stand dismissed, except to the extent of refund of the amount of Rs.18 lacs to the respondent as stated above.

VALMIKI J.MEHTA, J

January 13, 2010

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