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

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**OMP No.147/2003**

**16<sup>th</sup> February, 2010**

**MAHANAGAR TELEPHONE NIGAM LTD.**

...Petitioner

Through: Mr. Dinesh Agnani, Advocate.

**VERSUS**

**HARYANA TELECOM LIMITED**

....Respondent.

Through: Mr. Rohit Naagpal, 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. By this petition under Section 34 of the Arbitration & Conciliation Act, 1996, the petitioner challenges the Award dated 16.12.2002 passed by the sole Arbitrator. The Award was passed on account of the disputes which arose between the petitioner as the buyer and the respondent as the supplier of PIJF Underground Cables. The dispute was whether the petitioner could recover the amounts which it claimed to have allegedly over paid in one contract by issuing a debit note and hence recovering the amount from another contract, although

the first contract being the subject contract in question was completed to the satisfaction of both the parties. Putting it differently, the issue which arose in the arbitration proceedings was whether there can be an unsettling of the settled price of the contract between the parties many years after the contract has been completely performed.

2. The petitioner floated a tender dated 4.3.1994 for the subject goods being PIJF underground cables. Two purchase orders were issued in favour of the respondent, and which are dated 21.9.1994 and 29.9.1994. Pursuant to these purchase orders, the respondent made the supply of the contracted goods and completed the delivery by the scheduled date of 31.3.1995. The petitioner thereafter made payment of the entire amount to the respondent. The last payment was received by the respondent on 18.1.1996. As already stated, the contract was thus fully performed and executed to the satisfaction of both the parties.

3. The dispute which arose between the parties was on account of the following clause of the price variation in the contract:

“Price Variation: As per GMTS formula, price variations so worked out are to be multiplied by a factor of 1.3 (one point three) so as to derive net variations in the price inclusive of excise duties and sales tax.”

As per the contract entered into, it is undisputed that the respondent submitted its tender for the cables on price which was inclusive of excise duty. The contract was fully performed on this basis. After a period of more than

three years, petitioner raised two debit notes, one dated 3.3.1999 for Rs.6,59,054/- and another dated 22.3.1999 for Rs.9,22,876/- totalling to Rs.15,81,930/- for the aforesaid two purchase orders. The petitioner issued these debit notes on the claim that over payments have been made by the petitioner to the respondent and consequently the respondent was required to pay the petitioner the aforesaid sum of Rs.15,81,930/-. On account of the failure of the respondent to pay the said amount, the petitioner appropriated the amount from the other bills of the respondent for the supplies made against another 1999 tender. The respondent, therefore, initiated the arbitration proceedings and filed the claim petition to recover the aforesaid amount, which was recovered by the petitioner from the other bills pertaining to another tender.

4. The contract between the parties, in a way, left the prices already fixed in the contract, as tentative, because there was the following clause in the contract between the parties:-

“Prices offered in this purchase order are provisional. If DOT finalise lower rates in 1994-95 supply tender, then the same lower rates shall be applicable against this purchase order.”

5. This clause was included in the contract because the object of the petitioner/MTNL was that it should not have to pay for the same goods higher prices than were being paid by the Department of Tele Communications (DOT), and therefore, the contract provided that if DOT pays lesser prices for the PIJF Underground Cables, the same prices would apply to the contract in question.

The issue is till when can the prices remain unsettled awaiting the prices of DOT.

6. In this case what happened was that the petitioner calculated the prices variation on monthly copper rate including excise duty. This was, in terms of the contractual clause, already reproduced above. Thus, in terms of the contract, payment was made to the respondent treating the prices as inclusive of excise duty. It was subsequently found that there is more benefit to the petitioner when the price is calculated not including excise duty but excluding excise duty. Consequently, after many years of quietus to the contract, a circular was issued by the petitioner that for the contracts which become effective from 1.4.1995, a review should take place and any benefit received by the supplier of cables ought to be recovered from the suppliers by treating the price as excluding excise duty and not including the same. Mr. Agnani, appearing on behalf of the petitioner, does not dispute that the policy became effective for contracts w.e.f. 1.4.1995, though Mr. Agnani by reference to the letter dated 31.1.1997 sought to urge that it also related to purchase orders made prior to 1.4.1995.

7. The scope for hearing of objections under Section 34 is now well settled. This Court while hearing objections does not sit as an Appellate Court against the Award. If two views are possible and the Arbitrator has taken one plausible view, this Court will not interfere with the Award merely because another view is equally acceptable and which is sought to be canvassed by the

objector. An Award is set aside only if it is illegal i.e. beyond the law of the land, or violative of the contractual provisions or that its findings are so perverse that it shocks the judicial conscience. Keeping in view the aforesaid parameters of law, I have considered the objections and the arguments as raised on behalf of the petitioner.

The Award is a detailed one. It is of 21 pages running into 70 paragraphs. Various heads have been taken by the Arbitrator for allowing the claim petition of the present respondent. I need not go into all these heads and it will be sufficient if certain heads lead to the conclusion as given in the Award. In my opinion, the findings of the Arbitrator under the head that the contract which was completed to the satisfaction of both the parties, by deliveries being made by the scheduled date and payments also having been made under the subject contract, well before the notification in question asking for review of the case became applicable, is enough to entitle the respondent to succeed in the claim petition and disentitle the petitioner to the recoveries made from the bills of another contract of the year 1999. The second issue to which the Arbitrator has addressed himself is that once the policy letter requires the new policy to be effective for contracts w.e.f. 1.4.1995, there cannot be any other supplementary letter by which the recoveries can be made for contracts entered into before 1.4.1995.

8. The aforesaid conclusions of the Arbitrator are clear from the following paragraphs of the Award, and which are relevant, and I am inclined to accept the reasoning as contained in the same:

“15. The real question is whether the decision taken by the Government in the letter dated 21.11.1998 will apply to this case and will be binding on the claimant who supplied goods in 1995 and last payment to him was made on 18.1.1996. The claimant relies on DOT's circular dated 2.9.1994 which was communicated to the Telecom Circle by letter dated 10.11.1994. That letter reads as under:-

**Circular of 1994**

|                                                                                                                                                                                                                                                                                                                                                                                   |                                         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------|
| <b>Government of India</b>                                                                                                                                                                                                                                                                                                                                                        |                                         |
| <b>Ministry of Telecommunications</b>                                                                                                                                                                                                                                                                                                                                             |                                         |
| <b>Sanchar Bhawan, New Delhi-110 001</b>                                                                                                                                                                                                                                                                                                                                          |                                         |
| <b>No. 203-22/94-MMS-1(Pt.)</b>                                                                                                                                                                                                                                                                                                                                                   | <b>Dated:10<sup>th</sup> Nov., 1994</b> |
| <br>To                                                                                                                                                                                                                                                                                                                                                                            |                                         |
| <br>The Chief General Manager Telecom                                                                                                                                                                                                                                                                                                                                             |                                         |
| Telecom Circle/District                                                                                                                                                                                                                                                                                                                                                           |                                         |
| <br>Sub: Copper wire rod prices for Copper based items offered for inspection by the suppliers-<br>Clarification regarding charging of price variation.                                                                                                                                                                                                                           |                                         |
| <br>Ref: DOT Circular No. 203-22/94-MMS-I dated 2/9/94.                                                                                                                                                                                                                                                                                                                           |                                         |
| <br>Reference is invited to the above cited circular regarding the rate of copper wire rod applicable for cables and other copper based items offered for inspection in September 1994. The rate indicated is Rs.1,40,740 per Metric Tonnes <u>inclusive of Excise Duty</u> at the rate of 15%.                                                                                   |                                         |
| <br>Some Telecom Circles have sought clarification on charging of Excise Duty on Copper Wire @ 15% when the same is also charged on finished cable product @25%. In this regard it is clarified that the MODVAT benefits are being passed over to the Department by way of competitive quotations by the vendors in the tender and as such, it is in-built in the cost structure. |                                         |
| <br>In view of above, the price variation on copper wire rod prices are to be worked on the rates declared by DOT every month which are <u>inclusive of Excise Duty</u> .                                                                                                                                                                                                         |                                         |
| <br>Kindly acknowledge the receipt.                                                                                                                                                                                                                                                                                                                                               |                                         |

Sd/-

(Narendra Kumar)

Director (MMS)

Copy to:

- 1) All Cable Manufactures,
- 2) CGM (TS) 3A Chowringhee Place, Calcutta-13.
- 3) All Aos(TS)concerned/POA (CCU) DOT at HCL Calcutta/Hyderabad.
- 4) All CstS
- 5) Guard File.
- 6) T.C.D.A

Director (MMS)

16. It is on the basis of this circular letter that the claimant tendered for the price on which he was prepared to supply the goods. We have to remember that this is a commercial transaction between the parties. The award of a contract, whether it is by a private party or by a public body or the state, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can chose its own method to arrive at a decision. It can fix its own terms of invitation to tender. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price is one of the things on which the State has to decide. It may accept the cheapest offer. It may accept the lowest price quoted by a tenderer. This is exactly what happened in this case.

17. The price quoted by the claimant in this case was inclusive of excise duty as per the DOT's own circular dated 2.9.1994 embodied in the letter dated 10.11.1994. On this basis the claimant quoted the prices at which he was willing to supply the goods. The prices were inclusive of excise duty. Now the Government says that the price shall be exclusive of excise duty. This decision of price exclusive of excise duty was taken much after the contract had been fulfilled, goods had been supplied and accepted. Price had been paid. There was no complaint of any kind at that stage. Both parties knew that the price would be inclusive of excise duty and not exclusive of excise duty. This is how the parties understood the circular and the prevailing practice in the department and acted upon the same. Later if the Government changes its mind and finds that it will be advantageous to the department to exclude the excise duty from the basic copper price that decision will not be binding on a person who has completed the contract already.

### **Rationale of Clause 8.2**

18. The rationale of clause 8.2 is that DOT and MTNL should be able to purchase the cable wire from the market at the lowest price. If the supply tender

accepted by DOT of the same commodity at a particular figure the same price will apply to MTNL. MTNL is not expected to pay higher price than the one paid by DOT. The object is to see that the Government is not cheated by the tenderer. If someone is willing to supply at a lesser price to DOT why should MTNL pay a higher price. This is the underlying assumption of clause 8.2. But that clause does not say that if later on DOT changes its policy in price variation and starts excluding excise duty from base price of copper wire the same must apply to MTNL even in cases of closed transactions where goods have been accepted and price has been paid and nothing remains to be done.

### **Price**

19. Regarding prices to be followed in the tender the relevant clause is reproduced hereinbelow:

“Clause 12.2-General Conditions of Contract (p.21 of tender document)

### **PRICE FOR ORDERING**

The prices fixed by MTNL shall remain valid for the period delivery schedule stipulated in the ‘Schedule of Requirement’ by MTNL. Increase and decrease of taxes and duties will not affect the price during the offer delivery schedule.

### **Which Circular will Apply**

20. MTNL is not right when it relies upon the circular of DOT dated 17.9.1997 as mentioned in the debit note and also on further circulars of DOT dated 8.6.1995 and 31.1.1997 produced by it in the course of hearing before me. All these three circulars are in respect of price variation and have nothing to do with clause 8.2 regarding the final price. These circulars are not relevant to the question in controversy. None of them is applicable to and binding on the claimant.

21. These circulars are internal correspondence. The most important point is that these circulars apply w.e.f. 1.4.1995 and not to the earlier period covered in this case. The two POs in the present case are dated 21.9.1994 and 29.9.1994. The circulars came into effect only after 1.4.1995. Obviously they cannot apply to the transaction of 1994. Last delivery was made on 31.3.1995. That was also before 1.4.1995. Therefore the inter-departmental circulars are not binding on the claimant. The claimant had no knowledge of what was being decided by the Government and its various departments or even by C&AG in its report or by PAC until and unless there is advance information by the appropriate authority telling all the intending vendors, namely, cable manufacturers, that the price variation will be calculated by excluding the excise duty. Still better if it is made a part of the contract. If the contract is silent and there is a circular of

1994 clearly saying that the price variation will be including excise duty it is not open to the Government to make recovery from of the claimant.

22. Every trader works for profit. If the Government asks him to refund Rs.15 lacs and odd, as has been done in this case, there will be nothing left with him. He will be in great loss and probably ruined by such an action. This is not what was agreed nor was this the intention of the parties at the time of the making the contract.” (underlining is mine)

9. As I have already stated, the Arbitrator has also allowed the claim under other heads of Promissory Estoppel, Bargaining Power, Lack of Transparency, Estoppel etc., however, I need not refer to each of the heads as the findings given by the Arbitrator and as reproduced bodily in the above paras of this judgment, are enough to sustain the findings and the conclusions in the Award by the Arbitrator. The findings and the conclusions reproduced above cannot in any manner be said to be either illegal or in any manner perverse. In fact, I agree with the Arbitrator that if the petitioner is allowed to after many years unsettle the settled contracts which have come to an end by complete satisfactory performance and payment by both the parties, it would be unfair upon the respondent to say the least.

10. One argument as raised by the counsel for the petitioner however deserves acceptance and which is with regard to the rate of interest which is given by the Award. The Arbitrator has given interest @ 18% per annum. The Supreme Court in the recent chain of judgments reported as ***Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.***2005 (6) 678, ***McDermott International Inc. Vs. Burn Standard Co. Ltd.& ors*** 2006 (11) SCC 181, ***Rajasthan State Road Transport Corpn. Vs.***

*Indag Rubber Ltd. (2006) 7 SCC 700, Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra, 2007 (2) SCC 720 & State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd (2009)3 Arb. LR 140(SC)* has mandated the Courts to reduce the rates of interest granted under the Award in view of the changed economic scenario and the consistent fall in the rates of interest. This Court has been therefore uniformly awarding interest @ 9% per annum simple. In the facts and circumstances of this case, therefore, it would be just and proper that the interest which has been awarded to the respondent should be 9% per annum simple and not 18% per annum simple as given in the Award. I am, however, not changing the period for which the interest has been granted by the Award.

11. Accordingly, the objection petition is dismissed except that the rate of interest as granted by the Award is reduced from 18% per annum simple to 9% per annum simple.

12. Accordingly, the objection petition is disposed of with the aforesaid observations and subject to payment of costs of Rs.25,000/- by the petitioner to the respondent.

**VALMIKI J.MEHTA, J**

**February 16, 2010**

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