

F-358A

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

+ O.M.P. 243/2009

**BHARAT SANCHAR NIGAM
LIMITED (BSNL)**

..... Petitioner

Through: Mr. Sanjeev Narula, Advocate.

versus

**PARAMOUNT TELECOMMUNICATIONS
LIMITED**

..... Respondent

Through: Mr. Dhanesh Relan, Advocate.

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Date of Decision : FEBRUARY 24, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the 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.

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present objection petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act, 1996”) for setting aside the arbitral award dated 16th February, 2009 passed by the sole Arbitrator Shri Prem Kumar in Arbitration Case No.40/2006.

2. The relevant facts of this case are that on 12th June, 1998 petitioner-objector floated a tender for purchase of Polythene Insulated

Jelly filled (PIJF) telephone cables. Section III of Notice Inviting Tender (hereinafter referred to as “NIT”) contains the General (Commercial) Conditions of Contract. Clauses 6 and 13 whereof stipulate with regard to delivery of goods and changes in purchase order as under:

“6. DELIVERY AND DOCUMENTS:

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6.2 The delivery of the goods and documents shall commence within 4 weeks of placement of purchase order on vendor and shall be completed as stipulated in the P.O.

6.3 Supply shall be completed within a period of 2-6 months from the date of issue of Advance purchaser order.

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13. CHANGES IN PURCHASE ORDER

13.1 The purchaser may, at any time, by a written order given to the supplier, make supplies within the general scope of the contract in any one or more of the following:-

- a) Drawings, designs or specifications, where goods to be furnished under the contract are to be specifically manufactured for the purchaser;*
- b) The method of transportation or packing;*
- c) The place of delivery; or*
- d) The services to be provided by the supplier.*

13.2 If any such changes causes an increase or decrease in the cost of, or the time required for the execution of the contract an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract

shall accordingly be amended. Any proposal by the supplier for adjustment under this clause must be made within thirty days from the date of the receipt of the change in order.”

(emphasis supplied)

3. Section II of NIT contains instructions to bidders. Clause 27 whereof states with regard to advance purchase order and purchase order as under:-

“27. ISSUE OF ADVANCE PURCHASE ORDER:

27.1 The issue of a first advance purchaser order shall constitute the intention of the purchaser to enter into the contract with the bidder. Purchase orders will be the issued contract with the bidder. Purchase orders will be issued over the period of one year from the date of the issue of first advance purchase order for the requirement of the purchaser.

27.2 The bidder shall within 20 days of issue of the advance purchase order, give his acceptance along with performance security in conformity with Section IX provided with the bid documents.”

(emphasis supplied)

4. On 31st July, 1998 the tender was opened and respondent-claimant's bid was accepted by the petitioner-objector.

5. On 09th October, 1998 an advance purchase order was issued by the petitioner-objector. The delivery schedule stipulated in the advance purchase order read as under:-

“4.2 The supplies are to be completed maximum within six months from the date of issue of purchase order by the Telecom Circle(s)/District(s). However, the ordered quantity shall be evenly distributed for each month over

the said period of supply. However, subject to mutual consultation between the circle and vendor, the monthly schedule can be determined keeping in view the circle requirement and incorporated in the APO. Any slippage in the supply as per the monthly delivery schedule shall attract Liquidated Damage Charges as per clause 16 of Section III of the Bid document. The pro rata delivery per month will reflect in the delivery rating of the P.O. of the Vendor.”

(emphasis supplied)

6. On 30th October, 1998, petitioner-objector issued the final purchase order wherein it was stipulated that supplies shall be completed within six months from the date of issue of purchase order.

Clauses 22 and 25 of the said purchase order read as under:-

“22. <i>Delivery Schedule</i>	<i>:The supplies are to be completed maximum within six months from the date of issue of purchase order. The sizewise ordered quantity shall be evenly distributed for each month over the said period of supply.</i>
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25. *Other commercial/legal terms and conditions not covered here shall be governed by the provisions contained in the Tender documents No. T/E MM/SW/016998/000142 opened on 31-7-98 and APO No 203/2/98-MMS dated 09-10-98.”*

(emphasis supplied)

7. Since the respondent-claimant could not supply the cables till 30th April, 1999, petitioner-objector extended the delivery schedule till 22nd May, 1999. The petitioner-objector’s letter dated 04th May, 1999

extending the delivery schedule on the condition that liquidated damages would be payable in accordance with purchase order dated 30th October, 1998, reads as under:

“DEPARTMENT OF TELECOM

O/o Chief General Manager

H.P. Telecom Circle

Shimla 171006

Memo No: Engg/MM-38/Cables/98-99/158

Dated: 04-05-09

In accordance with this office letter of even No dated 23-04-99, approval of Chief General Manager Telecom H.P. Circle is hereby accorded for extension in Delivery Schedule till 22-05-99 with imposition of Liquidated Damages Charges as applicable for supply of balance quantity of cables ordered vide this office Purchase No dated 30-10-1998.

The rates applicable for cable supplied during extended period shall be @ 90% provisionally subject to finalization by DOT.

Other terms and conditions remain unchanged.

Sd/-

Sandeep Diwan

DGM(Dev)

Cc to :

- 1. PARAMOUNT COMMUNICATIONS LIMITED
M-4, Bahubali 59/17, New Rohtak Road C, New
Delhi-110005.*
- 2. DDG(MM-II) Department of Telecom, Sanchar
Bhawan, New Delhi.*
- 3. CGM(QA) 61, Cock Burn Road, Bangalore 4.*
- 4-6. DET (QA) New Delhi/Gurgaon/Chandigarh.*
- 7. CAO o/o CGMT HP Circle Shimla.*
- 8-9. GM TD Shimla/Dharamsala.*
- 10-13. TDM Solan/Mandi/Hamirpur/Kullu.”*

(emphasis supplied)

8. Respondent-claimant had no objection to levy of liquidated damages for delay in supply from 30th April, 1999 till the date of actual supply. However, on 10th April, 2000 petitioner-objector

unilaterally amended the advance purchase order as well as the purchase order by stipulating that the supplies shall be completed within a period of two to six months from the date of issue of advance purchase order. It was further stated in the said letter that liquidated damages for delay in supplies would be payable in accordance with Clause 16 of Section III of the NIT. The letter dated 10th April, 2000 reads as under:

***“DEPARTMENT OF TELECOM SERVICES
OFFICE OF THE CHIEF GENERAL MANAGER
TELECOM H.P. CIRCLE, SHIMLA-171009***

To

*M/s. Paramount Communication Limited,
M-4, Bahubali, 59/17, New Rohtak Road,
New Delhi-110005.*

No: Engg/MM-38/Cables/98-99/181 Dated 10-4-2000

Sub: P.O. No.Engg/MM-38/Cables/98-99/74 Dated 30-10-98- Amendment thereof.

In pursuance of DOT letter No. 203-9/96-MMS/927 dated 31-8-99 and letter No. 203-9/96-MMS/1371 dated 29-12-99, the following amendments in respect of relevant clauses of above cited Purchase Order is hereby issued.

- 1. As per clause 6.3 of Section-III of the governing Bid document T/E No. MM/SW/061998/000142 opened on 31-8-98.*

“supply shall be completed within a period of 2-6 months from the date of issue of the Advance Purchase Order.”

Therefore the delivery schedule clause No.4.1 of the APO stand deleted and clause No.4.2 shall stand partially modified to be in line with above stated bid provisions. As the delivery period has to be counted from 9-10-98, the maximum permissible delivery schedule would end on 8-4-99. The supplies received on or after 9-4-99 would mean supplies received during extended delivery schedule.”

2. *The prices shall be applicable as conveyed vide DOT letter No.203-9/96-MMS/927 dated 31-8-99.*
3. *Liquidated damages for delayed supplies will be applicable in accordance with the provisions in the clause 16 of Section-III of the above cited Bid document.*

All the relevant clauses of the P.O. may be treated as amended to this extent.

This issues with the concurrence of IFA.

*Sd/-
(Harbhajan Singh)
Asstt. General Manager(MM)*

Copy forwarded for information and necessary action to:

1. *DDG(MM-II),DOT, New Delhi.*
2. *ADG(ST), DOT, New Delhi.*
3. *CGM(QA), 61-Cock Burn Road, Bangalore-51.*
4. *DET(QA), New Delhi.*
5. *CAO o/o CGMT HP Circle, Shimla.*

*Sd/-
Asstt. General Manager(MM)”*

(emphasis supplied)

9. On 13th April, 2000, petitioner-objector issued a letter to respondent-claimant whereby the delivery schedule was re-fixed from 30th April, 1999 to 09th April, 1999 and amount of Rs.12,11,839/- was alleged to be payable by the respondent-claimant on account of liquidated damages. The relevant portion of the letter dated 13th April, 2000 reads as under:

“Dear Sir,

*In pursuance of order contained in DOT letter No.
203-9/96-MMS/1371 dated 29.12.1999/Delivery*

schedule/monthly delivery schedule has been re-fixed in respect of PO No. Engg/MM-38/Cables/98-99/74 dated 30.10.98 (APO No. 203-2/98-MMS dated 09.10.1998) placed on M/s. Paramount Communication Ltd., vide this office OM. No. Engg./MM-38/Cables/98-99/181, dated 10.04.2000. Accordingly invoice values and LD charges have been recalculated again as per Annexure attached and the competent authority is hereby conveyed for affecting recovery of Rs. 12,11,839/- (Rs. Twelve lakh eleven thousand, eight hundred thirty nine only). The brief detail is as under please.

Sl.		Calculation taking D/schedule 6 months from the date of issue of P.O. as already finalized vide O.M. No. Accts/3-184/CP/Cables/98-99/IV/286 dt.21.09.99	Received calculation taking D/schedule 6 months from the date of issue.
1.	Admitted invoice value of PO	Rs. 11,09,57,236/-	110885390/-
2.	Less LD charges for monthly slippage	Rs.10,34,905/-	2174901/-
3.	Final admitted value of PO	Rs.10,99,22,331/-	10871049/-
4.	Less amount already paid	Rs.10,99,22,331/-	10,99,22,331/-
5.	Net Balance payable/Re coverable.	NIL	(-)12,11,839/-

You are, therefore, requested to pay the said sum of Rs.12,11,839/- latest by 10.05.2000, failing which the amount will be recovered from any bills of your firm against any other PO under set off clause.”

(emphasis supplied)

10. The amount of Rs.12,11,839/- was deducted from the amounts payable to the respondent-claimant under other contracts. It is pertinent to mention that the aforesaid Rs.12,11,839/- was deducted on account of liquidated damages for the period 09th April, 1999 to 30th April, 1999. Aggrieved by the said deduction, respondent-claimant invoked the arbitration clause being Clause 20 of Section III of General Conditions of Contract.

11. The learned Arbitrator vide a detailed award has allowed the respondent-claimant's claim. The relevant portion of the impugned award reads as under:

"Issues No. 1 and 2:-

a. *These issues are taken together as the same require, discussion.*

b. *Bid documents have been placed on record. Section III contains General Conditions of the contract. Clause 13 of the said general conditions deals with changes in purchase orders. The same is reproduced hereunder for the sake of convenience.....*

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c. *The provisions of clause 13 make it amply clear that changes in purchase orders could be made only in the event of any one or more of the above grounds. The respondent is however relying on clause 6.3 of Section III according to which the supply shall be completed within a period of 2-6 months from the date of issue of advance purchase orders (APO). This clause seems to be of no help to the respondent in view of the specific grounds on which, changes in the purchase order could be made. The respondent cannot disown the delivery schedule fixed by the MM*

Branch and unilaterally, change the purchase order. The alleged amendment in clause 4.1 and 4.2 of the APO was unilateral and not in accordance with clause 13 of Section III of the General Conditions of the contract. There seems to be no reasonable basis on which such change could be made and as such the respondent was not entitled to levy LD Charges of the amount of Rs.12,11,839/- or any other amount for the supplies received after 08.04.99. The claimants have successfully executed the purchase order and delivered the goods and even received full and final payment for supply of PIFJ cables. The respondents were therefore, not within their rights to bring amendment in the purchase order and to change the delivery schedule and to deduct the amount of Rs.12,11,839/- from another contract from the bill of the claimants particularly when the purchase order had been successfully executed and even payment made.

d. As regards interest, I feel that since, deduction of the amount of Rs.12,11,839/- was illegal and without any basis, the claimant is awarded interest @ 9% per annum from the date of refund until realization. The interest from 13.04.2000 till date @ 9% on Rs.12,11,839/- comes to Rs.9,84,717/-. The claimant is therefore entitled to Rs.21,96,556/- in all.

13. **Relief**

I hereby pass award in favour of the claimant and against the respondent for a sum of Rs.21,96,556/- along with interest @ 9% per annum on the amount of Rs.12,11,839/- w.e.f. today until realization.”

(emphasis supplied)

12. Ms. Sanjeev Narula, learned counsel for petitioner-objector submitted that impugned award was contrary to the contract inasmuch as by virtue of letters dated 10th and 13th April, 2000, petitioner-objector had only brought the advance purchase order and the purchase

order in conformity with the provisions of NIT. According to Mr. Narula, by virtue of letters dated 10th and 13th April, 2000, the discrepancy which had crept into the advance purchase order and the purchase order was rectified.

13. On the other hand, Mr. Dhanesh Relan, learned counsel for respondent-claimant submitted that the impugned award was in conformity with the NIT inasmuch as Clause 27 of Section II of the NIT specifically stipulated that purchase order would be the governing contract between the parties. In this connection, he relied upon Clauses 22 and 25 of the purchase order dated 30th October, 1998, which have been reproduced hereinabove.

14. Having heard the parties at length and having perused the impugned Award, I am of the view that it would be appropriate to first outline the circumstances in which a Court can interfere with an arbitral award passed under the Act, 1996. The Supreme Court in *Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi* reported in (2008) 13 SCC 80 after referring to a catena of judgments including *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* reported in (2003) 5 SCC 705 has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy.

15. In fact, the Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.* reported in (2006) 11 SCC 181 has succinctly summed up the scope of interference by this Court by stating “ *the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc.....*”

16. Applying the aforesaid parameters, I am of the view that impugned Award calls for no interference as the learned Arbitrator has given cogent reasons for award of the respondent-claimant’s claim.

17. I am also of the opinion that Clause 6.3 of the General Conditions of Contract was not to be mandatorily incorporated in each and every contract and it was open to petitioner-objector corporation to stipulate a different period of supply in the purchase order. In fact, this would be apparent from Clause 27 of Section II of the NIT itself as it stipulated that the purchase order would be the governing contract between the parties and further that purchase orders could be issued over a period of one year from the date of issue of first advance purchase order.

18. In any event, in my opinion, it was not open to the petitioner-

objector corporation to unilaterally amend the delivery schedule in the purchase order retrospectively. This was not only contrary to the contractual terms but also highly inequitable besides being unethical. In fact, the practice to unilaterally amend the terms of a duly executed contract retrospectively is deprecated. Accordingly, I direct the Chairman and Managing Director of petitioner-objector Corporation to issue general practice directions to its officers not to unilaterally amend provisions of the contract retrospectively. With the aforesaid observations, present petition is dismissed but with no orders as to costs.

MANMOHAN,J

FEBRUARY 24, 2010

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