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

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**Date of Decision: 15.07.2010**

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**O.M.P. 274/2009**

MAHANAGAR TELEPHONE NIGAM LTD. (MTNL) ..... Petitioner  
Through: Mr. H.S. Dahiya, Advocate

versus

M/S VIJAY KUMAR GOEL AND ANR. .... Respondent  
Through: Mr. Vivekanand, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

1. Whether the Reporters of local papers may be allowed to see the judgment? : No
2. To be referred to Reporter or not? : No
3. Whether the judgment should be reported in the Digest? : No

**VIPIN SANGHI, J. (Oral)**

1. The petitioner, MTNL has filed the present petition under Section 34 of the Arbitration and Conciliation Act to seek setting aside of the arbitral award made by Sh. S.C. Shrivastava, the sole arbitrator appointed by the Chief Engineer (BW), MTNL under clause 53 of the agreement between the parties in relation to the claims made by the respondent/contractor.

2. The respondent was awarded the civil works vide letter No.EE(C)/IV/MTNL/99-2000/AL VVR/149 dated 18.11.1999. As per the

agreement, the date of start of the work was 03.12.1999 and the stipulated date of completion was 02.06.2001 (18 months). The work was actually completed on 31.10.2002.

3. The respondent/claimant raised its claims arising out of the contract, which were repudiated by the petitioner. Consequently, the respondent invoked the arbitration agreement.

4. The Chief Engineer (BW), MTNL appointed Sh. S.C. Shrivastava as the sole arbitrator, who entered reference to adjudicate the claims of the respondent. By the impugned award, the learned arbitrator has awarded various claims made by the respondent. The challenge in this petition is confined to the award made on claim nos.2, 8, 9, 10 and 11.

5. Under claim no.2, the respondent had claimed the payment of the escalation amount of Rs.11,44,759/-. This escalation was claimed under clauses 51.1 and 51.1.1 to 51.1.1.8 of the agreement for the contractual period as well as the extended period.

6. The term of the contract had been extended by the petitioner till the actual date of completion, i.e. 31.10.2002, without levy of compensation. The petitioner/claimant, it appears had opposed the said claim by placing reliance on a communication dated 29.09.2005 issued by the respondent. The said communication reads as follows:

*"This is in continuation to EOT as earlier submitted I further submitted as desired are as under:-*

*1. That I will not claim anything extra if my EOT is granted without levy of compensation.*

*2. That my previous letters will also stand cancelled".*

7. Before the arbitral tribunal, the respondent/claimant had submitted that the said communication had been obtained by the petitioner under duress. This submission of the respondent has been accepted by the learned arbitrator. It is this finding of the learned arbitrator, which is assailed by the petitioner herein.

8. The submission of the learned counsel for the petitioner is that the respondent had produced no material and had led no evidence in support of the submission that the communication dated 29.09.2005 had been obtained by the petitioner by exercising coercion or duress upon the respondent. He submits that the finding of the learned arbitrator is based on no evidence and is, therefore, perverse.

9. The learned arbitral tribunal dealt with the aspect of duress pleaded by the respondent in the following manner.

*"The argument of respondent that extension of time was granted without levy of compensation, in view of an undertaking given by Claimant that no claims shall be raised by him, if EOT is granted without levy of compensation, does not hold water. **It is also noted that on note sheet N/35 where EOT case has been processed it has been stated by AE (C) that "letter from agency dated 29.09.05 has been taken by me after hard pursuance to the agency."** This makes it amply clear that the letter was procured under duress. As more than Rs.22 lakhs were not paid to the claimant for 3 years after completion of work, and final bill was not yet finalized, the claimant was forced to give letter of no-claim. **This is an example of highly unethical practice.** The*

*extension of time has to be granted with or without levy of compensation based on the facts. It cannot be a case of barter or bargain, overlooking the contract provisions. The escalation payment was required to be adjusted from the Claimant's bill at the end of first quarter in March, 2000 itself and so on. Till stipulated period there was no issue of grant of EOT. But overlooking the contract provision, respondent did not pay/deduct the escalation to/from claimant".*

10. The submission of the petitioner is that mere noting in the note sheet by the AE (C) that the letter dated 29.09.2005 had been taken by him "*after hard persuasion*" cannot lead to the inference that the respondent had been subjected to coercion or duress.

11. In answer to the submission of learned counsel for the petitioner, Mr. Vivekanand, learned counsel for the respondent submits that the learned arbitrator had returned the finding with regard to the duress as aforesaid on the basis of the entire record placed before him. Apart from the self incriminating note sheet of the respondent extracted by the learned arbitrator, there were other materials placed before the learned arbitrator in support of the submission that the letter dated 29.09.2005 had been obtained under coercion and duress. Thos documents throw light on the circumstances in which duress was exercised on the respondent contractor. Mr. Vivekanand has referred to the hindrance register which recorded that the total hindrance justified was 541 days, whereas the total hindrance was only 516 days. This would mean that if the entire period of hindrance justified is deducted from the period from date of start of work to date of actual date of completion, the respondent had completed the work before the expiry of the time available under the contract.

12. He has also referred to the application for extension of time Part II, which is prepared by the department. In this proforma, the petitioner had accepted the delay as not being attributable to the respondent. He submits that even before taking the communication dated 29.09.2005, as early as on 09.05.2005 and 18.05.2005, the respective Executive Engineer and Superintending Engineer had acknowledged the fact that the delay was not attributable to any default of the contractor. However, the processing of the extension of time without levy of damages was withheld and was not completed till after the petitioner had extracted the communication dated 29.09.2005. The communication dated 29.09.2005 itself records that the same had been given at the 'desire' of the petitioner. It was not given by the respondent voluntarily and at its own behest.

13. In his rejoinder, learned counsel for the petitioner submits that the documents referred to by Mr. Vivekanand have not been referred to in the award. He submits that the reasoning of the learned arbitrator has to be tested only on the basis of the note sheet relied upon by the learned arbitrator.

14. In my view, there is no merit in this objection of the petitioner.

15. Firstly, the letter dated 29.09.2005 itself shows that the same had been submitted on the asking of the petitioner. Secondly, the note sheet as reproduced herein above, also shows that the letter dated 29.09.2005 had been procured after pressing the respondent contractor to issue the same and exerting coercion on the respondent.

Thirdly, the documents relied upon by the learned counsel for the respondent form a part of the arbitral record. The arbitrator has made the award after going through and taking into consideration the entire record. This is so stated by him on page 2 of the award, wherein he records that:

*“AND WHEREAS I have considered and applied my mind to the pleadings, documentary evidences, submissions both oral and written and authorities cited by the Claimant and Respondent in support of their contentions and I have given due thought and consideration to all the above and I have come to conclusion only after giving due and deep thought with careful consideration”.*

16. Since the materials relied upon by the learned counsel for the respondent further supports the finding returned by the learned arbitrator, in my view, the said record can be relied upon by the respondent in his defence to the objection raised by the petitioner.

17. There is another reason for rejecting the submission of the learned counsel for the petitioner. Once the extension of time without levy of compensation had been granted, under the contractual terms, the respondent became entitled to claim escalation which had occurred during the initial contractual period and also during the extended contract period. The purport of the letter dated 29.09.2005, in any event, would not take within its scope the amounts due to the contractor under the contractual terms. Consequently claim no2, in any event, would have been payable to the respondent. Pertinently, the petitioner does not dispute the computation of the said claim as made by the respondent.

18. I, therefore, reject the submission of the petitioner that the claim no.2 for escalation was barred on account of the issuance of the communication dated 29.09.2005.

19. The next objection raised by the learned counsel for the petitioner is in respect of claim no.8. Under this claim, the respondent had claimed payment on account of extra expenditure due to idle tools & plant and idle staff because the work was hindered by the petitioner department on various occasions. The amount claimed was Rs.16,60,680/-.

20. The learned arbitrator allowed the said claim to the extent of Rs.2,38,000/-. The amount was computed by taking into account the fact that the work had been prolonged beyond the initial period by about 17 months. The learned arbitrator assessed the said claim by assuming the salary of the foreman at Rs.4000/- per month and two watchmen at Rs.2500/- per month.

21. The objection to the award made on claim no.8 is essentially founded upon the plea that the respondent had undertaken not to make a claim due to prolongation of the contract. The said plea has been rightly rejected by the learned arbitrator and I also find no merit therein. Consequently, there is no merit in the submission of the learned counsel for the petitioner that claim no.8 has wrongly been awarded by the learned arbitrator.

22. Claim nos.9, 10 and 11 pertain to the claim of interest for different periods as made by the respondent/claimant. The respondent

claimed interest at the rate of 18% per annum. The claim for pendentialite interest was considered and granted by the learned arbitrator in the following manner:

- (i) Under sub head (a), on the award amount of claim no.1 of Rs.1,10,681/-, interest was granted from six months after the date of completion, i.e. 01.05.2003 till the date of award @ 10% p.a.
- (ii) Under sub head (b), interest was granted on quarterly escalation amount not paid, i.e. awarded amount of claim no.2 from one month after the month in which the payment was due. The learned arbitrator computed the interest @ 10% p.a. on quarterly basis beginning December 1999 onwards. This interest was also computed @ 10% per annum.
- (iii) Under sub head (c), the learned arbitrator granted interest on delayed payment of final bill amount of Rs.22,44,174/- from 01.05.2003 (i.e. from six months after date of completion of work) till the date of payment of the final bill (04.04.2007) @ 10% p.a.
- (iv) Under sub head (d), interest was granted on the amount of Rs.2,91,578/- (towards the non refund of the WCT) @ 10% p.a. It was computed for the period from one month after the date of deduction. In respect of each deduction, the learned arbitrator computed the interest for varying periods.
- (v) Under sub head (e), interest was granted on Rs.22,449/-, which was the amount of labour cess not refunded from the date of the final bill payment (4.4.2007) till the date of the award (7.2.2009) which worked out to Rs.4134/-.

(vi) Under sub head (f), the learned arbitrator granted interest on the non refund of the security deposit. The award made on this claim is related to the award made on claim no.4.

Total pendentialite interest awarded to the respondent/claimant is Rs.18,59,718/-.

23. Under claim no.10, future interest has been awarded on the amounts awarded under claim nos.1 to 5 and 8 to 11 @ 15% p.a. from 60 days after the date of the award till the date of actual payment, if award amount is not paid within 60 days from the date of the award.

24. The objection raised by the learned counsel for the petitioner to the award of interest is that even though the work had actually been completed on 31.10.2002, the respondent/contractor did not take any steps towards the finalization of the bill. The application for seeking extension of time without levy of liquidated damages was made after nearly 2 ½ years i.e. on 25.04.2005. The extension of time without levy of compensation was granted on 09.10.2005. Even thereafter, the respondent did not agitate his claims and invoked the arbitration only on 22.03.2007. It is therefore argued that on account of the laxity of the respondent/claimant, the petitioner should not be made to suffer by requiring the petitioner to pay interest. The rate of interest awarded has also been objected to by the learned counsel for the petitioner as excessive.

25. In his reply, the learned counsel for the respondent submits that it is a well known practice that the final bill has to be prepared by

the department. The petitioner department did not prepare the final bill. The respondent was asked to submit the application to seek extension of time without levy of compensation and accordingly, the same was submitted on 25.04.2005. Only after the respondent had invoked the arbitration agreement on account of the delay in the settlement of the final bill, the petitioner made payment of the final bill on 04.04.2007. It is, therefore, submitted there was no delay on the part of the respondent in agitating his rights and claims.

26. It is also urged by learned counsel for the respondent that in the objections as preferred before this Court, the only objection to the award made on claim no.9, 10 and 11 is with regard to the rate of interest and not to the period for which the same had been award.

27. In my view, there is merit in the submission of the learned counsel for the petitioner that the attitude of respondent/claimant was laid back and the respondent did not act with any sense of urgency in pursuing its claim after the work had been completed on 31.10.2002. The submission of the learned counsel for the respondent that the respondent applied for extension of time upon his being required to do so by the petitioner cannot be accepted. The respondent/contractor should have known that it was his obligation to apply for extension of time and the same should have been applied for soon after the completion of the work. Obviously, unless the said aspect had been looked into and decided one way or another, the final bill of the respondent (assuming that the same had to be prepared by the petitioner) could not have been prepared. The claim for escalation (for

the period after the stipulated date of completion) could also not have been examined without first deciding the issue as to whether extension of time should be granted without levy of compensation or not. Obviously, the claim for escalation after the stipulated date of completion could have been entertained only after coming to the conclusion that the delay was not attributable to the respondent/claimant. As noticed above, though the work was completed on 31.10.2002, the extension of time was applied only on 25.04.2005. There was a delay of about 2 ½ years (30 months) in the making of the said application, for which the petitioner cannot be saddled with interest.

28. There was further delay on the part of the respondent inasmuch, as, even after the grant of extension without levy of liquidated damages vide communication dated 09.10.2005, the respondent did not pursue the matter and invoked the arbitration only in March 2007. After the extension of time (without liquidated damages) had been granted, there may have been justification in the respondent waiting for some time to enable the petitioner to make payment of the final bill. As the extension of time was granted on 09.10.2005, the respondent could legitimately have waited upto 31.12.2005. However, for the period thereafter there is no justification for grant of interest upto 28.02.2007, when the arbitration was invoked in March, 2007. Therefore, there was further delay of 14 months in agitation of its claims by the respondent for which interest awarded by the learned Arbitrator should be deleted.

29. Merely because the petitioner may not have specifically raised a challenge to the award of interest for a particular period, that does not take away the jurisdiction of this Court to examine the award on the said aspect. Moreover, I find that in the objection petition the challenge is to the award of interest generally, which would include the challenge to the rate at which it has been awarded, and the period for which it has been awarded.

30. Considering the aforesaid aspects, the award of interest stands modified as below:

- (a) Claim no.1 was for the amount which was due for the work done but not been paid. At best, the petitioner could have withheld this amount on account of the prolongation of the contract, till they had taken a decision on the extension of time application made by the petitioner. There could be no justification for withholding of amount payable under claim no.1 after the date of issuance of extension of time letter on 09.10.2005.

The respondent would be entitled to interest on the amount awarded under claim no.1 (Rs.1,10,681) for the period from 01.11.2005 till the date of the award @ 10% p.a.

- (b) The respondent would be entitled to interest on the quarterly escalation amount not paid, i.e. awarded amount of claim no.2, @ 10% p.a., by reducing the period as follows:-

| Sl. No. | Quarter    | Payment due in | Interest calculated from the end of | Period upto 7/2/09* (months) | Due amount of escalation |
|---------|------------|----------------|-------------------------------------|------------------------------|--------------------------|
| 01.     | 12/99-2/00 | 3/2000         | 4/2000                              | 63.25                        | (-)34,699.94             |
| 02.     | 3/00-5/00  | 6/2000         | 7/2000                              | 60.25                        | 28,227.57                |
| 03.     | 6/00-8/00  | 9/2000         | 10/2000                             | 57.25                        | 16,551.64                |
| 04.     | 9/000-1/00 | 12/01          | 1/01                                | 54.25                        | 45,332.62                |
| 05.     | 12/00-2/01 | 3/01           | 4/01                                | 51.25                        | 5,024.64                 |
| 06.     | 3/01-5/01  | 6/01           | 7/01                                | 48.25                        | 1,12,094.16              |
| 07.     | 6/01-8/01  | 9/01           | 10/01                               | 45.25                        | 2,12,025.03              |
| 08.     | 9/01-11/01 | 12/02          | 1/02                                | 42.25                        | 1,77,614.37              |
| 09.     | 12/01-2/02 | 3/02           | 4/02                                | 39.25                        | 1,29,573.05              |
| 10.     | 3/02-5/02  | 6/02           | 7/02                                | 36.25                        | NIL                      |
| 11.     | 6/02-8/02  | 9/02           | 10/02                               | 33.25                        | 73,002.56                |
| 12.     | 9/02-10/02 | 11/02          | 12/02                               | 31.25                        | 2,45,314.71              |
|         |            |                |                                     |                              |                          |

\* After reduction of 42 months.

- (c) On the same parity of reasoning, the interest on the amount of the final bill of Rs.22,44,874/- could have been awarded from 01.05.2003 to 04.04.2007 minus the period of 42 months @ 10% p.a.
- (d) From the award of interest under sub head (d), it appears that the dates of deduction of WCT range between 08.09.2001 and 22.09.2007. Interest has been calculated on the amounts deducted upto 07.02.2009 which is the date of the award. The respondent, as noticed above, was not vigilant for a period of

42 months. Consequently, the period for which interest has been computed in respect of amounts at Sl. No.1 to 5 in the tabulation found at page 15 of the award is reduced by a period of 42 months for each of the entries at Sl. No.1 to 5.

- (e) Under sub head (e), the award of interest on Rs.22,449/-, being the amount of labour cess not refunded, @ 10% p.a. has been granted. In relation to the award of interest on Rs.22,449/-, I find that the same has appropriately been granted @ 10% p.a. from the date of final bill payment till the date of the award.
- (f)(i) Under sub-head (f)(i), the learned Arbitrator has awarded interest on the amount of Rs.76,027/- at the rate of 10% per annum from 01.05.2003 to 07.02.2009. Since the extension of time without levy of compensation came to be decided only on 10.09.2005, there was no question of any part of the security deposit being refunded (The delay in this regard is attributable to the respondent). Consequently, in my view, interest on Rs.76,027/- at the rate of 10% per annum could not have been awarded from 01.05.2003 onwards. The same ought to have been awarded from 01.11.2005 to 07.02.2009 after reducing from this period the 14 months period towards further delay in invocation of arbitration by the respondent. Under sub-head (f)(ii) interest of Rs.1,22,524/- @ 10% per annum awarded from 04.04.2007 to 07.02.2009. When the petitioner made payment of the final bill on 04.04.2007, there was no justification for the withholding of the amount of Rs.1,22,524/-.

Consequently, I find that the award on interest under sub-head (f)(ii) is completely justified.

Award of future interest @ 15% p.a. on the amounts awarded under claim nos.1 to 5 and 8 to 11 appear to be excessive. Keeping in view the inflationary trends prevalent during the relevant time, future interest is, therefore, reduced from 15% p.a. to 9% p.a. from the date of the award till payment.

The award stands modified accordingly.

The petition stands disposed of in the aforesaid terms.

**JULY 15, 2010**  
sr

**VIPIN SANGHI, J**