

* **HIGH COURT OF DELHI : NEW DELHI**

% Judgment delivered on: 10.04.2012

+ **O.M.P. No. 533 of 2009**

Mahanagar Telephone Nigam Limited Petitioner

Through: Mr. Ravi Sikri, Adv. with
Mr. Vaibhav Kalra, Adv.

Versus

M/s Telephone Cables Ltd. Respondent

Through: Ms. Ferida Satarwala, Adv.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. This petition has been filed by the petitioner under Section 34 of Arbitration and Conciliation Act, 1996 challenging the order dated 29.05.2009 passed by the Sole Arbitrator in a dispute between the parties. Briefly stated, the facts of the case can be summarized in the following manner.

2. The brief facts of the case as per the petitioner are, that on 30.11.1994 a tender bearing No.14021/MT (MMS) was floated by the Department of Telecommunication (hereinafter referred to as DoT) for procurement of PIJF cables, opened on 24.01.1995. The procurement against the tender was for two years from the date of issue of 1st advance purchase order. Supplies by all the successful bidders were to be made at L-1 rates.

3. On 22.01.1997, the letter of intent for 40 LCKM cables was issued to the respondent wherein it was stated that “prices of PIJF Cables for the purpose of obtaining present quantity will be provisional till applicable prices are available and shall be calculated at 95% of the total price (inclusive of all taxes and duties) finalized in tender dated 24.1.1995 on account of customs duty reductions in budget for 1996-1997”. As per the petitioner, the prices were kept provisional because the budget for the 1996-1997 was announced on 23.07.1996 and there had been a reduction in the custom duty in the budget. As the finalization of the prices takes time, therefore the DoT issued the letter of intent only on 22.01.1997 and kept the prices provisional, as per the letter dated 22.01.1997 the supply of cables was to be completed by 31.03.1997 as per the monthly schedule of the petitioner.

4. Thereafter, the delivery schedule was modified by the PO dated 05.03.1997 wherein it was provided that 50% of the quantity was to be supplied on or before 31.03.1997 and rest of the 50% by 30.04.1997. Clause 16 of the PO containing the general/commercial terms and conditions of the contract provided that it would be as per DoT tender No.14-21/94-MMT (MMS) dated 30.11.1994. Further, clause 6 of the DoT letter dated 08.01.1997 provided that the prices of the PIJF U/G cables would be provisional till the applicable rates are available.

5. The new tender was opened by the DoT on 25.03.1997 and in this new tender the prices of the same cables were considerably lower, this, according to the petitioner, was not correct as per the GoI policy to give high rates for the same products when the same were

available on lower rates.

6. In the delivery schedule it was very clearly provided that the date of dispatch from the manufacturer's work was to be deemed to be the date of delivery and physical supply of cables was to be made within 30 days from the date of dispatch. In case of delay of more than 30 days, the date of physical receipt of cables was to be considered as the date of delivery and liquidated damages were to be charged. Thus, for the purpose of charging liquidated damages, the date of dispatch was to be taken as the date of delivery. Thereafter the DoT issued another letter dated 09.05.1997 stating that in case of PO placed prior to 25.03.1997 having stipulated delivery period of 31.03.1997 or earlier, the rates stipulated in the PO are to be applied in respect of all the supplies made within the stipulated delivery period. Thus, the respondent could not be given the benefit of the instructions issued vide letter dated 09.06.1997 as the bills of the respondent were processed keeping in view the fact that 50% supply was either not made upto 31.03.1997 or excess quantity was supplied upto 31.03.1997.

7. It is stated by the petitioner, that since deductions were made from the final bill of the respondent, therefore on or before 31.01.2000 the respondent filed a suit in the court of the Civil Judge (Senior Bench), Chandigarh wherein it claimed Rs.36,87,679/- as the principal amount and Rs.21,94,167/- as interest @ 21% per annum with future interest. The petitioner objected to the said suit of the respondent by taking up the plea that in view of clause 21.1 of the tender document the matter should have been referred to arbitration. Thereafter, the petitioner an application under Section 11 of the Arbitration and

Conciliation Act, 1996 which was opposed by the respondent and was dismissed by the order dated 18.08.2001 passed by the learned Civil, Judge. Hence, the petitioner took the matter to the High Court of Punjab & Haryana by way of Revision Petition which was also dismissed by the order dated 29.01.2002.

8. Thereafter, the petitioner filed an SLP in the Supreme Court of India and by order dated 19.11.2008 the Court appointed Hon'ble Mr. Justice D.P. Wadhwa, retire judge of the supreme Court as the sole Arbitrator to adjudicate upon the disputes between the parties. The learned arbitrator passed the award dated 29.05.2009 in favour of the respondent and awarded a sum of Rs.70,27,337/- in its favour and also held that the respondent would be entitled to interest @9% p.a. on the said amount from the date of award till the date of payment.

9. Being aggrieved by the said award, the petitioner filed the present petition on the stating that the respondent does not come under the purview of DoT letter dated 09.06.1997, hence cannot take the benefit of clarifications as per the letter, because the case of the respondent clearly falls under the DoT letter dated 11.04.1997. According to the petitioner, the learned arbitrator failed to appreciate that 50% of the supplies were to be completed on or before 31.03.1997 and the rest 50% by 30.04.1997. As per clause 9.2 the date of dispatch from the manufacturer's work was to be deemed to be the date of delivery and physical supply of cables was to be made within 30 days from the date of dispatch and in the case in hand, only 505 of the quantity ordered had to be supplied by 31.03.1997 and the rest by 01.04.1997 and 30.04.1997.

10. Further, the learned arbitrator did not appreciate the fact that the words ‘supply’ and ‘delivery’ were used in different meanings in the tender documents and while the date of dispatch was to be taken as the date of delivery for the purpose of levying liquidated damages, the supply was meant to be physical supply of the materials.

11. In the reply filed on behalf of the respondent/claimant it is stated that award dated 29.05.2009 passed by Hon’ble Mr. Justice D.P. Wadhwa as the sole Arbitrator to adjudicate upon the disputes between the parties who passed by the sole arbitrator is a well-reasoned award and has been passed after taking all the relevant clauses of the tender, purchase order, Letter of Intent etc. in consideration. Further, it is stated that the present petition is not maintainable as it does not meet the requirements of Section 34 of the Arbitration and Conciliation Act, 1996 which provides that an arbitral award shall not be set aside except on one of the grounds enumerated in the provisions of this section. It is also stated that the petitioner has not specified that under which sub-section of Section 34 its application falls.

12. It is stated by the respondent that it is a well-settled law that when a specific question of law being a question of construction has been referred to an arbitrator, his decision whether right or wrong has to be accepted. It is further stated that an award is not open to challenge on the ground that the arbitrator has failed to appreciate the facts and in the instant case, the price to be paid by the petitioner to the respondent /claimant for the supply of cables is essentially a question of fact.

13. Another contention of the respondent is, that this court should not interfere with the award as it is not sitting as the appellate authority over the finding of facts or for determining the law points. Section 34 clearly indicates that an arbitration award shall only be set aside for the reasons extraneous to its contents; such as lack of jurisdiction of the arbitrator, fraud or corruption of the arbitrator or the party or the fundamental miscarriage of justice in the conduct of the arbitral proceedings. But, the petitioner herein has not pleaded any ground that can sustain the instant petition.

14. The main challenge is laid to the award on following counts:

- i. That the learned arbitrator has failed to appreciate that the petitioner had made the deductions in the bills of the respondent as the instructions of DOT dated 11.4.97 wherein the said letter clearly provided that 70 % of the payment was to be made for all the supplies received after 25.3.97. The said letter was a provisional measure and the respondent was also made clear that the rates for the said purchase orders were provisional in nature. Therefore, the learned arbitrator ought not to have awarded the claims of the respondent.
- ii. The learned arbitrator has not taken into consideration that the case of the respondent did not fall within the purview of letter dated 9.6.97 and rather the case of the respondent fell under 11.4.97.
- iii. The learned Arbitrator has failed to appreciate that the delivery schedule as per clause 9.1 of the purchase order provided that 50 % of the supplies could be made by 31.3.97 and 50 % by

30.4.1997 and thus the petitioner was justified to make the payments of what was ordered for which was 50 % of the ordered quantity. This aspect has been further highlighted to state that the excessive delivery made by the respondent would not lead to the petitioners paying the respondent at the rates applicable in March 1997 when the said 50 % delivery was to effected by April 1997.

- iv. The observations of the learned Arbitrator are assailed to state that the said observations are wrong and the learned Arbitrator has unjustifiably awarded a sum of Rs. 70,27,337/- together with interest @9% per annum on the said amount from the date of award till the date of payment and costs. It is stated that the point of 50 % supplies to effected by 31.3.1997 and rest a month thereafter has not been considered and thus the observations of the learned arbitrator are wrong in facts and law.

15. Mr. Ravi Sikri, learned counsel for the petitioner, has made his submissions which can be outlined in the following manner:

- (a) Mr. Sikri argued that the learned arbitrator fell in error in ignoring the existing policy of the Government of India, Department of Telecommunication, the petitioner was instructed to settle the payments at the rates of 70 % incase all the supplies received after 25.03.1997 and therefore, the petitioner was justified to implement such instructions. It is submitted by Mr. Sikri that the learned arbitrator ought to have taken notice that the government policy at the time of purchase order or delivery of thereof was to deal on the provisional rates basis and that was

also communicated to the respondent. Therefore, the petitioner has faithfully acted on the instructions of the DOT.

- (b) Mr. Sikri argued that as the clause 9 of the purchase order make it clear that 50 % of the supply can be made by 31.3.1997 and 50% on the later date, i.e., balance was to be supplied between 01.04.1997 and 30.04.1997 by the respondent . The rates applicable in this respect shall be also be modified according to the governing prices paid by the other bidders in the new tender dated 25.03.2007. The said aspect has been clearly overlooked by the learned arbitrator which warrants the interference under Section 34 of the Act from this court.
- (c) Mr Sikri argued that if vendor supplies more than 50% quantity before 31.03.1997, it does not mean that payment has to be released as per rate of March, 1997 if delivery schedule is not of March, 1997. As per petitioner, learned Arbitrator did not appreciate that the words “supply and delivery” were used in the tender in different meaning. The respondent cannot take advantage of the letter dated 09.06.1997 as the respondent comes under the DOT letter dated 11.04.1997.
- (d) Mr. Sikri argued that the learned arbitrator has made the award which is against the public policy as laid down under Section 34 as the public policy of the government was to save the exchequer and with that initiative, the payments were made at the reduced rates. The said award dated passed by the learned Arbitrator is thus against the public policy and this court can interfere in the award as the same is against public policy.

16. Per Contra, Ms. Ferida, appearing on behalf of the respondents has made her submissions which can be outlined as under:

- (a) Ms. Ferida, learned counsel has argued that the award passed by the learned arbitrator is perfectly justified both in law as well as fact. There is no legal infirmity under the award passed by the learned Arbitrator. Ms. Ferida argued that the grounds urged by the petitioner to assail the award cannot be taken into consideration as the same do not complete narrate the issue.
- (b) Ms. Ferida rebutted both the grounds urged by Mr. Sikri by submitting that the purchase order has been dealt with by the learned arbitrator very fairly and the view of the arbitrator is that 50 % delivery by 31.3.1997 and 50 % thereafter only operates as a matter of convenience to the respondent to supply but cannot operate a cut off date for fixation of the price is unexceptionable and the same cannot be faulted. Rather, the grounds raised by the petitioner are misconceived in as much as that the supplies were delivered by 31.3.1997 and the said fact was never disputed by the petitioner.
- (c) Ms. Ferida further argued that the scope of interference in the cases like the present one wherein there is a well reasoned award is extremely limited unless the court finds the patent illegality in the same. This court sitting under section 34 of the Act cannot interfere to correct the errors of the fact committed by the learned arbitrator if the award stands otherwise in law.

17. I have gone through the petition filed by the petitioner, reply thereto by the respondent, award passed by the learned arbitrator and

also the records of the proceedings. I have also given my careful consideration to the submissions advanced at the bar. The relevant finding of the learned Arbitrator on the aspect of objection raised by the petitioner has been dealt with in great detail; the extract of some portion reads as under:

“These two communications from DoT made quite clear that whether Purchase Order was prior to 25.3.1997 with stipulations of delivery period of 3.1.3.1997 or earlier, the rates stipulated in the purchase order shall apply. Contention of MTNL is that when the Purchase Order authorized the Claimant to make 50% of the supply upto 31.3.1997 and the balance 50% by 30.4.1997, the latter dated 11.6.1997 would have no application to the case of the Claimant. I am afraid this is misreading of the LOI, Purchase Order and communications dated 11.4.1997 and 9.6.1997 of the DoT. The delivery schedule gave option to the Claimant to make supply of 50% of the ordered cables upto to 31.3.1997, but there was no bar or prohibition put on the Claimant not to make supply of the whole material ordered upto 30/3/1997. In fact, that was the intention of the LOI on which MTNL places its reliance. Moreover, the ordered material i.e. cables could be supplied only after inspection. Nobody on behalf of MTNL raised any objection either for inspection or receipt of the cables upto to 31.3.1997. All these objections were raised when bills were presented for payment. I would, therefore, reject the stand of MTNL and would hold that the whole supplies were made in accordance with the L.O.I. read with the Purchase Order and payment has to be made in terms thereof. Deductions from the bills of the Claimant are apparently not authorized.

A half-hearted submission was made in the reply by the MTNL that subsequently when tender was opened on 25.3.1997 for same very PIJF cables, the rates quoted by various parties were much lower than that in the earlier

tender. It is stated that as per Government of India policy it would not be correct to go for high rates for the same products when the same was available on lower rates. I am unable to accept the argument. No such Govt. of India policy has been placed on record and as to how it has any legal implications to the case of the Claimant before me. I am unable to find any possible or reasonable objection by MTNL in withholding the amounts due to the claimant as per the bills submitted by the Claimant in respect of supplies made on or before 31.3.1997.”

18. Let me now reiterate the scope of the judicial interference against the arbitral award which has been time and again came up before the courts for consideration wherein the views of the courts including this court is consistent that the court while deciding section 34 objection cannot culminate into the appellate court to decide every legal and factual issue. It is only those errors of patent illegality, without jurisdiction or biasness or against the public policy where in the awards seems to be unsustainable, the courts are empowered to interfere and not in all other cases to correct errors committed by the Arbitrator.

19. It is equally trite that the court hearing the objections under section 34 of the Act shall not interfere in the arbitral award to substitute its own opinion or where there are two views possible, the court would have arrived at another view if the court were to hear the proceeding originally will not invite judicial interference under section 34 of the Act.

20. In *Oil and Natural Gas Corporation's* Case, the Supreme Court has considered the scope of interference of Arbitral Award on

the ground of Public Policy in great detail and observed that the phrase 'public policy of India' is not required to be given a narrower meaning and that wider meaning is required to be given, so as to prevent frustration of legislation and justice, the Supreme Court has held thus:

“31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case 1994 Supp. (1) SCC 644 it is required to be held that the award could be set aside if it is patently illegal. The result would be -award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.”

There exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the Courts is not permissible. In Ispat Engineering and Foundry Works v. Steel Authority of India Ltd., their Lordships of the Apex Court referring to various other judgments of the Apex

Court including, has held that the Court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the Arbitrator has committed an error of law. **The Court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties. (Emphasis Supplied).**

Holding that intervention of Court is envisaged in a few circumstances, like in case of fraud or bias by Arbitrators, violation of natural justice etc., in 2006(2) Arb.L.R.498(SC) [Mc Dermott International INC. v. Burn Standard Co. Ltd. and Ors. the Supreme Court](#) has held as follows:

“55. 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. The Court cannot correct errors of Arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. **So, scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as parties to the Agreement makes a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.**”
(Emphasis Supplied)

21. Thus, it is clear from the afore-quoted observations of the Supreme Court that the judicial interference in the cases where there are trivial errors is nil unless they go into the root of the matter. Testing the award passed in the present case on the bedrock of the extent of permissible judicial interference, it can be easily discerned that the award passed in favour of the respondent is reasonable. It is noteworthy that by a letter dated 09.06.1997 DOT had clearly issued

the directions to the petitioner to clear the dues for the orders placed and supplied made on or before 31. 3.1997 as per the rates stated in the purchase orders. The said letter superseded in the earlier instructions given by the Department. Thus, the reliance of the petitioner on the earlier letter and contending that the case of the respondent was covered by such instruction is totally misplaced. The respondent became clearly entitled to the dues pending as per the agreed rates mentioned in the purchase orders. Further, learned arbitrator has reasonably awarded the interest of 9% per annum by adopting the method of calculation from 23.08.1999. Furthermore, the contention that 50% delivery was to made by 31.3.1997 also does not aid the case of the petitioner as the same only facilitate the supply in parts but nowhere any stipulation in the contract states that the shall be determinative of the prices prevailing in those months. The said aspect has also been dealt by the arbitrator in detail and thus warrants no interference.

22. Accordingly no factual or legal infirmity is found in the award passed by the learned arbitrator. The petition is hereby dismissed. No costs.

MANMOHAN SINGH, J.

APRIL 10, 2012