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

Date of decision: 22.08.2013

\+ **FAO(OS) 185/2013**

RPG CABLES LIMITED ……Appellant

Through: Sh. Darpan Wadhwa with Sh. Mohit Jolly, Sh. Shankh Sen Gupta and Ms. Roshni Namboodri, Advocates.

Versus

MAHANAGAR TELEPHONE NIGAM LIMITED

…….Respondent

Through: Sh. Vaibhav Kalra with Ms. Sumedha Dang, Advocates.

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This is an appeal from an order of the learned Single Judge dated 07.11.2012 setting aside an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The Appellant ("RPG") is a company engaged in the manufacture and sale of PIJF U/G Telecommunication Cables. It

entered into a contract with the Respondent, (the Mahanagar Telephone Nigam Limited, (hereafter "MTNL") pursuant to a tender issued by the latter (MTNL/20-80(66)/98-99/98-MM/PIJF) dated 04.05.1998, for supply of specific quantities of Polythene Insulated Jelly filled Underground Telecom Cables (PIJF) at Delhi and Mumbai. As far as the present dispute is concerned, MTNL sent a Letter of Intent (LOI No. MTNL/20-80(66)/98-99/98-MM/PIJF/RPG) dated 21.10.1998 to RPG, which was duly accepted on 28.10.1998, for the supply of the telecom cables. In its reply, however, RPG noted:

> "*We acknowledge receipt of your Purchase* ***Order dt. 06-11-98*** *for supplies of cables.*
>
> *Our request, vide our letter Dt. 28-10-98 for rescheduling delivery was, in view of the notice served by our workers union to go* ***on strike from 21-10-98*** *for undue wage revision. Photo-copy of the notice Dt. 06-10-98 is enclosed for your records. The illegal strike by our workers is still continuing inspite of our best efforts to resolve the issue.*
>
> *You will appreciate that due to disturbed conditions prevailing at our plant, we are not able to process your ordered cables due for delivery in November 98. We are putting in our best efforts to bring back the normalcy in our operations and are hopeful to achieve the same soon. OUR ENDEAVOR is to ensure that all ordered cables are supplied to both consignees well before schedule. Delay, if any, in supplying the cables shall be covered under FORCE MEJEURE conditions.*
>
> *XXXXXX XXXXXX XXXXXX*
>
> *This letter of intimation may please be considered as notice under* ***cl. 17 of General Conditions of Contract***

(Section-III) of tender specification no. MTNL/20-80(66)/98-99/98-MM/PIJF DT.04-05-98.

Since the events are covered under force majeure conditions, we shall request you to amend the delivery schedule to read as commencement January 99, completion April 99 in four equal monthly lots calculated in terms of LCKM."

Thus, based on what RPG considered to be *force majeure* events, a request for extension of time for performance was made.

3. Thus, from the original timetable where the entire supply was to be dispatched within six months, i.e. 30.04.1999, with the quantities evenly distributed for each month of the period of supply, RPG requested that the timetable be amended to commence on 01.01.1999, and that the supply be allowed in four equal monthly instalments concluding on 30.04.1999. This request was accepted by MTNL in its letter dated 18.12.1998, and the delivery schedule for the purchase order was amended. Later, MTNL issued a memorandum (MTNL/20-80{66(6)}/98-99/98-MM/PIJF/RPG) dated 02.02.1999, by which it unilaterally amended the delivery schedule, returning to the original schedule before RPG's request.

4. By MTNL's letter of 08.03.1999, a request was made for the supply of 1200/0.5mm (A) cables in March, 1999 instead of April, 1999, as originally scheduled. RPG agreed to supply these cables by its letter dated 10.03.1999 and in addition requested that some other specified quantities of certain cable sizes, which were due in March 1999 to be simultaneously postponed till April 1999, without any liquidated damages. MTNL agreed to such postponement (though

without any reference to the question of liquidated damages) through its letter dated 12.03.1999. Later, the entire purchase order was met by RPG in terms of the schedule in MTNL's letter dated 18.12.1998, with the modifications agreed upon by the parties in terms of MTNL's letter dated 12.03.1999.

5. The total consideration for the contract was ₹20,94,61,022.59/-. Yet, RPG was paid only ₹20,65,61,512.59/-, i.e. the deficit amount of ₹24,99,510/- withheld by MTNL on account of liquated damages for late supply of the goods in terms of Clause 16 of the contract between the parties. This led to a dispute.

6. The parties referred the disputes to arbitration under Clause 20 of the contract. The arbitrator decided in favour of RPG, holding that it was entitled to the amount withheld by MTNL. In doing so, the arbitrator dealt with two issues - first, jurisdiction, (as MTNL claimed that Clause 16.3 of the contract placed the question of liquidated damages beyond the jurisdiction of the tribunal), and secondly the merits. On the latter the arbitrator had to decide whether the amended schedule for delivery of goods was binding on both parties, and whether any contractual understanding had been breached by RPG in the delivery of goods.

7. The arbitrator held that the jurisdiction over the dispute referred was not barred by the contract, since the real dispute concerned not the question of levy of liquidated damages, bur rather, the mutual understanding of parties as to the delivery schedule sought to be varied by MTNL through its letter dated 02.02.1999. On the merits, it was held that:

> *"In view of the foregoing, I find that the amendment to the delivery schedule purported to have been made vide letter dated 02.02.1999 - Annexure 'C-9' is unilateral. As such the same is not legally binding on the claimant. In view thereof, the deduction of Rs. 18.52 Lac from the price for the cables supplied by the claimant or withholding of the said amount describing it as liquidated damages is unwarranted. The parties do not dispute the correctness of the said sum, Even otherwise there is ample material to substantiate that the respondent had withheld the said sum. The claimant is thus held entitled to Rs, 18.52 Lacs. The Issues are decided accordingly..."*

8. MTNL felt aggrieved by the award; it approached this court, under Section 34 of the Arbitration and Conciliation Act, challenging the award on the ground that it was not liable, and that the disputes were not arbitrable. By the impugned judgment and order, the learned Single Judge allowed the MTNL's Petition. The claimant has, consequently appealed.

9. It is argued on behalf of RPG, by Mr. Darpan Wadhwa, learned counsel, that the claimant invoked the *force majeure* condition by letter dated 10.11.1998 to MTNL, to say that on account of a worker's strike in its factory, the delivery schedule would be changed; the first deliveries were to start on 01.01.1999. RPG requested to be allowed to supply the quantity in four equal monthly instalments, concluding on 30.04.1999 (the date as per the original delivery schedule). Similar requests were reiterated by RPG by its letters dated 26.11.1998, 03.12.1998 and 08.12.1998. MTNL was also told about the adverse impact on RPG's production due to the strike which had resulted in

preponement and postponement of some quantities of certain sizes. MTNL, in its letter of 18.12.1998, indicated a month-wise schedule for delivery and stated that priority was to be given to the sizes which were required on urgent basis. It further required the entire supplies for their Mumbai unit to be completed by March 1999 instead of April. It was after this mutually agreed change, that RPG started its production, when, suddenly, MTNL, in its letter of 02.02.1999, directed that the entire quantities had to be completed by 30th April, 1999, and that critical or priority sizes supply had to be completed by 28th February, 1999. The MTNL also requested for supply of 1200/0.5mm (A) cables = 8.2kms in March 1999 instead of April 1999, as scheduled. RPG agreed to supply these cables by its letter dated 10.03.1999 and in addition requested that some other specified quantities of certain cable sizes, which were due in March 1999 be simultaneously postponed till April 1999, without any liquidated damages. MTNL agreed to such postponement without any liquidated damages by its letter dated 12.03.1999. In these circumstances, argued counsel, the arbitrator was within his rights in holding that the dispute was arbitrable, and that the withholding of amounts towards liquidated damages not justified. Counsel submitted that the learned Single Judge fell into error in holding that the question of liquidated damages could not be gone into in arbitration, as it was an excepted matter. He relied on the ruling in *Bharat Sanchar Nigam Ltd v Motorola India (P) Ltd* 2009 (2) SCC 337. It was submitted that the award was legally unexceptionable inasmuch as the Arbitrator held that in the absence of mutual agreement, the contract could not have

been varied unilaterally. Thus the alleged change did not bind RPG; resultantly, MTNL could not withhold the amounts.

10. Mr. Vaibhav Garg, learned counsel appearing for MTNL, argued that the *ratio* in *Bharat Sanchar Nigam (supra)* could not apply to the facts and circumstances of the present case. It was argued that the learned Single Judge acted within his rights in holding that the question of liquidated damages was an excepted matter, and that the findings in paragraph 8 of the impugned order are warranted in the facts and circumstances of the case. It was submitted that RPG never protested against the revision of schedule, and the conditions imposed by the letter dated 02.02.1999; its claim was therefore, barred.

11. Before analysing the rival claims, it would be essential to set out some of the essential conditions of the contract between the parties. They are extracted below:

> *"15.2 Delay by the supplier in the performance of its delivery obligations shall render the supplier liable to any or all of the following sanctions; forfeiture of its performance security, imposition of liquidated damages and/or termination of the contract for default.*
>
> *XXXXXX XXXXXX XXXXXX*
>
> *16.2 Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery the Chairman and Managing Director, MTNL shall be entitled to recover 1/2% of the value of the delayed supply for each week of delay or part thereof, subject to maximum of (five per cent) 5% of the value of the delayed supply, provided that delayed portion of the supply does not in any way hamper the commissioning of the system. Where the delayed portion of the supply*

material hampers installation and commissioning of the system, liquidated damages (not as a penalty) shall be levied as above on the total value of the contract.

16.3. This clause will not come under the provisions of the Arbitration Clause 20"

12. In the *Bharat Sanchar Nigam* case (supra), the stipulation relied on to say that the matter was "excluded" somewhat identically with Clause 16.3 in the present case, read as follows:

" 16.2.....In the present case of turn key solution of supply, installation and commissioning, where the delayed portion of the delivery and provisioning of services materially hampers effective user of the systems, Liquidated Damages charged shall be levied as above on the total value of the concerned package of the purchase order. Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier.

XXXXXX XXXXXX XXXXXX

Clause 62. The bidder shall be charged liquidated damages at the rates as defined in the General conditions of contract as contained in Section III for any delay in the turnkey job entrusted to the bidder. However he shall be provided an incentive @ 0.5% of the cost of the network of each service area (Telecom Circle), for each week of early commissioning of the entire network in that service area, subject to a maximum of 3% of the value of the contract of the circle."

The Supreme Court then held, in *Bharat Sanchar Nigam,* that:

"8. .....The High Court held that there was no reason why the arbitration request on behalf of the respondent should not be allowed. It held

that Clause 16.2 is not an excepted matter under Clause 20 of the tender document.

9. Having heard the learned counsel for the parties and after examining the judgment of the High Court and the other materials on record, we are of the view that this appeal must be dismissed. Clause 20 is the arbitration clause and provides that any question, dispute or difference arising under this agreement or in connection therewith would be referred to arbitration. To this, an exception is also provided which lays down that the matters, the decision to which is specifically provided under this agreement, would not be referred to arbitration. From a bare reading of clause 16.2 of Section III of the tender document, it is clear that if the tenderer fails to deliver the goods and services on turnkey basis within the period prescribed, the purchaser shall be entitled to recover liquidated damages and the quantum of the liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier.

10. We are in full agreement with the findings of the High Court that there was a dispute as to whether the respondent had at all acted in breach of any terms and conditions of the tender document. The question to be decided in this case is whether the liability of the respondent to pay Liquidated Damages and the entitlement of the appellant, to collect the same from the respondent is an excepted matter for the purpose of Clause 20.1 of the General Conditions of contract. The High Court has pointed out correctly that the authority of the purchaser (BSNL) to quantify the Liquidated Damages payable by the supplier Motorolla arises once it is found that the supplier is liable to pay the damages claimed. The decision contemplated under Clause 16.2 of the agreement is the decision regarding the quantification of the Liquidated Damages and not any decision regarding the fixing of the liability of the

supplier. ***It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement.***

It is clear from the reading of clause 15.2 that the supplier is to be held liable for payment of liquidated damages to the purchaser under the said clause and not under clause 16.2. The High Court in this regard correctly observed that it was not stated anywhere in clause 15 that the question as to whether the supplier had caused any delay in the matter of delivery will be decided either by the appellant/BSNL or by anybody who has been authorized on the terms of the agreement. Reading clause 15 and 16 together, it is apparent that clause 16.2 will come into operation only after a finding is entered in terms of clause 15 that the supplier is liable for payment of liquidated damages on account of delay on his part in the matter of making delivery. Therefore, clause 16.2 is attracted only after the supplier's liability is fixed under clause 15.2. It has been correctly pointed out by the High Court that the question of holding a person liable for Liquidated Damages and the question of quantifying the amount to be paid by way of Liquidated Damages are entirely different. Fixing of liability is primary, while the quantification, which is provided for under clause 16.2, is secondary to it.

There is no provision in the agreement, apparent on the face of it, relating to a decision made by any specified authority on the issue of levy of Liquidated Damages, as is contemplated under clause 20.1 of the agreement which is excepted from the purview of arbitration. No decision coming within the scope of excepted matters under clause 20.1 is envisaged by any portion of the agreement regarding the liability of the supplier to liquidated damages.

Quantification of liquidated damages may be an excepted matter as argued by the appellant, under clause

16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. Even if the quantification was excepted as argued by the appellant under clause 16.2, this will only have effect when the dispute as to the delay is ascertained.

Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages.

The above stated position can be ascertained through the judgment of this Court in the case of State of Karnataka vs. Shree Rameshwara Rice Mills, (1987) 2 SCC 160. This Court in the said case, made a clear distinction between adjudicating upon an issue relating to a breach of condition of contract and the right to assess damages arising from a breach of condition. It was held that the right conferred to assess damages arising from a breach of condition does not include a right to adjudicate upon a dispute relating to the very breach of conditions and that the power to assess damages is a subsidiary and consequential power and not the primary power."

13. The decision in *Shree Rameshwara Rice Mills (supra)*, quoted in *Bharat Sanchar Nigam (supra*), made the distinction between a case where breach (of contract or conditions) is admitted, and where the quantum can be decided by one of the parties, in which case such dispute would be non-arbitrable, and the other instance, where the essential dispute would be *whether there was a breach at all.* In the latter category, said the Supreme

Court, the arbitrator would possess jurisdiction; it would not be an "excepted matter":

> *"On a plain reading of the words…….. it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the Officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract."*

14. We are of the opinion that the conclusions of the learned Single Judge, that the dispute pertaining to withholding of liquidated damages was an excepted matter, and consequently not arbitrable, proceeds on the erroneous premise that the question of whether a breach occurred at all is itself an excepted matter. As held by the Supreme Court, such disputes are arbitrable; only where the parties

are *ad idem* that there was a breach by one of them does the matter stand excluded, if such provision exists in the contract. Here, RPG did not admit breach; it contested the MTNL's position. Therefore, the Arbitrator acted within jurisdiction in holding that the dispute did not fall within the excepted category of matters.

15. As far as the merits go, the learned Single Judge has not faulted with the award. This court is satisfied that the reasoning of the arbitrator are sound, inasmuch as the award holds that the rationale for withholding the amounts claimed was alleged delay, based on a unilateral change in the delivery schedule with respect to certain items. The MTNL's argument here that the change was not objected to by RPG is unsustainable. A change in the terms has to be with mutual consent. The circumstances here are that the delivery schedule was changed at the inception, with the consent of the parties; the MTNL does not dispute that. If it wanted another change, a similar route had to be adopted. Instead it sought to unilaterally impose a different time line; its request for supply of some items could be acceded to. However, the lack of mutuality cannot be said to have been acquiesced at any stage by RPG, as is sought to be urged. In any case, appreciation of these aspects and findings of the arbitrator in this regard, do not disclose any fundamental or manifest error of the magnitude warranting interference under Section 34 of the Arbitration and Conciliation Act, 1996.

16. For the foregoing reasons, the appeal must succeed. The

impugned judgment and order of the learned Single Judge is hereby set aside; the arbitrator's award is hereby restored. There shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

AUGUST 22, 2013