

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

%

Judgment Reserved on: 06th February, 2015

Judgment Delivered on: 20th February, 2015

+ FAO(OS) 63/2015 and CM No. 2069/2015

MAHANAGAR TELEPHONE NIGAM LIMITEDAppellant

versus

FUJITSHU INDIA PRIVATE LIMITEDRespondent

Advocates who appeared in this case:

For the Appellants:

Mr Krinshendu Datta with Mr Vivek Malik, Mr Mukul Thakur and Ms Nayan Aggarwal

For the Respondent:

Mr Sandeep Sethi, Senior Advocate with Mr Khalid Arshad, Mr Pradeep Nayak, Mr Abhishek Bansal and Mr Ishwer Upneja.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. This appeal under Section 37 of the Arbitration & Conciliation Act, 1996, (hereinafter referred to as the Act), impugns the judgment dated 25.11.2014 passed by a learned Single Judge of this Court whereby the learned Single Judge had dismissed the objections filed by the appellant under Section 34 of the Act.

2. On 30.06.1998, the appellant-Mahanagar Telephone Nigam Limited (MTNL for short) issued the Notice Inviting Tender (NIT) for supply of CDMA IS-95A WLL technology. The respondent Fujitsu India Private Limited (FTPL for short) was the successful bidder and Letter of Intent (LOI) dated 01.06.99 was issued in its favour. Three Purchase Orders (hereinafter referred to as PO-I, PO-II and PO-III), over a period of time, were issued in favour of the respondent pursuant to the said tender.

3. Certain disputes arose between the parties with regard to the payments due to the respondents. The appellant-MTNL formed a Committee to deal with the issues that were pending between the parties. The Committee made recommendations to the Board of Directors of the appellant and also directed release of payment in respect of PO-I, II & III subject to certain deductions and concession being given by the respondent. An affidavit was submitted by the respondent FTPL enlisting the terms of the settlement and acceding to the deductions and concession proposed by the appellant.

4. The respondent by its affidavit accepted the following:

- “(i) that it would receive 69.4% of the amount payable against PO-I and PO-II, as full and final settlement.*
- (ii) MNTL, would issue a TOC for PO-I and PO-II, with retrospective effect i.e. 10.10.2002.*

=====

(iii) MTNL, would release the PBGs in issue, after release of payments.

(iv) In respect of PO-III, Fujitsu Group would accept for the moment 70% of the amount due, and that, the balance 30% would become payable within six months after resolution of balance AT points.

(v) Neither party would take recourse to legal proceedings in respect of POs.

(vi) Fujitsu Group would continue to provide maintenance support in terms of the PO.

(vii) Importantly, the affidavit shall not be construed as admission of any liability by the Fujitsu Group.”

5. Pursuant to the affidavit being filed by the respondent, the Board of Directors of the MTNL took the following decision:

“1. The TOC for year 1 PO be issued w.e.f 10.10.2002 and the payments of Year 1 PO (i.e. PO I and II) be deducted by 30.6% of the respective PO value (on account of deficiency in Coverage and capacity etc.) as full and final settlement and the balance payment may be released immediately.

2. 70% of Year 2 and 3 PO value (i.e. PO III) be released immediately and the balance payment is to be made after rectification of pending acceptance testing issues for "Year 1 PO" (Except for coverage and capacity for which deductions have already been agreed in terms of full and final settlement) and "Year 2 and Year 3 PO" within six months.

3. *The TOC for "Year 2 and Year 3 PO" may be issued after the pending A/T issues are rectified for Year 1 PO" (except for coverage and capacity) and "Year 2 and Year 3PO..."*

6. Despite the settlement, the disputes did not end between the parties and, accordingly, arbitration was invoked. The parties filed their respective claims and led evidence by way of affidavits and the deponents of the affidavits were subjected to cross-examination. The respondent produced four witnesses while the appellant produced three witnesses. The appellant-MTNL also preferred a counter claim.

7. The Arbitrator rejected the counter claim and held the respondent-claimant entitled to the following award:

Description of Claims	Amount Awarded	
	INR	USD
Outstanding balance out of 69.4% of the value of PO-I & PO-II	1,78,048/-	19,52,508.42
Outstanding balance out of 70% of the value of PO-III	1,27,12,991/-	5,43,129.00
Customs Duty illegally withheld by wrongly applying the settlement formula: Re: PO-I PO-II PO-III	6,25,18,021/- 13,64,994/- 3,43,57,096/-	

Shortfall in payment of Customs Duty Re: PO-I PO-II	1,05,15,482/- 32,65,778/-	
Maintenance charges Re:- Phase-I	23,00,74,880/-	
Expenses incurred on extension of PBG. PBG-II (from 24-04-2006 to 10-11-2012) PBG-III (from 16.05.2008 to 10-11-2012) JPY 51,58,371	2,64,333.88	

18.2 Consequently, it is directed that the Respondent shall pay to the Claimants the following sums of money:

INR: 36,04,09,994.88

USD: 2,495,637.42

JPY: 51,58,371

18.3 The above said amounts shall carry interest calculated @ 8% per annum with effect from 03-03-2009 till the date of payment or till 30 days after the date of the award, whichever is earlier.

18.4 PBG-II and PBG-III are declared as discharged. The Respondent shall return the PBGs to the Claimants with an endorsement of the PBGs having been discharged.”

8. The appellant filed an objection petition under section 34 of the Act objecting to the award passed by the Arbitrator. The learned Single Judge by the impugned order has dismissed the objections.

9. Before us, the learned counsel for the appellant has raised only two contentions. Firstly, it is contended that the respondent by way of the settlement had agreed to deduction of 30.6% from PO-I and a deduction of 30% viz-a-viz PO-III. It is contended that the total price of the PO-I was Rs.77,23,16,681/- and the break up of the same was Rs.36,41,31,876/- being the cost of the equipment/supplies; the total cost of duties and levies on imported equipments being 23,28,76,276/- including customs duty @ 53.81% of CIF price besides FPP charges and other charges and levies.

10. It is contended that as the total price of the purchase order was specified @ Rs.77,23,16,681/- and since the respondent had agreed to a deduction of 30.6% on the value of the purchase order, the Arbitral Tribunal had erred in not reducing the custom duty amount also by 30.6%. It is contended that the value of the purchase order included both, the cost of the equipment as well as the duties and levies and since there was a discount agreed to by the respondent on the value of the purchase order, it implied that the total value of the purchase order including the value of the custom duty would be reduced by the discounted amount.

=====

11. The other contention raised by the appellant is that the Arbitral Tribunal has erred in awarding Annual Maintenance Charges (AMC) for a period of six years, whereas, the Annual Maintenance Charges agreed upon was only for a period of one year and thereafter there was neither any agreement for payment of AMC nor any services were provided by the respondent. It is contended that the AMC could not be levied as the system supplied by the respondent was never commissioned and even the Arbitrator has held that the system was defective. It is contended that since the system itself was defective, the respondent had agreed to give a rebate on the value of the purchase order and as such the Arbitrator could not have awarded any amount towards the AMC for a defective system.

12. Per contra, the learned Senior Counsel for the respondent has submitted that the respondent is an importer and as per the purchase order, the payment of custom duty amount was subject to actuals on production of relevant documents. He contended that the custom duty was to be reimbursed to the respondent and respondent had agreed to grant a discount only on the value of the equipment. It is contended that since the custom duty was payable as per actuals, the same was reimbursable irrespective of the discount on the value of the equipment.

=====

13. The learned Senior Counsel for the respondent further submitted that the plea of the appellant that no maintenance was provided by the respondent was not tenable in view of the extensive evidence and documents produced by the parties. It is contended that from the admitted documents and the evidence and the cross-examinations of the witnesses, the respondent had been able to show that the maintenance services were provided till 16.05.2008, the date when the appellant directed the respondent to stop the maintenance work.

14. Since this is an appeal under Section 37 of the Arbitration Act, the scope of judicial scrutiny and interference by an appellate court is very limited. The Supreme Court in the case of **McDermott International Inc. v. Burn Standard Co. Ltd. and Ors: (2006) 11 SCC 181** held as under:

“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 the 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 make a conscious decision to exclude the court's

jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

15. It is, in these parameters, as laid down by the Supreme Court with regard to the scope of intervention that the present appeal impugning the order dated 25.11.2014 has to be dealt with.

16. The Arbitrator has considered the various documents, testimonies of witnesses, their examinations and the submissions made by the parties. The Arbitrator has extensively gone into the evidence and evaluated the entire material before him and has published a detailed speaking award.

17. The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while

=====

considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible¹.

18. If the Arbitrator has taken a view which the court finds reasonable and plausible, the court would certainly not interfere.

19. The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34.

¹ *Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited*: 202(2013) DLT 218.

20. As laid down by the Supreme Court in McDermott International Inc. (supra), the supervisory role of the court in arbitration proceedings has been kept at a minimum level and this is because the parties to the agreement make a conscious decision to exclude the courts' jurisdiction by opting for arbitration as the parties prefer the expediency and finality offered by it.

21. When examined in the light of the law as settled by various judicial pronouncements, it is clear that there is no merit in the appeal.

22. The Arbitrator had framed various issues and Issue No.4 dealt with by the Arbitrator in the impugned award at point No.7 is as under:

“13.7 Point No.7; Was MTNL entitled to deduct 30.6% from the amounts payable towards CD under PO-I and II and 30% from the amounts payable towards CD under PO- III?

[Issue 4]”

23. The Arbitrator, after examining the evidence and documents held that the deduction made by the appellant @ 30.6% from PO-I & II and a deduction of 30% from PO-III on account of custom duty was apparently erroneous. He held that the ratio of deduction as per settlement could not have application to the custom duty, the amount whereof was payable by the MTNL to FIPL only by way of reimbursement. Relying on the contract document, the Arbitrator held

that the foreign supplies were in the name of MTNL but obligation was cast on FIPL to have the goods cleared from the customs on payment of customs duty. The Arbitrator has further relied on the cross-examination of the witnesses to hold that by way of clarification, MTNL had made it clear to the bidders that variations in custom duty would be borne by MTNL and even as per the purchase order, the Arbitrator found that the reimbursement by MTNL was as per the actuals on production of relevant documents, though a ceiling on reimbursements was provided.

24. Considering the various documents and the evidence produced by the parties, the Arbitrator held that FIPL was entitled to reimbursement of the custom duty actually paid by them to the customs department.

25. The learned Single Judge has considered the findings of the Arbitrator and the various documents and has returned a finding that the view taken by the Arbitrator is a plausible view which could be taken in the matter and, therefore, could not be interdicted with.

26. We are in agreement with the finding of the learned Single Judge that the view taken by the Arbitrator is a plausible view which could be taken in the matter. Since the view taken by the Arbitrator is a plausible view, we are not inclined to interfere with the same and the contention raised by the appellant in this regard is not tenable.

=====

27. With regard to the AMC, the Arbitrator had framed two issues , i.e., Issues No.7 and 8, which have been dealt with under Point No.6 in the Arbitral Award as under:

“13.6 Point No.6: *a) Was there a contract for performance of maintenance services?*

b) Did the claimants perform maintenance services?

[Issues 7 & 8]”

28. The Arbitrator *in extenso* has referred to the various documents and evidence led by the parties. The Arbitrator referred to the cross-examination of the witnesses in a great detail. The Arbitrator, as a finding of fact, held that FIPL were supplying spares to MTNL and the witnesses of the MTNL themselves had admitted during the cross-examination that throughout the period 2002 until 2008, burnt out cards were being replaced by spares. The witnesses admitted that MTNL could not have procured these spares from any other entity as these were proprietary goods.

29. The Arbitrator returned a finding of fact that the spares were supplied by FIPL as part of the maintenance services activity. The Arbitrator, on appraisal of the evidence, has held that the system had been launched and was being used commercially and was being

maintained by FIPL. The Arbitrator also held that FIPL had been able to prove that it had carried out Annual Maintenance for the entire period beginning from 10.10.2002 (the date of taking over) upto 16.05.2008 (the date on which the FIPL equipment was de-commissioned). The Arbitrator held that there was overwhelming documentary and oral evidence to show that FIPL had rendered services and MTNL had availed them.

30. The learned Single Judge has held that the Arbitrator had invoked the principle of *quantum meruit* as no formal Annual Maintenance Services Agreement was executed between the parties, after the first year of maintenance as stipulated in the original agreement.

31. This was on the basis of the finding returned by the Arbitrator that the services were provided by FIPL for maintaining the system until it was de-commissioned in 2008. The learned Single Judge held that the Arbitrator had applied the correct principle of law, both in the interpretation of the documents concerned as also in the application of principle of law of *quantum meruit*.

32. We are in agreement with the findings of the learned Single Judge and find that the dispute now raised by the appellant is purely factual. The Arbitral Tribunal has, after a detailed examination of the documents and appraisal of the evidence by the parties, returned the

=====

finding of fact that the equipment supplied by the FIPL was commercially commissioned and FIPL had provided maintenance services till the year 2008. The Arbitrator, in our view, has applied the correct principle of law and has correctly appraised the evidence. Since the finding of fact returned by the Arbitrator is after detailed scrutiny and examination of the documents and appraisal of the documents, the same has not been interfered with by the learned Single Judge under section 34 of the Act. We exercising jurisdiction under section 37 of the Act, are certainly not inclined to re-visit and re-appraise the documents or evidence and interdict the finding of fact returned by the Arbitrator and confirmed by the learned Single Judge.

33. The Division Bench of this Court, in **National High Authority v. Italian Thai Development Public Company Limited: 2014 (1) Arb.LR 41 (Delhi) (DB)**, to which one of us (Badar Durrez Ahmed, J) was a party, held as under:

“We do not find any error in the reasoning adopted by the learned single Judge or the conclusion arrived by him. The findings of the Tribunal fall within the realm of pure findings of fact. There is nothing on record to establish that the findings were of such a nature as would move the conscience of the court or that there was any error of fact which would result in a monumental miscarriage of justice. We may refer to the decision of a Division Bench of this court in the case of **Food Corporation of India v. Shanti Cereals Pvt. Ltd., 2010 (3) ARB. LR 296 (Del.)**

=====

(DB). In the said decision the Division Bench of this court, in the context of examination of factual pleas raised before the court, observed as under:-

“7. Further, the argument of learned senior counsel for the appellant that the rice supplied by FCI to the respondent was not damaged and, in fact, was of a fine quality, cannot be sustained by us. As has been consistently held by this court, as well as the Hon'ble Supreme Court, the forum to raise factual pleas and contentions in an arbitration matter is only the arbitral tribunal. It is against the propriety of the legal regime, as well as the mandate of law set out in Section 34 of the Arbitration and Conciliation Act, 1996 that the courts in objection (and more so in appeal under Section 37) should entertain the arguments that are purely factual in nature. There is no gainsaying that the arbitral tribunal is the master of the factual arena and has the right to even go wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice.

(underlining added)

34. This Court in **National Highways Authority of India (supra)** has laid down that the Arbitral Tribunal is the master of the factual arena and has the right to even go wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error

would result in a monumental miscarriage of justice. The court would not, in objections under section 34 and more so in an appeal under section 37, entertain arguments that are purely factual in nature.

35. Further, in **Steel Authority of India v. Gupta Brothers Steel Tubes Limited: 2009 10 SCC 63**, the Supreme Court has laid down that an error relatable to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

36. Thus, clearly the finding returned by the Arbitrator with regard to the payment and period of AMC is purely factual in nature. The Arbitrator has returned the said finding after appraisal of the evidence of the parties. The finding has not been interfered with by the learned Single Judge. We, sitting in appeal under section 37 of the Act are not inclined to interfere with the same.

37. Learned counsel for the appellant placed reliance on the decision of the Supreme Court in **Oil and Natural Gas Corporation**

Limited v. Western GECO International Limited: (2014) 9 SCC 263

to contend that a decision which is perverse or so irrational that no reasonable person would have arrived at the same would not have sustained in a Court of Law and if on facts proved before the Arbitrator, the Arbitrator fails to draw an inference which ought to have been drawn or have drawn an inference which is on the fact of it, untenable resulting in miscarriage of justice, the adjudication made by the Arbitrator would be open to challenge and may be cast away or modified depending upon whether the offending part is severable from the rest. The reliance is misplaced as the said judgment is clearly not applicable in the facts of the present case. We, as also the learned Single Judge, found that the view taken by the Arbitrator is a plausible view and the inference drawn by the Arbitrator is not an inference which could not have been drawn or is untenable in the facts as proved. The view taken by the Arbitrator is a plausible view which could have been taken in the facts of the present case.

38. Further the judgment in the case of **DDA v. R.S.Sharma & Co.: 2008(13) SCC 80** relied upon by the learned counsel for the appellant to contend that award which is against the terms of the contract or prejudicial to the rights of the parties is open to interference by the court under section 34(2) of the Act, is also not applicable in the facts of the present case inasmuch as the view taken by the Arbitrator is not against the terms of the respective contract or prejudicial to the rights

=====

of the parties. The view taken is a plausible view and, in our considered opinion, does not call for any interference.

39. In view of the above, we find no merit in the appeal. The appeal is, accordingly, dismissed with no orders as to costs.

SANJEEV SACHDEVA, J.

FEBRUARY 20, 2015
SV

BADAR DURREZ AHMED, J.

