

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

Judgment Reserved on: April 07, 2015

% *Judgment Delivered on: April 17, 2015*

+ **FAO(OS) 391/2012**

HIMACHAL FUTURISTIC
COMMUNICATIONS LTD.

..... Appellant

Represented by: Mr.Bishwajit Bhattacharya,
Sr.Advocate instructed by Mr.Sumant
De and Mr.Chandrashekhar
Bhattacharya, Advocates

versus

BHARAT SANCHAR NIGAM LTD.

..... Respondent

Represented by: Mr.Vibhakar Mishra, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. Bharat Sanchar Nigam Ltd. (hereinafter referred to as BSNL) invited offers, as per terms notified in the tender documents, for supply of 1125 systems each of 2/15 and 4/36 Analogue MAR System of UHF Band along with accessories. The technical bids were opened on June 20, 1995. Himachal Telematix Ltd., name later on changed to Himachal Futuristic Communications Ltd. (hereinafter referred to as HFCL) was found to be technically and commercially eligible to bid.

2. Many other parties were also held technically qualified, and since the quantities to be supplied were large and the tender documents had required the tenderers to mention the quantity they would supply; and of course the

price, BSNL accepted the price bids of various parties, including Phoenix Telecom Ltd., ARM Hyderabad, United Telecom Ltd. and M/s MIC Electronics Ltd., apart from HFCL. Post negotiations the contract with each party was finalized at the same price.

3. As regards HFCL, BSNL issued a purchase order on February 22, 1996 for supply of 148 numbers of 4/36 MAR Systems and before that HFCL furnished a performance bank guarantee in sum of ₹42,00,000/- (Rupees Forty Two Lacs only). The purchase order accepted the bid for the goods to be supplied @ ₹10,11,360/- (Rupees Ten Lacs Eleven Thousand Three Hundred and Sixty only). Since frequencies for the systems had yet not been finalized by BSNL, the delivery schedule mentioned in the purchase order was three months from the date of issue of purchase order or two months from the date of issue of frequency.

4. Vide clause 13.1 of Section III of the General Conditions of Contract, BSNL retained the power to make changes within the general scope of the contract regarding drawings, designs or specifications where the goods were to be specifically manufactured, the method of transportation or packaging, the place of delivery or the service to be supplied by HFCL.

5. Clause 12 under Section III of the General (Commercial) Conditions of Contract, pertaining to the price, stipulated as follows:-

“12. PRICES :

12.1 (i)

(a) Prices charged by the supplier for Goods delivered and services performed under the Contract shall not be higher from the prices quoted by the Supplier in his Bid.

(b) In the case of revision of Statutory Levies/Taxes during the supply period, the Purchaser reserves the right to ask for

reduction in the prices.

(ii)

(a) Price once fixed will remain valid for the period of delivery. Increase and decrease of taxes and other statutory duties will not affect the price during this period.

(b) In case of delayed supplies after delivery period, the advantage of reduction of tax/duty would be passed on to the purchaser and no benefit of increase in price will be permitted to the supplier if there is any increase in tax/duty.”

6. The General Conditions of the Contract, vide clause 16.2, empowered BSNL to levy liquidated damages equal to ½% of the value of the delayed supply for each week or part thereof, subject to maximum of 5% of the value of the delayed supply.

7. On June 04, 1996, BSNL furnished frequency details and revised consignee details, but in respect of only 146 numbers of 4/36 MAR Systems. For the balance 2 the frequency details were furnished on August 28, 1996. On August 09, 1996 HFCL informed BSNL that it had received its letter dated June 04, 1996 on June 26, 1996 and accordingly it requested that the delivery period of the 146 systems be treated as commencing from June 26, 1996.

8. No delivery being made within the two months' period, on October 09, 1996, albeit with levy of liquidated damages, delivery period was extended by two months from October 09, 1996. In the said letter it was mentioned by BSNL that the price clause was amended to read as follows:-

<i>S.No.</i>	<i>Type</i>	<i>Qty</i>	<i>Rate (provisional)</i>	<i>Value (Provisional)</i>
<i>1.</i>	<i>4/36</i>	<i>148</i>	<i>9,10,224/-</i>	<i>13,47,13,152/-</i>
			<i>Total:-</i>	<i>13,47,13,152/-</i>

(Rupees Thirteen crores forty seven lakhs thirteen thousand one hundred fifty two only).

The prices indicated above are provisional and subject to adjustment of the prices approved by DOT for the year 1996-97."

9. It was indicated in the letter that the extension granted was with levy of Liquidated Damages. Supplies not being effected, on January 01, 1997 time was extended by BSNL up to February 15, 1997, with levy of Liquidated Damages; clearly indicating in the letter that the price paid would be reduced to ₹9,10,224/- (Rupees Nine Lacs Ten Thousand Two Hundred Twenty Four only), (The price indicated in the letter dated October 09, 1996). It was clarified that the prices are provisional. Thereafter, an identically worded letter was written extending the time for supplying the contracted equipment on February 18, 1997. On June 23, 1997, while further extending the period of supply, it was indicated that the prices stood reduced to ₹10,03,398/- (Rupees Ten Lacs Three Thousand Three Hundred Ninety Eight only) for deliveries made upto February 28, 1997; to ₹9,03,058/- (Rupees Nine Lacs Three Thousand Fifty Eight only) for deliveries made upto March 16, 1997, and ₹5,35,960/- (Rupees Five Lacs Thirty Five Thousand Nine Hundred Sixty only) for deliveries made beyond March 17, 1997. It was indicated that even these reduced prices were provisional.

10. Supplies not being made by other parties as well, similar letters, but on different dates, were written by BSNL to said parties reducing the price to ₹10,03,398/- (Rupees Ten Lacs Three Thousand Three Hundred Ninety Eight only) for deliveries upto February 28, 1997; to ₹9,03,058/- (Rupees Nine Lacs Three Thousand Fifty Eight only) for deliveries made upto

March 16, 1997, and ₹5,35,960/- (Rupees Five Lacs Thirty Five Thousand Nine Hundred Sixty only) for deliveries made beyond March 17, 1997. It was also indicated to said parties, as was indicated to HFCL, that the reduced prices were provisional.

11. HFCL supplied 68 systems upto August 28, 1997 and proposed to deliver the balance 80, as claimed by it, but did not do so because the prices were reduced as per letter dated June 06, 1997 to ₹5,35,960/- (Rupees Five Lacs Thirty Five Thousand Nine Hundred Sixty only), and that too provisionally. It finally affected the supply of the balance 80 and raised invoices for entire 148 number of goods.

12. The representative body of telecommunication equipment suppliers named Telecom Equipment Manufacturer Association of India took up the matter with BSNL in a representative capacity as per its letter dated July 14, 1997, giving reasons as to why the prices could not be unilaterally altered.

13. On May 26, 1998, BSNL sought to recover from HFCL ₹43,23,549/- (Rupees Forty Three Lacs Twenty Three Thousand Five Hundred Forty Nine only) alleging over payment made and in respect of which BSNL priced the supplies at the reduced rates indicated by it from time to time while extending the period of delivery.

14. Completing the delivery of all 148 units, at a unit price of ₹10,11,360/- (Rupees Ten Lacs Eleven Thousand Three Hundred Sixty only) HFCL raised the final bill in sum of ₹19,33,23,272/- (Rupees Nineteen Crores Thirty Three Lacs Twenty Three Thousand Two Hundred Seventy Two only) and after adjusting the amounts received demanded balance sum of ₹6,12,86,488/- (Rupees Six Crores Twelve Lacs Eighty Six Thousand Four Hundred Eighty Eight only). The straw collapsed when BSNL sought to invoke the bank guarantee, invocation whereof was stayed

by this Court.

15. Parties proceeded to arbitration.

16. Filing a Statement of Claim, HFCL pleaded facts to shift the burden of delay in making supply on the shoulders of BSNL and pleaded that under the contract the price was fixed and was subject to variation only in respect of excise duty and other taxes to be paid. It pleaded that the reduced prices were offered by BSNL based on tenders submitted and finalized for other such supplies; highlighting that with advancement of technology, for subsequent tenders the prices were lowered. It was additionally pleaded that another reason for the lower prices was the linkage between the equipment supplied and matching frequency. The claim made before the learned Arbitrator was to direct BSNL to make payment for the entire supply at the contract price of ₹10,11,360/- (Rupees Ten Lacs Eleven Thousand Three Hundred Sixty only) per unit without levy of Liquidated Damages and that it be declared that BSNL was not entitled to invoke the bank guarantee.

17. In the pleadings of HFCL a reference was made to an award dated July 10, 2000 pronounced by Justice P.A.Choudary (Retd.) in an identical dispute between M/s MIC Electronics Ltd. and BSNL. The dispute pertained to the same tender in respect of such supplies which were allocated to said company. The said company raised the same dispute of price reduction.

18. In the reply filed to the Statement of Claim filed by HFCL, BSNL pleaded that it was justified in lowering the price while extending delivery period and pleaded that said price was fixed keeping in view that under new tenders lower prices were offered. It pleaded that HFCL did not refute the letters dated October 09, 1996, January 01, 1997 and other letters written by it to extend the time for making the supply but at the reduced price. Though

not expressly BSNL pleaded novation of the price.

19. In the award dated July 10, 2000 pronounced by Justice P.A.Choudary (Retd.) it was held that clause 12 under Section III of the General (Commercial) Conditions of Contract the only power to vary the price was contingent upon increase or decrease of taxes and other statutory duties and vide clause 12.1 (ii)(b) it was clearly indicated that for supplies beyond the delivery period if there was a reduction in tax/duty the same shall be passed on to BSNL, but no benefit of increase in price occasioned by increase in tax/duty shall be available to HFCL. Thus, it was held that BSNL could not unilaterally reduce the price in the extended period of supply by linking the same to the price offered by other parties for different supplies. In the award it was highlighted that levy of liquidated damages condone the default of delay. It was further highlighted that on the one hand liquidated damages were levied on the basis of the contract price and on the other hand reduced prices were offered. The award terminated holding that M/s MIC Electronics Ltd. was liable to pay the liquidated damages levied but was entitled to receive payment at the contractually agreed rates, there being no evidence of decrease in statutory duties and taxes.

20. The arbitration proceedings between HFCL and BSNL terminated in a similar award dated June 01, 2006 passed by Shri N.K.Yadav, the General Manager (Marketing) of BSNL. For the 148 units supplied by HFCL it has been held in the award dated June 01, 2006 that HFCL is entitled to the payment at the contract rate and that BSNL was entitled to the liquidated damages for supplies made beyond the original contract stipulated date. A perusal of the order would show that after noting the relevant facts, with paragraphs number repeated again and again, in paragraphs 8 to 13 of the award at pages No.34 to 37 the reasoning is as under:-

“8. On going through all the records placed before the Arbitrator it is clear that the respondent has not terminated the contract as per the terms and conditions of the contract nor did Respondent purchase the goods from the open market incurring any excess expenditure making the claimant liable to reimburse such an excess amount. The terms and conditions of the contract were alive till the supply received by the respondent and these cannot be unilaterally altered or reduced as against the agreed prices by the respondent. Such type of unilateral change is not permissible in the eyes of law. The respondent is a model government department and it should act in good faith. The supplies, which have been accepted with liquidated damages, cannot be subject to the imposition of any additional penalty by way of reduction in price. Reduction in price after the scheduled delivery period is a type of additional penalty, which is impermissible in law.

9. All the extensions were given on the request of applicant against the P.O. of dated 22.2.96. However, these extensions, with reduced prices, in addition to levy of LD were unilateral decisions of the respondent; it could not be considered that both the parties had freely consented to it. The claimant had never agreed to the condition of the reduction in prices.

10. It is also found that extension was required due to delayed supply of frequencies by the respondent. The frequencies were allotted as late as upto 30.12.97 against the purchase order of 22.2.96.

11. The submission of the respondent that extension of time with reduced prices was their counter offer, in response to the applications made by the claimant for extension of time, and supply of the equipment by the claimant after such extension with reduction in prices amounts to acceptance of reduced prices by the claimant and that such conduct of the claimant resulted into novation. However, this argument cannot be accepted because a novation itself is a contract; it is a new contract creating new contractual relations and so it should have all the elements and ingredients of de novo contract. Thus in order to have a valid novation, a legal subject matter,

competent parties, mutual agreement or meeting of the minds and a sufficient consideration, are necessary.

12. The claimant also denied the above novation on the ground that terms of contract provides for prices as stated in the Purchase Order to remain firm during the entire period of contract, (except for adjustment of changes in statutory duties during extended delivery period), the respondent fixed provisional prices for deliveries from the claimant and later firmed up the same by unilaterally reducing the price of equipment so received by it and withheld an amount of approximately ₹6.13 crores which was lawfully due and payable to the claimant with interest. The novation exists only by reason of an agreement, in the absence of such an agreement there may be no novation by the substitution of a new obligation between the same parties. It is necessary in order to affect a novation, a valid consideration has to be introduced into the transaction. The required consideration should be a reasonable one. In the instant case, the aforesaid essential ingredients to effect novations are missing. The communication dated 23.6.97 is not result of any negotiation between the claimant and respondent. It is a unilateral communication made by the respondent in exercise of its executive power. It is peremptory. It cannot therefore, be considered that both parties have freely consented to it without which there can be no novation. Under the above circumstances, claimant submitted that the objection was raised by the TEMA on 14.7.97 for revision of prices. The claimant also raised objection vide its letter dated 25.7.97 to Chairman, Telecom Communication. Moreover, the communication dated 23.6.97 was provisional and not firm and could not qualify as a valid officer.

13. It is observed that the respondent did not observe even the minimum formalities of holding negotiation with the applicant while passing the order 23.6.97. The facts and circumstances of this case speaks that the nature of the contract and the method of its performance to which I have mentioned above shows that the claimant was not in a position to discontinue the deliveries due to import of components in bulk

at higher rates prevailing over a year back, could not supply their goods in time due to non intimating the frequencies in time by the respondent. There was no warrant either in the text or in the context or in the intendment of the parties to the contract, for the reduction in the prices, effected by the respondent's communication dated 23.6.97. This is clearly unjustified and an untenable act. This is an inequitable conduct on the part of the respondent. It is a case of economic coercion. The respondent was having full power to short close the contract as per terms and conditions of the contract and could have procured the equipment from the new suppliers who have given/accepted lower price of the equipment."

21. Taking note of the fact that as per clause 12 under Section III of the General (Commercial) Conditions of Contract, during the extended period of delivery benefit of reduction in taxes and statutory levies had to be given to BSNL, the learned Arbitrator has, while upholding the levy of liquidated damages awarded the price to HFCL for the 148 units supplied at the contract rate of ₹10,11,360 (Rupees Ten Lacs Eleven Thousand Three Hundred and Sixty only) for deliveries made up to July 22, 1996, at the rate of ₹10,03,398/- (Rupees Ten Lacs Three Thousand Three Hundred and Ninety Eight only) for deliveries made thereafter up to February 28, 1997 and thereafter at the rate of ₹9,03,058/- (Rupees Nine Lacs Three Thousand and Fifty Eight only) for the reason there was a reduction in custom duty and excise in the said time duration.

22. Whereas HFCL accepted the award, BSNL challenged the award by filing objections thereto under Section 34 of the Arbitration and Conciliation Act, pleading that there was a novation of the contract when while granting extension of time BSNL reduced the prices and to which reduction HFCL did not protest.

23. In para 19 of the impugned order, the learned Single Judge has

correctly summarized the findings returned by the learned Sole Arbitrator, and we reproduce the same as have been pithily crystallized by the learned Single Judge. They read as under:-

“(i) In the event of delay in effecting supplies as per the PO, there were provisions for (a) forfeiture of the PBG furnished by the supplier (b) imposition of LD and (c) termination/short closure of the contract for default. Even if the extension of time for delivery period was granted the purchaser would be entitled to recovery of ½% of the value of the delayed supply. There was nothing in the contract which permitted imposition of any additional or further financial sanctions by way of reduction in the price.

(ii) Imposition of LD tantamounted to Condonation of delay in HFCL making supplies and created an obligation on the BSNL for making payment on delivery of the goods within the extended delivery period.

(iii) BSNL had not terminate the contract as per its terms and conditions. Further, BSNL did not purchase goods from the open market incurring expenditure which had to be reimbursed by HFCL.

(iv) The unilateral change in the terms and conditions of purchase was not permissible. The supplies which had been accepted with LD could not be subject to the imposition of additional penalty by way of reduction in price. The reduction in price was in the nature of additional penalty which was not permissible in law. HFCL had never agreed to reduction in prices.

(v) Extension was required only due to delayed supply of frequencies by BSNL. The frequencies were allotted as late as 30th December 1997 against PO of 22nd February 1996.

(vi) Since there was no pre consent of both the parties to the altered condition of supply, there was no novation. The communication dated 23rd June 1997 was a provisional one and

was not firm and, therefore, not a valid offer. There was no justification in BSNL reducing the prices unilaterally and that “this is clearly unjustified and an untenable act. This is an inequitable conduct” and “it is a case of economic coercion”. During the extended delivery period, prices could have been reduced only on account of deduction in taxes and duties.”.

24. Before the learned Single Judge, whereas HPCL relied upon the award in favour of M/s. ARM Hyderabad pronounced by Justice P.A.Choudary (Retd.) as also to the decision of the Andhra Pradesh High Court in the writ petition filed by United Telecom Ltd., which award and which decision were affirmed till the Supreme Court; BSNL relied upon a Division Bench judgment of the Karnataka High Court concerning an award in favour of Phoenix Telecom Ltd. which was upheld by the learned Single Judge, but the Division Bench remitted the matter to the learned Arbitrator noting that the issue of novation of the contract was not discussed in the award.

25. Returning a finding in paragraphs 25 to 29 of the impugned decision that the decisions by the Andhra Pradesh High Court and the Karnataka High Court were pronounced before the decision of the Supreme court in the decision reported as 2003 (4) SCALE 92 ONGC Vs. Saw Pipes Ltd., the learned Single Judge opined that said decisions would therefore be of no help. Observing that the reasons given by the learned Arbitrator for the conclusions arrived at were laconic, vide impugned order dated May 30, 2012, in paragraphs 31 to 33, the learned Single Judge has allowed the objections filed by the BSNL and has set aside the award, without noticing that the entire award was not under challenge and could not be set aside in its entirety. Such part of the award which was in favour of BSNL and was not challenged by HFCL could not be set aside. We treat the impugned

order to mean that the award has been set aside limited to such part of it which is in favour of HFCL. Being relevant we note paragraph 31 to 33 of the impugned order. They read as under:-

“31. In the present case, clearly at every stage HFCL was conscious of the conditionality attaching to the extension of time for making delivery of the systems as undertaken by it under the PO. The learned Arbitrator erred both in law as well as on facts in holding the reason for the delay in delivery was the delay in supply of frequencies by the DOT. As noticed hereinbefore in respect of 146 units, the frequencies were furnished on 4th June 1996 and for two other systems on 28th August 1996.

32. Secondly, the learned Arbitrator does not have appear to have discussed the correspondence which showed that at every stage, HFCL was conscious that it was granted extension of time to make supplies but at a reduced price. The reliance sought to be placed on the protest letters dated 14th July and 25th July 1997 of the Telecom Equipment Manufacturers Association of India (TEMA) is not helpful to HFCL considering that it subsequently wrote to BSNL on 28th august 1997 offering a revised delivery schedule whereby the supplies were to be completed by 31st October 1997. There was no whisper of protest in the said letter about the reduced price. The same was the situation as regards the letters dated 22nd October, 4th November 1997 and 15th November 1997. What is also significant is that the last three letters were written after the DOT had communicated to all CGMs and suppliers about the finalization of the tender opened on 17th March 1997 and the determination of the firm unit price of ₹ 5,89,338.22. BSNL granted extension of time till 15th January 1998 subject to levy of LD and subject to the supplies being made in terms of the new technical specifications. In continuation of the said letter BSNL wrote to HFCL on 12th December 1997 intimating that the supply would be made at the unit rate of ₹ 5,89,338.22. The above correspondence unmistakably shows that the original contract conditions stood modified by consent of parties and the clauses concerning time and price stood amended and were

accepted without protest by HFCL. The learned Arbitrator completely overlooked the legal position flowing from Section 62 of the Contract Act and the law explained in **Bhagwati Prasad Pawan Kumar v. Union of India**. The impugned Award erroneously holds that the principles of novation were not attracted in the instant case. The learned Arbitrator committed a patent illegality in not even discussing the above correspondence and therefore erred in concluding that BSNL had acted arbitrarily in terminating the contract. The facts unmistakably show that it was HFCL which was in breach of the conditions of the contract and failed to deliver the contracted quantities within the time stipulated despite extensions granted for that purpose.

33. Thirdly, the conclusions of the learned Arbitrator that the act of SNL in reducing the prices “unilaterally” was “clearly unjustified and an untenable act”, “an inequitable conduct” and a case of “economic coercion” was without any basis whatsoever either in fact or in law. It is settled law that in the realm of contract, and particularly in the context of arbitration proceedings to determine if there was a breach of contract, there is no room for application of the principles of reasonableness and non-arbitrariness flowing from Article 14 of the Constitution. Where a party accepts a conditional of extension of time for completing supplies, such party cannot be heard to later plead arbitrariness or “economic coercion”. This was explained by the Supreme Court in **Assistant Excise Commissioner v. Isaac Peter (1994) 4 SCC 104** as under (at p.124):

“26. Learned Counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication?.... Doctrine of fairness or they duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and

to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties..... We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contract (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts.”

26. The learned Single Judge has found that the learned Arbitrator has not discussed the correspondence (refer para 32 of the impugned decision) which according to the learned Single Judge evinced that HFCL was conscious that while granting extension of time to make supplies the price was reduced. Further, (refer para 33 of the3 impugned decision) the learned Single Judge has found that principles of reasonableness and non-arbitrariness flowing from Article 14 of the Constitution were read into the realm of contract by the learned Arbitrator, for which the learned Single Judge has referred to the expression *‘This is clearly unjustified and an untenable act. This is an inequitable conduct on the part of the respondent.*

It is a case of economic coercion' used by the learned Arbitrator in paragraph 13 of the award.

27. The decision of the Supreme Court in Saw Pipes' case holds that an award would be liable to be set aside under clause (ii) of sub-Section 2(b) of Section 34 of the Arbitration and Conciliation Act, 1996 if it ignores a relevant statutory law or judicial decisions concerning the same. The decision further holds that an arbitrator is bound by the terms of the contract and is duty bound to enforce the same and if he does not do so the award would suffer from the vice of breach of mandate by the learned Arbitrator.

28. The facts noted hereinabove would show that to all suppliers of the equipment, pursuant to the same notice inviting tender and thus terms of the contract being identical, while extending period of delivery, BSNL simultaneously levied liquidated damages as also indicated a reduction in the price of the undelivered units. This stand was reiterated by BSNL each time when it further extended the delivery period. Neither party made any protest when these letters were received, but the apex body : Telecom Equipment Manufacturer Association of India took up the issue of unilateral reduction in the price by BSNL by applying the price at which tenders in future were accepted. The association pointed out that with advancement in technology the foreign component parts could be sourced cheaper and that the contracts finalized pursuant to the bids which were opened on June 20, 1995 resulted in the suppliers placing orders for parts with foreign suppliers at the then prevailing rate.

29. The two rival points which arose for consideration have been succinctly captured by Justice P.A.Choudary (Retd.) in his award dated July 10, 2000; and it had to be because an experienced retired judge of a High Court was the author of the award. The reasoning is in the sequence which

one finds in judicial opinions. The view point projected by BSNL was that when it extended the time for delivery, and in the case of HFCL the date being October 09, 1996, it clearly indicated that the price would be reduced. This was indicated each time when time for making delivery was further extended. Never ever did any party protest to the price being reduced. It was thus pleaded by BSNL that since the contract was for supply of goods, time was of the essence of the contract, if the goods were not supplied within the contract stipulated time, the contract could have been terminated by it or it could have agreed to its extension on terms. While agreeing to extend the time it set the term of the price being reduced and that neither supplier protested to the price reduction and by their act of making further supplies evinced their intention to agree to the price reduction and hence it was a case of novation of the contract attracting Section 62 of the Contract Act, 1872. The other pole projected by the suppliers, including HFCL, was that under clause 12 of Section III of the General (Commercial) Conditions of Contract the price was firm and subject only to revision of statutory levies and taxes, for or against either party and vide clause 12(ii)(b) in case of delayed supplies after delivery period, the advantage of reduction of tax/duty alone had to be passed on to BSNL without the benefit of increase thereof being permitted in favour of the supplier. It was thus argued that the contract had an in built provision regarding the price in case of delayed supplies after the delivery period. To this argument was dovetailed a limb : that BSNL could not recover liquidated damages at the contract price even for the delayed period supply requiring the period to be further extended but pay the price for said period at the reduced price.

30. The award dated July 10, 2000 pronounced by Justice P.A.Choudary (Retd.) has reasoned with the said two argument and has accepted the

argument by the supplier therein.

31. The instant award has also dealt with the same issue, but with lack of clarity in the reasoning, probably for the reason the learned Arbitrator is a technocrat. A perusal of paragraph 11 and 12 of the impugned award would show that the learned Arbitrator has discussed whether the contract was novated. It may be true that after noting the entire correspondence exchanged between the parties followed by noting the arguments advanced by the parties, the learned Arbitrator has not re-penned the same for the purpose of an analysis, but we do find a reasoning, which is correct in law, that novation to a contract must evince a bilateral consent. It is thus not a case where, as held by the learned Single Judge, the learned Arbitrator has ignored the law of the land. The learned Arbitrator has clearly applied the concept of a contract being capable of novation as recognized by Section 62 of the Indian Contract Act, 1872; but has found none. In paragraph 12 of the award the learned Arbitrator has clearly held that the terms of the contract provide for price variation even during the extended period of the contract and thus has bound BSNL to the same.

32. The line of reasoning by the learned Arbitrator in the instant case conforms with the line of reasoning adopted by Justice P.A.Choudary (Retd.), albeit very weakly stated. Said award has been upheld till the Supreme Court.

33. The expression '*this is clearly unjustified and an untenable act. This is an inequitable conduct on the part of the respondent. It is a case of economic coercion*' used by the learned Arbitrator is a surplusage and does not form part of the reasoning of the award. It is more by way of comment regarding the conduct of BSNL. The learned Single Judge has overlooked the distinction between a reasoning in an award and a surplus comment

made on the conduct of a party to the award.

34. Now, the reasoning of the learned Arbitrator in the impugned award, which has been more clearly stated in the award by Justice P.A.Choudary (Retd.) is a reasonable and a probable view and surely not a view which suffers from such unreasonableness that it would be called perverse. Two rival view points, one on facts and the other on the interpretation of the contract have been gone into, and with reasons stated, the latter accepted.

35. It was thus not a case where the view taken by the learned Arbitrator was liable to be set aside in view of the decision in Saw Pipes' case (supra).

36. Noting that during the extended period of supply price reduction benefit on account of reduction in customs, duty and excise has been granted by the learned Arbitrator in favour of BSNL and simultaneously the action of BSNL to recover liquidated damages at the contract price has been upheld by the learned Arbitrator, we allow the appeal and set aside the impugned decision dated May 30, 2012. OMP No.427/2006 filed by BSNL is dismissed.

37. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

APRIL 17, 2015
skb/mamta