

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

% **Judgment reserved on: 29th March, 2016**
Judgment pronounced on: 9th May, 2016

+ **O.M.P. No.690/2014**

BWL LTD Petitioner
Through Mr.Jayant K. Mehta, Adv. with
Ms.Bharti Badesra, Adv.

versus

UOI & ANR Respondents
Through Mr.Kirtiman Singh, CGSC with
Mr.Waize Ali Noor & Mr.Gyanesh
Bhardwaj, Advs. for R-1.
Mr.L.B.Rai, Adv. with Mr.Mohit
Kumar Sharma, Adv. for R-2.

+ **O.M.P. No.691/2014**

BWL LTD Petitioner
Through Mr.Jayant K. Mehta, Adv. with
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versus

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Through Mr.Kirtiman Singh, CGSC with
Mr.Waize Ali Noor & Mr.Gyanesh
Bhardwaj, Advs. for R-1.
Mr.L.B.Rai, Adv. with Mr.Mohit
Kumar Sharma, Adv. for R-2.

+ **O.M.P. No.1012/2014 & I.A. No.15907/2014**

BHARAT SANCHAR NIGAM LTD Petitioner
Through Mr.L.B.Rai, Adv. with Mr.Mohit
Kumar Sharma, Adv.

versus

M/S B.W.L. LIMITED

..... Respondent

Through Mr.Jayant K. Mehta, Adv. with
Ms.Bharti Badesra, Adv.

+

O.M.P. No.1013/2014 & I.A. No.15909/2014

BHARAT SANCHAR NIGAM LTD

..... Petitioner

Through Mr.L.B.Rai, Adv. with Mr.Mohit
Kumar Sharma, Adv.

versus

M/S B.W.L. LIMITED & ANR

..... Respondents

Through Mr.Jayant K. Mehta, Adv. with
Ms.Bharti Badesra, Adv.

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this judgment, I propose to decide the abovementioned four petitions filed by the parties as mentioned above under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') who have challenged the common Award dated 24th March, 2014 passed by one Sh.Niranjan Singh, sole Arbitrator, in respect of disputes relating to purchase order dated 27th July, 2009 against the tender dated 10th September, 1998 by Department of Telecommunications (DOT) and Bharat Sanchar Nigam Ltd. (BSNL) (hereinafter referred to as the "DOT/BSNL/ Government").

2. The DOT is a Government of India Enterprise having its registered office at Sanchar Bhawan, 20, Ashoka Road, New Delhi 110 001.

3. Bharat Sanchar Nigam Ltd. is a Government of India Enterprise and has been made in the party in the arbitration proceeding as it had taken over the Union of India w.e.f. October 1, 2000 who is having its registered office at Bharat Sanchar Bhawan, Janpath, New Delhi-110 001.
4. M/s. BWL Ltd. (hereinafter referred to as “BWL/company”) is a company engaged in manufacturing of Optic Fibre Cable
5. Brief facts of the case are that the Government floated a tender No.MM/OF/0611998/000146 dated 10th September, 1998 for procurement of 2292 Kms. of 6F Aerial Optical Fiber Cable alongwith accessories and fixtures.
6. The items accessories and fixtures had to be procured by the bidder only through the type approved sources and the supplies were to be made within two to six months from the date of the Purchase Order.
7. At that time, there was no approved manufacturer available for the same and BWL along with some other bidders pointed out this anomaly to the Government to which the Government by letter dated 7th October, 1998 replied that “.....*for accessories and fixtures, the bidders have sufficient time before the supply is to start and they must get type approval within next three month. If there is any problem in getting type approval within this time, the matter will be reviewed by DoT at that time.*”
8. After receiving the assurance, BWL as per its case submitted its offer through letter No.BWL/MKT/147/98-99/1228 on 14th October 1998 and the tender was opened on 15th October 1998 and it applied for type approval on 17th November, 1998, the source from where it had to procure the fixtures for the Purchase Order.

9. The Government thereafter issued an Advance Purchase Order No.CT/APO/120/98-99 to BWL on 4th January 1999 for supply of 1146 Kms. of 6F Aerial Optical Fibre Cable with accessories. BWL gave its acceptance to the Advance Purchase Order dated 4th January, 1999 by a letter dated 22nd January, 1999 and also furnished a bank guarantee in the sum of Rs.30,22,000/- valid up to 21st January, 2001, but by its letter, BWL also informed that till that time no type approval was available and the said fact should be kept in mind while prescribing delivery period in purchase order. DOT issued 1st P.O. No.CT/PO/096/98-99 dated 2nd February, 1999 for 6F, OFC along with accessories and fixtures with rates and quantities prescribed and delivery period of 4 months i.e. upto 1st June, 1999. The BWL had also apprised DOT about non availability of any type approval in the market and as such to extend the delivery period by 8 months vide its letter dated 5th February, 1999 and 5th March, 1999. The said company again requested DOT to extend the delivery period vide its letter dated 15th April, 1999, 27th April, 1999, 26th May, 1999 and 11th June, 1999 by another 4 months as the type approval for fixtures was still not available.

10. BWL, the source from where it had to procure the fixtures for the Purchase Order in question had applied for type approval including that of infrastructure assessment on 17th November, 1998. Type approval was granted by TEC on 2nd July, 1999 i.e. after a period of almost eight and a half months whereas the original delivery period was only four months which included the time to be taken towards obtaining the Type Approval as well. The said company by its letter dated 5th August, 1999 and 18th August, 1999 informed about receipt of type approval of fixture by its

suppliers and requested for extension of delivery schedule by another 4 months. Subsequently during bulk production of the fixtures, it was observed that there were certain discrepancies in the parameters of the specifications of the GR of fixtures with the effect that desired results for the products were not forthcoming. The matter was informed to TEC for necessary modifications/ amendments in specs, as well as to DoT by its letter dated 7th January, 2000 and 11th January, 2000. Meanwhile, DOT by its letter dated 6th January, 2000, for the first time (after a lapse of 7 months and 5 days) extended the delivery period upto 27th February, 2000, without levy of liquidated damages but at provisional rates of 90% of the prices indicated in the subject tender.

11. The said company by its letter dated 2nd February, 2000 apprised the Government that the procedure of getting amendment from TEC was not done and it would take some more time and requested DOT to extend the delivery period of another 3 months i.e. upto 31st May, 2000 without liquidated damages. The final price for 1999-2000 were notified by the Government by its letter dated 8th February, 2000 for supplies made upto 28th February, 2000.

12. At last TEC issued the required amendment in the specification on 10th February, 2000. The company kept requesting the Government for extending the delivery period upto 31st May, 2000 without levy of liquidated damages. The company's inventory of 6F Aerial Cable of the sum of Rs.7 to 8 crores was blocked and it could be liquidated on receipt of the extension of the delivery period.

13. By letter dated 19th May, 2000, the Government extended the delivery period but with liquidated damages. The Government while

granting extension of delivery period unilaterally also made delivery subject to price reduction i.e. at provisional prices, which was subject to further adjustment.

14. By letter dated 19th May 2000, the Government insisted to impose liquidated damages as well as change the contractual price unilaterally though terms of contract did not permit imposition of two penalties simultaneously for delay in supplies. This plea was without prejudice that the Department cannot deduct the amount under any of the heads as alleged by BWL who protested the same. On delivery of supplies, the Government levied liquidated damages on the supplies totaling to Rs.39,63,730/-. Further, the Government simultaneously and unilaterally imposed lower rates on the supplies made, thereby deducting further a total amount of Rs. 22,02,391/- from what was due to the company as per the original contract rates.

15. BWL after successful completion of the Purchase Order within the extended delivery period, as per its case, was entitled to the price of the goods supplied at the agreed rates in the sum of Rs.9,10,53,834/- as the imposition of liquidated damages as well as price reduction. It is submitted by BWL that the price reduction was also illegal and contrary to terms of contract for supplies. The relevant clauses 11.3(i) (b), 12(ii), 13.1, 15, 16 & 18.1 of contract are relied upon by BWL during the course of hearing.

16. By 14th July, 2000 BWL dispatched all the balance quantities despite yet another amendment wanted by the Government by its letter dated 25th May, 2000, especially for Himachal Pradesh (HP). This modification and followed up of redesign of stay clamps caused held up in

supplies till 14th July, 2000. The BWL by its letter dated 25th May, 2000 and 8th February, 2001 objected to:

a) Levy of Rs. 39,63,730/- as liquidated damages and had requested the Government to extend the delivery period without liquidated damages charges as –

- i) The type approval for the product itself was available as late as 2nd July, 1999. Though P.O. was issued on 2nd February, 1999 with first delivery period upto 1st June, 1999.
- ii) There were design discrepancies in the material needing amendments in specifications, which could be received only on 10th February, 2000.
- iii) Government again asked for another amendment in specs, of stay for HP vide its letter dated 25th May, 2000, whose redesign again delayed the supplies.
- iv) The processing of extending delivery period was held up by Government upto 73 weeks all responsibility of Government.

b) Unilateral imposition of lower rates through the reduced provisional prices amounting to a total value of Rs. 22,02,391/-.

- i) For the year 2000-01, the Government finalized the prices vide its letter dated 9th November, 2000 were valid upto 31st August, 2000 much beyond the delivery period of material that was upto 14th July, 2000.

17. It was the case of the BWL that the Government was liable to pay a total sum of Rs. 39,63,730/- approximately from the date on which various deductions on account of liquidated damages were made along with interest till the date of payment. Further, the Government had made illegal deductions from payment with respect to the supplies affected by the company amounting to Rs.22,02,391/- on account of price difference. The

said unilateral deduction were made by the Government purportedly on account of illegal and arbitrary reason of budgetary impact, that too when the prices were finalized long after when the company had manufactured and dispatched the entire material under the Purchase order.

The said reduction in rates as effected by the Government was totally illegal and in breach of contractual terms and conditions and more particularly Clause 12(ii) of Section III (General Conditions of Contract). The BWL issued a legal notice dated 14th January, 2003 to the Government to repay the due amount. BWL then revoked arbitration clause vide its letter dated 31st January, 2003 addressed to D.G., DOT. The latter vide its letter dated 26th February, 2003 appointed Mr. A K Jain, as an Arbitrator.

18. The BWL before the Arbitral Tribunal had contested the recovery of liquidated damages by the Government who also filed a claim in the sum of Rs.22,02,730/- being the illegal reduction in rates by the Government plus Rs.39,63,730/- being the reduction made towards liquidated damages totaling to Rs.61,66,121/- alongwith with interest at 24% p.a.

19. The matter was reserved for publishing the award by learned Arbitrator on 6th October, 2004. BWL kept corresponding with the learned Arbitrator requesting him to pass the award and when the same was not passed, the company in August 2010 filed petition under Section 14 and 15 of the Act for termination of the mandate of the learned Arbitrator and appointment of substitute arbitrator.

20. The Court issued notice to the Government including the Arbitrator. The service of the said petition was effected on the Arbitrator on 15th

September, 2010 whereas on 21st September, 2010, the Arbitrator passed the Award who dismissed the claims of the BWL by the Award of even date, who challenged the same by filing of the petition being OMP No.771/2010 under Section 34 of the Act.

After hearing the arguments, the Court by order dated 4th July, 2012 set-aside the award to the extent whereby the Arbitrator had rejected the claim of the petitioner of Rs.22,02,730/- as the same was rejected by Arbitrator without assigning any reason.

21. BWL thereafter challenged the order dated 4th July, 2012 vide FAO(OS) No.398/2012 wherein by order dated 26th November, 2012, the Division Bench held that, *“As per the contract between the parties, the authority named to appoint an arbitrator is directed to appoint an arbitrator within four weeks of receipt of this order and other than Mr.A.K.Jain, presently working as Director (HR), BSNL. The arbitrator appointed would hear arguments with reference to the existing pleadings and evidence led before Mr.A.K.Jain and would pronounce the award within six months of entering upon reference.”*

22. In view of the said order, the Government on 12th March, 2013 appointed Sh.Niranjan Singh, as Arbitrator to adjudicate the disputes.

23. Case No.1 is with regard to refund of liquidated damages charges of Rs.39,63,730/- and the price difference of Rs.22,02,391/- and payment of interest and cost over it in a O.F.C. purchase case against tender No.MM/OF/0611998/000146 dated September 10, 1998 by DOT/BSNL from M/s BWL Ltd. Case No.2 is with respect to refund of liquidated damages charges of Rs.11,89,303/- and payment of interest and cost over it in a O.F.C. purchase order No.CT/PO/023/99-2000 dated 26th July, 1999

against tender No.MM/OF/0611998/000146 dated 10th September, 1998 by DOT/BSNL from M/s BWL Ltd. The Arbitrator has passed the award in the above said two cases in the following manner:

A. With respect to P.O. No.CT/PO/096/98-99 dated 2nd February, 1999 –

- a) The amount of Rs.39,63,730/- deducted as LD charges from M/s. BWL Ltd. be refunded back by M/s BSNL.
- b) M/s BWL Ltd is to be paid at the revised prices only during financial year 1999-2000 and 2000-01. It's claim of Rs.22,02,391/- deducted due to reduced prices is rejected.
- c) M/s BWL Ltd.'s claim for payment of accrued interest is rejected.

B. With respect to P.O. No.CT/PO/023/99-2000 dated 26th July, 1999 –

- a) The amount of Rs.1189303/- deducted as LD Charges from M/s. BWL Ltd. be refunded back to it by M/s BSNL.
- b) M/s BWL's claim for interest is rejected.
- c) Both the parties to bear their respective costs of litigation in both the case.

24. BWL has challenged the award pertaining to the case Nos.1 and 2 on limited ground of rejecting the claim of interest by filing of two sets of objections, being O.M.P. No.690/2014 and O.M.P. No.691/2014 respectively.

On the other hand, BSNL has also filed the objections under Section 34 of the Act, being O.M.P. No.1012/2013 and O.M.P. No.1013/2014, with regard to refund of liquidated damages awarded to the company by the sole Arbitrator.

25. The main arguments in both the petitions filed by BSNL through his counsel are that as per Clause No.5 of the Advance Purchase Order delivery was to be made within a period of 4 months from the date of issue of Advance Purchase order.

Relevant portion of clause No.5 of Advance Purchase Order is reproduced herein below:

“Clause 5: Delivery Schedule

The supply of the goods shall be completed within four months from the date of issue of purchase order. The delivery schedule indicated herein is firm and not subjected to any change.”

It is submitted on behalf of the BSNL that BWL had accepted the said purchase order vide letter dated 22nd January, 1999 as it is and as per terms mentioned therein. The Advance Purchase Order was given to BWL who had accepted the same without any conditions. Therefore, the question of changing the terms of clause 5 of the advance Purchase Order does not arise. The BSNL was correct in imposing the liquidated damages and price reduction, once there was a delay in supplying the material. It is submitted by the Counsel that the Arbitrator has committed an error by passing the impugned award as his client had issued purchase order dated 2nd February, 1999 for supply of 6FAerial Optical Fibre Cable and accessories. As per clause No.6 of the purchase order the delivery of the goods was to be made by the respondent within a period of 4 months from the date of purchase order.

Clause No.6 of purchase order is reproduced herein below:-

“Clause 6: Purchase Order

The supply of the goods shall be completed within four months from the date of issue of purchase order. The delivery schedule indicated herein is firm and not subjected to any change.”

26. Counsel further submits that as the BWL was not able to supply the materials within time to his client, they are not entitled to receive or refund liquidated damages as imposed by his client. At the same time, counsel appearing for BSNL has admitted that BWL requested vide letter dated 30th October, 1999 for extending the delivery period and his client vide letter dated 6th January, 2000 granted extension of time to BWL for making delivery without liquidated damages upto 27th February, 2000. Counsel submits that as BWL could not supply within the extended period and again requested vide letter dated 24th February, 2000 for granting extension of time (though BSNL granted extension of time vide letter dated 19th May, 2000 but for subsequent period of delay, the extension was granted subject to levy of liquidated damages). BWL did not protest the same rather took the benefit of the extension of time and had made supply of the remaining quantity of goods and at that time it was aware about the imposition of liquidated damages by his client.

27. It is submitted by the counsel for the BSNL in view of the conditions of the contract mentioned in Clause No.16.2 which stipulates that if there is any delay in making supply of the goods, then for that the BSNL would not extend time and if the time is extended by the BSNL then the petitioner can, in the meanwhile, impose liquidated damages upon BWL.

28. Thus, the amount of liquidated damages imposed by BSNL cannot be challenged by BWL once the said condition is contained in clause No.16.2 of the General Conditions of the Contract, as the same was accepted by BWL imposing liquidated damages who now cannot wriggle out of the said condition imposed in the extension order once it has availed the benefit of extension of time granted by BSNL.

29. It is argued by the counsel for the BSNL/ Government that the Arbitrator while passing the impugned award has not taken into consideration this aspect who has not dealt either with the condition of the General Conditions of Contract i.e. clause No.16.2 or clauses to the extension letter by which extension has been granted by the BSNL subject to levy of liquidated damages and illegally and arbitrarily held that levy of liquidated damages imposed is wrong. Thus, the impugned award passed by the Arbitrator is liable to be set aside by this Court.

Counsel has referred the decision of Supreme Court in *Oil & Natural Gas Limited v. SAW Pipes Limited* AIR 2003 SC 2629 (paras 12 to 14) wherein it is held that the award passed by the Arbitrator can be set aside if the Award is contrary to the provisions of the contract.

He has also referred another decision of this Court in *BSNL v. Himachal Futuristic Communications Limited* 194(2012) DLT 661 wherein it was held that since the Arbitrator has not discussed or dealt with the provisions of the contract as well as the conditions imposed in extension letter, therefore, the said award is liable to be set aside. The relevant provisions of para No.32 of the said judgment has been reproduced herein below:-

“32. Secondly, the learned Arbitrator does not have appeared 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 unmistakeably 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.”

30. As far as the decisions referred by the learned counsel appearing on behalf of the BSNL are concerned, it is not disputed on behalf of other side who submits that in view of the facts involved in those cases, the correct proposition of law has been laid down by the respective Courts, but the facts in the present case are materially different so as the evidence produced. As far as the objection of the BSNL that the sole Arbitrator has not dealt with relevant clauses is concerned, counsel submits that it is the Government who has appointed him as sole Arbitrator to adjudicate the disputes between the parties. In case his award is read in a meaningful manner, he has dealt with each and every aspect of the matter. It is immaterial if all claims are not mentioned, but he had gone through all the papers and relevant clauses before publishing the award which is a reasoned one and was passed on the basis of the facts in the matter.

31. As far as conclusion with regard to Case No.1 is concerned, the following findings are arrived at by the learned sole Arbitrator as per facts of the case:

“After going through all the related documents of the case submitted by the two parties at various stages, hearing arguments from various related persons with reference to the existing pleadings and evidences led before Mr. A K Jain, the earlier arbitrator and his award, I feel that;

1- The very purchase process started with a known fact that some of the articles to be purchased with given specifications are not readily available in the market and are to be developed by the vendor, which has to be to the satisfaction and also type approved from T E C before

production. It becomes a grey area as has also been confirmed by letter dated 07-10-1998. This approval could be received only on 02-07-1999 i.e. after five and half months from the date of placing the first order on 02-02-1999. The vendor has continuously been making it known to the respondent through its various letters. I could not find any instance from the respondent side indicating that the delay in getting type approval is unusually long. Even other vendors could get this approval nearly at the same time. Thus to this extent, I don't find any fault with the vendor for the delay. Even respondent has given him first delivery extension without L. D. Charges.

So far as the discrepancies observed during bulk production are concerned, the vendor has timely intimated the problem to TEC as well as to DOT. The TEC has already corrected the situation by its letter dated 7-1-2000. Whether it was a clarification or amendment, is not of much significance because in any case, the specification has been changed by TEC.

Thus the vendor got clear production time with type approval first time for 6-1-2000 to 27-2-2000 without L.D. Charges but with provisional rates and 2nd time for 19-05-2000 to 14-07-2000 with L.D. Charges and further revised provisional rates. In the two spells, it got time for 53+ 57 days. This is little less than 4 months.

As against all the odds including the last change in specifications, required by the client for H P State, the vendor has supplied the material within 4 months. It does not deserve levy of L.D. Charges.

2- So far as the case of revision in prices is concerned, as per article 12 (ii) b of Section III of tender document;

"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."

As there has been change in rates, the reduction advantage has to go to the purchaser.

32. As regards Case No.2, in the conclusion, it was mentioned that *"The claimant has disputed only the LD Charges. Here the clear delivery period available is 1) From 26th July, 1999 to 25th October, 1999, ii) from 16th November, 1999 to 25th January, 2000 but with LD Charges and iii) from 17th February, 2000 to 28th February, 2000 with LD Charges. The type approval for fixtures was available on 2nd July, 1999 and the required amendment in specifications on 10th February, 2000. Against this purchase order, OF cables have been dispatched as per original schedule. Only fixtures were delayed as clearance was delayed and it was available only on 10th February, 2000. The material was all dispatched by 25th February, 2000 to the concerned consignee. Thus here, I don't find any delay of claimants making. I, therefore, feel that deduction of L.D. Charges is not justified."*

33. Thus, from the above conclusion of the learned Arbitrator, it is clear that the finding that BSNL had wrongly and unjustifiably withheld the liquidated damages charges is a finding which is reasoned and based entirely on documents. The Arbitrator also for the reason set out in the award concluded that it was BSNL which was responsible for delay in execution of contracted works and the delay was not on the part of the BWL in any manner. In fact, the finding reached by the learned Arbitrator is that after the type approval was granted and all clarifications were

given, BWL made the supplies in lesser period than the contracted period of four months.

34. BSNL has not raised, pleaded or argued that the findings of the Arbitrator are unreasonable or patently illegal, within the reasoning of *Associate Builders v. DDA*, (2015) 3 SCC 49.

With regard to the decision relied upon by the counsel for the BSNL of this Court in *BSNL* (supra) the same does not help the case of the BSNL on the facts of the present case. In the above said case, the delay in conclusion of the contracted work was on account of HFCL which it had admitted. It is clear from the facts noted in paragraphs 10, 11, 12 and 13 at pages 664 and 665 of the said judgment. On those facts, this Court concluded that there was a delay on the part of HFCL to supply goods to BSNL and that the extension of the contract with the condition of imposition of liquidated damages was accepted by HFCL.

There is no similarity of facts between that case and the present case. In the present case, not only did the BWL constantly communicated to BSNL that delay was clearly on account of reasons attributed to BSNL and other agencies and not to BWL and this is also the conclusion of the learned Arbitrator. As regards the extension of the contract upon imposition of liquidated damages on the same day i.e. 25th May, 2000 (the day when the extension was granted) and thereafter, on 8th February, 2001 BWL had objected the imposition of LD as extension of the contract.

35. It is specifically noted by the learned Arbitrator in the following terms in the facts of the present case:

“The claimant vide its letter dated 25-5-2000 and 8-2-2001 objected to

a) levy of Rs. 39,63,730/-as LD and had requested the respondent to extend the delivery period without LD charges as

i) The type approval for the product itself was available as late as 2-7-1999. Though PO was issued on 2-2-1999 with first delivery period upto 1-6-1999.

ii) There were design discrepancies in the material needing amendments in specification, which could be received only on 10-2-2000.

iii) Respondent again asked for another amendment in specs. of stays for HP vide it's letter dtd 25-5-2000, whose redesign again delayed the supplies.

iv) The processing of extending delivery period was held up by respondent upto 73 weeks, all responsibility of respondent.

b) Unilateral imposition of lower rates through the reduced provisional prices Amounting to a total value of Rs. 22,02,391/-.

i) For the year 2000-01, the respondent finalized the prices vide it's letter dtd 9-11-2000 were valid upto 31-08-2000 much beyond the delivery period of material that was upto 14-7-2000.

c) The claimant wants to claim pendent lite and future interest at the rate of 24% till payment of the amount of award.”

36. The principles underlying in Section 34 of the Act, which allow the Court to interfere with an award, are well established in **Connaught Plaza Restaurant Pvt. Ltd. v. Niamat Kaur**; 2013(3) Arb.LR 19 (Delhi) in the following terms:

“34. It is well settled that the court while exercising jurisdiction under section 34 of the arbitration and

conciliation Act, 1996 does not sit as a court of appeal to reassess the material, evidence and the terms of the contract assessed and interpreted by the arbitrator. While exercising jurisdiction under Section 34, the court is not to substitute its opinion with that of the arbitrator. Even otherwise, where two views were possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to by the arbitrator is a possible view. Re-appraisal of evidence or reinterpretation of clauses of an agreement by the court is also not permissible.

35. Applying the said principle of the law to the instant case, it is apparent that the impugned award nowhere falls within the scope of interference under the provisions of Section 34 of the Act. The said award is neither against the public policy nor the same has been passed contrary to any law in force. Rather, the view expressed by the learned arbitrator in his award is a plausible view.”

The Supreme Court in *Associate Builders v. DDA* (supra) has also interpreted the scope of Section 34 in similar terms.

37. It is, therefore, well established that under Section 34 of the Act, this Court does not review, re-appreciate or re-adjudicate the merits of the decision rendered by the Arbitral Tribunal and in so far as the ground of public policy is concerned, it is limited to fundamental policies of Indian law; interest of India; or justice or morality or patent legality. None of the aforesaid principles are even remotely established in the present case.

Therefore, the award dated 24th March, 2014 does not suffer from any infirmity and it appears that BSNL was unjustified in deducting and withholding LD charges. The objections filed by the BSNL do not fall within the scope of Section 34 of the Act and the same are dismissed.

38. Now, I shall deal with the objections filed by the BWL on limited issue of non-grant of interest. The said objections are filed as O.M.P. Nos.690/2014 and 691/2014.

39. The main arguments addressed on behalf of the counsel appearing on behalf of the BWL are that the denial of interest by the sole Arbitrator without assigning any reason is by ignoring Section 31 of the Act. It is submitted that despite holding that BSNL has unreasonably and unjustifiably withheld the liquidated damages charges, and that the same were payable by the BSNL to BWL, yet no interest has been awarded.

40. The totality of the finding of the sole Arbitrator in respect of interest are as follows:

1- With respect to P.O. No.CT/PO/096/98-99 dated 2nd February, 1999

- a) The amount of Rs.39,63,730/- deducted as LD charges from M/s. BWL Ltd. be refunded back by M/s BSNL.
- b) M/s BWL Ltd is to be paid at the revised prices only during financial year 1999-2000 and 2000-01. It's claim of Rs.22,02,391/- deducted due to reduced prices is rejected.
- c) M/s BWL Ltd.'s claim for payment of accrued interest is rejected.

2- With respect to P.O. No.CT/PO/023/99-2000 dated 26th July, 1999

- a) The amount of Rs.1189303/- deducted as LD Charges from M/s. BWL Ltd. be refunded back to it by M/s BSNL.
- b) BWL's claim for interest is rejected.
- c) Both the parties to bear their respective costs of litigation in both the case.

41. It appears that in both matters while coming to the conclusions, the sole Arbitrator has denied the interest without assigning any reason, otherwise the entire award, which proceeds to adjudicate the respective claims of the parties, holds entirely in favour of BWL, but it does not discuss or disclose any reason for denial of interest to BWL and rejects the claim in a summary and unreasoned manner.

42. In terms of Section 31 (3) of the Act, the arbitral award is required to state reasons upon which it is based. In unreasonably and summarily denial of the interest to BWL, the award fall foul to Section 31 (3) to that extent. In terms of Section 31 (7), an award for pre-reference payment of money is entitled to carry interest for pendetelite and post award periods. In this regard, BWL places reliance on the following decisions:

- i) ***Central Bank of India v. Ravindran & Ors***, (2002) 1 SCC 367 (Para 37).
- ii) ***Hyder Consulting (UK) Ltd. v. State of Orissa***, (2015) 2 SCC 189 (para 74-75; para 19, 80 and 81).
- iii) ***McDermott International Inc. Vs. Burn Standard Company Ltd.***, (2006) 11 SCC181 (para 154).

43. Therefore, the denial of interest to BWL is erroneous, bad in law and thus, liable to be set aside. BWL is entitled to interest @ 18% per annum for pre-reference pendete lite and post award periods. In fact, in terms of the judgement of ***Hyder Consulting*** (supra), if an award is silent on question of post-award interest, as per law, it is entitled to carry interest @ 18% per annum, an automatically attached rate of interest and therefore be allowed for the pre-reference pendete lite period which, as aforesaid,

has been denied to BWL who is entitled for the same rate of interest till the date of publishing the award.

44. In view of the above, the objections filed by BWL are allowed accordingly, as there is an error committed by the sole Arbitrator on the question of interest and the said findings are against the law. The objections filed by BSNL are dismissed.

45. No costs.

MAY 09, 2016



**(MANMOHAN SINGH)
JUDGE**