

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

+ **O.M.P. No.525/2007**

% **5th January, 2016**

BHARAT SANCHAR NIGAM LTD. Petitioner
Through: Mr. Chandan Kumar, Advocate.

versus

NATIONAL TELECOM OF INDIA LTD. & ANR. Respondents
Through: Mr. Raman Kapur, Senior Advocate
with Mr. Sanjay Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') is filed by the petitioner/objector Bharat Sanchar Nigam Limited impugning the Award passed by the Arbitrator dated 10.7.2007. By the impugned Award, the Arbitrator has allowed the claim petition filed by the respondent no.1 herein in the arbitration proceedings and has awarded in favour of the respondent no.1 a sum of Rs.1.09 crores alongwith interest @ 12% per annum from 1.4.1997 till payment besides a sum of Rs.3,46,580/- towards costs. The amount awarded of Rs.1.09 crores is the cost of 266 numbers of 6/15 lines of
OMP No.525/2007

Subscriber Line Concentrators (SLCs) which were manufactured by the respondent no.1 as per the contract awarded to it by the petitioner but which 266 numbers of SLCs were not taken supply of by the petitioner. On the petitioner making the payment of the aforesaid amount to the respondent no.1, respondent no.1 was directed to deliver to the petitioner the goods in question being 266 numbers of 6/15 lines of SLCs. SLCs are basically equipments by which the petitioner can increase the telephone connections for being available to its subscribers.

2. The facts of the case can be understood from the following aspects:-

- “(i) issuance of a Notice Inviting Tender (NIT) dated 28.09.1995 for the supply of SLCs by the respondent no.1;
- (ii) the bid offered by the respondent no.1 in accordance with the NIT;
- (iii) after evaluation of the bid (quote) of the respondent no.1, the petitioner/claimant placed an Advance Purchase Order (APO) dated 11.12.1996 for the purchase of the entire quantity of goods as detailed in the said APO on the terms and conditions specified in that document;
- (iv) unequivocal and unconditional acceptance of the APO by the petitioner/claimant vide Letter dated 23.12.1996; and
- (v) furnishing of Performance Bank Guarantee dated 21.12.1996 for Rs.10,64,610/- (Rupees Ten Lacs Sixty Four Thousand Six Hundred & Ten only) in pursuance of the APO dated 11.12.1996.”

3. The NIT issued by the petitioner was for supply of two types of SLCs as under:-

“(i) Subscriber Line Concentrators- 6/15 lines of 266 nos. @ Rs.51,792/- per unit (all inclusive) for a total value of Rs.1,37,76,672/- (Rupees One Crore, Thirty Seven Lacs, Seventy Six Thousand, Six Hundred and Seventy Two Only).

(ii) Subscriber Line Concentrators- 16/90 lines of 20 nos. @ Rs.3,75,777/- per unit (all inclusive) for a total value of Rs.75,15,540/- (Rupees Seventy Five Lacs, Fifteen Thousand, Five Hundred and Forty Only).”

4. The disputes between the parties are with respect to the 266 numbers of 6/15 lines of SLCs of the total value of Rs.1,37,76,672/-. Disputes have arisen inasmuch as the case of the present petitioner in defence in the arbitration proceedings to the claim of the respondent no.1 herein which was the claimant in the arbitration proceedings, was that there was no final contract entered into between the parties for 266 numbers of 6/15 lines of SLCs and the contract was complete only with respect to 20 numbers of 16/90 lines of SLCs. In effect, the petitioner by relying upon certain clauses of the NIT as also of the Advance Purchase Order (APO) dated 11.12.1996 contends that the petitioner had a right to short close the contract by not placing the purchase order for 266 numbers of 6/15 lines of SLCs or in other words in fact there was no contract at all entered into between the parties for 266 numbers of 6/15 lines of SLCs. On the other hand the

contention of the respondent no.1 is/was that the contract for supply of the entire quantities, of both types of SLCs, was complete when the petitioner issued its APO dated 11.12.1996. By the impugned Award, the Arbitrator has held that the contract was complete for both the types of SLCs when the APO dated 11.12.1996 was issued by the petitioner and the petitioner cannot contend that the contract was not complete for both the SLCs viz 20 numbers of 16/90 lines of SLCs and 266 numbers of 6/15 lines of SLCs valued at Rs.75,15,540/- and Rs.1,37,76,672/- respectively. Arbitrator has held that the petitioner had no right to foreclose the contract by its Letter dated 15.5.1998 inasmuch as there was a final and binding contract and which was complete with respect to supply of the entire quantities of both SLCs when the petitioner issued the APO dated 11.12.1996. These findings have been given by the Arbitrator in terms of the following issues which were framed in the arbitration proceedings:-

“ISSUE NO.1:

Whether the Arbitrator’s appointment as Sole Arbitrator vide High Court’s Order dated 23.08.2001, is not valid for the reasons stated in Preliminary Objection No.1 in the Reply to the Statement of Claim. If so, to what effect?

ISSUE NO.2

Whether on the facts of this case, the Advance Purchase Order dated 11.12.96 constituted a concluded Contract between the parties for the purchase of entire quantity as mentioned in the said APO. If so, to what effect?

ISSUE NO.3

If Issue No.2 is held in favour of the Claimant, then whether the Respondent has committed breach of the Contract by failing to place Purchase Order for purchase of remaining 266 Nos. of 6/15 Subscriber Line Concentrators for a total value of Rs.1,37,76,672.00. If so, to what effect?

ISSUE NO.4

Whether the purported foreclosing dated 15.05.1998 of the Advance Purchase Order dated 11.12.1996, is totally illegal, wrongful and in breach of Respondent's contractual obligation. If so, to what effect?

ISSUE NO.5

Whether the Claimants are entitled to any damages for alleged breach of the Contract by the Respondent. If so, the quantum thereof?

ISSUE NO.6

Whether the Respondent is liable to pay any interest. If so, at what rate, on what amount and for what period?"

5. Before this Court, on behalf of the parties two arguments have been urged as under:-

(i) The petitioner claims that with respect to 266 numbers of 6/15 lines of SLCs there was placed only an APO but not a purchase order, and since it is only the purchase order which is a contract, hence there was no final contract for supply by the respondent no.1 to the petitioner of the subject 266 numbers of 6/15 lines of SLCs. Petitioner therefore argues that petitioner was justified in foreclosing the contract by its communication dated 15.5.1998. Respondent no.1 has per contra argued that whatever be

the language of NIT, and which in any case does not support the case of the petitioner that petitioner has a right to foreclose the contract, but even if that be so, the entire contract for supply stood concluded in terms of the APO dated 11.12.1996 because of Clause 5 thereof which provided that the delivery schedule of both the SLCs to be completed by 31.3.1997. Putting it in other words it is argued by the respondent no.1 that not only there was no express or implied right of foreclosure of the contract by the petitioner, but even if an implied right be presumed to foreclose the contract once, however the last date of delivery in terms of the APO dated 11.12.1996 was fixed at 31.3.1997, after 31.3.1997 there did not arise any scope of the petitioner refusing to take contracted quantity of 266 numbers of 6/15 lines of SLCs.

(ii) The petitioner contends that no valid arbitration proceedings have taken place inasmuch as the arbitrator who has been appointed by a learned Single Judge of this Court vide Order dated 23.8.2001 in AA No. 192/1998 is not a valid appointment because no prior notice of 30 days under Section 11(5) of the Act was given by the respondent no.1 to the petitioner prior to filing of the petition for appointment of the arbitrator by the respondent no.1 which resulted in the appointment of the arbitrator by the Order dated 23.8.2001. In effect what is argued is that the arbitration clause seeking

arbitration was never invoked by the petitioner as required by terms of Clause 20 of the GCC and hence respondent no.1 could not have filed the petition being AA No.192/1998.

6. Let me take up the second contention first, inasmuch as, not too much discussion would be required in this regard. No doubt, at the time when the Order dated 23.8.2001 was passed by a learned Single Judge of this Court in AA No.192/1998, the law which prevailed was in terms of the judgment of the Supreme Court in the case of ***Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd. (2002) 2 SCC 388*** and which was that the order passed by the arbitrator is only an administrative order, however, the Arbitrator has rightly rejected this argument of the petitioner that the arbitrator has not been validly appointed for the following reasons:-

(i) In the proceedings AA No.192/1998 which concluded by passing of the Order dated 23.8.2001, it is noted that the counsel for the petitioner raised no objection that the petitioner is opposing the appointment of the arbitrator as prayed for in AA No.192/1998 on the ground that no notice was served as required by Clause 20 of the GCC. Arbitrator notes that this right to oppose the appointment of the arbitrator is a derogable right and for which

purpose the Arbitrator has referred to the judgment of the Supreme Court in the case of *Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others (2002) 3 SCC 572*, and the Arbitrator has held that by not raising this objection at the time of disposal of AA No.192/1998, the right claimed under Clause 20 of the GCC read with Section 11 (5) of the Act was derogated from.

(ii) Arbitrator has also simultaneously noted that the argument raised is only a technical argument and concluded that the courts have held that filing of a petition under Section 11 of the Act for appointment of the arbitrator itself can be treated as a notice and in the facts of the present case the petitioner did not within 30 days of receipt of the notice of the petition object to the appointment of the Arbitrator.

(iii) Arbitrator has further held that in the review petition challenging the Order dated 23.8.2001 appointing the arbitrator in AA No. 192/1998, an Order was passed by the learned Single Judge of this Court dated 11.2.2002 dismissing the review petition, and that reading of the grounds urged in the review petition shows that the petitioner herein had taken objection in the review petition of the non-compliance of the provision

of Section 11(5) of the Act and hence that it be held that the arbitrator was not validly appointed.

The aforesaid detailed reasoning of the Arbitrator is contained from internal pages 24 to 31 of the Award and I am not reproducing the same herein to avoid prolixity.

7. This Court is entitled to interfere with the findings of the Arbitrator only if the same are against law or violative of the provisions of the contract or perverse but the aforesaid findings of the Arbitrator holding that the arbitrator was validly appointed cannot be in any manner said to be illegal or violating the contractual provisions or perverse, and therefore, the objection raised by the petitioner to the appointment of the arbitrator is rejected.

8. That takes us as to whether at all there was a concluded contract for supply of 266 numbers of 6/15 lines of SLCs. No doubt, a reading of the definition Clauses 1(e) and (f) of NIT alongwith the co-related Clauses 27 and 28 and Clauses 6.2 and 15.1 of the GCC and Clause 7 of the SCC do show that there is a difference between an APO and the purchase order i.e an APO is only an intention to enter into a contract which is entered into when the purchase order is placed, however, the general clauses which are found

in the NIT, GCC and SCC would stand superseded in terms of the subsequent actual APO dated 11.12.1996 and which shows that the contract was concluded between the parties not only for the supply of 20 numbers of 16/90 lines of SLCs (for which the Purchase Order dated 26.2.1997 was subsequently issued) but also that the purchase order in fact and in reality on account of the actions of the parties under the contract was a concluded one for the entire quantities i.e a contract was entered into even for the 266 numbers of 16/90 lines of SLCs even if a specific purchase order for this was not issued because Clause 5 of the APO dated 11.12.1996 preponed the final delivery date which was fixed under NIT of two years from the issuance of the APO to the date of 31.3.1997 i.e delivery period for entire quantities stood preponed to around 3 months and 20 days from placing of the APO. This Clause 5 of the APO for the entire quantities of both SLCs reads as under:-

“5. Delivery Schedule: The supply of the goods shall commence immediately on placement of Purchase Order and be completed by 31-3-97. Delivery schedule indicated above shall be firm and not subjected to any change.”

9. No doubt, by virtue of the clauses which are relied upon and referred to by the petitioner, a specific contract theoretically is entered into when a purchase order is subsequently placed by the petitioner upon the

respondent no.1, and that in terms of Clause 27.1 of the NIT, the purchase orders could be issued within a period of two years after placing of the APO, but, once the period of two years is constricted by the APO dated 11.12.1996 for the entire quantities of both the SLCs to a period of 3 months and 20 days from the APO dated 11.12.1996 ie ending on 31.3.1997, it has to be held that placing of the purchase order from after 11.12.1996 for 266 numbers of 6/15 lines of SLCs was only a formality especially because delivery period was to be 3 months and 20 days from placing of the purchase order. This I say so because no doubt only placing of the specific purchase order would result in a contract between the parties for supply of particular quantities under the purchase order, however, it is settled law that parties by their conduct can remake a contract which they have made and conduct of the parties is to be taken by the court towards interpretation of the clauses of the contract as shown by the conduct of the parties in implementation of the contract. This is said by the Supreme Court in para 11 of the judgment in the case of *Godhra Electricity Co. Ltd. and Another Vs. State of Gujarat and Another (1975) 1 SCC 199* and which para 11 reads as under:-

“11. In the process of interpretation of the terms of a contract, the Court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them. The process of

practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidence by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation (see *Corbin on Contracts*, Vol. 3, pp.249 &254-56).”
(underlining added)

10. A reading of the ratio contained in para 11 of the judgment in the case of *Godhra Electricity Co. Ltd. And Another (supra)* makes it clear that whereas language of a contract as originally existed in the typed form of the contract may have a particular meaning, but the parties can understand the meaning differently as shown by their subsequent conduct under the contract. Putting it in another words, no doubt the contract intended placement of a specific purchase order for concluding the contract with respect to 266 numbers of 6/15 lines of SLCs, however, once the petitioner itself by its conduct fixed the final date of delivery of the total constricted quantity under the APO including for the 266 numbers of 6/15 lines of SLCs, it was necessary that if a right was to be exercised by the petitioner for foreclosing the contract by not purchasing the 266 numbers of 6/15 lines of SLCs, such a

right to foreclose had to be necessarily exercised on or before the last date of delivery of both the SLCs ie 31.3.1997, and not as was done much later on 15.5.1998 by the petitioner. As already stated above, the period of two years under the NIT was reduced by the petitioner itself to 3 months and 20 days and once the final delivery period is of 3 months and 20 days then unless within this total delivery period of 3 months and 20 days, the petitioner informs the respondent no.1 that no purchase order would be placed for the 266 numbers of 6/15 lines of SLCs, in such a situation by the conduct of the petitioner, the APO dated 11.12.1996 has to be necessarily read as a concluded contract for supply of not only of 20 numbers of 16/90 lines of SLCs but also for 266 numbers of 6/15 lines of SLCs.

11 Learned counsel for the petitioner argues that since the respondent no.1 has written letters right from 6.6.1997 to 8.4.1998 asking the petitioner to place the purchase order and therefore it should be held that in fact no purchase order was placed for the 266 numbers of 6/15 lines of SLCs, and hence the Arbitrator has illegally held that there was a concluded contract for supply by the respondent no.1 to the petitioner of 266 numbers of 6/15 lines of SLCs, however, this argument of the petitioner appears to be attractive only at the first blush, and this argument however has no real

substance, for the reason that the requests of the respondent no.1 by its letters dated 6.6.1997 to 8.4.1998 were really requests by the respondent no.1 to complete the formality of placing of the purchase order without in any manner affecting the finality of the concluded contract for the supply of complete quantity ie the contract for all quantities of both SLCs stood concluded and completed when the APO dated 11.12.1996 was issued and for complete contract of the constricted quantity of SLCs of 266 numbers and 20 numbers there was no requirement of a formal purchase order being placed after 31.3.1997 by the petitioner upon the respondent no.1 for the petitioner to argue that without placing of the specific purchase order there was no concluded contract for supply of 266 numbers of 6/15 lines of SLCs. Therefore, the letters of the respondent no.1 are really only for seeking a formal placement of the purchase order on account of the original language of the NIT, but this language of Clause 27 of the NIT and the GCC cannot mean that the contract in the present case was not concluded with respect to the entire quantity in view of Clause 5 of the APO dated 11.12.1996.

12. There is another way of looking at the matter. This Court while hearing objections under the scope of Section 34 of the Act cannot interfere unless the findings and conclusions of the Arbitrator are totally perverse and

illegal. The facts of the present case alongwith the original language of the NIT and the GCC when amended by Clause 5 of the APO dated 11.12.1996 at best can be said to lead to the two plausible and possible conclusions. Once the Arbitrator has arrived at one of the plausible and possible conclusions, it is beyond the scope of Section 34 of the Act for this Court to interfere with one plausible and possible view which has been arrived at by the Arbitrator that there is a concluded contract with respect to 266 numbers of 6/15 lines of SLCs. Clearly therefore, the objections of the petitioner in this regard do not fall within the scope of Section 34 of the Act and hence the Award cannot be interfered with.

13. In view of the above, there is no merit in the objection petition and the same is therefore dismissed, leaving the parties to bear their own costs.

JANUARY 05, 2016
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VALMIKI J. MEHTA, J.