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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: February 10, 2017

Date of decision: April 11, 2017

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OMP 746/2009

FINOLEX CABLES LIMITED

..... Petitioner

Through: Mr. Atul Y. Chitale, Senior Advocate with
Mr. Nitin S. Tambwekar, Mr. Gurjyot Sethi,
Ms. Shivangi Khanna and Mr B.S. Sai,
Advocates.

versus

MAHANAGAR TELEPHONE NIGAM LTD. (MTNL) Respondent

Through: Mr. Sandeep Sethi, Senior Advocate with
Mr. Vaibhav Kalra and Mr. Jasbir Bidhuri,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

11.04.2017

1. Finolex Cables Limited ('FCL') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging an Award dated 18th August 2009 by the sole Arbitrator in the disputes between FCL and the Respondent Mahanagar Telephone Nigam Ltd. ('MTNL') arising out of an order dated 20th December 1990 placed by MTNL on FCL for supply of U/S Jelly Filled Cable ('JFC').

2. The aforementioned order was in respect of the following four sizes of JFC:

Sl. No.	Items	Unit Price	Total Price
1.	20/6 Armoured U/s Jelly Filled Cable	65,102.00	9,76,530.00
2.	50/6 Armoured U/s Jelly Filled Cable	1,08,852.50	10,88,525.00
3.	400/6 Armoured U/s Jelly Filled Cable	5,84,820.00	23,39,280.00
4.	2400/4 Armoured U/s Jelly Filled Cable	12,93,946.72	3,23,48,668. 00

Conditions attached to the PO

3. The terms and conditions attached to the purchase order ('PO') dated 20th December 1990 require to be discussed at this stage. The delivery schedule stated that the delivery had to be completed by 20th May 1991. The place of delivery was also indicated. It stated "entire quantity is to be supplied to Delhi/Bombay Unit." The consignee was "MTNL, Delhi/Bombay."

4. Clause 5.2 stated that the Store should be supplied as per Annexure-A. The description of Item 4 above was erroneous and had to be amended subsequently. The PO acknowledged that the FCL had furnished a performance bank guarantee (PBG) dated 5th December 1990 for Rs.18,37,650. It was stated that payment would be made by MTNL only after acceptance of the BG.

5. Clause 9.2 stated that MTNL reserved the right to cancel the balance quantity of order if the supply was not made within the delivery period or extended delivery period, if any. In terms of Clause 10, delivery was to be as per Annexure-A, which as already noted, required the delivery to be

completed by 20th May 1991. The addresses of the two consignees were spelt out in Annexure-A as under:

“The Assistant Engineer,
Mulund Cable Depot,
Mahanagar Telephone Nigam Limited,
Bombay-400080.

The Assistant Engineer,
Circle Store Depot,
Mahanagar Telephone Nigam Limited,
A-III Block, Janakpuri,
New Delhi.”

6. Under Clause 10.3 it was made clear that “the delivery of cables shall be made as per Annexure-A. The stores were to be supplied conforming strictly to the specification supplied by TEC/CGM (QA), Bangalore and modification thereof, if any.

7. Under Clause 14.3 reasonable quantities were to be offered for inspection to DET (QA). Thereafter the invoice raised by the supplier was to be accompanied by such certificate of inspection stating that the stores conformed to the specifications offered and were accepted. Under Clause 15 a taking over certificate (‘TOC’) was to be attached to the invoice to the payment. Clause 17 provided for liquidated damages and read as under:

"17. Liquidated Damages

17.1 The date of delivery of the stores stipulated in the acceptance of Purchase Order should be deemed to be the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be made after expiry of the contract and be accepted

by the Consignee, such deliveries will not deprive the Purchaser of his right to recover liquidated damages under Clause 17.2 below, where, however, supplies are made within 21 (twenty one) days of the contracted original delivery period, the consignee may accept the stores and in such cases the provisions of clause 17.2 will not apply.

Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery, the Chairman Cum Managing Director, MTNL, shall be entitled to recover ½% of the undelivered stores value of the Order placed; for each week of delay or part thereof, subject to a maximum of 10% of the value of the Order placed.”

8. The error in the description against Serial No. 4 was that MTNL had mentioned ‘Foam Type’ whereas it had to be amended to ‘Foam Skin Cable’. By the letter dated 3rd January 1991 FCL asked MTNL to carry out the necessary amendments to the specifications. On 14th January 1991, MTNL replied stating that Item No. 4 was “unarmoured Foam Skin jelly filled cable” and that the specifications shall be as per the latest TEC specifications for foam jelly filled cable with up to date amendments.

FCL's version of events that followed

9. What happened thereafter constitutes the bone of contention between the parties. According to MTNL, FCL was to submit the sample for TEC approval much in advance of the stipulated date by which delivery had to be completed i.e. 20th May 1991. As it transpired, the Petitioner submitted a sample to TEC for approval only two days before the expiry of the aforementioned deadline i.e. on 18th May 1991. The delay between 14th January 1991 and 18th May 1991 for submitting the samples for ‘type approval’ by the TEC was not satisfactorily explained by FCL. The type

approval was granted ultimately on 5th August 1991. The reasons for the failure to make delivery thereof are sought to be explained differently by the two parties. According to FCL after the type approval was granted by the TEC which was after the stipulated delivery period, MTNL time and again wanted FCL to extend the delivery period. It is stated that FCL obliged and kept extending the PBG from time to time.

MTNL's version

10. The version of MTNL, however, is different. It is stated that since the TOC was not issued as documentary evidence of completion of the contractual obligation, the PBG had to be kept alive. It is pointed that FCL never objected to keeping the PBG alive. It is pointed out that though FCL sought amendment of the delivery schedule which had already expired on 20th May 1991 it never really communicated its willingness to supply the ordered quantity.

11. MTNL maintains that time continued to be the essence of the contract. MTNL stated that after getting approval of the TEC on 5th April 1991, FCL did not supply even a single meter of this variety of cable. There is no exchange of correspondence during this period between the parties. What is, however, apparent is that a letter was written by FCL to MTNL on 7th April 1992 requesting MTNL to short close the balance portion of the order without any commercial implication as they presumed that requirement of any supply cable did not exist anymore. MTNL points out that this presumption by FCL was unilateral and not based on fact. MTNL's case is that by keeping the PBG alive as and when demanded by MTNL, there was

an implied consent by FCL and MTNL to keep the PO alive.

12. For a period of over 9 years thereafter MTNL kept asking FCL to extend the PBG and FCL also continued doing so. This conduct of both parties is indeed intriguing. The PBG for the sum of Rs.18,37,650 was extended 15 times.

13. Meanwhile on 26th September 2000, FCL issued to MTNL two further BGs in relation to certain other contracts for the sum of Rs.20,79,320 and Rs.1,55,100.

Termination of contract

14. FCL addressed a letter to the Department of Telecommunication ('DoT') on 26th September 2001 "for induction of Foam Skin Cables ('FOC') in telecom network." In reply thereto on 14th December 2001, the TEC informed FCL as under:

"The proposal for induction of Foam Skin Cables (FSC) in Telecom network has been considered. The proposal appears to be good but BSNL is trying to reduce the use of underground PIJF cable by using more and more other modern technology like WLL, DLC and HDSL etc. in its network. Further BSNL has issued instructions to the field units to shift from concentrated switching to distributing switching by use of more and more RSUs/RLUs so that large sizes of primary cables are reduced in the network. There is no plan of BSNL to try a new type of Foam Skin Cable in its network at present.

In view of the above we are not interested for presentation on advantages of Foam Skin Cables at this stage."

15. What is strange however is that FCL did not address any letter as such to

MTNL asking whether it in fact still requires Foam Skin Cables as extracted hereinbefore.”

16. It is stated that on 29th January 2004 MTNL specifically invoked the BG for alleged non-performance of the contract. A copy of the letter dated 29th January 2004 addressed by MTNL to the bank has been placed on record. It appears that the said PBG for Rs.18,37,650 was in fact encashed. On 24th February 2004, a letter was addressed by MTNL to FCL stating as under:

“Sir,
Regarding the above mentioned purchase order, you did not supply 2400//4 mm. diameter wire without covering (25 km length). Due to this reason contract has been terminated. The loss due to termination of contract is calculated is Rs.40,70,756/- out of the Rs.18,37,650.00 bank cheque/DD has been encashed. Balance Rs.22,23,106.00 has to be recovered, the said amount within seven days of receipt of this notice, please give bank draft in favour of MTNL at office of undersigned.

In this much amount has not been deposited within this period, this amount will be deducted from any of your bills or any other bank guarantee.”

17. On 9th March, 2004, FCL wrote to MTNL stating *inter alia* that since the requirement of the cable did not exist, they should not impose any financial burden by encashing the BGs. FCL requested that the charges deducted be reimbursed.

18. On 18th March, 2004, MTNL wrote to the Central Bank of India, Pimpri Branch, Pune invoking the BG for Rs.20,79,320 given in another contract and appropriated the said sum towards damages for the present contract. On

the same date, MTNL also encashed the BG for Rs.1,55,100 given in yet another contract and appropriated that sum towards damages in the present contract.

Arbitration proceedings

19. By the letters dated 6th November, 2005 and 24th December, 2005, FCL sought reference of the disputes to arbitration. By the letter dated 30th December, 2005, addressed to Mr. S.M. Dewan, the Chairman-cum-Managing Director ('CMD'), MTNL appointed him as the sole Arbitrator for adjudication of the disputes between the parties.

20. FCL then filed its statement of claim ('SOC') before the learned sole Arbitrator claiming a sum of Rs.40,70,756 from MTNL along with interest @ 15% per annum from the date of invocation of the BG till the date of repayment. FCL also prayed for cost of arbitration.

21. Apart from filing its reply to the SOC, MTNL also raised a counterclaim of Rs. 6,28,44,266 from FCL towards losses suffered on account of delay in supply of cables.

22. On 23rd June, 2008, the learned Arbitrator framed the following issues for determination:

“(i) Whether the Respondent has rightly cancelled the Purchase Order No MTNL/120-80(521)90-MM/FINOLEX/90-91/89 dated 20.12.1990?

(ii) Whether invocation of Bank Guarantee by the Respondent in terms of Clause 7.4 of General Purchase Condition of NIT, was justified?

(iii) Whether Claimant is entitled for Rs.40,70,756/- against the invocation of bank guarantee by the Respondent?

(iv) Whether the Respondent is entitled to its counterclaim of Rs.6,28,44,256/- from the Claimant towards losses suffered on account of delay in supply of cables?

(v) Whether the parties are entitled to interest?

(vi) Whether the parties are entitled to cost.”

Impugned Award

23. The learned Arbitrator on the basis of the written synopsis filed by the parties passed the impugned Award dated 18th August, 2009 in which he held as under:

i. There was an implied consent of both the FCL and the MTNL to keep the PO alive. FCL did not insist on supplying of the goods or dispatching it to MTNL. There was no evidence placed on record by the FCL to show that MTNL, when supplied with the goods, refused to accept them. The contention of the FCL that the MTNL was duty bound to demand delivery appeared *prima facie* to be incorrect since the PO itself specified the place of delivery, the delivery period, etc.

ii. MTNL not following up with the FCL to delivery material for a period of 12 years was not normal for a purchaser who required the goods. Nevertheless the delay of 12 years in supply of the ordered material and the lack of subsequent reminders by FCL to supply the material left no choice with MTNL but to cancel the PO. Consequently the action of MTNL in

cancelling the PO was “correct and well within the terms and conditions” of the PO.

iii. Nothing was brought on record to show that both parties knew that any loss is likely to result from non-delivery of the cables. MTNL had failed to furnish details of the project in which the cables were to be used and whether such project was, in fact, delayed or abandoned. There were no details regarding loss incurred by MTNL, which could be attributed directly to the non-availability of cables. No mention of any risk purchase had also been made. The comparison of the price of the cables claimed to have been used by MTNL with the ordered cable was not provided. If the agreed LD were to be enforced it must be a result of some genuine pre-estimated damages.

iv. Going by the terms of clause 7.4, MTNL was justified in invoking the BG and recovering LD up to a maximum of 10% of the ordered value, i.e., Rs.36,75,300 only.

v. Except bald averments and an assumed loss of profit there is no material placed on record by MTNL to substantiate the counterclaim. They were accordingly rejected.

vi. No interest was awarded. The parties were directed to bear their respective costs.

Submissions on behalf of FCL

24. Mr. Atul Y. Chitale, learned Senior Advocate appearing for the FCL

made the following submissions:

i. From the conduct of MTNL in getting FCL, time and again, to extend the BG, it was apparent that time was not the essence of the contract. The facts showed that on its part FCL never sought alteration of the date of delivery. There was no failure as such by FCL to honour its commitment as far as the supply of goods was concerned. MTNL did not, during this long period of 12 years, terminate the contract for failure to deliver within the extended period of delivery.

ii. Reliance was placed on the decision in ***Keshavlal Lallubhai Patel & Ors. v. Lalbhai Trikumlal Mills Ltd. AIR 1958 SC 512***. It was urged that under Section 63 of the Indian Contract Act, 1872 ('ICA'), the extension of time, at the instance of MTNL, should be taken to be an acceptance by it of the fact that time was no longer the essence of the contract. Consequently there was no breach as such by FCL in failing to deliver the consignment of cables. Reliance was also placed on the decisions in ***Arosan Enterprises Ltd. v. Union of India AIR 1999 SC 3804*** and ***Bharat Petroleum Corporation Ltd. v. The Great Eastern Shipping Co. Ltd. (2008) 1 SCC 503***.

iii. Reference was made to Section 2(6) of the Sale of Goods Act, 1930 ('SOGA'), which defined "future goods" to mean goods to be manufactured or produced or acquired by the seller after making the contract of sale. This had to be read with Section 6(3) of the SOGA, which states that "where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods." Section 11 of the

SOGA stated that “unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale.” Further “whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.”

iv. There was an obligation on MTNL to apply for delivery. Section 35 of the SOGA, states that “apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.” Reference is made to the decisions in *Nune Sivayya v. Maddu Ranganayakulu AIR 1935 PC 67* and *Alapaty Ramamoorthy v. Polisetti Satyanarayana AIR 1958 AP 550*.

v. It is submitted that in the present case the contract for supply of goods against item 4 of the PO was, in fact, a contract for supply of future goods. It is submitted that the extension of the BG for a period of 12 years without taking delivery of the goods and without raising a demand for supply was proof that the items in question were “future goods” and not for a specific project. For a period of more than 12 years MTNL neither invoked the BG and sent no intimation for delivery of the goods. This did not happen even till the time of short closure of the PO on 24th February, 2004. There was no intimation, at any time, by MTNL to FCL about the delivery of the goods. It is accordingly submitted that the invoking of the BGs and recovery of the amount provided therein was untenable in law.

vi. Independent of the above, it is submitted that there was no loss whatsoever suffered by MTNL for it to be compensated therefor. The type

of loss of profit as alleged was remote to the so-called breach. No compensation was payable for any remote loss or damage sustained from any such breach. No material was placed by the MTNL before the learned Arbitrator to even remotely demonstrate that it suffered any loss. In any event, in order to be entitled to damages, MTNL had to show that it took steps to mitigate the loss. That was not done.

vii. Even assuming that Section 73 of the ICA would apply, it would only entitle the Arbitrator to award “reasonable” compensation. There was no justification, therefore, in allowing 10% of the value of the contract as damages on the ground that it constituted a “genuine pre-estimate of damages.” Nothing was shown by MTNL that there were any deliberations between the parties. It was merely a standard form of contract. Therefore, MTNL was not entitled to claim and recover and FCL was not bound to pay any sum as LD.

viii. Reliance is also placed on the decision in ***Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136*** to urge that the burden was on MTNL to prove that it had suffered losses.

Submissions on behalf of MTNL

25. Countering the above submissions, Mr. Sandeep Sethi, learned Senior Advocate appearing for MTNL, referred to clause 17 of the PO, which provided for ½ % of the value of the undelivered stores, subject to a maximum of 10% of the value of the order as LD. He submitted that in a mercantile contract time continued to be the essence of the contract irrespective of the extension of time. He referred to the decision in ***Wasoo***

Enterprises v. J.J. Oil Mills AIR 1968 Guj 57.

26. Mr. Sethi pointed out that the PO made it clear that what the description of the goods was and also who the consignees were. The time period of delivery was also clearly indicated as was the quantity. He pointed out that by the letter dated 3rd January, 1991, FCL accepted the revised delivery schedule. Mr. Sethi pointed out that at no point of time did FCL inform MTNL that it had readied the consignment for delivery. On its own it presumed that MTNL no longer wanted the cables and by the letter dated 7th April, 1992 it sought “sympathetic consideration for short closing” the order “without any commercial implication.” In the letter dated 7th April, 1992, there was no claim made by FCL for any losses suffered for which compensation was being sought.

27. Mr Sethi submitted that there was also inconsistency in the pleadings on whether FCL, in fact, had the consignment ready. At one stage it was pleaded in the SOC that FCL was compelled to keep the necessary stock of raw materials for the unarmoured cable and that had caused loss and damage to FCL. However, in the letter dated 9th March, 2004, addressed to MTNL, FCL *inter alia* stated:

“It would not be out of place to put on record that till date we are still holding the stock of 5 (Five) drums of this Size/Type of Cable, since it was not required either by MTNL or by the then DoT (now BSNL) and this has put us in financial loss of developing this item besides, carrying the inventory for such a long time.”

28. At no time prior to this letter did FCL inform MTNL that it had the said stock of cables ready for delivery. Since the PO itself specified the place of

delivery, delivery period, etc., there was no need for MTNL to again make a specific demand for delivery.

29. Mr. Sethi argued that what has been awarded by the learned Arbitrator is only a reasonable pre-estimate of the genuine damages whereas clause 7.4 itself envisaged a maximum of 10% of the value of the order. There was no need for MTNL to prove loss or damage. In that context a reference was made to the decision in *Oil & Natural Gas Corporation Ltd. (ONGC) v. Saw Pipes Ltd. (2003) 5 SCC 705*; *Construction & Design Services v. Delhi Development Authority AIR 2015 SC 1282* and *Kailash Nath Associates v. Delhi Development Authority (supra)*. Mr. Sethi further relied on the decision in *H.M. Kamaluddin Ansari & Co. v. Union of India (1983) 4 SCC 417* and submitted that inasmuch as Clause 20 of the other contract in which the other two BGs were furnished permitted it, the encashment of such BGs in order to recover damages was not illegal. He further submitted that the view taken by the learned Arbitrator was a plausible one. Relying on the observations in *Associate Builders v. Delhi Development Authority (2015) 3 SCC 49* he submitted that the impugned Award could not be said to be opposed to the fundamental policy of Indian law and therefore, no interference was called for.

Scope of Section 34

30. The above submissions have been considered. At the outset, the Court would like to recapitulate the Court's power under Section 34 of the Act to interfere with an arbitral Award. The scope is considerably limited. In *Associate Builders v. DDA (supra)*, the present legal position has been

summarised as under:

“It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator’s approach is not arbitrary or capricious, then he is the last word on facts.”

31. In *NHAI v. ITD Cementation (2015) 14 SCC 21* the legal position was reiterated as under:

“25. It is thus well settled that construction of the terms of a Contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the Contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the Contract in such a way that no fair minded or reasonable person could do.”

Breach of contract

32. One of the issues which arise for determination is whether the learned Arbitrator could be said to have exceeded his powers and jurisdictions in holding that the termination of the contract by MTNL was justified and consequently whether the invocation and encashment of the BGs in question was valid. On the question of the commission of breach of contract by the Petitioner, the following facts emerge from the PO placed by MTNL on FCL:

i. The PO itself clearly described the goods in question and whatever amendment was required to be made to the PO was carried out by the letter dated 14th January, 1991. The fourth type of cable was to be approved by the TEC. The cable was of unique type. FCL accepted to develop it and then got it approved by the TEC before the supply.

ii. Considering that the original delivery period was to expire on 20th May, 1991, it is not understood why FCL had to wait till 18th May, 1991 to submit the cable that it had made for approval by the TEC. There was an unexplained delay between 14th January, 1991 and 18th May, 1991 in doing so. Be that as it may, with the TEC having been approached only on 18th May, 1991, the grant of approval on 5th August, 1991 meant that the original delivery period expired on 20th May, 1991.

iii. Both parties appear to have accepted this reality. Neither did MTNL move to terminate the contract for failure of FCL to adhere to the delivery period and nor did FCL resist the demands of MTNL from time and again for keeping the BG alive. It must be recalled that the BG was for Rs.18,37,650 and it kept getting renewed for a period of over 12 years with MTNL making a request in that regard and FCL obliging it.

iv. The finding of the learned Arbitrator that there was “an implied consent of both the claimant and the Respondent to keep the purchase order alive” is the correct assessment of what transpired between them.

33. In the above context it is seen that the letter dated 7th April, 1992 by the FCL to the MTNL seeking short closure was understandable. In that letter

all that is stated is that FCL had made arrangements “for procurement of raw material for development of this item and within a period of 8-9 months we were able to offer the cable for proto testing and finally we got type approval.” It offered short closure “without any commercial implication.” If indeed FCL suffered losses at that stage why it would offer for a short closure “without commercial implication” is not understood.

Time not the essence

34. In the considered view of the Court for a period of 14 years after the original PO dated 20th December, 1990, with neither party making a move for closure of the contract, it was plain that time was, in fact, not the essence of the contract from the point of view of either party.

35. In this context Section 63 of the ICA does come into picture and the reliance by Mr. Chitale on the decision in ***Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd.*** (*supra*); ***Arosan Enterprises Ltd. v. Union of India*** (*supra*) and ***Bharat Petroleum Corporation Ltd. v. The Great Eastern Shipping Co. Ltd.*** (*supra*) appears justified. In the last mentioned judgment the Supreme Court observed as under:

“19. It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offerree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offerree’s silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance an agreement sub *silentio*. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct.”

36. The conclusion that can be drawn from this is that the parties accepted

the stark reality that time was never the essence of the contract and probably there was no need for the cables any longer. Even if the PO had not been cancelled it virtually amounted to cancellation because it was no longer required.

37. There appears to be some confusion in the conclusion drawn by the learned Arbitrator although the logic of his reasoning in the impugned Award is on the above lines. The learned Arbitrator notes that the act of MTNL in not following up to deliver material for a period of 12 years “is not a normal act.” To the Court it appears that not even replying to FCL’s letter dated 7th April, 1992 in seeking short closure was an equally unusual act.

38. While the Court is unable to accept the plea of Mr. Chitale appearing on behalf of the FCL that the goods in question were “future goods”, there is merit in his contention based on Section 35 of the SOGA that FCL was not bound to deliver the goods till MTNL applied for delivery. The argument of Mr. Sethi that the PO itself made clear what the dates of delivery should be and therefore, the goods were not “future goods” is really an argument in futility. The admitted position is that MTNL was in absolutely no hurry to accept the delivery of the goods and they did not even bother to find out why the goods were not delivered. This is despite the FCL writing to MTNL on 7th April, 1992 telling it “since it is more than two years our offer was submitted..... Moreover there has not been requirement from the field units in the last year for this high pair foam skin cable....”

39. In that view of the matter while the Court concurs with the conclusion drawn by the learned Arbitrator that time was no longer the essence of the contract it does not accept the conclusion regarding the validity of the cancellation of the PO by MTNL. The Court is of the view that the PO by sheer efflux of time was no longer required to be complied with and in that sense did not any longer represent a contract that was required to be complied with by either of the parties.

No proof of loss suffered

40. This is critical because of the next issue that arose before the learned Arbitrator, viz., whether the invocation of the BG by MTNL in terms of Clause 7.4 of the PO was justified.

41. MTNL has no explanation whatsoever for suddenly springing on FCL the unilateral invocation of the BG which it made FCL renew from time to time. There was no loss suffered by MTNL on account of the failure of FCL to supply the cables. Merely because Clause 7.4 of the PO entitles MTNL to seek LD up to a maximum of 10% cannot justify the amount it sought to recover, namely, the entire sum of Rs.36,75,300, which according to the learned Arbitrator was approximately 10% of the contract value.

42. The law in relation to LD has been explained by the Supreme Court in its decision in ***Kailash Nath Associates v. Delhi Development Authority*** (*supra*). In para 43 of the said decision, the Supreme Court has explained the legal position as under:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to

be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached,

Section 74 would have no application.”

43. It is, therefore, plain that it was incumbent on MTNL to prove that it had suffered some loss although as Mr. Sethi rightly pointed out it did not have to prove the actual loss. What, however, the learned Arbitrator has found and which finding has not been challenged by MTNL is that MTNL suffered no loss whatsoever. There was absolutely no material placed on record by MTNL that it suffered an iota of loss on account of non-supply of cables. Therefore, even assuming that Clause 7.4 signifies a genuine pre-estimate of damages, MTNL was not relieved of showing that it had suffered some loss. This again even if it proved that it suffered some loss, the adjudicatory body, which in this case was the learned Arbitrator was required to award ‘a reasonable sum’. What is reasonable would depend on the facts and circumstances of every case. If the maximum amount of LD was to be awarded then it was incumbent on the Arbitrator to explain how the maximum LD anticipated by the clause as reasonable sum. In this regard, the Court finds no explanation whatsoever for the learned Arbitrator awarding the maximum 10% of the total value of the contract particular when no loss whatsoever has been suffered by MTNL.

44. The Court is, therefore, not able to sustain the impugned Award insofar as it holds that the invocation of the BG by MTNL was justified and awards MTNL a sum of Rs.36,75,300 as LD. This part of the Award is based on no evidence whatsoever. It is contrary to the settled legal position as explained by the Supreme Court in ***Kailash Nath Associates v. Delhi Development Authority*** (*supra*) and ***NHAI v. ITD Cementation*** (*supra*). An Award inconsistent with the law explained by the decision of the Supreme Court

would opposed to the fundamental policy of Indian law. It would attract invalidation under Section 34 (2) (b) (ii) of the Act.

Conclusion

45. Consequently, the Court sets aside the impugned Award to the extent it awarded MTNL LD in the sum of Rs.36,75,300. The said sum has to, therefore, be refunded to FCL by MTNL.

46. This is apart from the fact that there was no justification to invoke the BGs furnished by FCL to MTNL for some other contracts and encashing them to make up for the damages claimed by MTNL in this contract. The aspect of encashment of those BGs without any breach of those contracts by MTNL has not even been examined by the learned Arbitrator. In any event in the considered view of the Court MTNL was not justified in encashing any of the BGs for any reason whatsoever.

47. For all of the aforementioned reasons, the Court sets aside the impugned Award insofar as it has held against the FCL and awarded MTNL a sum of Rs. 36,75,300 together with the corresponding interest.

48. The petition is accordingly allowed with costs of Rs.20,000, which would be paid by MTNL to FCL within a period of four weeks.

S.MURALIDHAR, J

APRIL 11, 2017

dn/b'nesh