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

+ FAO(OS) 227/2017 & CM No.28576/2017

% Reserved on : 4th September, 2017
Date of decision : 18th September, 2017

MAHANAGAR TELEPHONE NIGAM LTD. Appellant
Through : Mr. Abhinav Vashisht, Sr. Adv.
With Ms. Tanmishtha Singh,
Ms. Priya Chauhan and Ms.
Rishita Mall, Advs.

versus

FINOLEX CABLES LIMITED Respondent
Through : Mr. Atul Chitale, Sr. Adv, with
Mr. Nitin Tambwekar, Mr.
Gurjyot Sethi, Ms. Shivangi
Khanna and Ms. B.S. Rai,
Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

GITA MITTAL, ACTING CHIEF JUSTICE

1. The present appeal, filed under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 10 of the Delhi High Court Act, 1966 by the Mahanagar Telephone Nigam Limited (*'MTNL' hereafter*), challenges the order dated 11th April, 2017 passed by the Id. Single Judge on the original side of this court accepting objections filed by the Finolex Cables Limited (*'FCL' hereafter*)

against the arbitral award dated 18th August, 2009 passed by the sole arbitrator in a dispute between FCL and MTNL.

To the extent necessary, we first note the facts giving rise to the present appeal.

2. MTNL had entered into a contract dated 11th July, 1990 with FCL for supply of following four sizes of Jelly Filled Cables (JFCs) :

<i>S.No.</i>	<i>Items</i>	<i>Unit Price</i>	<i>Total Price</i>
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	1,08,8520.50	10,88,525.00
3.	400/6 Armoured U/s Jelly Filled Cable	5,84,820.00	23,29,280.00
4.	2400/4 Armoured U/s Jelly Filled Cable	12,93,946.72	3,23,48,668.00

3. Pursuant to the said contract, a purchase order dated 20th December, 1990 was placed upon FCL. The date of delivery of the aforesaid goods was 20th May, 1991. The entire quantity was to be supplied to the Delhi/Bombay unit with the consignee being specified as “MTNL Delhi/Bombay”.

4. There is no difficulty with regard to the supply of three sizes of cables which were duly supplied in accordance with the delivery schedule. However, the fourth size was a unique type of cable requiring approval of the Telecom Engineering Centre (*‘TEC’ hereafter*), which admittedly could not be supplied by FCL by the specified date. There also appears to have been an error in the description of the said cable, which had to be amended subsequently.

5. In terms of the contract, FCL had furnished performance bank guarantee dated 5th December, 1990 in the sum of Rs.18,37,650/-
6. Clause 9.2 of the purchase order/Contract stated that the MTNL reserved the rights to cancel the balance quantity of the order if the supply was not made within the delivery period or extended delivery period (i.e., by 20th May, 1991). Clause 10.3 stipulated that delivery of the cable would be supplied strictly as per specifications supplied by the TEC/CGM(QA), Bangalore.
7. In clause 14.3, reasonable quantities were to be offered for inspection to DET (QA) and the invoices raised by the supplier were to be accompanied by certificates of inspection stating that the stores conformed to the specifications offered and were accepted.
8. We extract hereunder clause 17 which provided for liquidity damages and reads as follows:

"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.”

9. It appears that FCL submitted a sample to the TEC on 18th May, 1991, i.e., two days before the expiry of the dead line on 20th May, 1991. This type approval was granted ultimately only on 5th August, 1991. According to the FCL, after the type approval was granted by TEC, which evidently was after the stipulated delivery period, MTNL time and again wanted the FCL to extend the delivery period. It is an admitted position that FCL obliged and kept extending the performance bank guarantee from time to time. MTNL would point out that FCL raised no objection to the extension of the performance bank guarantee.

10. It was the case of the MTNL, in the arbitration proceedings, that time continued to essence of the contract, and that, even after obtaining the approval of the TEC on 5th April, 1991, FCL did not supply a single meter of the ordered cable. It is interesting to note that there is no exchange of correspondence during this period between MTNL and FCL. It is apparent that MTNL did not make a single request to the FCL to supply the cable.

Interestingly, without once calling upon the FCL to deliver the cable for a period of over nine years, MTNL asked the FCL to extend the PBG. Thus the PBG for the sum of Rs. 18,37,650/- was extended 15 times.

11. It would appear that FCL presumed that requirement of the supply of cable did not exist anymore. Mr. Atul Y. Chitale, Id. Senior Counsel for the FCL (*respondent in the present matter*) has drawn our attention to the letter dated 7th April, 1992 addressed by the FCL requesting MTNL to short close the balance portion of the purchase order without any commercial implications, on account of there being no follow up by the MTNL.

12. MTNL has contended that, by keeping the PBG alive as and when demanded by MTNL, there was an implied consent by FCL to keep the purchase order alive.

13. Another pertinent fact which needs to be noted is that FCL had addressed a letter dated 26th September, 2001, to the Department of Telecommunication (DoT) “*for induction of Foam Skin Cables (‘FOC’) in telecom network*”. TEC’s reply dated 14th December, 2001 is important whereby TEC wrote the following :

*“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.”

(Emphasis supplied)

14. It is pointed out on behalf of FCL that MTNL therefore was not really interested in the supply of the fourth cable as it was using more modern technology as is evident from the above.

15. It is in this factual background, that on the 29th of January 2004, MTNL wrote a letter addressed to the Central Bank of India invoking the PBG furnished by the FCL as guarantee towards the contract.

16. The basis for the invocation is disclosed in a letter dated 24th February, 2004 addressed by MTNL to FCL wherein it was stated as follows :

“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.”

(Emphasis supplied)

17. On 9th March, 2004, FCL wrote a letter to MTNL stating, *inter alia*, that as the requirement of the cable did not exist, financial burden should not be imposed upon the FCL by encashing the bank guarantee. FCL instead requested that charges deducted for the bank guarantee, be reimbursed to it.

18. MTNL claimed liquidated damages of Rs.40,70,756/- and recovered Rs.18,37,650/- from the available performance bank guarantee and called upon FCL to deposit Rs.22,33,106/- being the balance amount.

19. On 18th March, 2004, MTNL also invoked a bank guarantee in the sum of Rs.20,79,320/- furnished by FCL from the Central Bank of India, Pimpri Branch, Pune which had been given in another contract, appropriating the amount thereof towards the claimed damages in the present contract.

20. It is also on record that, another bank guarantee for the sum of Rs.1,56,100/- furnished by FCL towards another contract was also encashed by MTNL and so appropriated.

We are noting this fact for the reason that MTNL has encashed these bank guarantees and has appropriated this amount towards the amount claimed by it as liquidated damages in the present case which are the subject matter of the orders by the arbitrator with regard to which the dispute was raised before the arbitral tribunal.

Arbitration proceedings

21. Aggrieved by the above action, by its letters of 6th November, 2005 and 24th December, 2005, FCL sought reference of the disputes to arbitration. The Chairman-cum-Managing Director of MTNL appointed Dr. S.M. Dewan, D.G., SCOPE as the sole arbitrator for adjudication of the disputes between the parties. FCL filed the statement of claim whereby it claimed an amount of Rs.40,70,756/- as due and payable from MTNL along with interest @ 15% per annum

from the date of invocation of the bank guarantees till the date of repayment as well as cost of arbitration. Apart from filing its reply, MTNL also raised a counter claim of Rs.6,28,44,266/- from FCL.

22. After consideration of the matter at length, the sole arbitrator had passed an Award dated 18th August, 2009, *inter alia*, holding that there was implied consent of both FCL and MTNL to keep the purchase order alive. The Arbitrator notes that MTNL did not follow up with the FCL to deliver the material for a period of 12 years; that nevertheless, the delay of 12 years in supply of the ordered material and lack of subsequent reminders by the FCL to supply the material left no choice but to cancel the purchase order; that there is no material to show that parties knew that the loss was likely to result from non-delivery of the cables; that if the agreed liquidated damages were to be enforced, it must be a result of some genuine pre-estimated damages; that in view of the clause 7.4 of the purchase order, MTNL was justified in invoking the bank guarantee and recovering the liquidated damages up to maximum of 10% of the ordered value. i.e., Rs.36,75,300/-.

The Arbitrator has noted that except the bald averments and an assumed loss of profit, there was no material at all on record to substantiate the counter claim which was actually rejected. No interest or costs were awarded.

23. This arbitral award was assailed by FCL under Section 34 of the Arbitration Act by way of OMP No.746/2009. These objections were considered and decided by the Id. Single Judge by way of the judgment dated 11th April, 2017. The Id. Single Judge placed reliance

on the pronouncement of the Supreme Court reported at **(2015) 4 SCC 136, *Kailash Nath Associates vs. Delhi Development Authority*** and concluded that the sum of Rs.36,75,300/- as liquidated damages was based on no evidence at all and consequently, invocation of the bank guarantee by the MTNL was unjustified. It was also concluded by the Id. Single Judge that conduct of both parties, i.e. of MTNL and FCL in submitting the cable only on 18th May, 1991 for approval to the TEC and that by the TEC granting approval only on 5th August, 1991, resulted in the expiry of the original delivery period on 20th May, 1991 and that both the parties had accepted this reality. The Id. Single Judge also observed that MTNL did not consider this as a breach of contract and took no steps to terminate the contract for the failure of FCL to adhere to the delivery period and nor did the FCL resist the demands of MTNL from time and again for keeping the bank guarantee alive for the period of 12 years. It was held by the Id. Single Judge that finding of the Id. Arbitrator that there was “*an implied consent of both the claimants and the respondent to keep the purchase order alive*” was a correct assessment of what transpired between them.

This judgment stands assailed by MTNL before us.

24. We have heard Mr. Abhinav Vashisht, Id. Senior Counsel for MTNL and Mr. Atul Chitale, Id. Senior Counsel for FCL at length. In the judgment dated 11th April, 2017, Id. Single Judge has noted that by the letter dated 7th April, 1992 by the FCL to the MTNL seeking short closure was understandable. The Id. Single Judge has extracted from this letter the submission by FCL which had made arrangement “*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". FCL had offered short closure without any commercial implication. MTNL did not permit the short closure but also neither did it, in response, allege any breach of contract nor claimed any liquidated damages.

25. We may extract the observations of the Supreme Court reported at **(2008) 1 SCC 503 Bharat Petroleum Corporation Ltd. v. The Great Eastern Shipping Co. Ltd.** which reads as follows:

"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."

26. In these facts, the conclusion of the Id. Single Judge that in view of the fact that for a period of 14 years after the original purchase order dated 20th December, 1990, neither party made a move for closure of the contract and consequently time was not the essence of the contract from the point of view of either party cannot be faulted. This conclusion is also supported by the decisions reported at **Keshavlal Lallubhai Patel & Ors. v. Lalbhai Trikumlal Mills Ltd.** and **AIR 1958 SC 512; AIR 1999 SC 3804 Arosan Enterprises Ltd. v. Union of India.**

27. The Id. Single Judge has rightly also concluded from the letter dated 14th December, 2001 that probably MTNL did not need the cable anymore. From the above discussion, it is apparent that the hard reality is that neither party considered time as being of essence to the contract.

Whether the encashment of the bank guarantees and appropriation of the amounts of the liquidated damages was justified?

28. Before examining the findings of the Id. Single Judge on this issue, we may usefully consider the applicable legal principles. The Id. Single Judge has placed reliance on the law laid down in para 43 of the *Kailash Nath* which summed up the legal position *qua* the claim of liquidated damages in the following terms :

“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, OMP No. 746 of 2009 Page 22 of 23 Section 74 would have no application."

(Emphasis by us)

29. It is trite that under Section 74 of the Contract Act, that to claim liquidated damages even where liquidated damages may be specified, the party so claiming, is entitled only to "reasonable compensation" not exceeding the amount specified. Even in a contract, where it is difficult to prove the actual damage or loss, proof thereof is not

dispensed with to arrive at “*reasonable compensation*”. It is only in cases where damages or loss was impossible to prove, that the amount named in the contract as liquidated damages, if it is a genuine pre-estimate of damage or loss, can be so awarded.

30. It has been held by the Id. Single Judge therefore, that 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. Both legally and factually, this is the correct position.

31. On application of the above well settled principle, there can be no manner of doubt, that it was incumbent on MTNL to prove before the Arbitrator that it had suffered some loss, even though it may not have to prove the actual loss.

32. In the present case, the Id. Single Judge has noted that the Id. Arbitrator has found, that MTNL suffered no loss whatsoever.

33. We may extract the findings of the Arbitrator in this regard which read as follows :

“On perusal of the records furnish by MTNL we do not find any proof or details of any loss incurred by the respondent that can be attributed directly due to non-availability of the said cables. No mention of any risk purchase has been made. Comparison of the price of the cables claim to have been used by MTNL with the ordered cable is not provided.

It is an accepted fact that if agreed liquidate damages are to be enforce, it must be the result in genuine pre-estimate of damages and they do not include a sum fixed in terrorem covering a breach of contract.

Assumed loss of revenue to the tune of approx Rs.6.28 Cr is mentioned by the respondent without any supporting

details of breakup. Details are the same as stated in counter claims by the respondent. It has many presumptions firstly on the number of pair in a cable assumed 90% loading of cable, assumed 5 km length of primary cable and assumed 24 months period till alternate arrangement of cable was made through new tender. No mention of new tender quality specification rates etc are given. Average revenue per user for 1992-93 at Rs.10765.61 is not supported by any document.”

34. In para 43 of the impugned judgment dated 11th April, 2017, the Id. Single Judge has noted that the MTNL has not challenged this finding.

35. Despite the above conclusion in the Award, the Arbitrator holds as follows :

“In view of the reasons stated in the previous pages and going by the terms of the contract at clause 7.4, the respondent is justified in invocation of the bank guarantee and recovery of liquidity damages upto a maximum of 10% of the total value of the order i.e. Rs.36,75,300/- only.

36. On a consideration of the material of the record of the arbitral tribunal, the Id. Single Judge has noted that *“absolutely no material was placed on record by the MTNL that it suffered an iota of loss on account of non-supply of cables”*.

37. The Id. Single Judge has further returned the finding that even if MTNL had proved it that it had suffered some loss, the Arbitrator as the adjudicatory body, was required to award only a *“reasonable sum”*. What would be the reasonable sum is to depend on the facts and

circumstances of every case. In the present case, the Id. Single Judge has observed that the arbitrator has awarded the maximum amount specified under Clause 7.4. As noted above, MTNL led no evidence of loss. The Id. Single Judge has found that the Award of the amount is without any explanation at all as to how the maximum liquidated damages anticipated by the said clause was actually a “*reasonable sum*” in the facts and circumstances of the case. This is legally impermissible.

38. We are unable to fault with the findings of the Id. Single Judge that having found no loss whatsoever as having been suffered by the MTNL, there was no warrant or explanation at all for the Arbitrator awarding the maximum i.e. 10% of the total value of the contract being the sum of Rs.36,75,300/-. The finding of the Id. Single Judge in the impugned judgments, that the Arbitral award was based on no evidence at all and was contrary to the well settled legal position, thus has to be upheld.

Scope of Section 34 of the Arbitration Act

39. The Id. Single Judge has held that an award which was inconsistent with the law laid down by the decision of the Supreme Court would be opposed to the fundamental policy of the India and would attract the invalidation under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996.

40. The extent of jurisdiction of the court while dealing with the challenge to an arbitral award, by now, stands authoritatively examined by a plethora of pronouncements of the Supreme Court,

which travel from the judgment reported at **1994 Supp (1) SCC 644, Renusagar Power Co. Ltd. v. General Electric Co.** to **(2015) 3 SCC 49, Associated Builders v. DDA**. On an analysis of all the said decisions, this court has, in a recent judgment reported at **MANU/DE/2699/2017, NHAI v. Hindustan Construction Co. Ltd.**, delineated the following propositions :

“36. Associated Builders v. DDA, MANU/SC/1076/2014 : (2015) 3 SCC 49, may justifiably be christened as the high watermark in the law relating to Section 34 of the Act, and any attempt to paraphrase the decision is fraught with the risk of mutilation. The decision is, almost entirely, definitively authoritative, and brooks no ambiguity or anomaly. Nonetheless, in view of the proliferation of litigation, challenging arbitral awards, in recent times, we have, in a recent decision, dated 10th August 2017, in Shiam Cooperative Group v Kamal Construction Co. Ltd., extracted, in extenso, the relevant paragraphs from the said decision, and respectfully culled, therefrom, the following clear principles:

- (i) The four reasons motivating the legislation of the Act, in 1996, were*
 - (a) to provide for a fair and efficient arbitral procedure,*
 - (b) to provide for the passing of reasoned awards,*
 - (c) to ensure that the arbitrator does not transgress his jurisdiction, and*
 - (d) to minimize supervision, by courts, in the arbitral process.*
- (ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.*

- (iii) *An award would be regarded as conflicting with the public policy of India if*
 - (a) *it is contrary to the fundamental policy of Indian law, or*
 - (b) *it is contrary to the interests of India,*
 - (c) *it is contrary to justice or morality,*
 - (d) *it is patently illegal, or*
 - (e) *it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.*
- (iv) *An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if*
 - (a) *it disregards orders passed by superior courts, or the binding effect thereof, or*
 - (b) *it is patently violative of statutory provisions, or*
 - (c) *it is not in public interest, or*
 - (d) *the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or*
 - (e) *the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or*
 - (f) *the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or*
 - (g) *the principles of natural justice have been violated.*
- (v) *The "patent illegality" had to go to the root of the matter. Trivial illegality were inconsequential.*
- (vi) *Additionally, an award could be set aside if*
 - (a) *either party was under some incapacity, or*
 - (b) *the arbitration agreement is invalid under the law, or*

- (c) *the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or*
 - (d) *the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or*
 - (e) *the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or*
 - (f) *the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or*
 - (g) *the award contravenes the Act, or*
 - (h) *the award is contrary to the contract between the parties.*
- (vii) *"Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which*
- (a) *the findings, in the award, are based on no evidence, or*
 - (b) *the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or*
 - (c) *the Arbitral Tribunal ignores vital evidence in arriving at its decision.*
- (viii) *At the same time,*
- (a) *a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",*
 - (b) *if the view adopted by the arbitrator is a possible view, it has to pass muster,*
 - (c) *neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.*

- (ix) *"Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.*
- (x) *For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.*
- (x) *The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts."*

41. It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the Id. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at **MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No.63/2015)**, the Division Bench of this court has held that *"an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34"*. Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or

manifestly perverse. The impugned judgment dated 11th April, 2017 of the Id. Single Judge cannot be said to suffer from any such infirmity.

Conclusion

42. It is to be noted that the arbitral tribunal rejected the counter claim of the MTNL, yet proceeded to award liquidated damages. We are unable to agree with Mr. Abhinav Vasisht, Id. Senior Counsel for the appellant - MTNL that the contract was of such nature that it was not possible to evaluate the damages and therefore, that 10% of the amount quantified in the contract between the parties as liquidated damages had to be treated as being reasonable award of damages.

43. It is clearly stated in para 43.6 of ***Kailash Nath*** that in case where damages are difficult or impossible to prove, the claimants would be entitled to the liquidated damages if they were a genuine pre-estimate of the damage. No material at all in this regard was produced before the arbitral award. MTNL has not even asserted that it had suffered loss.

44. The Arbitrator has not even examined the challenge by the FCL to the encashment of the bank guarantees furnished by FCL to MTNL for other contracts and permitting amount thereof to be applied towards liquidated damages claimed by MTNL in the present case. In any case, keeping in mind the view taken by the Id. Single Judge *qua* the Award of the liquidated damages for which these two bank guarantees were encashed, there is no justification at all for encashment of these two bank guarantees.

45. In view of the above discussion, the judgment dated 11th April, 2017 passed by the Id. Single Judge cannot be assailed on any legally tenable grounds.

Result

46. The present appeal is completely devoid of merit and is hereby dismissed with costs which are quantified at Rs.50,000/-.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

SEPTEMBER 18, 2017

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