

rrpillai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 568 OF 2010

M/s. Singhal & Bros

... Petitioners

vs.

(1) The Mahanagar Telephone Nigam
 Ltd. and Anr.

... Respondents

(2) Shri G. S. Chaturvedi
 General Manager (Planning)

Mr. Nawaz Haindaday i/b. Ms. Nipa Shah for the Petitioner.

Mr. S. R. Rajguru for Respondent nos. 1 and 2.

CORAM : A.K. MENON, J.

RESERVED ON : 25th JULY, 2018PRONOUNCED ON : 25th SEPTEMBER, 2018**JUDGMENT**

1. This petition under section 34 of the Arbitration and Conciliation Act, 1996 ("The Arbitration Act, 1996") assails an award dated 22nd October, 2009 passed by a sole arbitrator who was the General Manager (Planning) of respondent no. 1. Although the Arbitrator has been impleaded as respondent no. 2 obviously no relief can be claimed against the Arbitrator.

2. A few facts may be gone into before dealing with submissions of counsel :

2.1. The petitioners are a partnership firm inter alia carrying on business of laying underground gas pipelines, telephone lines, telecom cables and

cables for Railway Signaling systems. Disputes arose between the parties in the matter of digging of trenches and laying of cables/ optical fibers and allied works within the city of Mumbai. Trenches were to be dug on the road for which respondent no. 1 invited tenders in May, 1994 for reinstatement of trenches dug for laying cables/ optical fiber. The work of reinstatement of roads were earlier done by the Municipal Corporation themselves. Pursuant to the bidding process the petitioner was appointed contractor for North, West-I and East-I zones within the Municipal limits of the Bombay Municipal Corporation (BMC). Petitioner entered into an agreement on 21st November, 1994 for the purposes of reinstatement of trenches and re-servicing of the roads.

2.2. It is the petitioners case that the tender only referred to reinstatement of the trenches dug up by MTNL as per satisfaction of the BMC officer and the contractors were required to produce an Acceptance Certificate of the BMC in respect of work done in a particular area. The work was inspected by officers of the BMC and they then certified the same. According to the petitioner work carried on by them was duly inspected and verified by MTNL which would record quantities for each item in a Measurement Book. After the measurements were recorded the contractor would apply the rates mentioned in the contract and submit bills. Neither the tender nor the agreement laid down any specific issue relating to reinstatement of the roads.

2.3. The petitioners claim to have submitted bills in accordance with the items and quantity recorded. They relied upon copy of a sample bill which is annexed at Exhibit-A to the petition. Upon submission of the bills during the progress of work these are stated to be verified with regard to the rates and quantities by the concerned officer of MTNL and payments were made accordingly. A summary of bills raised is relied upon by the petitioners. It is claimed that the petitioners have not been paid certain amounts claimed to be due and payable on completion of work. Discussions apparently took place between BMC and the petitioners based on which MTNL issued an order dated 21st July, 1995 laying down parameters and specifications for reinstatement work. Supplementary measurements were also stated to be recorded in the measurement book and was certified by the BMC. Verification of the bills by MTNL officials is stated to be a straight forward exercise and the only aspects to be checked is whether the correct rates have been applied and part payments made. According to the petitioners in respect of work completed they had submitted bills.

2.4. It is the petitioner's case that various other projects had also been undertaken for the MTNL and for one such tender the petitioners had submitted a security deposit of Rs.11,29,275/- but the petitioners included the claim for refund of security deposit in the reference with which we are now concerned. In the arbitration they claimed a sum of Rs. 1,26,01,260/- from respondent no. 1 primarily arising out of alleged shortfall in payments made against supplementary bills, security deposits, interest on amounts,

legal expenses and damages. It appears that the MTNL did not release payments and as a result a Writ Petition came to be filed in this Court.

2.5. Vide order dated 27th April, 2005, this Court passed an order directing MTNL to appoint an arbitrator. Instead of doing so MTNL challenged the order before the Supreme Court. On 11th February, 2008 Supreme Court disposed the Special Leave to Appeal (Civil) No. 4449/2006 and directed MTNL to appoint an arbitrator and proceed afresh in accordance with law. The arbitrator then heard the parties on the claim. That is how impugned award dated 22nd October, 2009 came to be passed.

3. Mr. Haindaday learned counsel appearing on behalf of the petitioners submitted that the award was bad in law and was liable to be set aside. He submitted that there was no counter claim and all claims were pressed into service. Making reference to the award Mr. Haindaday submitted that the award is bad in law for following reasons :

- (a) The award is bad on the ground of bias demonstrated by the Arbitrator.
- (b) The award is in contravention of the fundamental policy of law since no reasons are given.
- (c) It is also contended that the award is bad since it is in conflict to the public policy of India.

4. The learned counsel for the petitioner submitted that MTNL had failed to produce relevant records before the arbitral tribunal. The award is also assailed on

the ground that the Tribunal could not have ordered payment of interest on the Rs.11,29,275/- apart from the fact that the arbitrator used his own method to compute the aforesaid amounts. Being a public body Mr. Haindaday submitted that the MTNL would be bound to follow the General Financial Rules, 2005 (GFRs) in the discharge of its duties and the security deposit was not capable of being forfeited. The petitioners have accused MTNL of withholding evidence and several aspects of the award demonstrated bias against the claimants.

5. Although it is not necessary to enter upon the merits of the controversy briefly put the seven claims are as under :

(i)	Shortfall in payments	-	Rs.10,38,608.96
(ii)	Payments due against supplementary bills	-	Rs.18,33,182.00
(iii)	Interest on legitimate payments withheld	-	Rs.57,86,892.00
(iv)	Security deposit	-	Rs.11,29,275.00
(v)	Interest on Security deposit	-	Rs.18,63,303.00
(vi)	Legal expenses	-	Rs. 4,00,000.00
(vii)	Mental trauma and loss of business caused by acts of harassment	-	Rs. 5,00,000.00

6. Mr. Haindaday submitted that in respect of first claim MTNL were required to submit records which have been called for but were not produced. The arbitrator after recording the submissions observed that the respondent was asked to produce copies of disputed bills since the original and supplementary bills were in contemplation but MTNL could not produce the bills. They kept seeking more and more time on the ground that the case was quite old.

7. In the meanwhile in a meeting held on 24th March, 2009 both parties were asked to submit supporting documents for claims nos. 2 and 4 and exchange copies to the respondent and MTNL was asked to make their final submissions on claim no.

1. Meanwhile on 26th March, 2009, the petitioner questioned the impartiality of the arbitrator on the ground of bias. The petitioner contended that the arbitrator had been granting a long time for MTNL to search old records yet bills were not forthcoming. The Tribunal observed that in respect work done at Shivaji Park Exchange and Mankhurd Exchange things were in order but in respect of Powai, Ghatkopar, Chembur, Bandra and Andheri although petitioners were required to submit correct details of the bills and payments received against the bills, they were not able to submit requisite information. Moreover the petitioner's had not submitted documents to substantiate the claim and therefore the matter remained pending.

8. Mr. Haindaday submitted that the arbitrator had paraphrased the contents of the correspondence inaccurately. Although the arbitrator had held five meetings the respondents had only been expressing difficulty in checking facts quoting departmental issues. The petitioners therefore called upon the arbitrator to decide on the other claims. Mr. Haindaday submitted that the manner in which the arbitrator has dealt with the case smacks of bias and in any case it is an impossible and unreasonable view, given the fact that the respondent took time to present evidence to show that all amounts due had been paid in the past, but in view of their absence of produce relevant records an adverse inference ought to have been drawn which the arbitrator has failed to do. Although the tribunal recognised

the fact that MTNL was to provide the requisite records for verification, there are no reasons why the claim was disallowed and the only reasons given is that the petitioner did not produce any credible evidence.

9. In respect of claim no. 2 arbitrator records that as per tender condition 1D *“all items of work shall be subjected to quality control check to be performed by Engineer in charge of MTNL, Bombay and Engineer in charge of BMC”*. It is recorded that the applicants submission to the effect that methodology of work was not clear in the tender was addressed in a letter dated 21st July, 1995, but by that time the work had been completed and bills had been submitted. Apparently after submission of the bill some work had to be redone. However this claim is refuted by MTNL. According to MTNL there was no direction to redo works already completed and supplementary bills raised were to be untenable.

10. As far as claim no. 3 is concerned Mr. Haindaday submitted that the claim only pertains to interest @ 15% for a period of 13 years. As on date of the award the claim is of Rs. 57,86,892/- Mr. Haindaday submitted that interest ought to have been awarded but was rejected. Claim no. 4 was for refund of the security deposit. According to the petitioner the security deposit was made in relation to certain other contract. However, MTNL contended that it had black listed the petitioners for irregularities committed and that the applicant was prosecuted and charge sheeted by the CBI and hence they had a right to withhold payment as per terms and conditions of the contract. He submitted that the arbitrator had concluded that the security deposit was not refundable and to be withheld but without reference to

any provision in the tender which would entitle MTNL to refuse return of the Security deposit. In this respect I find that the arbitrator recorded that during the course of the hearing the petitioners were shown correspondence revealing that the petitioners were under investigation apropos alleged irregularities committed and that all pending bills, security deposit and retention money were kept pending till final investigation report was received. The tribunal records that after seeing this letter the petitioners dropped their demand for security deposit and also records that in view of the said letter no further elaboration was required.

11. Mr. Haindaday submitted that the petitioner had never given up these claims. Grounds “r” and “s” of the petition specifically challenges this aspect of the award. It was submitted by Mr. Haindaday that the security deposit did not even pertain to the present set of disputes but had been included on the specific instructions of MTNL who had contended in the course of argument that the security deposit was being retained pending a further decision in the matter. He submitted that the petitioner had been denied the claim unjustifiably merely due to the fact that an inquiry has been pending and in fact the petitioners have been acquitted in the case.

12. Mr. Haindaday drew my attention to letter dated 3rd December, 2005 addressed by Deputy General Manager, MTNL to the petitioners recording that the request made on 23rd November, 2005 for refund of the security deposit in relation to tender no. CCB/TRI/94-95 dated 24th May, 1994. He submitted that this request

dated 23rd November, 2005 was in regard to refund of security deposit pertaining to a completely different tender yet MTNL had contended that the claim could be adjudicated before one Mr Devesh Kumar who had been appointed sole arbitrator and that the refund of security deposit will be considered only after conclusion of the arbitration proceeding. My attention is also invited to the fact that on 28th November, 2008 MTNL had written to the sole arbitrator on the aspect of refund of security deposit wherein MTNL contended that an FIR has been registered on 13th June, 2000 against the petitioner's partner who was prosecuted and chargesheeted by CBI under the provisions of Prevention of Corruption Act, 1988 for issuing bogus bills in respect of reinstatement of work carried out by the petitioner and in this connection the petitioner's had been black listed with directions not to issue any further contracts to the petitioners. In this view of the matter it was contended that the security deposit was not refundable although Mr. Haindaday submitted that it was impermissible for MTNL to retain the deposit and that the recording of the concession was incorrect, I am of the view that this contention of the petitioners cannot be accepted in the absence of contemporaneous evidence of the petitioner having made any attempts to have the alleged errors corrected under Section 33 even assuming the claim was arbitrable.

13. Claim no. 5 pertains to the interest on security deposit and as such interest was claimed @ 15% per annum but since the arbitrator held that the security deposit was not payable this claim was also rejected. The claim nos. 6 and 7 were for legal expenses and mental trauma and loss of business which also came to be rejected.

14. Mr. Haindaday submitted that there was no justification whatsoever in declining the claims. Although MTNL was bound to produce records in respect of claim no 1. they had repeatedly sought time to obtain relevant particulars and place the same on record. They had failed to do so and despite several adjournments granted they have omitted to produce records contending that they were required to maintain records only for a period of 5 years. In the instant case since matter has already been sub-judice it was incumbent upon MTNL to keep records available since they were aware that these would be required in the arbitration pursuant to order of the SLP No.4449/2006 dated 11th February, 2008.

15. Mr. Haindaday then submitted that even the GFRs were not produced and in the circumstances it was incumbent upon the arbitrator to draw an adverse inference which he had failed to do. Specific reference was made to the GFRs yet the same were not produced and only casual reference was made to the rules. It was incumbent upon MTNL to produce these rules, all the more since the reply to the statement of claim contained no reference to the GFRs. The only ground taken as far as refusal to pay the security deposit, is that the petitioner is not eligible for repayment of the security deposit because an FIR had been filed. However, in the meantime it was established that the petitioner was discharged in case CBI Case No. 61 of 2003. Mr. Haindaday referred to certified copy of the judgment dated 17th July, 2014 passed by the Special Judge, CBI wherein respondent no. 6 is shown as Pramodkumar Goel who are contractors / representative of the petitioners. It transpires that pending the complaint Mr. Pramodkumar Goel of the petitioner expired and the complaint abated.

16. In the light of the above decision of the Special Judge in CBI Special Case No. 61 of 2003 Mr. Haindaday submitted that there was no occasion to withhold security deposit, the only reason was for withholding security deposit of Rs.11,29,275/- was in the respect of abandonment of claim and shortfall of Rs. 6,49,324/- .

17. Mr. Haindaday also relied upon provisions of section 209 of the Companies Act which provides for the requirement of keeping books of accounts by a company. It provides that every company shall keep in its registered office, proper books of accounts with respect to all sales and purchases of goods and assets and liabilities. He submitted that the respondent MTNL could not avoid compliance with section 209. Section 209(4)(a) provides that books of accounts of every company shall be kept for eight years preceding the current year together with vouchers relevant to any entry in the books of account and if any persons fails to take steps to ensure compliance they would have committed an offence which is punishable with imprisonment and/or fine.

18. Mr. Haindaday further submitted that even in the Income-Tax Rules, 1962 provision 6F(1) every person carrying on legal, medical, engineering or architectural profession or profession of accountancy or technical consultancy or interior decoration or authorised representative or film artist are required to maintain books of accounts. Under the said Rule 6F (5) books of accounts and other documents specified in sub-rule (2) and sub-rule(3) were required to be maintained for a period of six years from the end of the relevant assessment year. It

is therefore submitted that MTNL was bound in law to maintain these books and the respondent having not produced the same the arbitrator was bound to draw adverse inference against the respondent.

19. Mr.Haindaday also relied upon judgments in the CBI cases in the following matters involving inter alia the petitioners.

- (a) CBI Special Case No. 20 of 2003
- (b) CBI Special Case No. 61 of 2003
- (c) CBI Special Case no. 88 of 2004
- (d) CBI Special Case no.07 of 2004
- (e) CBI Special Case 61 of 2003

20. In view of the above Mr. Haindaday submitted that the award is liable to be set aside. In support of his contention Mr. Haindaday relied upon following judgments :

- (i) *Oil & Natural Gas Corporation Ltd. vs. SAW Pipes Ltd. [AIR 2003 SC 2629]*
- (ii) *Renusagar Power Co. Ltd. vs. General Electric Co. [AIR 1994 SC 860]*
- (iii) *Tower Vision India Private Limited vs. Videocon Telecommunications Ltd. [O.M.P.(I) (Comm) 105/2016]*

21. Mr. Rajguru, learned Advocate for the MTNL submitted that there is no substance in the challenge. He submitted that the tender had been accepted in the year 1994-95. He further submitted that all amounts due to the petitioner was found to be paid in October, 1995 and were accepted without protest, but

supplementary bills were thus raised on the basis of circular of dated 21st July, 1995 and to which reference is made, copy of which appears annexed to letter dated 11th September, 2008 Exhibit -F to the petition seeking to justify numerous claims. Enclosures to the said letter contain details of bills submitted and the bills passed and the amount of difference.

22. Mr. Rajguru invited my attention to affidavit in reply to the petition dated 12th January, 2011 wherein he relied upon paragraph 12 in which the deponent submits that the petitioner had filed Writ Petition No. 2733 of 2004 for setting aside the impugned order dated 29th June, 2004 as per the reply dated March, 2005 the petitioners had claimed Rs. 86,20,659.79p in 53 bills from April to June, 1995 in respect of reinstatement work done from December, 1994 to June, 1995. It was submitted that the said bills were inflated to the extent of Rs. 12,00,524.79p and the respondent worked out the value of the bills payable at Rs. 74,20,128/- being value of work executed and after deducting an amount of Rs.7,42,019/- towards security deposit being 10% of Rs.74,20,128/- and an amount of Rs.1,48,402/- towards Income Tax @ 2% p.a, MTNL paid over a sum of Rs.57,40,205/- as advance and the balance of Rs. 7,89,682/- was paid in October, 1995. These amounts were accepted without protest. It is only as afterthought that claims were raised. He submitted that the claims were fabricated and that the petitioners' partner had escaped being convicted since he had expired.

23. Special Case no. 61 of 2003 clearly establishes that the accused nos. 1 and 2 Divisional Engineer of MTNL were convicted and sentenced to two years

imprisonment and fined of Rs.20,000/- on six counts under section 120 B, 420, 467, 468, 471 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act. It is only others who were acquitted and meanwhile the petitioner's partner Mr. Goel had expired. It is therefore contended by Mr. Rajguru that the petitioner cannot seek to take advantage of the fact that there is no order of conviction against four accused who were all acquitted. Mr. Rajguru further submitted that in the rejoinder there was no denial of the fact that these amounts had been accepted without protest.

24. Mr. Rajguru further submitted that the claim was also time barred since payment of bills were made in October, 1995 and was accepted without protest. First time a grievance was raised regarding non payment was in 1998 after expiry of period of limitation which commenced in March, 1995. He submitted that as such dispute being old records of the year 1995 were not preserved and hence not available. In view of the dispute since 2009 the old records were to be maintained and Mr. Rajguru submitted that it was for the petitioner to produce the records in question and having failed to do so the burden cannot now be shifted on the respondent to help the petitioner to prove his case.

25. Mr. Rajguru further submitted that Exhibit M to the petition clearly records that it was agreed between all parties present that the parties agreed to drop the claim under supplementary bills and for security deposit and only the other issues were pressed to be decided at the final hearing and hence it is stated that there is no question of the respondents being faulted on that count. Mr. Pramod Kumar Goel

was present at the said meeting and signed the said minutes and in any event, the use of the words “short payment” in original bills agreed by both parties and quantified at Rs.6,49,324/- was not actionable since both parties agreed to drop the supplementary bill claim.

26. I have heard the learned counsel for the parties at length and have perused the Award. Considering the factual matrix as dealt with in the Award. The challenge on various grounds canvassed by Mr. Hainday would be relevant only if the petitioner had not given up some of the main claims. I am of the view even assuming Exhibit M, wherein petitioner partner had signed in attendance is entered or altered after the petitioner signed, the fact that it is annexed to the petition whether or not it was made available during the arbitration proceedings would certainly have elicited a denial from the petitioner. However perusal of the petition does not reveal any specific response. It is not the case of the petitioner that these minutes were not received. On the other hand in paragraph 31 petitioner states as follows :

“31. “Despite the comments of respondent no. 1 dated 13th August, 2009 received by the Petitioners on 14th August, 2009, during the arbitration proceeding, the Learned Arbitrator inexplicably, without permitting the Petitioners any opportunity to deal with the allegations raised by Respondent no. 1, immediately during the proceeding held on the date of receipt of this letter on 14th August, 2009, whilst recording the contentions raised by Respondent no. 1 in the letter dated 13th August, 2009 had recorded that the parties have agreed that there is a short payment by Respondent no. 1 to the Petitioners for Rs. 6,49,324/- without permitting the petitioners to deal with the said contention and without permitting the petitioners to give their say on the same, the Learned Arbitrator (obviously with a view to aid and abet Respondent no. 1) closed the reference. Hereto annexed and marked as 'Exhibit-M' is the copy of the Minutes dated 14th August, 2009.”

27. Apropos the said minutes of meeting it is pertinent to mention that there is no dispute that Mr. Pramodkumar Goel was present at the meeting since his signature has been admitted during the course of hearing. The reaction of the petitioner after receipt of the said communication would however be relevant. In this respect Mr. Haindaday submitted that the communication was received only on 20th January, 2010, but I find that the challenge to the recording of proceeding at the meeting is not one of the grounds taken in this petition. Save and except stating that minutes were prepared without permitting the petitioners to respond thereto and with a view to aid and abet respondent no. 1 the arbitrator closed the reference, nothing more has been stated as a response to the said minutes. One would have expected that faced with such recording of events on the final day, the petitioner would have promptly protested the recording of events in these minutes, on the other hand paragraph 32 seeks to explain the way the written minutes dated 14th August, 2009, on the basis that the arbitrator was acting in a biased manner and the petitioner had “no choice” but to sign the minutes prepared by the arbitrator and that the petitioner's were allegedly “waiting for an opportunity to comment upon the unfair conduct” of the arbitrator when “suddenly” the award came to be published.

28. In my view it is not possible to accept this explanation given the fact that sufficient time was available for the petitioners to respond to the said minutes since the award was published only on 22th October, 2009. From 14th August, 2009 to 22th October, 2009 the petitioner has not protested to recording of events of the meeting in the minutes of the order dated 22th October, 2009.

29. On the controversy pertaining to production of record although the petitioner has made serious allegations of bias against arbitrator and of suppression of evidence against the respondent, what must not be lost sight of is that if at all supplementary bills had been raised, it was for the petitioner to produce these supplementary bills and place it before the tribunal which it had failed to do. I am unable to accept the contention of the petitioner that the burden of proving supplementary bills had been issued and were payable was upon respondents. Furthermore, the conviction of the two Divisional Engineers of the respondent was also based on fabrication of supplementary bills and for reinstatement on account of issuance of work orders and other documents showing that reinstatement work had been carried out. The reluctance of the petitioner to produce these bills in the course of arbitration is also a factor to be taken into consideration and in that respect the view taken by the arbitrator is certainly a plausible view and cannot be said to be a view that a reasonable person could not take.

30. The Award holds that the respondent was able to show from available records that the petitioners' contention that the entire amount of the original bills were payable did not hold good. They contended that records were required to be preserved for only 5 years as per the GFR and records pertaining to the year 1995 were not available. They contended that they were unable to make any comment on the claim for shortfall of Rs.6,49,324/-. In conclusion arbitrator holds that the petitioner was unable to show how these original bill amounts were payable. Mr Haindaday submitted that finding to the effect that petitioner application did not

provide credible evidence of amounts being outstanding. In this behalf Mr. Haindaday made reference to a letter dated 15th March, 1999 Exhibit-H to the petition which is believed to be the copy of an internal communication recording that after initial measurements had been made supplementary measurements were also made but since the tender term were not clear it was not known how deductions were made from the contractor's original bills, when these could have been made only on the basis of the measurement book. In my view this is an aspect that cannot be gone into under Section 34 since it is not possible to appreciate evidence in a challenge under Section 34. In any event in my view the said writing would not come to the assistance of the petitioner since it appears to be an unsigned copy of a note. It does not even disclose who the author of the note was. Mr. Haindaday submitted that the petitioner had not agreed to withdraw the supplementary bills, yet the arbitrator recorded that the petitioner agreed to withdraw the claim on supplementary bills. In my view this contention of the petitioners cannot be accepted in the absence of contemporaneous evidence of the petitioner having made any attempts to have the alleged errors corrected under Section 33. Absent such evidence and consideration the Award cannot be challenged.

31. In *ONGC (supra)* Mr. Haindaday relied upon observation of the Supreme court in paragraph 15 to the effect that the phrase Public Policy is considered vague, susceptible to narrow or wider meaning depending on the context in which it is used and it can be stated that the concept connotes some matter which concerns the public good and the public interest or what would be injurious or harmful to

the public interest is varied from time to time. That an award which on the face of it is patently in violation of the statutory provisions cannot be said to be in public interest. I am unable to agree that in the facts of the case the Award is violation of law or public policy.

32. In *Renusagar Power (supra)* it was held that the award could be set aside if it is patently contrary to the fundamental policy of Justice and in addition if it is patently illegal according to the root of the matter and if the illegality is trivial in nature, award is against the public policy. Furthermore an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such an award will be against public policy and must be adjudged as such. The facts of the case at hand do not fit the criteria embodied in *Renusagar Power*.

33. In *Tower Vision (supra)* dealing with illustration (g) to section 114 of the Indian Evidence Act, 1872 held that if evidence that can be produced is withheld, the Court may presume that such evidence is unfavourable to the person who is withholding it. That the applicant- bankers were withholding the indenture of mortgage and in view of their refusal to produce the same despite the same being pointed out during the hearings, the Court must presume that the mortgage does not extend to the spectrum in question. The applicants bankers had not taken steps for enforcement of the alleged security. Mr. Haindaday's submission that failure of MTNL in producing records should result in an adverse inference being drawn against the respondent is not justified since the bills were issued by the petitioner who did not produce the office copies which ought to have been in their possession.

Moreover some claims under the Supplementary bill were not pressed and the burden to prove the claim continued to be that of the petitioner.

34. The judgment in CBI Special Case No. 20 of 2003 which concerns a complaint made against the petitioners / partner alleging that a criminal conspiracy to cause wrongful loss to MTNL by raising 16 bills with false and bogus certificate of completion purported to be issued by housing societies. In that case the prosecution failed to prove that fake and bogus reinstatement work was carried out. 20 witnesses had been examined. However, the accused were all acquitted. Shri Pramod kumar Goel was accused no. 3 but the case had abated in view of his demise. However, after considering the offence of accused, other accused had been acquitted and their bail bond cancelled.

35. Similarly in the case of CBI Special Case No. 61 of 2003 also Mr. Pramod Kumar Goel was accused no. 6 and the case against him had abated on account of his demise. Two of the accused who were convicted were Sub-Divisional Engineer, MTNL and Divisional Engineer, MTNL. Accused no. 3, 4, 5 and 7 have been acquitted. It is however pertinent to note that the conspiracy alleged in that case involved accused nos. 1 and 2 who issued bogus work orders to the petitioner and falsely certified that the reinstatement work was carried out satisfactorily and obtained payment on the basis of fake and forged documents. Findings in paragraph 2 of the judgment dated 17th July, 2014 were to the effect that the petitioner obtained payments on the basis of fake and forged document. In fact there was no cable fault at the respective locations and there was no question of

any work being carried out. The accused in that case had fraudulently certified in the measurement book that he had checked the work and issued certification of the measurement book. Accused no. 3 is alleged to have abused his position as a public servant and made false and fake entries in the measurement book and accused nos. 6 and 7 submitted fake completion certificates on the fake letterheads of housing societies and caused monetary loss to MTNL. In view of the conviction of the accused nos. 1 and 2, I am of the view that the fact that accused no. 6, contractor of the petitioner firm had expired resulting in the case against him abating cannot ensure to the advantage of the petitioners. The findings of the Court in relation to accused nos. 1 and 2 establish that respondents Divisional Engineers had conspired with the petitioners and falsely issued bogus work orders and falsely certified reinstatement and collected monies. Merely because some of the accused were acquitted would not bind the Arbitrator's to decide in favour of the petitioner.

36. In CBI Special Case no. 88 of 2004 wherein Shri Pramod Kumar Goel was accused no. 5, the accused nos. 1 to 4 and 6 and 7 were acquitted and their bail bonds cancelled. In yet another case CBI Special Case no.07 of 2004 the accused were all acquitted. In CBI Special Case No. 133 of 2004 wherein late Mr. Pramod Kumar Goel was accused No. 8, accused nos. 2, 3, 5, 6, 7, 9, 11 to 17 were acquitted. Out of 17 accused 13 were acquitted.

37. The Judgment of CBI Special Case 61 of 2003 in paragraph 107 merely records that Mr. Pramod Kumar Goel, who was representative for the petitioners had died and the proceedings against him had abated and the focus shifted to

accused nos. 1 and 2 whereby they were passed had falsified work orders and consciously approved bills though no reinstatement was undertaken by the petitioner contractor. The judgment holds that these bills were in fact bogus. Thus the accused nos. 1 and 2 and the contractor namely petitioner could not have raised bills in questions. The judgment in paragraph 113 holds that the accused nos. 1 and 2 and M/s. Singhal & Brothers were responsible for irregularities and the work orders and bills.

38. Thus the burden in my view was upon the petitioner to produce these bills and could not be shifted to the respondent. The Arbitrator obviously felt that drawing of an adverse inference may not have been justified. The award is awkwardly worded in several portions but that having been said, I am unable to accept the contention of the petitioners that the award is in conflict with the public policy of India. In my view the Award considers the claims made and those given up as recorded in the course of the proceedings and the view taken is neither perverse, the challenge as mounted cannot succeed. For the aforesaid reasons, I pass the following order :

- (i) Arbitration petition is dismissed.
- (ii) No costs.

(A.K. MENON, J.)

Rajeshwari
Ramesh
Pillai

Digitally signed
by Rajeshwari
Ramesh Pillai
Date: 2018.09.26
10:54:02 +0530