

\$~8, 9 & 10

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

Decided on: 04th December, 2018

+ **FAO(OS) 159/2010**

UNITECH LTD

..... Appellant

versus

MAHANAGAR TELEPHONE NIGAM LTD & ANR..... Respondents

+ **FAO(OS) 383/2010**

+ **FAO(OS) (COMM) 214/2018 & CAV 843/2018 & CM APPL.
Nos.37412-37414/2018**

MAHANAGAR TELEPHONE NIGAM LIMITED

..... Appellant

versus

M/S UNITECH LIMITED

..... Respondent

Present: Mr.S.K.Maniktala, Mr.Tushar Chawla & Mr.Udit Maniktala,
Advocates for M/s Unitech Limited

Mr.Sudhanshu Batra, Sr.Advocate with Mr.Jasbir Bidhuri &
Mr.Aditya Mishra, Advocates for MTNL

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S.RAVINDRA BHAT, J. (OPEN COURT)

%

1. The subject matter of these three appeals is common; it pertains to works contract awarded by Mahanagar Telephone Nigam Limited [hereafter referred to as "MTNL"]. Both MTNL as well the claimant [hereafter referred to as "Unitech"] have challenged the order of a learned Single Judge dated 23.11.2009. MTNL has also challenged a subsequent judgment dated 09.05.2018 passed by another learned Single Judge.

2. The subject matter of FAO(OS) 159/2010 – which is Unitech’s appeal, is with regard to the learned Single Judge’s decision 23.11.2009 (hereinafter referred to as “First Judgment”), setting aside the award dated 28.01.2000 with respect to claim No.1(a)(4) [hereafter referred to as “shuttering claim”]; the other head of challenge is with respect to the reduction of interest, directed by the learned Single Judge.

3. FAO(OS) 383/2010, by MTNL pertains to the award with respect to the claim No.3 [₹10,99,198/-] [hereafter referred to as “De-watering claim”]. The second appeal, FAO(OS) 214/2018 impugns the decision of a learned Single Judge rendered on 09.05.2018 [hereafter referred to as “Second Judgment”]. The subject matter of this challenge is with respect to the matters remitted on 23.11.2009 [hereafter referred to as “First Judgment”]. These cover two claims by Unitech i.e. claim Nos. 4 & 5. The Arbitrator after the remission ruled in favour of the Unitech, the claimant.

4. The necessary facts in brief are; the contract awarded, was for construction of multi-storey telephone exchange building on Envelope No.9, CGO Complex, Lodhi Road, New Delhi, for the tendered amount of ₹14,86,18,830.18. The scope of work encompassed the construction of multi-storey building with two basements, ground floor and 6 floors above it. According to the agreement between the parties, the stipulated date of commencement of construction [date of start] was 10.09.1992 [the stipulated or agreed date for completion was 09.09.1994]. It is undisputed between the parties that the contract was not completed within that time. Four extensions were granted by the MTNL to facilitate the task, the last upto 18.12.1995. The works were ultimately completed on 12.09.1998. Unitech thereafter raised several claims and invoked the arbitration clause.

MTNL disputed these claims; in accordance with the agreed condition, a Tribunal was constituted under the Arbitration and Conciliation Act, 1996 [hereafter referred to as the “Act”]. The award was published by the Tribunal on 28.01.2000. This became the subject matter of a challenge under Section 34 by MTNL [OMP No.91/2000].

5. After considering the record and the submissions of the parties, the learned Single Judge by an order/judgment of 23.11.2009 disposed of the objections, partly accepting MTNL’s plea and setting aside the award on the shuttering claim as well as reducing the interest rate on the award amount [from 18% granted by the Tribunal to 9%]. The Single Judge remitted for re-consideration and fresh decision by the Tribunal, claim No.4 [establishment expenses during the extended period, claim towards bank guarantee and insurance charges] and claim No.5 [escalation costs on materials, labour and Petrol, Oil and Lubricants (POL)]. The Tribunal by an award dated 11.10.2012 – the second award, rendered its decision. In respect of claim No.4 the Tribunal awarded Unitech the sum of ₹46,80,000/- for on site establishment and with respect to bank guarantee and insurance charges, the amounts of ₹17,66,450/- and ₹11,29,603/- respectively were awarded. So far as claim No.5 was concerned, the sum of ₹1,53,88,188/- was awarded to Unitech.

6. MTNL urges firstly, in its appeal against the second judgment [FAO(OS) 214/2018] by relying upon the Supreme Court’s ruling in *Kinnari Mullick vs. Ghanshyam Das Damani* (2018) 11 SCC 328, that the first judgment, so far as it remitted the matter for fresh consideration to the Tribunal, cannot be sustained. It was contended, therefore, that the findings recorded pursuant to the remand are unenforceable.

7. At the outset, this Court is of the opinion that the Supreme Court in *Kinnari* (supra), indicated that absent a specific request by a party at the stage of hearing of an objection under Section 34 of the Act before its disposal, the Court should not remit the matter for re-consideration. This constitutes a departure from the rule enunciated in *Mc Dermott International Inc. vs. Burn Standard Limited* (2006) 11 SCC 181, that the objection hearing court under Section 34 of the Act has the power to merely set aside the finding and leave it to the parties to work out the consequences. To the extent that *Kinnari* (supra) departs from the principles, no doubt the Arbitral Tribunal is invested with further jurisdiction. The question here, however, is, can MTNL after participating in the remitted proceedings, and receiving an award contrary to its liking, now cry foul and contend that the Tribunal lacked jurisdiction to decide on the remitted matters? The answer, in the opinion of this Court has to be in the negative. If one considers the history of this litigation and that the award was made in 2000; and the fact that the Single Judge [by the first judgment of 23.11.2009] remitted two limited issues which were considered by the Tribunal subsequently in 2012, the fact that the parties proceeded on the footing that the Tribunal possessed the jurisdiction to decide the remitted matter, cannot be lost sight of. It is also a matter of record that MTNL did not challenge the second award on claim Nos. 4 & 5, on the ground that it seeks to urge - lack of jurisdiction by the Tribunal in the second round. For these reasons, the Court is not persuaded by the objections raised at the threshold that the Tribunal did not possess jurisdiction to re-visit claim Nos. 4 & 5.

8. MTNL's objection with respect to the first judgment [FAO(OS) 383/2010] is that in regard to claim No.3 [de-watering] Unitech was made aware about the site conditions. The express reference is made in this regard to clause 2.1.1, clause 11 and other terms and conditions of the contract to say that physical/geological conditions were made aware of and Unitech was always facilitated to undertake inspection. It is stated that the parties even visualized that in the event of heavy monsoon, the contractor had the obligation to de-water the site.

9. This Court notes that the learned Single Judge upheld the award granted to the extent of ₹10,99,198/- on the de-watering claim. The award on this aspect is also not an unreasoned one; it discusses the site conditions and the extra effort that the contractor had to undertake, after being handed over the site in a belated manner. The general findings of the Arbitral Tribunal in the very first section of the award relate to the breach of the contract on the part of MTNL in its failure to hand over the site in a timely manner and according to the findings, the site was handed over on 07.06.1993. Given that the date of completion of the entire contract visualized by the parties was 09.09.1994, it can easily be inferred that the construction of a double basement multi-storey building in the balance period was almost an impossibility. On these grounds, the Tribunal quite correctly concluded that MTNL was in breach of its obligations. That it chose to extend the period of contract after 18.12.1995, in the opinion of this Court, is a consequential delay, that does not in any manner affect the findings of the Tribunal or the learned Single Judge. As far as claim No.3 goes, the Court discerns no patent illegality or palpable unreasonableness in regard to the construction of the terms of the contract so as to enable the

learned Single Judge to disallow the award. For these reasons, MTNL's appeal [FAO(OS) 383/2010] has to fail. It is accordingly dismissed.

10. While attacking the second award, MTNL emphasizes that the award of ₹46,80,000 [towards establishment expenses during the extended period], ₹11,29,603/- [towards insurance charges] and ₹17,66,450/- [towards bank guarantee charges] are not based upon any cogent material. It is highlighted that the contractor produced vouchers only in respect of eight months on a selective basis, which was the premise for the Tribunal to average out the possible expenses.

11. The learned Senior Counsel submitted that Unitech had the evidence with it and that its failure to produce the relevant material meant that an adverse inference has to be drawn. Learned counsel contended that at best, the award should have been confined to the amounts calculable from the materials adduced, rather based on the inferences drawn from such materials. On the question of escalation of establishment charges etc. the relevant extract of the second award, which was taken note of by the Single Judge, is as follows:

<i>S.No.</i>	<i>Month</i>	<i>Total (Rs.)</i>
1	Sept. 94	190478
2	Oct. 94	196059
3	Feb. 95	177897
4	May 95	140726
5	Jan. 96	130716
6	Jun. 96	155106
7	Mar. 97	105567
8	Dec. 97	83398
	<i>Total</i>	<i>1179947</i>

S.No.	Period	Calculation of average salary	Average per month (Rs.)	Month	Amount (Rs.)
1	9/94 – 2/95	190478+ 196059+177897 = 564434/3	1,88,145	6	11,28,868
2	3/95 – 5/95	177897 +140726 = 3X8623/2	1,5-9312	3	4,77,935
3	6/95 – 1/96	140726 +130716 = 271442/2	1,35,721	8	10,85,768
4	2/96 – 6/96	130-716+155106 = 285822/2	1,42,911	5	7,14,555
5	7/96 – 3/97	155106 +105567 = 260673/2	1,30,337	9	11,73,029
6	4/97 – 12/97	105567 + 83398 =188965/2	4,483	9	8,50,343

12. With respect to claim No.4(d) i.e. the bank guarantee and insurance charges, the Tribunal noted that the proportionate cost worked out to ₹11,29,603/- based upon the insurance premia during the period 08.09.1997 upto 07.03.1998 likewise for the bank guarantee charges the claim award was limited to ₹17,66,450/- even though a much higher figure of ₹44,17,410/- was sought.

13. Although it is tempting for a Court and the Appellate Court, as this Court is, to nitpick with the approach adopted by the Tribunal, it has preferred to rest its findings on the basis of a calculation on an averaging in exercise. At the same time, the Court notices that it is not as if the claimant had not adduced any evidence at all. The evidence that it did lead spanned a period of nearly three years between September, 1994 to December, 1997. It is true that the month-wise breakup with the supporting vouchers was not furnished. The absence of such detailed evidence *ipso facto* cannot lead this Court to conclude that there was no material. The Court notices that the approach of the Tribunal on this aspect was broadly a correct one. It notes that the establishment costs – during the extended period was highest

during the initial months but it reduced considerably over a period of time. For instance, in September, 1994, the monthly establishment charges claimed was ₹1,90,478/-; it came down to ₹83,398/- in December, 1997. The Arbitral Tribunal preferred to work out a reasonable average which it termed to be a low reasonable average for the last year i.e. 1998. If this Court were to try the dispute, perhaps the result would be different. But that by itself is no ground for the Court to conclude that the award is either unreasoned or illegal or without any factual foundation. Given that, the Arbitral Tribunal has a leeway in considering the materials on record and coming to its own conclusion on the basis of the evidence as well as upon the basis of its experience, and given that the Tribunal was chosen by the parties voluntarily, this Court is of the opinion that the award of ₹46,80,000/- was justified.

14. As far as the award for insurance charges and bank guarantee expenses are concerned, like-wise the Court of the opinion that the mere circumstance that the insurance premia for only one year was shown or vouchers were adduced, cannot itself lead to the inference that there was no insurance cover for the previous years. So far as bank guarantee charges are concerned, it is not disputed that the bank guarantees were kept alive till December, 1998 or even thereafter, to cover the contract completion period. In these circumstances, it was reasonable on the part of the Tribunal to hold that these charges had to be paid to the claimant.

15. The second broad head of claim No.5 is with respect to the escalation charges during the extended period – which covered labour cost, material & POL etc. These in the opinion of the Court are standard claims. Although initially in the first round, Unitech had claimed ₹1,43,20,308/- for

escalation up to 30.11.1997, it appears to have later revised it in the remitted proceedings, upwards to ₹1,53,88,188/- to cover the period till December, 1998. Being standard charges based upon the CPWD Manual and rates, the Court is of the opinion that the Tribunal's adoption of such rates, which are known to all, including MTNL, and are applicable to works contracts, cannot be characterised as arbitrary or contrary to the contract or even blatantly illegal.

16. For the above reasons, the Court is of the opinion that FAO (OS) 214/2018 has no merit. It is accordingly dismissed.

17. In FAO(OS) 159/2010 Unitech has challenged the Single Judge's decision [first judgment], so far as it set aside the award of shuttering charges [₹3,52,525/-]. Its ground of challenge is that this was never objected to by MTNL in its petition. The second ground of challenge is downward revision of interest rate, as against awarded rate of 18%, the learned Single Judge reduced it to 9%.

18. This Court is of the opinion that Unitech's objection with respect to the setting aside of the award of the shuttering claim is merited. The plain reading of OMP 91/2000 would disclose that MTNL did not lay a challenge to the findings of this claim at all but rather confined it to certain other awards vis-a-vis other heads. Furthermore, given the limited jurisdiction that the learned Single Judge had under Section 34, setting aside the disallowance of claim No.1(a)(4) [shuttering claim] was not justified. It is accordingly set aside. The claimant Unitech is, therefore, held entitled to the said award amount of ₹3,52,525/-.

19. As far as interest goes, during the hearing, learned Senior Counsel for MTNL, justified the limiting of the interest to 9% stating that it was in accord with the general principles applicable, since the bank rates by and large correspond to the rate that the Single Judge awarded. On the other hand, the claimant's counsel pointed out that the discussion in the award is specific to this i.e. MTNL insisted upon payment of 16.5% interest compounded quarterly, [in clause 67.3 of the contract between the parties]. On the mobilization advance of ₹1,43,208/-, it was submitted that these facts were taken into consideration by the Tribunal which allowed 18%, even though it did not take note of the specific conditions which postulated that the interest was compoundable quarterly.

20. Learned counsel had also relied upon *Bhagwati Oxygen Ltd. vs. Hindustan Cooper Ltd.* 2005 (6) SCC 462, where in somewhat similar circumstances the award of 18% was upheld by the Tribunal. In *Bhagwati* (supra) the Supreme Court observed as follows:

“42. In our view, however, a relevant and germane factor weighed with the arbitrator in awarding eighteen per cent interest, that at that rate HCL had given advance to BOL. In view of the said circumstances, in our opinion, even that part of the award passed by the arbitrator did not deserve interference and the learned Single Judge and the Division bench were not right in reducing the rate of interest.”

21. In the present case, it is not in dispute that clause 67.3 visualized that 16.5% interest compoundable quarterly was payable by Unitech upon the mobilization advance it had received from MTNL. If this was to be converted into simple interest rates, it would work out in excess of 20%. Given these circumstances, interference with the award of interest at the rate of 18% per annum in the opinion of the Court was not justified or

based on any principle of law. It cannot be held that award of 18% is per se illegal or warrants interference in the manner that the Single Judge did with the award. For the above reasons, FAO(OS) 159/2010 has to be and is accordingly allowed.

22. Claim No.1(a)(4) and the claim for balance interest [i.e. 18% on the amounts awarded by the Tribunal] are upheld.

23. In view of the above discussion, FAO(OS) 383/2010 and 214/2018 are dismissed and FAO(OS) 159/2010 is allowed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

DECEMBER 04, 2018

'hkaur'



नित्यमेव जयते