IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.04.2018

\+ **O.M.P. (COMM) 288/2016 and IA Nos. 6842/2016, 4440/2017 & 5924/2017**

MAHANAGAR TELEPHONE NIGAM LIMITED ..... Petitioner

versus

M/s CARRYCON INDIA LIMITED ..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Saket Sikri, Mr Junaid Nahvi and Ms Niyati Patwardhan.

For the Respondent: Ms Kamlakshi and Mr D. Saundarya Singh.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner (hereafter 'MTNL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 30.12.2015 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a sole arbitrator, Mr Ashok Sharma, former CGM (Law), MMTC (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties in respect of the 'Agreement for Rehabilitation of Outdoor Plant of GM (N-II) Area' dated 27.01.2003 (hereafter 'the Agreement').

2. The dispute between the parties related to the price payable by MTNL for the work of laying of cables through Trenchless Technology. Whilst, the respondent (hereafter 'Carrycon') claimed that MTNL was liable to pay for the said work at the rate of ₹412/- per meter as agreed under the Agreement, MTNL disputed the same. According to MTNL, the Agreement stood novated in so far as the rates payable for the work and the same was payable at the rate of ₹230/- per meter. By the impugned award, the Arbitral Tribunal has accepted Carrycon's claim that the Agreement was not novated and it would be entitled to recover the differential amount (being the difference between the amount paid at the rate of ₹230/- per meter and as computed on the basis of ₹412/- per meter). Accordingly, the Arbitral Tribunal has awarded a sum of ₹2,36,11,929.26/- (₹2,17,81,929.26/- on account of the balance differential amount and ₹18,30,000/- on account of the security amount). The Arbitral Tribunal has awarded a sum of ₹2,06,10,302.96/- along with *pendente lite* interest at the rate of 10% per annum from 10.04.2007 till the date of the impugned award. The Arbitral Tribunal has also awarded post award interest at the rate of 12% per annum on the awarded amount from the date of the award till the payment.

3. The controversy involved in the present petition relates to Carrycon's claim for the balance differential amount in respect of the downward revised rates from ₹412/- to ₹230/- per meter for the work of laying of cables through Trenchless Technology.

4. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

4.1 MTNL issued a Notice Inviting Tender (NIT) on 25.11.2002 for "*rehabilitation of outdoor plant at Saraswati Vihar, Rohini, Badli and Narela, Delhi which included the work of laying of cables through Trenchless Technology*". The NIT specifically provided that MTNL reserved its right to award the work to three contracts in the specified ratio of 50:30:20.

4.2 Carrycon submitted its bid pursuant to the said NIT, which was accepted as the respondent was the lowest bidder and was declared the L1 bidder. The parties entered into an agreement dated 27.01.2003 ('the Agreement') and Carrycon was awarded 50% of the said work at the rate of ₹412/- per meter. Carrycon also furnished a Performance Bank Guarantee of ₹12,50,000/-.

4.3 Material Management Cell (MM Cell), a division of MTNL issued another Notice Inviting Tender (NIT) on 30.12.2002 for new network creation through Trenchless Technology for the same work of laying of cables through Trenchless Technology. The rates for the said work were discovered to be lower than the rates for the work awarded pursuant to the NIT dated 25.11.2002.

4.4 On 13.05.2003, a meeting was held between MTNL and Carrycon regarding reduction of rates in the new tender for similar work of laying of cables through Trenchless Technology. MTNL insisted Carrycon to carry out the work at the reduced rates. Therefore, Carrycon issued a letter dated 17.05.2003 to the DGM (C & A), GM North of MTNL agreeing to the new rates proposed by the MTNL, which would be applicable from the date of acceptance of new rates by the MM Cell.

4.5 MTNL, by a letter dated 03.07.2003, informed Carrycon that the base rate of ₹230/- per meter was approved by the Competent Authority for the work of laying of cables through Trenchless Technology and the said rate would be applicable from the date of the Agreement that is, 27.01.2003.

4.6 Carrycon submitted its first bill dated 23.06.2003 for execution of the part of the work contracted at the agreed rate of ₹412/- per meter. However, MTNL cleared the said bill by unilaterally reducing the rate to ₹230/- per meter.

4.7 The respondent sent letters dated 04.07.2003 and 17.07.2003 protesting against the conduct of MTNL in not adhering to the terms of the Agreement and unilaterally changing the terms of understanding arrived at between the parties on 13.05.2003.

4.8 Carrycon by its letter dated 29.12.2003 requested MTNL to extend the validity period of contract by a further period of three months with effect from 29.12.2003. Thereafter, Carrycon sent another letter dated 04.01.2004 once again requesting MTNL to extend the period of the contract. Carrycon also confirmed that it was ready to work for the item of laying of cables at an approved rate of ₹ 230/- per meter for all the work orders issued during the extending period. By a letter dated 07.01.2004, MTNL extended the validity of the contract as requested by Carrycon, albeit, for a period of three months. Carrycon sought a further extension by its letter dated 15.04.2004. The same was also acceded to by MTNL and by a letter dated 01.05.2004, the period of contract was extended for a further period of three months. The work under the Agreement was completed on 26.07.2004.

4.9 Carrycon issued a notice dated 26.12.2006 for payment of balance amount at the rate of ₹412/- per meter but the MTNL did not respond to the aforesaid notice.

4.10 Thereafter, Carrycon issued a notice dated 31.07.2007 to CGM, MTNL invoking the arbitration clause.

5. Similar dispute was raised before a Coordinate Bench of this Court in OMP 268/2003 captioned "*Vichitra Const. v. MTNL*" and by an order dated 25.08.2004, it was held that MTNL cannot unilaterally deduct the amount and was directed to release the differential amount of ₹182/- per meter on submission of the bank guarantee. Carrycon sought to rely on the said order.

The impugned award

6. Before the Arbitral Tribunal, MTNL contended that the claims made by Carrycon were barred by limitation as they were preferred beyond the period of three months provided under Clause XIX of the NIT, for raising any claims or disputes. The said contention was rejected by the Arbitral Tribunal by referring to the decision of this

Court in ***National Highways Authority of India v. MECON – GEA Energy Systems India Ltd.*** : ***199 (2013) DLT 397***.

7. The Arbitral Tribunal framed the following issues:

> "(i) whether the respondent is entitled to the amount of ₹2,36,11,929.26/- including the balance differential amount and the security amount.
>
> (ii) whether MTNL is liable to pay to the respondent at the rate of ₹412/- or ₹230/- per meter.
>
> (iii) whether the payment by MTNL to the respondent at the rate of ₹230/- per meter constitutes full and final payment as per the contractual provisions
>
> (iv) whether there was any acceptance by the respondent to the rate of ₹230/- per meter at which MTNL has made payments to the respondent."

8. The Arbitral Tribunal held that pursuant to the discussions held between the parties, Carryon had offered to amend the terms of the Agreement entered into between the parties on 07.01.2003 and by a letter dated 17.05.2003 had communicated its consent to accept the reduced rates from the date of acceptance of new rates by the MM Cell. However, this offer was not accepted by MTNL as MTNL by its letter dated 03.07.2003 insisted that the reduced rates be applicable with effect from the date of the Agreement. The Arbitral Tribunal concluded that under the circumstances, there was no consensus *ad idem* between the parties and, therefore, no contract came into existence to provide services at the reduced rate of ₹230/- per meter.

9. The Arbitral Tribunal also rejected the contention that Carrycon had accepted the new reduced rates by its conduct as the Arbitral Tribunal observed that Carrycon had sent letters dated 07.07.2003 and 17.07.2003 protesting against MTNL's unilateral reduction in the rates with effect from the date of the Agreement. MTNL's contention, that the invoices raised by Carrycon at the rate of ₹230/- per meter indicated its acceptance of the reduced rate, was also rejected as the Arbitral Tribunal noted that the first invoice was raised at the rate of ₹412 per meter; however, MTNL had not paid the same. The Arbitral Tribunal accepted the contention that Carrycon had raised invoices at the reduced rates to avoid any tax complications and the same did not indicate Carrycon's acceptance of those rates. The Arbitral Tribunal also observed that the Performance Bank Guarantee was submitted by Carrycon taking into account the contractual rate of ₹412/- per meter and MTNL had not reduced the value of the Bank Guarantee required to be furnished under the Agreement. The Arbitral Tribunal reasoned that this was perhaps because MTNL was aware of the disputes and desired to hold on to the higher security.

10. In view of the above, the issues struck by the Arbitral Tribunal were decided in favour of Carryon and the Arbitral Tribunal awarded a sum of ₹2,36,11,929.26/- in its favour. The Arbitral Tribunal awarded a sum of ₹2,06,10,302.96/- along with *pendente lite* interest at the rate of 10% per annum from 10.04.2007 till the date of the impugned award. The Arbitral Tribunal has also awarded post award interest at the rate of 12% per annum on the awarded amount from the date of the

award till the payment.

Submissions

11. Mr Sikri, the learned counsel appearing for MTNL contended that the Arbitral Tribunal had fallen into error in not accepting that the Agreement stood novated. He contended that the conclusion of the Arbitral Tribunal that there can be no novation of the contract without the parties entering into a fresh written agreement is patiently erroneous and, therefore, the impugned award could not be sustained. He urged that the letter dated 03.07.2003 expressly provided that the approved rate of ₹230/- per meter would be applicable to the Agreement between the parties and the same rate would be applicable from the date of the Agreement that is, 27.01.2003. He submitted that thus, in view of this letter dated 03.07.2003, there was no ambiguity that the Agreement between the parties stood novated. He further urged that the Arbitral Tribunal had erred in not appreciating that Carrycon had raised invoices at the reduced rates and this clearly indicated that Carrycon had agreed to perform the work at the lower rate of ₹ 230/- per meter. He also referred to the letter dated 04.01.2004 and contended that Carrycon had clearly indicated its willingness to perform the work of laying of cables through Trenchless Technology at a consideration of ₹230/- per meter.

12. On a pointed query raised by the Court as to which was the date on which the Agreement was novated according to MTNL, Mr Sikri responded that the same was novated during the discussions held on

13.05.2003 and the same was also confirmed by Carrycon by a letter dated 17.05.2003. He submitted that in its letter dated 17.05.2003, Carrycon had indicated that the reduced rate would be effective from the date of acceptance of the rate by the MM Cell. MTNL had conveyed the decision of the Competent Authority that the same would be applicable from the date of entering into the Agreement, that is, 27.01.2003.

13. Ms Kamlakshi, the learned counsel appearing for Carrycon countered the submissions made on behalf of Mr Sikri. She submitted that the impugned award could not be faulted as Carrycon had not agreed to execute the work at reduced rates. She submitted that initially Carrycon had agreed to accept reduced rates with effect from the date on which the MM Cell approved the same. However, this offer was not accepted, as MTNL insisted on unilaterally changing the terms of the Agreement from 27.01.2003. Thus, there was no concluded contract. In this regard, she further emphasized that MTNL had not produced any material to show that the date on which the MM Cell had approved the reduced rates and, therefore, the same could not be applied. She further submitted that the Agreement to charge reduced rates during the extended period of the Contract, as communicated by the letter dated 04.01.2004, was also not binding on Carrycon as it had agreed to work at a reduced rate under economic pressure, which is also clearly evident from the tenor of the said letter.

Reasoning and Conclusion

14. The contention advanced on behalf of MTNL that the novation of the contract on 13.05.2003 has been rejected by the Arbitral Tribunal, as it found that there was no consensus *ad idem* between the parties. Much reliance was placed by Mr Sikri on the letter dated 17.05.2003 sent by Carrycon. The relevant extract of the said letter reads as under:-

> "During the discussion we agree on the following proposal:-
>
> 1. The base rate for laying of cable through trench less would be the approved rates of MM cell plus the enhancement for respective areas as per the agreement entered with you.
>
> 2. The effective date of accepting the new base rate will be from the date of acceptance of the new rate by your MM cell.
>
> As such we are continuing our work as agree upon."

15. According to MTNL, the aforesaid terms were not agreeable as MTNL required that the new rates be applicable from the date of the agreement (that is, 27.01.2003). This is clear from the letter dated 03.07.2003 sent by MTNL, which reads as under:-

> "To
>
> M/S Carrycon India Ltd.
> A-128, Second Floor,
> Meena Chamber,
> Mohammadpur, Near B. C. P.

Africa Avenue

New Delhi – 110066

No.GM(N-II)/TECH/REHAB/TRENCHLESS/03-04/3

Dated
3/7/2003

Dear Sir,

With reference to your letter No.CCON/NDL/03-04, dated 17/5/03 regarding the rates for laying of cable through trench less method, it is intimated that after the discussions, it is approved by the Competent Authority that the base rate for laying of cable through trench less method will be the approved rate of MM Cell circulated by the AGM (MM-1) vide his letter No.AGM (MM-11)/MM-15/No Dig.LOI/03-04/52 dated 6/8/03. The approved base rate of MM Cell for Bore size upto 145 mm (All types of soil except rock) is Rs.230/- per meter which is applicable in the present agreement made with you for the Rehabilitation work instead of Rs.412/- (Para 5.3, sub para (b) at Page No.37 of NIT book let).

The above rate is applicable from the date of signing of the agreement i.e. 27.01.2003."

16. In the aforesaid context, the Arbitral Tribunal had held that there was no consensus *ad idem* between the parties. It held that the letter dated 03.07.2003 constituted a counter offer, as it did not unconditionally accept the terms as stated by Carrycon in its letter dated 17.05.2003. This Court finds no reason to interfere with the said conclusion in these proceedings. It is also relevant to note that MTNL had not disclosed any material to establish the date on which the MM Division had approved the reduced rates. Even before this Court, no material has been produced to establish the same. However, insofar as

the work executed during the extended period, that is, after 25.01.2004, it cannot be disputed that Carrycon had agreed to execute the same at the rate of ₹230/- per meter. This is clear from the letter dated 04.01.2004 sent by Carrycon to MTNL. The said letter is set out below:-

> "Ref…..CCON/NDL/03-04
> 04.01.2004
>
> To,
>
> The Asst. General Manager (A) N-II
> O/o GM (N-II), Sanchar Parisar
> Sector III, Rohini,
> Delhi
>
> Dear Sir
>
> Sub: Rates for laying of cable through Trenchless method.
>
> Ref.: GM (N-II)/Tech/Tender/Rehab/02-03 dated 25/11/02 and GM (N-II)/Tech/Rehab/Trenchless/03-04 dated 16.12.2003.
>
> We refer your above offer for extension of the tender for further period. We are ready to work for the extended period at the same rate and terms and conditions except the laying of cable through trench less method.
>
> We are ready to work for the item laying of cable through trenchless method at MM Cell approved rate i.e. 230.00 per mtr. for all the work orders issued during the extended period.

Thanking you,

Yours faithfully

FOR CARRYCON INDIA LIMITED

Sd/-

(Prakash Bhanu)
Executive Director"

17. A copy of the said letter produced by MTNL also indicates a handwritten noting by the concerned officer of MTNL dated 06.01.2004, which reads as – "issue letter for extension".

18. It is apparent from the above that Carrycon had sought for extension for the period of contract and had agreed to execute works during the extended period at the rate of ₹230/- per meter since MTNL had granted the extension as sought for. It is not open for Carrycon to now contend to contrary.

19. This Court is of the view that the Arbitral Tribunal had clearly fall in error in ignoring the import of the said letter. Accordingly, the impugned award to the extent that it holds that Carrycon is entitled to be paid at the rate of ₹412/- per meter for the work done during the extended period that is, from 25.01.2004 to 26.07.2006, is unsustainable and set aside.

20. The amount and the interest awarded to Carrycon, consequently be reduced to the aforesaid extent. The petition is disposed of in the

above terms. All the pending applications are also disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

APRIL 09, 2018
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