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

% *Date of judgment: 25th September, 2018*

+ **FAO (OS) (COMM) 163/2018 and CM No. 30597/2018**

MAHANAGAR TELEPHONE NIGAM LTD Appellant

Through: Mr. Saket Sikri, Mr. Ajay Pal Singh,
Mr. V. Mudgal, Ms. K. Gayatri and
Mr. Pranav Sharma, Advocates

versus

M/S CARRYCON INDIA LTD Respondent

Through: Mr. Kirti Uppal, Senior Advocate with
Ms. Kamakshi Singh and Mr. Parijat
Kumar, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J.

1. Present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') read with Section 13(2) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as the 'Commercial Courts Act') is directed against the order dated 09.04.2018 passed by the learned Single Judge of this Court in O.M.P (COMM) No. 288/2016, whereby the objections to the Arbitral Award dated 30.12.2015 passed by the Sole arbitrator were dismissed.

2. Before dealing with the rival submissions of the learned counsels appearing for the parties, we deem it appropriate to set out basic facts which led to the dispute between the parties as noted by the Learned Single Judge. Relevant portion reads as under :-

“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.

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/-.

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

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.

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.

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

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.

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 19.12.2003. Thereafter, Carrycon sent another letter dated 24.01.2004 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.

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.

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

3. Upon conclusion of the arbitration proceedings, the Arbitral Award dated 30.12.2015 was passed by the Sole Arbitrator whereby an

Award for a sum of Rs. 2,36,11,929.26 was directed to be paid to the claimant by the respondent company/MTNL on account of the balance differential bills which were not paid and the security amount. A sum of Rs.2,06,10,302.96 was awarded in favour of claimant and against MTNL on account of *pendente lite* simple interest calculated @ 10% per annum from the date of filing claim petition with future interest @12% per annum from date of award till the payments were made. Objections to the award dated 30.12.2015 filed by MTNL were considered by learned Single Judge in OMP (COMM) No. 288/2016 and by way of the impugned order, the learned Single Judge held that the letter dated 3.07.2003 constituted a counter offer as it did not unconditionally accept the terms as stated by Carrycon in its letter dated 17.05.2003 and upheld the award on this aspect. However learned Single Judge modified the rate of laying of the cables @ of Rs.230/- per meter instead on Rs. 412/- per meter during the extended period from 25.1.2004 on the basis of letter dated 4.01.2004 issued by the claimant to MTNL. Being aggrieved by the aforesaid order, MTNL has filed the present appeal.

4. Mr Saket Sikri, learned counsel for the appellant contends that the order passed by the learned Single Judge is liable to be set aside as the same is not sustainable in law as also on facts that the respondent company has tendered their confirmation in respect of the revised rates vide letter dated 17.05.2003; that on 03.07.2003 a letter was sent informing the respondent company that the Material Management Cell has approved the revised rate and the same would be applicable from the date of signing of the agreement; that the agreement dated 27.01.2003, originally entered between the parties stood novated as the respondent company had willingly agreed to the reduced rates from Rs 412/- to Rs 230/- per meter; that post confirmation, the

respondent company continued the work at the revised rates and raised all their invoices at the reduced rate of Rs 230/- per meter which clearly indicates their unequivocal acceptance to the downward revision of rates; that the alleged protest letters dated 04.07.2003 and 17.07.2003 were never proved by the respondent company, moreover there was no mention of protest letters in the Statement of Claim; that hence in view of the above the impugned order dated 09.04.2018 is prayed to be set aside. In support of his contentions learned counsel relied on *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors.*, reported at (2006) 11 SCC 181 (para 51), *Bhagwati Prasad Pawan Kumar v. Union of India* reported at AIR 2006 SC 2331 and *Chitra Kumari v. Union of India* reported at 2001 (3) SCC 208.

5. On the converse, Mr Kirti Uppal, learned senior advocate appearing for the respondent contended that there is no infirmity in the impugned order as well as award which would require interference by this court. It is further contended that the law with regard to scope of judicial inference in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is even narrower than while deciding the objections to the Award under Section 34 of the Arbitration and Conciliation Act, 1996. It is further contended that the sole arbitrator had examined the agreement, letters and evidence recorded by them and has correctly applied law to the facts of the present case. The counsel also submitted that there was no novation of the agreement as the parties never reached to a consensus; that reliance placed by the appellant on the letter dated 17.5.2003 as issued by the respondent company to prove the alleged novation of the Agreement holds no merit as vide the said letter the respondent company had only accepted revised rate @ rate of Rs. 230/- per meter applicable from the date of

acceptance that the respondent company presented the bills initially at the rate of Rs. 412/- per meter but the respondent company was made to submit all the bills @ 230/- per meter in order to protect themselves from various government tax liabilities; that two protest letters dated 04.07.2003 and 17.07.2003 were served upon the appellant in which it was stated that since the appellant had failed to notify them about the new rate earlier and had failed to agree with the terms mentioned in letter dated 17.05.2003 they will continue to work but under protest to avoid any panel action; in support of his contentions learned senior advocate placed reliance on the case of *Sasan Power Limited vs. North American Coal Corporation India Private Limited* reported at *AIR 2016 SC 3974*, *P.C.L Suncon (JV) v N.H.A.I.* reported at *2015 SCC Online Del 13192*, *McDermott International Inc. v. Burn Standard Co.Ltd. and Ors*, reported at *(2006)11 SCC 181*, *Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd*, reported at *2014(144) DRJ 220(DB)*, *Associate Builders vs. Delhi Development Authority* reported at *(2015) 3 SCC 49* and *MTNL Vs. Fujitshu India Private Limited* reported at *2015(2) ARBLR 332 (Delhi)*.

6. We have heard the learned counsels for the parties and considered their rival submissions.
7. The facts which are not in dispute are that parties entered into a contract for Rehabilitation of Outdoor Plant of GM (N-II). It is also not in dispute that on 13.05.2003 a meeting was held between MTNL and Carrycon for reduction of rates; that pursuant thereto respondent company vide communication dated 17.05.2003 informed MTNL that they are agreeing to the new rates i.e. Rs. 230/- per meter from the date of acceptance of new rates by Material Management Cell.

8. To appreciate the rival submissions made by the counsels for their parties we deem it appropriate to extract the relevant portion of the letter dated 17.05.2003 written by the respondent company to the Appellant which 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.”

9. It would also be necessary to reproduce the letter dated 03.07.2003 and the protest letters dated 4.07.2003 and 17.07.2003 issued by the respondent company, respectively: -

“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.”

Letter dated 04.07.2003, relevant portion reads as under:

“...in these respect we would like to bring to your notice that the cut of date of implementation of the new rate i.e. Rs.230.00 Per Mts is not been clearly mention from the MM Cell. As such we request you to accept the new base rate from the date of

implementation of the new rate from MM Cell if any clarification in this respect is issued by your MM Cell.”

Letter dated 17.07.2003, relevant portion reads as under:

“... since you failed to confirm the new rate of similar tender by MM Cell and to agree to our offer dated 17.05.2003, as such we are continuing to operate the contract under protest with respect to the Trenchless rate to avoid any panel action.”

10. The question which arises for consideration is as to whether the communication dated 03.07.2003 made by MTNL can be construed as an offer or novation of contract.
11. From perusal of the aforesaid letter it is seen that pursuant to meeting dated 17.05.2003 between the appellant and the respondent company, a communication was issued to MTNL on 17.05.2003 agreeing to the new rates i.e. Rs. 230/- per meter from the date of acceptance of new rates by Material Management Cell. This offer was not accepted by MTNL and a counter offer was made vide communication dated 03.07.2003 whereby they informed the respondent company that the base rate of Rs. 230/- per meter was approved by the competent authority for laying of cables which would be applicable from the date of agreement i.e. 27.01.2003. Carrycon in response vide communication dated 04.07.2003 and 17.07.2003 in clear terms protested against the counter offer made by MTNL. It is only vide communication dated 23.12.2003 and 04.01.2004 the respondent company sought extension of time @ Rs 230/- per meter which would be applicable from the date of extension. The perusal of the extension letters reveals that relaxation sought by the appellant company was for period from 29.12.2003 till the completion of the contract and it cannot be construed that the appellant company agreed for performance of

work contract @ Rs 230/- per meter.

12. The arbitrator also rightly analyzed this issue in paragraphs 11.3, 11.5 and 15.3, which are reproduced below:-

“11.3 I FIND and HOLD that the facts as brought out above clearly indicate that while pursuant to some discussions between the parties, the claimant had written letter dated 17.05.2003 agreeing to the new base rate which would be applicable from the date of acceptance of new rate by the MM Cell. This was an offer to change/amend the terms of agreement which was already signed between the parties on 27.01.2003. however, the respondent again vide its letter dated 03.07.2003 changed the date of applicability of the new rates i.e. Rs 230/- per meter from “date of acceptance of new rate by the MM Cell” to “the date of agreement i.e. 27.01.2003.” thus the letter dated 03.07.2003 was in the nature of a counter offer which was not accepted by the claimant and was disputed vide its two subsequent letters dated 07.07.2003 and 17.07.2003. under these facts and circumstances there was no consensus ad idem between the parties and therefore no new contract came into existence between the parties.”

“11.5 I FIND and HOLD that taking into account the conduct of the claimant in the present case, it is seen that the claimant had sent two letters of protest dated 07.07.2003 and 17.07.2003 against the letter dated 03.07.2003 from the respondent. These letters were denied by the respondent and the claimant had obtained copies of these letters from the CPIO of the respondent MTNL through RTI Act. Therefore it cannot be said that the counter offer contained in letter dated 03.07.2003 was unconditionally accepted by the claimant by its conduct or otherwise.”

“15.3 I FIND and HOLD that the facts of the present case are different from the facts of above cited cases. In the present case the claimant did write letters of protest on the reduction of rates and further there was no agreement between the parties on the date from which the reduced rates would be applicable. Under

the facts and circumstances of this case, the novation of the old contract dated 27.01.2003 was never completed and there was never consensus ad idem between the parties with regard to the date of applicability of the reduced rates.”

13. The case of the Appellant was that by raising all bills at Rs. 230/- per meter and by accepting all payments at the same rate the contract stood novated. Perusal of the records reveals that there was only unilateral acceptance, but no consensus was arrived between the parties. The Apex court in the case of ***Sasan Power Limited vs. North American Coal Corporation India Private Limited*** reported at ***AIR 2016 SC 3974*** while dealing with the concept of novation has held that novation is the substitution of a contract by a new one, only through the consent of both the parties. Paragraphs 66 and 67 of the judgment reads as under:

“66. That apart, in my view, reading of Agreement-I and Agreement-II also does not indicate that any novation of contract has emerged inter se parties. It is for the reason that in order to constitute a "Novation of contract", it is necessary to prove, in the first place, that the contract is in existence and second, such contract is substituted by a new contract either by the same parties or different parties with a mutual consideration of discharge of the old contract.

67. In other words, the novation of contract comprises of two elements. First is the discharge of one debt or debtor and the second is the substitution of a new debt or debtor. The novation is not complete unless it results in substitution, recession or extinguishment of the previous contract by the new contract. Mere variation of some terms of a contract does not constitute a novation. (See Pollock & Mulla Indian Contract and Specific Relief Acts, 13th Edition, pages 1225-1226).”

14. Moreover the scope of this court is limited with regard to Section 34 and 37 of The Arbitration and Conciliation Act, 1996. The position of

law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. This Hon'ble Court in the case of ***P.C.L Suncon (JV) v N.H.A.I., 2015 SCC Online Del 13192*** , in para 24 stated that :

“24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.”

15. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, while deciding a petition under Section 34 of the Act. The Hon'ble Supreme Court in the case of ***McDermott International Inc. v. Burn Standard Co.Ltd. and Ors, (2006) 11 SCC 181*** held as under:

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in

few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

16. It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of ***State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd.***, reported at **2014 (144) DRJ 220 (DB)**, in para 16 it has been held as under:

"16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments."

17. In ***Associate Builders vs. Delhi Development Authority***, reported at

(2015) 3 SCC 49, the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act held as under:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score¹. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts In P.R. Shah, Shares and Stock Brokers (P) Ltd. V B.H.H Securities (P) Ltd.: (2012) 1 SCC 594, this Court held:

A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

18. This Court, time and again has emphasized on the narrow scope of section 37. In the case of **MTNL Vs. Fujitsu India Private Limited**,

reported at **2015 (2) ARBLR 332 (Delhi)**, the division bench held as under:

The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re- appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous it is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: 202(2013) DLT 218.

The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and

confirmed by the court under section 34 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 ld. 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, 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.

19. Having regard to the law laid down by this Court, learned Single Judge and Arbitral Tribunal as well as the Apex Court in number of decisions rendered and applying the law laid down to the facts of the present case, we do not find any merit in the appeal. Hence, no grounds are made out to interfere in the impugned order passed by Learned Single Judge. Resultantly, the appeal is dismissed along with pending applications.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

SEPTEMBER 25, 2018

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