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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 03rd May, 2018
Pronounced on: 09th May, 2018

+ O.M.P. (COMM) No.461/2016

MAHANAGAR TELEPHONE NIGAM LTD Petitioner
Through : Mr.Harish Malhotra, Sr Advocate
with Mr.Jasbir Bidhuri, Advocate.

versus

M/S UNITECH LTD Respondent
Through : Mr.S.K.Maniktala and Mr.Tushar
Chawla, Advocates with Mr.S.P.
Shrivastava and Mr.R.C.Taneja
from respondent in person.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') has been filed by the petitioner for quashing of the impugned arbitral award dated 11.10.2012.
2. The brief facts as alleged by the petitioner/objector are as follows:-
 - a) the petitioner - Mahanagar Telephone Nigam Limited (MTNL) awarded a work to the respondent for construction of telephone exchange at 9, CGO Complex, New Delhi, vide an Agreement dated 04.09.1992;

- b)* certain disputes arose between the parties and learned arbitrator was appointed on 12.03.1997, who entered the reference on 30.04.1997 and gave an award on 28.1.2000;
- c)* MTNL filed a petition O.M.P 91/2000 under Section 34 of the Act challenging the Award in this Court, decided vide judgment dated 23.11.2009 wherein it was observed:-

"Claim #4 contains many sub-heads and where different items of Claim for extra expenditure due to prolongation of work done beyond the stipulated date of completion which was 09.09.1994. The Arbitrator has duly noticed that the contract instead of being completed in Sept. 1994 was ultimately completed in December 1998. The Arbitrator has also given a finding of fact that it is the objector who was guilty of causing delays in the performance of the contract and details of such subjects have been given while pronouncing upon these claims. I may note that it is also an admitted fact that for the extended period, no liquidated damages/compensation have been imposed upon the contractor in as much as the objector being guilty of delay itself it had no option but to extend the contract without any consequential levy on-the contractor for any loss/damages. The issue however remains that once the Arbitrator has held the objector guilty of delay can the losses as awarded to the contractor by the Award necessarily follow. To this I agree with the counsel for the objector that with respect to Claim #4(b) which is-granted for huge amount of Rs.46,80,000 as also the Claim towards insurance of workman compensation for Rs.11,29,603 and for bank guarantees charges of Rs.17,66,460, the Arbitrator has given absolutely no basis for arriving at these figures nor has he referred to either any calculation or any evidence as to how these amounts have been awarded. Same is the position with respect to Claim #5 under which escalation has been granted to the Contractor. The Award on these aspects can thus be said to be an unreasoned Award."

3. The learned senior counsel for the petitioner submit as per judgment dated 23.11.2009 the learned arbitrator was directed to give reasons for amounts so awarded in his award dated 28.01.2000, but the learned arbitrator went ahead and so far as claims No.4*b* and 4*d* are concerned he did not give sufficient reasons for awarding such sums yet

again and qua claim No.5 he without any cogent reason gave the award for an extended period viz. till December, 1998.

4. Claim No.4*b* pertains to the Establishment Expenses during the extended period; claim No.4*d* pertains to bank guarantee charges, insurance charges etc. during such extended period; whereas the claim No.5 relate to Escalation Charges for the extended period.

5. It is the case of the learned senior counsel for the petitioner that though the petitioner had filed a table Annexure X to its Rejoinder showing different amounts claimed by the respondent and the amount actually due and recoverable as per the documents filed by the claimant had a huge difference of ₹7,57,406/- qua the administrative expenses viz salaries etc for the extended period, yet the learned arbitrator ignored the same. It is the case of the petitioner though some vouchers were filed by the respondent qua permanent staff, but the learned arbitrator wrongly awarded such expenditure on average basis till December, 1998. Further, he argued even no proper reasons were given for awarding insurance charges and Bank Guarantee charges for the extended period despite the respondent having failed to file entire bills of insurance and receipts of the bank for extending the bank guarantees.

6. It is argued the respondent failed to file entire vouchers of salaries paid to the permanent staff - the entire bills/record of payments made to the insurance company, charges to Bank for extending Bank Guarantee till December, 1998. Further it is argued the learned arbitrator exceeded his jurisdiction by awarding the escalation charges till December 1998

when he himself has awarded such charges only till November 1997 in his earlier award dated 28.01.2000.

7. However I may refer to order dated 23.11.2009 passed by this Court in OMP No.91/2000 wherein the Court *inter alia* recorded:-

“9. xxxx I am therefore remanding this matter back to the Arbitrator for passing a fresh reasoned Award with respect to these claims. I may hasten to clarify that I am not pronouncing on merits or validity of the amounts awarded and what are the amounts to be awarded will be decided by the Arbitrator after hearing arguments of both the parties.”

8. Let me now see how the learned arbitrator has dealt with the claims No.4b and 4d in his impugned award dated 11.10.2012:-

“9. Claim #4(b): The Claim is in respect of extra expenditure on site establishment for the extended period of the Contract (from Sept. 1994 to December 1998). The Claimant has produced records of salaries paid to the temporary and the permanent staff for Sept. 94, Oct. 94 and Feb. 95. For temporary staff vouchers of actual salary receipts have been produced. For permanent staff, however, the earnings have been calculated, and rightly so, after adding site allowance, food allowance, special allowance, city allowance etc. which are due to the employee and deductions made for income tax, loan, PF loan etc. Here, the cost of the employee to the company has been taken as expenditure incurred. For these 3 months, the expenditures are Rs.1,90,478, Rs.1,96,059 and Rs.1,77,897. The average of these 3 months salaries comes to Rs.1,88,145. This average has been used to calculate expenditure for the 6 month period of Sept. 94 to Feb. 95. The amount of salary paid for the 6 month of (9/94 to 2/95) on the basis of average of expenditure during 9/94 10/94 and 2/05 comes to Rs.11,28,868.

10. The next slab for computation of salaries for 3 months is 3/95 to 5/95 is based on the salaries paid during March 95 (Rs.1,71,897) and May 95 (Rs.1,40,726). The average (Rs.1,59,312) has been multiplied by 3 to get the total salary paid for the period Mar. 95 to May 95 (Rs.4,77,936). The calculation has thus been continued on similar lines for the period 6/95 to 12/97.

11. For the period 12/97 to 12/98 the average salary per month has been taken as Rs.50,000 and comes to Rs.6,00,000. This is reasonable as the staff would have gradually reduced during the last year of the contract. The total amount under Claim 4(b) thus comes to Rs.60,30,500. My Award against this claim is Rs.46,80,000 only. I have taken a lower figure to account for any inaccuracies that may

have occurred due to the process of picking out certain months for working out average etc. The Award is, therefore, justified on the basis of calculations supplied. No change is called for.

12. Claim #4(d): This Claim is with regard to the expenditure incurred by the Claimant due to CAR (contract all risk) Insurance policy and Bank Guarantee (performance Guarantee) - which are statutory and which had been extended up to Dec. 98. The calculation for expenditure on insurance policies is supported by the payment made by UNITECH to the New India Insurance Company Ltd for a 6 month period of 8.9.97 to 1.3.98. The amount paid for this period is Rs.1,70,973. On this basis the cost due to the delay would proportionately come to Rs.11,29,603. This is the amount which has been awarded. No change is called for.

13. The next amount under Claim 4(d) pertains to expenditure on extending Bank Guarantee for the period Sept 94 to Dec 98. According to the contract the contractor has to provide a "Performance Guarantee at the rate of 10% of the accepted value of the tender i.e, Rs.1,48,61,883.00, as per clause 19.2 of the tender document. This is to be in the form of a bank guarantee of a nationalised bank. The performance guarantee is to be refunded after the expiry of the period of liability as stipulated in the contract. The contract was extended from the original date of completion of Sept 94 to Dec 98, and the final bill was paid on the expiry of the maintenance period on 31.12.1999. The bank guarantee also had to be extended for this period and was released by MTNL on 4.1.2000; The charges levied by the bank for providing a guarantee for a period of one month is Rs.54,654,70. The total amount claimed is as below:

Total up to 31.12.97 (p 12, Rejoinder)	Rs.37,61,554
For the period 1.1.98 to 31.12.98	Rs.06,55,865
Total	Rs.44,17,410

14. The amount claimed is high. Based on usual rates at which banks give bank guarantees, I have awarded a sum of Rs.17,66,450.

During the hearings held now, MTNL have not argued for reduction of the amount awarded. UNITECH have not represented against this award or asked for a higher amount. There is no need change in my original award on this item of the Claim."

9. On perusing the award it cannot be said no evidence was ever produced before the learned arbitrator. For permanent employees, the respondent had filed various vouchers of their salaries. Those vouchers were considered to find the average expenses incurred by the respondent

every month. Not only the learned arbitrator considered the salaries of employees but also took other components in determining such average viz, site allowance, food allowance, special allowance, city allowance, deductions for the income tax, loans, PF etc. Rather the Ld. Arbitrator was considerate to reduce the award to ₹46,80,000/- under claim No.4b despite the amount being calculated was ₹60,30,500/-, for he gave such concession to account for any inaccuracies that may have occurred due to the process of picking out certain months for working out average etc.

10. Similarly, qua claim No.4d viz. insurance charges, the receipts of premium for six months period from 08.09.1997 to 01.03.1998 of ₹1,70,973/- was taken into account by the learned arbitrator to calculate premium paid by the respondent till December, 1998. It is not the case of the petitioner the insurance company changed its premium every month or that no payment was made at all.

11. Similarly, it is an admitted case the bank guarantee was discharged only in the year 2000, hence the charges paid to keep it alive for the extended period was certainly the liability of the petitioner herein and hence was awarded. Thus there is no illegality in the impugned award so far as the claims No.4b and 4d are concerned.

12. Upon a bare perusal of the award, I may say certainly it is not a case of no evidence. What weightage needs to be given to the evidence led before him has to be seen by the learned arbitrator, per Section 19 (4) of the Act, which notes:-

*“19. Determination of rules of procedure.—
(1) to (3) xxx xxx*

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

13. Qua claim No.5, viz., it was argued the extension of time was never granted by the petitioner herein as the respondent did not file any application in this regard and hence could not have claimed escalation charges per clause No.66.2 and clause 22 of Agreement entered into between the parties. The clauses read as under:-

"66.2

" such compensation for escalation in prices shall be available only for the work done during the stipulated period of contract including such period for which the contract is validly extended under the provisions of relevant clause of the contract without any action under the relevant clauses and also subject to the condition that not such compensation shall be payable for a work for which the stipulated period of completion is six months or less "

22. EXTENSION OF TIME

If the contractor shall desire an extension of time for completion of the work due to the works having been unavoidably hindered in the execution or on any I other grounds, he shall apply in writing to the Engineer-in-Charge who shall in his opinion (which shall be final) be convinced of the reasonable grounds, then he may authorize extension of time as in his opinion be necessary and communicate in writing. Whenever, such extension is granted by the Engineer-in- Charge, "this would be without prejudice to the Owner's rights under this contract".

14. It is thus argued the agreement was never validly extended and the effect of above clauses was never seen and considered by the Id. Arbitrator, but however the arbitrator granted Escalation charges till December, 1998 despite in his earlier award he has granted such charges only till November 1997.

15. However a bare perusal of the arbitral record would reveal three applications were moved for Extension of Time by the respondent viz. Ex.C32 dated 10.08.1994; Ex.C360 dated 02.02.19963 and Ex.C428

dated 05.02.1997, hence, the learned senior counsel for the petitioner cannot allege no application was ever moved by the petitioner for extension of time, per clause 22 of the Agreement.

16. Now, if the Engineer in Chief did not take decision on such applications, the respondent cannot be faulted with. Admittedly the work was completed only in December 1998 and there is no denial to this fact by the petitioner herein. Moreso, in its objections against claim No.5, the petitioner never allege *the extension was not validly granted or it was never applied*. The only objection the petitioner took was the indices for the extended period were wrongly taken in award dated 28.01.2000 which indices were now corrected by the learned arbitrator in its award dated 11.10.2012.

17. Let me now see how the learned arbitrator dealt with claim No.5 in his impugned award:-

15. Claim #5: Clause 66.2.a provides for compensation for Escalation in the prices of materials, labour, and POL. Clause 66.2.a.5 provides-for compensation for the Escalation in Steel Prices. Formulae have been given which specify how these escalations will be calculated. They are based on variation in material cost, variation in labour cost, all-India whole sale index for all commodities, consumer price index for industrial labour (all India) declared by Labour Bureau, Govt. of India, variation in the cost of fuel, oil and lubricant, average index of wholesale price for group (fuel power. light and lubricant as published weekly by the economic advisor to the Govt. of India). Principles to be followed while working out the indices mentioned in detail.

16. Compensation for Escalation in Steel Prices are to be worked out with reference to variation in steel cost, the value of the reinforcement steel, and the rates as circulated by the Joint Plant Committee.

Hon'ble Court has clubbed this claim with Claims 4(b) and 4(d)

17. Since the beginning of the Contract, these Escalations were calculated by the Contractor every three months and checked and paid by MTNL. Payments were made regularly till December 1995. Subsequently, the payments were withheld

on the ground that the extension of time for the Contract had not been issued by MTNL. During hearings, MTNL stated that the Escalations according to the Contract will be paid as soon as the extension of time is granted for completion of the Contract without levy of any penalty. The final bill has been paid by MTNL in Dec 99 without levying any compensation. The Escalation has accordingly become due. It has not been contested by MTNL at any point of time.

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20. REVIEW OF AWARD FOR CLAIM 5.

Principles of evaluation

Since the award was remitted to me, and the original award against Claim 5 was not final, I decided to give an award for the total escalation. I directed the Claimant to submit details of claim no.5 till the work was completed so that the total amount of escalation can be calculated for award. Claimant UNITECH supplied detailed calculations of Claim No.5 on 6.7.2010.

21. In the 5th meeting held on 24.2.2011, it was recorded "the detail of Escalation during this period has now been given. The Arbitrator has already asked the Respondents MTNL to check these calculations and to intimate if there are any modifications or corrections that are needed according to them. Shri Malhotra promised that "the verification of calculations for Claim #5 shall be completed within 15 days and the report submitted to the Arbitrator".

22. An Order was issued' on April 18th 2011 stating "the directions have not yet been complied with. Parties shall report compliance within 10 days of the date of issue of this letter."

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26. I have considered the provision in the agreement as well as the pleadings carefully.

The provision in the agreement that

"(MI and M10) ... are for the period under consideration and that valid at the time-of receipt of tenders, respectively"

leaves no doubt about the interpretation given by MTNL. Subpara 4 merely confirms this interpretation. Same is the situation for LI/LIo and FI/FIo. This is also supported by the fact that UNITECH never raised any objection during 1992-1995 when they received 14 payments on this basis.

27. Accordingly I hold that the base indices are as in December 1991; i.e. M10, LIo and FIo are 213.20, 225 and 202.20 respectively.

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29. In calculating escalation, the following principles shall be observed:

1. Base indices for materials, labour and fuel are to be taken as the indices in December 1991 when the tenders were called. The base indices, therefore, are, 213.20, 225 and 202.20 for material and labour and fuel respectively.

2. Escalations are not payable on extra items.

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31. For the period Jan 96 to Dec 98, calculation of escalation is shown in the tables on the following pages. MTNL has taken escalations calculated by UNITECH and corrected it by multiplying by a suitable factor to arrive at the escalation according to correct indices.

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33. The net claim payable for escalation is as follows:

Escalation in Materials for period	
19.12.95 to 31.12.98	Rs.1,03,31,208.63
Escalation for labour for period	
19.12.95 to 31.12.98	Rs.37,48,219.99
Escalation for POL for period	
19.12.95 to 31.12.98	Rs.9,58,876.22
Escalation for steel claimed by both parties for the period is	Rs.3,49,884.00

Total Rs.1,53,88,188.00."

18. Here I would also like to refer to an additional affidavit filed on behalf of the petitioner towards objections to claim No.5 of the claimant. The said affidavit is annexure P12. A document viz. annexure I to the affidavit Annexure P12 notes:-

"Statement of Claim of agency vs. calculation of MTNL for claim No.5. Escalation for the work Construction of TE Bldg. CGO Complex, Lodhi Road, New Delhi.

A. Claim of the agency

(i) For the period 19.12.95 to 30.11.97.

(a) Escalation on ale Material, Labour and POL. (Agreement item)	=1,32,08,578.00
(b) Extra items	7, 71,746.00
(c) Steel.	3,49,884.00

1,43,30,208.00

(ii) For the period 1.12.97 to 31.12.98

(a) Escalation on ale Material, Labour and POL. (Agreement item) =	4494765.32
(b) Extra items	620268.34
	----- 5115033.66

Total claim= 14330208.00+5115033.66=19445241.66 (A)

(B) Amount as calculated by MTNL

(i) For the period 19.12.95 to 30.11.97

(a) Escalation on ale Material, Labour and POL. (Agreement item)	10662073.29
(b) Extra items	Nil
(c) Steel.	349884.00

1,10,11,957.29

(ii) For the period 1.12.97 to 31.12.98

(a) Escalation on ale Material, Labour and POL.

(Agreement item) = 4376231.55

(b) Extra items Nil

Total claim= 11011957.29+4376231.55=15388188.84 (B)

Difference of A and B = 40,57,052.82”

19. As per the document Annexure I to affidavit Annexure P12 filed, the petitioner disputed the claim of the respondent to be ₹1,94,45,241/-. Rather the petitioner gave its own calculation of escalation charges to be only ₹1,53,88,188/-. Now it is the same amount which has been awarded by the learned arbitrator in the impugned award, hence, petitioner should have no grievance at all.

20. Thus, there being no infirmity in the award passed by the learned arbitrator, I see no reason why it should be set aside. The law is well settled this Court is not to re-appreciate the evidence produced during arbitral proceedings and it is only for the arbitrator to weigh such evidence and to reach to a conclusion which the learned arbitrator has fairly done in this case. It is a settled law if two views are possible the view taken by the learned arbitrator cannot be interfered with unless it is perverse and shock the conscience of the Court.

21. Hence, the objection petition being misconceived is accordingly dismissed. No order as to costs.

YOGESH KHANNA, J

MAY 09, 2018

M/RS