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

Date of decision: 08.10.2018

+ **FAO(OS) 205/2017**

HARYANA TELECOM LIMITED

..... Appellant

Through: Mr. Abhishek Sharma and Ms.Pavitra
Singh, Advocate.

versus

MAHANAGAR TELEPHONE NIGAM LTD

..... Respondent

Through: Mr. Raman Kapur, Senior Adv.
with Mr. Vivek Malik and Mr.Utsav
Mukherjee, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The appellant is aggrieved by an order of the learned Single Judge which interfered with the Award of the Arbitral Tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'). The Arbitral Tribunal had held in its Award that the amounts deducted towards liquidated damages had to be paid by the respondent (hereafter 'MTNL') to the appellant.

2. The undisputed facts are that the parties had entered into a contract whereby the appellant agreed to supply a certain quantity of cables which were to be laid by the MTNL in respect of its telecommunication network

(LCKM of underground Jelly Field Telephone Cables ranging between 10 to 2400 pairs). The contract entered into by the parties contained, *inter alia*, a compensation/liquidated damages clause which reads as follows:-

“CLAUSE-16: LIQUIDATED DAMAGES

16.1 The date of delivery of the stores stipulated in the acceptance of tender should be deemed to be the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should however, deliveries be made after expiry of the contract delivery period without prior concurrence of the purchaser, and be accepted by the consignee, such deliveries will not deprive the purchaser of his right to recover liquidated damages under clause 16.2 below. However, when supply is made within 21 days of the contracted original delivery period, the consignee may accept the stores and in such cases the provision of clause 16.2 will not apply. The grace period of 21 days shall be applicable only for delivery of stores and not for inspection.”

16.2 Should the tenderer fails to deliver the stores or any consignment thereof within the period prescribed for delivery the Chairman and Managing Director. MTNL shall be entitled to recover ½% of the value of the delayed supply for each week of delay or part thereof, subject to maximum of 10% of the value of the delayed Supply, provided that delayed portion of the supply does not in any way hamper the commissioning of the system. Where the delayed portion of supply materially hampers installation and commissioning of the system, Liquidated damages (not as a penalty) shall be levied as above on the total value of the Contract.”

3. It is not in dispute that the appellant did not deliver the cables on time. As a consequence, MTNL deducted amounts in terms of Clause 16.2. The appellant thereafter called upon MTNL to pay the amount – which was in the sum of ` 1,03,20,763/- by notice dated 24.02.1997. Non-compliance by MTNL led to reference of the dispute to a three member Arbitral Tribunal.

On 12.03.2003 the Tribunal interpreted the condition i.e. Clause 16.2 and held that the condition, in fact, amounted to an unenforceable penalty which rendered MTNL to refund the amounts. The MTNL challenged the Award before the learned Single Judge. In an earlier round, the learned Single Judge had set aside the Award reasoning that the Tribunal's Award was patently erroneous because Clause 16.2 was a liquidated damages condition and in fact constituted a pre-estimate of damages by the parties. The delay in supply of cables was held to be an event covered by it which entitled the MTNL to deduct the amount. On appeal, the Division Bench set aside the order of the learned Single Judge on a narrow ground that the pleadings of the parties had not been taken into account while setting aside the Award. The second time round again the learned Single Judge arrived at the same findings in the impugned order.

4. Learned counsel for the appellant urges that the material on record in the form of pleadings clearly show that the MTNL never pleaded or claimed that the Clause 16.2 was expression of a genuine pre-estimate of the damages by the parties. Emphasizing that the MTNL was under a duty to adduce some evidence to reveal its injury and the extent of it, the learned counsel submitted that in the absence of any such proof, the MTNL could not have withheld the amounts. Such refusal to pay the amounts, that were otherwise illegal, the Award was therefore sound. Learned counsel also submitted that the Award was justified because the MTNL was unable to show how it suffered any, much less substantial, damages entitling to withhold `1.03 crores.

5. At the outset, this Court notices that the learned Single Judge took note of another judgment of a Division Bench in '*Haryana Telecom Limited*

vs. *Bharat Sanchar Nigam Ltd.*’, FAO(OS) 441 of 2010. On that occasion the Division Bench confirmed the learned Single Judge’s view that the evidence of loss of revenue or pecuniary loss was not the kind which could be objected to.

The learned Single Judge then held as follows:-

30. Indeed, even in the present case, it is not possible for the Court to agree with the submission on behalf of HTL that MTNL was required to prove the actual loss suffered by it. The purpose of the first part of Clause 16.2 is to provide for a genuine pre-estimate of damages payable as LD even without the requirement of having to prove the actual loss. Section 74 of the ICA emphasises that in case of a breach of contract the party complaining the breach is entitled to reasonable compensation whether or not actual loss is proved to have been caused.

31. In the present case, the AT proceeded on the erroneous basis that the first part of Clause 16.2 required proof of actual loss. In fact, the first part of the said clause applied only where "the delayed portion of the supply does not in any way hamper the commissioning of the system." If it did, then the second part of Clause 16.2 applies. The very interpretation of Clause 16.2 and of Section 74 of the ICA by the AT was, therefore, flawed.

*32. Specifically, the AT has overlooked the legal position as explained in **ONGC V. Saw Pipes Limited** (supra) and, in particular, its observation that "in some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation." The conclusions of the AT that: "Forfeiture of part of price is out of all proportion to the damage" and that "It is unconscionable for the purchaser to retain and withhold part of the price" is not on the basis of analysis of the pleadings or the evidence. Specifically, the plea of MTNL in para 8 of its reply that it purchases materials from several sources and "the delay caused by one of the suppliers*

by itself cannot be pleaded and proved" and, therefore, the present case "falls within that class where the Court may not be able to assess the compensation on account of breach of contract to supply some material" was not even discussed by the AT. The purport of HTL's letter No. Nil dated 6th May, 1995 to MTNL stating that it was ready to "accept the price and L/d as acceptable to MTNL" was also not examined.

33. The interpretation of Clause 16.2 by the AT is such that no fair minded or reasonable person would adopt in the facts and circumstances of the case. The impugned Award is also contrary to the settled legal position as regards Section 74 of the ICA.

34. Consequently, the impugned Award dated 12th March, 2003 is set aside on the ground that it is contrary to the provisions of the contract, the ICA and also opposed to the fundamental policy of Indian law as explained in the aforementioned decisions of the Supreme Court."

6. As noticed earlier Clause 16.2 visualizes a compensation event as it were. If one takes into consideration the fact that the contract was for supply of specified goods, within an agreed time-frame – and further takes into account the circumstance that the supplies were to facilitate laying of cables which in turn meant entering into contract with third parties, the nature of injury was most likely unquantifiable at the stage when it occurred. In other words, the compensation event visualized in second part of Clause 16.2 was of the kind that was considered by the Supreme Court in various judgments [*Oil & Natural Gas Corporation Ltd. vs. SAW Pipes*, 2003 (5) SCC 705 and *Kailash Nath Associates vs. Delhi Development Authority*, (2015) 4 SCC 136] and subsequent decisions. In *Kailash Nath Associates* (supra) the Court held that the phrase "whether or not actual damage is proved to have been caused" thereby occurring in Section 74 of the Act meant that where it was possible to prove actual damage, such proof was necessary and that – "it is only in cases where damage or loss is difficult or impossible to prove that the

liquidated amount named in the contract, if a genuine pre-estimate of damage or loss can be awarded”.

7. The pleadings in this case – which the earlier Division Bench did not have the benefit of consideration, clearly point to the fact that MTNL in its statement of defence/reply in paras H to L had clearly stipulated that the amount was payable and could therefore be withheld by it on account of the liquidated damages condition. Undoubtedly, it did not lead any evidence. However, the Court is of the opinion that the burden of proving such loss, did not arise having regard to the nature of the contract.

8. The Court also notices that the appellant itself in the correspondence had admitted to the applicability of the liquidated damages clause.

9. For the foregoing reasons this Court is of the opinion that there is no merit in the appeal, which is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

A. K. CHAWLA
(JUDGE)

OCTOBER 08, 2018

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