

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

+ **OMP (COMM) 21/2015**

Reserved on: 12th January, 2018
Date of decision: 19th February, 2018

PRASAR BHARATI

..... Petitioner

Through: Mr.Rajeev Sharma, Ms.Radha
Lakshmi, Advs.

versus

COMCON INDUSTRIES

..... Respondent

Through: Ms.Anindita Deka, Ms.S.Spandana
Reddy, Ms.Vidushi Garg, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the arbitral award dated 24.08.2015 passed by the Sole Arbitrator in case no. 12(3)10-D(P)(P-S) Cell/AT-348 dated 25/07/2013.

2. The disputes between the parties relate to the non supply of "General Purpose Receivers (144 Nos.)" by the respondent to the petitioner.

3. The petitioner vide its Acceptance of Tender dated 25.07.2013 had placed an order of supply of the following items on the respondent:

"Procurement of Professional DRM Monitor Receiver and DRM General Receiver:-

Comcon								
	Description	Make & Model	Unit	Qty	Unit Price without Vat/Service Tax (in Rupees)	VAT/Service Tax %	VAT/Service Tax Amount in Rs.	Total Price with Tax in Rs.
3.1	PROFESSIONAL DRM MONITORING Receiver along with standard accessories. Such as Jog Wheel as per clause 2.1 of section II with following configuration options included: GPS receiver, 2RS232,2 relay outputs, builtin loudspeaker, external loudspeaker outputs, Alarm system and builtin DVD drive	RF Mondial RF-SE 12	Nos.	36	1155350.00	5%	57767.50	43672230.00
3.2	DRM General Purpose Receiver along with standard accessories as per clause 2.2 of section II	Uniwave DRM General purpose Receiver	Nos.	144	19955.00	12.50%	2494.38	3232710.00

4. The agreement contains a *force majeure* Clause, which is reproduced herein under:-

“20. FORCE MAJEURE

In the event of either party being rendered unable by force majeure to perform any obligation required to be performed by them under the contract, if any concluded, the relative obligation of the part affected by such force majeure lasts. The terms “Force Majeure” as implied here is shall mean acts of God, War, Civil riots, fire directly affecting the performance of the contract, floods and Acts and Regulations of respective Government of the two parties, namely the organization and the contractor. Both upon the occurrence of such cause and upon its termination, the party

alleging that it has been rendered unable as aforesaid, shall within seventy two hours of the alleged beginning and ending thereof giving full particulars and satisfactory evidence in support of its claim. If deliveries are suspended by force majeure conditions lasting for more than 2 (two) months, the Organization shall have the option of canceling this contract in whole or part at its discretion without any liability on its part.”

The agreement further authorizes the petitioner to levy liquidated damages in case of failure of the respondent to supply the equipments. The equipments were to be supplied on or before 31.10.2013.

5. In terms of the agreement, the respondent had also submitted to the petitioner a Performance Bank Guarantee for an amount of Rs. 24,32,700/-, equivalent to 5% of total contract value, which was Rs. 4,86,53,416/-.

6. There is no dispute regarding the fact that the respondent supplied the Professional DRM Monitor Receiver to the petitioner. As far as the DRM Monitor General Purpose Receiver were concerned, the make and model approved by the petitioner was “UNIWAVE DRM General Purpose Receiver”. The respondent vide its letter dated 01.08.2013 i.e. within the period of supply and in fact, within a week of the Acceptance of the Tender, informed the respondent that in spite of repeated attempts, the manufacturer of the equipment, which is a company managed by an individual technocrat, was not responding and from the informal information received from the industry sources, it had been learnt that the concerned key person is having some serious personal problem and is not active in business. A request was, therefore, made to the petitioner to

accept the offer of supply of “Morphy Richard” make DRM Commercial Receiver instead of the UNIWAVE DRM General Purpose Receiver.

7. The petitioner vide its letter dated 13.08.2013 stated that in the absence of a firm declaration / official documents, the request of the respondent for a change in the model of DRM General Purpose Receiver cannot be examined.

8. The respondent again, vide its letter dated 10.10.2013, informed the petitioner that it has got confirmation that the CEO of the manufacturer, M/s UNIWAVE, had expired and the entire business activity of UNIWAVE had been closed down. The respondent also annexed certain e-mails exchanged with the French Embassy in this regard.

9. The respondent, however, vide its letter dated 12.03.2014 extended the period of supply to 30.04.2014 with liquidated damages. This was inspite of categorical stand of the respondent that it was in no position to supply the UNIWAVE make and model of the General Purpose Receiver due to closure of the company that was manufacturing the same.

10. The petitioner further, vide its letter dated 26.05.2014, informed the respondent that it has decided to forfeit the Performance Bank Guarantee and to “procure the items at your own risk and cost”.

11. The respondent vide its letter dated 06.06.2014 stated that as the Performance Bank Guarantee was for two distinct equipments, the same in relation to General Purpose Receiver would only be to an extent of Rs. 1,61,650/- and not the whole amount. It further, drawing reference to the previous communication, gave a proposal that the petitioner may procure the General Purpose Receiver from an alternative source at the risk and

cost of the respondent. The respondent, however, encashed the Bank Guarantee of the respondent to the full amount vide its letter dated 07.01.2015.

12. The respondent sought interim protection against such invocation by way of OMP 67/2015, which was dismissed by this Court vide its order dated 25.05.2015 *inter alia* holding that the question whether the respondent was prevented from honouring its obligations due to circumstances beyond its control is an issue that will be examined in the arbitration proceedings.

13. The Arbitrator in his Impugned Award records that the petitioner had not contested the non-availability of the equipment i.e. UNIWAVE DRM General Purpose Receiver in the market. The Arbitrator has further held that the respondent had offered to the petitioner to purchase the equipment from open market at the risk and cost of the respondent; the cost of these receivers was showing a downward trend with more advance features and therefore, there was no reason for the petitioner to have encashed the Bank Guarantee, specially when the equipment which covered the major cost component of the order had already been supplied by the respondent to the petitioner. The Arbitrator, in his final direction has directed as under:-

“In view of the above, I direct the respondents to release the whole Performance Bank Guarantee by 30.9.2015 and to amend the order to delete the General Purpose Receivers from the order.”

14. The learned counsel for the petitioner has contended that the Award is liable to be set aside as the Arbitrator has no power to amend and vary the terms of the Contract. He has further contended that it was

admitted that the supply of UNIWAVE DRM General Purpose Receiver was not made by the respondent to the petitioner and the value of the same was Rs. 32,32,710/-, therefore, the enchashment of the Performance Bank Guarantee of the value of Rs. 24,32,700/- was justified. He has further contended that the force majeure clause contained in the agreement would not be attracted in the facts of the present case as there was no material on record to show that the equipment manufacturer had stopped its operations or was not in a position to supply the equipment in question.

15. I have considered the submissions made by the learned counsels for the parties. The Contract in question was for the supply of two distinct equipments. The respondent had duly supplied the Professional DRM Monitor Receiver which were valued at Rs. 4,36,72,230/-. It could not supply the UNIWAVE DRM General Purpose Receiver valued at Rs. 32,32,710/- contending that the manufacturer had stopped manufacturing the said equipment. The respondent filed certain e-mails to substantiate this stand before the Arbitrator. On the other hand, the petitioner did not even aver that the UNIWAVE equipment were available in the market or that the same were still being manufactured by the Original Equipment Manufacturer. In view of the same, the Arbitrator has clearly held that the force majeure clause shall become applicable and the agreement, in so far as it relates to the supply of UNIWAVE DRM General Purpose Receiver, shall stand frustrated. Being a non-legal person, merely because he directs that the Agreement shall stand amended, would not be sufficient to set aside this Award. In *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49, it was held as under:-

“33. 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 score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: “General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”. It is very important to bear this in mind when awards of lay arbitrators are challenged.] . 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 & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (SCC pp 601-02, para21) [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held:

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating 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.”

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.”

16. Section 56 of the Contract Act, 1872 is reproduced herein under:-

“56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

17. In ***Satyabrata Ghose v. Mugneeram Bangur & Co. & Another***, AIR 1954 SC 44 Supreme Court held as under:-

“8. Section 56 occurs in Chapter IV of the Indian Contract Act which relates to performance of contracts and it purports to deal with one class of circumstances under which performance of a contract is excused or dispensed with on the ground of the contract being void.

9. *The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word “impossible” has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.*

10. xxxxxx....*We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law dehors these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before our courts.*

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20. *It is well settled and not disputed before us that if and when there is frustration the dissolution of the contract occurs automatically. It does not depend, as does rescission of a contract*

on the ground of repudiation or breach, or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract. What happens generally in such cases and has happened here is that one party claims that the contract has been frustrated while the other party denies it. The issue has got to be decided by the court “ex post facto, on the actual circumstances of the case.”

18. In **Naihati Jute Mills Ltd. v. Khyaliram Jagannath** AIR 1968 SC 522 Supreme Court reiterated that:-

“5. Section 56 of the Contract Act inter alia provides that a contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. It also provides that where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such a promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance. As envisaged by Section 56, impossibility of performance would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of either party the contractual obligation had become incapable of being performed because the circumstances in which performance was called for was radically different from that undertaken by the contract.

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7. Such a difficulty has, however, not to be faced by the courts in this country. In *Ganga Saran v. Ram Charan* [(1952) SCR 36] this Court emphasized that so far as the courts in this country are concerned they must look primarily to the law as embodied in Section 32 and 56 of the Contract Act. In *Satyabrata Ghose v. Mugneeram* [(1954) SCR 310] also, Mukherjee, J. (as he then was) stated that Section 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may be expressed or implied, in cases where the court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56. Although in English law such cases would be treated as cases of frustration, in India they would be dealt with under Section 32. In a majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from performance of the contract. The Court can grant relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract. There would in such a case be no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs, it is the court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in Section 56 which governs such situations.”

19. In *Smt. Sushila Devi & Another v. Hari Singh & Others* (1971) 2 SCC 288 the Supreme Court again reiterated that Section 56 of the Indian Contract Act lays down a rule of positive law which is not confined to something which is not humanly possible. If the performance of a Contract becomes impracticable or useless having regard to the object and purpose the parties had in view, then it must be held that the performance of the Contract has become impossible.

20. Recently in *Delhi Development Authority v. Kenneth Builders and Developers Private Limited and Others* (2016) 13 SCC 561, Supreme Court relying upon the judgment of *Satyabrata Ghose (supra)*, reiterated that if subsequent intervening circumstances were not contemplated by the parties, the same would frustrate the performance of the Contract if it makes such performance impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the Contract.

21. In the present case, as noted above, the Arbitrator has accepted the plea of the respondent that the Agreement stood frustrated due to shutting down of the manufacturing by the Original Equipment Manufacturer M/s UNIWAVE. In view thereof, the encashment of the bank guarantee by the petitioner was unjustified as the Contract to that extent stood frustrated. The Contract in question being severable as far as the supply of professional DRM Monitor Receiver is concerned, the direction of the Arbitrator is to be read to mean that the Contract, so far as it relates to the supply of UNIWAVE DRM General Purpose Receiver, stood frustrated. It cannot be read as ordering any amendment in the Contract. I do not find the view of the Arbitrator to be unreasonable or perverse.

22. Accordingly the present petition is dismissed with cost quantified at Rs. 50,000/-

NAVIN CHAWLA, J

FEBRUARY 19, 2018/rv

