IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **13.03.2019**

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P. No.763 of 2013

M/s.Kulja Industries Limited
Plot No.1 Industrial Estate
Chambaghat
Solan – 173213
Himachal Pradesh. .. Petitioner

vs.

1.Chief General Manager
Bharat Sanchar Nigam Limited (BSNL)
Southern Telecom Projects
No.25 BSNL Towers
Greenways Lane
Raja Annamalaipuram
Chennai – 600 028.

2.Mr.C.Periyasamy
The Learned Arbitrator & The Principal Manager (CFA)
BSNL Chennai Telephones
No.3, Kushkumar Road
Nungambakkam, Chennai – 600 034. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 29.06.2013 made in Order No.GM/CHI/ARB/01/12-13/29.06.2013, through which, the petitioner is aggrieved and to pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render justice.

For Petitioner : Mr.S.Siva Shanmugam

For Respondents : Mr.Vijay Narayan, Senior Counsel
Assisted by Mr.S.Udayakumar for R1

R2-Arbitrator.

ORDER

There is one petitioner and there are two respondents.

2. Instant 'Original Petition' (hereinafter 'OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an 'arbitral award dated 29.06.2013' ('impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator. To be noted, sole Arbitrator, who constituted the AT has been arrayed as second respondent before me. Therefore, the contest is between the petitioner and the first respondent.

3. As far as AT is concerned, petitioner before me was the claimant and the contesting first respondent was the sole respondent.

4. To be noted, instant OP has been filed under Section 34 of A & C Act as mentioned supra.

5. Section 34 in the scheme of A & C Act finds its slot under Chapter VII of A & C Act, which is captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 of A & C Act also reveals that recourse to Court against an arbitral award may be made by an 'application'. Also to be noted, the very caption to Section 34 of A & C Act reads 'Application for setting aside an arbitral award'. Be that as it may, such recourse against an arbitral award is being assigned the nomenclature 'Original Petition' in this Registry. Therefore, I shall refer to the instant proceedings as 'OP' for the sake of convenience and clarity.

6. Mr.S.Siva Shanmugam, learned counsel on record for petitioner and Mr.Vijay Narayan, learned senior counsel appearing on behalf of Mr.S.Udayakumar, counsel on record for the contesting first respondent are before this Court.

7. A perusal of the case file placed before me reveals that instant OP has not been admitted, but notice was issued. Therefore, instant OP is listed under the caption 'NOTICE REGARDING ADMISSION' today. As notice has been issued, I heard both sides.

8. As far as challenge to the impugned award passed by AT is concerned, learned counsel for petitioner submits that it is predicated on one ground viz., it is in conflict with public policy of India. Learned counsel also says that as far as being in conflict with public policy of India, it is his specific submission that it is in contravention with fundamental policy of Indian law.

9. Therefore, instant OP under Section 34 of A & C Act is predicated on the primary ground that the impugned award made by AT is in conflict with public policy of India as it is in contravention with the fundamental policy of Indian law.

10. Thumbnail sketch of the facts or in other words facts that are imperative for appreciating this order shall be set out in the following paragraphs infra.

11. Undisputed facts as projected before me in the hearing reveal that first respondent before me (which shall hereinafter be referred to as 'BSNL') issued a Notice Inviting Tender dated 01.11.2007. This Notice Inviting Tender was for supply of what has been described as 'Permanently Lubricated HDPE Pipes. The short form/abbreviation used is PLB HDPE pipes. This Court is informed that HDPE stands for 'High-Density Polyethylene'. Therefore, PLB

HDPE pipes would necessarily expand and read as 'Permanently Lubricated High-Density Polyethylene Pipes' (which shall hereinafter be referred to as 'said product' for the sake of convenience and clarity)

12. Aforesaid Notice Inviting Tender was for supply of said product for about 4800 kms stretch at a total cost of Rs.18.56 crores.

13. It is not in dispute that petitioner responded to the Notice Inviting Tender, petitioner was the lowest bidder and therefore, petitioner was given an Advance Purchase Order dated 14.12.2007. Petitioner is one 'Kulja Industries Limited' and for the sake of convenience and clarity from hereon petitioner shall be referred to as 'KIL'.

14. After the Advance Purchase Order dated 14.12.2007, KIL was issued Purchase Order dated 08.01.2008. The arbitration agreement between the parties (arbitration agreement within the meaning of Section 7 of A & C Act) is in the form of a Clause in the Notice Inviting Tender and both parties agree that it is Clause 20, which reads as follows:

> ***'20.ARBITRATION***
>
> *20.1 In the event of any doubt, dispute or difference arising under this agreement or in connection therewith (except as to the matters, the decision to which it is specifically provided under this agreement), the same shall be referred to the sole*

arbitration of the CGMP, STP, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CGMP, STP, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CGMP, STP or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CGMP, STP or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996. There will be no objection to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the mater is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CGMP, STP, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with the terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessor.

20.2 The arbitrator may from time to time with the consent of both the parties enlarge the time frame for making and publishing the award. Subject to the aforesaid, Arbitration and Conciliation Act, 1996 and the rules made there under, any modification thereof for the time being in force shall be deemed *to apply to the arbitration proceeding under this clause.*

20.3 The venue of the arbitration proceeding shall be the office of the CGMP, STP,BSNL, Chennai or such other places as the arbitrator may decide.

20.4 For points discussed in clause 16.2(iv) of Section-III the request for Arbitration will not be entertained.'

15. Counsel for petitioner and learned senior counsel appearing on behalf of counsel for BSNL submit that aforesaid Notice Inviting Tender, Advance Purchase Order and Purchase Order dated 01.11.2007, 14.12.2007 and 08.01.2018 respectively, constitute the contract ('said contract' collectively for clarity and convenience) between the parties and therefore, both sides agree that the aforesaid Clause being Clause 20 in the Notice Inviting Tender is the arbitration agreement between the parties being arbitration agreement within the meaning of Section 7 of A & C Act. In other words, there is no doubt or disagreement about the arbitration agreement.

16. Reverting to the narration of thumbnail sketch of the facts, it is not in dispute that KIL could not supply the entire quantity of said product within the agreed period. It is not in dispute that KIL supplied only 1474 kms of said product before the cut off date of 19.06.2008, necessitating KIL seeking extension. It is also not in dispute that extension has been granted and ultimately the said product in its entirety i.e., said product for a stretch of

about 4800 Kms was supplied within the extended period of time and the extended periods of time are captured in two letters being letter dated 24.04.2009 bearing reference No.KULJA/STP/CO/09-10/126 and letter dated 19.05.2009 bearing reference No.CGMP/CHI/LPO/PLB TENDER-II/2007-08/II/63

17. Ultimately, after supply of the said product in entirety i.e., for entire stretch in accordance with the original Purchase Order, BSNL admittedly levied Liquidated Damages ('LD' for brevity). This became the bone of contention which was the pivotal arbitrable dispute before AT. In other words, it is not in dispute before me that LD levied by BSNL and deducted from the monies payable to KIL is the pivotal and primary arbitral dispute that arouse between the parties. While KIL contested that LD cannot be levied for the period when said contract was not in vogue viz., the period between 01.01.2009 and 18.05.2009 and also contended that LD cannot be levied on the original value of the contract being Rs.18.56 crores, when the price was admittedly revised and reduced leading to the reduction in the value of the said contract, BSNL contended that reduction in value of contract was on agreed terms and therefore, it is justified in levying LD and deducting the same from the payments which have been made to KIL. As mentioned supra, this is the epicentre of the arbitral dispute between the parties and that led to invocation of aforementioned arbitration clause. Respondent No.2 before me,

whom this Court is informed goes by the designation Principal Manager (CFA) in BSNL was the sole Arbitrator, who constituted the Arbitral Tribunal. Arbitral Tribunal entered reference and arbitration was conducted.

18. Ultimately, the impugned award came to be passed after full contest.

19. Vide the impugned award, AT held that Clause 14 of Notice Inviting Tender, which is captioned 'FALL CLAUSE' would come into play. I deem it appropriate to extract Clause 24 of Notice Inviting Tender and the same reads as follows:

> *'24.FALL CLAUSE*
>
> *24.1. The prices once fixed will remain valid during the scheduled delivery period except for the provisions in the clause 12.1 of Section-III. Further, if at any time during the period of contract*
>
> *a. It comes to the notice of the purchaser regarding reduction of price for the same or similar equipment/service; and/or*
>
> *b. The prices received in a new tender for the same or similar equipment/services are less than the prices chargeable under the contract;*
>
> *the purchaser for the purpose of delivery period extension, if any, will determine and intimate the new price, taking into account various related aspects such as quantity,*

geographical locations etc, and the date of its effect for the balance quantity/service to the vendor. In case the vendor does not accept the new price to be made available during the extended delivery period and that the date of its effect, the purchaser shall have the right to terminate the contract without accepting any further supplies. The termination of the contract shall be at the risk and responsibility of the supplier and the purchaser reserves the right to purchase the balance -unsupplied quantity/service at the risk and cost of the defaulting vendor besides considering the forfeiture of his performance security.

24.2. a. The vendor while applying for extension of time for delivery of equipment/service if any, shall have to provide an undertaking as "We have not reduced the sale price, and/offered to sell the same or similar equipment/service to any person/organization including Department of Central/State Government or any Central/State PSU at a price lower than the price chargeable under the contract for scheduled delivery period.

b. In case undertaking as in clause 24.2(a) is not applicable, the vendor will give the details of prices, the name(s) of purchaser, quantity etc. to the purchaser, while applying extension of delivery period.'

20. On the basis of Fall Clause, AT returned a finding that the rate on which BSNL will have to pay KIL for the said product is Rs.26,851.37 per Km,

which is neither the original agreed value nor the reduced value, which was the basis for the extensions.

21. It is also not in dispute before me that BSNL, which was sole respondent before AT filed an application under Section 34 of A & C Act being OP No.816/2013, as far as aforesaid aspect of the matter is concerned, i.e., the aspect of AT returning a finding that Fall Clause (Clause 24) will come into play and the said OP being O.P.No.816 of 2013 came to be dismissed after contest on 19.01.2015, it is also not in dispute before me that dismissal of O.P.No.816 of 2013 being OP filed by BSNL under Section 34 of A & C Act against impugned award has attained finality and has been given legal quietus. In other words, it is submitted on instructions, that there is no appeal under Section 37 of A & C Act and therefore, the order dated 19.01.2015 made in said O.P.No.816/2013 has attained finality.

22. Having set out a thumbnail sketch of the facts, this Court now proceeds to discuss the ground on which, the instant OP was argued i.e., ground on which impugned award was assailed and the manner in which, this Court deals with the ground projected before it. This is done under the caption 'DISCUSSION AND DISPOSITIVE REASONING' infra.

23. **DISCUSSION AND DISPOSITIVE REASONING:**

23.1. As mentioned supra, instant OP is predicated on the sole ground that impugned award is in conflict with public policy of India, as it is in contravention with fundamental policy of Indian law.

23.2. As mentioned supra, the main ground on which it is argued is that impugned award is in conflict with public policy is two fold. One is LD has been levied on the original value of the contract being Rs.18.56 crores while the value of the contract has been brought down owing to reduction in the price i.e., price per Km for the said product. The second limb of submission is that LD has been levied even for the period when the said contract was not in vogue viz., for the period from 01.01.2009 to 18.05.2009.

23.3. This takes us to how the AT has dealt with this aspect of the matter.

23.4. AT, after examining records placed before it, has come to the conclusion that the reduced price has been agreed to by KIL, as the basis of which extension of time would be granted and therefore, it cannot be gainsaid by KIL that LD ought to have been levied only on the original value of the contract.

23.5. However, AT has also come to the conclusion that Fall Clause, being Clause No.24, which has been alluded to supra, would operate and the price that can be reduced by applying Fall Clause being Rs.26,851.37 per Km would be the rate which will be applicable and that would be the rate for the said product for the supply made in the extended time period.

23.6. This takes us to the question as to whether the impugned award of AT is in conflict with public policy of India as being one opposed to fundamental policy of Indian law.

23.7. Fundamental policy of Indian law has been elucidatively explained by the Hon'ble Supreme Court in the ***ONGC Ltd. v. Western Geco International Ltd.***, reported in ***(2014) 9 SCC 263*** which was subsequently reiterated by the Hon'ble Supreme Court in the celebrated and oft quoted judgment being ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49***

23.8. A perusal of ***Associate Builders case*** wherein ***Western Geco*** has been reiterated will reveal that fundamental policy of Indian law has been explained by Hon'ble Supreme Court and three distinct juristic principles have been culled out and litmus tests for testing whether an arbitral award is in conflict with public policy qua the juristic principles have also been laid down. The three distinct juristic principles as culled out and laid down by Hon'ble Supreme Court in ***Western Geco case*** reiterated in ***Associate Builders case*** are (a) judicial approach, (b) adherence to principles of natural justice and (c) perversity /irrationality.

23.9. With regard to judicial approach, it was held that fidelity of judicial approach should be exhibited on a reading of the impugned award. With regard to principles of natural justice, it was held that it should be tested on the time honoured and sanctus *audi alteram partem* principle and as to whether sufficient reasons have been given in the arbitral award. With regard to third juristic principle viz., perversity/irrationality, the same has to be tested on the time honoured *Wednesbury* principle of reasonableness. In other words, with regard to the third principle i.e., perversity/irrationality, if the impugned award passes the muster of *wednesbury* test of reasonableness, it would not be hit by the vice of perversity/irrationality and only when it fails to pass the muster of *wednesbury* principle, it can be held that the impugned award is hit by the vice of perversity/irrationality for being categorised as one that can be set aside under Section 34 of A & C Act.

23.10. Keeping in mind the aforesaid principles and litmus tests that have been laid down by the Hon'ble Supreme Court, I embarked upon the exercise of testing the impugned award before me in the light of the ground on which it was assailed by the protagonist of instant OP i.e., KIL.

23.11. There is no dispute or disagreement that fidelity of judicial approach is certainly seen even on a bare and plain reading of the impugned award made by the AT and as there is no dispute before me in this regard, no further elaboration on this is required. With regard to the second juristic principle i.e., natural justice, there is no dispute or disagreement before me that anybody was not given adequate opportunity. Therefore, it is not necessary to examine or delve into that aspect of the matter. This leaves us with the third principle of perversity/irrationality.

23.12. That third principle i.e., irrationality/perversity would be tested by applying *wednesbury* principle of reasonableness as litmus test as alluded to supra. *Wednesbury* principle of reasonableness in the understanding of this Court to put it into very simple language would mean that if a conclusion which no reasonable person will arrive at on the basis of material placed before it, has been arrived at by AT that it shocks the conscience of the Court, it will not pass the test of *wednesbury* principle of reasonableness. In the instant case, an analysis of the impugned award made by AT reveals that it certainly passes the muster of *wednesbury* test of reasonableness, as it cannot be gainsaid that the conclusion which AT has arrived at vide the impugned award is unreasonable or so unreasonable that no reasonable person would have arrived at such a conclusion on the basis of materials placed before it.

23.13. On the contrary, the impugned award before this Court comes across as a well-reasoned award on the basis on which the findings have been returned by the AT has been very succinctly and pithily articulated in one part of impugned award captioned 'AWARD', which reads as follows:

'In view of the above discussions and conclusions arrived at, the following is the award on the claims.

LD deducted for the pipes and materials supplied within 20 weeks are as per tender conditions only.

LD deducted for the materials supplied after the issue of extension by STP vide: STP vide their letter dated 19-May-2009 up to 30-June-2009 is the bone of contention and challenged by M/s. Kulja Industries.

Despite sufficient extension for more than 20 weeks given by STP Circle, M/s. Kulja Industries have failed to complete the supply as agreed by them. Hence STP has terminated M/s. Kulja.

However, STP has considered the repeated requests of M/s. Kulja for giving one more extension upto 30/06/2009, after issue of termination order, based on their letter dt 24th April 2009 wherein they sought condonation of delay beyond 20 weeks as a special case and have explicitly asked for one more extension of delivery schedule upto 30/06/2009 considering the time for production, dispatch and QA clearance.

M/s.Kulja have requested extension up to 30-06-2009 with the following conditions voluntarily:

a. Kindly give one more extension condoning the delay beyond 20 *weeks as a special case.*

b. The delivery time may kindly be extended up to 30-Jun-2009 considering the time required for production, dispatch and QA clearance.

c. We agree to supply the balance quantity of PLB HDPE Pipe and accessories with acceptance of liquidated damages up to the last date of delivery.

d. We also agree to accept any other rate finalized during this extension period in line with Fall clause of the tender, if any.

e. As per tender condition, we will submit additional bank guarantee for the pending quantity of supply.

It is very clear that M/s.Kulja agreed to supply the pipes and accessories with acceptance of LD charges up to the last date of delivery and also M/s. Kulja have agreed to accept any other rate finalized during the extended period in line with the fall clause of the tender.

It is observed that LD calculation made by STP for the first 20 weeks is @ 12% as per tender condition and for the subsequent 34.2 weeks @ 12% uniform rate. As per Clause 16.2 (v) of the tender conditions, the total value of LD charges shall be limited to a maximum of 12% only.

As per fall clause of the tender conditions, any rate finalized during the extension period is liable to be accepted by the bidder. M/s. Kulja vide their letter dt. 24/04/2009 have agreed to accept any other rate finalized by BSNL during the extension period which is in line with the above fall clause.

It is noted that during this extension period, the rate of Rs.26851.37/km for 200 mt coil was finalized by Kolkata Telecom Stores.

Having considered the request of M/s. Kulja Industries and *issued one more extension, it means that STP has in principle agreed to give one more extension as per tender conditions only which implies that LD cannot be imposed more that 12% as per clause 16.2(v).*

The other option is STP should have offered the rate finalized by Kolkata Telecom stores under the fall clause of tender conditions in respect of quantities yet to be supplied for which extension was considered vide M/s.Kulja's letter 19th May 2009 in which they have agreed to this condition also.

Given the fact that revocation after termination was not supported by the tender conditions, giving extension based on the written undertaking by M/s.Kulja to accept any rate finalized during the extension period would have been justified.

Hence STP is directed to settled the issue at the finalized rate of Rs.26851.37/km which is the approved rate of Kolkata Telecom Stores for the materials supplied during this extension period in line with fall clause of the tender.'

23.14. A perusal of the above would reveal that AT has relied on the aforesaid letter dated 24.04.2009, wherein and whereby KIL sought for extension of time. In response to the letter dated 24.04.2009, BSNL had sent a letter dated 19.05.2009 and considering the importance of the said letters, I deem it appropriate to extract both the letters viz., letter dated 24.04.2009 from KIL to BSNL and BSNL's reply dated 19.05.2009 to the aforesaid letter, I do so and the same read as follows.

'KULJA INDUSTRIES LIMITED

KULJA/STP/CO/09-10/126 *April 24,2009*

Fax No:044-24954444

The Chief General Manager,
Southern Telecom Projects,
Bharat Sanchar Nigam Limited,
25, Greenway Lane,
Raja Annamalaipuram,
CHENNAI – 600 028

Kind Attn: Mr.Ananthan P.R.

Sub:	*Condonation of delay for more than 20 weeks and reinstatement of order -reg.*
Ref:	*1. P.O.No.CGMP/CHI/LPO/PLB TENDER-II/2007-08/45 dated 08.01.08 for the supply of PLB HDPE Pipes and accessories.*
	2. Your letter No.CGMP/CHI/LPO/PLB Tender-II/2007-08/II/59 dated 21.04.2009

Dear Sir,

With reference to your letter cited above dated 21.04.2009, we would like to bring to your kind consideration the following points:-

1. We are very thankful to you for having extended the delivery date of the Purchase Order cited above up to 15.12.2008. Due to the following reasons, we could not complete the balance supplies in time:

a) There has been labour unrest in the factory and work to rule agitation affecting the production capacity.

b) Delay in supply of raw materials.

c) Frequent power failure and tripping resulting in loss of production.

d) Overlapping of delivery schedules of other purchase orders.

2. Also due to some unforeseen circumstances, we could not complete the full supply despite extension of time. Hence we *requesting you to consider one more extension with the following conditions:-*

a) Kindly give one more extension condoning the delay beyond 20 weeks as a special case.

b) The delivery date may kindly be extended up to 30th June, 2009 considering the time required for production, dispatch and QA clearance.

c) We agree to supply the balance quantity of PLB HDPE Pipe and accessories with acceptance of liquidated damages up to the last date of delivery.

d) We also agree to accept any other rate finalized during this extension period in line with Fall Clause of the tender, if any.

e) As per tender condition, we will submit Additional Bank Guarantee for the pending quantity of supply.

Sir, we are one of the regular suppliers of PLB HDPE Pipes and accessories to BSNL, Government, Public Sector Undertakings, RailTel, ITI, Railways and to other telecom provider for more than a decade adhereing to the commitments in time without any complaints in quality from anybody. Our prestige and reputation is at stake, if you do not consider one more extension.

In view of the above facts, kindly consider and grant one more extension for which we will be ever grateful to BSNL.

Thanking you Sir, once again and assuring you to complete the balance supply with the extension date.

Yours faithfully,
for KULJA INDUSTRIES LIMITED,
sd/-
AUTHORIZED SIGNATORY

BHARAT SANCHAR NIGAM LIMITED

O/o Chief General Manager, Southern Telecom Projects, 25, Greenways Lane, Raja Annamalaipuram, Chennai – 600 028.

Ph. 044-2495 2208 ***MM CELL*** *FAX.044-2495 6405*

To

M/s.Kulja Industries Limited,
Plot No.1, Industrial Estate, Chambaghat 13,
Distt. Solan (HP).
(Tele : 01792-224367, Fax: 01792-220267 & 230067)

No:CGMP/CHI/LPO/PLB TENDER-II/2007-08/II/63 Dated:19th-May-2009

Sub: Further Extension of Delivery-reg.

Ref: 1. This office Tender No.CGMP/CHI/MM/PLB TENDER-II/2007-08/II/1 Dt.01-11-07.

2. This Office PO No.CGMP/CHI/LPO/PLB TENDER-II/2007-08/45 dt. 08-1-08

3. Extn. Lr.No-1: CGMP/CHI/LPO/PLB TENDER-II/2007-08/II/20 dt. 25-10-08

4. Extn. Lr.No-2: CGMP/CHI/LPO/PLB TENDER-II/2007-08/II/42 dt.20-11-08.

5.Your. Lr.No.KULJA/STP/CO/09-10/126 dated April 24, 2009.

Based on the condonation of delay approved by the Competent Authority, the delivery date for the balance supply of PLB Pile is hereby further extended up to 30-June-09 as requested by you, with the following conditions:-

1. *The delivery date is further extended up to 30-Jun-09 with LD charges up to the last date of supply.*
2. *The approved rate with ED @ 8.24% w.e.f. 24-02-2009 and*

the Net Price payable after levy of LD up to 30-Jun-09 is as given below.

Item	***For 1km coil/KM-Rs***	***For 200mt coil per km***
Basic	**29,580.57**	**30,175.58**
ED @ 8.24%	**2,437.44**	**2,486.47**
ST 1%	**320.18**	**326.62**
Freight	**3,200.00**	**3,200.00**
Total	**35,538.19**	**36,188.67**
LD @ 12% for first 20 weeks	**4264.58**	**4342.64**
LD @ 12% for balance 34.42 weeks	**7339.35**	**7473.68**
Total LD	**11603.93**	**11816.32**
Net Price Payable	**23,934.26**	**24,372.34**

3. No additional BG is required since the additional PBG submitted for Rs.39,13,150/- valid upto 30-11-2010 is taken into account.

4. No further extension will be granted. If the supply is not completed on or before 30-Jun-09, further action shall be taken as per tender/PO conditions without any further correspondence.

The receipt of this letter may be acknowledged please.

Sd/-

Asst. General Manager (MM),

O/o. CGM Projects, BSNL,

Chennai – 600 028.'

23.15. A perusal of two letters will reveal that extension of time has been given by BSNL by reducing the price per Km. To be noted, in the tabulation which has been set out in the BSNL letter dated 19.05.2009, there is no dispute or disagreement before me that the arbitral dispute does not touch upon the 200mt coil per Km and the entire arbitral dispute is restricted to 1Km coil per Kilometre. In other words, the entire arbitral dispute perambulated within the second column in the tabulation and the third column in the tabulation in the letter dated 19.05.2009 is of no relevance, is the common submissions made in unison by both sides.

23.16. Having examined these two letters closely and having analysed/examined the impugned award particularly that portion of the impugned award, which has been extracted and reproduced supra leaves this Court with the conclusion that the impugned award is certainly not hit by the vice of being in conflict with public policy of India and it is certainly not in contravention with the fundamental policy of Indian law. In other words, it is neither irrational nor perverse. To be noted, this is the only ground on which, instant OP is predicated and was argued before me.

23.17. In this regard, it is made clear that while embarking upon the exercise of testing whether the impugned award is hit by the vice of being in conflict with public policy of India, this Court reminded itself of **Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited** reported in **(2009) 17 SCC 796.** Hon'ble Supreme Court in this judgment, held that proceedings under Section 34 of A & C Act are summary procedures and this can be referred to as Fiza developers principle. This Fiza Developers principle was subsequently reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in **(2018) 9 SCC 49** and while so reiterating, Hon'ble Supreme Court held that Fiza Developers principle is a step in the right direction. It is also made clear that this test qua impugned award has been done by this Court by reminding itself that such a test has to be within the contours and confines of Section 34 of A & C Act.

23.18. Before I conclude, it is to be set out that learned senior Advocate for BSNL submitted that the two letters, which this Court has extracted and reproduced supra are of utmost importance and the same were referred to. As mentioned supra, notice was issued, I heard both sides.

23.19. Besides this, learned senior Advocate, on instructions from the instructing counsel, who in turn had taken instructions from BSNL, submitted that the differential component which has to be paid to KIL pursuant to O.P.No.816 of 2013 attaining finality vide order dated 19.01.2015 shall be processed and the differential component shall be paid out to KIL as early as possible and in any event within 12 weeks from the date of receipt of a copy this order. This statement is recorded as the submission was made at the bar on instructions.

24. **CONCLUSION:**

Owing to all that have been set out supra, this Court is clear in its mind that instant OP does not qualify as one which has made out a case for admission much less a case for having the impugned award set aside.

25. **DECISION:**

O.P.No.763 of 2013 is dismissed. However, owing to the nature of the matter and in the light of the trajectory of the hearing before me, parties are left to bear their respective costs.

13.03.2019

vsm

Speaking Order/Non-Speaking Order

Index : Yes/No
Internet: Yes/No

M.SUNDAR. J.,

vsm/mp

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