IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment :	Date of Pronouncing Judgment :
10-04-2019	18-06-2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

O.S.A.No.200 of 2013 and O.S.A.No.34 of 2014 and

O.S.A.No.200 of 2013

The Principal General Manager (Telecom)
Bharat Sanchar Nigam Limited
Tiruchirapalli.
.. Appellant

Vs.

1. India com limited (formerly known as Sesa Seat Information Systems Ltd) Herms Heritage Phase I, Commercial Opp to Shastri Nagar, MSEB, Pune, Nagar Road PUNE.

2. M.Gopalakrishnan, Arbitrator / Deputy General Manager (FA/IFA) Retd, Office of the Principal General Manager (Telecom), Bharat Sanchar Nigam Ltd., Trichur.

3. The Director (PHP), Department of Telecommunications Sanchar Bhavan, 20 M., Ashoka Road, New Delhi.
.. Respondents

O.S.A.No.34 of 2014

Indiacom Limited (formerly known as
Sesa Seat Information Systems Ltd)
Herms Heritage Phase I, Commercial
Opp to Shastri Nagar, MSEB, Pune, Nagar Road,
Pune. .. Appellant

-Vs-

1. The Principal General Manager (Telecom)
Bharat Sanchar Nigam Limited
Tiruchirapalli.

2. M.Gopalakrishnan, Arbitrator / Deputy General Manager
(FA/IFA) Retd, Office of the Principal General Manager
(Telecom), Bharat Sanchar Nigam Ltd., Trichur.

3. The Director (PHP), Department of Telecommunications
Sanchar Bhavan, 20., Ashoka Road, New Delhi-110001.
.. Respondents

Prayer in OSA No.200 of 2013:- Appeal under Order 36 Rule (1) read with Clause 15 of the Letters Patent against the common order dated 06.01.2012 in O.P.No.187 of 2009 and O.A.No.426 of 2009.

Prayer in OSA No.34 of 2014 : Appeal under Order 36 Rule (1) read with Clause 15 of the Letters Patent against the order dated 06.01.2012 in O.P.No.187 of 2009.

For Appellant in OSA 200 / 2013 & R1 in OSA 34 / 2014 : Mr.S.Udaya Kumar, Senior Central Govt Standing Counsel
For R1 in OSA 200 / 2013 & Appellant in OSA 34 / 2014 : Mr.Vijay Narayan, Senior Counsel for Mr.R.Parthiban
For R-2 in both OSAs. : Arbitrator
For R-3 in both OSAs. : No appearance

COMMON J U D G M E N T

(Judgment of the Court was delivered by KRISHNAN RAMASAMY, J.)

The Original Side Appeal No.200 of 2013 has been preferred by the Bharat Sanchar Nigam Limited (BSNL) against the common order dated 06.01.2012 passed by the learned Single Judge, in O.P.No.187 and O.A.No. 426 of 2009. Aggrieved against certain portion of the said order, dated 06.01.2012, Indiacom Limited (ICL) filed Original Side Appeal No.34 of 2014.

2. For the sake of easy reference and understanding, the parties herein shall be hereinafter referred to as per the rank assigned in O.S.A.No.34 of 2014, viz., the appellant/ICL, first respondent/BSNL and inso far as the second and third respondents are concerned, they shall be referred to as such.

3. The brief facts are as follows :-

i) The appellant/ICL is engaged in the business of printing and publication of Telephone Directories with Yellow Pages. In response to an tender floated by the first respondent/BSNL, inviting bids for printing and publication of Telephone Directories with Yellow Pages for the Trichy Secondary Switching Area, for three years commencing from 1994, the appellant submitted the bid. Since the appellant offered the highest bid amount of royalty, the contract was awarded to the appellant/ICL. Subsequently, an agreement was entered into between the appellant/ICL and the first respondent/BSNL on 27.04.1994, for three consecutive years (1994 to 1996).

ii) As per Clause 4 of the agreement, the appellant is required to supply three issues of the main directory along with supplementary directory in the following order:-

(i) Year 1994 - 50,000 copies of the main directory;
(ii) Year 1995 - 60,000 copies of the main directory; and
(iii) Year 1996 - 75,000 copies of the main directory;

iii) In terms of 12.1 of the agreement, the appellant was required to submit a bank guarantee for a sum of Rs.20,00,000/- to the first respondent/BSNL towards performance of the contract. In terms of Clause 13.1, the appellant/ICL was required to pay a sum of Rs.5,53,000/- as guarantee towards the royalty paid. The parties entered into re-negotiation on 22.11.1997 regarding the supply of additional copies for the Third Main Issue. The discussions and the agreed terms were reduced into writing in the form of Minutes of Meeting (for short, MOM) and both the parties signed the same.

iv) However, it is the case of the appellant/ICL that the first respondent/BSNL altered the terms of the agreement dated 27.04.1994 unilaterally by terming the MOM, dated 22.11.1997 as Supplementary Agreement. When the appellant/ICL raised their objections with regard to the alteration of the contents of MOM dated 22.11.1997, via., various correspondences, the first respondent/BSNL invoked the Bank Guarantee without any intimation to the appellant/ICL. Since the first respondent/BSNL invoked the Bank Guarantee, both the appellant/ICL and the first respondent/BSNL invoked arbitration proceedings in accordance with Clause 38 of the Original Agreement, dated 27.04.1994.

v) The learned Arbitrator passed an award dated 04.03.2009, rejecting the claim of the appellant/ICL and awarding the first respondent/BSNL, a total sum of Rs.25,52,000/- comprising of the bank guarantee and the royalty guarantee.

vi) Aggrieved by the said award, the appellant/ICL preferred Original Petition No.187 of 2009 under Section 34 of the Arbitration and Conciliation Act, 1996 before this Court. The appellant/ICL also filed Original Application No.426 of 2009, seeking for an order of injunction, restraining the first respondent/BSNL from appropriating the award amount of Rs.25,52,000/-. The learned Single Judge, by an order dated 06.01.2012, disposed of the Original Petition with the following directions:-

i) The appellant/ICL is directed to pay the first respondent Rs.25,52,000/-, and
ii) The first respondent/BSNL to pay the appellant, the interest accrued out of the deposit by the first respondent/BSNL.

vi) Challenging the said order of the learned Single Judge dated 06.01.2012, the appellant i.e., Indiacom Limited, (ICL) has preferred O.S.A. No.34 of 2014 and the first respondent, i.e., The Principal General Manager, BSNL has preferred OSA No.200 of 2013.

4. Mr.Vijay Narayan, the learned Senior Counsel appearing for Mr.R.Parthiban, the appellant/ICL submitted that, since the appellant/ICL had not delivered the directories, in terms of the Original Agreement, dated 27.04.1994 a Meeting was held between the appellant/ICL and the first respondent/BSNL on 22.11.1997, wherein, the representatives of both the appellant and the first respondent took part and in such Meeting, both the parties had discussed only about the number of free copies to be supplied by the appellant for the 2nd Main Issue, the production of bank guarantee and the modification of the total number of copies for the 3rd issue and the parties had never discussed about the number of copies with regard to the 3rd Main Issue and whether it has to be supplied by the appellant/ICL at 'free of cost' or on payment of cost of the first respondent/BSNL. But the first respondent/BSNL had unilaterally included the following hand written portion in the MOM dated 22.11.1997, i.e. “This forms part of the agreement signed on 27.04.1997.” and alleged that the appellant/ICL committed breach of contract as they have not complied with the terms of the subsequent MOM, dated 22.11.1997.

4.1 It is the main contention of the learned Senior Counsel that the hand written portion, quoted supra was not part of the MOM signed by the representatives of the appellant on 22.11.1997, but the same was included by the first respondent/BSNL in the MOM held on 22.11.1997 and termed it as 'Supplementary Agreement', without the consent of the appellant/ICL. Therefore, the learned Senior Counsel contended that the first respondent/BSNL committed breach of contract, as the MOM dated 22.11.1997 was unilaterally amended by the first respondent/BSNL as to be part of the main agreement dated 27.04.1994, without the consensus of the appellant/ICL, as envisaged under Clause 38 of the agreement.

4.2 According to the learned Senior Counsel, the unilateral amendment of the MOM, dated 22.11.1997 amounts to breach of contract and in support of his contention, relied upon the following case laws:-

i)Dharma Prathisthanam -Vs- Madhok Construction Pvt Ltd., - AIR 2005 SC 214.

ii) Union of India -Vs- M/s.D.N.Revri & Co., - 1976 4 SCC 147

iii)Tata Press -Vs- MTNL & Union of India – 1995 AIR 2438

4.3 Therefore, the learned Senior Counsel contended that the MOM dated 22.11.1997 cannot be termed as Supplementary Agreement entered into between the appellant/ICL and the first respondent/BSNL, due to non-consensus between the parties. He heavily relied upon the dictum laid down by the Hon'ble Supreme Court, in the case of Dharma Prathisthanam -Vs- Madhok Construction Pvt Ltd (supra). that “any agreement to be legally enforceable, has to be unambiguous, must spell out the terms and conditions very clearly and must clearly envisage the intent and the consensus of both the parties involved”

4.4. The next point urged by the learned Senior Counsel is that the MOM dated 22.11.1997 clearly mentions that the number of free copies to be supplied by the appellant/ICL to the first respondent/BSNL was only with regard to the 2nd issue. As far as the supply of copies for the 3rd issue is concerned, it mentions only the total number of copies to be supplied by the appellant/ICL, i.e., 1,25,000 copies, and nowhere, it is mentioned that the appellant/ICL has agreed to sell all 1,25,000 copies for the third issue at free of cost. He further contended that such unambiguity in the minutes on the point whether the 3rd issue would be supplied at free of cost, has also been taken note of by the learned Single Judge in his order dated 06.01.2012 in O.P.No.187 of 2009 and held as follows:-

> “Therefore, the Minutes of the Meeting dated 22.11.1997 is not so clear and the Arbitrator also has not given any findings in this regard. Any how, the learned Senior Counsel for the petitioner has brought to the notice of this Court that,

> the Bank had already sent the DD on 11.06.1998 itself for Rs.25,52,000/- in favour of Trichy Telecom and by an interim award of the Arbitrator, Trichy Telecom was directed not to encash the DD and keep the same in a separate Account for earning interest. The total amount as on date in the said account is over Rs.60 lakhs. Considering the circumstances, I am of the view that the respondent is entitled for a sum of Rs.25,52,000/- as prayed for by them. The remaining amount lying in the credit of the separate account can be withdrawn by the petitioner."

4.5 The learned Senior Counsel further advanced his arguments submitting that the moment the appellant/ICL noted the handwritten portion in the MOM, the appellant sent a letter dated 03.12.1997 to the first respondent, disagreeing with the contents of the MOM. Thereafter, the appellant/ICL, vide letter dated 14.03.1998, requested for appointment of Arbitrator to resolve the dispute. In fact, even prior to the Meeting held on 22.11.1997, the appellant/ICL, vide letter dated 03.12.1997, clearly expressed their inability to supply copies over and above the quantity specified in the agreement as free supply for the 3rd main issue copies to the first respondent/BSNL, due to increase in the cost of production. Therefore, the learned Senior Counsel contends that, by no stretch of imagination, the first respondent/BSNL can assume that the appellant/ICL accepted the MOM dated 22.11.1997 as Supplementary Agreement, especially, when the appellant has clearly reasoned out in their letter dated 03.12.1997, of their inability to supply copies over and above the quantities specified in the main agreement, due to increase in the cost of production.

4.6 Learned Senior Counsel further contended that, in fact, the learned Single Judge while considering the challenge made to the arbitral award, rightly held that the first respondent/BSNL and third respondent had committed breach of contract by unilaterally amending the contract. However, the learned Single Judge failed to grant full relief to the appellant/ICL, and instead, restricted the same towards payment of interest alone. Therefore, the learned Senior Counsel pleads for setting aside the order of the learned Single Judge, and consequently, the award passed by the learned Arbitrator.

5. Per contra, Mr.Udayakumar, learned Senior Central Government Standing Counsel, appearing on behalf of the first respondent/BSNL submitted that the appellant/ICL had not

delivered the directories, and hence, supplementary agreement was entered into between the parties by convening a Meeting on 22.11.1997, and in the said meeting, the appellant/ICL agreed to supply 20,000 additional copies for the 2nd main issue (1996 directory) at free of cost; less the number of copies already supplied over and above 60,000 and 10,000 additional copies at the cost already quoted by the appellant/ICL by 06.01.1998. The appellant/ICL had also agreed that the first instalment of 40,000 copies will be supplied by 31.12.1997 and the supply for the 3rd main issue corrected upto 31.03.1998 will be by 30.06.1998.

5.1 The learned Standing Counsel further submitted that, in the bottom of MOM dated 22.11.1997, it has been specifically mentioned as follows.

> "This forms part of the Original Agreement dated 27th April 1994 (hand written)".

Subsequent to the said meeting, the first respondent had sent a communication on 27.11.1997, whereby, it was brought to the notice of the appellant that the supplementary agreement was signed on 22.11.1997 and the same would form part of the main agreement, dated 27.04.1994, and also enclosed the copy of the same, which was duly acknowledged by the appellant. Even during such point of time, the appellant/ICL never raised any objection with regard to the handwritten portion in the MOM, as stated above. The learned Standing Counsel further submitted that, in fact, the appellant also sent a letter dated 03.12.1997, not denying the contents of MOM, and they only conveyed their inability to supply copies over and above the quantities specified in the main agreement due to increase in paper cost and production, and not expressed their inability to supply the copies at free of costs. Therefore, the learned Standing Counsel submitted that, this will amount to breach of contract. The first respondent/BSNL, as reply to the appellant's letter dated 03.12.1997, sent a letter dated 06.01.1998, mentioning about the Minutes dated 22.11.1997 as Supplementary Agreement. Further, in the said letter, the first respondent/BSNL specifically stated that the appellant's failure to supply copies as agreed in the MOM, amounts to breach of agreement on the part of the appellant and therefore, the first respondent was constrained to invoke the production guarantee and the said amount will be forfeited to the Government.

5.2 Learned Standing Counsel further submitted that since the appellant/ICL committed serious breach of contract, the invocation of bank guarantee is legally valid, and therefore, the findings of the learned Arbitrator as well as the findings rendered by the learned Single Judge of this Court are justifiable, except, the certain portion of the order of the learned Single Judge, whereby, the learned Single Judge has permitted the appellant to withdraw the remaining amount lying to the credit of the separate account. Further, the observation of the learned Single Judge in the penultimate para of the impugned order that the last portion in the MOM was added after signing of the minutes, without referring to the letters dated 27.11.997 and reply dated 06.01.1998, is an error apparent on the fact of record, and hence, prayed for setting aside the same.

5.3 Learned Standing Counsel pointed out that the learned Arbitrator before passing the final award on 04.03.2009, passed an interim award on 05.12.2001, permitting the first respondent/BSNL to en-cash the demand draft of Rs.25,52,000/- and deposit the same in the account opened in the name of the General Manager, Telecom District, Trichy, and the disbursement of the amount along with encashment of bank guarantee will be decided at the time of passing final award and the learned Arbitrator, while passing the final award, made the said interim award dated 05.12.2001 absolute. But, the learned Single Judge, without taking note of the said interim award, which was made permanent, has mechanically passed an order, permitting the appellant/ICL to withdraw the remaining amount lying in the credit of separate account, which is not at all countenanced in law and this is an error apparent on the face of record and liable to be set aside.

5.4 It is also the contention of the first respondent/BSNL that the award of the learned Arbitrator was rendered after considering the materials facts placed on record and after giving due weightage to the terms of the agreement and when the arbitral award was put to challenge, this Court cannot act as an Appellate Authority by sitting over an appeal and interfere with the findings and decision of the Arbitrator. As held by the Honourable Supreme Court in the case of Quality Manufacturing Corporation -Vs- Central Warehousing Corporation reported in (2009) 5 SCC 142, the Arbitrator is legitimately entitled to take a view, which he holds to be correct one after considering the material placed before him and after interpreting the provisions of the agreement and the decision rendered by the Arbitrator has to be accepted as final and binding. The Hon'ble Supreme Court also followed the said intra Court's decision (i.e. decision in Quality Manufacturing Corporation) in Sumitomo Heavy Industries Limited -Vs ONGC reported in (2010) 11 SCC 296. Thus, by placing reliance on the aforesaid decision, the learned Standing Counsel submitted that the Arbitrator passed a well-reasoned award and the learned Single Judge has also confirmed the award but with slight modification, permitting the appellant/ICL to withdraw the remaining amount lying in the credit, which alone is not sustainable, as stated supra. Therefore, he submitted that this Court cannot interfere with the well-considered award of the Arbitral Tribunal and there is no scope for re-appreciation of facts.

5.5. Further, the learned Standing Counsel placed reliance on the judgment of the Supreme Court in Associate Builders -Vs- Delhi Development Authority reported in (2015) 3 SCC 49, wherein, the Hon'ble Supreme Court, after considering its intra Court's judgment, in ONGC Limited -Vs- Western Geco International Limited (2014) 9 SCC 263, held that, insofar as the award of the learned Arbitrator is concerned, there is no patent illegality, while arriving at the decision, that under the explanation to Section 34(2)(b)(ii) of 1996 Act, award is said to be in conflict with public policy of India, the award would be set aside, if there were error of law by Arbitrator. The learned Standing Counsel submitted that, so far as the case on hand is concerned, there is no manifest error apparent on the face of the record in the award passed by the learned Arbitrator.

5.6. The learned Standing Counsel further submitted that, the present Appeal viz., O.S.A.No.34 of 2014, is filed only against the portion of the order of the learned Single Judge, whereby, the appellant/ICL was permitted to withdraw the interest accrued out of the deposit by the first respondent/BSNL, lying in the credit of separate account. The learned Standing Counsel submitted that the appellant is not entitled to withdraw, as, after encashment of demand draft, the amount is lying in the current account being maintained by BSNL. In the current account, the said amount will not carry any interest, and therefore, the said portion of the order, permitting the appellant to withdraw the interest accrued out of the deposit by the first respondent/BSNL is liable to be set aside. Further, he submitted that the appellant/ICL had committed breach of contract and therefore, they are not entitled to claim any amount and the award passed by the learned Arbitrator has to be upheld.

6. We have heard the learned counsel for both the parties and perused the materials placed on record, including the written arguments submitted on behalf of both parties along with the case laws furnished by them.

7. The issues that arises for consideration in the both the Appeals are as follows :-

i. Whether the findings of the learned Arbitrator that the subsequent MOM dated 22.11.1997 will form part of the main agreement dated 27.04.1994 is correct? If so, whether the appellant is bound to comply with the terms of the supplementary agreement, MOM dated 22.11.1997, by supplying 1,25,000 copies at free of cost to the first respondent/BSNL for the Third Main Issue?

8. It is an admitted fact that pursuant to the non deliverance of directories by the appellant/ICL in terms of the Original Agreement, dated 27.04.1994, a meeting was held on 22.11.1997, in which, both the appellant's and the first respondent's representatives took part and entered into negotiation, wherein, certain points were discussed. Such discussions and the agreed terms were reduced into writing in the form of Minutes of Meeting, which was duly signed by the representatives of both the parties. Subsequent to the said meeting held on 22.11.1997, the first respondent sent a letter dated 27.11.1997 to the appellant, wherein, it is stated as follows:-

> “The Supplementary Agreement signed on 27.11.1997 between M/s.Sesa Seat Pune and Trichy Telecom, forming part of the original agreement signed on 27.04.1994 is herewith forwarded for further action please.”

9. On receipt of such communication, the appellant sent a letter dated 03.12.1997, expressing their inability to supply copies over and above the quantity specified in the agreement as free supply copies for the 3rd main issue. However, the appellant agreed to supply 20,000 copies at free of cost and 10,000 copies at the rate of Rs.34.50 per copy, as confirmed in the MOM dated 22.11.1997. We have also gone through the said communication dated 03.12.1997 sent by the appellant to the first respondent. It is to be noted that, in the said letter dated 03.12.1997, nowhere, does the appellant denied anything about the letter dated 27.11.1997 and the hand written portion, viz., “this MOM shall form part of the original agreement signed on 27.11.1994.” When such be the case, now, the issue to be decided is whether the MOM forms part of the original agreement dated 27.04.1994 or not. As stated supra, since the appellant had not mentioned anything about the hand written portion in the MOM, in their letter dated 03.12.1997 and there was no denial of the letter dated 27.11.1997 sent by the first respondent to the appellant, and further, the appellant agreed to supply 20,000 copies at free of cost and 10,000 copies on payment of particular cost for the 2nd main issue, towards part performance of the terms of the MOM, we are of the considered view that the MOM dated 22.11.1997 forms part of the main original agreement, dated 27.04.1994. The learned Arbitrator as well as the learned Single Judge concurrently held that the MOM is part of the

original agreement dated 27.04.1994 and we also uphold the same.

10. Thus, if the MOM forms part of the original agreement dated 27.04.1994, the next issue that falls for consideration is as to whether the appellant committed any breach of contract in terms of the MOM, dated 22.11.1997. In this connection, it would be apposite to extract the relevant portion from the MOM, dated 22.11.1997, with regard to the supply undertaken by the appellant for the Third Main issue:-

> "The Third Main Issue corrected upto 31.03.1998 will be brought out by 30th June, 1998 subject to the handing over of the final corrected date by Tiruchy Telecom on 30th April, 1998.
>
> The total number of copies will be 1.25 lakhs for the Third Main Issue.
>
> The supplementary directory to the Third Main Issue corrected upto September 1998 will be brought out by November, 1998.
>
> The first instalment of 60,000 copies will be supplied on 30 November, 1998 and the balance as per the actual requirement assessed by Tiruchy Telecom (20,000 copies)
>
> "This forms part of the agreement signed on 27.04.1997."

11. On going through the aforesaid MOM, dated 22.11.1997, it is clear that the appellant/ICL agreed to supply 20,000 additional copies for the 2nd main issue at free of cost, less the number of copies already supplied over and above 60,000 and 10,000 additional copies at the cost already quoted by the appellant by communication dated 06.01.1998. Therefore, it is very clear that the appellant supplied 20,000 additional copies, as requested to be supplied by the first respondent at free of cost and 10,000 additional copies at the cost mentioned in the MOM, dated 22.11.1997. With regard to the supply for the 3rd main issue, there is no whisper in the MOM, whether the copies has to be supplied by the appellant/ICL at 'free of cost' or on 'payment of cost' of the first respondent/BSNL. The MOM mentions only about the total number of copies to be supplied by the appellant for the 3rd main issue, i.e., 1,25,000 copies. The learned Arbitrator, while dealing with the said issue had not given any specific finding but simply came to the conclusion that the MOM dated 27.11.1997 forms part of the original agreement dated 27.04.1994 and further observed that, the appellant/ICL had supplied 20,000 copies at free of costs and

10,000 additional copies at particular costs for the 2nd main issue, and therefore, they have performed their obligations in part and insofar as the supply for third main issue is concerned, they have not complied with the contractual obligation as per the agreed terms of the Agreement dated 27.04.1994 and hence, held that there is a breach of contract on the part of the appellant/ICL. We are of the view that this conclusion arrived at by the learned Arbitrator is without any basis.

12. The said findings of the Arbitral Tribunal really shocks the conscience of this Court, because, it was not specifically mentioned in the MOM with regard to supply of 1,25,000 copies for the 3rd main issue either at free of cost or on payment of cost. In fact, when we have gone through the communication sent by the appellant dated 03.12.1997, in response to the letter sent by the first respondent, dated 27.11.1997, wherein, it is seen that the appellant/ICL had expressed their inability to supply copies over and above the quantity specified in the Main Agreement as free supply. Thus, since the MOM dated 22.11.1997, mentions only the total number of copies required to be supplied by the appellant/ICL for the third main issue, i.e. 1,25,000 copies and, nowhere, does it specify that the copies to be supplied at free of cost or payment of costs, and the appellant vide communication dated 03.12.1997, expressed their inability to supply free copies due to increase in paper cost and production, etc. Further, first respondent/BSNL, in their letter, dated 06.01.1998 rejecting the proposal of the appellant/ICL made in communication dated 03.12.1997, clearly stated that the entire 1,25,000 copies for the 3rd main issue has to be supplied at free of cost, which per se would show that to the inability expressed by the appellant/ICL to supply copies over and above the quantity specified in the agreement as free supply for the 3rd main issue copies, the first respondent/BSNL expressed their disagreeableness.

13. Further, in the meeting held on 22.11.1997, it is clear that the representatives of both the first respondent/BSNL and appellant/ICL had discussed only on the issue of total number of copies required by the first respondent, and in the absence of any agreement/consensus arrived at between the parties with regard to the supply at free of costs or on payment, particularly, for the third main issue, in any of the subsequent meetings or correspondences, even if the MOM, dated 22.11.1997 forms part of the main agreement, dated 27.04.1994, it is not obligatory on the part of the appellant/ICL to supply 1,25,000 copies at free of cost for the third main issue. All these aspects were not considered by the Tribunal and erroneously, came to the conclusion that there is a breach of contract on the

part of the appellant/ICL, which really shocks the conscience of this Court.

14. Though this aspect was taken note of by the learned Single Judge in a challenge made to the said award and rightly found that there was breach on the part of the first respondent/BSNL, the learned Single Judge instead of setting aside the award, erroneously, passed an order holding that the respondent/BSNL is entitled for a sum of Rs.25,52,000/- as prayed for by them. Further, it would amount to rendering injustice to the appellant/ICL if it is held that the first respondent/BSNL is entitled for a sum of Rs.25,52,000/- as prayed for by them when the learned Single Judge rightly found that the breach was only on the part of the first respondent/BSNL.

15. Therefore, the findings of the learned Arbitrator that there is breach on the part of the appellant/ICL on the basis that the appellant/ICL failed to supply 1,25,000 at free of cost to the first respondent/BSNL is incorrect, as rightly noted by the learned Single Judge. However, since the learned Single Judge failed to set aside the said findings of the learned Arbitrator, we are inclined to set set aside the findings of the learned Arbitrator with regard to the commission of breach on the side of the appellant/ICL. Similarly, we also set aside the aforesaid portion of the order of the learned Single Judge holding that the first respondent/BSNL is entitled to the sum of Rs.25,52,000/- as prayed for by them, for the reasons assigned hereinabove. Consequently, the award passed by the learned Arbitrator is set aside.

16. In the result, the Original Side Appeal No. 34 of 2014, filed by the appellant/ICL is partly allowed and the Appeal filed by the first respondent/BSNL in O.S.A. No.200 of 2013 is dismissed. No costs.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

KST/sd

To
The Sub Assistant, Original Side,
High Court, Madras

+1cc to Mr.S.Udaya Kumar, Advocate SR.No.49317

+1cc to Mr.R.Parthiban, Advocate SR.No.49286

+1cc to Mr.K.Ramanamoorthy, Advocate SR.No.49235

O.S.A.No.200 of 2013 &
O.S.A.No.34 of 2014

GJ II(CO)
GMY(22/08/2019)