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

+ O.M.P. 493/2013

Date of Decision : 31st July, 2019

SURANA TELECOM AND POWER LTD Petitioner
Through: Mr.Amarjeet Singh, Adv.

versus

MAHANAGAR TELEPHONE NIGAM LTD..... Respondent
Through: Ms.Vandana Bhatia and
Mr.Sarthak Bhatia, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

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 11.04.2013 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Purchase Order dated 30.05.2005 as amended on 05.12.2005 and the Annual Maintenance Contract (AMC) dated 22.12.2007, executed between the parties.
2. By way of the Purchase Order dated 30.05.2005, the respondent had placed an order of 75,000 Handheld WLL Subscriber Terminals of CDMA 2000-IX Technology (Model No.C-300 Huawei make with

color display) on the petitioner. By way of an amendment dated 05.12.2005, this quantity was reduced to 37,500.

3. Clause 14 of the Purchase Order provided for the warranty period of one year towards defects and Clause 9 provided for the Annual Maintenance Contract (AMC) and an Appendix providing the format of AMC.

4. Clause 1.1 of the AMC provides that terms of this Agreement format shall be applicable even during warranty period.

5. The warranty period expired on 15.10.2007. The parties thereafter entered into an Annual Maintenance Contract for the first year on 22.12.2007. Clause 1.1 of this Agreement again provides that the terms of this Agreement shall also apply during warranty period.

6. Clause 16 of the AMC provides for defect removal period for the handheld device and is reproduced hereinbelow:

“16. FAULTS: SEVERITY LEVELS AND RESTORATION TIME:

16.1 Any fault in the CDMA terminal affecting the availability of service (i.e. voice) shall be treated as Severity Level "A". Such faults shall be rectified within THREE days of its reporting to the supplier.

16.2 Faults in the CDMA terminals causing crash of any specific features programmes (i.e. games, phone book, etc.) shall be treated as Severity Level "B". Such faults shall be also rectified within three days of reporting to the supplier.

16.3 The time for restoration of fault will be counted from the time of reporting to the centre as per procedure prescribed in this agreement.

16.4 For the purpose of arriving at the penalties as indicated in clauses 17, the calculated percentage upto two decimal points shall be rounded off to nearest figure (eg 44.9% will be taken as 4% and 4.50 shall be taken as 5%).”

7. Clause 17 of the AMC provides for penalty in case of failure of the petitioner to remove the defect within the time stipulated in Clause 16 and reads as under:

“17. PENALTIES:

17.1 If the supplier fails to restore the fault within the time limit specified in clause 16 above, following penalties shall be applicable.

<i>Severity Level</i>	<i>Penalty per day/per terminals</i>
<i>A</i>	<i>Rs.50/-</i>
<i>B</i>	<i>Rs.25/.</i>

17.2 If the supplier is unable to meet the deadline of seven days as mentioned in above para for repair/replacement of faulty equipment, a penalty of Rs.75/- per day of delay per terminal shall be applicable. A system of despatch and receipt challans shall be worked out between MTNL and the supplier within three months of the placement of Purchase Order in order to account for the delay. Decision of MTNL as to how the system is designed shall be final.

17.3 The penalty shall be deducted from the quarterly bills. The maximum value of penalty shall not exceed 10% of

AMC amount in that quarter. However there shall be no limit on the penalty for delay in repair of units/models as mentioned in 17.2 above.

17.4 After the expiry of annual maintenance contract, it shall be optional for MTNL not to enter the AMC contract further with the contractor. In such circumstances the contractor will be bound to hand over the spare parts/sub assemblies/printed circuit boards etc to MTNL at the mutual agreed rate.”

8. For failure of the petitioner to remove the defects in a timely manner, the respondent levied a penalty of Rs.68,41,300/- for the warranty period and a further penalty of Rs.61,26,925/- for the first year of the AMC. The respondent further called upon the petitioner to execute an AMC for the second year.

9. The petitioner, on the other hand, refused to execute the AMC for the second year contending that the penalty amounts sought to be recovered from it are highly exorbitant and not workable.

10. Based on the representation of the petitioner, the respondent issued a Memorandum dated 20.07.2009 which reads as under:

“Following amendments are authorized with respect to AMC Terms and conditions (Annexure-III of above referred Purchase Order)

i) *An upper cap for penalty on account of delay in repair of terminals on the part of the supplier shall not be more than the AMC value. Clause 17.3 of Annexure-III of above referred Purchase Orders stands amended to this effect.*

ii) *The turn around time have been increased to 10 days in place of 3 days. Clause 9,10,16.1 & 16.2 of Annexure-III of above referred Purchase Orders stands amended to this effect.*

iii) *The penalty beyond 10 days up to 15 days shall be Rs.50/- and Rs.25/- per day per terminal for Severity level 'A' and Severity level 'B' respectively. Clause 17.1 of Annexure-III of above referred Purchase Orders stands amended to this effect.*

iv) *After 15 days, the penalty shall be Rs.75/- per day per terminal. Clause 17.2 of Annexure-III of above referred Purchase Orders stands amended to this effect.*

v) *If any vendor does not co-operate, he will be blacklisted.*

All other terms and conditions of the Purchase Orders shall remain unchanged.

This is issued with the approval of competent authority."

11. Based on this Memorandum, the petitioner by a letter dated 22.07.2009 contended that the Memorandum would apply also to the warranty period, thereby resulting in reduction of penalty of Rs.68,41,300/- to Rs.17,25,000/- and requested for refund of excess amount deducted by the respondent of Rs.51,18,300/-.

12. Further correspondence ensued between the parties with respect to the execution of the AMC for the second year as also for release of the amount withheld by the respondent.

13. Based on representation of the petitioner, the respondent issued another Memorandum dated 16.02.2010, which reads as under:

“Various references have been received from M/s SURANA, M/s ICOMM and M/s UTL regarding applicability of penalty during warranty period against the Purchase Orders placed on them for supply of CDMA WLL Terminals.

In this regard it is mentioned that as per Clause 10.1.5, 10.4 of Section IV of the tender and Clause 1.1 of Annexure-I (Annual Maintenance Contract) of the tender, it is clearly mentioned that all the terms and conditions of AMC including penalty clause, shall be applicable during warranty also.

In view of the above, it is to clarify that the above referred Memorandum dated 20.07.2009 issued i.r.o. penalty clause of terms and conditions of AMC will be applicable for warranty period also.

All other terms and conditions of the Purchase Orders shall remain unchanged.”

14. As the second year AMC was not executed by the petitioner and the amounts not released by the respondent, the disputes arose between the parties, which were referred to arbitration and have been adjudicated through the Impugned Award.

15. The Arbitrator, while rejecting the claim of the petitioner for refund of excess amount deducted by the respondent and allowing the counter claim of the respondent for full amount of penalty, has held that the petitioner was in default of meeting the timelines provided in Clause 16 of the AMC with respect to remedying the defaults in the handheld devices. The petitioner has challenged this finding, however, as the same is based on factual appreciation and time frame provided in the Agreement, I see no merit in the said challenge.

16. The Arbitrator has, however, further held that as the petitioner unconditionally accepted the Purchase Order and the terms of the Annual Maintenance Contract, the penalty imposed by the respondent was justified. As far as the Memorandum dated 20.07.2009 and 16.02.2010, the Arbitrator has held that in terms of Clause 13.1 of the Tender document, changes in the Purchase Order were permissible only for the terms mentioned in Clause 13.1 thereof. The penalty clause not being one of these terms, the respondent could not have made any amendment in the same. The Arbitrator therefore held that the amendments made by the Memorandum dated 20.07.2009 and 16.02.2010 were unauthorized and illegal.

17. The learned counsel for the petitioner submits that the amendment having been made by the respondent as a contracting party, cannot be held to be illegal. Clause 13 merely authorizes the respondent to make amendments in a written order of supply in certain terms thereof, however, does not prohibit the respondent from making amendments in consultation with the petitioner in the other terms of the Purchase Order. He submits that the contracting party would always have the power to amend the Contract. He submits that the finding of the Arbitrator is therefore completely perverse and against the Public Policy of India inasmuch as it holds that the contracting party has no power to amend the Contract once it is executed.

18. On the other hand, the learned counsel for the respondent submits that the petitioner in any case was not entitled to seek benefit of the Memorandum dated 20.07.2009, inasmuch as, the same can

only have a prospective effect, that is, it would be applicable only from the second year of AMC. She further submits that the petitioner would also not be entitled to seek benefit of the Memorandum dated 20.07.2009 as a pre condition for application of the same was the execution of the AMC for the second year which the petitioner refused to execute. As far as the Memorandum dated 16.02.2010 is concerned, she submits that the same was issued unauthorisedly and, therefore, cannot bind the respondent.

19. I have considered the submissions made by the learned counsels for the parties. In terms of Section 62 of the Indian Contract Act, 1872 the parties can novate, rescind, and alter the Contract by mutual agreement. This is the foundation of any Contract. The parties to a Contract are free to amend the Contract, even retrospectively, if they so desire. To take away this power from the contracting party as is done by the Arbitrator in the present case would certainly impinge on the Public Policy of India. Therefore, the finding of the Arbitrator that the Memorandum dated 20.07.2009 is illegal and not binding on the parties cannot be sustained.

20. As far as the submission of the learned counsel for the respondent that the petitioner even otherwise is not entitled to seek benefit of Memorandum dated 20.07.2009 or that the Memorandum dated 16.02.2010 having been issued unauthorisedly, as the Arbitrator has not considered these issues, it would not be open for this Court to adjudicate on the same in the first instance. These issues would have

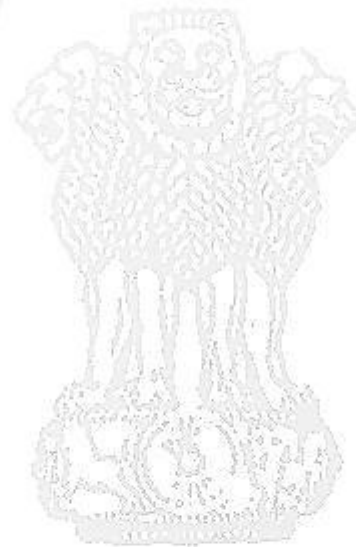
to be considered in proper proceedings/arbitration proceeding on appreciation of evidence led by the parties on the same.

21. In view of the above, the Impugned Award so far as it holds that the Memorandums dated 20.07.2009 and 16.02.2010 are not binding on the parties is set aside, leaving it open to the parties to agitate their claims and counter claims arising therefrom in accordance with law.

22. The petition partially succeeds in the above terms. There shall be no order as to costs.

NAVIN CHAWLA, J

JULY 31, 2019/Arya



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