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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 11th February, 2019

Date of decision : 14th March, 2019

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O.M.P. (COMM) 194/2016

DELTON CABLES LTD.

..... Petitioner

Through: Mr. G. Tushar Rao, Advocate with
Mr. Nitinjay and Mr. Mayank
Sharma, Advocates (M: 9810708121).

versus

DEPARTMENT OF TELECOMMUNICATIONS Respondent

Through: Mr. Ravi Sikri, Sr. Advocate with Mr.
Deepak Yadav and Mr. Arun Sanwal,
Advocates for MTNL.
Ms. Sunieta Ojha, Advocate for R-
3(M: 8800237326).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter the 'Act'*) challenges the impugned award dated 14th February, 2007 passed by the Ld. Sole Arbitrator rejecting the claims of Delton Cable Limited (*hereinafter 'Delton'*) against the DG, DOT and MTNL.

2. The brief background of the petition is that the Department of Telecommunications (*hereinafter 'DOT'*) issued notice inviting tenders bearing tender number 14-21/94-MMT(MMS) for supply of underground cables and other forms of cables on 30th November, 1994. Delton Cables Limited was one of the bidders, which submitted the bid in respect of the

said tender. The bid was awarded to it. Disputes arose in respect of supplies made to MTNL in the Delhi region. The first purchase order was placed on Delton on 11th December, 1995. The second purchase order was placed on 12th August, 1996. Disputes in the present case relate to the second purchase order.

3. On the issue of sale tax, there was a departure in the purchase order from the tender conditions. As per the purchase order, the sales tax was to be deposited by Delton over and above the price and Delton, thus, sought clarifications, which were not given. Several letters were written by Delton seeking clarification, to which there was no reply. Supplies were completed in 1997. Delton then invoked the arbitration clause. Ld. Arbitrator rejected the claims of Delton, hence the present petition.

4. The notice inviting tender had the following important clauses.

**“SECTION II
INSTRUCTIONS TO BIDDERS**

1. DEFINITIONS :

(a) *“The Purchaser” means the Department of Telecommunications acting on behalf of the President of India.*

(B) (d)

(e) *“The Advance Purchaser Order” means the intention of Purchaser to place the Purchase Order on the bidder.*

(f) *“The Purchase Order” means the order placed by the Purchaser on the Supplier signed by the Purchaser including all attachments and appendices thereto and all documents Incorporated by reference therein. The purchase order shall be deemed as “Contract” appearing in the document.*

(g) *“The Contract Price” means the price payable to the Supplier under the purchase order for the full and proper performance of its contractual obligations.*

.....
9.2 *The prices of the goods shall be quoted exfactory. Excise duty, Sales Tax, and other statutory taxes payable shall be quoted separately item wise.*

11.3 *For purpose of compliance to be furnished pursuant to clause 11.2(c) above, the bidder shall note that the standards for workmanship, material and equipment and reference to brand names or catalogue number, designated by the Purchaser in its Technical Specifications are intended to be descriptive only and not restrictive.*
.....

27. *ISSUE OF ADVANCE PURCHASE ORDER:*

27.1 *The issue of an Advance Purchase Order shall constitute the intention of the Purchaser to enter into the contract with the bidder. Purchase orders will be issued over the period of 2 years for the requirements of the Purchaser.*

27.2 *The bidder shall within 30 days of issue of the Advance Purchase Order, give his acceptance along with performance security in conformity with section IX provided with the bid documents.*

28. *SIGNING OF CONTRACT:*

28.1 *The issue of Purchase Order shall constitute the award of contract on the bidder.*

28.2 *Upon the successful bidder furnishing the performance security for the first year purchase pursuant to Clause 27 the purchaser shall discharge 50% of the bid security. The remaining bid security shall be discharged upon the bidder furnishing the performance security for the last purchase order."*

5. In addition to these clauses in the NIT, the NIT also required the supplier to provide a bid security. The relevant clause reads as under:

"12. BID SECURITY:

12.1 Pursuant to Clause 7 the bidder shall furnish,

as part of his bid, a bid security for an amount of Rs. 20,00,000 (Rupees Twenty lakh only) The bidders (Small scale Units) who are registered with National Small Scale Industries Corporation under SINGLE POINT REGISTRATION SCHEME; are exempted from Bid security as per the existing policy of Govt. of India. A proof regarding current registration with NSIC for the TENDERED ITEM will have to be attached along with the bid document.

12.2 The bid security is required to protect the Purchaser against the risk of bidder's conduct which would warrant the security's forfeiture, pursuant to para 12.7.

12.3 The bid security shall be in the form of a Bank Guarantee issued by a scheduled bank in favour of the purchaser, valid for a period of 240 days.

6. The General Conditions of Contract annexed to the NIT stipulated various terms and conditions relating to payment terms, sales tax etc., The relevant clauses are extracted below

“11. PAYMENT TERMS

...

11.3 (i) (a) Sales tax on Central Government purchases shall be paid at the prescribed rate against "D" form for despatches outside the State of manufacture. Within the state of manufacture, the Sales Tax will be paid on actuals on presentation of the original voucher.

(b) Any increase in taxes and other statutory duties/levies after the expiry of the delivery date shall be to the contractor's account. However, benefit of any decrease in these taxes/duties shall be passed on to the Purchaser by the supplier.

...

12.1 (i) PRICES

(a) Prices charged by the Supplier for Goods delivered and services performed under the Contract shall not be higher from the prices quoted by the Supplier in his Bid.

(b) In case of revision of Statutory Levies/Taxes during the supply period the Purchaser reserves the right to ask for reduction in the prices.

(ii) (a) Price once fixed will remain valid for the period of delivery. Increase and decrease in taxes and other statutory duties will not affect the price during this period.

(b) In case of delayed supplies after delivery period the advantage of reduction of tax/duty would be passed on to the purchaser and no benefit of increase in price will be permitted to the supplier if there is any increase in tax/duty.

...

13. CHANGE IN PURCHASE ORDERS:

13.1 The purchaser may, at any time, by a written order given to the Supplier, make changes within the general scope of the contract in any one or more of the following.

(a) Drawings, designs or specifications, where Goods to be furnished under the Contract are to be specifically manufactured for the Purchaser;

(b) the method of transportation or packing;

(c) the place of delivery; or

(d) the services to be provided by the Supplier.

13.2 If any such change causes an increase or decrease in the cost of, or the time required for the execution of the contract an equitable adjustment shall be made in the Contract Price or delivery schedule, or both, and the Contract shall accordingly be amended. Any proposal by the Supplier for adjustment under this clause must be made within thirty days from the date of the receipt

of the change in order.

7. A letter of intent was issued to Delton on 10th November, 1995 in terms of the Notice Inviting Tender (*hereinafter* 'NIT'). The first purchase order was placed on 11th December, 1995 wherein the clause relating to sales tax read as under:

“ii. Sales Tax : *Extra at actuals limited to 4% (against 'C' form) of basis price plus excise duty.”*

8. The second purchase order was issued by MTNL on 12th August, 1996, wherein the clause relating to sales tax read as under:

“iii. Sales Tax : *Inclusive. Issue of 'C' forms not applicable as DOT prices are all inclusive.”*

9. According to Delton, the sales tax liability was to be limited to the extent of 4% against issuance of 'C' forms and not 10%, which was the actual sales tax paid by it. Since the contract was a government purchase, concessional sales tax was to be applied, therefore, the departure in the second purchase order of 'C' forms being made not applicable resulted in loss of 6% sales tax, which it had deposited. It was, therefore, entitled to reimbursement of 6% sales tax. As per Delton, the NIT and Letter of Intent made it clear that only 4% sales tax was payable over and above the price quoted by Delton. Further purchase orders were also placed on Delton on 3rd March, 1997 and thereafter. However, the sales tax issue remained unresolved.

10. On 30th August, 1996 after the second purchase order was issued, Delton sought a clarification from MTNL, relying on clause 11.3 (1) of the general conditions of contract in the NIT. It claimed that the NIT was clear

to the effect that these were central government purchases and hence, 'D' forms would be issued. It also stated that since DOT's price were all inclusive, 'D' forms were being issued to enable Delton to charge a concessional rate of sales tax @ 4%. It claimed that there was no justification for the MTNL supplies to be treated differently. It, thus, sought amendment of the purchase order, either by reimbursement of the actual sales tax amount or by furnishing 'C' forms. Delton then continued to make supplies and invoices were raised 'under protest'. All the invoices claimed that the central sales tax had been paid at 10%. This was not resolved and in repeated letters including letters dated 17th March, 1997, 21st May, 1997 and 8th October, 1997, Delton continued to seek clarification, which did not elicit any response.

11. Delton filed a writ petition before the Delhi High Court against MTNL and DOT, challenging the non-grant of sales tax concessions. The said writ was dismissed on 7th December, 1999. On 24th February, 2000, a legal notice was issued on behalf of Delton wherein reliance was placed on benefits extended in other telecom circles as also the clarification given by the DOT on 7th February, 1997. The arbitration clause was then invoked. On 2nd August, 2001, in AA No.308/2000, Mr. Justice Jaspal Singh (Retd.) was appointed as the Sole Arbitrator.

12. Before the Ld. Arbitrator, the following claims were raised:

“24. Since, MTNL has failed to furnish C Forms within the prescribed statutory period it should have borne the liability for the differential sales tax @ 6% and as such the Claimant is entitled to the following claims which should be awarded in its favour and against the Respondents :

i) Claim for Rs. 18,92,750.41 for supplies made

under Order No. MTNL/20-80(530)95-MM/Delton/96-97/12 being the differential amount of sales tax @ 6% paid in excess by the Claimant on account of the failure of MTNL to furnish the Form C within the statutory period.

- ii) Interest @ 24% per annum on the above amount for the delayed period upto 30.9.2001 being Rs.22,63,024/-.*
- iii) Interest pendente lite and future interest till the date of payment of the aforesaid amounts being Rs.18,92,075.41 and interest thereon @ 24% p.a.*
- iv) Claim for Rs. 71,13,969.43 for supplies made against order No.AGM(MM-II) MM-128/Delton Cables/96-97/18 being the differential amount of sales tax @ 6% paid in excess by the Claimant on account of failure of MTNL to furnish Form C within the statutory period.*
- v) Interest @ 24% p.a. on the above amount for the delayed period upto 30.9.2001 being Rs. 71,74,764/-.*
- vi) Pendente lite and future interest on the above being Rs.71,13,969.43 till the date of payment @ 24% p.a.*

In the above premises, the Claimant prays for the following award:

- a) An award be made for a sum of Rs. 18,92,750.41 in favour of the Claimant as set out in para 24(i) above; and*
- b) An award be made for a sum of Rs. 71,13,969.43 in favour of the Claimant as set out in para 24 (iv) above.*
- c) An award be made for a sum of Rs. 22,63,024/- being the interest @ 24% p.a. for the delayed period upto 30.9.2001 as set out in para 24(ii) above.*

- d) An award be made for a sum of Rs.71,74,764.00 in favour of the Claimant being the interest @ 24% p.a. for the delayed period upto 30.9.2001 as set out in para 24(V) above.*
- e) Pendente lite interest and future interest be awarded @ 24% p.a. on the amount awarded; and*
- f) Cost of arbitration application and arbitration proceedings; and*
- g) Any other and further sums be awarded as are deemed fit and proper; and*
- h) Such further or other orders be made as are deemed fit and proper.”*

13. In reply to the claim petition, MTNL took the stand that the purchase order being clear that the concessional sales tax would not apply, Delton is not entitled to any relief. It was averred that the sales tax office on 16th August, 1996, issued an order forbidding MTNL from issuing ‘C’ forms in future. Thus, the concessional sales tax applicable qua MTNL’s purchases/supplies stood withdrawn. It is, thus, stated on behalf of MTNL that the purchase orders were clear and Delton having agreed to the same and made the supplies, cannot seek any benefit. A distinction was drawn that whereas DOT was a central government wing, MTNL was a public sector undertaking. The sales tax department had withdrawn the concessions, and this being a supervening act by the sales tax authorities, MTNL cannot be held responsible for the same. Since there was a clear stipulation in the purchase order, the claims are not liable to be allowed.

14. Evidence was also led before the Ld. Arbitrator. The findings of the Ld. Arbitrator are as under:

- a. The purchase order constituted the contract between the parties.

- b. The bid price and the contract price are different and distinct.
- c. The price being what is fixed in the purchase order, the purchase order was clear, hence the claimant was not entitled to relief.

15. The submissions of Mr. Tushar Rao, Id. counsel appearing for Delton are as under:

- i. That DOT was the main tenderer which had prescribed the terms and conditions of the tender. Once the same was prescribed by the DOT, MTNL had no power to alter or change the same.
- ii. The bid having been based on the fact that concessional sales tax would apply, the conditions could not have been changed at the time of placing of the purchase order.
- iii. The tender period was for two years and during the said period, the terms and conditions contained in the tender were binding.
- iv. The purchase order also makes reference to the tender and hence cannot derogate from the terms in the tender.
- v. The general conditions of contract make it clear that the price submitted by the bidder is valid for two years.
- vi. Under clause 13.1, changes in the purchase order can be made only in respect of a limited number of issues, however, sales tax is not one of them.
- vii. Clause 16 of the general conditions is clear that other conditions would be as per the DOT tender.
- viii. On 7th February, 1997, clarification was issued by DOT directing that in cases where 'C' forms could not be issued, refunds may be given.

16. It is, thus, submitted that the award is erroneous and contrary to the
O.M.P. (COMM) 194/2016

contract.

17. On the other hand, Ld. Senior counsel for MTNL Mr. Ravi Sikri, submits as under:

- i. The sales tax authorities having withdrawn the benefits of concession to MTNL, it was not to be blamed.
- ii. The purchase order was clear and hence the supplier supplied the goods with open eyes.
- iii. The clarification issued by the DOT did not bind MTNL as the board of MTNL took a decision to seek further clarification from the DOT, which was duly sought but there was no reply from the DOT. Thus, the clarification dated 7th February, 1997 was not binding on MTNL.

18. Mr. Sikri relies upon the following two judgments.

- ***Alcatel India Limited v. Mahanagar Telephone Nigam Limited & Anr., 2001 (59) DRJ 393 (DB)***
- ***Security Printing & Minting Corporation of India Limited & Anr. v. Gandhi Industrial Corporation, (2007) 13 SCC 236***

19. The entire dispute calls into question as to what constitutes the binding contract between the parties. While it is the case of Delton that the LOI constitutes the binding contract, it is the case of MTNL that the purchase order constitutes the binding contract. This issue can be resolved by a perusal of the various clauses in the bid documents. A perusal of the definitions shows that the APO is an intention of the DOT to place the purchase order. The purchase order is the order placed by the purchaser on the supplier. The definition of purchase order, however, is clear and states

that “the purchase order shall be deemed as “Contract” appearing in the documents”. Thus, the definition of ‘purchase order’ brooks no ambiguity.

20. The contract price is also the price payable under the purchase order. Thus, while the NIT, APO, LOI, etc. could constitute the background documents, the final contract is the purchase order.

21. Delton submitted that DOT having been the tenderer, MTNL could not have changed the terms and conditions of the tender. This contention may appear appealing at first blush, however, a deeper look reveals that at the time when DOT had called for the tender, bidders clearly knew that DOT’s tender would include the supplies to MTNL. It is common knowledge that insofar as the metro cities of Mumbai and Delhi are concerned, telecommunication services are provided by the government through MTNL. Thus, for these circles, any bidder was well aware that the purchase order would be placed by MTNL.

22. On 10th June, 1996 itself, this fact was also clarified. The language of the said letter is important and is set out hereinbelow:

“To

*M/s. Delton Cables,
New Delhi.*

Sub: Procurement of Underground Cables (PIJF, Foamskin, PCM & Quad) against the T/E No.14-21/94-MMT (MMS) opened on 24.1.1995.

Consequent upon the receipt of your unconditional acceptance to the LOI No.203-60/94-MMS dated 3-6-96 for the procurement of PIJF, PCM, Quad and Foamskin Underground Cables against the subject tender enquiry, the Telecom Circles have been authorised to place formal purchase order on your firm as per the allocation enclosed. It may also be noted that any order received against the subject

tender in excess of authorisation issued earlier during 1995-96 shall be adjusted out of this allocation. A copy of the instructions issued to the Telecom. Circles in this regard is enclosed for your ready reference. You are requested to have necessary liaison with the allocated Telecom. Circles for getting the formal purchase orders.

*Composite Performance Bank
Guarantee/Corporate Guarantee has been accepted provisionally centrally for this allocated quantity of cables. The payment against the supplies to the Circles shall be by way of single window payment arrangement.*

Encl: As above.

*(V. K. ARYA)
DIRECTOR (MMS)*

Annexure

*Name of the Firm DELTON CABLES
Circle-wise allocation of Cables.*

<i>S. No.</i>	<i>Name of the Circle</i>	<i>Qty. allocated (LCKM)</i>
<i>1.</i>	<i>Haryana</i>	<i>0.40</i>
<i>2.</i>	<i>Punjab</i>	<i>0.34</i>
<i>3.</i>	<i>MTNL, Delhi</i>	<i>0.26</i>
	<i>Total:</i>	<i>1.00"</i>

23. Thus, even at the initial stage itself, Delton was well aware that MTNL was to place the purchase order.

24. Delton was aware of the stipulation relating to Sales Tax when the Purchase Order was placed, which clearly provided that the prices were inclusive of Sales Tax and issue of 'C' forms was not applicable. Even the purchase order dated 12th August, 1996, while giving reference to the letter of intent and the tender enquiry, made a departure from the same and clarified that the price would be inclusive of the sales tax. Further,

clause 16 of the purchase order reads as under:

“16. OTHER GENERAL/COMMERCIAL TERMS AND CONDITIONS OF THE CONTRACT:

As per DOT Tender No.14-21/94-MMT (MMS) dated 30.11.94 opened on 24.1.95.”

25. Thus, once the final purchase order was placed, it was only in respect of ‘*other general/commercial terms and conditions*’ that the DOT tender was made applicable. Though, the purchase order is referred to as a formal purchase order, it was not merely a formality. The use of the words ‘formal purchase order,’ in fact, meant that the said documents contained the final terms and conditions and the initial documents were tentative in nature. This interpretation is also supported by clause 27 & 28 of the NIT of the bid documents, which make it clear that the APO is merely ‘*the intention of the purchaser to enter into the contract.*’ Clause 28 stipulates that the issue of the purchase order ‘*shall constitute the award of contract on the bidder.*’ Thus, the contract, which forms the basis of the arrangement between the parties, is the purchase order and it is only to the extent that the purchase order does not have stipulations, that other general/commercial terms, were to be governed by the DOT’s tender.

26. The clarification given by DOT, that MTNL ought to reimburse the sales tax, was urged to constitute a binding direction by the DOT to MTNL. However, the board of MTNL did not accept the said clarification and took a decision that if the purchase order was clear, no reimbursements were to be made. Since the sales tax authorities had withdrawn the concessional tax benefits to MTNL, it cannot be said that the stand of MTNL is contrary to the tender conditions. Moreover, Delton had entered into the contract with

open eyes. There being no ambiguity in the sales tax related conditions, in the Purchase Order Delton had the option of not making supplies until the clarification, which it had sought, was issued. A perusal of the correspondence written by Delton to MTNL repeatedly raised various issues and not just issues relating to the sale tax. There were issues relating to the pricing of other goods etc.. Delton also sought further additional orders from MTNL in the various letters. Delton understood that at the time when the purchase order was placed, though it sought reimbursement/issuance of form 'C', that the clarification may, in fact, not be forthcoming from MTNL. In fact, a perusal of the correspondence reveals that despite repeated letters being written, it was only after the entire supplies were made and the payments were received that the present dispute was raised by the Delton. Reliance on clause 13.1 of the general/commercial conditions of the contract is also misplaced as the same deals with 'changes in purchase orders'. This clause applies after the purchase order has come into existence and not before. Even under this clause the purchaser has the freedom to change the drawings, designs, and specifications, method of transportation or packaging, the place of delivery and the services to be provided by the supplier. This clause does not mean that the purchase orders cannot be different from the letter of intent or the tender conditions. There could be various supervening facts such as imposition of tax and regulatory changes, especially in a tender envisioning multiple supplies over a period of two years. The tender makes space for such changes and hence the definition of purchase order as the final contract. In fact, the spirit of the tender is also clear from clause 11.3 and 12.1, which read as under:

“11.3 (i) (a) Sales tax on Central Government

purchases shall be paid at the prescribed rate against "D" form for despatches outside the State of manufacture. Within the state of manufacture, the Sales Tax will be paid on actuals on presentation of the original voucher."

(b) Any increase in taxes and other statutory duties/levies after the expiry of the delivery date shall be to the contractor's account. However, benefit of any decrease in these taxes/duties shall be passed on to the Purchaser by the supplier.

...

"12.1 (i) (a) Prices charged by the Supplier for Goods delivered and services performed under the Contract shall not be higher from the prices quoted by the Supplier in his Bid.

(b) In the case of revision of Statutory Levies/Taxes during the supply period the Purchaser reserves the right to ask for reduction in the prices.

(ii) (a) Price once fixed will remain valid for the period of delivery. Increase and decrease in taxes and other statutory duties will not affect the price during this period.

(b) In case of delayed supplies after delivery period the advantage of reduction of tax/duty would be passed on to the purchaser and no benefit of increase in price will be permitted to the supplier if there is any increase in tax/duty."

27. As per clause 12.1, if there was any increase in the taxes or duties, no benefit of increase in price was permissible. This is further also clear from clause 11.3 of the purchase order. Thus, the seller was well aware that there could be changes in the taxes/duties during the tender period. Any increase would not increase the price. The tenderer/purchaser was however entitled to benefit of increase in the taxes/duties, as there would be no change in the

price. Withdrawal of the concession of the sales tax to the MTNL is, in fact, an increase in tax, which the supplier had to bear.

28. In *Security Printing and Minting Corporation of India (supra)*, the Supreme Court held that the withdrawal of MODVAT credit having been specified clearly in the supply order and the supplier having undertaken the supplies, the completed contract is binding on the authorities. The relevant paragraphs of the said judgment are extracted herein below:

“16. After hearing learned counsel for the parties and perusing the record we are of opinion that the view taken by the Arbitrator and affirmed by the learned Single Judge and the Division Bench of the High Court cannot be sustained. Firstly, when the terms and conditions have been reduced (sic to writing) in the supply order dated 31-5-1995, therein the condition of MODVAT credit was incorporated and it was accepted by the claimant. The contract had come into existence and the supply had been started on the basis of that supply order. Though the claimant had protested with regard to this clause but the appellant did not accede to the request of the respondent for deleting that clause and the appellant had informed the claimant on 31-12-1995 that there was no change in the conditions of the supply order still claimant continued to supply the goods as per the order. Therefore, on the face of this condition there is no going back from that. In case the claimant was not inclined to accept this clause he could have very well withdrawn from the contract. But it did not do so and continued with the contract. Therefore, on the basis of the clear terms of the contract, the claimant is bound by it and it has to restore whatever MODVAT credit received by it to the appellant security press. The view taken by the Arbitrator that since it was not the condition when the tender was floated is not correct as after the complete

contract having come into existence, there is no purpose to refer to the terms of tender. What is binding is the completed contract and not the terms of offer of the advertisement. Whatever may be the offers in the advertisement, once the completed contract has come into existence, this is binding. There are no two opinions in the matter in the present case that the terms and conditions of the supply order dated 30-5-1995 were complete. Therefore, what is binding is the terms of the contract and not the terms in the offer of advertisement. Therefore, under these circumstances the view taken by the Arbitrator as well as learned Single Judge and the Division Bench of the High Court is *ex facie* illegal. It is true that normally the Courts are very slow in interfering with the finding and interpretation given by the Arbitrator. So far as the principle of law is concerned, there are no two opinions and it has to be accepted. But the fact remains that if any perverse order is passed, then the Courts are not powerless to interfere with the matter. As pointed out above, once the concluded contract has come into existence, then in that case the offer of advertisement cannot override the terms and conditions of the completed contract. Therefore, in our opinion, the view taken by the Arbitrator, as affirmed by learned Single Judge and the Division Bench of the High Court on the face of it is illegal and against the law.

17. Secondly, learned counsel has submitted that the principle of *sub silentio* applies in the present case. There is no question of principle of *sub silentio* involved in the present case. The terms and conditions of the contract are very clear and it was clearly understood by the claimant as it protested that the condition with regard to MODVAT credit should not be allowed to continue in the terms and conditions of the contract and the same may be deleted which is evident from the communications dated 5-6-1995 and

20-6-1995. Therefore, there was no misunderstanding. There was no question of applying the principle of sub silentio when the terms and conditions were well known and clearly understood between the parties. More so, MODVAT credit is available in order to avoid double taxation on the papers which were imported by the appellant security press after paying the excise duty and therefore, the claimant claimed the benefit of excise duty paid by the security press and the security press had issued gate passes and documentary evidence for the payment of excise duty on which the claimant claimed the benefit of MODVAT credit. Therefore, on that count also the benefit could legitimately be claimed by the appellants as they have paid the excise duty also. Therefore, under these circumstances, we are of opinion that the view taken by the Arbitrator, as well as learned Single Judge and the Division Bench of the High Court cannot be sustained and we accordingly, allow this appeal and set aside the order of the Arbitrator with regard to MODVAT credit and also the view taken by learned Single Judge and the Division Bench of the High Court of Bombay to this extent. The appellants will be entitled to retain the amount(s) equivalent to MODVAT credit as claimed by the respondent. There would be no order as to costs.”

29. Thus, in the above case, the Supreme Court holds that no purpose would be served in referring to the terms of the tender as, the final contract was, the supply order.

30. In ***Alcatel India Limited (supra)***, a Division Bench of this Court has held that the mere issuance of a letter of intent does not lead to creation of a contract. The relevant portion of the said judgment is extracted hereinbelow:

“16. After the issue of the purchase order on the supplier/bidder a formal agreement between the MTNL

and the successful bidder is required to be executed in terms of clause 2(g) of the Instructions to Bidders. Till such time a purchase order is placed on the bidder the contract does not come into existence. According to clause 2(i) of the Instructions to Bidders, the contract comes into existence from the 'Contract Date', which means the date on which the contract comes into effect in accordance with clause No.35 of the Instructions to Bidders. Besides, unless the purchase order is issued the price payable to the bidder cannot be fixed. According to clause 2(h) of the Instructions to Bidders, the contract price means the price payable to the supplier under the purchase order for the complete fulfilment and proper performance of its contractual obligations to the satisfaction of the M.T.N.L. Merely issuance of the letter of intent and acceptance thereof by the bidder along with furnishing of the performance security, does not amount to creation of a contract between the parties. By that stage even the contract price and the contract date is not fixed. LOI only signifies the intention of the purchaser. We are unable to accept the submission of the learned senior counsel for the appellant that furnishing of the performance security and acceptance of the LOI issued by the first respondent constituted a contract between the parties and the first respondent was obliged to place the purchase order on the appellant. Since no binding contract came into existence between the parties, there was nothing to prevent the first respondent from scrapping the tender. The court sitting in writ jurisdiction cannot issue a mandamus to a purchaser to place a purchase order on a particular seller, or to command the former to enter into a contract with the latter."

31. Mr. Rao's passionate appeal that MTNL has no locus to change the terms and conditions as it is only a sub-agent/purchasing entity, which is bound by the DOT's direction though appealing, is liable to be rejected as

the purchase order constitutes the final contract. Ld. Arbitrator is bound, as per Section 28 of the Arbitration Act, to decide as per the terms of the contract. The change of the stipulation relating to sales tax in the purchase order, as sought by Delton is, in fact, nothing but a plea to ‘re-write the contract’ which is not permissible. The facts and circumstances such as the NIT & DOT’s clarification could have had persuasive value for the board of MTNL to consider changing the terms of the purchase order, thereby resulting in a fresh agreement or novation. However, the said facts cannot be an appeal to ‘rewrite’ the contract. The purchase order continues to be the binding contract between the parties. Ld. Arbitrator’s findings that the supplier cannot take benefit of mere letters written repeatedly seeking clarifications, while making the supplies, is a valid finding. Once the purchase order, under which the supplies were made was clear, a mere hope by the supplier that MTNL would clarify in its favour, could not form the basis of claims. The impugned award, thus, does not warrant any interference and is upheld.

32. OMP is, accordingly, dismissed. There shall be no orders as to the costs.

**PRATHIBA M. SINGH, J.
JUDGE**

MARCH 14, 2019/dk