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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) 134/2016

CMI LIMITED

..... Petitioner

Through: Mr. S.K. Gupta, Mr. K.R. Gupta and
Mr. Harsh Tayal, Advocates for
C.M.I. (M: 9810035583).

versus

MAHANAGAR TELEPHONE NIGAM LTD & ANR.... Respondents

Through: Mr. Ravi Sikri, Sr. Advocate with Mr.
Deepak Yadav and Mr. Arun Sanwal,
Advocates for MTNL.

AND

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O.M.P. (COMM) 198/2016

MAHANAGAR TELEPHONE NIGAM LTD.

..... Petitioner

Through: Mr. Ravi Sikri, Sr. Advocate with Mr.
Deepak Yadav and Mr. Arun,
Advocates.

versus

C.M.I & ANR.

..... Respondents

Through: Mr. S. K. Gupta, Mr. K.R. Gupta and
Mr. Harsh Tayal, Advocates for
C.M.I. (M: 9810035583).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, the 'Act'*) have been filed challenging the impugned award dated 2nd December, 2010. The dispute arises on the

short question as to whether CMI- the supplier ('CMI') is entitled to 'C' forms or reimbursement of 6% of sales tax amount deposited in respect of supplies made to the purchaser- Mahanagar Telephone Nigam Limited (*hereinafter* 'MTNL').

2. OMP (COMM) 198/2016 has been filed by MTNL challenging the award on the ground that the purchase order clearly contained a stipulation that the price quoted by the bidder would be inclusive of sales tax and the issuance of 'C' forms was not applicable to MTNL. The Ld. Arbitrator held against MTNL. OMP (COMM) 134/2016 filed by CMI Limited (*hereinafter* 'CMI') is on the non-grant of interest on the awarded amount.

3. The background of the present petition is that the Department of Telecommunications (*hereinafter* 'DOT') issued notice inviting tenders bearing tender number 14-21/94-MMT(MMS) for supply of Polythene Insulated Jelly Filled (PIJF) underground cables on 30th November, 1994. CMI was one of the successful bidders. The Letter of Intent was placed by DOT on CMI for supplies on 22nd January 1997. As per the LOI, the purchase orders were to be placed by the various circles. CMI made supplies in respect of various telecom circles across the country. Disputes arose in respect of supplies made to MTNL in the Delhi region.

4. The NIT consisted of the following clauses:

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

...

(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.

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 NIT also provided for the terms and conditions relating to placement of orders by the purchaser. The relevant clauses are extracted below:

24. AWARD OF CONTRACT:

24.1 *The Purchaser shall consider placement of orders for commercial supplies on those bidders whose offers have been found technically, commercially and financially acceptable and whose goods have been Type Approved/Validated by the Purchaser.*

24.2 *The procurement against the tender is for two years requirement and the terms & conditions of this tender shall be operative for the two years from date of issue of first Advance Purchaser Order.*

25. PURCHASER'S RIGHT TO VARY QUANTITIES AT THE TIME OF AWARD:

The Purchaser reserves the right at the time of award of contract to increase or decrease by upto 25% of the quantity of goods and services specified in the Schedule of Requirements without any change in unit price of the ordered quantity or either terms and conditions.

26. PURCHASER'S RIGHT TO ACCEPT ANY BID AND TO REJECT ANY OR ALL BIDS:

The Purchaser reserves the right to accept or reject any bid and to annul the bidding process and reject all bids, at any time prior to award of contract without assigning any reason whatsoever and without thereby incurring any liability to the affected bidder or bidders on the grounds for the Purchaser's action.

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.”*

7. 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.

8. The Letter of Intent was issued on 22nd January, 1997 by DOT. The clause on prices in the LOI reads as under:

“6. Prices

- (a) *The prices of the PIJF U/G Cables for the purpose of obtaining present quantity will be provisional till applicable prices are available, and shall be calculated @ 95% of the total price(s) (inclusive of all taxes and duties) finalized in tender No.14-21/94-MMT (MMS) dated 24.1.95 of DOT in respect of PIJF U/G Cables on account of*
(i) *Total prices under TE NO.14-21/94-MMT (MMS), opened on 24.1.95, shall be adjusted to the Custom Duty reduction in the Budget for 1996-97”*

9. It is relevant to note here that clause 11 of the LOI, clearly recorded that the purchase order was to be placed by MTNL in respect of the cities of Bombay and Delhi. The said clause reads as under:

“11. Purchase Order shall be placed by Mahanagar Telephone Nigam Limited, Bombay and Delhi and Telecom Circles.”

10. The DOT had also issued letters dated 8th June, 1996 and 13th February, 1997. The relevant portions of these letters are set out herein below:

Letter dated 8th June 1996

“4) Prices finalized and approved for each size of cables are enclosed as per Annexure-III. The Annexure shows in detail price of each cable size with basic price, Excise Duty and Sales-Tax applicable separately..”

Letter dated 13th February, 1997

“Consequent upon the receipt of your unconditional acceptance to the LOI No.203-2/95-MMS dated 22.01.97 for the procurement of PIJF, PCM, Quad and Foamskin Underground Cables against the subject tender enquiry, MTNL/Telecom Circle(s) have been

authorized 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 authorization issued earlier from MTNL/Allocated Circles shall be adjusted out of this allocation. You are requested to have necessary liaison with the MTNL/allocated Telecom Circle(s) for getting the formal purchase orders.

"Composite Performance Bank Guarantee No.BG/789/97 dated 28-01-97 from Dena Bank ND for Rs.49,10,000/- has been accepted centrally for this allocated quantity of cables."

11. As per the above letters, MTNL was to place the purchase order which was placed by MTNL on CMI vide purchase order dated 5th March, 1997. The said purchase order contained the following clauses on sales tax:

"iii. Sales Tax Inclusive. Issue of 'C' forms not applicable as DOT prices are all inclusive"

12. When the purchase order was placed by MTNL with the above mentioned clause, CMI challenged the same and sought a clarification from MTNL as the clause relating to sales tax was in contradiction with the clause contained in the General Conditions of Contract as provided in the NIT. The case of CMI was that the prices were quoted on the basis of 'C' forms to be issued by MTNL, which would in effect mean that CMI would be liable to pay only 4% Sales Tax instead of 10% thereby giving it a benefit of 6% Sales Tax. If 'C' forms were not to be issued then the prices would have been higher. After the price was fixed and the bids were accepted, changing of this condition for MTNL supplies was impermissible. CMI also relied upon a clarification issued by DOT to the effect that MTNL ought to issue C-Forms or would be liable to reimburse the supplier. The said clarification

dated 7th July, 1997 is set out herein below:

“

Subject: Clarification in respect of ‘Octroi’ charges-Sales Tax against Purchase Orders issued by MTNL.

This office has been in receipt of request from MTNL seeking clarification in respect of issue of exemption certificate for octroi charges and availing of concessional sales tax against Purchase Orders placed by MTNL.

Following decision is hereby conveyed:-

Purchase Orders are placed by MTNL for MTNL where MTNL is not in a position to issue requisite certificate for claiming concessional rates of sales tax (Form ‘C’), the supplier shall be reimbursed the difference between the actual sales tax paid by him and that due under concessional rates (at present 4%) had the certificate.

Similarly, if octroi exemption certificate is not issued by MTNL, the actual octroi paid by the supplier will be reimbursed.

Such reimbursement of sales tax and octroi shall be considered only if documents establishing actual payments are produced along with the claim.

This has got the concurrence of DOT Finance.”

13. MTNL however did not agree to the clarification. Since the issues relating to sales tax were not resolved, CMI invoked arbitration. The Ld. Arbitrator arrived at the following conclusions:

- That the contract stood concluded between DOT and CMI upon the NIT being floated, CMI having submitted an offer and the LOI being issued by DOT;
- That MTNL was merely a recipient of the goods and could not change the terms which were already agreed upon;

- That the contract stood concluded with the issuance of the LOI and the performance bank guarantee by CMI;
- The purchaser being MTNL, it did not have the power to change conditions of the concluded contract;
- MTNL could not deny issuance of C-Form and simultaneously avail concessional sales tax;
- Since CMI had not been given either C-Form or D-Form and had paid 10% sales tax along with interest to the department, the said amount was liable to be reimbursed by MTNL. MTNL was only one of the consignees.

Accordingly, the operative portion of the said award reads as under:

“18. The contention of the Claimant is quite in order and tenable as the , contract between the Claimant and the Purchaser (DOT) stands concluded with the unconditional acceptance of the LOI(APO) dt.22-01-97and furnishing of PBG within the stipulated period by the Claimant and acceptance thereof by the Purchaser through letter No.203-2/95-MMS dt.13-02-97. The terms and conditions as stipulated in the LOI (APO) dt .22-0 1-97were binding on both the parties and could not be unilaterally altered by any party to the contract. MTNL was merely one of the consignees in terms of the concluded contract and had no locus-standi to alter any term of the concluded contract in it's favour unilaterally. Moreover, there were explicit instructions issued by the DOT(Purchaser) to all the consignees including MTNL to place formal POs on the successful bidders including CMI (Claimant) as per terms and conditions contained in the LOI(APO) issued to the Supplier (Claimant)as well as the governing tender opened on 24-01-95 (This letter has been taken on record). Prior to this DOT also issued

clarifications to MTNL through its letter No.80-16/95-MMC dt.07-02-97(exhibit C-6 of the claim document) in respect of Octroi Charges and ST against POs issued by MTNL (extract is reproduced below for facility of ready reference). This letter is considered very relevant and was issued in consultation with the associated Finance.

"POs placed by MTNL for MTNL where MTNL is not in a position to issue requisite certificate for claiming concessional rates of ST ('C' form) the supplier shall be reimbursed the difference between the actual ST paid by him and that due under concessional rates (at present 4%) had the certificate to that effect been given. Such reimbursement of ST and Octroi shall be considered only if documents establishing actual payments are produced along with the claim."

19. In view of the position explained above and earlier by me all the contentions and submissions made by MTNL in this regard legally fall flat and hence rejected. This justifies claim No.1 in the claim document relating to payment of additional ST to the tune of 6% only in lieu of non- submission of 'C ' or 'D' form as the case may be. No interest is, however, admissible on this additional ST of 6 % what so ever except for the interest levied on account of payment of additional ST in installments which is indicated separately in claim No.1 as Rs.2,51,885/- (Rs. Two lakh fifty one thousand eight hundred and eighty five only.) The claim relating to additional ST of 6% is payable only after production of documents establishing actual payment of such sum. Similarly, the interest of Rs.2,51,885/- becomes payable only after production of documents establishing payment of such sum. This verification task will be carried out by the paying authority .

20. Regarding issue (d) under para 14 of part(C) above (Issue No.4) the Claimant replied in affirmative in their written submissions a copy of which was also given to the Respondent. They cited MTNL's PO No.MTNL/20-80 (531)/95-MM/CMI/95-96/23 dt. 28-8-95. In their written submissions/arguments made on 11-07-09., Respondent (MTNL) also agreed to having issued form 'C' against this PO dt.28-08-95 as earlier ST Department was issuing 'C' forms to MTNL but stopped issuing 'C' forms later on. This confirms that earlier MTNL was issuing 'C' form in conformity with the governing tender's terms and conditions.

21. Regarding issues (g) and (h) under para 14 of part (C) above (Issue Nos.7 and 8) I have gone through the various submissions/arguments of both the parties as also the case laws and judgments cited by them. Keeping in view the history of the case and circumstances of the case I don't find any justification regarding payment of interest and other charges claimed and hence rejected. As to the costs, it is decided in keeping with the circumstances of the case that both parties will bear their own costs.

D. AWARD

For reasons recorded above, the following award is made. Para No.19 of part (C) relating to PROCEEDINGS/DISCUSSIONS is to be kept in view while implementing the award.

It is directed that MTNL do pay to the Claimant a sum of Rs.60,06,629/- (Rs. Sixty lakh six thousand six hundred and twenty nine only) towards additional ST of 6% paid by the claimant to the Sales Tax authorities (STA) due to non furnishing of requisite 'C' Form by the MTNL and Rs.2,51,885/- (Rupees Two lakh fifty one thousand eight hundred and eighty

five only) towards interest paid by the CMI to the STA in the instant case subject to production of documents establishing actual payments of such sums to the STA within two months of submission of such documents after the detailed award is announced. The amount payable will be limited to actual payments made by the CMI to the STA in this regard. MTNL shall pay an interest @ 7% per annum after expiry of the prescribed period till the amount is actually paid to the Claimant.”

Accordingly, Ld. Arbitrator directed a refund of Rs.60,06,629/- to CMI.

14. Mr. Sikri, Id. Counsel appearing for MTNL submits that the final contract being the purchase order, the Ld. Arbitrator committed an error in holding that the supplier is entitled to reimbursement.

15. Mr. Sikri further submits that the grant of reimbursement of 6% Sales Tax when admittedly the said concession given by the Sales Tax Department was withdrawn qua MTNL is contrary to the express terms of the purchase order. He submits that MTNL cannot be made to bear the burden of the withdrawal of the concessional sales tax. DOT and MTNL cannot be equated in this manner. Further, the purchase order was clear and hence the supplier supplied the goods with open eyes.

16. 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***

17. Mr. K. R. Gupta, Id. counsel for CMI submits that the petition raises two fundamental questions. 1) Who are the contracting parties and 2) What

is the contract. He submits that the contracting parties were the Department of Telecommunications ('DOT') and the suppliers. The Letter of Intent ('LOI'), is in fact the contract between the parties. According to Mr. Gupta, MTNL being merely the beneficiary of the contract, cannot change the terms and conditions of the main contract. The supplier has supplied the goods to MTNL at the direction of DOT. The definition of 'purchaser' clearly being the "*Department of Telecommunications acting on behalf of the President of India*", MTNL, in fact, has no locus to alter the terms of the contract. The fact that the purchase orders are placed by MTNL and payments are made by MTNL are merely internal arrangements between DOT and MTNL, to which the supplier is not privy. He relies on the letter of intent dated 22nd January, 1997 to argue that the said documents, which have been signed by the purchaser, constitute the contract between the parties.

18. He further submits that the issuance of the purchase order was merely a formality and nothing more. It is further submitted that the reference to the DOT's tender in the purchase order also shows that the purchase order was placed under the said tender and could not be interpreted in a manner alien to it. The purchase order could not derogate from the terms and conditions of the tender. To the extent that there is no contradiction, the tender conditions would be binding.

19. Thus, it is the submission of CMI that the issue of the purchase order by MTNL was only a formality. The concluded contract had been entered into between DOT and CMI and thus MTNL could not change the terms of the contract. It is further argued by CMI that award dated 14th February, 2007 passed by the Ld. Sole Arbitrator Justice Jaspal Singh (retd.) in the case of *Delton Cables Ltd. v Department of Telecommunications* was

contrary to the terms of the contract as the Ld. Arbitrator had failed to consider the fact that as per the terms of the contract, DOT and not MTNL was the purchaser. Ld. Counsel appearing for CMI seeks to distinguish the judgment in *Security Printing* by arguing that the same was a case of principal to principal and not principal to agent. Thus, the said judgment is of no application.

Analysis

20. The entire dispute calls into question as to what constitutes the binding contract between the parties. While it is the case of CMI that the LOI read with the NIT 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 the 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 document*”. Thus, the definition of ‘purchase order’ brooks no ambiguity.

21. The definition of contract price is also “*the price payable to the Supplier under the purchase order*”. Thus, while the NIT, APO, LOI, etc. could constitute the background documents, the final contract is the purchase order.

22. CMI, 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. 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 and DOT LOI issued vide letter No. 203-78/96-MMS(pt-II) dated 8.1.97.”

23. Thus, once the final purchase order was placed, it was only in respect of “*other general/commercial terms and conditions*” that the DOT tender and LOI were 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, which makes 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.

24. 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, CMI had entered into the contract with open eyes. There being no ambiguity in the sales tax related conditions in

the Purchase order, CMI had the option of not making supplies until the clarification, which it had sought, was issued. A perusal of the correspondence written by CMI 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. CMI also sought further additional orders from MTNL in the various letters. CMI 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 CMI. 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 of the General Conditions of Contract annexed with the NIT, which reads 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."

25. As per clause 12.1, if there was any increase in taxes or duties, no benefit of increase in the price was permissible. This is further clear from clause 11.3 which provided that if there is any increase in taxes, the same would be to the contractor's account. Thus, the seller was well aware that there could be changes in the taxes/duties during the tender period. Any increase in taxes 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.

26. The submission of Mr. Gupta and the finding of the Arbitrator that MTNL is merely a consignee of the cables is incorrect as a perusal of the NIT along with the General Conditions and the LOI clearly shows that the contract between the parties was the purchase order. Even the definition of contract price is clear to the effect that the price payable to the supplier was the price mentioned in the purchase order and not the NIT or any other documents. Moreover, the submission that the purchaser was the DOT and the NIT is also belied by a mere perusal of the purchase order itself which mentions the name of the purchaser as MTNL. The extract from the Purchase order reads as under:

*“ 1. ...Name of Purchaser: The Mahanagar Telephone
Nigam Limited, ...”*

Thus, MTNL was not merely a consignee of the goods but the purchaser itself.

27. The further submission of Mr. Gupta that the issuance of the purchase order was merely a formality is also incorrect as the purchase order was to conclude the final contract.

28. The impugned award rendered by the Ld. Sole Arbitrator proceeds on the argument of CMI that MTNL, on the one hand was availing the concessional sales tax and was refusing to pass it on to the supplier. The submission of CMI as recorded in the impugned award reads as under:

*“In support of its claim CMI has submitted that neither
the DOT nor the MTNL were competent to alter or*

vary the terms and conditions of the governing tender as contained in the bid documents after the conclusion of the contract between the DOT and CMI (Claimant). Accordingly, MTNL one of the field units can't deny 'C' form and simultaneously avail concessional ST. MTNL can not have it both ways and therefore insertion of modified ST clause in it's PO dt. 05-03-97 regarding non-supply of 'C' forms is unauthorized, illegal and is null and void."

29. This is a completely incorrect position as the Sales Tax Department, vide notice dated 11th March, 1996, had withdrawn the concession given to MTNL on various goods including underground telephone cables. This was upheld by Sales Tax Officer vide order dated 16th August, 1996. A perusal of the said order dated 16th August, 1996 passed by the Sales Tax Officer shows that MTNL had been in the past extended the concessional sales tax conditions only on the basis that it was involved in the activity of power generation which the Sales Tax Officer found to be incorrect. On the ground that, MTNL was engaged only in telecommunication services, the benefits had been withdrawn. Thus, the award, proceeded on a factually incorrect basis that MTNL was simultaneously availing the concessional sales tax while refusing to pass on the same to the Supplier – CMI.

31. 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.”

32. 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.

33. 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.”

34. Mr. Gupta's submission that MTNL is merely a beneficiary of the contract, would not be correct in the facts of the present case. This is because DOT had called for the tender on behalf of its various circles, including MTNL. The NIT contained the broad terms and conditions but was clear to the effect that the purchase order was to be the final contract. All bidders were conscious of the fact that the actual purchase orders were to be placed by the various circles in case of non-metro areas and MTNL in case of Delhi and Mumbai. The suppliers were well aware that the DOT was itself not procuring but the order was to be placed by the respective circles and MTNL. Thus, they accepted the purchase order issued by various circles and made the supplies. While relying on the concessions

given to them in the various circles without any objection, when MTNL refused the benefit of sales tax under the 'C' form, they sought to raise objections in respect of the conditions in the MTNL's purchase order. The purchase orders were placed by the various agencies working under the broad umbrella of the DOT, which was clear to the bidder right from the beginning. Thus, the contracting parties for each of the purchase orders was the specific procurement agency and the bidder. The contract was the purchase order placed by each of the Circles/agencies. The letter of intent, as held in *Alkatel (supra)*, did not by itself constitute the contract. The letter of intent signifies the intention to purchase. The final purchase order binds the contracting parties. The manner in which clause 16 of the purchase order is worded, in fact, makes it clear that the terms and conditions in the NIT/ APO/LOI were subservient to the main contract i.e. the purchase order and not the other way round. ***Security Printing and Minting Corporation of India (supra)*** is clearly applicable in the present case as the contract, i.e., the purchase order, is between MTNL and the supplier, which is a contract of principal to principal.

35. The purchaser being defined as the President of India acting through DoT would not make difference to interpreting the terms of the contract. In the Purchase Order, the Purchaser is defined as MTNL. Since the NIT was issued on all India basis, it was a general NIT containing the various terms and conditions. The said NIT itself stipulated that the purchase order was to be deemed as the contract. Any transaction has to be governed by the document, which is the final contract and not by the identity of the purchaser. The mere fact that the NIT was a general NIT for supplies to be made across the country, does not make the NIT the concluded contract

between the parties. The NIT thus being clear as to what constitutes the contract, it cannot be argued that the NIT would overrule or prevail over the actual purchase order i.e. the contract.

36. The contention 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 CMI is, in fact, nothing but a plea to 're-write the contract' i.e., 're-write the purchase order' which is not permissible. The facts and circumstances i.e., the clauses in the NIT, clarification by DoT etc., 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. 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 Ld. Arbitrator has therefore clearly erred in holding that the purchase order was not the concluded contract. The purchase order was the concluded contract between the parties. As per the terms and conditions of the NIT and the bid documents, LOI read with purchase order, CMI was well aware that insofar as Delhi region of supplies were to be made to the MTNL were concerned, it would not be issued any C-Form as the Sales Tax Office had withdrawn the concessional benefit given to MTNL. Accordingly, the impugned award is liable to be set aside.

The award is accordingly set aside.

37. Insofar the objections of CMI Ltd. are concerned, these are in respect of non-grant of interest. Since the award granting reimbursement of 6% sales tax has been set aside, the objections of CMI are no longer liable to be entertained.

38. Thus, OMP COMM 198/2016 is allowed and the award dated 2nd December, 2010 is set aside. OMP COMM 134/2016 is dismissed. However, there are no orders as to the costs.

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

MARCH 14, 2019/dk

