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

Reserved on: 31.10.2018

Pronounced on: 23.04.2019

+ O.M.P. (COMM) 452/2018 & I.A. No. 14978/2018

UNION OF INDIA MINISTRY OF COMMUNICATIONS

DEPARTMENT OF TELECOMMUNICATIONS THROUGH ITS

SECRETARY

..... Petitioner

Through: Mr. Dinesh Agnani, Senior Advocate
with Mr. L.B. Rai, Mr. Mohit Kumar
Sharma and Mr. Kartik Rai, Advs

versus

SHYAM TELECOM LIMITED

..... Respondent

Through: Mr. Sachin Datta, Senior Advocate
with Ms. Kanika Sinha, Ms. Tanmaya
Sinha, Advs

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1 This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as '1996 Act') against the Award dated 27.07.2018. The petitioner before me is, in effect, the Department of Telecommunication (hereafter referred to as 'DOT'). The DOT has preferred the instant petition via Union of India, Ministry of Communication (in short 'UOI'). The respondent, on the other hand, is a company by the name Shyam Telecom Limited (hereafter referred to as 'STL').

2 The dispute lies in a very narrow compass. The DOT/UOI is aggrieved by the fact that the learned Arbitrator has allowed STL's claim for recovery of a sum of Rs.70,48,000/- along with interest at the rate of 9% per annum on the ground that encashment of Performance Bank Guarantee (in short 'PBG') by DOT/UOI was bad in law as it was unable to prove the loss and/or damage suffered by it.

2.1 It may be relevant to note at this stage itself that the learned Arbitrator has also awarded to STL costs in the sum of Rs.3 lakhs.

3 Therefore, before I proceed further and examine the contentions advanced on behalf of the parties both for and against the impugned Award, it may be necessary to note the background circumstances and facts which have led to the institution of the present petition.

4 The DOT/UOI had taken out a Notice Inviting Tender (in short 'NIT') dated 25.01.1995, whereby it sought bids for the supply of Optical Fibre Line Terminating Equipment and associated equipment including Multiplexers. STL submitted its bids along with other entities.

4.1 The record shows that STL was declared a successful bidder. Consequently, an Advance Purchase Order (in short 'APO') dated 25.09.1995 was issued in favour of STL. As per the terms of the APO, STL was to supply equipment worth Rs.29,23,88,000/-. It appears that STL was assured by the DOT/UOI that the APO will be converted into a Detailed Purchase Order (in short 'DPO') after its acceptance and upon a PBG in the sum of Rs.70,48,000/-, having a validity period of three years, being furnished. It would be important to note at this juncture that the PBG was required to be furnished as a security to ensure performance by STL. The provision with regard to this aspect stood incorporated in Clause 4 of the

General (Commercial) Conditions of Contract (in short 'GCC'). This Clause dealt with performance security.

5 Notably, the DOT/UOI issued a Purchase Order (in short 'P.O.') dated 23.02.1996 in favour of STL, *albeit*, for a sum much lesser than the value of the APO. The P.O. issued in favour of STL was worth only Rs.17,45,88,612.60/-. As per this P.O., STL was to supply the agreed equipment within the period stipulated therein.

6 Evidently, on account of delay in the execution of the P.O, the DOT/UOI, vide letter dated 17.06.1996, put STL to notice that in case the supplies were not made within the scheduled delivery period, then, it would cancel/short-close the contract and encash the PBG.

6.1 The record shows that the DOT/UOI did exactly what it had indicated via its aforementioned communication and, consequently, vide communication dated 03.10.1996, cancelled the P.O. and, thereupon proceeded to encash the PBG.

7 Being aggrieved, in and about 1997, STL moved this Court via a petition under Section 11 (6) of the 1996 Act.

8 This Court, vide order dated 06.10.1998, appointed the Director General, DOT as the Arbitrator. Since the Director General, DOT did not enter upon reference, STL filed another application with this Court for appointment of an Arbitrator.

9 Resultantly, by an order dated 08.02.2000, a retired Judge of this Court was appointed as an Arbitrator. STL filed its Statement of Claims (in short 'SOC') with the learned Arbitrator on 18.07.2000. Via its SOC, STL lodged several claims, however, at the stage of arguments, it seems, it confined itself to the recovery of money obtained by the DOT/UOI upon

encashment of the PBG furnished by it.

9.1 Pertinently, on the other hand, the DOT/UOI filed its counterclaims before the learned Arbitrator, for the first time, on 23.01.2002.

9.2 It may be relevant to note that because several claims and counterclaims were filed, a lot of time was spent before the learned Arbitrator, perhaps, unnecessarily for recording evidence.

9.3 As noted above, ultimately, insofar as STL was concerned, it confined itself to the narrow issue pertaining to money obtained by the DOT/UOI upon encashment of the PBG.

9.4 On the other hand, since DOT/UOI had lodged several counterclaims, the learned Arbitrator had to take a view regarding them. As noted above, via the impugned Award, the principal value of the PBG along with interest and costs was awarded in favour of STL.

9.5 The counterclaims preferred by the DOT/UOI were dismissed. Learned Arbitrator gave two reasons for dismissing the counterclaims. First, that they were barred by limitation in view of the fact that the cause of action qua them if at all, had arisen on 03.10.1996 when the contract obtaining between the parties was terminated. Second, that this Court, while referring the disputes to him, had directed adjudication only with regard to the '*disputes as raised in the petition*'.

9.6 Be that as it may, as noticed above, learned Arbitrator, in any event, dismissed the counterclaims on the ground that they were barred by limitation, *albeit*, after entertaining them, despite an objection being raised in that behalf at the very threshold by STL.

10 Given this background, what requires to be examined by me is, as to whether the learned Arbitrator's decision to direct, in effect, repayment of

the money obtained by the DOT/UOI via encashment of the PBG was right.

10.1 The learned Arbitrator, in coming to the conclusion, which he did, returned the following findings of fact:-

(i) STL failed to fulfil its contractual obligation and was, thus, in breach of its obligation, both in terms of the APO and/or the PO.

(ii) The mere fact that a part of supplies was made by STL, which were accepted by the DOT/UOI, would not absolve STL of its contractual obligations.

(iii) Though STL had sought to supply the agreed equipment, by factoring in new technology and by entering into collaboration, the DOT/UOI rightly rejected STL's proposal made in that behalf as it was not envisaged under the contract obtaining between the parties.

(iv) There was no reasonable cause or justification for the breach committed by STL.

(v) Last but not least, the DOT/UOI was unable to prove that it had suffered a loss and hence, it could not have invoked and/or encashed the PBG.

10.2 It is pertinent to note that this last finding with regard to loss was returned by the learned Arbitrator based on his reading and interpretation of terms of the contract as also the PBG.

10.3 I may also indicate that the learned Arbitrator in the concluding part of the impugned Award has observed that the encashment of the PBG for the entire amount was bad in law as ultimately the P.O. had been scaled down from Rs.29,23,88,000/- to Rs.17,45,88,612.60, and thereby, reducing the requirement of furnishing a PBG from Rs.70,48,000/- to Rs.46,92,000/-. This conclusion the learned Arbitrator, evidently, reached also for the reason

that the APO was not the PO.

10.4 As noticed hereinabove, the learned Arbitrator held based on his interpretation of the terms of the contract obtaining between the parties and the PBG that the encashment of the PBG was *per se* bad in law as the DOT/UOI had failed to prove the loss suffered by it.

11 It is this aspect which has been assailed on behalf of the DOT/UOI by Mr. Dinesh Agnani, Senior Advocate, while Mr. Sachin Dutta, Senior Advocate, appearing for STL had sought to defend the reasoning given in the Award.

12 Thus, the entire case, in a sense, pivots on the provisions obtaining in the contract with regard to provision for performance security. There are two relevant clauses adverted to in this behalf, on behalf of the DOT/UOI. These are Clauses 4 and 15. For the sake of convenience, the relevant parts of Clauses 4 and 15 are set out hereafter:-

“4. PERFORMANCE SECURITY:

4.1 The supplier shall furnish performance security to the purchaser for an amount equal to 5% of the value of each Purchase Order upto Rs. 4 crores and 2% for every additional one crore of purchase order limited to [sic: a] maximum of one crore based on the quantity proposed to be procured against the Purchase Order.

4.2 The proceeds of the Performance Security shall be payable to the Purchaser as compensation for loss resulting from the Supplier's failure to complete its obligations under the contract.

4.3 The Performance Security Bond shall be in the form of a bank guarantee issued by a Scheduled Bank and in the form provided in the Bid Document, Section IX.

4.4 The Performance Security Bond will be discharged by the Purchaser after completion of the Supplier's performance obligations including any Warranty obligations under the Contract".

15. DELAYS IN THE SUPPLIER'S PERFORMANCE

15.1 Delivery of the Goods and performance of services shall be made by the Supplier in accordance with the time schedule specified by the purchaser in its Purchase Order. In case the supply is not completed in the stipulated delivery period, as indicated in the Purchase Order, purchaser reserves the right either to short close/cancel this purchase order and/or recover liquidated damage charges, The cancellation/short closing of the order shall be at the risk and responsibility of the supplier and purchaser reserves the right to purchase balance unsupplied item at the risk and cost of the defaulting vendors.

15.2 Delay by the Supplier in the performance of its delivery obligations shall render the Supplier liable to any or all of the following sanctions, forfeiture of its performance security, [sic: the] imposition of liquidated damages and/or termination of the contract for default.

15.3 If at any time during [sic: the] performance of the Contract, the Supplier or sub contractor(s) encounter conditions impending timely delivery of the goods and performance of service, the

Supplier shall promptly notify the Purchaser in writing of the fact of the delay, its likely duration and its cause(s). As soon as practicable after receipt of the Supplier's notice, the Purchaser shall evaluate the situation and may at its discretion extend the period for performance of the contract after mutual discussion with the supplier.”

13 What is not in dispute is that STL did furnish a PBG in the sum of Rs.70,48,000/-. It is also not in dispute that the PBG, furnished by the STL, was, in substance given as security to ensure performance as contemplated in the contract obtaining between the parties.

13.1 The two sub-clauses which are crucial for ascertaining whether or not the DOT/UOI could have encashed the PBG without proof of loss are Clauses 4.2 and 15.2.

13.2 As would be seen from a bare perusal of Clause 15.2 that the delay by STL in performing its delivery obligations were to render it liable for any/all of the following punitive sanctions: forfeiture of its performance security and/or imposition of liquidated damages and/or termination of the contract for default.

13.3 In this particular case, the contract was terminated and the performance security was forfeited by encashment of the PBG.

13.4 What is important to note is that under Clause 4.2 proceeds of performance security were to be paid to the DOT/UOI as ***“compensation for any loss resulting from supplier’s (i.e. STL’s) failure to complete its obligations under contract”***

13.5 This Clause has to be read in conjunction with the relevant parts of the PBG which allowed the DOT/UOI to trigger the encashment of the PBG.

For the sake of convenience, that part of the PBG is extracted hereafter:

“We State Bank of India do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of breach by the said contractor(s) of any of the terms or conditions contained in the said Agreement or by reason of the contractor(s) failure to perform the said Agreement. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee where the decision of the Government in these counts shall be final and binding on the Bank. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 70,48,000/- (Rupees Seventy Lakhs Forty Eight thousand only)”.

(emphasis is mine)

13.6 A careful perusal of the aforesaid extract of the PBG would show that it is unconditional and was required to be paid by the concerned bank i.e. State Bank of India (‘SBI’), without demur, merely on demand, upon the DOT/UOI stating that the amount claimed was due by way of **“loss or damage caused to or would be caused to or suffered”** by it **“by reason of breach by STL”** **“of any of the terms or conditions contained in the said Agreement”** or **“by reason of STL’s failure to perform the said Agreement”**.

13.7 A close examination of this critical term of the PBG would show that it is in line with the provisions of Clause 4.2 of the contract obtaining

between the parties.

13.8 There is nothing shown to me which would suggest that while encashing the PBG, DOT/UOI had, in fact, asserted that it had suffered a loss on account of breach of obligations undertaken by STL under the contract.

13.9 The argument, however, advanced on behalf of the DOT/UOI, is that this is, precisely, the error which the learned Arbitrator has committed. The submission is that the DOT/UOI was not required to prove that it had suffered a loss, once breach of the terms of the contract by STL had been established.

14 The submission was that PBG, which had been furnished by STL towards performance security, represented the likely loss that the DOT/UOI was to suffer on account of the breach.

14.1 In other words, it is contended that the learned Arbitrator had failed to appreciate that proof of loss was not the pre-condition for forfeiture of performance security which, in turn, had been given in the form of the PBG. In this behalf, the emphasis was laid on the provision of Clause 15.2 of the GCC. Furthermore, in support of his submission, Mr. Agnani placed much stress on paragraphs 63 and 66 of the judgment rendered by the Supreme Court in *Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, (2003) 5 SCC 705.

15 On behalf of STL, Mr. Sachin Dutta submitted that this was not a case where this Court should interfere with the Award for the reason that it proceeded on an interpretation of the terms of the contract. According to Mr. Dutta, interpretation of the terms of a contract was within the domain of the learned Arbitrator. In support of his submission, learned senior counsel

relied upon a judgment of the coordinate Bench, which involved the DOT and dealt with the same Clauses which are a subject matter of the instant petition. Mr. Dutta submitted that the coordinate Bench had sustained the Award via its judgment dated 09.10.2018, passed in OMP (COMM.) No. 429/2018, in the matter of ***Union of India Vs. Intercity Cables Pvt. Limited, 2018 SCC OnLine Del 11934***. Besides this, reliance was also placed on the judgment of the Supreme Court in ***Kailash Nath Associates Vs. Delhi Development Authority and Another, (2015) 4 SCC 136***.

16 It would, therefore, be relevant, at this juncture, to advert to the observations made in the impugned Award on this aspect by the learned Arbitrator:

“However, neither at the time of invocation of bank guarantee nor even before that was it ever stated that the Respondent was suffering or had suffered losses or was likely to suffer losses. In none of the communications addressed by the Respondent to the Claimant such a grievance was made. The language of Clause 4.2 of the General (Commercial) Conditions of Contract clearly envisaged that the proceeds of Performance Security would become payable to the purchaser as compensation for any loss resulting from the supplier's failure to complete its obligations under the contract. The bank guarantee also required it. I have already reproduced the relevant portion of the letter of October 3, 1996 [sic: 1996]. It speaks of no loss suffered by the Respondent or likely to be suffered. On June 17, 1996 also a letter was addressed to the Claimant by the Respondent

containing a threat to get the Performance Bank Guarantee encashed. That letter was as under:

"Dear Sirs,

The matter has been considered and I am directed to convey that in case the supplies of the equipment against the above said PO are [sic: is] not completed within the scheduled delivery period, DOT shall be constrained to cancel/shortclose the above said PO and get the performance bank guarantee encashed at your risk and responsibility. This may kindly be noted.

Yours faithfully,

(N.R. Gupta)

17/6/96

ASSISTANT DIRECTOR GENERAL (CT)"

There was no reference in the aforesaid letter to the Respondent having suffered any loss or there being any likelihood of any loss in [sic: the] future. Thus neither on October 3, 1996 when it was decided to cancel the contract and to get the performance bank guarantee encashed nor at an earlier stage was it the case of the Respondent that it had suffered loss or was likely to suffer loss in the future. Of course the Respondent, and as already noted above, has come up with counterclaims but they were not even in existence nor, in any case, mentioned when the performance guarantee was encashed and are admittedly barred by limitation. They also

cannot be looked into as reference to me to act as an Arbitrator is confined only to the "disputes raised in the petition". The fact, thus, remains that at the time when the contract was cancelled and performance bank guarantee was encashed it was not the case of the Respondent that it was getting the bank guarantee encashed as "compensation for any loss resulting from the Supplier's failure to complete its obligations under the contract". This being the position, I do feel that though there was lapse on the part of the Claimant in as much as it did not perform its part of the contract the performance bank guarantee which was only "compensation" for "any loss that the Respondent suffered", could not be encashed solely on account of Claimant's failure to complete its obligations under the contract. There was no such loss nor alleged. In any case, the Performance Guarantee was not encashed on that ground. And this being the position the invocation of the Bank Guarantee was not in terms of the Bank guarantee nor in terms of Clause 4.2 as referred to above."

(emphasis is mine)

17 The aforesaid observations show that the learned Arbitrator, based on his reading of Clause 4.2 of the GCC, came to the conclusion that unless the DOT/UOI shows that it had suffered a loss, it could not claim money from STL merely on account of its failure to complete its obligations, as a failure should have resulted in loss which was required to be compensated.

18 I must indicate here that, to my mind, the law on the subject of

compensation for damages suffered is fairly well settled, which can be encapsulated as follows: for an aggrieved party to claim damages, whether liquidated or un-liquidated (and to that extent, there is no difference between the two), it has to demonstrate and prove the following: (i) first, that there is a breach by the opposite party and (ii) second, the breach has resulted in a legal injury or loss.

18.1 Having proved the aforesaid ingredients, the aggrieved party, in a case falling within the realm of liquidated damages, is required to prove the extent of loss or damages suffered by it, where if it is possible for it to prove loss or damages suffered by it. It is required in law to do so and thereafter receive reasonable sum as compensation subject to the cap or limit provided in the liquidated damages clause.

18.2 However, where the contract is of such a nature that it is not possible to calculate the extent of loss or damage suffered by an aggrieved party and what is provided in the Contract by way of liquidated damages, appears to the Court to be a genuine pre-estimate of the likely losses that would arise as a result of the breach, then, the law places no obligation on the aggrieved party to prove the loss or damage, suffered by it. The crucial aspect, in such a situation is that it should be a genuine pre-estimate of the loss (as was the case in *Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*), that the aggrieved party is likely to suffer. In the instant case, the learned Arbitrator has found that no such expression or words are found in Clause 4.2 of the GCC. On the other hand, the learned Arbitrator notes that the words used in Clause 4.2 are '**compensation for any loss**' which results from the supplier's i.e. STL's failure to complete its obligation under the contract. There is, according to the learned Arbitrator, a distinction between the situation which

obtained in *Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.* and the instant case.

18.3 Thus, whichever way you look at it, that is, application of the plain terms of the contract and/or the PBG or, if you like, their interpretation it falls within the domain of the Arbitrator.

18.4 If, one were to accept the contentions advanced on behalf of the DOT/UOI that there is an error of law, such an error cannot be corrected by me while exercising jurisdiction under Section 34 of the 1996 Act. Thus, on balance, in my view, this is not a case of patent illegality, as sought to be projected on behalf of the DOT/UOI. The following observations of the Supreme Court in *Associate Builders Vs. DDA*, (2015) 3 SCC 49, being apposite, are extracted hereafter:

“...This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do....”

19 This brings me to the argument advanced on behalf of the DOT/UOI based on the provisions of Clause 15.2 of the GCC. The argument being that forfeiture of the performance security did not require proof of loss.

19.1 To my mind, this argument misses the point that Clause 15.2 of the GCC cannot be read in isolation. Clause 15.2 will have to be read in

consonance with the provisions encapsulated, regarding performance security, in Clause 4.2 of the GCC which envisages payment of proceeds of performance security to the DOT/UOI as compensation for any loss resulting from STL's failure to complete its obligations under the contract. Therefore, this argument, advanced on behalf of the DOT/UOI, does not impress me and is, accordingly, rejected.

20 Before I conclude, I must also note that on behalf of the DOT/UOI, the judgment rendered by the coordinate Bench in *Union of India Vs. Intercity Cables Pvt. Limited* was sought to be distinguished by alluding to the fact that counterclaims, in that case, were not pressed. To my mind, there is no material distinction between the situation which obtained in the instant case and in the matter of *Union of India Vs. Intercity Cables Pvt. Limited*. The facts and circumstances are similar, if not identical, and the Clauses in issue are identical. Therefore, the mere fact that counterclaims were not pressed in *Union of India Vs. Intercity Cables Pvt. Limited* while, in this case, they were neither referred to nor were filed within time will not change the ratio of the judgment delivered in that case. The ratio of the judgment in that case in sum is that the matter fell within the domain of the Arbitrator as he had come to a particular conclusion based on the interpretation of the terms of the contract.

20.1 Pertinently, the DOT/UOI has not preferred any appeal against the judgment of the coordinate Bench; at least no such information was furnished during the course of arguments.

21 Thus, having sustained the reasoning of the Arbitrator qua the principal issue, the other aspects regarding directions to pay interest at the rate of 9% from the date of encashment of the PBG till realization and the

payment of costs are aspects which are consequential in nature. As a matter of fact, no submissions were advanced on behalf of the DOT/UOI with regard to issues pertaining to interest or costs.

22 Therefore, for the foregoing reasons, I am not inclined to interfere with the Award. Consequently, the petition is dismissed. The pending application shall stand closed. There shall, however, be no order as to costs insofar the instant petition is concerned.

RAJIV SHAKDHER, J

APRIL 23, 2019

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