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

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Date of Decision : 24.02.2025

+ **FAO (COMM) 56/2025 & CM APPL. 11159-62/2025**

MAHANAGAR TELEPHONE NIGAM LIMITEDAppellant

Through: Ms. Soumitra Chatterjee, Mr. Ashman
Romy, Advocates.

Versus

N C CABLES PRIVATE LIMITED

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE TEJAS KARIA

VIBHU BAKHRU, J. (ORAL)

1. The appellant, Mahanagar Telephone Nigam Limited (hereafter **MTNL**), has filed the above-captioned appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter **the A&C Act**) impugning an order dated 12.03.2024 (hereafter **the Impugned Order**) passed by the learned Commercial Court, whereby MTNL's application under Section 34 of the A&C Act (Arbitration No.1461/2017 captioned *Mahanagar Telephone Nigam Limited v. M/s N.C. Cables Pvt. Ltd.*) was rejected.

2. MTNL had filed the aforesaid application under Section 34 of the A&C Act impugning an arbitral award dated 21.09.2008 (hereafter **the Impugned Award**) rendered by an arbitral tribunal comprising of a sole arbitrator (hereafter **the Arbitral Tribunal**). The Arbitral Tribunal had



found that the MTNL had wrongfully invoked the bank guarantee furnished by the respondent and on the basis of the said findings awarded a sum of ₹25,20,295/- along with interest at the rate of 18% per annum in favour of the respondent. Additionally, the Arbitral Tribunal also awarded damages cost equal to the arbitration fee and ₹10,000 in favour of the respondent and against MTNL.

3. The impugned award was rendered in relation to the disputes that had arisen between the parties in connection with the Purchase Order dated 24.12.2005 (hereafter *the PO* or *the Contract*) for supply of 907 Kms of 5/0.5 UA and 599 Kms of 50/0.50 UA quantity of Polythene Insulated Jelly Field Telecom Cables (hereafter *PIJF Cables*).

4. MTNL had invited tenders for supply of PIJF cables from qualified suppliers by a notice dated 25.05.2005.

5. The respondent had submitted its bid pursuant to the aforesaid notice, which was found to be competitive. Thereafter, by a letter dated 19.12.2005, MTNL had informed the respondent that it was authorised to place a formal purchase order as per the following allocation:

Cable Size	Qty. (Kms.)	Rate/Km (Rs.)	Amount (Rs.)
5/0.5 UA	907	10579.50	9595606.50
50/0.5A	599	84150.07	50405891.93
G. Total:			60001498.43 Say 60001498.40

6. MTNL also called upon the respondent to furnish a performance bank guarantee for an amount equal to 5% of the value of the PO within a period



of seven days from the date of issuance of the said letter.

7. Pursuant to the MTNL's letter dated 19.12.2005, the respondent furnished a bank guarantee bearing no.05545BG000053 dated 23.12.2005 issued by Karnataka Bank Limited for a sum of ₹30,00,075/- (hereafter *the PBG*).

8. After receipt of the PBG, MTNL had proceeded to issue the PO.

9. The respondent claimed that immediately on receipt of the PO, it commenced production and had supplied PIJF Cables as under:

Size: 5 Pair/0.5 mm (UA)		
Sl. No.	Date	Quantity Supplied in Kms.
1.	15.2.2006	229.616
2.	30.3.2006	338.446
Total:		568.062

Size: 50 Pair/0.5 mm (A)		
Sl. No.	Date	Quantity Supplied in Kms.
1.	26.2.2006	75.85
2.	7.3.2006	41.70
3.	17.3.2006	33.00
4.	17.4.2006	50.42
Total:		200.97

10. The respondent claims that on 07.03.2006, there was a dacoity at its factory premises at Greater Noida, U.P. The armed miscreants sabotaged equipment and stole goods worth more than ₹45 lacs including 1300 cable kms of extruded cores, which were made for manufacturing PIJF cables for supply to MTNL in terms of the PO. The respondent also filed an FIR in



respect of the said incident. As a result of the said incident, the respondent could not maintain the schedule for supply of PIJF cables. By a letter dated 27.03.2006, the respondent requested MTNL that the original delivery schedule be extended for a period of one month in order to enable him to regularise its production. It also claimed that the said period was required to be excluded from the contractual delivery period under the force majeure clause being Clause 17 of the General Conditions of Contract (hereafter the **GCC**).

11. MTNL did not accede to the request and by a letter dated 08.06.2006, foreclose the Contract and invoked the PBG to the extent of ₹25,20,295/-.

12. Aggrieved by the same, the respondent filed a petition (being OMP No.274/2006) under Section 9 of the A&C Act before this Court seeking an order restraining MTNL from encashing the PBG. By an order dated 19.06.2006, this Court restrained MTNL from encashing the bank guarantee. However, in the meantime, MTNL had invoked the PBG and recovered the amount as demanded.

13. In the aforesaid circumstances, the respondent invoked the Arbitration Agreement under the Contract for reference of disputes to arbitration.

14. The respondent filed a statement of claims before the Arbitral Tribunal claiming damages quantified at ₹36,00,000/-. The respondent claimed that due to foreclosure of the contract by MTNL, it had suffered loss of profits amounting to ₹36,00,000/-, which it would have earned on the balance quantity of PIJF cables that remained to be supplied. Additionally, the respondent also claimed recovery of the amount of ₹25,20,295/- being an



amount recovered by MTNL from encashment of the PBG, along with interest at the rate of 18% per annum.

15. The Arbitral Tribunal considered the evidence and material placed on record by the parties and concluded that MTNL had failed to substantiate its claim that it had suffered any loss on account of non-supply of balance quantity of PIJF cables as per the agreed schedule. In particular, the Arbitral Tribunal considered the responses furnished by MTNL to the interrogatories, which disclosed that MTNL had sufficient stock of PIJF cables and had not suffered any loss or delay on account of non-supply of PIJF cables by the respondent.

16. Insofar as the claim for damages is concerned, the respondent did not press the said claim and accordingly, the same was rejected. However, the Arbitral Tribunal awarded costs being the share of arbitral fee paid by the respondent and further costs quantified at ₹10,000/-.

17. As noted above, MTNL filed an application (Petition no.1461/2017) under Section 34 of the A&C Act seeking to set aside the impugned award. The learned Commercial Court did not find any grounds to interfere with the impugned award and accordingly, rejected the same.

REASONS AND CONCLUSION

18. The learned counsel appearing for the MTNL assailed the impugned award and the impugned order on the sole ground that the impugned award was contrary to the terms of the contract between the parties.

19. The learned counsel appearing for the MTNL referred to Clause 15 of



the GCC, which is set out below:

“15. DELAYS IN THE SUPPLIER’S PERFORMANCE

- 15.1 Delivery of the Goods and performance of the 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 shot closing of the order shall be at the risk and responsibility of the supplier and purchaser reserves the right to purchase balance unsupplied items 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 sanction: forfeiture of its performance security, imposition of the liquidated damages and/or termination of contract for default.
- 15.3 If at any time during the performance of the contract, the supplier encounter conditions impending timely delivery of the goods and performance of service, the supplier shall promptly notify to the purchaser in writing 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 (by not more than 20 weeks) subject to furnishing of additional performance security by the supplier @ 5% of the total value of the purchase order. The vendor has to submit his request for extension along with the required additional BG at least two weeks before the expiry of delivery period. The decision regarding extension shall be communicated within two weeks of the receipt of the request.



15.4 If the supplies are not completed in the extended delivery period, the purchase order shall be short-closed and both the performance security shall be forfeited.

15.5 The extension of delivery period against the purchase order, if any, should be granted subject to the condition that MTNL shall have the absolute right to revised the price(s) and also levy penalty for delayed supplies.”

20. He submitted that in terms of Clause 15.2 of the GCC, MTNL was entitled to forfeit the performance security, impose liquidated damages and terminate the Contract for failure on the part of the respondent to perform the Contract in accordance with the agreed terms and conditions. He submitted that MTNL was, thus, well within its right to invoke the PBG. He submitted that this necessarily flowed from the terms and contract between the parties and was not contingent on MTNL proving any loss or damages.

21. It is material to note that the Arbitral Tribunal had considered the aforesaid contention and had rejected the same. Clause 4.2 of the GCC provided that the performance security would be payable as compensation for loss resulting from suppliers’ failure to complete the obligations under the Contract. Clause 4.2 of the GCC is set out below:

“4.2 The proceeds of the performance security shall be payable to the purchaser as compensation for any loss resulting from the supplier’s failure to complete its obligations under the contract.”

22. Undisputedly, the PBG was furnished as a performance security to secure MTNL against the loss suffered by it on account of failure on the part of the respondent to perform its obligations in terms of the Contract. Undeniably, the respondent was required to supply PJIF cables in



accordance with the agreed schedule and it had failed to do so. The respondent had relied on the force majeure clause, which entitled the respondent to extension of time for performing its supply obligations.

23. According to the respondent, MTNL had not acted in terms of the Agreement by failing to extend the delivery time enabling the respondent to regularise the supplies.

24. However, the Arbitral Tribunal had proceeded on the principal basis that MTNL had failed to prove that it had suffered any loss and therefore, could not retain the amount recovered by encashment of the PBG.

25. Admittedly, MTNL has been unable to establish that it had suffered any loss. On the contrary, the responses to the interrogatories, which are noted by the Arbitral Tribunal establish that the appellant had not suffered any loss. In the aforesaid view, we are unable to fault the Arbitral Tribunal for awarding an amount of ₹25,20,295/- in favour of the respondent (along with interest) being the amount, which was recovered by MTNL by invoking the PBG furnished by the respondent.

26. An arbitral award can be set aside under Section 34 of the A&C Act only if the grounds as set out in Section 34 of the A&C Act are established. In the present case, MTNL has been unable to establish that the impugned award can be impeached on any of the grounds as set out in Section 34(2) of the Act. Clearly, the impugned award cannot be held to be contrary to the public policy of India.

27. The learned counsel for the MTNL had rested its case mainly on the



impugned award being vitiated by patent illegality.

28. However, we find no merit in the said contention. As explained in the catena of decisions, the ground for setting aside an arbitral award as vitiated by patent illegality on the face of the award is very restricted. It is only available where it is *ex facie* apparent from the face of the record that the award is patently illegal. Further, patent illegality is such that it strikes at the core of the arbitral award. We consider it apposite to set out the following passage from the decision Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*: (2022) 1 SCC 131**. The Supreme Court has further explained the grounds of patent illegality. The relevant extract of the said decision is set out below:

“29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself



susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.”

29. In the present case, we are unable to accept that the arbitral award is vitiated by any patent illegality.

30. We find no ground for setting aside the impugned award and we find no fault in the impugned order dismissing MTNL’s application for setting aside the impugned award under Section 34 of the A&C Act.

31. The appeal is unmerited and accordingly, dismissed. The pending applications are also disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

FEBRUARY 24, 2025

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Click here to check corrigendum, if any