

(2012) 05 DEL CK 0262
In the Delhi High Court
Case No : O.M.P. 427 of 2006

Bharat Sanchar Nigam Limited

APPELLANT

Vs

Himachal Futuristic Communications Limited

RESPONDENT

Date of Decision : 30-05-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 28(3), 55, 62, 8
Sales of Goods Act, 1930 — Section 13, 64A

Citation : (2012) 5 AD 697 : (2012) 194 DLT 661

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Sukumar Pattjoshi and Mr. Somesh Kumar Dubey, for the Appellant;
C.A. Sundaram with Mr. Chandrachur Bhattacharyya, Ms. Rohini Musa, Yogesh V. Kotematu and Mr. Zafar Inayat, for the Respondent

Final Decision : Allowed

Judgement

Justice S. Muralidhar

1. The Petitioner Bharat Sanchar Nigam Limited ("BSNL") has in this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") challenged an Award dated 1st June 2006 passed by the learned sole Arbitrator in the dispute between it and the Respondent Himachal Futuristic Communications Limited ("HFCL"), formerly known as Himachal Telematics Limited ("HTL"), arising out of a Purchase Order ("PO") dated 22nd February 1996 for supply of 148 numbers of 4/36 MARR systems in UHF range along with accessories. By the impugned Award the sole Arbitrator held that HFCL was entitled to be paid the differential amount subject to deduction of 5% Liquidated Damages ("LD") for supplies made during the extended delivery period as claimed by HFCL together with simple interest at 6% per annum from the date when payment became due till the actual date of payment. HFCL was also held entitled to the return of the Performance Bank Guarantee ("PBG") dated 11th December 1995 for a sum of

Rs. 42 lakhs.

Background Facts.

A tender was invited for procurement of 1125 systems each of 2/15 and 4/36 analog MARR system of UHF band along with accessories by the BSNL. The tender was opened on 20th June 1995 and HTL was found to be a technically and commercially eligible bidder. An Advance Purchase Order ("APO") dated 24th November 1995 was placed on HTL for the supply of 136 numbers package of 2/15 Shared Radio System and 148 numbers of package of 4/36 MARR system at a package price of Rs. 3,20,897 and Rs. 10,11,360 respectively. The APO was amended by a letter dated 27th November 1995 only in respect of PBG. By its letter dated 12th December 1995 HTL accepted the APO unconditionally only for 4/36 MARR systems and submitted a PBG for Rs. 42 lakhs at 5% of the total value of 148 numbers of 4/36 MARR systems.

2. On the basis of acceptance of the APO, a PO was placed on HTL on 22nd February 1996 for supply of 148 numbers of 4/36 MARR systems in UHF range. The delivery schedule was up to three months from the date of issue of PO or two months from the date of issue of frequencies.

3. In accordance with the terms and conditions applicable to the PO, HTL had to obtain type approval from the Department of Telecommunications ("DOT") (QA) prior to the start of supplies to the consignees. The consignee details were also furnished along with the PO. The delivery period was said to be firmed and was not subject to any change. Clause 13.1 of Section III of the General Conditions of Contract ("GCC") provides as under:

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 the following:

- (a) Drawing, designs or specifications, where goods to be furnished under the contract are to be specifically manufactured for purchaser;
- (b) The method of transportation or packing;
- (c) The place of delivery; or
- (d) The service to be supplied by the supplier.

4. On 4th June 1996, BSNL furnished frequency details and revised consignee details to HTL in respect of 146 numbers of 4/36 MARR systems i.e. (98.6% of the ordered quantity). The frequency and consignee details in respect of balance two numbers were furnished on 28th August 1996. By a letter dated 17th June 1996, BSNL enquired about the probable timeframe by which the systems would be supplied to the Circles.

5. By a letter dated 9th August 1996, HFCL informed BSNL that the frequency and consignee details have been received by it in respect of 146 numbers of 4/36

MARR systems only on 26th June 1996. Accordingly, it is requested that the delivery period of the above referred order be extended "up to two months from the issue of letter". BSNL was also informed that HTL has been amalgamated with HFCL and issuance of suitable amendment to the PO to the above effect was requested.

6. On 9th October 1996, DOT wrote to HFCL extending the delivery period by two months "with levy of liquidated damage charges". Further the price Clause-7 was amended and the provisional value of 148 numbers of 4/36 MARR systems was indicated as Rs. 13,47,13,152 at the rate of Rs. 9,10,224 per package. It was further indicated that "the prices indicated above are provisional and subject to adjustment of the prices approved by DOT for the year 1996-97".

7. No delivery was made of any system even by the extended period. On 17th December 1996, HFCL wrote to DOT as under:

Dear Sir, With reference to your letter No. 10-8/95-MMC dated 12th December 1996 regarding delivery of MARR systems against subject order and discussions we had with DOT in M(P)'s office on 17th December 1996, we wish to inform you that due to delay in receipt of imported components there is delay in supplies of MARR systems.

As informed in the meeting we once again inform that we have reviewed critically the material position and manufacturing activities and are pleased to inform you that we will be offering systems for PQT in the week starting from 23rd December 1996 and supplies will be completed by end March" 97. We therefore request to kindly extend delivery period of subject order upto 31st March 1997.

We hope our request will be considered favourably and will allow us DP extension up to 31st March 1997.

8. Another letter was written by HFCL on 16th December 1996 for extension of delivery period up to 28th February 1997. Here, it was stated that there was a delay in receipt of some imported component in supplies of MARR systems. A second extension was granted by DOT by a letter dated 1st January 1997 up to 15th February 1997. The rates stipulated were the same as in the letter dated 9th October 1996. It was again reiterated that the prices indicated were provisional and subject to adjustment.

9. On 7th February 1997, HFCL wrote to DOT stating that it had offered the systems for a Pre-Qualification Test ("PQT") and that the commercial supply would commence as soon as the PQT was completed. HFCL offered to supply 25 numbers of MARR by end of February 1997, 50 numbers of MARR by 15th March 1997 and 73 numbers of MARR by 31st March 1997. Consequently, it was requested that the delivery period be extended up to 31st March 1997. What is significant here is that HFCL was admitting that even as on 7th February 1997 not a single set of MARR had yet been supplied to BSNL. On 18th February 1997, the DOT conveyed to HFCL the extension of the delivery period up to 31st March

1997 with levy of LD charges at the provisional price and other conditions communicated in the letter dated 1st January 1997.

10. By 31st March 1997, HFCL could supply only 20 numbers of MARR systems. In its letter dated 3rd June 1997 to DOT, HFCL attributed the delay in supplying the balance systems to delay in the receipt of some of the raw material. Further, since MARR system was being manufactured by them for the first time, QA had also taken considerable time. Further extension of the delivery period by three months was requested. On 6th June 1997, the DOT wrote to HFCL extending the delivery period up to 31st August 1997 with levy of LD charges. A new rate of Rs. 5,35,960 (provisional) per package for 4/36 MARR (UHF) system was indicated. It was indicted that the said price was provisional and "subject to adjustment to the prices approved against the tender opened on 17th March 1997". It was added that "no further extension shall be granted". After the tender was opened on 17th March 1997 and the price was approved as Rs. 5,89,338.22, DOT issued a letter dated 23rd June 1997 to all Chief General Managers ("CGMs") communicating the revision of prices. As regards the 4/36 MARR (UHF) systems, the firm price of supply up to 22nd July 1996 was Rs. 10,11,360; from 23rd July 1996 to 28th February 1997 it was Rs. 10,03,398; from 1st March 1997 to 16th March 1997 it was Rs. 9,03,058 and from 17th March 1997 onwards it was Rs. 5,35,960 per package. The final prices at Serial No. 4 i.e. the price set from 17th March 1997 onwards was to be as approved for a tender opened on 17th March 1997. Copy of the said circular was marked to all consignees/paying authorities as per POs.

11. Meanwhile, on 17th June 1997, HFCL wrote to DOT stating inter alia as under:
We wish to bring the following facts to your kind knowledge.

We had obtained a type approval from TEC to supply 4/36 MARR systems to DOT based on the transfer of technology from M/s ARM Ltd., Hyderabad. The equipment was being manufactured by us on SKD basis and accordingly our manufacturing facility was approved.

The delivery schedule was very kindly extended by your office upto 31st March 1997 which has now been further extended upto 31st August 1997 vide your letter No. 10-8/95-MMC/HFCL/700 dated 6th June 1997 for the supply of balance quantity of the order. In view of the fact that the equipment being supplied by us is manufactured on SKD basis on HTOT as it was prior to 31st March 1997, therefore, there has not been any change in our manufacturing process. It remains absolutely same and is based on the TEC approval granted to us.

We would therefore earnestly request you to kindly issue necessary instructions to the office of the Chief General Manager Telecom Quality Assurance, Bangalore to accept the equipment as was being accepted earlier.

12. On 28th August 1997, a revised schedule for delivery of balance 80 systems was communicated by HFCL to DOT. This was to take place between 15th

September 1997 to 31st October 1997. Extension of delivery period was sought up to 31st October 1997. In response, on 10th September 1997, DOT extended the delivery period up to 31st October 1997 with levy of LD charges and at the provisional prices and other conditions communicated by its earlier letter dated 6th June 1997. It was stated that the supply shall be made as per the Technical Specifications ("TS") of the tender opened on 17th March 1997 "observing all terms and conditions of the tender". It was clarified that "all other terms and conditions of the PO shall remain unaltered".

13. On 10th October 1997, DOT communicated to all CGM and suppliers that the tender opened on 17th March 1997 had been finalized and that supplies against the captioned PO of 4/36 MARR (UHF) systems could be at a firm unit price of Rs. 5,89,338.22. By the letters dated 22nd October and 4th November 1997, HFCL again sought extension of delivery period by two months up to 31st December 1997. By a letter dated 13th November 1997, BSNL informed HFCL that it was extending the delivery period up to 27th November 1997 with levy of LD charges and that the unit price per package was Rs. 5,89,338.22. DOT asked HFCL to consider the said letter as the final notice failing which the PO would be treated as cancelled/short closed at the risk of HFCL and the PBG shall be encashed. All other terms and conditions remained unaltered.

14. On 15th November 1997, HFCL explained to DOT that for delivery of the balance 36 systems the time should be extended by another 60 days from 13th November 1997 onwards. On 9th December 1997, DOT wrote to HFCL extending delivery period up to 15th January 1998 with levy of LD charges. Within three days of the said letter, on 12th December 1997, DOT wrote to HFCL stating as under:

(1) Supply shall be made at the unit rate of Rs. 5,89,338.22 (all inclusive) per package already intimated vide this office letter even no. dated 13th November 1997.

(2) This extension in DP up to 15th January 1998 may be treated as final notice and no further extension shall be given in any case.

(3) The supply shall be made as per new technical specification against T.E. No. MM/RN/111996/000081 opened on 17th March 1997.

All other terms and conditions of the PO shall remain same.

15. On 26th May 1998, DOT wrote to HFCL stating that a sum of Rs. 43,22,549 had been overpaid to it due to revision of prices of 4/36 MARR (UHF) system from Rs. 9,10,224 to Rs. 5,89,338.22 with effect from 17th March 1997. This was in respect of 15 systems of 4/36 MARR (UHF) systems dispatched to CTSD Bangalore under three invoices dated 31st March 1997. Accordingly, HFCL was asked to deposit the excess amount within seven days. According to BSNL, this was reiterated in the letters dated 12th June, 2nd July, 3rd September and 3rd November 1998.

16. On 17th November 1998, HFCL informed the DOT that in a similar case the Accounts Officer in Chennai had held the payment made to M/s Phoenix Telecom Limited ("PTL") had been in excess and against the said order PTL had approached the High Court of Andhra Pradesh at Hyderabad which directed that PTL would be entitled to payment for the supplies made up to 6th June 1997 as per the contract rate; for the supplies made between 6th June 1997 to 23rd June 1997 at 90% of the contract rate, on condition that the PBG furnished by PTL would be kept alive. It was further mentioned that DOT's appeal against the aforementioned judgment had been dismissed by the Division Bench of that High Court and it had been ordered that the excess amount deducted should be released against PTL's PBG. Accordingly, it was requested that the PBG of HFCL should not be encashed till the matter was decided by the learned Single Judge of the Andhra Pradesh High Court. HFCL assured DOT that it would keep the PBG alive.

17. HFCL invoked the arbitration clause and the disputes were referred to the sole Arbitrator who passed the impugned Award inter alia allowing the claims of HFCL and directing that subject to deduction of 5% LD charges for all supplies made during the extended delivery period, HFCL was held entitled to be paid by the BSNL the deferential amount at the following rates:

(A) Up to 22nd July 1996 @ Rs. 10,11,360

(B) From 23rd July 1996 to 28th February 1997 @ Rs. 10,03,398

(C) From 1st March 1997 onwards @ Rs. 9,03,058 (on the basis of reduction in custom duty and excise as per prevailing rates at that time) till last delivery.

The Arbitral Award

18. As already indicated hereinabove, the above amount was directed to be paid by BSNL to HFCL with 6% per annum simple interest from the date the payment became due till the date of actual payment. The summary of the findings of the learned Arbitrator are as under:

(i) In the event of delay in effecting supplies as per the PO, there were provisions for (a) forfeiture of the PBG furnished by the supplier (b) imposition of LD and (c) termination/short closure of the contract for default. Even if the extension of time for delivery period was granted, the purchaser would be entitled to recovery of 1/2% of the value of the delayed supply. There was nothing in the contract which permitted imposition of any additional or further financial sanctions by way of reduction in the prices.

(ii) Imposition of LD tantamounted to condonation of delay in HFCL making supplies and created an obligation on the BSNL for making payment on delivery of the goods within the extended delivery period.

(iii) BSNL had not terminated the contract as per its terms and conditions. Further, BSNL did not purchase goods from the open market incurring

expenditure which had to be reimbursed by HFCL.

(iv) The unilateral change in the terms and conditions of purchase was not permissible. The supplies which had been accepted with LD could not be subject to the imposition of additional penalty by way of reduction in price. The reduction in price was in the nature of additional penalty which was not permissible in law. HFCL had never agreed to reduction in prices.

(v) Extension was required only due to delayed supply of frequencies by BSNL. The frequencies were allotted as late as 30th December 1997 against PO of 22nd February 1996.

(vi) Since there was no pre consent of both the parties to the altered condition of supply, there was no novation. The communication dated 23rd June 1997 was a provisional one and was not firm and, therefore, not a valid offer. There was no justification in BSNL reducing the prices unilaterally and that "this is clearly unjustified and an untenable act. This is an inequitable conduct" and "it is a case of economic coercion". During the extended delivery period, prices could have been reduced only on account of deduction in taxes and duties.

Submission of counsel

19. This Court has heard the submissions of Mr. Sukumar Pattjoshi, learned counsel for BSNL and Mr. C.A. Sundaram, learned Senior counsel for HFCL.

20. The first submission on behalf of the Respondent HFCL is that the impugned Award dated 1st June 2006 was based on another Award passed in the case of M/s ARM, Hyderabad, who was also issued a PO under the same tender and was similarly situated as HFCL. The said claim of M/s ARM, Hyderabad was upheld by the Arbitral Tribunal and BSNL paid the differential amount at 15% per annum simple interest. The said Award was challenged u/s 34 of the Act but the said petition was dismissed by the City Civil Judge, Hyderabad. The Revision Petition against the said order was dismissed by the High Court of Andhra Pradesh and the Special Leave Petitions ("SLPs") against the said dismissal were rejected by the Supreme Court on 17th January 2003. The review petition filed by DOT was also dismissed by the Supreme Court on 5th March 2003. Thus, the arbitral Award dated 10th July 2000 in the case of M/s ARM, Hyderabad had attained finality.

21. Secondly, it is submitted that United Telecom Limited had filed Writ Petition Nos. 3900-3901 of 2001 against BSNL in the High Court of Karnataka challenging the action of BSNL in unilaterally reducing the rates of 4/36 MARR systems supplied after 17th March 1997. The High Court of Karnataka passed an order on 15th October 2003 allowing the writ petition and holding the action of BSNL in unilaterally reducing the rates, to be arbitrary, unfair and unreasonable and directing refund of the amount so deducted with interest. Further, on 23rd February 2004, a Division Bench of the Karnataka High Court dismissed the BSNL's appeal against the order dated 15th October 2003 of the learned Single

Judge of the Karnataka High Court. SLP (C) No. 19624 of 2004 filed by BSNL against the aforementioned order of the Division Bench was dismissed by the Supreme Court on 15th October 2004. It is accordingly submitted that since the issue involved in the present case is identical to the issues that were discussed in the Award concerning M/s ARM, Hyderabad and the judgment of the Karnataka High Court concerning United Telecom Ltd., the challenge to the impugned Award in the present case should fail.

22. In response to the above plea, it is submitted on behalf of BSNL that the ground that the impugned Award of the learned Arbitrator is opposed to public policy was available only after the decision of the Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., on 17th April 2003. The Award dated 10th July 2000 passed by the learned Arbitrator in the case of M/s ARM, Hyderabad was challenged at a time when the decision in Saw Pipes had not been pronounced. The dismissal of the SLP on 17th January 2003 was also prior to the decision in Saw Pipes. Moreover, the SLPs were dismissed in limine. The decision of the High Court of Karnataka in the United Telecom Ltd. did not discuss the factual matrix in which new prices were made applicable to the PO.

23. Reliance is also placed by the BSNL on the decision in Bhagwati Prasad Pawan Kumar Vs. Union of India (UOI), and the decision dated 19th May 2009 of the Division Bench of this Court in FAO (OS) No. 457 of 2006 titled Bharat Sanchar Nigam Ltd. Vs. BWL Ltd., to urge that once HFCL had accepted the terms and conditions for extension to the delivery period, then it was bound to accept the reduction in prices. In fact HFCL did not protest about the reduction in price. Reference is also made to the decision dated 16th August 2007 of the Division Bench of the Karnataka High Court in M.F.A. No. 7943 of 2003 in Union of India v. M/s Phoenix Technology Corporation (P) Limited.

Orders in similar matters

24. There appears to be two distinct sets of orders concerning these very transactions one prior to the decision of the Supreme Court in Saw Pipes and the other subsequent to the said decision. In Saw Pipes, the Supreme Court recognized that u/s 34 of the Act, a domestic Award could be challenged on the ground that it was opposed to the public policy of India and further explained the scope and ambit of that expression as including a patent illegality.

25. There can be no issue that in the case of M/s ARM, Hyderabad, the Award was passed on 10th July 2000 at a time when the decision in Saw Pipes was not available. The negating of the challenge to the said Award by City Civil Court, Hyderabad followed by its affirmation by the High Court of Andhra Pradesh and thereafter the Supreme Court, all took place prior to the decision in Saw Pipes. Secondly, it is not known whether the factors in the case of M/s ARM, Hyderabad were similar to those in the present one. Each Award has to be examined on its own terms. An Award passed by an Arbitrator in a claim made by another supplier of 4/36 MARR systems does not ipso facto constitute a precedent vis-a-

vis a claim by another supplier to the BSNL. This Court is, therefore, not persuaded to hold that on account of the Award in respect of the dispute involving M/s ARM, Hyderabad having gone in favour of M/s ARM, Hyderabad, the present challenge by the BSNL to the impugned Award in favour of HFCL, should fail.

26. As regards the order of the Karnataka High Court in the case involving United Telecom Limited, again there was no reference whatsoever to the decision of the Supreme Court in *Saw Pipes*. Moreover, the decision in that case has relied mainly on the decision in the case of M/s ARM, Hyderabad. There was no occasion to discuss the individual facts of the different cases. The dismissal of the SLP of BSNL in limine and not on merits would not constitute a binding precedent as far as the present case is concerned.

27. On the other hand, after the decision of the Supreme Court in *Saw Pipes*, we have two other decisions of Division Benches of both this Court as well as Karnataka High Court in similar matters. In *BSNL v. BWL Ltd.* the disputes between the parties arose out of a contract for the supply of optical fibre cables. Time for making supplies was extended on more than one occasion with the supplier accepting the condition of LD as well as lesser price of 75% instead of 95% at the time of delivery. With continued failure to deliver the agreed quantity the BSNL terminated the contract and encashed the bank guarantees. The arbitrator who adjudicated the ensuing dispute held that BSNL's termination of the contract was arbitrary and that the Respondent therein was entitled to loss of profit. The Single judge rejected the objections to the Award and an appeal was filed before the Division Bench. Reversing the Award and the judgment of the Single Judge, the Division Bench held that no protest was registered by the Respondent to the changed conditions under which time for making supply was extended. It was held that by not obtaining the type approval within time and not making supplies within the extended time limit, it was the Respondent which was in breach of contract. In a pure and simple contract the principles of reasonableness flowing from Article 14 of the Constitution were not attracted. In the circumstances, the plea of the contractor for damages was negatived and the Award was set aside. The decision in *Saw Pipes* was made the basis of the said judgment of the High Court.

28. In *Union of India v. M/s Phoenix Technology Corporation (P) Limited*, the facts concerned the supply of 136 systems of 2/15, 4/36 MARR UHF Range, arising out of the same tender as was involved in the present case. The Award of the arbitrator was upheld by the Single judge and an appeal was filed by the DOT. Allowing the appeal, it was held by the Division Bench of the Karnataka High Court as under:

32. Learned Arbitrator was required to examine the subsequent event after expiry of the time schedule fixed in the contract for supply of the goods. The reduction of price for supply of goods beyond the time schedule was accepted and goods were supplied to the purchaser, certainly amount to agreeing to

supply the same at the reduced price keeping in view the reduction of the custom duty in respect of one Item No. 4 in the components of equipment for supply of system to the purchaser. Therefore, the condition of revised price for supply of the system to the purchaser was accepted by the awardee. Therefore, the terms and conditions of the contract constitute that there was offer and acceptance by the parties, that would constitute add-adem consensus. Therefore, this case certainly falls within the ambit of Section 8 of the Contract Act. Non-consideration of the above important aspects of the matter certainly is in contravention of the terms and conditions of the contract as agreed upon by the parties. Further, the learned Arbitrator also was not right in not placing reliance upon Section 64A of the Sales of Goods Act and Section 13 of the said Act. Section 64A referable to the amount of increased or decreased taxes to be added or deducted in contracts of sale. In the case on hand, the Arbitral Tribunal has allowed the claim on the basis of the earlier rates agreed between the parties on the basis of tender bid of the awardee, in which the awardee did not perform his part of the contract, where time was stipulated and the time is not the essence of the contract u/s 55 of the Contract Act, but still if time is stipulated in the contract it must be adhered by the parties is the well established principle of law as laid down by the Apex Court in the case of Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., . Not taking this aspect into consideration by the learned Arbitrator at the time of passing the Award, certainly vitiates the impugned judgment and Award as learned City Civil Judge has not examined the case in this perspective. Non-consideration of the case of the department with reference to Section 8 of the Contract Act and Section 28(3) of Arbitration and Conciliation Act is certainly a violation of a public policy as provided u/s 34 of the Act, which has been interpreted by Supreme Court in ONGC case referred to supra.

29. The case was remanded to the arbitral tribunal for re-examination of the claims and counterclaims on merits. It is stated that against the aforementioned judgment an SLP has been filed in the Supreme Court and there has been stay of the proceedings on remand. However, there is no stay of the judgment of the High Court as such. For the present it would suffice to note that as regards the same tender and identical contracts there are differing views of at least two High Courts. The present case can therefore be decided on its merits without reference to any of the above decisions.

Discussion of the objections to the Award on merits

30. In the present case, clearly at every stage HFCL was conscious of the conditionality attaching to the extension of time for making delivery of the systems as undertaken by it under the PO. The learned Arbitrator erred both in law as well as on facts in holding the reason for the delay in delivery was the delay in supply of frequencies by the DOT. As noticed hereinbefore in respect of 146 units, the frequencies were furnished on 4th June 1996 and for two other systems on 28th August 1996.

31. Secondly, the learned Arbitrator does not have appear to have discussed the correspondence which showed that at every stage, HFCL was conscious that it was granted extension of time to make supplies but at a reduced price. The reliance sought to be placed on the protest letters dated 14th July and 25th July 1997 of the Telecom Equipment Manufacturers Association of India (TEMA) is not helpful to HFCL considering that it subsequently wrote to BSNL on 28th august 1997 offering a revised delivery schedule whereby the supplies were to be completed by 31st October 1997. There was no whisper of protest in the said letter about the reduced price. The same was the situation as regards the letters dated 22nd October, 4th November 1997 and 15th November 1997. What is also significant is that the last three letters were written after the DOT had communicated to all CGMs and suppliers about the finalisation of the tender opened on 17th March 1997 and the determination of the firm unit price of Rs. 5,89,338.22. BSNL granted extension of time till 15th January 1998 subject to levy of LD and subject to the supplies being made in terms of the new technical specifications. In continuation of the said letter BSNL wrote to HFCL on 12th December 1997 intimating that the supply would be made at the unit rate of Rs. 5,89,338.22. The above correspondence unmistakably shows that the original contract conditions stood modified by consent of parties and the clauses concerning time and price stood amended and were accepted without protest by HFCL. The learned Arbitrator completely overlooked the legal position flowing from Section 62 of the Contract Act and the law explained in Bhagwati Prasad Pawan Kumar v. Union of India. The impugned Award erroneously holds that the principles of novation were not attracted in the instant case. The learned Arbitrator committed a patent illegality in not even discussing the above correspondence and therefore erred in concluding that BSNL had acted arbitrarily in terminating the contract. The facts unmistakably show that it was HFCL which was in breach of the conditions of the contract and failed to deliver the contracted quantities within the time stipulated despite extensions granted for that purpose.

32. Thirdly, the conclusions of the learned Arbitrator that the act of BSNL in reducing the prices "unilaterally" was "clearly unjustified and an untenable act", "an inequitable conduct" and a case of "economic coercion" was without any basis whatsoever either in fact or in law. It is settled law that in the realm of contract, and particularly in the context of arbitration proceedings to determine if there was a breach of contract, there is no room for application of the principles of reasonableness and non-arbitrariness flowing from Article 14 of the Constitution. Where a party accepts a conditional of extension of time for completing supplies, such party cannot be heard to later plead arbitrariness or "economic coercion". This was explained by the Supreme Court in Assistant Excise Commissioner and Others Vs. Issac Peter and Others,

26. Learned Counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting

under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication?.... Doctrine of fairness or they duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties..... We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contract (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts.

33. Reliance is placed by learned Senior counsel for HFCL on the decision in M.P. Housing Board Vs. Progressive Writers and Publishers, to urge that the view taken by the learned Arbitrator was a plausible one and therefore this Court should not interfere. For the reasons explained, this Court is of the view that in the instant case, the impugned award suffers from a patent illegality and cannot be sustained in law. For the aforementioned reasons, the impugned Award dated 1st June 2006 of the learned Arbitrator is set aside. The petition is allowed with costs of Rs. 10,000 which will be paid by HFCL to BSNL within four weeks.