

(2015) 03 DEL CK 0110

In the Delhi High Court

Case No : OMP 169/2013

Canara Bank

APPELLANT

Vs

Bharat Sanchar Nigam Ltd. and Others

RESPONDENT

Date of Decision : 26-03-2015

Acts Referred:

Citation : (2015) 4 AD 312 : (2015) 3 ARBLR 408 : (2015) 218 DLT 715

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Pradeep Dewan, Senior Advocate and Anupam Dhingra, for the Appellant; Chandan Kumar and Shankar Kumar Jha, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Dr. S. Muralidhar, J.—The Petitioner Canara Bank challenges an Award dated 22nd November 2012 passed by the sole Arbitrator in the disputes between it and Bharat Sanchar Nigam Ltd. ("BSNL"), Respondent No. 1. Renewable Energy Systems Ltd. ("RESL"), Respondent No. 2 was also party to the arbitration proceedings as co-claimant.

Background facts

2. The background to the present petition is that Canara Bank financed the manufacture of 9070 Solar Power Generating Systems ("SPGS") by RESL and supplied to BSNL in terms of a tripartite Master Lease Agreement ("MLA") dated 19th February 1998.

3. Under the MLA, the SPGS on being manufactured by RESL were in the first instance to be sold to Canara Bank at the agreed rate of Rs.21,200 per unit and then given on lease to BSNL for a fixed period of five years in terms of the conditions stipulated in the MLA. The SGPSs were to be installed by RESL at different stations, after the destination details were provided by BSNL.

4. Canara Bank states that it disbursed to RESL Rs.11,99,70,534.19 to meet the costs of manufacturing of the SPGS. According to Canara Bank pursuant to the MLA, only 1000 units of value of Rs.2.12 crores were commissioned. The destination details of remaining 8070 SPGS were not provided by BSNL.

5. A supplementary agreement dated 19th April 2000 was executed between the parties in respect of the 1000 units that had been commissioned. This agreement recorded the amount of the quarterly lease rental ("QLR"), the date of commencement of QLR and other charges payable by BSNL to Canara Bank. It is stated that the obligation under the contract for installation of the remaining 8070 SPGS could not be completed on account of the breach committed by BSNL by not giving the destination details. According to Canara Bank, it was thus deprived of the lease rental for the entire quantity of 9070 units besides lease management fee and additional fee of QLR for each completed month of delay in respect of the remaining 8070 units. In respect of the 1000 units that had been installed, the lease management fee was not paid to Canara Bank. RESL took the stand that BSNL had committed a default by refusing to accept the delivery of 8070 units. Canara Bank's case was that RESL also failed to repay the outstanding amount to Canara Bank.

6. RESL invoked the arbitration clause and Mr. H.P. Mishra, DDG (TRF), BSNL was nominated by BSNL as the sole Arbitrator. RESL filed its claim before the sole Arbitrator for recovery of loss of profit, for damages etc. against BSNL for breach of contract. Canara Bank also filed its claims against BSNL towards the QLR in respect of the 1000 installed units and loss of profit on account of non-installation of balance 8070 units. It also had claims against the RESL. The defence of BSNL was that due to the inordinate delay on the part of RESL, the performance of the MLA became impracticable.

The first Award

7. In the Award dated 24th February 2004 (hereafter "first Award"), the sole Arbitrator framed as many as 34 issues arising from the pleadings filed by the parties. The learned Arbitrator (hereafter "first Arbitrator") held BSNL guilty of breach of contract both as regards demand of the lease money for the 1000 SPGS installed as well as for the balance 8070 units which could not be sold by RESL to Canara Bank and in turn could not be given to BSNL on lease by Canara Bank. However, the learned Arbitrator held that the precise liability of BSNL could not be determined "unless the parties offer satisfactory proof of the losses reportedly suffered by them that are directly attributable to the said (in) action on the part of the Respondent DOT/BSNL."

8. The sole Arbitrator in partly answering Issue No. 27, in para 6 of the conclusion observed as under:

"6. I am therefore of the view that the Claimant-CB has to be compensated for the losses, etc. suffered by it on account of the breach of contract on the part of the Respondent-DOT/BSNL. Such compensation cannot be withheld on the

ground that the Agreement had not provided for it, or that the Agreement had provided for paying only lease rentals to the Bank as a Lessor. This answers a part of Issue 27." 9. As regards the claims of RESL for compensation, the first Arbitrator observed in para 31 of the first Award as under:

"31. I end this part of the discussion by concluding that the relief sought by RESL at 9 (a) and 9(b) above cannot be determined with the available information. I also propose that the matter may be investigated in detail by an expert committee comprising of a nominee each of RESL, CB, BSNL and an independent body like the Institute of Chartered Works Accountants of India, and in case the said expert committee after examining various evidence (including records of the Lessor Canara Bank) concludes that a certain number of sets of SPGS equipments and VRLA batteries (other than the 1000 already delivered) were actually ready (manufactured and procured by RESL) and only waiting for destination details for inspection and dispatch as on 31.7.98, the liability of the Respondent- DOT/BSNL towards RESL can be determined as indicated in paragraphs 24 and 29 above, with due consideration of the contents of paragraph 20 above as well." 10. As a result, no compensation was actually determined to be paid to either Canara Bank or RESL despite the first Arbitrator holding BSNL liable for the breach of contract.

Proceedings in this Court

11. Canara Bank filed OMP No. 184 of 2004 and BSNL filed OMP No. 174 of 2004 under Section 34 of the Act challenging the first Award dated 24th February 2004.

12. In a judgment dated 6th July 2009 disposing of both petitions this Court came to the following conclusions:

(i) The offer made during the sitting of the Arbitrator at Hyderabad by both RESL and Canara Bank for inspection of 8070 units leads "one to believe that RESL was in a position to give inspection of balance units". The law does not require the goods to be supplied to be kept in readiness. All that is required is that the party claiming possession on account of the breach ought to prove that in the absence of the breach it was ready to perform its part of the agreement so as to be entitled to a claim for loss and profit." These aspects had not been gone into by the first Arbitrator who intended a further enquiry in that respect. The first Award to that extent was held to be against law and public policy.

(ii) The judgment of the Division Bench of the Delhi High Court in National Highways Authority of India Vs. ITD Cementation India Ltd., contemplated a situation where after setting aside the Award the matter could be remitted to the Arbitrator adjudicating on the issue of quantification giving the parties an opportunity to adduce additional evidence. In the present case, it could not be said that no losses have been suffered by RESL or Canara Bank.

(iii) The objections of BSNL to the first Award were not sustainable. OMP No. 174 of 2004 was accordingly dismissed.

(iv) OMP No. 184 of 2004 of Canara Bank insofar as it sought remission of the matter to the Arbitrator was allowed.

(v) The contention of BSNL that the finding of the first Arbitrator that RESL had not manufactured the balance 8070 units had become final since RESL had not challenged the first Award, had no merit. The said finding of the first Arbitrator was inconsistent with the other findings of the first Award. The question of compensation had to be determined "irrespective of whether 8070 units were lying for delivery or not."

(vi) The claims of Canara Bank against RESL were not arbitrable. Therefore the first Arbitrator was justified in holding that the inter se disputes between Canara Bank and RESL could not be examined.

(vii) The claim of Canara Bank against BSNL could not be limited to the extent of actual number of equipments manufactured and kept ready. "If bank/RESL by evidence or otherwise are able to establish before the Arbitrator that but for the breach by the BSNL they were able to perform their part of agreement, the Bank and RESL were entitled to compensation for breach as also held by the Arbitrator".

(viii) The finding of the Arbitrator as regards the amount due towards 1000 units of the equipment was factual as was the finding that the Canara Bank was at fault in complying with the formalities for release of the payments with respect to 1000 units. Both findings did not call for any interference.

(ix) In the event that the first Arbitrator was unavailable for arbitration, then the arbitration would be held by the present incumbent in office. To the above extent, the first Award was set aside and remitted to the Arbitrator. In consonance with the law laid down by the Division Bench in ITD Cementation "the parties shall be entitled to adduce further evidence on the quantum to be determined by the Arbitrator".

Second round of arbitration

13. Mr. Rajeev Singh, (hereafter "second Arbitrator") a BSNL employee and the incumbent in office when the above order was passed by this Court, entered upon the reference in the second round of arbitration.

14. The following further evidence was filed by the parties before the second Arbitrator. On 1st November 2011, Mr. P.V.P. Sastry, the Accounts Officer of RESL filed an affidavit to bring on record the hypothecation agreement dated 4th March 1998 entered into between Canara Bank and RESL, a copy of which was annexed with the affidavit. During the arbitral hearing on 12th January 2012, in response to a query raised by the second Arbitrator, RESL informed that the equipments got burnt in a fire accident that took place in 2006. In response to a further query whether such equipments were insured and a claim had been filed with the insurance company, RESL sought time to confirm.

15. An affidavit was filed by BSNL on 13th December 2011 pointing out that proof of loss suffered by Canara Bank was essential. No document had been placed on record to show that the pre-conditions for disbursement of the loan, as set out in the hypothecation agreement have been complied. It was contended that even the law did not require actual proof of equipments manufactured and kept ready to be proved. There was "absolutely no evidence to produce purchase of raw material".

16. BSNL filed an additional affidavit on 18th January 2012 contending that if RESL in fact had claimed any loss from insurers it should divulge the particulars. Accordingly the "story of fire consuming the equipment was strongly denied by BSNL". Accordingly, BSNL urged that the claims be rejected.

17. On 28th January 2012 Mr. P.V.P. Sastry filed another affidavit stating that "the 8070 SPG systems manufactured by RESL and kept ready pending furnishing of destination details by BSNL were kept insured till the month of September 2005". The affidavit further stated that at the time of fire in the godown where the said SPG systems were stored, i.e., in July 2006, the insurance policy had lapsed. Consequently, "neither was any insurance claim made nor any amount received towards insurance in respect of the said 8070 SPG systems".

18. Mr. P.C.M. Rao, a Director of RESL filed an affidavit on 20th April 2012, enclosing copy of the insurance policy for the period 31st August 2005 to 29th September 2005 which showed that the goods were insured for a value of Rs.7.25 crores, which was the insurable value of the goods at the concerned point of time. Further the name of Canara Bank, Leasing Division, Bashirbagh was also indicated in the said policy as financier of the goods insured. Another affidavit was filed by Mr. Rao on the same day i.e., 20th April 2012.

The second Award

19. On 22nd November 2012, the second Arbitrator passed a three page Award. After summarizing what had transpired prior to the reference, the second Arbitrator summarized the important facts that emerged. He concluded that "The Bank also kept itself sufficiently covered for any losses which it could suffer due to its financing agreement with the RESL". Referring to Issue No. 4 of first arbitral Award which posed the question whether there was any proof of production and availability of stock, the second Arbitrator concluded "In the absence of such conclusion about the manufactured items it cannot be said that bank was able to perform its part of the agreement but for breach of agreement by BSNL". In the second Award it was further concluded that Canara Bank never became the owner of the equipments. Noting that RESL had produced a copy of the insurance policy which was "issued in their name only" and after noting that when the instruments in possession of RESL got burnt at a time when there was no insurance cover, the second Arbitrator concluded " The bank could not take possession of the equipment, which it could have taken as mentioned in the

hypothecation agreement of goods entered between Bank and RESL".

20. The operative portion of the second Award reads as under:

"In view of the facts of the case, as narrated above, and based on objective assessment of the information and arguments presented to me, I pronounce the arbitration award on 22nd November, 2012 as under:-

No new evidence to substantiate the claim was given by the claimant parties. The bank has failed to establish that it was able to fulfill its part of the contract. In view of this, the claim of RESL and Canara Bank against BSNL is not established, and hence rejected. The cost of stamp paper shall be borne by BSNL".

Submissions of counsel for Canara Bank

21. Mr. Pradeep Dewan, learned senior counsel appearing for Canara Bank, first submitted that the second Arbitrator had completely misconstrued the scope of the reference as far as the second round of arbitration proceedings was concerned. It was submitted in the first place that the second Arbitrator misread the MLA which contained the complete mechanism under which RESL was to obtain a credit facility from Canara Bank in order to procure the material for supplying to BSNL the requisite 9070 SPGS. Having obtained the credit facility RESL was to manufacture the SPGS and install the same as per the destination details given by the BSNL. Prior to the installation the SPGS systems were to be sold to Canara Bank which in turn would give them on lease to BSNL against payment of QLR in terms of the MLA. The BSNL undertook in terms of Clause 33.2 (ii) to pay to Canara Bank the QLR. Mr. Dewan pointed out that Canara Bank was essentially a banking institution and by agreeing to be a party to the MLA it assumed the dual character of lessor-cum-financier only because of the unconditional liability of BSNL to pay the QLR to Canara Bank.

22. Mr. Dewan pointed out that the finding in the first Award, as confirmed by the Court, that BSNL had committed breach of its obligations under the contract, and was liable to compensate the Canara Bank for the losses suffered by it had attained finality. The only issue for which the matter was remanded to the Arbitrator for the second round of arbitration was the determination of such losses. Despite this Court stressing that there was no need for Canara Bank and RESL to show that it had kept ready 8070 units for installation, the second Arbitrator again misdirected himself by examining the issue whether the 8070 units were actually ready for delivery and whether in fact the material for manufacture of such units was available.

23. Mr. Dewan further submitted that the learned Arbitrator erred in examining the question whether Canara Bank had made efforts to take possession of 8070 units when that was not even the requirement of the MLA.

24. Mr. Dewan pointed out that there was sufficient evidence already on record to show that Canara Bank disbursed the monies in favour of RESL. The statement of

account (disbursement) together with corresponding debit vouchers of Canara Bank were already on record. These were not even challenged by BSNL. In fact in its reply to the statement of claim, BSNL had not even disputed that Canara Bank had disbursed more than Rs.11.99 crores to RESL to manufacture 9070 units of SPGS. In fact the lease rentals in respect of the 1000 units that had already been installed amounting to Rs.260.06 lakhs which was earlier withheld by BSNL was paid by it to Canara Bank in Court in the first round.

25. In the second round of arbitration further documents were placed on record. In particular a copy of the insurance policy which showed that the goods worth Rs.7.25 crores were hypothecated to Canara Bank and yet the learned Arbitrator erroneously concluded that "No new evidence to substantiate the claim was given by the claimant parties". Mr. Dewan submitted that the loss suffered by the Petitioner could be determined by mere mathematical calculations by taking into account the 8070 units since not delivered, the lease management fee, interest for the delayed payment, penalty etc. as provided in the MLA. There was sufficient evidence to show that both Canara Bank and RESL were ready to perform their part of the contract and that but for the breach by BSNL, Canara Bank and RESL would have been able to perform their respective obligations under the contract.

26. Mr. Dewan placed reliance on the decision in *North Eastern Railway Vs. Tripple Engineering Works*, to urge that this Court should again send the matter for a third round and this time to an independent arbitrator since on two occasions the Arbitrators who were the employees of BSNL had miserably failed to consider the evidence on record and adopted an injudicious approach in the matter. He also placed reliance on the decisions in *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, , *Union of India (UOI) Vs. Modern Laminators Ltd.*, , and *Gayatri Balaswamy Vs. ISG Novasoft Technologies Ltd.*, .

27. On the aspect of the principle of mitigation of loss, Mr. Dewan referred to the decision in *M. Lachia Setty and Sons Ltd. Vs. Coffee Board, Bangalore*, where it was held, in terms of para 1194 at page 478 of Halsbury's Laws of England (4th Edn.), Volume 12, that in cases of breach of contract "the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the defendant". It was further urged in *M. Lachia Setty* that in contract cases as well as generally "there is no duty to minimize damages, because no one has a right of action against the non- defaulting party if he does not reasonably avoid certain consequences arising from the default. Such a failure does not make the non-defaulting party liable to suit; it only indicates that the damages actually suffered are greater than the law will compensate. Therefore in contract actions, the doctrine of avoidable consequences is only a statement about how damages will be measured". He

also placed reliance in *Dwaraka Das Vs. State of Madhya Pradesh and Another*, in which it was held "when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement". Lastly, reliance was placed on *M/s. B.P.L. Ltd. Vs. State of A.P.*.

Submissions of counsel for BSNL

28. In reply to the above submissions, Mr. Chandan Kumar, learned counsel appearing for BSNL first submitted that despite repeated opportunities no material was placed on record either by Canara Bank or RESL to show that they were ready to perform their obligations under the contract but for the breach by BSNL they in fact had been in opposition to install the balance 8070 SPGS. BSNL had specifically denied the documents placed on record by RESL. The financial arrangement was not dealt with by the MLA. It was independently entered into between the Canara Bank and RESL by way of an indemnity agreement dated 27th February 1998 and the hypothecation agreement dated 4th March 1998.

29. Mr. Chandan Kumar submitted that even in the additional affidavit filed by the BSNL and RESL there was nothing to indicate that Canara Bank had in fact disbursed any amount to RESL. No document was produced to show whether any claim was lodged with the insurance company due to the alleged fire. It was denied that any goods for inspection were made available as alleged. According to Mr. Chandan Kumar, the evidence placed on record was wholly insufficient for the Arbitrator to make any determination as to the compensation payable to the Petitioner. Reference was made to the decision in *A.T. Brij Paul Singh and Others Vs. State of Gujarat*.

30. Mr. Chandan Kumar emphasized that it was absolutely essential for the contractor to prove losses. He also referred to the decision in *State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd.*, and submitted that unless Canara Bank was able to produce evidence to prove the loss suffered by it, no amount could have been awarded by the learned Arbitrator. He also referred to the decisions in *All India Radio Vs. Unibros and Another*--> and *M/s. Shah Jagshi Jethabhai, 549, Meru Towers-A, Jame Jamshed Road, Matunga (C.R.), Mumbai - 400019 Vs. J.N. Construction, 701, Horizon View, 1/A, Raheja Complex, Seven Bungalows, Versova, Mumbai - 400061*, Some injury must be shown to have been caused even if the actual proof of losses may not be necessary. In support of his submission, he referred to the decision in *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*,. He also referred to the decision in *Sudarsan Trading Co. Vs. Government of Kerala and Another*, to urge that "reasonableness of the reasons given by the arbitrator, cannot be challenged". Further where "a specific question is referred, the award is not liable to be set aside on the ground of an error on the face of the award even if the answer to the question involves an erroneous decision on a point of law".

31. Mr. Chandan Kumar maintained that the learned Arbitrator had delivered a

perfect Award which did not call for any interference by this Court in exercise of its power under Section 34 of the Act.

32. Both learned counsel for the parties took the Court through the first Award dated 24th February 2004 and the materials placed on record to appreciate the scope of reference before the second Arbitrator.

33. The Court was informed by learned counsel for RESL that RESL received the money due to it and therefore did not wish to make submissions. He stated that he was making submissions as an officer of the Court. He too referred to the specific portions of the first Award and the order of this Court in the petitions challenging the first Award.

Analysis and Reasons

34. At the outset it is important for the Court to first discuss certain aspects of the first Award which were not interfered with by the Court when it gave its judgment in OMP No. 184 of 2004.

35. The first Award in para 3.91 sets out the details in an affidavit filed by the Canara Bank under Section 17 of the Act. In para 5 of the said application, it was averred that Canara Bank "had provided the requisite finance to RES to manufacture the requisite 9070 units of SPGS but BSNL failed/avoided and neglected to notify RES about the destinations where equipment was to be installed or to receive the balance quantity of 8070 units of SPGS". Accordingly, Canara Bank in the application contended that the balance equipment was lying with RESL "as a dead stock as the same having been manufactured to meet the specific requirements of BSNL cannot be put to any use nor any alternative buyer can be found therefor". In part 8 of the application it was stated that as per the RESL "8070 pcs. of SPGS are lying idle at its factory/warehouse at Hyderabad. The said goods may get perished with the passage of time and in any event would day-by-day lose their value". It was pointed out that Canara Bank had a lien over those goods and that it would be in the interest of justice that "interim measures be taken in relation to the subject matter of arbitration" and for the said purpose a receiver be appointed. Further, it was prayed that the Receiver make an inventory of 8070 pieces of SPGS, and take them into protective custody.

36. The first Award in para 3.92 also set out the reply to the said application by BSNL. Quoting Clause 12.2 (a) and 12.2 (b) of the MLA, BSNL stated that it would make payment of the QLR only upon the submission of documents including irrevocable authority from the supplier for payment to the lessor. According to BSNL, the MLA nowhere deals with the issue of manufacture or finance and therefore that question was beyond the jurisdiction of the Arbitral Tribunal ("AT") to adjudicate. It was denied that BSNL had refused to receive 8070 SPGS. BSNL specifically contended that the AT should not pass any order on Canara Bank's application as Canara Bank was free to take possession of the goods and in passing such an order the Arbitrator, will only legitimize all

transactions which are beyond the jurisdiction of the Arbitrator; and secondly those which have not seen the light of the day. In other words, the BSNL resisted the application filed by Canara Bank under Section 17 of the Act.

37. The first Award, however, failed to decide the said application. For some reason, the first Arbitrator did not consider it appropriate to deal with the application, as and when it was filed. Even when dealing with Issue No. 7 on "RESL was actually ready and willing to perform its part of MLA up to 22.5.2001 when TEC issued the Order" the first Arbitrator concluded that after going through the evidence he did not find anything contrary to the assertion of RESL that it was ready to perform its part of the agreement after 22nd May 2001 when the TEC issued the impugned order withdrawing the specifications for the equipment under the agreement. He also returned the finding "RESL was by and large ready to perform its obligations under the MLA, though the precise extent of its readiness cannot be determined for want of evidence".

38. In the judgment passed by this Court on 6th July 2009, it was noted in para 12 that during the sitting of the Arbitrator at Hyderabad both RESL and Canara Bank had offered inspection of the remaining 8070 units and the BSNL opposed the said request. The Court concluded "The said offer lends one to believe that RESL was in a position to give inspection of balance units".

39. Consequently, the Court further concluded that in any event the law did not require "the goods required to be supplied to be kept in readiness". The Court was categorical that from the findings of the Arbitrator to which there was no challenge "it cannot be said that the present is a case of no losses having been suffered by RESL/Bank".

40. What flows from the above discussion of the findings of this Court is that

(i) it was unnecessary to examine the question whether 8070 units of SPGS were in fact kept ready for dispatch/installation. That finding of this Court in its order dated 6th July 2009 attained finality with there being no challenge to that order;

(ii) that BSNL was in breach of contract, was found by the learned first Arbitrator in the first Award and that was upheld by the Court in the order dated 6th July 2009. The challenge by the BSNL to the Award was rejected with the Court dismissing the OMP No. 174 of 2004 filed by the BSNL;

(iii) the Court was clear that "the question of determination of compensation is to be determined irrespective of whether 8070 units were lying ready for delivery or not". The Court was also clear about what the scope of the second reference was. It was for determination of the compensation payable to Canara Bank. It was observed "if Bank/RESL by evidence or otherwise are able to establish before the arbitrator that but for the breach by BSNL they were in a position to perform their part of the agreement, Bank/RESL would be entitled to compensation for breach".

41. Therefore, only to the extent that in the first Award the first Arbitrator had

declined to decide the above issue and instead referred the matter to an expert committee the Court set aside the first Award. Otherwise the Court was categorical in upholding the finding in the first Award that BSNL was in breach of the contract.

42. In the light of the above, the Court finds it strange that in the second Award the Arbitrator has again commented on whether Canara Bank ought to have produced the materials "proof of production and availability in stock".

43. The first Arbitrator had declined to answer Issue No. 4 on proof of production because it was held indeterminable as per the information on hand. However, while answering Issue Nos. 27 to 30, the first Arbitrator noted in para 22 as under:

"22. As the revenue stream that CB was entitled to received over a period of five years included elements of both costs and profit, to determine the Lessee-DOT/BSNL's liability it is first necessary to ascertain whether CB was willing and ready to perform its part of the contractual obligation under the MLA. Fortunately, except for the question of quantities and amounts, this is easily answered in the affirmative because the documents show that the Bank has, rather than restricting its role as a financier strictly within the parameters of the MLA, gone well ahead and financed even the manufacture of the equipment by sanctioning Advances and Letters of Credit, etc., and there is nothing on record to prove that the Claimant CB was not willing and able to perform the role intended for it in the MLA. The next part is to ascertain the profit that CB would have made in the normal course of things, had DOT/BSNL actually furnished these details well in time. This obviously depends upon the performance, up to 31.07.98, of the third key player-the Claimant RESL-who was being "lease"-financed by CB for this lease order." 44. As already noticed hereinabove, the first Arbitrator also concluded, as regards RESL's readiness to perform its part of the obligation, while answering Issue No. 7 as under:

"To conclude, after going through the evidence presented to me in this regard, I do not find anything contrary to the assertion of RESL that it was willing to perform its part of the Agreement up to 22.5.01, when the TEC issued the impugned order withdrawing the specifications for the equipment under the Agreement. I also find that RESL was by and large ready to perform its obligations under the MLA, though the precise extent of its readiness cannot be determined for want of evidence". 45. The second Arbitrator failed to appreciate that both the above findings were not interfered with by this Court in its judgment dated 6th July 2009.

46. Apart from the above, as rightly pointed out by Mr. Dewan, the evidence already on record and that filed after remand were overlooked by the second Arbitrator. This included the statement of account of RESL and debit vouchers drawn on Canara Bank to show the disbursement of finance to RESL. Importantly, the second Arbitrator did not refer to the endorsement in the

insurance policy that the value of the goods insured was Rs. 7.25 crores and further the noting therein that the said goods stood hypothecated to Canara Bank.

47. The second Arbitrator also overlooked the fact that the affidavits were filed by RESL and Canara Bank which have been referred to above to the effect that at the time when the fire took place the goods were not insured since the insurance policy had lapsed by then. Consequently, there was no question of making any claim under that policy. It is, therefore, pointless for the BSNL to now contend that there should have been a claim made to the insurance company. He was plainly in error in simply observing that no new evidence to substantiate the claim was given by the parties.

48. The Court is accordingly of the view that the second Award suffers from serious errors reflecting a lack of judicious approach and a failure by the second Arbitrator to deal with the evidence before him. The second Award has to be termed as perverse, irrational and contrary to the public policy of India.

49. As pointed out by Mr. Dewan, with this Court having observed that it could not be said that no losses were suffered by Canara Bank and that the compensation payable to it had to be determined, by failing to do so, the second Arbitrator acted contrary even to the order passed by the Court. With the number of units being known and the QLR being known, it was indeed not a complicated matter. The Court, therefore, sets aside the impugned second Award dated 22nd November 2012.

Consequential directions

50. The question now arises, what should the Court do next? This Court is conscious of the view taken by this Court in *Union of India v. Modern Laminators Ltd.* (supra) and recently by the Madras High Court in *Gayatri Balaswamy* (supra) that the Court, under Section 34 of the Act, has power to modify or vary an Award or even remand the matter for a fresh determination. As far as the present case is concerned, the Court already having exercised its power once to remand the matter to another Arbitrator, and with that order of the Court not having been complied with, it is but inevitable that the matter should again be referred to another Arbitrator so that the entire effort is not set at naught.

51. However, given that on two occasions the Arbitrators appointed by BSNL have been unable to perform their tasks in accordance with law, the Court is not inclined to require the third round of adjudication for the limited purpose as mentioned hereinbefore to take place before another BSNL nominee. Consequently, this Court appoints Mr. Lal Singh, a former Additional District Judge, residing at MM-24, DLF Ankur Vihar, Loni Ghaziabad, U.P.-201102 (Mobile No. 9910384617) as sole Arbitrator to determine the specific issue as to the compensation and consequential interest and costs which Canara Bank is entitled to on account of the breach of contract by BSNL. The learned Arbitrator will determine the said issue question on the basis of the existing material. The

learned Arbitrator will call upon both the parties to make their submissions both oral and in writing on the issue and endeavor to deliver an Award within a period of six months from the date he enters upon the reference pursuant to this order. The arbitration will take place under the aegis of the Delhi International Arbitration Centre ("DAC"). The fees of the learned Arbitrator will be in terms of the Delhi Arbitration Centre (Arbitrator's Fees) Rules. The Registry is directed to send, within four weeks, the entire arbitral record to the DAC.

52. The petition is disposed of with the above terms with costs of Rs.20,000 which shall be paid to Canara Bank by BSNL within four weeks.