

(2014) 11 DEL CK 0013
In the Delhi High Court
Case No : OMP No. 492/2013

Mahanagar Telephone Nigam Limited	APPELLANT
Vs	
Fujitsu India Private Limited	RESPONDENT

Date of Decision : 25-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 28(3), 31(7)(a), 34, 34(2)(b)(i), 34(2)(b)(ii)

Citation : (2014) 11 DEL CK 0013

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Sukumar Pattjoshi, Sr. Advocate, Vivek Malik and S. Dubey, Advocate for the Appellant; Sandeep Sethi, Sr. Advocate, Pradeep Nayak, Khalid Arshad, Abhishek Bansal and Ishwer Upneja, Advocate for the Respondent

Judgement

Rajiv Shakdher, J.—The challenge by way of the present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) is to the award dated 17.12.2002.

1.1. Before I proceed further, it may be relevant to note, at the very outset that the disputes between the parties, essentially, revolved around a settlement dated 13.4.2006, entered into between the parties. While, the petitioner herein, is aggrieved by the fact that no amounts were payable to the respondents, apart from that which was already paid; the respondents (i.e. the original claimants) in their claims lodged before the learned arbitrator had inter alia sought release of the amounts not paid and/or short paid, consequential reliefs in the form of interest, costs and expenses incurred, as also, for release of performance bank guarantees, which were furnished and were alive even while the matter was pending consideration of the learned Arbitrator.

1.2. The petitioner apart from defending the claims lodged by the respondents herein, also filed counter claims for refund of amounts already paid along with interest at the rate of 18%; recovery of amount of Rs. 114,99,57,440/-

expended towards migration to a new technology along with interest; and recovery of an amount of Rs. 100 crores on account of loss of goodwill, reputation, business opportunity and loss of subscriber base due to poor service rendered on account of defective equipment/systems allegedly supplied by the respondents herein. Like other claims this amount was also sought recovery of with interest at the rate of 18%.

1.3. In every case though, interest was sought for till the date of realisation.

Preface

2. In order to appreciate the arguments advanced on behalf of the parties herein, it may be relevant to broadly note the contours of the facts arising in the present case. For the sake convenience, I will be referring to the petitioner as MTNL, and respondent No. 1, which is, Fujitsu India Private Limited as FIPL. Fujitsu Limited, which is arrayed as respondent no. 2, will be referred to as FL. Collectively, they shall be referred to as, Fujitsu Group.

2.1. On 30.6.1998, MTNL, evidently issued Notice Inviting Tender (NIT). The NIT, required the bidders to supply CDMA IS95A WLL technology, on a turnkey basis. Initial requirement was that the technology supplied would cater to 50,000 subscribers in Mumbai with capacity for enhancement to 1,00,000 subscribers, in year two, and with further expansion to 1,50,000 subscribers in year three.

2.2. FIPL and FL claim that they made a joint bid on 12.10.1998. According to FIPL, it was shown in the bid as the lead partner. While, MTNL does not dispute that FIPL was the lead partner, it did take a stand with regards to its lack of privity of contract with FL, and hence, an objection to its participation as a party in the arbitration proceedings. This, of course, lost its significance, as noted by the learned arbitrator in the impugned award, as he had not only decided the matter on merits but had also noted that the equipment imported for the purposes of the project in issue, was supplied by FL, in respect of which, partial payments had been made by MTNL.

2.3. Since, FIPL was a successful bidder, a LOI dated 1.6.1999 was issued in its favour for 50,000 lines expandable over a period of three years.

2.4. In consonance with the above, on 2.7.1999, a purchase order was placed by MTNL upon FIPL qua 50,000 lines. As indicated above, the project was awarded on a turnkey basis which, broadly, meant that the successful bidder was required to survey, design, and thereafter, supply the equipment, install, test commission, and finally, make over the system to MTNL. The contract, also envisaged, training and provision of Annual Maintenance Service (AMS). The total value of this purchase order (hereinafter referred to as PO-I) was Rs. 77,23,16,681/-.

2.5. To be noted, the imported equipment which were supplied by FL was required to be paid in US dollars.

2.6. The PO-I, also made reference to AMS, which had to be provided to MTNL,

for the first year at a consolidated price of Rs. 5,92,00,000/-.

2.7. Insofar as the customs duty is concerned, it was to be reimbursed to the FIPL on the basis of the actual amounts expended. The obligation to clear the goods was, however, placed on the FIPL.

2.8. FIPL, furnished a bank guarantee, in terms of the contract, on 26.6.1999.

2.9. Between 12.10.2010 and 17.4.2001, amendments were carried on in PO-I. The final value of PO-I was pegged at Rs. 90,19,91,960/-; this included a foreign currency component of USD 98,37,478. The said amount was to be paid in U.S. dollars. On account of this amendment, the Performance Bank Guarantee amount was enhanced to Rs. 9,04,50,041 (in short PBG-I), on 7.2.2001.

3. On 9.8.2001, the main equipment which was to be imported from Japan was supplied by FL. The consignments were cleared by FIPL after payment of the requisite customs duty. Upon supplies being made, FIPL wrote to MTNL, for release of balance payments for imported items.

3.1. It is at this stage that MTNL, noticed that there was some interference in the network due to overlapping of CDMA with GSM frequencies of another mobile/cellular service provider i.e. Hutchison Max. This required installation of filters for suppressing interference caused due to overlapping frequencies.

3.2. MTNL, in this behalf had taken up the issue with the Wireless Planning and Coordination Wing (in short WPC) of the Ministry of Communication.

3.3. Consequent thereto, not only did WPC issue a circular dated 25.9.2001 and a letter dated 5.10.2001 whereby, it directed all cellular operators to install suitable filters to block interference experienced due to overlapping frequencies but it also, appears to have, propelled MTNL to place a second purchase order, on 16.11.2001, for supply of interference suppression filters (in short killer filters).

3.4. As in case of PO-I, main equipment was supplied by FL and, the payment, towards imported equipment was required to be made in US dollars. PO-II also provided that MTNL would take AMS for the first year and, the charges for the same were included in PO-I.

3.5. Customs duty was to be reimbursed on the basis of actual expenses incurred in that behalf. In respect of PO-II, a performance guarantee in the sum of Rs. 20,32,997/- (in short PBG-II), was issued.

3.6. By 31.12.2001 technical commissioning of network to be supplied by FIPL, was completed. Accordingly, MTNL, admittedly, inaugurated the same on that date.

3.7. As a matter of fact on 2.1.2002, MTNL issued a congratulatory letter to FIPL for ensuring a successful commission of the project. The network was put to commercial use by MTNL, on 26.1.2002.

3.8. For provisioning AMS, FIPL set up a project office, in Mumbai and, as a

matter of fact, the services were apparently provided even after completion of the first year of the installation of the network by FIPL.

3.9. According to FIPL even though the contract had been executed successfully, MTNL refused to issue a Take Over Certificate (in short TOC). This resulted in consequent withholding of balance payment by MTNL, as well. In this respect, FIPL wrote letters dated 20.3.2002 and 4.4.2002, to MTNL.

4. Crucially, in the meanwhile, it appears, that due to evolution of technology, MTNL, in order to catch up with its competitor in the private sector, issued a fresh NIT for a new system, on 18.9.2002. This new system was based on CDMA WLL 2000 1x technology. The new system was to be installed in Mumbai and Delhi, each having a capacity of 4 lakh lines.

4.1. Insofar as the network installed by FIPL was concerned (which from hereon would be referred to as Phase-I, as it dealt with 50,000 lines), Acceptance Testing (in short AT) was completed, on 10.10.2002. A joint AT report was furnished by MTNL along with a letter dated 22.10.2000.

4.2. Despite the aforesaid circumstances obtaining, MTNL refused to issue a TOC and release balance payments to Fujitsu. The two bank guarantees which were furnished were also not discharged, while FIPL continued to provide maintenance support. Though, the parties herein had their points of differences, they evidently moved forward, inasmuch as MTNL, issued, on 30.10.2002, a fresh letter of intent for expansion of its network from 50,000 to 1,42,230 lines. In other words, MTNL was desirous of putting in place additional, 92,230 lines by placing its faith in the existing contractor, i.e. the Fujitsu Group.

4.3. At this juncture, it would have to be borne in mind, as indicated above, that six weeks prior to issuance of this LOI, MTNL had issued a NIT for inviting bids for new technology it sought to introduce. Prima facie this was indicative of the fact that the two events were not interlinked.

4.4. Be that as it may, on 13.12.2002 MTNL issued a third purchase order (in short PO-III), for expansion of its network by 92,230 lines. FIPL, on its part had furnished a performance bank guarantee (in short PBG-III), in the sum of Rs. 8,70,47,141/-. This was the second phase of the project and, as such, would be referred to as Phase-II.

4.5. As in phase-I, the main equipment was to be supplied by FL and payment qua the same was required to be made in U.S. dollars. PO-III, also provided that MTNL would take AMS for the first year and the charges for the same, which were crystalized as Rs. 1,85,32,000/-, were included in the price of the said PO. Customs duty was required to be reimbursed on the basis of actual expenses incurred in that behalf.

4.6. Insofar as PO-III was concerned, the equipment was installed and commercially launched in Mumbai in April, 2003 and, in Navi Mumbai by August, 2003. The network for entire Mumbai, in respect of PO-III, was completed in

January, 2004. FIPL, on its part, provided maintenance services in the first year of its operations and continued to do so thereafter, though no formal AMS contract was executed.

4.7. On 23.2.2004, AT was completed and a report was generated in that behalf.

4.8. Like qua phase-I, in respect of Phase-II (i.e. PO-III), MTNL failed to issue the TOC and make balance payments despite the fact that the network, as required, was commissioned on 23.2.2004.

4.9. In consonance with MNTL's approach of wanting to switch over to new technology and, having issued an NIT in this behalf in September, 2002, it went a step further by issuing a purchase order on 1.3.2004.

5. Apparently, between April 2004 and March, 2006, correspondence was exchanged between the parties, mainly, between FIPL and MTNL with regard to points of difference. While, FIPL sought issuance of TOC, release of balance payment, and discharge of outstanding PBGs; MTNL, stressed upon, removal of glitches in the network. At one stage, FIPL had submitted a procedure for additional tests which, according to it, MTNL, had to approve. These, apparently, were not approved and hence, not carried out. What, however, did happen is that MNTL formed a Committee to deal with the issues which were outstanding between the parties herein. This Committee made recommendations to the Board of Directors of MTNL. Broadly, the Committee directed release of payment in respect of POs-I to III subject to certain deductions and concessions being given by the Fujitsu Group. To ensure that there was no going back on the commitment given by the Fujitsu Group, FIPL was required to submit an affidavit acceding to the deductions and concessions proposed thereto.

5.1. In consonance with the above, FIPL, along with its letter dated 5.4.2006, submitted an affidavit dated 28.3.2006. By this affidavit, Fujitsu Group accepted the following:

(i) that it would receive 69.4% of the amount payable against PO-I and PO-II, as full and final settlement.

(ii) MNTL, would issue a TOC for PO-I and PO-II, with retrospective effect i.e. 10.10.2002.

(iii) MTNL, would release the PBGs in issue, after release of payments.

(iv) In respect of PO-III, Fujitsu Group would accept for the moment 70% of the amount due, and that, the balance 30% would become payable within six months after resolution of balance AT points.

(v) Neither party would take recourse to legal proceedings in respect of POs.

(vi) Fujitsu Group would continue to provide maintenance support in terms of the PO.

(vii) Importantly, the affidavit shall not be construed as admission of any liability

by the Fujitsu Group.

5.2. On receipt of the aforesaid affidavit, MTNL Delhi addressed a letter dated 13.4.2006 to MTNL Mumbai; a copy of which was marked to FIPL. In the said letter it was conveyed, that the, Committee, constituted for the purpose had examined the issues whereupon, it's Board of Director had taken the following decision:-

"1. The TOC for year 1 PO be issued w.e.f. 10.10.2002 and the payments of Year 1 PO (i.e. PO I and II) be deducted by 30.6% of the respective PO value (on account of deficiency in Coverage and capacity etc.) as full and final settlement and the balance payment may be released immediately.

2. 70% of Year 2 and 3 PO value (i.e. PO III) be released immediately and the balance payment is to be made after rectification of pending acceptance testing issues for "Year 1 PO" (Except for coverage and capacity for which deductions have already been agreed in terms of full and final settlement) and "Year 2 and Year 3 PO" within six months.

3. The TOC for "Year 2 and Year 3 PO" may be issued after the pending A/T issues are rectified for Year 1 PO" (except for coverage and capacity) and "Year 2 and Year 3 PO..".

5.3. It was further stated that Fujitsu had agreed to the above issues, and that an undertaking/Affidavit on non-judicial stamp paper, duly signed by Fujitsu had been submitted. It further stated that Fujitsu would provide full network support as specified in the Tender with respect to warranty and AMC, to the satisfaction of MTNL.

5.4. In terms of the settlement, MTNL took two positive steps. First, it issued a TOC qua POs-I & II, on 24.4.2006. Second, it released PGB-I dated 29.6.1999, in the sum of Rs. 9,04,50,041/-.

5.5. What MNTL did not do, was to release PBG-II, which was issued in connection with PO-II. Though the Fujitsu Group had submitted their bills on 1.5.2006, in accordance with the settlement, these were not cleared. As a matter of fact, the AMs charges were also not paid, despite, receipt of services. The issuance of TOC, payments, and release of PB-III also remained outstanding through June of 2006 right upto a legal notice was served by Fujitsu Group on 3.3.2009, invoking the arbitration agreement, as encapsulated in clause 22.2.2 of the General Conditions of Contract (GCC).

5.6. It may be relevant to note that, in the interregnum, that is, on 17.3.2008, MTNL communicated to FIPL its decision to switch over to the new technology i.e. CDMA 1x network in Mumbai. In other words, the network put in place by the Fujitsu Group, was thus de-commissioned, with effect from March, 2008. In close proximity, post issuance of notice invoking arbitration, an arbitrator was appointed in the matter. The learned Arbitrator gave opportunity to both parties to file their respective claims, if any. In response thereto, statement of claims

was filed by the respondents herein. MTNL, on its part, not only filed its statement of defence but also its counter claims.

5.7. After admission/denial of documents was carried out, eighteen (18) issues with several sub-issues were struck in the matter. With the consent of counsels for the parties, the issues so framed, were discussed in the form of points for consideration. Parties were also permitted to lead oral evidence. The evidence, was filed by way of affidavits. The deponents were subjected to cross-examination. While, the Fujitsu Group cited four (4) witnesses, MNTL cited three (3) witnesses. The record shows that the final arguments were concluded on 15.07.2011.

5.8. Vide letter dated 25.10.2012, the learned Arbitrator, informed the parties that a hearing would take place on 6.11.2012 for the purposes of quantifying the amounts to be awarded consistent with the decision on several points which he had reached. Accordingly, on 2.11.2012, the learned Arbitrator, sent yet another communication to the parties, setting therein, the gist of findings arrived at by him to enable the parties, to make their respective calculations, in advance, so as to save time, at the hearing fixed on 6.11.2012.

5.9. At the hearing held on 6.11.2012, the learned arbitrator reserved final award in the matter and also, passed directions to the effect that the PBGs in issues, were not required to be renewed, with a further direction that, MTNL would not invoke or encash the said PBGs and the same would be returned to the Fujitsu Group, in view of the finds arrived at by him.

6. As indicated above, the award was finally delivered on 17.12.2012.

7. In the background of the aforesaid facts, the arguments were advanced on behalf of the MTNL by Mr. Sukumar Pattjoshi, Sr. Advocate assisted by Mr. Vivek Malik and Mr. S. Dubey, Advocates; while on behalf Fujitsu Group, submissions were made by Mr. Sandeep Sethi, Sr. Advocate, assisted by Mr. Pradeep Nayak, Mr. Khalid Arshad, Mr. Abhishek Bansal and Mr. Ishwer Upneja, Advocates.

Submissions of Counsels

7.1. Mr. Pattjoshi's submissions can be paraphrased as follows:

(i) The arbitrator had no jurisdiction to adjudicate upon the alleged dispute, which stood concluded by the settlement agreement, as reflected in the letter dated 13.4.2006. The said settlement agreement reflected a full and final settlement of all disputes pertaining to the POs in issue. Reliance was placed on the judgment of the Supreme Court in the case of: *Nathani Steels Ltd. v. Associated Constructions*, 1995 Supp. (3) SCC 324.

(ii) The learned Arbitrator in adjudicating upon the disputes has thus, violated the provisions of Sections 28(3), 34(2)(b)(i) and 34(2)(b)(ii). (iii) The award contains contrary findings. While in respect of phase-II the learned Arbitrator has given a finding that it was not commissioned. Insofar as the phase-I is

concerned, it gave a finding that it was commissioned. The project in issue was one seamless system. Since, admittedly, there were deficiencies in Phase-II which were not rectified, there could have been no commissioning, in fact, of Phase-I. The system, in fact, was useless for the purposes of MTNL as any mobile network survives on efficiency of network, coverage, and capacity.

(iv) In the background of the fact that FIPL had submitted an affidavit dated 28.3.2006, along with its letter dated 5.4.2006, which formed the basis of the decision contained in MNTL's letter dated 13.4.2006, the learned Arbitrator had no jurisdiction to dwell on issues other than the issue of short payment, if any, in terms of the aforementioned settlement.

(v) The only reason that MNTL arrived at a settlement, was that, the deficiencies and defects in the system provided by the FIPL, would be rectified. Therefore, there was no reason whatsoever for MTNL to make further payments. This was clear from the fact that the settlement envisaged deduction of 30.6% under PO-I and PO-II and release of balance 30% under PO-III, within six months of removal of defects. While, MTNL took steps post the settlement by making payments, the FIPL failed to remove deficiencies and defects.

(vi) Under the settlement, FIPL was to provide uninterrupted AMS. Significantly, there was no mention either in the affidavit dated 28.3.2006 or, in the letter dated 5.4.2006, that MTNL would have to make payments for AMS.

(vii) Since, there was delay in execution of the project, MNTL was entitled to deduct monies towards liquidated damages.

(viii) The impugned award has resulted in an absurd situation, which is that, while the value of PO-I, admittedly, was a sum of Rs. 90,19,91,960/-, MTNL has been called upon to pay, post the settlement, a sum of Rs. 96,42,38,886/-. The manner in which this figure has been arrived at is indicated in the written submissions filed on behalf of the MTNL as follows:

(ix) No amount towards AMS could have been ordered to be paid as, in terms of the POs, parties had agreed that for the first year no amount would have to be paid since it was included in the PO value. Insofar as the subsequent year was concerned, AMS contract had to be executed every year. Reliance, in this behalf was placed on clause 9 of the GCC appended to tender dated 30.6.1999. In any event, AMS charges were not payable as the project in issue was not commissioned.

(x) Customs duty has been wrongly awarded on actual basis, in excess of not only the ceiling limit fixed in the PO but also beyond the 69.4% limit fixed under the settlement. In this behalf, reference was made to Freight and Forwarding (FFP) charges which, in the award, were subjected to ceiling limit of 69.40%, in terms of the settlement. It was submitted that both FFP and customs duty fell under the heading "Duties and Levies" and thus, had to be dealt with similarly, and not in the manner, in which, it was dealt with by virtue of the impugned

award.

(xi) The fact that the PO contained a clause that the customs duty was to be reimbursed on actual basis, was not indicative of the fact that, it was not a part of the PO value.

(xii) The clause requiring the payment of the customs duty being payable on actuals was to safeguard against profit making by successful bidders on this score. It was contended, the fact that, the consignee of the goods was MTNL, could not lead to the conclusion that it was not part of the PO value. In every contract involving the Government, such a clause, for reimbursement of customs duty obtain (wherever there is an import component involved), and therefore, the presence of a clause would not mean that customs duty was not part of the PO value.

(xiii) Insofar as release of PBG-III was concerned, the same could not have been ordered in view of the findings contained in paragraph 13.5.22 of the award. In other words, since surviving AT issues had not been resolved, the Fujitsu Group, was not entitled to release of balance 30% of the amount pertaining to Phase-II (i.e. PO-III). Reference, in this regard was also made to paragraph 15.7, wherein the arbitrator has recorded that PBG-II and III have been renewed from time to time by the Fujitsu Group, and that, they were valid till 10.11.2012.

(xiv) Insofar as liquidated damages are concerned, the contention was that, since the project was never completed and the time for completion envisaged in the project had elapsed, MTNL ought to have been permitted to claim liquidated damages, in terms of clause 18 of the Award.

(xv) As regards interest it was submitted that the learned Arbitrator has awarded a rate of interest of 18% on dollar payments which is high and inconsistent with the rate generally awarded by courts in India. The submission was that rate should have been fixed keeping in mind the London Inter-Bank Offered Rate (in short LIBOR).

(xvi) As regards rejection of counter claims, the arguments advanced on merits were identical. It was submitted that since defects were not rectified, MTNL was entitled to refund of amounts paid with interests and also, for reparation qua losses suffered by it on account of loss of goodwill and reputation and dissatisfaction caused amongst its subscribers due to supply of defective/incomplete equipment.

(xvii) Lastly, the award was assailed on the ground of delay, in pronouncement, as well. Reliance, in this behalf has been placed on the judgment of the Division Bench of this court, dated 26.11.2012, passed in FAO(OS) 398 and 399 of 2012, in the case of: BWL Ltd. v. Union of India &Anrs.

8. On the other hand, Mr. Sandeep Sethi, on behalf of Fujitsu Group, submitted that the award, needed to be sustained as it was neither in violation of the public policy nor was it patently illegal or, contrary to justice or morality.

9. It was Mr. Sethi's submission that this Court could not re-appreciate the quantum or quality of the evidence produced before the learned arbitrator or, re-interpret the provisions of the contract, while exercising its powers under Section 34 of the Act.

9.1. It was further contended, it was in fact the case of the Fujitsu Group, that the outcomes had to be consistent with the settlement arrived at between the parties. Furthermore, it was, according to him, MTNL's contention, that the settlement ought not to have been enforced as the equipment supplied was deficient and, what was supplied was neither commissioned nor used. It was thus stated that it is in the light of this stance that, MTNL had preferred a counter claim in respect of refund of amounts already paid and payment of amounts qua expenses expended in installing a new technology. It was contended, it was in this light and at the instance of MTNL that the issue with regard to deficiencies in the network installed by the Fujitsu Group, was framed.

9.2. Mr. Sethi submitted that the learned Arbitrator after examining the evidence placed on record came to the conclusion in paragraph 13.1.6 of the award that the equipment supplied was commissioned and commercially exploited by the MTNL.

9.3. Mr. Sethi stated that as a matter of fact a large portion of the claims, which according to him were otherwise payable, were disallowed by the learned Arbitrator.

10. In respect of payment awarded towards AMS, Mr. Sethi made the following brief points:-

(i) This is an argument raised for the first time in this court, which has no genesis in the reply to the statement of claims filed before the learned Arbitrator. This aspect was not urged before the learned Arbitrator. The submissions qua AMS made by MTNL are recorded in paragraphs 6.37 to 6.41 of the Award.

(ii) According to the learned counsel the defence raised qua AMS was that, the project was not commissioned, and that there was no formal written contract qua maintenance services.

(iii) The settlement itself required provisioning of maintenance services, and that, the terms and conditions of the PO could not be altered in that behalf. Reliance was placed in this behalf on clauses 4 and 7 at pages 57 and 58 of the award.

(iv) From the findings recorded by the learned Arbitrator, it was sought to be demonstrated that not only was the network commercially exploited but that it was maintained by Fujitsu Group. That Fujitsu Group continued to provide AMS for the entire period between 10.10.2002 and 16.5.2008.

(v) For the first year there was an express term in the contract for providing AMS, while thereafter, there was an implied term in the contract. Based on these findings it was argued, that the learned arbitrator applied the settlement

formula, so to say, of reducing the AMS charges by 30.6%. It was further submitted that, it was precisely for this reason, since according to the learned arbitrator, AT issues had not been addressed, that no payment towards AMS charges, with respect to PO-III, was awarded.

11. As regards the issue of customs duty, it was submitted that the argument that it was part of the PO value, and thus, subject to deduction of 30.6% for PO-I & II and 30% for PO-III was based on interpretation of the terms of the contract. It was submitted that payment of the customs duty was not linked to performance. The only condition applicable for its reimbursement was, the production of relevant documents, evidencing its payment. In this behalf, clauses 8A(ii) of PO-I and II, and clause 6 of PO-III, which are identical except for the CIF prices of foreign supplies, were relied upon. Reliance, was also placed on clauses 9A(c) of PO-I and II, as well. In other words, it was contended that customs duty did not form part of the consideration, as was projected by MTNL. It was further contended that, in contrast, FFP was always treated as part of the consideration. To demonstrate the difference in understanding, it was highlighted that insofar as FFP charges were concerned, invoices were raised while qua customs duty debit notes were raised for reimbursement.

12. Insofar as the argument of MTNL that by virtue of the award, it had been called upon to pay a sum of nearly 96.42 crores (approximately) as against the value of PO-I which was Rs. 90.19 crores (approximately) it was contended that MTNL had wrongly applied a conversion rate of Rs. 56/- per U.S.D. mentioned in the PO. It was stated that the imported supplies of equipment made by FL were to be paid in U.S.D. and, therefore, conversion of the import component of the contract into rupees was misleading. It was highlighted that the aspect of foreign exchange fluctuation was not taken in the statement of defence and that conversion rate had relevance only for the purpose of evaluation. Reference in this regard was made to paragraphs 13.4.5 to 13.4.8 as also the provisions of PO-III.

13. Insofar as interest was concerned, Mr. Sethi pointed out that the interest of 8% was not high, as contended on behalf of MTNL. It was submitted that the interest at the rate of 18% was awarded only for the period beyond 30 days post the passing of the award in case payments, as directed, were not made by that time. The learned counsel also submitted that in respect of that portion of the award, which was in foreign currency, the discretion of the arbitral Tribunal to award interest was not circumscribed by LIBOR. In support of this submission, reliance was placed on a judgment of the Division Bench of the Bombay High Court dated 19.9.2013, passed in Appeal No. 391/2013, in the case titled: "Steel Authority of India Ltd. V. Pacific Gulf Shipping Co. Ltd."

Reasons

14. I have heard learned counsels for the parties and perused the record. The gravamen of the submissions advanced on behalf of the petitioner by Mr.

Pattjoshi, is that, with the settlement dated 13.04.2006 arrived at with FIPL, no dispute remained outstanding which required adjudication. According to Mr. Pattjoshi, the very fact that the claims of the Fujitsu Group were adjudicated upon, rendered the award liable to challenge, and consequently being set aside, as it violated the provisions of Section 28(3) read with Section 34(2)(b)(i) and 34(2)(b)(ii) of the Act. In other words, in substance, there was accord and satisfaction. In my view, the submission is completely untenable for the following reasons:

(i) First, no such argument appears to have been taken before the learned arbitrator.

(ii) Second, what the learned arbitrator was called upon to adjudicate was, whether or not parties had adhered to the obligations undertaken under the settlement dated 13.04.2006, and that, if there was a failure, whether consequences, if any, ought to follow in the nature of interest and charges/expenses incurred. In addition, the learned arbitrator was also called upon to adjudicate as to whether the Fujitsu Group was entitled to moneys qua claims which were not covered by the aforementioned settlement.

(iii) Third, MTNL's counter-claims, broadly, with respect to the following: refund of moneys paid along with interest at the rate of 18% per annum, reimbursement of expenses for its apparent migration to new technology, because of deficiencies and defects in the system supplied by FIPL, and losses suffered on account of injury to reputation, dilution of goodwill and dissatisfaction of a subscriber-belies the tenability of this submission.

(iv) And lastly, the settlement, keeping in mind the rival positions of parties herein, envisaged, broadly, the following:

(a) In so far as PO Nos. I and II were concerned (i.e., Phase-I), a TOC was to be issued with effect from 10.10.2002 and payments were to be made to the extent of 69.4%. In other words, on account of alleged deficiency in coverage and capacity, MTNL was required to deduct from the said POs, amounts equivalent to 30.6%. Upon deduction, claims under POs I and II would stand settled and the balance payment equivalent to 69.4% was to be released immediately.

(b) As regards PO-III (which concerned phase-II), immediate payments to the extent of 70% were to be made, while balance 30% was required to be paid, on FIPL addressing the AT points. The maximum time-frame for which was, six (6) months. Pertinently, issues with regard to coverage and capacity of the system supplied to MTNL by the Fujitsu Group was excluded from the ambit and scope of AT points referred to above.

(c) TOC for year 2 and year 3 PO (i.e., PO-III) could be issued after pending AT issues were rectified for year 1 PO, i.e., PO-II (save and except that which pertained to coverage and capacity) and year 2 and 3 PO.

(d) FIPL was to provide full network support as specified in the tender with

respect to warranty and AMS to the satisfaction of the MTNL.

14.1. Therefore, clearly the settlement dated 13.04.2006, did not provide that AMS would be free of cost and that customs duties (admittedly borne by FL), would be subject to a deduction equivalent to 30.6% applicable to payments under PO I and II, as contended on behalf of MTNL.

14.2. It is for this very reason, in my opinion, that the judgment of the Supreme Court in the case of Nathani Steels Ltd. v. Associated Constructions, would have no applicability.

15. The other principal argument of Mr. Pattjoshi that the learned arbitrator had in a sense contradicted himself, in as much as, he had directed payments in terms of the settlement for POs I to III, even though he had recorded a finding that Phase-II was not commissioned. In other words, it was Mr. Pattjoshi's submission that since the entire network put in place by FIPL, was one seamless system, the very fact that the learned arbitrator had come to the conclusion that Phase-II was not commissioned, should have been a good enough reason to not only reject the claims advanced by the Fujitsu Group, but also to allow MTNL's counter-claims.

15.1. This submission of Mr. Pattjoshi is also untenable for the reason that the settlement dated 13.04.2006 by itself put in place as to what area of the alleged deficiencies and defects could not be pressed and/or re-opened any further as against those which could be insisted upon. The alleged defects with regard to coverage and capacity were set at rest by the settlement. The rectification of only those deficiencies and defects, if any, which could be insisted upon by MTNL, were those which came within the scope and ambit of AT points.

15.2. The very fact that such a methodology had been adopted by rival parties, was indicative of the fact that phase-I, which was subject matter of PO I and II, was a complete system by itself, and that Phase-II, which formed the subject matter of PO III, and involved only extension of subscriber lines from 50,000/- to 1,42,230, could be separated and dealt with separately. In other words, Phase-II resulted in only expansion of subscriber base by another 92,230 lines. The initial tender envisaged such an expansion subject to, of course, MTNL raising a demand in respect of the same. Defects, if any, in Phase-I, would not necessarily impact what was provided by the Fujitsu Group, with respect to Phase-II.

15.3. MTNL had, as is evident from the award, based on the material placed before the learned arbitrator, taken a conscious decision to segregate the issues pertaining to Phase-I from those which evidently were outstanding vis-?-vis Phase-II.

15.4. It is for this reason, without getting into the nitty-gritty or blame-game, MTNL offered scaling down of sums payable under POs I and II to the extent of 69.4%. A flat deduction equivalent to 30.6% was thus accepted by the Fujitsu Group. The deduction was evidently required to cover all defects, including those,

pertaining to coverage and capacity. It would be difficult to assume, at this stage, that MTNL would agree to release of payments equivalent to 69.4% in respect of a system which was unworkable as is sought to be portrayed, at this stage, on its behalf by Mr. Pattjoshi.

15.5. As a matter of fact the settlement further envisaged immediate release of 70% of payment as reflected in PO III, the balance 30% to be released after the FIPL had addressed and/or resolved the AT points/issues. These were, obviously, issues and points which did not affect the viability of the network put in place by the Fujitsu Group.

15.6. The learned arbitrator's finding with respect to the failure of the Fujitsu Group in addressing the AT points is in the context of non-fulfilment of obligations undertaken by the Fujitsu Group and, not that, the network supplied was faulty. This submission is belied by the fact that, admittedly, MTNL had itself conveyed to FIPL on 02.01.2002 that the network, had been successfully commissioned. This, coupled with the finding of fact returned by the learned arbitrator, that the network had been put to commercial use by the MTNL on 21.06.2002, flies in the face of the submission that the network supplied by Fujitsu Group had defects of the kind which made it unworkable or rendered it completely useless for the purposes of MTNL. The Fujitsu Group was rightly penalized for its failure to address the AT points, by redacting 30% of the payments from PO III, as envisaged in the settlement dated 13.04.2006, and AMS provided qua PO III. This was despite the stand taken by the Fujitsu Group that it had put in place a protocol for advance testing which was not taken forward by MTNL.

16. I must note here a submission advanced by Mr. Pattjoshi in the same context with regard to the direction of the learned arbitrator for release of PBG-III. It was submitted that since PBG-III was furnished against PO III, the learned arbitrator having noted that AT points were not addressed, such a direction could not have been issued. This argument is also misconceived for the reason that parties had agreed as to what would be the consequences of the failure on the part of FIPL to address the AT points. The only consequences which were provided in the settlement was that the payments to the extent of 30% of PO III would stand deducted. The release/discharge of PBG-III was not one of the consequences provided therein. Therefore, I find no error patent or otherwise in such a direction issued by the learned arbitrator.

17. The other argument of Mr. Pattjoshi that MTNL could not be called upon to pay any charges towards AMS is also not tenable for the following reasons:

17.1. As correctly found by the learned arbitrator, services were provided and thus, the system was maintained by the Fujitsu Group until it was decommissioned in 2008.

17.2. The learned arbitrator has also returned a finding of fact that the settlement envisaged provision of support services by the Fujitsu Group. The

settlement, however, did not advert to the consideration which would be payable to the Fujitsu Group for provisioning AMS. It is in these circumstances that the learned arbitrator took recourse to the provisions of PO-1, which had quantified provision of AMS for year one at Rs. 5.92 Crores. Since, the maximum limit for payments for PO-1 were pegged at Rs. 69.4% for the first year that is between 10.10.2002 till 10.10.2003, the Fujitsu Group was awarded a sum of Rs. 4,10,84,800/-. For the period thereafter i.e., between 10.10.2003 and 16.05.2008 when, the system provided by the Fujitsu Group was decommissioned, the principle of quantum meruit was invoked as no formal AMS agreement was executed between the parties. For the latter period, the arbitrator though, awarded amounts at the reduced rate of Rs. 4,10,84,800/- p.a., despite, arguments to the contrary of the Fujitsu Group, on the ground that no evidence was led as to what would be the value of the maintenance services for the said period. Furthermore, AMS charges claimed for P.O. III (i.e., Phase-II) was also declined, on the ground that the respondent provided services in the "hope and expectation" that unless they did the needful, the petitioner, would not approve the AT and/or issue the TOC. This part of the work, according to me, in substance, has been categorized, by the learned arbitrator, as gratuitous work, and hence, proceeded to decline payment.

17.3. In my view, the finding is based on evidence placed on record. To my mind, the learned arbitrator has applied the correct principle of law both in interpreting the documents concerned i.e., the POs as also in application of the principle of law of quantum meruit.

18. This brings me to the issue pertaining to customs duty raised by Mr. Pattjoshi.

18.1. Briefly put, the contentions in this behalf were that the learned arbitrator ought not to have directed payment of customs duty based on quantification of actual amounts spent in that behalf by FL but subjected the same to deduction of 30.6% from PO-I, and similarly, a deduction of 30% vis-?-vis PO-III. This argument was sought to be supported on the basis of the following:-

18.2. First, the three POs in issue were the subject matter of the settlement and therefore, should suffer the same percentage of deduction as envisaged in the settlement.

18.3. Second, that both customs duty and FPP fell under the heading, "duties and levies", under respective POs and, had thus, to be dealt with similarly.

18.4. To appreciate this issue, one would have to first notice the relevant clauses in the purchase orders. The relevant clauses being: clause 8(A)(ii) of POs-I & II and clause 6(A)(ii) of PO-III. The two sets of clauses read as follows: -

"Clause 8 of PO 1:

Prices:

The total price of the order shall be Rs. 77,23,16,681/- (seventy seven crores

twenty three lakhs sixteen thousand six hundred eighty one only) and its break up as follows: -

(A). Imported equipment (Annexure A, Part 1)

(i). Foreign supplies-CIF prices in US \$ 8.547,814 only.....

(ii). Duties and levies on equipment (Annex. A, Part 1)-

Total cost of Duties and levies on imported equipment CIF prices is Rs. 23,28,76,276/- (Rupees twenty three crores twenty eight lakhs seventy six thousand two hundred and seventy six only), its details are as follows: -

a) CD charges 53.816% of CIF prices

b) FFP charges: 1% of CIF prices

c) Other charges and levies: lumpsum basis as shown therein.

The payment of the CD amount is subject to actual on production of relevant document. In no case, the payment should exceed the CD amount as shown in Annexure A (Part-1)..."

Clause 8(A)(ii) of PO-II same as the above except for change in figures.

"Clause 6 of PO III

Prices:

The total price of the order shall be Rs. 87,03,73,391/- (Rupees Eighty Seven Crore Three Lac Seventy Three Thousand Three Hundred Ninety One only) and its break-up is as follows: -

A. Cost of imported equipment (Annexure-A)

(i). Foreign supplies-CIF prices in US \$ 1,08,62,572/- (US \$ One Crore Eight Lac Sixty Two Thousand Five Hundred Seventy Two only). Payment for this to be made in US \$.

x x x x x

(ii). Duties and Levies on imported equipment (Annexure A")-The total cost of duties and levies on imported equipment Rs. 17,82,56,303/- (Rupees Seventeen Crore Eighty Two Lac Fifty Six Thousand Three Hundred Three only). The payment of CD amount is however be subject to actual on production of relevant document. In no case, the payment should exceed the duties and levies as shown in Annexure-A).."

18.5. A perusal of the aforesaid clauses would show that while customs duty was pegged at Rs. 53.816% of the CIF prices in PO-I, the FPP charges was 1% of the CIF charges. Additionally, PO-I clearly stated that payment of customs duty amount was subject to actuals on production of relevant documents, and that, in no case, payment towards customs duty would exceed the amount shown in

Annexure A (Part-I). In so far as FPP charges are concerned, there is no such indication in PO-I.

18.6. A similar provision qua customs duty was also made both in PO-II and PO-III. The only difference being that in PO-II & III, a consolidated amount in INR was reflected qua customs duty and other levies and charges as against percentages in PO-I.

18.7. The learned arbitrator thus, based on the material before him and his interpretation of the provisions of the PO and the settlement, came to the conclusion, that customs duty had to be paid on the basis of the actual amount spent in that behalf by FL. The argument that customs duty should suffer a deduction to the extent of 30.6% under PO I & II and 30% under PO-III, was rejected.

18.8. This is a plausible view, which could be taken in the matter, and therefore, in my opinion, cannot be interdicted with. Furthermore, the findings returned in paragraphs 13.7.6 and 13.7.7 would show that MTNL proceeded on the same basis by reimbursing under PO-I Rs. 20,43,07,257 and Rs. 11,12,57,876/- under PO-III, based on its understanding, that it was a reimbursable expense. The argument therefore, that this was part of the consideration of the POs 1 to III, in my view is, not tenable.

19. In so far as liquidated damages are concerned, Mr. Pattjoshi submitted that since the Fujitsu Group had not executed the contract completely, MTNL ought to have been allowed to retain monies deducted on account of liquidated damages. In this connection, clause 18 of the GCC and the relevant clauses of the POs were adverted to. In the award from paragraphs 13.4.27 till 13.4.35, this aspect has been dealt with by the learned arbitrator in detail, with reasons, which I do not intend replicating in extenso. What is though noticeable from the findings returned by him, are the following: first, that the aspect of returning monies by way of deduction towards liquidated damages did not find mention either in the statement of defence or in the counter claim filed on behalf of MTNL. Second, that the decision taken with respect to liquidated damages by MTNL internally, was not placed on record. Third, Fujitsu Group was not given any opportunity to defend its position before levying liquidated damages. Fourth, there was no certainty as to the exact amount of liquidated damages levied as the exact amount was not crystalized. Fifth, the settlement put an end to the levy of liquidated damages. And lastly, the arbitrator on an interpretation of clause 18 of the GCC, and those, obtaining in the POs, came to the conclusion that liquidated damages could be levied, only if, delay in supplies led to a delay in commissioning.

19.1. I find no error in any of the findings returned by the learned arbitrator in this behalf.

20. As regards Mr. Pattjoshi's objection the award of interest at the rate of 8% p.a. on even those claims qua which MTNL is required to pay in U.S. dollars, was

high; I am in agreement with the submissions made by Mr. Sethi that there is no fetter on the discretion of the learned arbitrator in not applying the LIBOR measure in awarding interest. A case in point, which is, the judgment of the Division Bench of the Bombay High Court in *Steel Authority of India Vs. Pacific Gulf Shipping Company Ltd.* rejected such a submission on the ground that Section 31(7)(a) of the Act confers discretion upon the arbitral tribunal where the award is for payment of money, to award interest unless otherwise agreed by the parties, at such rate, as it deems reasonable. The argument that in cases where the award is in foreign currency, the interest awarded by an arbitral tribunal should not exceed the LIBOR measure, is rejected.

20.1. As to what were the interest rates prevalent under LIBOR regime would also have to be proved. One could though, take judicial notice of the fact that there were discrepancies noted in the fixation of interest rates under LIBOR.

20.2. LIBOR, as well known, is nothing but an average interest rate ascertained from time to time based on inputs given by major banks in London as to their interest rates. Under the LIBOR regime, banks give details vis-?-vis actual interest rate that they are paying or would be required to pay for borrowing from other banks. Apparently, in about 2012, it was discovered that banks were manipulating their interest rates by either increasing or decreasing rates with a view to profit or demonstrate their financial robustness. Investigations in this behalf were commenced in various jurisdictions, including USA and U.K. The Treasury Committee of the U.K. has, evidently, gone into the issue with regard to fixation of LIBOR rates. (see report of the Treasury Select Committee of the Parliament of the U.K. available at www.publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/481/48102.htm)

20.3. The purpose, with which I have referred to this aspect of the matter is, to bring home the point that the LIBOR measure, by itself, may not be perhaps, a yardstick, by which, necessarily, courts in India or arbitrators ought to be governed.

20.4. In any event, in my view, the rate awarded in the present case is not so unconscionable or penal, which would require interference by the court.

21. The other argument of Mr. Pattjoshi that under PO-1, the MTNL was required to pay a sum of Rs. 90,19,91,960/- whereas the awarded amount comes to a figure of Rs. 96,42,38,886/-. In my view, as correctly submitted by Mr. Sethi, the figure of Rs. 96,42,38,886/- includes the amounts awarded in U.S. Dollars which have been converted into INR, at the rate of exchange of Rs. 56/- = 1 USD. This conversion overlooks the fact that the POs itself provided that the imported equipment had to be paid in foreign currency and that INR values were provided only for the purpose of convenience. (See clause 8 of POs-I & II and clause 6 of PO-III). It is precisely for this reason that the learned arbitrator rejected the contention of MTNL that fluctuations in foreign exchange rate should be borne by the Fujitsu Group.

22. The submission with regard to rejection of the counter claims of MTNL is also untenable and hence, cannot be interfered with, in view of the findings returned by the learned arbitrator. The arbitrator's findings: (i) that the payments made by MTNL were in pursuance of the settlement arrived at between the parties; (ii). MTNL had graduated to a new technology not because the equipment supplied by the Fujitsu Group was defective or unworkable because it wanted to perhaps meet competition; and (iii), lastly no specific evidence was placed on record to support the plea that it had suffered loss of goodwill, reputation and subscriber base-being based on material placed before him, does not call for interference, under Section 34 of the Act.

23. The last submission of Mr. Pattjoshi was that the award should be set aside as its pronouncement was delayed beyond reasonable time. In this behalf, Mr. Pattjoshi said that the learned arbitrator had reserved the award on 15.07.2011, while it was pronounced only on 17.12.2012, after nearly seventeen (17) months. In support of this submission, he had relied upon the judgment of the Division Bench of this Court in *BWL Ltd. Vs. UOI and Anr.* 2000 (2) Arb. L.R. 190 (Del). Mr. Joshi had also contended that perusal of contents of one of the emails sent by the learned arbitrator, on 02.11.2012, to convene a meeting for rehearing the matter on 06.11.2012, disclosed that the time gap had dimmed his recollection of arguments advanced by parties. Reference, in this regard, was made to the following sentence which, finds mention in the e-mail dated 02.11.2012, sent by the learned arbitrator.

"...But they are entitled to payment of balance 30.6% value of phase-I..."

24. On the aspect of delay, the following requires to be noticed: -

24.1. The learned arbitrator had closed hearing in the matter on 15.07.2011. On that date, counsel for MTNL sought 10 days time to file brief synopsis of submissions advanced before the learned tribunal. The counsel for the Fujitsu Group though having filed synopsis sought further time to file better synopsis particularly in relation to AT points and liquidated damages.

24.2. It appears that on 25.10.2012, an e-mail was sent by the learned arbitrator to the effect that the draft award was ready and that he required, clarification on one or two points. Furthermore, it was indicated that assistance of parties would be required to "work out certain calculations", consistent with findings arrived at with him. Meeting for this purpose was fixed on 06.11.2012. Four (4) days prior to the said meeting, an email dated 02.11.2012, was sent by the learned arbitrator, wherein he set out his tentative findings on various aspects of the case. These findings were communicated to the parties to shorten the time at the hearing fixed on 06.11.2012, and also, to enable parties to arrive at their respective calculations.

25. Having examined the tentative findings given in email dated 02.11.2012, I am persuaded to hold that they are consistent with the final award passed by the learned arbitrator on 17.12.2012. The meeting of 06.11.2012 was thus, held to

seek clarification on certain issues including aspects with regard to what would be the appropriate rate of interest. Nothing has been placed before me which would demonstrate that MTNL had objected to the arbitrator's request to parties and their counsel to convene in the meeting on 06.11.2012, on the ground that the pronouncement of award by that time, had already been delayed, as is sought to be contended at this juncture. Furthermore, parties having not provided for any time frame for completion of adjudication which would include rendering of award, the court would have to apply the reasonable timeframe yardsticks in such situations. If the pronouncement of award is delayed beyond reasonable time frame (which would necessarily have to take into account the facts and circumstances of each case), it can certainly be set aside as has been done by the Division Bench in the case of *BWL Ltd. Vs. UOI*. Such an award would perhaps on account of unreasonable delay, be infused with patent illegality or perhaps said to be opposed to public policy of India. (See *OIL India Vr. Essar OIL Ltd.*). There is no ground taken in the petition, as filed, under Section 34 of the Act for setting aside the award on the ground of delay.

26. Having regard to the record, in my view, the timeline between reserving orders in the matter and pronouncement of the award is not of such nature as would render it patently illegal or opposed to public policy. This submission has been made by Mr. Pattjoshi, dehors a ground to that effect being articulated in the petition itself. The judgment of the Division Bench of this Court in *BWL Ltd. Vs. Union of India and Anr.* is distinguishable. In that case a delay was nearly five (5) years occurred after the hearing in the matter was concluded and two (2) years and seven (7) months after the conclusion of a clarificatory hearing in the matter.

26.1. In my opinion, while unreasonable delay, in some cases may supply a ground for setting aside the award, the courts should, however, be slow in doing so and, reach such a conclusion if, mandated, only after carefully scrutinising the attending circumstances. Setting aside an award on this ground may at times set back parties in terms of time, effort, and money, and often, result in a situation where they may not enjoy the fruits of a successful litigation in their life time. The remedy should not result in a situation which is worse than the malady of the delay facing the court.

27. For the foregoing reasons, I find no ground for interfering with the award at hand. The petition is accordingly dismissed. Costs shall follow the result.