

(2015) 05 DEL CK 0297
In the Delhi High Court
Case No : O.M.P. 1052 of 2014

Mahanagar Telephone Nigam Ltd.

APPELLANT

Vs

HCL Infotech Ltd.

RESPONDENT

Date of Decision : 19-05-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 5

Citation : (2015) 5 AD 249 : (2015) 221 DLT 62

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Rajiv Dutta, Senior Advocate, Rachna Joshi Issar, Ambreen Rastogi and Siddharth Dutta, for the Appellant; V.N. Koura, S. Sirish Kumar and Abhinav Tandon, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, J.—The challenge in the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") is to an award dated 27th August, 2014 passed by the Sole Arbitrator in the disputes in between the Petitioner Mahanagar Telephone Nigam Limited ("MTNL") and the Respondent M/s. HCL Infotech Limited ("HCL").

2. The background to the present petition is that MTNL issued a tender notice dated 24th September, 2009 inviting bids for supply of equipments, installation, testing, operation, management, commissioning and making over the communication infrastructure for the Common Wealth Games 2010 (CWG 2010) to MTNL, Delhi on a turnkey basis. The work also involved decommissioning the system/equipments and redeploying and integrating them with MTNL's existing IP/MPLS (Multi Protocol Label Switches) network in Delhi and Mumbai.

3. HCL's bid being the lowest was accepted and MTNL issued an Advance Purchase Order (APO) dated 6th February, 2010 followed by three Purchase Orders (POs) dated 12th March 2010, 17th May 2010 and 27th July 2010. On

2nd October, 2010 MTNL approved the commissioning of the "communication infrastructure network" for the CWG with effect from 28th September, 2010. The further work of decommissioning and re-deployment with existing infrastructure of MTNL at Delhi and Mumbai were to take place after the conclusion of the CWG. The case of HCL was that while a substantial part of the contracted sum was paid to HCL after the conclusion of the CWG, the money due on redeployment was not. It is this dispute which was referred to the Sole Arbitrator.

4. 11 claims were filed by HCL before the learned Arbitrator. Claim No. 1 was for a sum of Rs. 66,12,38,221.50 towards 20 % of equipment cost for re-deployment. In the impugned Award, the said claim was allowed together with interest @ 8% from the date of the Award till date of payment. Claim No. 2 was for 20% of the equipment cost of part B equipment which was returned and retained by HCL. The said claim was held by the learned Arbitrator to have become infructuous. Claim No. 3 was for 20% of the equipment [set-top boxes (STBs)] after completion of re-deployment and integration with the existing with the MPLS network at Delhi and Mumbai in the sum of Rs. 3,60,206/-. The said claim was allowed together with interest @ 8% p.a. from the date of award till date of payment. Claim No. 4 was for 100 % service cost of re-deployment for the first PO for a sum of Rs. 9,66,73,538. The said claim was allowed together with interest from the date of award till realisation. Claim No. 5 was for two sums: (i) Rs. 12,96,000/- for additional GIS Survey together with interest and (ii) Rs. 4,63,883/- towards Fabric Route Mapping of GIS survey carried out in Delhi together with interest. Both the above said sums were allowed together @ 8% from the date of award till date of payment. Claim No. 6 was for a sum of Rs. 1,43,00,000/- towards reimbursement of octroi paid by HCL. The said claim was allowed to the extent of Rs 22,19,960 as claim for reimbursement of octroi with 8% interest from the date when the documents showing the payment of octroi were received by the Petitioner till the date of realisation of the amount. The interest claimed by the Respondent was rejected as having become infructuous. Claim No. 7 was for a sum of Rs. 2,85,02,281/- towards refund of liquidated damages (LD) wrongly levied by MTNL on HCL since the delay was not attributable to HCL. The said claim was allowed to the extent of Rs 1,89,66,663 together with interest @ 8% per annum. Claim No. 8 was for Rs. 2,23,00,000/- withheld on account of delay in supply of material. The said claim was allowed together with interest @ 8% per annum. Claim No. 9 was for Rs. 5,87,34,885/- towards compensation for additional costs of keeping the HCL project team deployed at Delhi and Mumbai for the existing period from 1st February, 2011 up to 16th January, 2012. The said claim was rejected. Claim No. 10 was for declaration that the HCL had been discharged of its obligations. It was held that claim did not survive since HCL was discharged of all its obligations under the contract. Claim No. 11 was for discharge of the Bank Guarantees (BGs) and reimbursement of the cost for keeping the said BGs alive. The said claim was allowed.

5. MTNL filed four counter claims. Counter Claim No. 1 was for the payment of its

liability of Rs. 9,13,77,520/- raised against the MTNL towards income-tax; Counter-Claim No. 2 was for the income-tax liability of Rs. 8,63,20,466 against the MTNL; Counter-Claim No. 3 was for Rs. 77.95 Crores (approx.) being the VAT liability and Counter-Claim No. 4 was for penalty amount of Rs. 2,81,81,000/- on account of non rectification of faults in Next Generation Converged Network (NGCN). All the above counter claims were rejected by the Sole Arbitrator.

6. Mr. Rajiv Dutta, learned Senior Counsel for MTNL took the Court to the various clauses of the contract, the relevant documents on record and the relevant portions of the impugned. He first submitted that the impugned Award was passed in disregard of the agreed terms of the Contract between the parties and was liable to be set aside. Reliance was placed on the decision in *Rashtriya Chemicals and Fertilizers Ltd. Vs. Chowgule Brothers and Others*, AIR 2010 SC 3543 : (2010) 127 FLR 549 : (2010) 6 JT 624 : (2010) 4 LLJ 6 : (2010) 8 SCC 563 .

7. Mr. Dutta referred to Clause No. 2 of Section IV(B) of the Notice Inviting Tender (NIT) which defines the entire scope of the project and includes study planning and design, supply, delivery, Proof of Concept, Installation, Commissioning, Monitoring, Maintenance, IT Testing, Audit and Optimization. Sub clause (viii) dealt with redeployment and reuse. Inter alia the clause envisaged that after the conclusion of CWG-2010 the bidder will dismantle the system and provide a redeployment plan to the MTNL. After approval from MTNL the bidder and his OEM will redeploy and integrate the equipment with the MTNL's existing infrastructure in seamless manner followed by joint testing after integration with existing IP and MPLS network. The installation material was to be arranged by the bidder to complete redeployment within three months" time period. After it was delayed beyond three months to redeploy, the warranty and AMC period would increase accordingly.

8. Mr. Dutta referred to the definition of "redeployment in Clause 2 (m) of Section II of NIT which reads as under:

"2 DEFINITIONS:"..... "

(m) "Redeployment" means to decommission the equipments (all kind of network components (routers, VOIP, WiFi, NOC Components, including Power Plant monitoring terminals etc. deployed for this CWGDN) and thereafter transportation, handling, insurance charges, installation, integration and commissioning with MTNL Delhi and Mumbai with existing IP/MPLS as per MTNL, plan. Provide all kinds of materials and logical support including logistic, IP planning, Supply installation material etc for successful joint tests and commissioning of the network."

9. Mr. Dutta stressed that the learned Arbitrator erred in observing in the impugned Award that it was only the first PO which was relevant for redeployment of the CWG Network. Accordingly, to Mr. Dutta, Clause 12 of the PO dated 17th May, 2010 also provided for the redeployment.

10. In reply it was submitted by Mr. V.N. Koura, learned counsel for HCL, that redeployment and re-use in terms of Clause 5 (ix) of the first PO was completed but not within 90 days with effect from 31st October, 2010 on account of reasons attributable entirely to MTNL. He referred to the amended statement of claims filed by HCL before the learned Arbitrator.

11. The Court has perused the three POs dated 12th March, 2010, 17th May, 2010 and 27th July, 2010. While the first PO clearly mentions in Clause 5 under the Scope of PO that subsequent redeployment of the equipment in Delhi and Mumbai is also the responsibility of the Respondent, there is a conspicuous difference in the wording of Clause 5 in the POs dated 17th May, 2010 and 27th July, 2010. Clause 12 (4) of the latter two POs state that 20% would be paid "after completion of re-deployment and integration with existing MTNL/MPLS Network at Delhi and Mumbai." However, the mere fact that a standard format Clause 12 regarding the terms of payment appeared in all the POs does not take away from the fact that it is Clause 5 that determines the scope of work.

12. There is a logic to the difference in the wording of Clause 5 of the POs. As noted by the learned Arbitrator the first PO pertained to equipments listed in Part-A of the Schedule of Requirements set out in Section 5 of the Tender. Part-A equipments were to be purchased outright by MTNL. The Part A equipments were to be redeployed and reused at MTNL's facilities at Mumbai and Delhi. Consequently the first PO included redeployment as part of the scope of work. Part-B of Section 5 of the Tender listed out equipments that were to be utilized only for CWG-2010 and on completion of the CWG they were to be returned to HCL. This included STBs which were to be supplied under the third PO. Therefore, only the first PO was relevant for the purpose of redeployment. The Court is therefore unable to find any error having been committed by the learned Arbitrator in concluding that it is only the first PO that envisaged subsequent redeployment of the equipment in Delhi and Mumbai.

13. The work of redeployment envisaged under the first PO has been discussed in detail by the learned Arbitrator. Under Clause 5 (ix), HCL was to provide a re-deployment plan to MTNL and after approval from MTNL, HCL was to re-deploy and integrate the equipments. It was assumed that complete re-deployment would take place within three months time period from 31st October, 2010 i.e. by 31st January, 2011. There is no dispute between the parties that the re-deployment was delayed and some part of it remained incomplete. The question that arose was whether HCL was responsible for the delay in re-deployment.

14. The learned Arbitrator discussed the process involved which required identification of Part-A equipment which was to be diverted for re-deployment at Mumbai and Delhi. The process also involved identification of various sites and locations in both cities for the purposes of re-deployment. The learned Arbitrator analysed in detail not only the pleadings but also the depositions of the witnesses and came to the conclusion that "by and large the Respondent i.e. MTNL was responsible for the delay in completing the re-deployment within time". The

learned Arbitrator noted the case of HCL that the bill of materials ("BoM") containing the detailed list of redeployment was issued by MTNL only on 3rd December, 2010. It was further modified on 16th December, 2010 and 19th May, 2011. The modification continued even after provisional completion certificate issued by MTNL on 24th October, 2011. Modifications were made to the BoM even on 1st March, 2012.

15. As far as the System Requirement Specifications (SRS) was concerned, the final SRS document was signed only on 18th May, 2011. Even the list of locations at Delhi where the Part-A equipment had to be redeployed was revised. Permission to dismantle the equipment installed at Indira Gandhi International Airport and at the CWG venue was denied by the Organising Committee and this delayed the dismantling and shifting. The Schedule of Joint Testing of the hardware and software was not finalized even as on 18th April, 2011. As regards the redeployment of equipment at Mumbai, MTNL revised the initial list and finalized on 14th December, 2010 which led to further delays.

16. The learned Arbitrator also discussed the provisional commissioning certificates and noted that redeployed equipment in Delhi was put into commercial use by MTNL with effect from 24th October, 2011 at Mumbai on 15th January, 2012. In the amended statement of claim, HCL had stated that these punch points in respect of Delhi and Mumbai had been fully addressed. The learned Arbitrator also discussed the reply to the above averment of MTNL and then came to the conclusion that the punch points at Delhi and Mumbai have been resolved by HCL. MTNL had begun earning revenue from the redeployed equipments. Certain new grounds were raised by MTNL and those too were addressed by the learned Arbitrator. It is at the end of the above exercise that the learned Arbitrator concluded: "the equipment pertaining to the both issues which were supplied by the claimant and commissioned for the CWG was redeployed and integrated in the existing system of MTNL at Delhi. This is the requirement of the contract."

17. The assertion of Mr. Bedi, HCL's witness was that MTNL was asking for equipment different from the one provided by HCL for the CWG. This was not controverted by MTNL's witnesses. After discussing the evidence at length, the learned Arbitrator concluded that "all the punch points raised by the MTNL have been closed except those which relates to the supply of different equipment from one which was supplied for the CWG. This would be beyond the scope of redeployment."

18. The Court fails to appreciate how the above findings of the learned Arbitrator can be interfered with by the Court in exercise of its power under Section 34 of the Act. The Court is not sitting in appeal over the Award. It is not expected to re-appreciate the evidence and interfere with the Award only because another view is possible to be taken on the said evidence.

19. Claim No. 7 was regarding MTNL having wrongly recovered Liquidated

Damages (LD) to the tune of Rs. 1,89,66,663/-. From the evidence on record, it was apparent that even MTNL did not deny that on account of the eruption of the Eyjafjallajoekul Volcano in Iceland in 2010, there was disruption of flights across Europe. Resultantly, there was a delay in receipt of the some of the equipments. The question was if this was admittedly a force majeure event, then was MTNL justified in not giving HCL the benefit thereof? The case of MTNL before the learned Arbitrator, which was reiterated before the Court by Mr. Dutta, was that in terms of Clause 18 of the NIT benefit of the force majeure clause was only to the extent of not terminating the contract. According to MTNL, this did not prevent it from recovering LD for the delay in supply of the equipments.

20. The Court is of the view that the interpretation placed on the relevant clauses of the contract by the learned Arbitrator was a possible one. The learned Arbitrator has taken pains to discuss the entire evidence and every plausible document placed on record by the parties. The clauses of the contract have also been discussed threadbare. The learned Arbitrator has given detailed and valid reasons for that concluding that MTNL was not justified in withholding LD from the bills of HCL. The court is not persuaded by the submissions of Mr. Dutta that the said findings are perverse or patently illegal.

21. For all the above reasons, the Court is not satisfied that MTNL has made out any ground in terms of Section 34 of the Act for interference with the impugned Award. The petition is dismissed with costs of Rs. 20,000 which will be paid by MTNL to HCL within four weeks.