Case Citation: (2026) ibclaw.in 3528 HC

2026:DHC:5270

$~J

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

Judgment reserved on: 10.03.2026
Judgment pronounced on: 01.07.2026

\+ **O.M.P. (COMM) 43/2020**

BHARAT SANCHAR NIGAM LTD. .....Petitioner

Through: Mr. Satvik Rai, Mr. Vineesh Tyagi, and Mr. Kartik Rai, Advs.

versus

M/S BWL LTD. .....Respondent

Through: Mr. Ramesh Singh,Sr. Adv., Ms. Monisha Handa, Mr. Arnav Chaudhary, Advs.

\+ **O.M.P. (COMM) 63/2020**

BHARAT SANCHAR NIGAM LTD. .....Petitioner

Through: Mr. Satvik Rai, Mr. Vineesh Tyagi, and Mr. Kartik Rai, Advs.

versus

M/S BWL LTD. .....Respondent

Through: Mr. Ramesh Singh, Sr. Adv., Ms. Monisha Handa, Mr. Arnav Chaudhary, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT

1. These are petitions filed under section 34 of the Arbitration and

IBC Laws | www.ibclaw.in

Conciliation Act, 1996 ***("the Act")*** seeking to challenge two Arbitral Awards dated 03.04.2008 ***("impugned Awards"),*** passed by the learned Sole Arbitrator***("Arbitrator")***in the matters of Arbitration between *M/s BWL ltd. v. Union of India & Anr.*

2. The present petitions bearing O.M.P. (COMM) Nos. 43/2020 and 63/2020 challenges the Arbitral Awards passed in AA Nos. 302/03 and AA No. 301/03 respectively.

3. M/s BWL Ltd. ***("BWL")*** was the Claimant in both the Arbitral proceedings and Bharat Sanchar Nigam Ltd. ***("BSNL")*** was the respondent in both the proceedings.

4. BSNL is the successor in interest of the Department of Telecommunications ***("DOT").***

5. DOT was converted to a public sector undertaking namely, BSNL and all its operations and assets stood transferred to BSNL by virtue of notification dated 30.09.2000.

6. Hence, for the sake of brevity and intelligibility, hereinafter DOT and BSNL, both are referred as BSNL.

FACTUAL BACKGROUND

O.M.P. (COMM) 43/2020 (arising out of A.A. No. 302/03)

7. On 27.09.1996, the Union of India through its Department of Telecommunication invited tenders for supplying of 6075 Kms of 12F optical fibre cable and other accessories.

8. The bid submitted by BWL in pursuance of this tender was accepted and a letter of acceptance dated 12.12.1996 was issued.

9. Pursuant thereto, an advance purchase order dated 29.11.1996 and purchase order date 24.12.1996 was issued for supply of 552 Kms of 12F Optical fibre along with accessories.

10. The delivery of the entire supply was to be made by 28.02.1997. However, BWL supplied only 418 Kms out of total 552 Kms by the fixed date of 28.02.1997, leaving a balance of 134 Kms.

11. As BWL failed to supply the requisite quantity by the time fixed, it applied for seeking extension.

12. Accordingly, the first extension was granted on 06.03.1997 extending up to 31.03.1997.

13. Second extension was also granted for a period starting from 19.06.1997 to 15.07.2997.

14. The last final extension was granted on 11.09.1997 (on ex post facto basis) up to 22.08.1997.

15. Admittedly, these extensions were granted subject to levy of liquidated damages and price reduction.

16. Consequently, BSNL levied liquidated damages and price reduction to the tune of Rs. 4,00,185/- and Rs. 19,30,586/- respectively.

17. The imposition of the aforesaid liquidated damages and price reduction was challenged by the BWL before the Arbitrator by invoking arbitration mechanism contained under Clause No. 20 of the General (Commercial) Conditions of Contract ***("GCC")*** *vide* letter dated 10.11.1999.

Impugned Award (A.A. No. 302/03)

18. The Arbitrator held that BSNL is entitled to recover liquidated damages and accordingly recovered such damages. However, it is not entitled

and liable to pay back Rs. 1930568/- recovered towards price reduction.

19. BWL was also awarded *pendente lite* interest on the aforesaid amount at the rate of 9% p.a. and post-award interest till the date of realization on the principal amount at the rate 9% p.a. along with legal fees and expenses to the tune of Rs. 200000/-.

O.M.P. (COMM) 63/2020 (arising out of A.A. No. 301/03)

20. A tender dated 20.02.1997 bearing No. MM/OF/021997/000092 was floated by BSNL for the procurement of 2500 Kms of 24F optical fibre cable along with other accessories.

21. BWL turned out to be the successful bidder and accordingly an advance purchase order bearing No. CT/APO/017/97-98 dated 07.07.1997 for 610 Kms of 24F optical fibre cable was issued.

22. BWL unconditionally accepted the aforesaid advance purchase order and also along with letter dated 26.08.1997 furnished a performance bank guarantee for Rs. 23,13,000/-.

23. Upon such acceptance, a purchase order dated 16.09.1997 was placed for supply of 610 Kms of 24F optical fibre cable with accessories, within 4 months i.e., by 15.01.1998.

24. By the date fixed between the parties, BWL could only deliver 12Kms of cable out of 610 kms, leaving a balance of 598 Kms.

25. Pursuant to this failure in fulfilling its obligation, BWL applied for multiple extensions of time.

26. The first extension was granted on 26.02.1998 up to 19.03.1998, followed by a second extension granted on 30.03.1998 up to 06.04.1998, followed by another extension granted on 06.04.1998 up to

14.04.1998. Another final extension was also granted on 10.06.1998 up to 09.08.1999.

27. The first three extensions were allowed subject to levy of liquidated damages and the final one was allowed subject to price reduction also in addition to liquidated damages.

28. BSNL levied liquidated damages amounting to Rs. 25,42,797/- upon BWL and price reduction was quantified at Rs. 44,94,651/-.

29. BWL filed an Arbitration Petition bearing No. 301/2000, wherein the Arbitrator was appointed in terms of the Order dated 12.07.2002.

Impugned Award (A.A. No. 301/03)

30. The Arbitrator held that BSNL was entitled to recover liquidated damages but not price reduction and hence, the amount deducted on account of price reduction i.e., Rs. 44,94,651/- was awarded to BWL with *pendente lite* interest at the rate of 9% p.a. and post award interest on the principal amount from the date of award till realization at the same rate along with costs of Rs. 200000/-.

SUBMISSIONS ON BEHALF OF BSNL

31. Mr. Rai, learned counsel for BSNL, submits that the impugned Awards suffer from patent illegality and are against the public policy of India for the reason of being based on *prima facie* erroneous application of propositions of law.

General Submissions (in O.M.P. (COMM) 43/2020 and O.M.P. (COMM) 63/2020)

32. The Arbitrator has failed to appreciate the fact that the terms of the original contract stood modified by consent of both the parties. The

acceptance of BWL can be inferred from the conduct and performance on its part to fulfil the obligations under the Contract.

33. He also submits that the factual matrix of the present case is similar to controversy already decided in the judgment of *Bharat Sanchar Nigam Limited v. Himachal Futuristic Communications Limited*[1], wherein this Court while holding the decision of arbitrator to be contrary to Section 62 of the Indian Contract Act, 1872 ***("the Contract Act")*** and *Bhagwati Prasad Pawan Kumar v. Union of India*[2] observed that the communication between parties modified the original contract with respect to time and price.

34. BWL was aware of the conditions attached to extensions for making the requisite supply, having accepted them, subsequently BWL was estopped from challenging such terms and conditions.

35. The impugned Awards are patently illegal inasmuch as they are passed without taking into consideration and applying Section 9 of the Sales of Goods Act, 1930 ***("the 1930 Act")***. According to Section 9 of the 1930 Act, the prices decided in a contract are only for a limited/specified period and not for the supplies made thereafter.

36. All extension letters issued by BSNL stated that the price for supplies made in the extension period to be the prevailing market rates. BWL raised no objection to this condition and rather supplied goods without protest.

37. Correspondences for request of non-reduction of prices by BWL cannot form the basis of awarding claim in favour of BWL, it is the

[1]2012 SCC OnLine Del 3178.
[2](2006) 5 SCC 311.

overall conduct which should have been taken into consideration, whereby BWL continued to supply and acceded to the change of conditions by its conduct.

38. The Arbitrator has taken an implausible view in interpreting Clause No. 12(ii)(a) and not taking into consideration the fact that Clause No. 12(ii)(a) was superseded by the amended conditions.

39. The Arbitrator in passing the impugned Awards has exceeded the confines of jurisdiction by overlooking Section 62 of the Contract Act which provides for effect of novation.

40. BWL by supplying the goods after grant of extensions has accepted the terms and conditions for grant of extensions including price reduction, by implication. Also, it cannot accept the benefit without accepting the condition attached to it. Reliance is placed on Section 8 of the Contract Act, *BSNL v. BPL Mobile Cellular Ltd.*[3] and *Amrit Banspati Co. Ltd. v. Union of India*[4].

41. It is on this ground of non-consideration of the BSNL's case, the impugned Awards are submitted to be in violation of public policy. Reliance is also placed *ONGC v. Saw pipes Ltd.*[5]

42. In O.M.P. (COMM) 43/2020, no other specific submissions have been raised by BSNL.

Specific Submissions (in O.M.P. (COMM) 63/2020)

43. It is submitted *qua* impugned Award, that the extensions were granted *vide* various letters which contained stipulation to this effect that the

---

[3](2008) 13 SCC 597.
[4]1964 SCC OnLine All 356.
[5](2003) 5 SCC 705.

extension granted would be subject to imposition of liquidated damages and price reduction.

44. BWL has out of its free will and own volition accepted the terms and conditions of the extensions and thereafter supplied the goods. It is settled position of law that if extension are granted, the party at whose instances extension are given cannot choose to accept some conditions of it while rejecting the others, it has to be accepted or rejected as a whole.

45. The Arbitrator has failed to consider the reply of BSNL in the arbitral proceedings wherein the fact of novation of contract by virtue of extensions granted, is clearly stated.

46. The Arbitrator has failed to take into consideration the fact that the terms of the original contract stood novated after extension and thus, clause Nos. 11, 12(1)(ii)(b), and 13 of the GCC would not be applicable.

47. BWL was allowed to supply the goods only on the condition of imposition of liquidated damages and price reduction as per provisional rates. Thus, the impugned Award holding price reduction to be illegal is in violation of law. Reliance is placed on *Himachal Futuristic (Supra)*, *Bhagwati Prasad Pawan Kumar (Supra)*, and *Amrit Banspati (Supra)*.

SUBMISSIONS ON BEHALF OF BWL

48. At the outset, Mr. Singh, learned senior advocate for BWL, states that the present petitions are barred by limitation for the reason that the BSNL has filed these petitions after expiry of the statutory period of 3 months and has not furnished any proof to this effect that it actually

received the impugned Award No. 302/03 on 31.04.2008 (O.M.P. (COMM) 43/2020) and impugned Award No. 301/03 on 21.04.2008 (O.M.P. (COMM) 63/2020).

49. He also states that BSNL by way of present petition has merely reiterated its contentions already raised before the Arbitrator and is seeking a review of merits, which is beyond the jurisdiction conferred by Section 34 of the Act on this Court. Reliance is placed on *Connaught Plaza Restaurant Pvt. Ltd. v. Niamat Kaur*[6] and *MSK Projects v. State of Rajasthan*[7].

50. He states that the contentions raised are in the nature of questions of fact and it is a settled position of law that the view of Arbitrator is final on these questions. Reliance is placed on *Associate Builders v. D.D.A.*[8]

51. The primary issue before the Arbitrator was that whether the conditions of Contract allowed BSNL to unilaterally reduce the price of goods supplied during the extended period and to levy liquidated damages for the delay in performance.

52. The findings of the Arbitrator are based on interpretation of terms of Contract which is the domain of Arbitrator and the same is beyond the scope of Section 34 of the Act.

53. The Arbitrator has arrived at rational conclusions in the impugned Awards after elaborately discussing the evidence in detail.

54. The findings of the Arbitrator *qua* price reduction are based on reasons and documents on record. Thus, the no grounds as enumerated under

---

[6] 2013 SCC OnLine Del 2320.
[7] (2011) 10 SCC 573.
[8](2015) 3 SCC 49.

Section 34 of the Act warranting interference by this Court are established by BSNL in the present case.

ANALYSIS AND FINDINGS

55. I have heard the learned counsels for the parties and perused the documents placed on record.

PRELIMINARY OBJECTION OF LIMITATION

56. BWL has raised a preliminary objection that the petitions are time barred for the reason of being filed after the expiration of 3 months limitation period as contemplated under Section 34 of the Act. Section 34(3) of the Act reads as under:

> *"34. Application for setting aside arbitral award.—*
>
> *(1)...*
>
> *(2)...*
>
> *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*
>
> *Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*

57. It is the case of BWL that BSNL has not furnished any documentary proof in support of its averment that the it actually received the

IBC Laws | www.ibclaw.in

impugned Award No. 302/03 on 31.04.2008 (O.M.P. (COMM) 43/2020) and impugned Award No. 301/03 on 21.04.2008 (O.M.P. (COMM) 63/2020).

58. The preliminary objection of limitation against the present petitions is misconceived as documents placed on record in the Arbitral records shows endorsement that the signed copies of the impugned Awards were received by the BSNL on 21.04.2008, which are reproduced as under:

JASPAL SINGH
FORMER JUDGE, DELHI HIGH COURT

Registered A.D.

In the matter of Arbitration between BWL Ltd. and Union of India & Anr. (AA No. 301/03).

To,

3. BWL Limited,
Kundan House
101A, Hari Nagar Ashram
Behind Nafed Building
New Delhi-110014.

4. Bharat Sanchar Nigam Ltd.
A Body Corporate Govt. Of India
Sanchar Bhawan,
20, Ashoka Road
New Delhi-110001.

Notice

Please take notice that in the above-cited matter the Award has been announced today. A duly signed copy of the Award is attached herewith.

3-04-08

Jaspal Singh
Justice Jaspal Singh (Retd.)
(Sole Arbitrator)

Recd Signed copy of Award
21/04/08
AD (MT-II)
BSNL CO office, New Delhi

59, HEMKUNT COLONY, OPPOSITE NEHRU PLACE, NEW DELHI-110048
OFF. : 91-11-26478081 FAX : 91-11-26216831

JASPAL SINGH
FORMER JUDGE, DELHI HIGH COURT

Registered A.D.

In the matter of Arbitration between BWL Ltd. and Union of India & Anr. (AA No. 302/03).

To,

1. BWL Limited,
   Kundan House
   101A, Hari Nagar Ashram
   Behind Nafed Building
   New Delhi-110014.

2. Bharat Sanchar Nigam Ltd.
   A Body Corporate Govt. Of India
   Sanchar Bhawan,
   20, Ashoka Road
   New Delhi-110001.

Notice

Please take notice that in the above-cited matter the Award has been announced today. A duly signed copy of the Award is attached herewith.

3-04-08

Justice Jaspal Singh (Retd.)

(Sole Arbitrator)

Recd Signed copy of Award
21/04/08
AD(MT-II)
BSNL CO office
Janpath N. Delhi

59, HEMKUNT COLONY, OPPOSITE NEHRU PLACE, NEW DELHI-110048
OFF. : 91-11-26478081 FAX : 91-11-26216831

59. Thus, the present petitions which were filed on 18.07.2008 are filed within the prescribed limitation period.

2026:DHC:5270

60. In this view, the preliminary objection raised by BWL to oppose the maintainability of the present petitions stands rejected.

SCOPE OF INTERFERENCE UNDER SECTION 34 OF THE ACT

61. The scope of interference under Section 34 of the Act is now clearly established. The Court is not required to sit in appeal as an Appellate Court over the Award, and it can neither reappreciate the evidence nor reinterpret the terms of the contract, when the view already taken by the arbitrator is a probable and possible one. Judicial intervention by Court with the Award is permissible only on limited and specific grounds, as encapsulated under Section 34 of the Act. The Court is not required/empowered to reappreciate evidence or substitute its own view with that of the Arbitral Tribunal. It is a settled position of law that Section 34 of the Act, embodies the principle of minimal judicial interference, thereby preserving the foundational precept of the Act, the finality and efficacy of Arbitral Awards. The Hon'ble Supreme Court has recently observed this scope of interference in the judgment of ***Consolidated Construction Consortium Ltd. v. Software Technology Parks of India***[9], the relevant paragraphs of which reads as under:

> *"46. Scope of Section 34 of the 1996 Act is now well crystallised by a plethora of judgments of this Court. Section 34 is not in the nature of an appellate provision. It provides for setting aside an arbitral award that too only on very limited grounds i.e. as those contained in sub-sections (2) and (2-A) of Section 34. It is the only remedy*

[9](2025) 7 SCC 757.

for setting aside an arbitral award. An arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law which would require re-appraisal of the evidence adduced before the Arbitral Tribunal. If two views are possible, there is no scope for the court to re-appraise the evidence and to take the view other than the one taken by the arbitrator. The view taken by the Arbitral Tribunal is ordinarily to be accepted and allowed to prevail. Thus, the scope of interference in arbitral matters is only confined to the extent envisaged under Section 34 of the Act. The court exercising powers under Section 34 has per force to limit its jurisdiction within the four corners of Section 34. It cannot travel beyond Section 34. Thus, proceedings under Section 34 are summary in nature and not like a full-fledged civil suit or a civil appeal. The award as such cannot be touched unless it is contrary to the substantive provisions of law or Section 34 of the 1996 Act or the terms of the agreement."

62. At the outset, Mr. Singh, learned Senior Counsel for BWL, states that the petitions are *sans merit*, as BSNL has failed to establish and prove any specific ground of scrutiny under Section 34 of the Act. The impugned Awards are detailed Awards substantiated by the evidence/documents available on record passed after taking into consideration the contentions of the parties and the same does not suffer from any vices as enumerated under Section 34 of the Act

warranting interference by this Court. The findings of the Arbitrator are plausible and therefore cannot be interfered with under the Section 34 jurisdiction.

63. With the above scope of Section 34 of the 1996 Act in mind, I shall now deal with the rival contentions.

PRICE REDUCTION

64. The core challenge of BSNL in the present petitions is based on the premise that BSNL is entitled to impose price reduction by virtue of the conditional extensions granted to BWL, which has, in effect, novated the original contract.

65. The contentions and controversy surrounding both the impugned Awards are the same i.e., the issue of price reduction in view of the extensions granted.

66. BSNL has assailed the findings of the Arbitrator in both the impugned Awards for being perverse and against public policy on three fold grounds, which needs to be analysed for the purpose of resolving this controversy:

i. The original Contract between the parties stood novated by consent of both the parties and thus, Section 62 of the Contract Act applied.

ii. BWL by supplying the goods after extensions has by its conduct accepted the conditions/terms on which extensions were granted within the meaning of Section 8 of the Contract Act.

iii. The Arbitrator failed to appreciate and apply Section 9 of the 1930 Act in the light of the factual scenario of the present case.

IBC Laws | www.ibclaw.in

2026:DHC:5270

67. For the sake of intelligibility, I shall now test both the impugned Awards on the touchstone of Section 34 of the Act in view of the general and specific submissions made by BSNL.

O.M.P. (COMM) 43/2020 (Arising out of A.A. No. 302/03)

68. As summarised above, the case of BSNL is based on a very specific point that the extensions granted to BWL coupled with condition of levy of liquidated damages and price reduction has novated the original contract by virtue of which the Arbitrator has erred in ruling that BSNL was not entitled to impose price reduction.

69. The Arbitrator *qua* this issue of price reduction in the Award, commenced his adjudication by examining Clause No. 13 of GCC, the Arbitrator then perused Clause Nos. 11.3 and 12 of GCC along with Clause Nos. 3 and 5 of advance purchase order and Clause No. 7 of the purchase order, while also considering the submissions of both the parties with respect to interpretation of these clauses. The Arbitrator further took into consideration the reliance placed by BSNL on Exhibit RW1/11 and on Section 9 of the 1930 Act. Upon a comprehensive consideration of the aforesaid terms of the Contract, evidentiary material and applicable statutory provisions, and in light of evidence of constant resistance to price reduction, the Arbitrator returned a categorical finding that BWL never agreed to this unilateral amendment to the Contract relating to price and the same is beyond the terms of the Contract. The relevant portions of the Award reads as under:

> *"Coming to the question of price reduction, as already noticed above, the main question is as to whether the Respondent could, in terms of the contract, reduce the price on account of non-*

delivery of the equipment in time. It may be noted that the total price reduction comes to Rs.19,30,568/-.

Before I proceed to come into grip with this question a few clauses in the contract need to be noticed. The first such clause is Clause No. 13 in the General (commercial) Conditions of Contract. It runs as under: (page-47)

> *Clause 13: CHANGES IN PURCHASE ORDER:*
>
> *Clause 13.1:- The purchaser may, at any time, by a written order given to the Supplier, make changes within the general scope of the contract in any one or more of the following:*
>
> *(a) Drawings, designs or specifications, where Goods to be furnished under the Contract are to be specifically manufactured for the purchaser;*
>
> *(b) The method of transportation or packing;*
>
> *(c) The place of delivery;or*
>
> *(d) The services to be provided by the Supplier.*
>
> *Clause 13.2: If any such change causes an increase or decrease in the cost of, or the time required for the execution of the contract an equitable adjustment shall be made in the Contract Price or delivery schedule, or both, and the Contract shall accordingly be amended. Any proposal by the Supplier for adjustment under this clause must be made within thirty days from the date of the receipt of the change in order.*

Before referring to other relevant clauses I may mention that it

was contended by the learned Counsel for the Claimant that under the above mentioned Clause 13, no right was vested with the Respondent to change the Purchase Order as far as the question of price is concerned.

Since, during arguments reference was also made to Clause 11.3 and so also to Clause 12 of the said General Conditions, I may as well as deal with them at this very stage. Clause 11.3 which finds mention under the sub-head payment terms provides as under:-

> *Clause 11.3:- "Any increase in taxes and other statutory duties/levies after the expiry of the delivery date shall be to the contractor's account. However benefit of any decrease in these taxes/duties shall be passed on to the Purchaser by the supplier".*
>
> *It was argued on behalf of the Claimant that even under this clause only taxes and other statutory duties/levies after of the expiry of the delivery date could effect the pocket of the contractor.*

Coming to Clause 12.1 which is under the sub-head "prices" it is provided as under:

> *<u>Clause 12:</u> PRICES…*
>
> *….*

On the basis of the above said Clause 12 it was argued by Mr. Malhotra that price once fixed was to remain valid till the period of delivery and that where the supply was delayed and made after delivery period only the advantage of reduction of tax / duty

could be enjoyed by the purchaser and further that no benefit of increase in price was permitted to the supplier even in a case of increase in tax/duty. In short thus it was argued that even under Clause 12 the Respondent had no power or authority to reduce the price. However, on the other hand, Mr. Sameer Aggarwal relying upon the above-quoted Clause 12(ii)(a) and Clauses 3 and 5 of the Advance Purchase Order and Clause (7) of the Purchase Order, contended that the price which had been fixed was to remain valid only for the period of delivery and that this being the position there was no bar to reducing the same after the period of delivery. Clauses 3 and 5 of the Advance Purchase Order and Clause 7 of the Purchase Order run as under:-

> *Clause 3:- Any increase in taxes and other statutory duties / levies after the expiry of delivery date shall be to contractors account. However, benefit of any decrease in these taxes/ duties shall be passed on to the purchaser by the supplier.*
>
> *Clause 5: Delivery Schedule: The supply of goods shall commence immediately on placement of Purchase Order and be completed by 28.2.97. Delivery Schedule indicated herein shall be firm and not subjected to any change.*
>
> *Clause 7:*
>
> *Prices: Total value of the order shall be Rs. 4,10,97,797.76 as per annexure "A". The unit prices given in the annexure "A" are inclusive of ED, ST & other statutory duties / levies etc and Packing & Forwarding charges, Freight &*

> *Insurance charges.*
>
> *Any increase in taxes and other statutory duties / levies after the expiry of delivery date shall be to the contractors account. However benefit of any decrease in these taxes /duties shall be passed on to the purchaser by the supplier.*

My attention was also drawn to the affidavit of Sh. Razi Ahmad dated 28th November, 2003 in which it is stated that the Claimant itself had demanded payment with regard to the stores supplied after original delivery period as per the provisional prices intimated by the deponent, and to the letter of the Claimant itself which was produced by Sh. Razi Ahmad through his affidavit and which is marked at RW 1/11. The perusal of the RW 1/11 (page-56 with the affidavit of Sh. Razi Ahmad) would go to show that the whole of the letter has not been produced and only what is purported to be para 2 of the letter has been produced. However the relevant portion of said para 2 of the letter is as under:

> *"The bills against remaining material which has been delivered after original D.P. may please also be passed as per provisional prices intimated by D.O.T.".*

I will be dealing in some detail with this letter also at a later stage.

The provisional prices were intimated by D.O. T. on 6th March, 1997 (page-70) and on 11th September, 1997 (pages 89 and 90). My attention was also drawn to the letter of the Claimant dated 5th June, 1997 Exhibit RW 1/9 (page-52 & 53 with affidavit of Sh. Razi Ahmad) and more particularly to the following appearing in

IBC Laws | www.ibclaw.in

the letter:

> *"The supplies made within the original delivery schedule should not attract all the provisional price which infact was given be the extended delivery schedule with 1.D charges vide DOT's letter dated 6.3.97".*

It was argued by Mr. Aggarwal that by this letter the Claimant admitted that there could be reduction in price of the supplies made after original delivery schedule. It may however be noticed that in the cross-examination of Mr. Razi Ahmad while stating that reduction in price could be due to reduction in taxes and/or reduction in market price, he has proceeded to state that there were three periods in the supply of the material. In the case of first supply there was no reduction but in the second period reduction was on account of reduction in taxes and that in the third period only reduction was due to lower rate in new tender opened during that period. He has further proceeded to state that the second period was from 1st March, 1997 to 22nd April, 1997. In other words as per Mr. Razi Ahmad for the supplies made during the period 1st March, 1997 to 22nd April, 1997 the reduction in price was only on account of reduction in taxes. If the argument of Mr Aggarwal that delivery to the Respondent and not to the carrier would amount to actual delivery is accepted and which I do accept, then, is that case, there was no supply daring period of 1st March, 1997 to 22nd April, 1997. If that be so then the supplies made from 23rd April, 1997 onwards only would attract the third period and from the recorded

appears that after 22nd April, 1997, as per the Respondent, the following deliveries were made as stated in para 2.7 page-8 of the Statement of Claim.

Para 2.7 The Claimant submits that the quantity of 134 Kms., for which the delivery extension was sought by the Claimant, was also manufactured by Claimant before February 28, 1997 and was offered for inspection within the extended schedule. The Respondents however, agreed to do the inspection only around end of March 1997. Out of the total quantity of 134 Kms., 41.180 Kms. and 27.884 Kms. were cleared on March 29, 1997 and March 31, 1997 respectively and balance 64.943 Kms. was cleared on April 3, 1997 and therefore, the entire lot was dispatched by the Claimant on or before April 3. 1997. The details with respect to the dispatch of last lot of 134 Kms. of 12F. Cables are given as under:

Qty. Offered	Our Offr. Ltr.No. Date Desp	Inspe. Cert. Rechd at	Date of	Date of Mtrl.
41.80 Kms.	078, 28/3/97	TC/SGI/96-97/78. 29/3/97	29/3/97	Hassan on 23/04/1997
27.884 Kms.	083. 30/3/97	TC/SGI/96-97 83.31/3/97	31/3/97	Hassan on 23/4/97
64.943 Kms.	084. 31/3/97	TC/SGI/97-98/1,3/4/97	3/4/97	Bangalore on 25/4/97,7/5/97, & 22/8/97",

IBC Laws | www.ibclaw.in

Mr. Aggarwal drew my attention to the Purchase Order dated 14th August, 1997 pertaining to the Claimant itself (page-44) which, according to him, shows that as per the Claimant itself the price quoted was Rs. 56764.60/- with effect from 23rd April, 1999. As per Mr. Aggarwal this has to be treated as the market price prevailing at that time and that this was the price which was paid to the Claimant on 11th September, 1997. Mr. Aggarwal also drew my attention to Section 9 of the Sales and Goods Act, 1930 and pointed out that the price fixed in the contract being only for the specified period and not for supplies made thereafter, therefore, under Section 9 of the said Act the price could be as determined during the course of dealings between the parties. It was contended that as in every letter of extension of time the Respondent had made clear that the price for the supplies made during the extended period would be the prevailing market price and as the Claimant raised no objection to it and rather made supplies without any protest to that condition, it must be taken that the price with regard to the supplies made during the extended period, was taken to be that which was the market price at the relevant time. In support he again referred to RW 1/11, a letter to which reference has already been made by me above.

The contentions raised by Mr. Aggarwal need to be looked into in some detail. Undoubtedly, sub-section(2) of the section 9 of the Sale of Goods Act, 1930 (hereinafter referred to as the Act) as the price in this case was fixed as would be borne out from the

contract documents already referred to above. The contract did not leave the price open to further negotiations. Clause 12(ii)(a) makes it clear that the price once fixed will remain valid for the period of delivery and that increase and decrease of taxes and other statutory duties will not affect the price during the period of delivery. It was argued by Mr. Aggarwal, and as noticed above, that the price so fixed was to remain valid "for the period of delivery" only and not thereafter. But then, to my mind, this clause cannot be read in isolation. Significantly clause 12(1)(a) debars the supplier from claiming price "higher from the prices quoted by the supplier in his Bid". Though it could but it does not invest the purchaser with the right to reduce the price already agreed. Clause 12.1 (1)(b) does give the right to the purchaser to ask for reduction in price but only in case of "revision of statutory Levies/Taxes" and not otherwise. Though Clause 12.1(1)(b) uses the expression "supply period" and not "period of delivery" as used in 12(1)(ii)(a) or "delivery period" as used in 12(1)(i)(b) since "supply" means act of supplying, furnishing, providing or distributing, I am inclined to hold that it refers only to the delivery period as fixed in the contract and not to the extended period more so because the extended period is specifically taken care of in Clause 12(1)(ii)(b)

Right to reduce the price is when there is "revision of statutory levies / taxes during the supply period. In case of "delayed supplies" made "after delivery period" the contract gives no right to the purchaser to ask for reduction in the prices. Under Clause

IBC Laws | www.ibclaw.in

12.1(ii)(b) the only thing provided is that in case of delayed supplies "after the delivery period" the "advantage of reduction of tax/duty" would be passed on to the purchaser "and that "no benefit of increase in price will be permitted to the supplier if there is any increase in tax/duty". The clause goes no further. Does it not show that in case of "delayed supplies" made "after delivery period" also the price fixed would stand with the only concession that the "advantage" of reduction of tax/duty would be passed on to the purchaser? To my mind if Clauses 11.3 and 12 and Clause 3 of the Advance Purchase Order read with Clause 7 are read together what would emerge out is as under:

"The price fixed…

…

… of the purchaser".

But then this does not finish the matter here. It may be recalled that it was also the contention of Mr. Aggarwal that the Respondent had agreed to reduction in price with regard to the delayed deliveries.

In support, and as already noted above, reference was made to letter Exhibit RW-1/11. It need again be mentioned that page-1 of the letter has not been placed on the record. It is only page-2 which has been produced. Though page-2 is not disputed by the other side but during arguments it was submitted by Mr. Malhotra that the first page of RW-1/11 had been intentionally kept back and that what is stated in the page which has been produced given a picture which is not complete. It was argued

IBC Laws | www.ibclaw.in

that the Claimant had consistently been taking the plea that the price originally fixed was firm and called for no variation and the Claimant had asked for release of money in Exhibit RW-1/11 "as per provisional prices without giving up its stand" and that as such asking for payment as per provisional prices pertaining to material delivered after the original delivery period must be taken to be not a categorically agreement to accept those provisional rates. In this regard my attention was also drawn to the statement affidavit of Mr. Sunil Khetawat dated 9th of February, 2004 be states that the Claimant was "forced" to ask for passing of bills as per provisional prices "as otherwise the Respondent would not have made any payments to the Claimant". An incomplete letter, under the circumstances, would not inspire confidence. More so in view of the affidavit of Mr. Sunil Khetawat as referred to above. More so when we have on the record number of letters from the Claimant consistently taking the stand that the prices fixed were firm and not subject to variation. That the Claimant had never categorical agreed to the unilateral reduction of price is clearly borne out from its letter June 28, 1991 (Exhibit-CW-1/25) in whit the Claimant asserted:-

> *On going through the contract, we understand that for any delay L/D would be calculated as per terms and conditions as mentioned in the contract. But no where it is mentioned that the prices would accordingly change for aforesaid reason, if the material is despatched within the extended delivery schedule*

> *As per Clause 12 of the General Conditions of the Contract it is very clearly mentioned that (Quote "the prices once fixed shall remain valid for the paid of delivery. Any increase and decrease of taxes and other statutory duties will un affect the price during this period.*
>
> *In case of delayed supplies after delivery period the advantage of reduction of duty, would be passed on to the purchaser and no benefit of increase in price will be permitted to the supplier if there is any increase in tax/duty" unquote)*
>
> *From the above we understand that only on account of decrease tax/duty that the prices would tend to change. Therefore, the fixation of price w.e.f. 23.04.97 onwards as per Annexure- AA-1 does not seem to be applicable on us as material was despatched with in the extended delivery schedule.*

Reference may also be made to letter of the Claimant dated August 14, 1997 which first make reference to the revision made in prices and to the stand of the Claimant that even that revision would apply certain supplies and then to the actual stand taken by the Claimant. And it is taken in following words:-

> *On going through the contract, we understand that for any delay L/D would be calculated as per terms and conditions so mentioned in the contract. But no where it is mentioned that the prices would also accordingly change for aforesaid reason, if the material is despatched within the extended*

delivery schedule.

As per Clause 12 of the General Conditions of the Contract it is very clearly mentioned the (Quote "the prices once fixed shall remain valid for the period of delivery. Any increase and decrease of taxes and other statutory duties will not affect the price during this period.

In case of delayed supplies after delivery period the advantage of reduction of tax/duty would be passed on to the purchaser and no benefit of increase in price will be permitted to the supplier if there is any increase in tax/duty" unquote).

From the above we understand that only on account of decrease in tax/duty that the prices would tend to change. Therefore, the fixation of price w.e.f. 23.04.97 onwards as per Annexure- AA-I does not seem to be applicable on us as material was despatched with in the extended delivery schedule.

We find the same stand…

….

…terms of the contract.

I may lastly also refer to the Advance Purchase Order which shows that the contract was on a fixed price and there could be a variation in this fixed price only on account of marginal changes taking place "due to engineering of roots". Thus, in short, under the contract the Respondent had no power or authority to reduce the price merely on the ground that the time for delivery had

been extended on account of delay in honouring the delivery schedule. Reference, in this connection, may also be made to Clauses 15 and 16 of the General Commercial) Conditions of Contract also. While clause 15 deals with delays in the supplier's performance, clause 16 relates to liquidated damages. Clauses 15 and 16 run as under:-

> *15. DELAYS IN THE SUPPLIER'S PERFORMANCE*
>
> *15.1 Delivery of the Goods and performance of services shall be made by the Supplier in accordance with the time schedule specified by the purchaser in its Purchase Order. In case the supply is not completed in the stipulated delivery period, as indicated in the Purchase Order, purchaser reserves the right either to short close/cancel this purchase order and/or recover liquidated damages charges. The cancellation/short closing of the order shall be at the risk and responsibility of the supplier and purchaser reserves the right to purchase balance unsupplied item at the risk and cost of the defaulting vendors*
>
> *15.2 Delay by the supplier in the performance of its delivery obligations shall render the supplier liable to any or all of the following sanctions, forfeiture of its performance security, imposition of liquidated damages and/or termination of the contract for default.*
>
> *15.3 If at any time during performance of the Contract, the Supplier or subcontractor(s) encounters conditions impending timely delivery of the goods and performance of*

IBC Laws | www.ibclaw.in

service, the Supplier shall promptly notify the Purchaser in writing of the fact of the delay, its likely duration and its causes(s). As soon as practicable after receipt of the Supplier's notice, the Purchaser shall evaluate the situation and may at its discretion extend the period for performance of the contract after mutual discussion with the supplier

Clause-16: LIQUIDATED DAMAGES

16.1 The date of delivery of the stores stipulated in the acceptance of tender should be deemed to be the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be made after expiry of the contract delivery period without prior concurrence of the Purchaser, and be accepted by the consignee, such deliveries will not deprive the Purchases of his right to recover liquidated damages under clause 16.2 below. However, when supply is made within 21 days of the contracted original delivery period, the consignee may accept the stores and in such cases the provision of clause 16.2 will not apply

16.2 Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery the Purchaser shall be entitled to recover ½ % of the value of the delayed supply Re each week of delay or part thereof, subject to maximum of 5% of the value of the delayed supply, provided that delayed portion of the supply

> *does not in any way hamper the commissioning of the other systems. Where the delayed portion of the supply materially hampers installation and commissioning of the other systems, L/D charges shall be levied as above on the total value of the Purchaser Order. Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier.*

A bare perusal of Clause 15 would go to show that in case of delay in the supplier's performance the purchaser had the right either to short close/cancel the Purchase Order and/or recover liquidated damages charges and further that in case of delay by the supplier in the performance of its delivery, the supplier was to be liable to any or all of the following sanctions:

(i) Forfeiture of its performance security

(ii) Imposition of liquidated damages and or

(iii) Termination of contract of default.

As noticed above Clause 16 which deals with liquidated damages, provides that where the delivery is not made within the prescribed period the purchaser shall be entitled to liquidated damages <u>*Significantly, neither Clause 15 or Clause 16 invests the purchaser with any right to reduce the price in case of delay in performance of the contract*</u>

I may mention that during arguments reference was made by Shri Sameer Aggarwal Advocate to O.N.G.C. Ltd. v. Saw Pipes Ltd. AIR 2003 SC. 2629, Union of India v. M/s Free India Dry Accumulators Ltd. 1993 (25) DRJ 354, V/O

"TVAZHPROMEXPORT" v. Mukand Limited 2005 (3) Arbitration Law Reporter 406, Suchita Steel (India) v. Union of India 114 (2004) DLT. 351, Maharashtra Sute Electricity Board v. Sterlite Industries (India) &Anr. 2002 (1) Cur L. J. (CCR) 477, Chaudhary Construction Company v. D.D.A 1998 (44) D.R.J. 524, The Divisional Controller, KSRTC v Mahadeva Shetty &Anr. 2004 (1) U.J. 44 (SC). There cannot possibly any general with the proposition of law laid down in those judgments but then this case been distinguishable on fact I have been examined the same is the light of its own facts to keeping in view the propositions of law so will established the judgments referred to above.

For the reasons recorded above I hold that the Respondent was not justified in resorting to price reduction. The amount deducted on account of price reduction is Rs. 1930568=00. I also hold that the Respondent would have been entitled to recover liquidated damages on the delayed supplies at the rate of 5% of the original price of the delayed supplies. So calculated the amount of damages for delayed supply would come to Rs. 496720=00. The Respondent however actually deducted a sum of Rs. 400192=00 towards liquidated damages calculated at reduced price. However, there is no claim by the Respondent to recover the outstanding amount calculated at original price nor such claim was put up during arguments. The Respondent is thus liable to payback to the Claimant a sum of Rs. 1930568=00 recovered on account of price reduction. I therefore pass an Award in favour

of the Claimant and against the Respondent for the recovery of the said sum of Rs. 1930568=00. Keeping in view the complexity of the issues involved and the facts and circumstances of the case. The Claimant shall be entitled only to pendentelite interest on the said amount at the rate of 9% per annum besides interest on the principal amount at the rate of 9% per annum from the date of the Award till realization. No account has been given with regard to legal fee and the other expenses. However, keeping in view the effective sittings the Claimant is also allowed a sum of Rs. 2,00,000/- towards cost."

(Emphasis Supplied)

70. The effect of Novation of Contract is governed by Section 62 of the Contract Act, which reads as under:

> *"62. Effect of novation, rescission, and alteration of contract.—**If the parties to a contract agree** to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed."*

71. The term Novation has been defined in the judgment of ***Benjamin Scarf v. Jardine***[10], and quoted with approval by the Hon'ble Supreme Court in ***Sasan Power Ltd. v. North American Coal Corpn. (India) (P) Ltd.***[11], the relevant paragraph of ***Sasan Power (Supra)*** reads as under:

> *"23. In law, "novation" means—*
>
> *"... there being a contract in existence, some new contract is substituted for it, either between the same parties (for that*

[10] [L.R.] 7 App. Cas. 345.
[11] (2016) 10 SCC 813.

might be) or between different parties, the consideration mutually being the discharge of the old contract". [Lord Selborne, L.C. in Benjamin Scarf v. Jardine, (1882) LR 7 AC 345 at p. 351.]"

72. From a conspectus of the aforesaid, it is clear that the most crucial element for effecting a novation of a contract is mutual agreement between the parties, no such novation/alteration can be effected unless the parties to an agreement are at *consesnsus ad idem.*

73. Thus, in the present matter, the original Contract would only have been novated when the parties would have mutually agreed to discharge the old contract and accept the new one. No unilateral novation by imposing any condition can possibly be done by any party to bind the other.

74. In this view, the question of fact, whether BWL agreed to accept the condition of price reduction imposed by grant of extension, has already been determined by the Arbitrator.

75. The Arbitrator in his findings examined Clause No. 13 of the GCC, and turned on to an important Clause No. 12 which relates to prices and then while considering the submission of BSNL with respect to Section 9 of the 1930 Act, categorically returned the findings that the Contract between the parties was firm and did not contain any scope for renegotiation. The Arbitrator read Clause No. 12.1 (ii)(a) with Clause No. 12.1(i)(a) to hold that these clauses restricts the supplier from claiming price higher from the quoted price but it does not confer any power upon the purchaser to reduce the price agreed between the

parties. Although Clause 12.1(i)(b) of the GCC vests the right of reducing the prices with the purchaser but it is only limited to cases where there is revision of statutory levies/taxes. Clause 12 reads as under:

> *"Clause 12: PRICES:*
>
> *Clause 12.1:-(i)(a) Prices charged by the Supplier for Goods delivered and services .. performed under the Contract shall not to be higher from the prices quoted by the Supplier in his Bid.*
>
> *(b) In the case of revision of Statutory Levies/ Taxes during the supply period the Purchaser reserves the right to ask for reduction in the prices.*
>
> *(ii)(a) Price once fixed will remain valid for the period of delivery Increase and decrease of taxes and other statutory duties will not , affect the price during this period.*
>
> *(b) In case of delayed supplies after delivery period the advantage of reduction of tax/duty would be passed on to the purchaser and no benefit of increase in price will be permitted to the supplier if there is any increase in tax/duty."*

76. The Arbitrator then made a categorical finding that the right to reduce the price is only available in case of revision of statutory levies/taxes during the period of supply, and there is no such right to reduce price in absence of such revision of taxes after the delivery period. The Arbitrator read Clause Nos. 11.3, 12, 13 of GCC along with Clause No.

IBC Laws | www.ibclaw.in

3 of advance purchase order and Clause 7 of purchase order to summarise the position of contractual terms in the following words:

> *"The price fixed would remain firm though it may be reduced in case of revision of statutory Levies/Tax during the supply (delivery) period and where the delivery is after the "delivery period" as fixed in the contract, only the "advantage" of reduction of tax/duty would be passed on to the purchaser. The contract provides for nothing less nothing more. And, this being the position no right vests with the purchaser to reduce the price only on the ground that market price has gone down. And this being the contractual obligation, section 9 of the Sale of Goods Act does not come to the rescue of the purchaser."*
>
> ***(Emphasis Supplied)***

77. *Qua* the findings of the Arbitrator with respect to Clause No. 12, it is the case of BSNL that the Arbitrator has not taken a plausible view as the prices in accordance with that clause were not to be changed during the period of delivery but afterwards it could have changed because the original Contract stood amended by virtue of the conditional extensions granted. The Clause No. 12 more particularly Clause No. 12(ii)(a) stood superseded by the new conditions which had been accepted by the BWL.

78. These contentions of the BSNL again revert us back to the core of the controversy that is whether BWL has accepted the condition of price reduction contained in extensions granted, resulting in novation of the original contract.

IBC Laws | www.ibclaw.in

79. I find it crucial to state that by way of the present petitions, BSNL has fleetingly raised several contentions which have already been adjudicated by the Arbitrator with detailed findings. These petitions are in the nature of seeking reappreciation of evidence which would require this Court to travel beyond the jurisdiction conferred upon itby Section 34 of the Act.

80. The Arbitrator while dealing with this issue of acceptance of the condition of extension, in particular appreciated multiple evidences placed on record (letters dated 08.10.1997, 18.12.1997, 24.02.1998, 03.11.1998, 30.07.1999, 06.08.1999, 21.10.1999, 18.10.2000) of consistent resistance and disapproval by BWL to the proposed price reduction, and relying on these evidences concluded that in his view BWL never agreed to this unilateral amendment/condition imposed upon it with the extensions granted. Thus, the Arbitrator held price reduction to be beyond the terms of the Contract. Relevant portions of the Award reads as under:

> *"We find the same stand taken by the Claimant in its letter dated October 8, 1997 (Exhibit- CW-1/28 and in letter of December 18, 1997 (Exhibit-CW-1/29). Reference in this respect take it made to letter of the Claimant dated February 24, 1998 (Exhibit-CW-1/30) in which too the Claimant has asserted that the prices once fixed would not be subject to change. The same position was taken in the letter of November 3, 1998 (Exhibit-CW-1/31 and to the other letters of July 30, 1999 (Exhibit-CW-1/32), August 6, 1999 (Exhibit-CW-1/33). I am also in this connection*

IBC Laws | www.ibclaw.in

*referred to the letter of the Claimant dated October 21, 1999 (Exhibit-CW-1/37) which clearly points out that the price reduction and deduction made on that account was "totally illegal and unjustified" and that the price once fixed were to remain firm except in the case of reduction in custom duty/excise duty/taxes/levies. Lastly reference may also be made to the legal notice on October 18, 2000 which too was to the same effect. Thus keeping in view the consistent stand taken by the Claimant and as referred to above much cannot be allowed to be made out of the fact that the Claimant had asked for payments at the reduced provisional price. This is more so on account of the explanation given by Mr. Khetawat. I may also mention that in view of the material on record it does appear **that the Claimant never agreed to unilateral amendment** in the terms of the contract relating to price. Consequently and there being no cogent evidence on the record to prove that reduction it price was account of any reduction in taxes or levies, I am inclined to hold that the Respondent had no right to unilaterally reduce the price once fixed and that too beyond the terms of the contract."*

(Emphasis Supplied)

81. Notably, from a perusal of the Award it is clear that the Arbitrator has not ignored any relevant Clause or material document. The Arbitrator has conducted a detailed analysis of all the Clauses and correspondence

IBC Laws | www.ibclaw.in

exchanged between the parties, and has marshalled these materials to reach a reasoned conclusion by proper appreciation.

82. Under Section 34 of the Act, the scope of interference is very narrow and in that jurisdiction this Court is neither required nor entitled to reappreciate a finding of fact which essentially require evidentiary assessment, when the finding of arbitrator is a plausible view and substantiated on evidence available on record.

83. Thus, in view of this finding of the Arbitrator which deserves to be upheld, I find, no reasons to infer that there was any mutual agreement between the parties to discharge the original Contract resulting in novation by virtue of grant of extensions.

84. BSNL has also stated that in the present case, the condition of extensions i.e., the condition of price reduction was accepted by conduct of the BWL in making the requisite supplies(performance of its obligation under the Contract) as per Section 8 of the Contract Act. Section 8 of the Contract reads as under:

> *"8. Acceptance by performing conditions, or receiving consideration.—<u>Performance of the conditions of a proposal</u>, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."*

85. To substantiate the aforesaid submission, reliance is also placed on ***Bhagwati Prasad Pawan Kumar (Supra)*** and more particularly paragraph No. 19 to state that the Arbitrator has failed to appreciate the fact that performance of condition (supply) by BWL is acceptance of the conditional extension by conduct within the meaning of Section 8 of

the Contract Act. Paragraph No.19 of the aforesaid judgment reads as under:

> *"19. It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear (that the offeree did the act with the intention (actual or apparent) of accepting the offer. The decisions which we have noticed above also proceed on this principle.* ***Each case must rest on its own facts.*** *The courts must examine the evidence to find out* ***whether in the facts and circumstances of the case the conduct of the "offeree" was such as amounted to an unequivocal acceptance of the offer made. If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct.*** *On the other hand, if the evidence disclose that the "offeree" had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act. "*
>
> ***(Emphasis Supplied)***

86. From a conspectus of the judgment of the Hon'ble Supreme Court as relied upon by the learned counsel for the BSNL itself, it is clear that the application of Section 8 i.e., the decision on acceptance by conduct is a question of fact which needs to be decided after due consideration of the surrounding circumstances.

87. The judgment of ***Bhagwati Prasad Pawan Kumar (Supra)*** emphasises that for a conduct to be termed as acceptance it must be unequivocal

IBC Laws | www.ibclaw.in

and without reservation, as already categorically stated that while making supplies under extensions granted, BWL has specifically objected to the imposition of condition of price reduction.

88. Another limb of the aforesaid contention is that if an offer is made coupled with a condition, then the offeree cannot accept the benefit without accepting the said condition. This contention, to my mind, does not support the case of the petitioner as in the present case, the Arbitrator has returned categorical findings that the price reduction was beyond the terms of the original Contract itself and the same was in fact resisted to by the BWL, when extensions were granted. Hence, it is not a case where BWL accepted the offer of BSNL unconditionally or without reservations. The Arbitrator in the present case has interpreted the terms of the Contract, and has taken a plausible view and the same cannot be reappreciated under the Section 34 jurisdiction. Hence, the reliance placed on judgments of ***BPL Mobile (Supra)*** and ***Amrit Banspati (Supra)*** is misconceived.

89. It is also the case of BSNL that the Arbitrator has erred in not appreciating and applying Section 9 of the 1930 Act while adjudicating the controversy at hand. As per Section 9 of the 1930 Act, the prices fixed in the contract are only for a fixed period and not for the supplies made thereafter. Section 9 of the 1930 Act reads as under:

> *"9. Ascertainment of price.—(1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.*

> *(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."*

90. BSNL has reiterated the same contentions which were already raised and categorically discussed by the Arbitrator in his Award (as reproduced above). Thus, by way of fleetingly raising this contention BSNL is only seeking reappreciation by this Court, which is not permissible.

91. Additionally, the finding of the Arbitrator *qua* application of Section 9 is based on reasons and is a plausible conclusion drawn from the terms of the Contract itself. The Arbitrator held that in the present case the terms of Contract are such that they left no scope for further negotiation on prices in terms of Section 9 of the 1930 Act. The relevant portion of the Award is already reproduced in paragraph No. 73 of this judgment.

92. The Arbitrator has interpreted the terms of the contract, the provisions of the Contract Act, and of the 1930 Act. To my mind, the views and findings of the Arbitrator are reasonable and plausible, hence, within the contours of Section 34 of the Act, they do not require any interference.

93. Another contention of BSNL is that the Arbitrator has failed to appreciate that BWL was conscious of the fact that the extensions granted were conditional in nature and thus, by making the requisite supplies pursuant thereto, it is estopped from challenging the terms and conditions of the Contract thereafter.

94. This contention of BSNL cannot be accepted, as estoppel being a rule of evidence cannot, in its effect, operate to enforce a novation of contract where consent/agreement is not there. The Arbitrator as discussed above has categorically appreciated the correspondences and found out that BWL consistently resisted the proposed price reduction and never unequivocally accepted the condition even by its conduct. Moreover, a party cannot be precluded from asserting its contractual rights merely because it continued to perform the Contract, particularly when with reservations/protest against the imposition of condition.

95. BSNL has also placed heavy reliance on the judgment of ***Himachal Futuristics (Supra)*** to argue that in somewhat similar circumstances, similar correspondences were held to modify the original Contract. However, the reliance placed on the aforesaid judgment is misconceived as the decision of the learned Single Judge in the said judgment has already been set aside by the Hon'ble Division Bench in its judgment dated 17.04.2015 passed in an appeal titled ***Himachal futuristics communications ltd. v. Bharat Sanchar Nigam Ltd.***[12], the relevant paragraph of the judgment of Hon'ble Division Bench dated 17.04.2015 reads as under:

> *"36. Noting that during the extended period of supply price reduction benefit on account of reduction in customs, duty and excise has been granted by the learned Arbitrator in favour of BSNL and simultaneously the action of BSNL to recover liquidated damages at the contract price has been*

[12]FAO(OS) 391/2012, pronounced on 17.04.2015.

IBC Laws | www.ibclaw.in

upheld by the learned Arbitrator, we allow the appeal and set aside the impugned decision dated May 30, 2012. OMP No.427/2006 filed by BSNL is dismissed."

96. This judgment of Hon'ble Division Bench has also attained finality as the Hon'ble Supreme Court *vide* Order dated 10.07.2017 has dismissed the Special Leave Petition[13] preferred against the said judgment.

97. Thus, the said contention does not deserve consideration by this Court and deserves to be rejected at the threshold itself.

98. It is clear in view of the aforesaid discussion that the interpretation of terms of a Contract and findings of facts based on evidence is the exclusive domain of the Arbitrator, this Court under Section 34 jurisdiction cannot interfere with such findings or interpretation when the same is based on a plausible view and is substantiated by evidence on record.

O.M.P. (COMM) 63/2020 (Arising out of A.A. NO. 301/03)

99. Major contentions raised by BSNL in this petition are identical to that of in O.M.P. (COMM) 43/2020 (arising out of A.A. No. 302/03), and are already discussed above on the identical principle issues of novation, application of Section 8 of the Contract Act, and Section 9 of the 1930 Act.

100. Notably, both the Awards were passed by the same Arbitrator on the same date arising out of identical controversy between the same parties.

101. Since, the controversies in both the petitions are identical, I am not inclined to burden this judgment by repeating the entire discussion or

[13] SLP(C) No. 25894 / 2015.

analysis *in toto*. Thus, for the purpose of this petition, I shall confine the discussion to the impugned Award specific facts and to additional contentions that survive for consideration, and to examine the findings of the Arbitrator warranting interference under Section 34 of the Act.

102. The Arbitrator in the present impugned Award also took a similar view as above and the relevant portions of the impugned Award reads as under:

> *"I have already reproduced above Clause 12 dealing with the question of price. It shows that firm price had been fixed and the same was to remain valid for the period of delivery and that price was to remain unaffected either by increase or by decrease of other statutory duties. It was only in case of delayed supplies after delivery period that the advantage of reduction of tax/duty was to pass on to the purchaser. This is what was the contract. And, as we know by now, the price for the contracted 610 km quantity was Rs. 84,500/- per km. What further needs to be noticed is that no reduction in price was sought or claimed on 26th February, 1998 when extension was granted upto 19th March, 1998 or on 30th March, 1998 when extension granted was upto 6th April, 1998 or again when extension was granted upto 14th April, 1998. It was only the last extension upto August 9, 1999 that was subject to not only liquidated damages but to price reduction also. But then this reduction in price was not on account of any reduction of tax/duty. The price was reduced on the ground that "prevailing prices" during the*

IBC Laws | www.ibclaw.in

period were "comparatively less from the approved prices quoted in the Purchase Order" [see para 19 of the Statement of Defence]. Clearly thus reduction in price was neither under Clause 11 nor under Clause 12. Was this reduction sanctified under Clause 13.2? Surely not Clause 13.2 is subject to Clause 13.1. It is not even pleaded that the decrease in price was prompted by any of the changes referred to therein. The reduction in price was thus unauthorised and rightly saw a prompt protest from the Claimant. After all the reduction was not only unjustified it also amounted to change in the terms and conditions of the contract which could not be done unilaterally.

The Respondents have deducted from the bills a sum of Rs. 44,94,651/- towards price reduction.

For the reasons recorded above I hold that the Respondent was not justified in resorting to price reduction. The amount deducted on account of price reduction is Rs. 4494651=00. I also hold that the Respondent was entitled to recover liquidated damages on the delayed supplies only at the rate of 5% of the value of the delayed supplies at original price. So calculated the amount of damages for delayed supply would come to Rs. 27,28,857=00. The Respondent however actually deducted a sum of Rs. 25,42,797=00 by calculating the price at reduced rate. However, there is no claim by the Respondent that in case price reduction is taken as not valid it should be allowed liquidated damages at original price

nor was this plea taken during arguments. Thus no award with regard to the difference of Rs. 186060=00 can be passed in favour of the Respondent, there being no such claim from its side. The Respondent is thus liable to payback to the Claimant a sum of Rs. 44,94,651=00 recovered on account of price reduction. I therefore pass an Award in favour of the Claimant and against the Respondent for the recovery of the said sum of Rs. 44,94,651=00. Keeping in view the nature of the disputes raised, their complexity and the facts of the case the Claimant shall also be entitled to pendentelite interest on the said amount at the rate of 9% per annum besides interest on the principal amount at the rate of 9% per annum from the date of the Award till realization. No account has been given with regard to legal fee and the other expenses. However, keeping in view the effective sittings the Claimant is also allowed a sum of Rs. 200,000/- towards cost."

103. The Arbitrator after a perusal of the relevant clauses of the GCC including Clause No. 12 while dealing with the issue of price reduction returned categorical findings that it is only after the delivery period that advantage of decrease in tax/duty was allowed to the purchaser. The Arbitrator then noted that there was no price reduction condition appended to the first three extensions granted on 16.02.1998, 30.03.1998, and 06.04.1998. It was only the final extension granted on 10.06.1998 which contained not only a condition for imposition of

liquidated damages but also of price reduction based on prevailing prices. The Arbitrator held this condition of price reduction to be beyond the terms of the Contract and consequently, held it to be unauthorized.

104. The Arbitrator also in his impugned Award stated a finding of fact that BWL on 18.06.1998 has promptly expressed its reservation/protest against the imposition of said condition for granting the last extension dated 10.06.1998.

105. BWL continued to perform its obligation arising out of the Contract under protest and the same is clearly visible from a perusal of the letter dated 18.06.1998, which is reproduced as under:

127

BWL/OFCD/MKT-948/98-99/ 488 18th June, 1998

Dy. Director General (MM-I),
Department of Telecommunications,
Sanchar Bhawan,
20, Ashoka Bhawan,
New Delhi-110 001

Ref: Purchase order No. CT/PO/041/97-98 dated 16.9.97 for the supply of 610 Kms 24F Optical fibre cable alongwith accessories.

Dear sir,

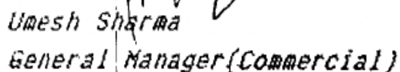
This has reference to the above said purchase order. Please refer your letter No. 80-7/97 MMC/BWL/459 dated 10.6.98 extending the delivery period of the above purchase order upto 9.8.98.

We are very much surprised to note that you have even reduced the prices now over and above imposition of Liquidated Damage which we have been requesting you not to do vide our various letters given to you earlier.

However we shall make the supplies under protest and without prejudice to our rights as reduction in price and imposition of Liquidated Damage is totally unjustifiable and illegal.

Thanking you,

Yours faithfully,
for BWL Limited



Umesh Sharma
General Manager(Commercial)

106. For the reasons as discussed in the above section of this judgment (Paragraph Nos. 61 to 95), I am of the view, that the original Contract in the present petition was not novated by virtue of the conditional extension being given and for the same reasons as applicable above, in the present case as well BWL cannot be said to have accepted the condition of price reduction by its conduct of continued performance as the same was done "under protest and without prejudice to its rights".

107. In this view the findings of the Arbitrator not only are reasoned but also substantiated on evidence on record. Thus, I find no grounds within the confines of Section 34 of the Act to interfere with the findings of the Arbitrator.

108. BSNL has also fleetingly raised a contention that the factum of novation was averred in the reply filed before the Arbitrator but the Arbitrator did not consider the same.

109. From a perusal of the reply to the statement of Claim filed by the BSNL before the Arbitrator, it is clear that the whole reply was premised around the argument that the extension was clearly granted with two conditions i.e., imposition of liquidated damages and price reduction. Since, BWL has performed its part of the obligation, it has agreed to the condition of the extension. Nowhere in the reply, BSNL has averred the factum of novation of Contract.

110. However, even if it would have been pleaded, it would have been of no advantage to the case of BSNL because from a perusal of the aforesaid letter dated 18.06.1998, it is clear that there was no unequivocal acceptance of the revised extension terms, which could have been interpreted as novation of the original Contract. Additionally, BWL

IBC Laws | www.ibclaw.in

performed its obligation arising out of the Contract "under protest and without prejudice to its rights".

CONCLUSION

111. For all the aforesaid reasons, and having found no ground within the confines of Section 34 of the Act to interfere with the impugned Awards and set aside the reasoned findings of the Arbitrator, I am of the view that the impugned Awards do not suffer from perversity, patent illegality or any other recognised vice warranting interference.

112. Accordingly, the petitions are dismissed in the aforesaid terms, along with pending applications, if any.

JASMEET SINGH, J

JULY 01, 2026/SS