

Mtnl vs.motorola Inc.

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SooperKanoon Citation : sooperkanoon.com/1205198

Court : Delhi

Decided On : Mar-31-2017

Appellant : Mtnl

Respondent : Motorola Inc.

Advocate for Pet/Ap. : Mr. L.N. Anchal, Mr. Ciccu Mukhopadhaya, Mr. Surjendu Das, Ms. Rashmi Gogoi

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on: February 07, 2017 Date of decision on: March 31, 2017 MTNL O.M.P. 11/2014 Through: Mr. L.N. Anchal, Advocate.

... Petitioner

versus MOTOROLA INC. Respondent Through: Mr Ciccu Mukhopadhaya, Senior Advocate with Mr Surjendu Das and Ms Rashmi Gogoi, Advocates. AND O.M.P. 380/2015 Through: Mr L.N. Anchal, Advocate.

... Petitioner

versus MTNL \$~ * + + M/S MOTOROLA INC. Respondent Through: Mr Ciccu Mukhopadhaya, Senior Advocate with Mr Surjendu Das and Ms Rashmi Gogoi, Advocates. CORAM: JUSTICE S. MURALIDHAR %

JUDGMENT

3103.2017 1. These are two petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) filed by Mahanagar Telephone Nigam Limited (MTNL). OMP Nos. 11 of 2014 & 380 of 2015 Page 1 of 21 2. OMP No.11 of 2014 challenges an Award dated 26th August, 2013 passed by the sole Arbitrator whereas OMP No.380 of 2015 challenges an additional Award dated 21st January, 2015 by the same learned Arbitrator. Background facts 3. Both Awards were passed in the disputes between MTNL and the Respondent, M/s. Motorola Inc. (Motorola), arising out of a Letter of Intent (LOI) dated 11th January, 2000 for 50K lines of CDMA IS-95 A, WLL equipment project in MTNL Delhi telephone on Turnkey for survey, design and supply of equipment, installation, testing, commissioning, making over system to consignee, training, providing AMC etc, as per the details in Annexure-1 & Annexure-2 of the said LOI. 4. Motorola was also required to supply spares sufficient for maintenance. The total value of the Purchase Order (PO) was Rs. 50,66,40,322. The contract was to conclude with the issue of the Taken Over Certificate (TOC) by MTNL.

5. In terms of the LOI, Motorola furnished a Performance Bank Guarantee (PBG). MTNL issued a PO dated 7th March, 2000 (hereafter PO-1) to Motorola. In terms thereof, Motorola was required to supply the entire equipment including infrastructure and support equipment within 3 months of the issue of the LOI. The entire installation and commissioning including acceptance testing was to be completed within 6 months i.e., by 10th July, 2000.

6. There was another PO dated 28th November, 2000 (hereinafter PO-2) OMP Nos. 11 of 2014 & 380 of 2015 Page 2 of 21 placed by MTNL on Motorola India Pvt. Ltd. ('Motorola India') for the value of Rs. 38,38,000 for construction of additional fixture for Antennae for GSM (narrow-based ground tower). A third PO dated 9th August, 2002 (hereinafter PO-3) for extension of network for 1,50,000 lines with CDMA20001X technology equipment for a value of Rs. 84,92,74,436 was placed by MTNL on Motorola. MTNL's case 7. The case of MTNL is that Motorola could not meet its obligations under PO-1 dated 7th March, 2000 i.e., it could not install or complete the entire project within 7 months nor could it get the acceptance testing done for the 50,000 lines within 6 months of the issue of the LOI or even thereafter. MTNL states that it paid Motorola Rs. 26,81,01,873 against

PO-1. Since the payments were linked to delivery, there was no question of making any balance payment.

8. MTNL claims that Motorola came up with suggestions and assurances to rectify the defects and MTNL was left with no choice but to agree to the said suggestions. This led, according to MTNL, to the issuance of PO-2 which was placed on Motorola India, a separate legal entity, for construction of the ground-based tower both, for CDMA and GSM infrastructure on an incremental cost basis. MTNL alleges that even PO-2 did not improve the situation as there was half-hearted and reluctant execution thereof by Motorola India.

9. MTNL states that Motorola came up with the proposal for migration and expansion of CDMA network; and that MTNL, anxious to safeguard its OMP Nos. 11 of 2014 & 380 of 2015 Page 3 of 21 reputation and recover its earlier investments, agreed to the proposal which led to PO-3. It is stated that PO-1 dated 7th March, 2000 and PO-3 dated 9th August, 2002 were independent contracts entered into between the parties but on a turnkey basis.

10. MTNL alleges that even in respect of PO-3, Motorola failed to carry out successful installations and there was no acceptance testing. It is alleged that the equipment did not function in terms of the specifications. MTNL states that Motorola did not offer the Call Line Identification Presentation (CLIP) feature and BSC or WAM capacity. MTNL claims to have been forced to scrap the entire system and had to deploy a state-of-art network by investing an additional sum of Rs. 105.84 crores so as to enable it to retain its customers and goodwill. It is alleged that Motorola also gradually withdrew its maintenance support resulting in deduction of subscriber base. MTNL, at no stage, issued the TOCs. MTNL claims to have pointed out various deficiencies to Motorola during the various meetings but Motorola failed to rectify them.

11. It is stated that on 30th April, 2005, a meeting was held between MTNL and Motorola to carry out the rectifications and close the issue. It is further stated that various deliverables which had been agreed to be supplied by Motorola after carrying out model tuning did not take place. MTNL states that against PO-3 dated 9th August, 2002, it had paid Motorola Rs. 42,52,49,292. Thus, in all it paid

Motorola Rs. 69,33,51,165 against PO-1 and PO-3. OMP Nos. 11 of 2014 & 380 of 2015 Page 4 of 21 Motorola's version 12. Motorolas case, however, is different. According to Motorola, the network in terms of PO-1 was installed and 50,000 lines were commissioned by Motorola. It is stated that MTNL inaugurated and finally put the system into commercial use from October 2001 onwards. Since the technology was changing worldwide when MTNL decided to expand the network, Motorola offered CDMA20001X technology. It is stated that MTNL independently took a decision to scrap the entire CDMA to a different technology with a view to making it more effective, efficient and competitive. It is stated that PO-3 was issued by MTNL in this background. Motorola states that in April 2003 the existing network was migrated to 1X and the expanded network was inaugurated by MTNL as a CDMA20001X network after extensive testing including Radio Frequency (RF) testing at the hand of the technical personnel of the MTNL.

13. As regards MTNLs grievance that Motorola did not offer the CLIP feature and BSC or WAM capacity, Motorola states that CLIP was an optional feature and not mandatory. Nevertheless, as a gesture of goodwill, Motorola did provide the CLIP feature before April 2003 i.e., prior to the inauguration of the expanded network. Further, it is stated that the BSC capacity was as per the contract and that, too, was demonstrated before April 2003. As regards the RF issue which was connected with PO-3, the case of Motorola is that the RF drive test was completed successfully on 31st July, 2006 and the drive test data was handed over to MTNL for assessment. It is stated that, in terms of a mutual agreement, M/s. Qualcomm was responsible for processing the data and submitting a report. It is stated that Qualcomm OMP Nos. 11 of 2014 & 380 of 2015 Page 5 of 21 reports which were shared by MTNL with Motorola demonstrated that Motorola had complied with all its obligations in regard to RF coverage and that all three criteria were met in the test drive. It is pleaded by Motorola that despite successful completion of RF test, MTNL withheld the final TOC and did not make payments due to Motorola under the contract. Despite various reminders in 2006 and 2007, the payments were not released. The arbitration proceedings 14. The arbitration process began with Motorola invoking the arbitration clause by a notice dated 29th September, 2008. Motorola then filed a statement of claim before the sole Arbitrator for a total sum of US \$ 8,768,405 and for a sum of Rs. 22,29,17,746 to Motorola India. Interest @

16% per annum on the above sum from 8th September, 2006 till the date of payment was also claimed. Motorola sought directions to MTNL to release all the BGs that had been issued in its favour by Motorola.

15. Apart from filing its statement of defence, MTNL preferred a counter-claim for a sum of Rs. 69,33,51,165 being the amount paid by it to Motorola against the POs. Motorola further claimed Rs. 105.84 crores which it purportedly spent on purchase of equipment that it states were not functioning properly. It also claimed Rs. 100 crores on account of loss of goodwill, reputation, business opportunity and loss of subscribers. The total sum claimed by MTNL against Motorola was Rs. 275,17,51,165. Issues 16. After the completion of the pleadings, the learned Arbitrator framed the following issues for consideration: OMP Nos. 11 of 2014 & 380 of 2015 Page 6 of 21 1. Which of the parties is in breach of the terms of the Tender dated 16.3.1999 and if so, to what effect?.

2. Whether the Respondent, MTNL, suffered any loss on account of reputation, goodwill and business opportunity, and if so, to what effect?.

3. Whether the Respondent, MTNL, is entitled to refund of any amount from the Claimant on account of alleged breach of the Tender or any of the Purchase orders thereunder?.

4. What amount, if any, each of the parties is entitled to?.

5. Whether any of the claim or counter claim is barred by limitation?.

6. Whether any of the parties is entitled to the award of interest on the amount if awarded, and if so, at what rate and for what period?.

7. Relief. 17. On behalf of Motorola, affidavits of Mr. Vijay Kumar (CW-1) and Mr. Narendra Kumar Rawat (CW-2) were filed. MTNL filed affidavits of Mr. Ashok Gupta, AGM (A&P), CDMA, MTNL, Mr. Nand Kumar, Manager (A&P), MTNL, Mr. Mukesh Kumar, DGM (MM-1), Mr. Yogesh Kumar, SDE (RF) CDMA and Ms. Alka Asthana, Director (PSU) (RW-1 to RW-5 respectively). The impugned Award 18. By the impugned Award dated 26th August, 2013, the learned sole Arbitrator came to the following conclusions: OMP Nos. 11 of 2014 & 380 of 2015 Page 7 of 21 (i)

The plea of MTNL that the claim in respect of the three POs was barred by limitation was without merit. Even according to MTNL, there was no finality to the contract and various issues were pending. It is with a view to resolving those issues that a meeting was held between the parties on 28th March, 2006. The plea that the counter-claims of MTNL were barred by limitation was also, therefore, rejected. (ii) It was not possible to accept that time was the essence of contract under PO-1 and PO-3. MTNL never terminated the contract on any of the grounds available to it nor did it levy liquidated damages (LD). (iii) MTNL did not make any grievance regarding breach of any contractual obligation by Motorola under PO-1 and PO-3. The non-payment of the balance 50% for PO-1 and PO-3 was only on account of the RF coverage. Both parties appointed M/s. Qualcomm as an independent third party for that purpose on 13th November, 2005. Qualcomm completed the RF coverage test by 31st July, 2006. That test was successful as was evident from the internal report of MTNL which stated that test results have been examined by Qualcomm which now have been found to meet the coverage criteria and the current 30% loading of the network. It is on that basis that Motorola sought issuance of the TOCs to receive the balance amount due to it. It was noted that the goods in question had been put to commercial use by MTNL right from 2001 and revenue was also earned from the network. (iv) By its letter dated 17th November, 2007, MTNL informed Motorola that it was looking into the pending issue and was awaiting the recommendation of its internal committee constituted for the purpose. However, no further OMP Nos. 11 of 2014 & 380 of 2015 Page 8 of 21 communication was received by Motorola from MTNL. This led to the arbitration proceedings. (v) Having accepted the goods and having used them, it was not open for MTNL to refuse to pay for them. On 13th and 14th November, 2005, MTNL promised Motorola that the final TOC would be issued after resolution of RF coverage issues. However, there was no response from MTNL thereafter. Consequently, MTNL was bound to issue the final TOC. (vi) Further, not having levied liquidated damages or not having terminated the contract on ground of any alleged default", MTNL should be taken to have waived any claim in that regard. Motorola was correct in its submission that it complied with its obligation in relation to RF coverage issue. When parties agreed to the RF coverage test under the supervision of Qualcomm, the earlier tests would cease to have relevance. (vii)

The plea of MTNL that it did not get any opportunity to inspect the goods supplied by Motorola was not raised in any correspondence exchanged between the parties between 2001 and 2007. Consequently, there was no basis for raising such a plea for the first time in the arbitration proceedings. (viii) It was too late in the day for MTNL to contend that non-issuance of TOC would mean rejection of the goods. Further, no plea was raised by MTNL on the basis of Section 21 of the Sale of Goods Act, 1930 (SOGA). No such plea was raised earlier by MTNL. With the stringent conditions as in Clause 16 of the bid and with the working of the project for a number of OMP Nos. 11 of 2014 & 380 of 2015 Page 9 of 21 years, it was difficult to accept the contention of MTNL that it had no opportunity to inspect the equipments and, therefore, did not accept them. (ix) Sections 41 and 42 of the SOGA clearly applied to the facts of the case. It was too late in the day for MTNL to contend that it did not accept the goods. If there was any failure on the part of the Respondent, MTNL did not stop using the equipment. It did not levy LD or even terminate the contract. Merely because the subscriber base fell, the blame cannot be laid at the doorstep of the system. It worked between 2001 and 2007 and during this period, there was migration to other systems. (x) MTNL was in breach of the contract. Consequently, Motorola was entitled to refund of any amount paid by it. MTNL has suffered no loss on account of reputation, goodwill and business opportunity. Interest @ 15% per annum was held to meet the ends of justice. It was directed to be paid from 1st October, 2008 till the date of payment. Submissions on behalf of MTNL¹⁹ Mr. L.N. Anchal, learned counsel appearing for MTNL, made the following submissions: (i) Oral evidence led by the parties was not taken into account. (ii) PO-2 dated 28th November, 2000 does not contain an arbitration clause and yet a claim in that regard was decided. (iii) There was an express undertaking by Motorola to comply with all the conditions of the tenders including CLIP, IP and RF. OMP Nos. 11 of 2014 & 380 of 2015 Page 10 of 21 (iv) PO-1 and PO-3 were placed on a turnkey basis. Since Motorola failed to fulfil its commitment, it was not entitled to any relief. Relying on the decision in *M. Lachia Setty & Sons Ltd. v. The Coffee Board, Bangalore* AIR 1981 SC162 it was urged that it was mandatory for Motorola to show that it had mitigated the losses sustained. (v) Interest was in the nature of compensation for money deprived. It could not have been a source of profit. The rate of interest allowed was excessive.

Qualcomms report was inconclusive and the Arbitrator could not have simply termed the TOC as deemed to have been issued. MTNL was entitled to recover LD at 5% of the total PO-3. The decisions relied upon in the impugned Award regarding applicability of Sections 41 and 42 of SOGA were on a different set of facts. In the present case, the supply was of a highly sophisticated scientific system which had to be supplied by Motorola by on a turnkey basis. Section 21 of the SOGA applied. Reference was made to the decisions in Mohan Lal Mani Lal v. Dirubhai Bavajibhai AIR1962 Gujarat 56 and Province of Madras v. CA Galia Kotwala & Co. (1945) 2 MLJ418 (vi) The application dated 25th September, 2013 filed by Motorola for the additional claim i.e., release of the BGs was barred by limitation. It is pointed out that it is only on 15th March, 2014 that an application was filed for bringing on record the facts pertaining to the BGs. This application ought not to have been entertained. Motorola had in fact waived its right to seek return of the BGs. Non-inclusion of a specific issue on that aspect by the learned Arbitrator in the list of issues framed was a conscious decision. OMP Nos. 11 of 2014 & 380 of 2015 Page 11 of 21 Submissions on behalf of Motorola 20. Mr. Ciccu Mukhopadhaya, learned Senior counsel for Motorola submitted as under: (i) Section 34 is a supervisory and not an appellate jurisdiction. Reliance is placed on the decisions in J.G. Engineers (P) Ltd. v. Union of India & Ors., (2011) 5 SCC758 and Associate Builders v. Delhi Development Authority (2015) 3 SCC49 (ii) Time was never the essence of the contract as was evident from the materials placed before the learned Arbitrator. The finding to that effect by the learned Arbitrator was a plausible view to take. (iii) The learned Arbitrator had given reasons for not dealing with the oral evidence as he was of the view that the oral evidence more or less reflected the respective position of the parties as emanating from the documentary evidence and affidavits. (iv) The factual finding of the learned Arbitrator, which has been unable to be dislodged by MTNL, was that it was MTNL that was in breach of the contract and, therefore, Motorola had to be compensated for such breach. Sections 40 and 42 of the SOGA applied. MTNL continued using the equipment. It did not terminate the contract or levy LD. Motorola was not responsible for the reduction in MTNL's subscriber base, thus the blame could not be laid at the doorstep of the system. (v) On the aspect of the additional Award, although a specific issue may not OMP Nos. 11 of 2014 & 380 of

2015 Page 12 of 21 have been framed, Issue No.(vii) pertaining to 'relief' covered it. It is plain that inadvertently this aspect was missed by the learned Arbitrator when the Award dated 26th August, 2013 was passed. This was rectified by the learned Arbitrator by passing the additional Award dated 20th January, 2015. It was observed that the release of the Bank Guarantees is only a consequential relief claimed based on the primary relief for payment of the outstanding amount on the ground that the Claimant had performed its obligations under the Contract. (vi) The interest awarded was not excessive and did not call for interference. Scope of the powers under Section 34 of the Act 21. Before commencing the examination of the above submissions, it is necessary to recapitulate the legal position regarding the scope of the Court's powers of judicial review of an arbitral Award under Section 34 of the Act.

22. In *Associate Builders v. Delhi Development Authority* (supra), the Supreme Court summarised what constituted the fundamental policy of Indian law. In that process, it extracted certain passages from the earlier decision in *ONGC Ltd. v. Western Geco International Ltd.*, 2014 (9) SCC263 In para 40 of that judgment, it was observed as under: 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal OMP Nos. 11 of 2014 & 380 of 2015 Page 13 of 21 that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest. 23. A reference was also made in *Associate Builders v. Delhi Development Authority* (supra) to the decisions in *Kuldeep Singh v. Commissioner of Police* (1999) 2 SCC10 and *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, (2012) 1 SCC594 where it was reiterated that the Court does not sit in appeal over the Award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. It was reiterated that the Award could be challenged only on the grounds mentioned under Section 34(2) of the Act. Inter

alia it was observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if any arbitrator construes a term of the contract in an unreasonable manner, it will not mean that the Award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair- minded or reasonable person could do. It was further reiterated that once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. The Supreme Court also reiterated that an award can be said to be against justice only when it shocks the conscience of the Court. The Court observed that it is settled law that where a finding is based on no evidence, and the AT takes into account something irrelevant to the decision which it arrives at, or ignores vital evidence in arriving at its decision, such decision would be termed as perverse. OMP Nos. 11 of 2014 & 380 of 2015 Page 14 of 21 24. In Associate Builders v. Delhi Development Authority (supra), the Supreme Court has emphasised that on questions of fact, the view of the learned Arbitrator would be final. The following observations in the said decision are relevant: It must clearly be understood that when a court is applying the public policy test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. 25. In NHAI v. ITD Cementation India Limited (2015) 14 SCC21 observed as under: 25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do. Non-consideration of oral evidence 26. In light of the above legal position, the Court commences its examination of the

issues posed by MTNL. It is noticed that the findings rendered by the learned Arbitrator on the various issues have been factual and based on the evidence placed on record by way of affidavits. OMP Nos. 11 of 2014 & 380 of 2015 Page 15 of 21 27. The Court would like to deal with the issue raised by MTNL that the learned Arbitrator ought to have referred to the oral evidence. In this regard, the following observations of the learned Arbitrator are relevant: I have examined the record being pleadings, the evidences- both oral and documentary and have heard the arguments. With respect to the oral evidence it does not advance the case of either of the parties. After examining the oral evidence in detail it appears, by the large, it was rather unnecessary to read it. Case can be said to be based entirely on documents. 28. Under Section 19 of the Act, the proceedings before an Arbitrator are expected to be flexible. It is not expected to be straitjacketed by the CPC. It is for that reason that Section 19(1) of the Act specifically states that an Arbitral Tribunal will not be bound by the provisions of the CPC or the Indian Evidence Act. It is entirely up to the Arbitral Tribunal to decide whether or not it would entertain oral evidence and to what extent. In the present case, the learned Arbitrator has found that the oral evidence, by and large, was consistent with what has been said by both parties on affidavit. It is for this reason he held that the oral evidence did not advance the case of either of the parties. It was, therefore, unnecessary to examine the oral evidence.

29. The Court is unable to discern any legal error having been committed by the learned Arbitrator in deciding not to go by the oral evidence of the parties. The Award is a detailed one which discussed threadbare documents relied upon by both parties and the affidavit filed by them. In the circumstances, the Court finds no merit in the contention that the impugned Award should be set aside only because the learned Arbitrator did not refer OMP Nos. 11 of 2014 & 380 of 2015 Page 16 of 21 to the oral evidence. Uncontroverted factual findings 30. MTNL has no answer to the finding of the learned Arbitrator that it did not take steps to terminate any of the three POs much less levied LD for any detail execution of the work. It has also not been able to show how the factual finding of the learned Arbitrator that the test results examined by Qualcomm showed that the system met the RF coverage criteria and that this was accepted by MTNL.

31. The other important finding of the learned Arbitrator which has been unable to be shown by MTNL to be perverse or contrary to the record is that despite many of MTNLs subscribers migrating to GSM due to changed category, it did not stop using the equipment supplied by Motorola. A reference has been made by the learned Arbitrator to the interim Award dated 17th January, 2007 which stated that 60 out of the 81BTCs of Motorola were being used for GSM or Huawei CDMA network. This made it plain that MTNL had accepted the goods supplied by Motorola. It did not reject the goods thereby acknowledging the liability to pay. Again, the following findings have not been controverted by MTNL - Contract provides for the mode of rejection i.e. by terminating the contract and buying the alternate goods at the risk and cost of the supplier i.e. the Claimant. That has not been so and no notice of breach with opportunity to cure such breach was ever given by MTNL. Rather, as noted above, goods have been put to commercial use by MTNL and used right from 2001 and revenue earned from the network. OMP Nos. 11 of 2014 & 380 of 2015 Page 17 of 21 Sections 40 and 42 SOGA32 One of the issues before the learned Arbitrator was whether MTNL should be permitted to rely on Section 21 of the SOGA which requires goods to be put in a deliverable state and till it is so done the property does not pass to the buyer. The learned Arbitrator noted that the said contention raised during the course of arguments was never pleaded or argued earlier. It appears to have been taken only in response to the reliance placed by Motorola on Sections 40 and 42 of the SOGA viz. an act inconsistent with the sellers ownership of the goods amounts to acceptance by the buyer. The learned Arbitrator after discussing the case law came to the definite conclusion that Sections 40 and 42 of SOGA clearly applied to the facts and circumstances of the present case. The finding in this regard is as under: Putting the system to commercial use and to earn revenue is inconsistent with any plea of non-performance of the system in terms of the contract. MTNL used the system all these years, earning revenue and also increase in the subscriber base. Now when the subscriber base fell all types of defensive pleas have been raised. Merely because the subscriber base fell the blame cannot be laid at the door step of the system that was supplied. System worked from 2001-2007 and during this period there have been migration to other systems. 33. Here again, the Court is unable to discern any legal infirmity in the analysis of the

evidence by the learned Arbitrator or the setting out of the legal position. Non-issue of TOC³⁴ It was noted by the learned Arbitrator that MTNL did issue the OMP Nos. 11 of 2014 & 380 of 2015 Page 18 of 21 provisional TOC and nothing remained for it not to issue final TOC. It was rightly observed that Motorola could not have been deprived of the balance price of the goods delivered by it only because MTNL failed to issue the final TOC. It is in those circumstances that the learned Arbitrator held that considering the whole aspect of the matter TOC is deemed to have been issued. Additional Award is valid ³⁵. On the issue of the return of BGs, the additional Award makes it clear that within one month of the date of the receipt of the Award dated 26th August, 2013, Motorola preferred an application before the learned Arbitrator for an additional Award in relation to the BGs. Indeed, the return of the BGs to Motorola, with it having succeeded in demonstrating before the learned Arbitrator that it was not in breach of the contract, was only consequential. There was no need to frame a specific issue on that aspect. Issue No.7 which dealt with Relief was sufficient to cover it. This is what has been observed by the learned Arbitrator.

36. The Court finds that this legal position has been correctly analysed by the learned Arbitrator in the additional Award in the following passage: ... release of the Bank Guarantees is consequential to the Claimant succeeding in the principal claim, i.e. for release of its outstanding payment on the ground it had performed its obligations under the Contract. Having found in favour of the Claimant in the Award, the Claimant is consequently entitled to an award for the release of the Bank Guarantees which were issued its contractual obligations. faithful performance of for the OMP Nos. 11 of 2014 & 380 of 2015 Page 19 of 21 ³⁷. None of the grounds raised by MTNL as regards additional Award is legally tenable. To recapitulate in *Associate Builders v. Delhi Development Authority* (supra), the Supreme Court held in para 33 as under: 33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a

trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts ... 38. Except the broad sweeping general grounds, MTNL has not really made out any ground of patent illegality warranting interference by the Court. As rightly pointed out by Motorola, the learned Arbitrator misconducting the proceedings is not one of the grounds of challenge available under Section 34 of the Act. This has been explained by the Bombay High Court in *Indian Commercial Co. Ltd. v. Amrish Kilachand* (2003) 1 ArbLR10(Bom) in the following words: 16 It is clear from Section 34 that the legal misconduct is not one of the grounds provided by that section for setting aside an award. Having regard to the policy of law of making an award immune from challenge on that ground, it would not be open for the Court while executing a decree or considering an objection to its execution to entertain a challenge to the decree on grounds not provided for in the Act, barring something in the nature of fraud or nullity which goes to the foundation of the award or decree. OMP Nos. 11 of 2014 & 380 of 2015 Page 20 of 21 39. The learned Arbitrator also rightly observed that the application filed by Motorola on 15th March, 2014 was only to bring certain facts pertaining to the BGs on record. The prayer for passing the additional Award was made earlier. Conclusion 40. For the aforementioned reasons, the Court finds no grounds having been made out by MTNL for even interference with the Award dated 26th August, 2013 and the Additional Award dated 20th January, 2015.

41. Both petitions are, accordingly, dismissed with costs of Rs. 20,000 in each petition. The costs will be paid by MTNL to Motorola within four weeks from today. S. MURALIDHAR, J MARCH31 2017 dn OMP Nos. 11 of 2014 & 380 of 2015 Page 21 of 21