

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH  
AT HYDERABAD

(Special Original Jurisdiction)

MONDAY, THE TWENTY EIGHTH DAY OF FEBRUARY  
TWO THOUSAND AND FIVE

PRESENT

**THE HON'BLE MR JUSTICE C.Y.SOMAYAJULU**

**WRIT PETITION NO : 19454 of 2004**

Between:

Sinclair Infra Tech Limited rep., by its authorized Signatory  
Sri B.V.Rama Rao, s/o late Sri B.Venkateshwar Rao,  
r/o Narayanguda, Hyderabad.

**..... PETITIONER**

AND

1. Union of India, rep., by its Secretary to the Government,  
Department of telecommunications, Ministry of  
Telecommunications, New Delhi-110 001.
2. Bharat Sanchar Nigam Limited, Government of India Enterprise,  
148B, Statesman House, Barakhamba Road, New Delhi  
110 001, rep., by The Chairman & Managing Director.
3. Bharat Sanchar Nigam Limited, The Dy. Director General (MM),  
12th Floor, 148B, Statesman House, Barakhamba Road,  
New Delhi-110 001.
4. Bharat Sanchar Nigam Limited, Assistant Director General  
(C.T.), BSNL Corporate Office, 12th Floor, 148B, Statesman  
House, Barakhamba Road, New Delhi-110 001.
5. Bharat Sanchar Nigam Limited, Assistant Director (C.T.-I),  
BSNL Corporate Office, 12th Floor, 148B, Statesman House,  
Barakhamba Road, New Delhi 110 001.

**.....RESPONDENTS**

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ order or direction, more particularly one in the nature of writ of mandamus: (a) declare the decision contained and communicated by the BSNL through its communication dated 15-10-2004 as arbitrary and unjust; (b) further declare that the decision of the BSNL, to revise the unit prices as intimated by it through its letter dated 25-08-2004 as illegal and unconstitutional; (c) consequently, direct the respondents

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**THE HON'BLE SRI JUSTICE C.Y.SOMAYAJULU**

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**WRIT PETITION No.19454 of 2004**

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**ORDER:**

This writ petition is filed questioning the letter dated 15.10.2004, proposing to cancel the Purchase Order No.MT/PO/06/2004-04 dated 09.09.2003.

2. The facts, which are not in dispute, are, petitioner, is a Company incorporated under the provisions of the Indian Companies Act, 1956. Bharat Sanchar Nigam

Limited (for short 'BSNL') issued a global tender bearing No. MM/OF/072002/000247 for supply of STM-1 SDH Equipment. On a representation made by the indigenous manufacturers of the said equipment that the said notification is giving scope for its being construed that multinational companies only can participate in the bid, BSNL issued a clarification on 18.09.2002, introducing clause 15(B) in Section IV of the bid document, which enabled indigenous manufacturers also to submit their tenders. In that bid, under Clause 15(B), petitioner became the second lowest bidder (L2) while Semi Conductors Complex Limited, Chandigarh, a Government of India Public Sector undertaking was the Lowest bidder (L1) and accordingly both L1 and L2 were awarded the contract for supply of the equipment required by BSNL. As per the terms of the bid document, BSNL would place an order for 25% quantity, which would be subjected to observation and testing for a period of three months after installation and commissioning in the field. Only on its (BSNL) being satisfied with the performance of the equipment, would it place an order for the remaining 75% of the quantity. Accordingly, BSNL placed an Advance Purchase Order (APO) for 25% of the quantity with petitioner through its letter No.MT/APO/07/2003-04 tentatively valuing the order at

Rs.1,28,74,410-54ps. As required in the APO petitioner furnished bank guarantee for Rs.6,43,721/-, and started manufacturing and supplying of the equipment, after securing the Type Approval Certificate (TAC). At the request of the petitioner time for supply was extended with certain conditions, and petitioner completed the supply of 25% of the equipment. BSNL finalized the price for the said 25% of the equipment supplied by the petitioner to it vide letter No.33-01/2003—MMC/Vol.II/431 dated 29.06.2004. Since one of the multi-national companies, which also was awarded a contract under clause 15A of Section IV of the bid document, could not supply the equipment ordered, Semi Conductors Complex Limited (L1) and petitioner (L2) became entitled to that order as add on quantity. So, by its letter dated 28.07.2004, BSNL placed an APO for the remaining 75% quantity (as per the contract) + add on quantity, tentatively fixing the price at Rs.4,78,80,271/- and directed the petitioner to furnish performance bank guarantee of Rs.22,65,000/-. By its letter dated 04.08.2004/05.08.2004, enclosing performance bank guarantee for Rs.22,65,000/- valid for a period of three years, petitioner submitted its acceptance, and having found that the clause in its APO dated 28.07.2004 of the BSNL, reading,

"The prices shall be finalized with the budgetary impact of regular budget announced for the year 2004-05 or the approved prices of new tender to be opened during 2004-

05, on whichever is on lower side”

is not in accordance with the bid document, addressed the following letter dated 16.08.2004 to the BSNL.

“However, on scrutiny of the APO terms and conditions, it is found that in the 2<sup>nd</sup> part of clause-3 (i), the contract prices are restricted to those obtained in the new tender of 2004-05. This is not applicable in our case as they are totally governed by conditions of Tender Enquiry under reference-1 (T.E.No.MM/ OF/ 072002/000247 dated 31.07.2002) above. Such condition of restricting price of a contract under a previous Tender based on un-established prices to be obtained in future tenders is neither in the scope of the Tender documents nor in the procurement policy.”

for which, BSNL, by its letter dated 25.08.2004 informed the petitioner as follows:

“Kindly refer to the above mentioned captioned Advance Purchase Order and your acceptance of APO under reference. The New tender for the procurement of STM-1 SDH equipment in BSNL has been opened on 18.08.2004. Due to the decreases in unit prices (all exclusive) of all the items, the provisional unit prices of each item of the said APO is hereby revised as shown in the enclosed annexure. These provisional prices are the 90% of the L-1 quoted price against the New Tender Enquiry No.MM/OF/062004/000270 opened on 18.08.2004. During the original delivery period, the final prices of STM-1 SDH equipment shall be the approved prices of the last tender opened on 03.10.2002 with budgetary impact as on date or the approved prices of New tender opened on 18.08.2004, whichever is on lower basis.

You are requested to convey your unconditional/ unequivocal acceptance of the revised provisional unit prices (all inclusive) in respect of the above said APO within Seven days i.e. up to 31.08.2004, failing which the said APO shall be withdrawn.

All other terms and conditions of the said APO shall remain unaltered.”

For the said letter of BSNL, petitioner sent a reply dated 27.08.2004 informing that the tender document did not contemplate the prices being finalized as per the tenders to be opened in future, and that introduction of a new clause in the APO is not fair, and sent a reminder dated 16.09.2004, for which BSNL sent a reply dated 15.10.2004 reading:

“Kindly refer to your letter under reference and captioned Advance Purchase Order. Your request for not linking the new tender process against the subjected APO has

not been agreed to. It is informed that “during the original delivery period, the final prices of STM-1 SDH equipment shall be the approved prices of the tender opened on 03.10.2002 with budgetary impact, if any as on date of the approved prices of New tender to be opened in this year, whichever is lower”.

You are requested to convey your unconditional/ unequivocal acceptance of the revised provisional unit process (all inclusive) intimated on 25.08.2004 vide letter under reference (ii) in respect of the above said APO. Your reply must reach up to 25.10.2004, failing which the said APO shall be withdrawn at your risks and responsibilities.

All other terms and conditions of the said APO shall remain unaltered.”

Apprehending that BSNL would give effect to the above letter, petitioner approached this Court for a declaration that the above communication revising the prices, as mentioned therein, is arbitrary, illegal and consequently to direct BSNL to place an order for supply of 75% balance quantity and the add on quantity to it, in accordance with the terms in the bid document.

3. The case in brief of the respondents, as disclosed in the affidavit of the 4<sup>th</sup> respondent filed on behalf of the respondents, is that this Court has no territorial jurisdiction to entertain the writ petition and in any event the writ petition filed without resorting to the remedy of arbitration, available as per the bid document, is not maintainable more so because this Court's jurisdiction cannot be invoked by resorting to Art.226 of the Constitution of India for enforcement of contracts. On merits, since petitioner could not supply 25% of the quantity within the stipulated delivery schedule, its performance cannot be said to be satisfactory. When there is delay in supply clause 6(xii) of the purchase order dated 09.09.2003 placed on the petitioner would come into play. Petitioner, who did not comply with the initial purchase order for 25% quantity, does not have a vested right to the balance 75% of the quantity. The conditions stipulated in the APO for 75% balance quantity only would govern the price for that quantity. Prices for the quantity mentioned in the purchase order would firm up only during the delivery period. Since prices communicated to the petitioner in the letter dated 29.06.2004 are only for the supplies made up to 28.02.2004, in response to the earlier purchase order and since fixation of price is strictly as per the Contract, and since the same was accepted by

the petitioner, petitioner is not entitled to any relief, more so because it (petitioner) would not be visited with any penal consequence for its non compliance with the APO.

4. Heard Mr. Nuty Ramamohana Rao, learned counsel for the petitioner, and Mr. Sukumara Patta Joshi, learned standing counsel for BSNL.

5. The points for consideration are:

1. Whether this Court has no territorial jurisdiction to entertain this petition?
2. Whether the writ petition for the relief sought is not maintainable?
3. To what relief, if any, is the petitioner entitled to?

**Point No.1:**

6. The main contention of the learned standing counsel for BSNL is that since no part of the cause of action has arisen within the jurisdiction of this Court, this Court has no jurisdiction to entertain this petition, by relying on the decision of a learned single Judge of this Court in **MIC ELECTRONICS LTD. v. UNION OF INDIA**, which was confirmed by a Division Bench in **MIC ELECTRONICS LTD. v. UNION OF INDIA**. He also relied on **OIL & NATURAL GAS COMMISSION v. UTPAL KUMAR BASU & OTHERS**, **M/S.KUSUM INGOTS & ALLOYS LTD. v. UNION OF INDIA** and **B.R. ELECTRICALS v. THE CHAIRMAN AND OTHERS** in support of his contention.

7. The contention of the learned counsel for petitioner is that since **MIC ELECTRONICS LTD.** cases (1 and 2 supra) relate to a tender which did not fructify into a contract, and since this case relates to supply of goods in pursuance of a concluded contract and since the contract between the parties has to be performed at Hyderabad, a place within the jurisdiction of this Court and since as per Art.226(2) of the Constitution the Court in whose jurisdiction a part of cause of action has

arisen would have jurisdiction to entertain the writ petition, this Court does have jurisdiction to entertain this petition. He also relied on **M/S.KUSUM INGOTS & ALLOYS LTD.** case

(4 supra) and **NAVINCHANDRA N. MAJITHA v. STATE OF MAHARASTRA** in support of his contention.

8. The facts in **MIC Electronics Ltd.** cases (1 and 2 supra), strongly relied on by the learned counsel for the respondents, show that MIC Electronics Limited, which is a small scale industry, manufacturing Electronics and Telecommunications Network Systems, in response to a tender floated by BSNL submitted its tender claiming benefit of exemption from payment of bid security up to the amount equal to the monetary limit as certified by the National Small Industries Corporation Limited, as per the bid document. After opening the bids, BSNL returned the bid documents of MIC Electronics Ltd. on the ground that it is not accompanied with the bid security amount as per Cl.2.1 of Section IV of the Tender Notice. Questioning the said rejection MIC Electronics Ltd. filed a writ petition in this Court. BSNL opposed the petition inter alia on the ground that this Court has no territorial jurisdiction to entertain the writ petition. Counsel for both sides, as in this also, relied on **M/S.KUSUM INGOTS & ALLOYS LTD.** case (4 supra) in support of their contention that this Court has no territorial jurisdiction to entertain the writ petition. The finding of the learned single Judge that the facts pleaded in the writ petition, which have to disclose that at least a part of the cause of action had arisen within the territorial jurisdiction of the Court in which the writ petition is filed, are not found in the petition filed by the MIC Electronics Ltd., dismissed the petition, and that finding was confirmed by a Division Bench.

9. **OIL & NATURAL GAS COMMISSION** case (3 supra) relied on by the learned counsel for the respondent also has no application to the facts of this case because that case also relates to an unconcluded contract. The writ petitioner in that case invoked the jurisdiction of Calcutta High Court on the ground that his reading the advertisement, making a representation and receiving a reply thereto at Calcutta would give rise to a cause of action at Calcutta. Repelling that contention and holding that mere reading of the advertisement at, submitting an offer from, and receiving a reply at, Calcutta would not give jurisdiction to the Court at Calcutta, the



writ petition was dismissed. Since this is not a case of submitting an offer, but is a case of petitioner complaining of a breach of the contract, the said decision has no application to the facts of this case.

10. **B.R. ELECTRICALS** case (5 supra) relied on by the learned counsel for the petitioner also has no application to the facts of this case. The writ petitioner in that case invoked the jurisdiction of Delhi High Court on the ground that payment due to it was stopped only due to the instructions given by the first respondent's office located at Delhi. Except the first respondent's office at Delhi issuing instructions to stop payment to B.R. Electricals no other part of the cause of action arose in the jurisdiction of Delhi High Court. Holding that mere issuance of instructions stopping payment due to the goods supplied, by an office which had no role to play either at the time of entering into the contract or during its performance, would not give rise to a cause of action for invoking its jurisdiction, Delhi High Court dismissed the writ petition of B.R. Electricals. The facts of that case are entirely different to the facts of this case and so the said decision has no application to the facts of this case.

11. In **M/S. KUSUM INGOTS & ALLOYS LTD.** case (4 supra), relied on by the learned counsel for both sides, the apex Court held that the High Court in whose jurisdiction a part of the cause of action arises would have jurisdiction to entertain the writ petition. In **NAVINCHANDRA N. MAJITHA** case (6 supra), a writ petition was filed in Bombay High Court for quashing a Criminal complaint filed at Shillong, on the ground that a false complaint was filed with a mala fide intention to put pressure on him to reverse the transaction relating to transfer of shares which took place at Mumbai. Bombay High Court dismissed the petition on the ground that it has no territorial jurisdiction. The Supreme Court while setting aside the order of Bombay High Court, and holding that major part of the cause of action did arise in Bombay and so Bombay High Court does have territorial jurisdiction to entertain the writ petition, had while ordering transfer of the case from Shillong, directed Mumbai Police to take up further investigation.

12. Clause (2) of Art.226 of Constitution lays down that the High Court in whose jurisdiction the whole or a part of the cause of action arises can entertain a writ

petition. In this case there is a concluded contract between the petitioner and BSNL, and petitioner, admittedly, has to supply the goods manufactured by it in a place within the jurisdiction of this Court, to the BSNL, at places to be named by it. It is well known that in cases of breach of contract, the place where the goods are manufactured, or where the goods have to be delivered, or the place where payment has to be received for the goods supplied or the place where breach is committed, also will have jurisdiction to entertain the proceedings, because those acts give rise to a cause of action. Since petitioner received the letter impugned in this writ petition at Hyderabad, a place within the jurisdiction of this Court, and since petitioner has to receive payment from the BSNL for the goods manufactured by it at a place within the jurisdiction of this Court, a part of cause of action did arise within the jurisdiction of this Court, and so it cannot be said that this Court has no territorial jurisdiction to entertain the writ petition. The point is answered accordingly.

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**POINT NO.2:**

13. The contention of the learned counsel for the BSNL on this point is two fold. His first contention is that since the bid document contains an arbitration clause, petitioner, if aggrieved, has to refer the matter to arbitration but cannot file a writ petition. His next contention is that in any event since petitioner is alleging breach of contract, question of this Court granting relief under Article 226 of the Constitution in cases relating to breach of contract does not arise. He relied on **HYTHRO POWER CORPORATION LTD. v. DELHI TRANSCO LTD., STATE OF JAMMU AND KASHMIR v. GHULAM MOHD. DAR** and **STATE OF BIHAR AND OTHERS v. JAIN PLASTICS AND CHEMICALS LIMITED** in support of his contention. The contention of the learned counsel for the petitioner is that since BSNL is but an instrumentality of the State, it has a duty to act fairly, even in contracts with third parties, and any arbitrary or unfair act on its behalf, which violates Art.14 of the Constitution, gives rise to the affected party to invoke the jurisdiction of this Court under Art.226 of Constitution, and for invoking public law remedy, clause relating to arbitration cannot be a bar and so this writ petition is maintainable. He relied on **MAHAMMAD GAZI v. STATE OF M.P.** in support of his contention that even in cases relating to contracts with private parties by a state writ petition is maintainable.

14. Before considering the merits of the contentions raised by the learned counsel for the parties it is relevant to refer to the decisions relied on by them. In **HYTHRO POWER CORPORATION LTD.** case (7 supra), Delhi Transco issued a notice inviting tenders for balance of the work relating to erection, testing and commissioning of 220 KV DC Tower Line from Samaypur to Mehrauli, which contained an arbitration clause. The Delhi Transco issued a letter of intent to Hythro Power Corporation. For resolution of a dispute between it and Delhi Transco, Hythro Power Corporation Limited filed a petition for arbitration under Section 11 of the Arbitration and Conciliation Act, 1996, in the High Court. A learned single Judge of the Delhi High Court, acting as the designate or nominee of the Chief Justice, holding that since no agreement in writing with an arbitration clause was executed by the parties, rejected the petition. Aggrieved thereby Hythro Power Corporation Limited filed a writ petition in a Delhi High Court which was also dismissed on the ground that there is no written agreement. On appeal to it, the Apex Court set aside to order of the Delhi High Court and remitted the case to the Delhi High Court with a request to the Chief Justice, or his nominee, to hear the case in accordance with the arbitration clause in the notice inviting tenders. This decision is not much of help in deciding this petition because question as to maintainability of a writ petition in case of violation of terms of contract by an instrumentality of the State was not considered therein.

15. In **GULAM MOHD. DAR** case (8 supra) a writ petition was filed seeking a direction to the State for payment of 42% escalated rates, as approved under a supplementary agreement and confirmed by the Chief Engineer, which was allowed by a learned single Judge and was confirmed by a Division Bench. In further appeal to it, the Apex Court holding that High Court should not entertain a writ petition involving disputed questions of fact, at the request of the counsel appearing for the parties before it, appointed an arbitrator. In **JAIN PLASTICS AND CHEMICALS LIMITED** case (9 supra) the writ petitioner company, in pursuance of a tender notification for supply of PVC Pipes and Fittings at Patna and Hazipur, issued by the State Government, submitted a tender, which was accepted and an agreement was executed for an estimated value for supplies amounting to Rs.5,81,92,584.84ps. There was a delay in making supplies by the writ petitioner company and so the

State Government with held some payments due and payable to the writ petitioner company. Contending that the authorities of the State Government returning the requisite road permits and other relevant papers was the only cause for the delay in supplying the material, writ petitioner company filed a writ petition seeking a direction to the State Government to release the amount due to it, which was allowed by a learned single judge holding that failure or refusal of the Government to supply the road permits was the cause for the delay and gave a direction to the State Government to pay the amount claimed by the writ petitioner company and that order was confirmed by a Division Bench. On further appeal by the State Government, the Supreme Court, while setting aside the order of the High Court, held that since question whether the alleged non-supply of road permits by the authorities of the Government would justify breach of contract by the writ petitioner company or not is a question of fact which has to be decided on evidence to be adduced and since such seriously disputed questions of fact and rival claims of the parties with regard to breach of contract are not to be decided in a writ petition, dismissed the writ petition. In my considered opinion, both the above decisions have no application to the facts of this case and for deciding this point, because this writ petition does not relate to a claim by the writ petitioner seeking escalated price or payment of money with held by the Government. The case of the petitioner is that BSNL had unilaterally and arbitrarily incorporated an additional clause in the APO, contrary to the terms in the bid document.

16. In **MOHAMMED GAZI** case (10 supra), a highest bidder in a tender auction of tendu leaves was prevented from having the benefit of the contract, due to a stay order obtained by the previous bidder and so the tendu leaves perished. When the highest bidder sought return of the security amount government imposed a cut on that amount as penalty. Questioning the same, the highest bidder filed a writ petition, which was allowed by a learned single Judge and was dismissed by a Division Bench in appeal. On further appeal, the Apex Court set aside the order of Division Bench and confirmed the order of the learned single Judge. In **ABL INTERNATIONAL LTD. V. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD.** the Apex Court held that merely because one of the parties raised a dispute with regard to facts of the case, Court entertaining a petition under Article 226 of the Constitution is not always bound to relegate parties to a suit, as there is no absolute

bar for entertaining a writ petition even if it arises out of contractual obligation or involves some disputed questions of fact, and that a State or an instrumentality of a State, which is a party to a contract, has an obligation in law to act fairly, justly and reasonably as required under Article 14 of the Constitution and so a writ Court can issue suitable directions to set right arbitrary actions of such State or its instrumentality, and that a writ petition cannot be said to be not maintainable merely because there are some disputed questions of fact. Reverting to this case since BSNL, admittedly, is an instrumentality of the State, it has to act fairly, justly and reasonably as required by Article 14 of the Constitution. If on facts it is found that it did not act fairly and reasonably the writ petition cannot be dismissed merely because it is in respect of a contractual obligation. If on facts it is found that the action of BSNL is fair, reasonable and not arbitrary the writ petition is liable to be dismissed. Otherwise, it will have to be allowed.

17. I find force in the contention of the learned counsel for the petitioner that arbitration clause in an agreement would not be a bar for a party invoking the public law remedy under Article 226 of the Constitution. Therefore, if on facts it is to be held that the writ petition is maintainable, the fact that there is a clause relating to arbitration is not and cannot be a bar for the Court entertaining a petition under Article 226 of the Constitution. The point is answered accordingly.

**POINT NO.3:**

18. The dispute between the parties is in relation to the clause relating to “approved prices of new tenders to be opened during 2004-05” incorporated in the APO dated 28.07.2004 of the BSNL. As stated earlier though petitioner signified its assent to that APO through its letter dated 04/05-08-2004, shortly thereafter by its letter dated 16.08.2004, it took an exception to the incorporation of such clause, which is not found in the bid document. Here it should be kept in view that BSNL did not treat the letter dated 04/05/-08-2004 of the petitioner as an unconditional acceptance for its APO dated 28.07.2004, because in its letter dated 15.10.2004 addressed to the petitioner, which is impugned in this petition, BSNL stated

“You are requested to convey your unconditional/ unequivocal acceptance of the revised provisional unit prices (all inclusive) intimated on 25.08.2004 vide letter under reference (ii) in respect of the above said APO. Your reply must reach up to 25-10-2004, failing which the said APO shall be with drawn at your risks and

responsibilities. ....”

Here it should be stated that the bid document does not anywhere state that prices for the goods tendered for would be subject to the new tenders to be opened in future. In fact, clauses 12, 15 and 16 in Section-III of the bid document, which relate to Prices, Delays in Suppliers Performance and Liquidated damages respectively, do not contain such a clause.

19. As stated earlier, as per the bid document, delivery of the tendered goods has to be made in two phases, i.e. order for 25% of the goods would be placed initially by BSNL with the qualified tenderers. If it is satisfied with the quality and performance of the equipment supplied, then only it would place the order for the remaining 75% of the equipment as second phase. There is no dispute with regard to the first phase of 25% goods supplied between the parties. The case of BSNL in the counter affidavit is, since it, while placing the purchase order for 25% of the goods in the first phase, vide its purchase order dated 09.09.2003, incorporated clause 6, reading-

“In case of delivery period extension is considered for delayed supplies after the expiry of delivery schedule, it will be given subject to condition stipulated in Clause 16 of Section –III of the bid document. During the extended delivery period the prices applicable shall be with reduction of taxes/duties and/or New Tender prices if any, on whichever is lower basis.” (underlining mine)

Petitioner is bound by that underlined clause and so such clause was reincorporated in the APO dated 28.07.2004 for the balance 75% order. Even assuming that BSNL was right in incorporating a new clause for the first time, like the above underlined portion, while placing the purchase order, since clause 5 of the said purchase order dated 09.09.2003 relating to ‘Scope of the Purchase Order’ reads:

“The purchaser hereby places an order on the supplier to supply the goods as per Annexure “A” for STM1 SDH Equipment for quantities shown in Annexure “A” (25% of the bidder’s eligible quantity). The balance 75% quantity shall be released only if the performance of the supplied equipment are found to be satisfactory.”

and since sub clause (vi) in Clause 6 thereof reads:

“The order for the balance 75% quantity shall be released only if the performance of the already supplied equipment is found to be satisfactory during this three months trial period. Supplies for the balance 75% quantity shall have to be completed within 4 (four) months after placement of order for this balance quantity.”

it is clear that ‘delivery period extension’ referred to in sub clause (xii) of Clause 6 of the Purchase Order extracted above relates only to 25% of the equipment ordered thereunder, but not to the 75% of the order, which is yet to be placed by the BSNL since ‘delivery period extension’ cannot arise in respect of the goods not yet ordered. Fixing delivery schedule for the balance 75% of the goods would arise only after the BSNL is satisfied with the performance of the initially supplied 25% of the goods. It is no doubt true petitioner sought for and obtained extension of delivery time in respect of the initial 25% goods. In respect of such extension letter dated 05.02.2004 of BSNL addressed to the petitioner reads:

“Sub:- Supply of STM-1 SDH equipment against PO  
No.MT/PO/06/2003-2004 dated 09-09-2003

Ref:- 1) SIL letter No.Nil dated 29-01-2004

Dear Sirs,

Kindly refer to your letter under reference and the captioned PO. It has been decided to extend the Delivery Period of the captioned PO to complete the supplies by **28-02-2004**.

i) BSNL have the absolute right to revise the price(s) and also to levy penalty for any delayed supplies.

ii) The delivery period extension up to **28-02-04** will be with **levy of Liquidated damage charges and the** supply during the above extended delivery period up to **28-02-04** shall be made at the provisional prices @ 90% of the firm unit prices all inclusive intimated against the captioned PO.

iii) The Provisional unit Prices shall be finalised by BSNL subject to the adjustment to the prices to be finalised by this office after taking in to consideration the effects of the duties/taxes for the subsequent years or the new tender approved prices if any, on which ever is lower basis, if applicable.

iv) Please ensure that supply of the equipment should be completed within the scheduled extended delivery period.

v) It may be treated as one month notice of short closure of the captioned Po in case the supplies are not completed within the extended periods above, captioned Po shall stand short closed for the balance qty at the entire risks and responsibilities of the supplier without any further notice and PBG shall be forfeited.

vi) **All other terms and conditions of the PO shall remain unaltered.** (emphasis supplied)

and letter dated 29.06.2004 of BSNL addressed to the petitioner reads:

"Subject:- Final Prices for the supply STM-1 SDH equipment for the Purchase Orders issued against T.E.  
No.MM/OF/072002/000247 opened on 03-10-2002.

Ref:-

1.MT/PO/10/2003-2004 dated 29-10-2003 M/s Semiconductor Complex Ltd.

2.MT/PO/06/2003-2004 dated 09-09-2004 M/s Sinclair Infra Tech Limited'

3.CT/PO/30/2003-2004 dated 08-03-2004 M/s Fibcom

4.CT/PO/31/2003-2004 dated 08-03-2004 M/s ITI (R/Q)

5.CT/PO/34/2004-2004 dated 22-03-2004 M/s HTL(R/Q)

Kindly refer to the of the above referred Purchase Orders placed against Tender Enquiry No. MM/OF/072002/000247 opened on 03-10-2002 for the supply of STM-1 SDH Equipment. Under clause 6(xii) of the PO mentioned under Sl. 1 & 2 it is stated that in case of delivery extension is considered for the delayed supplies after the expiry of schedule delivery period, it will be given subject to the conditions stipulated in clause 16 of Section-III of the bid document. During the extended delivery period the prices shall be with the reduction of taxes/duties/or new tender prices, if any on lower basis.

For the Pos under Sl 3 to 5 above, order was released at provisional value and it was stated that during the original delivery period, the final price shall be with the implication of duties/taxes announced on 09-01-2004.

The Prices have since been finalized. The final and firm Prices that will be applicable for the supplies made up to 08-01-2004 and after 09-01-2004 are shown in the enclosed Annexures.

If any excess payment made against the above Pos, the same may please



be recovered from the payment bills of the suppliers.

All other terms and conditions of the said Purchase Order shall remain unchanged.

Encls:

1. 'A' for the Pos placed on M/s SCL, M/s ITI & M/s HTL
2. 'B' for the PO placed on M/s Sinclair.
3. 'C' for the PO placed on M/s Fibcom."

Since it very well knew that the prices mentioned therein only would govern the remaining 75% of the goods to be supplied also, BSNL in its APO dated 28.07.2004 quoted the provisional value of the remaining 75% goods of the bid document as Rs4,78,80,271/-.

20. That tender No.MM/OF/062004/000270 for the very same STM-1 SDH equipment was floated by BSNL on 03.06.2004 is evidence from the 'Notice For Cancellation of Tender' in

F.No.11-7/2004 MMT (OF) dated 30.09.2004 notified by the BSNL which reads:

"Competent authority has decided to cancel tender No.MM/OF/062004/000270 issued on 03.06.2004 for procurement of STM-1 SDH equipment. The above noted tender is hereby cancelled."

From the letter dated 25.08.2004 addressed to the petitioner by BSNL referred to supra, it is seen that the said tender was opened on 18.08.2004. BSNL placed the APO for purchase of the remaining 75% of the goods on 28.07.2004 after calling for fresh tenders for the same type of equipment, and just before 20 days prior to the opening of the said tender, instead of waiting for the opening of new tender floated by it. So, it should be deemed that BSNL was interested in taking the remaining 75% goods, as per the bid document, from the petitioner. Otherwise, it would not have placed the order for that quantity just prior to the opening of the new tender floated by it. So, merely because the prices settled in a new tender happened to be lower than the rates fixed in the earlier tender, BSNL cannot be heard to say that the prices

for the goods to be supplied under the new tender would govern the prices of the goods supplied under the old tender, when the bid document does not contain such a clause, more so because clause 12 in Section III of the bid document, relating to prices, reads as follows:

**“12 PRICES:**

12.1 (i) (a) Prices charged by the Supplier for Goods delivered and services performed under the Contract shall not be higher from the prices quoted by the Supplier in his Bid.

(b) In the case of revision of Statutory Levies/Taxes during the finalisation period of the tender 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.”

The above clause obviously was incorporated in view of Section 64-A of the Sale of Goods Act. From the bid document it is clear that while fixing the prices the change in the rate of taxes only would be taken into consideration even in respect of delayed supplies. Besides that the tenderer, who is favoured with the purchase order, would be liable to pay liquidated damages, as mentioned in clause 16 of Section-III of the bid document for the delayed supplies. Question of petitioner paying liquidated damages in respect of the balance 75% quantity ordered through the APO dated 28.07.2004 does not arise because delivery schedule for that quantity is four months after placement of the purchase order, as seen from clause 5 of the said APO dated 28.07.2004 which reads as follows:

**“Delivery Schedule:**

i) Since it is balance 75% order for the qty under the no.MM/OF/072002/000247 opened on 03-10-2002 so the TAC already obtained against the PO no.MT/PO/06/2003-2004 dated 09-09-2003 under the same TE shall remain valid for this order.

ii) The delivery of the goods shall commence immediately on the placement of Purchase Order on Vendor and shall be completed within **Four months (04) from the date of issue of PO.**

iii) If the bidder fails to commence the supply during the original delivery period or fails to deliver the goods evenly, the Purchaser reserve the right to cancel the P.O. and encash the PBG. The delivery of the goods shall be completed within 04 months.”  
(emphasis supplied)

In the above circumstances, and since Bid document does not stipulate the prices for supplies or delayed supplies being governed by the tenders to be opened in future, BSNL is not justified in compelling the petitioner to supply the goods agreed to be supplied by it as per the concluded contract, at a rate almost about 50% less than the price fixed, on the basis of rates fixed in a subsequent tender which is cancelled.

21. Learned standing counsel for BSNL feebly contended that the order for 75% balance quantity should be taken as an independent contract and since petitioner by its letter dated 04/05/-08-2004 accepted the terms in the APO dated 28.07.2004 it cannot go back on such acceptance. I am unable to agree with the said contention because in the letter dated 28.07.2004 sent by the BSNL to the petitioner the Subject and Reference are as under:

“Subject:- Advance Purchase Order for the supply of STM-1  
SDH Equipment for 75% qty + add on order (Orion  
Technology – under New GR)

Reference:- **Tender Enquiry No.MM/OF/072002/000247  
opened on 03.10.2002.**” (emphasis supplied)

From the above cited reference, it is clear that order for 75% quantity is made only in pursuance of the tender opened on 03-10-2002, but not as a new contract. That apart, as stated earlier, petitioner on finding out that a new clause was incorporated in the APO dated 28.07.2004 of the BSNL addressed a letter dated 16.08.2004 to BSNL objecting to such a clause. Since the letter dated 15.10.2004 addressed to the petitioner (impugned in this writ petition) by the BSNL, extracted in para-2 supra clearly shows that it did not act on the acceptance letter dated 04/05-08-2004 of the petitioner, and kept the issue open, obviously on the basis of the letter dated 16.08.2004 of the petitioner, and sought its confirmation, it is clear that the issue relating to the disputed clause is still at large.

22. All the above apart, in any event, since the tender No.MM/OF/062004/000270 issued on 03-06-2004 was cancelled by BSNL in its letter F.No.11-7/2004 MMT (OF) dated 30.09.2004 extracted in para-20 supra, it is unfair and arbitrary on the part of BSNL to ask the petitioner to supply goods as per the rates in a cancelled tender. The point is answered accordingly.

23. For all the above reasons, I hold that BSNL imposing a fresh clause in its APO dated 28.07.2004 that prices for the quantity of the goods (equipment) to be ordered as mentioned therein would be subject to the new tender to be opened during 2004-05, and compelling the petitioner to accept the said clause by its letter impugned in the writ petition is arbitrary, unconscionable, unfair, unjust and unreasonable and consequently quash the said clause and direct BSNL to act strictly in accordance with the terms and conditions stipulated in the bid document, and not impose any new conditions, while placing a purchase order for the remaining 75% of the equipment (goods) etc. from the petitioner. Accordingly, Rule Nisi is made absolute. No costs. Advocate fee is fixed at Rs.2,500/-.

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(C.Y.Somayajulu, J.)

Date: 28-02-2005

Cvrk



THAT RULE NISI HAS BEEN MADE ABSOLUTE AS ABOVE.

WITNESS THE HON'BLE SRI DEVINDER GUPTA, THE CHIEF JUSTICE ON  
THIS MONDAY, THE TWENTY-EIGHTH DAY OF FEBRUARY, TWO THOUSAND  
AND FIVE.

..... REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1. The Secretary to the Government, Union of India, Department of Telecommunications, Ministry of Telecommunications, New Delhi-110 001.
2. The Chairman & Managing Director, Bharat Sanchar Nigam Limited, Government of India Enterprise, 148B, Statesman House, Barakhamba Road, New Delhi 110 001,

3. The Dy. Director General (MM), Bharat Sanchar Nigam Limited,  
12th Floor, 148B, Statesman House, Barakhamba Road,  
New Delhi-110 001.
4. The Assistant Director General (C.T.), Bharat Sanchar Nigam  
Limited, BSNL Corporate Office, 12th Floor, 148B, Statesman  
House, Barakhamba Road, New Delhi-110 001.
5. The Assistant Director (C.T.-I), Bharat Sanchar Nigam Limited,  
BSNL Corporate Office, 12th Floor, 148B, Statesman House,  
Barakhamba Road, New Delhi 110 001.
6. 2 CD copies.