

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

% *Judgment pronounced on: June 11, 2014*

+ **Arb. A. No.4/2012 & I.A. No.2580/2012**

STERLITE OPTICAL TECHNOLOGIES LTD ..... Appellant  
Through Mr.N.K.Kaul, Sr.Adv. with  
Mr.Kirat Singh Nagra &  
Mr.Pranav Vyas, Advs.

versus

BHARAT SANCHAR NIGAM LTD ..... Respondent  
Through Mr.Ankur Mittal, Adv. with  
Mr.Abhay Gupta, Adv.

**CORAM:  
HON'BLE MR.JUSTICE MANMOHAN SINGH**

**MANMOHAN SINGH, J.**

1. In the present Appeal, the appellant challenges the order dated 10<sup>th</sup> October, 2011, passed by the Arbitral Tribunal, wherein the learned sole Arbitrator has allowed an application moved by the respondent under Section 16(1), (2) and (3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"). The impugned order terminates the arbitration proceedings. It is held in the impugned order that the claim submitted by the appellant before the tribunal cannot be entertained.

2. Brief facts are that appellant had been supplying the respondent with PIJF underground cables for some time and has been a successful bidder in several earlier tenders. The contract between the parties was for supply of PIJF underground cables, on a

long-term recurrent basis. There was a clause in the contract which entitled the respondent, BSNL to come out with circulars indicating the price of copper, one of the basic raw materials used for manufacture and supply of PIJF cables. Based on the said circulars, it was envisaged that the price payable to the appellant for supply of the cables could change from time to time.

3. On 12<sup>th</sup> January, 2005, the respondent floated a tender bearing No.MM/SW/012005/000283 ("Tender Document") for the procurement of 120 LCKM PIJF underground cables.

4. The cable supplying companies declined to accept the price offered in the APO including the appellant. Therefore, a Price Negotiation Committee (PNC) was constituted by the respondent-BSNL on 30<sup>th</sup> June, 2005 to negotiate with the bidders referred in APO. This PNC negotiated with respect to all other raw material prices except copper, which was to be the exclusive right of the respondent to issue monthly price bulletin/circular. During this course, the Union Budget in February, 2005 reduced import duty from 15% to Zero percent on copper for Telecom Sector.

5. Further, the respondent issued APO dated 30<sup>th</sup> July, 2005 to all successful bidders and asked for unconditional and unequivocal acceptance to the same, to which the appellant complied on 9<sup>th</sup> August, 2005. As well the appellant on 30<sup>th</sup> June, 2006 and 8<sup>th</sup> February, 2006 gave unconditional and unequivocal acceptance to all terms and conditions of APO and the appellant was fully aware that the respondent would be issuing provisional pricing of copper and the final prices of copper were under the consideration of appropriate committee of the respondent.

6. For the first few months of the Contract, the respondent issued circulars indicating the price of copper as per the market rate indicated in HCL's circulars. HCL being a manufacturer of copper had the expertise to indicate the price for the same and in fact, all throughout, BSNL in past tenders has adopted the price given by HCL. The appellant having participated in earlier tenders was aware of and expected this practice to continue, which it did, but only for the first few months of the present tender.

7. It is the case of the appellant that the respondent-BSNL suddenly and arbitrarily started coming out with "Provisional Circulars" which indicated the rate of copper at a flat 10% lesser value than the rate indicated by HCL. At first, the appellant was made to understand that there would be some form of rationalization and reconciliation of these rates and thus continued supplying. However, inspite of repeated requests no such reconciliation took place and the respondent stuck to its arbitrary stance.

8. The appellant was thus left with no option but to initiate arbitration by submitting the claim for recovery of the loss suffered by it on account of the arbitrary act of the respondent by challenging the mode of computation of the prices and determination thereof by the respondent in the form of circular.

9. The Arbitration clause as contained in the agreement reads as follows :

"Clause 20. Arbitration

20.1 In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same

shall be referred to the sole arbitration of the CMD, BSNL.....The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996....”  
(Emphasis Supplied)

10. The respondent's application under Section 16 of the Act was based on the ground that the dispute submitted by the appellant was not arbitrable as the authority of BSNL to issue circulars indicating the price of copper was specifically provided in the agreement and thus fell in the exception clause.

11. The learned arbitrator after hearing the parties passed the impugned order dated 10<sup>th</sup> October, 2011 whereby the learned arbitrator allowed the application under Section 16 of the Act filed by the respondent and terminated the arbitration proceedings. Hence, the appellant has challenged the impugned order dated 10<sup>th</sup> October, 2011 in the present appeal.

12. This appeal came up for hearing when Mr.Neeraj Kishan Kaul, learned Senior counsel, with Mr.Kirat Singh Nagra, Advocate appeared on behalf of the appellant and Mr.Ankur Mittal, Advocate with Mr.Abhay Gupta, Advocate appeared on behalf of the respondent.

13. Mr.Kaul, learned Senior counsel appearing on behalf of the appellant has made his submissions which can be outlined in the following manner:

- a) It has been argued that the learned sole Arbitrator fell in grave error by deciding the controversy on merits while dealing with the objection of respondent that the dispute submitted by the appellant was not arbitrable under Section 16 of the Act. It has

been argued by Mr.Kaul that the impugned order nowhere decides as to whether the dispute is arbitrable or not and also nowhere returns the clear finding that the dispute falls outside the scope of the arbitration clause 20 of the agreement dated 30<sup>th</sup> July, 2005. On the contrary, the learned Arbitrator in his order dated 10<sup>th</sup> October, 2011 observed that the respondent did its best to ascertain the prices of the copper on the basis of the past practice and thereafter provided the circular at the current rates. As per Mr.Kaul, the said decision is on the merits of the case and not on the question of the arbitrability of the dispute. Thus, the learned sole Arbitrator has erroneously decided the application under Section 16 of the Act filed by the respondents and also wrongfully terminated the arbitral proceedings.

b) In answer to the objection under Section 16 of the Act, Mr.Kaul argued that the dispute submitted before the arbitral tribunal is clearly arbitrable under clause 20 of the agreement due to the numerous reasons which are:

- The appellant's stand that the decision of the BSNL to determine the copper prices is not specifically provided in the agreement and thus it cannot be categorized a decision under the agreement which can go outside the purview of the dispute under the agreement.
- The appellant is not challenging the competence of BSNL to issue the circular but is challenging the mode of computation of the prices as the said prices are ascertained in the arbitrary manner by the respondent.

- Even if it is assumed that there exists such decision under the agreement whereby the appellant is estopped from challenging the decision, the said clause preventing adjudication of such dispute shall be in restraint of legal proceedings and would be thus void as opposed to public policy.
- The arbitration clause 20 of the agreement is very widely worded which covers within its ambit any dispute which arises out of or in connection thereto with the agreement. The nature of dispute raised by the appellant wherein the respondent has improperly computed the prices of the copper without following the previous practice is clearly arising out of or in connection with the agreement and thus cannot be said to be non arbitrable.

For all these reasons, as per Mr.Kaul, the dispute is arbitrable in nature and the learned Arbitrator has not even considered these submissions while passing the impugned order and proceeded to advert to the merits of the case by pointing out the inability of the respondent to procure the rates of the copper from other sources which could not have been done by the learned Arbitrator.

- c) It has been argued by Mr.Kaul, learned Senior counsel that even in cases where the arbitration clauses are not so widely worded, the Courts have clearly held that the claims are arbitrable where there existed ambiguity in connection with the entertaining the claim. Mr.Kaul relied on the judgment passed in the cases of ***Asian Techs Limited vs. Union of India***, (2009) 10 SCC 354

and also ***Bharat Drilling and Foundation Treatment Pvt. Ltd. vs. State of Jharkhand***, (2009) 16 SCC 705 wherein the Supreme Court has held that the excepted clauses of similar nature merely bar the government from entertaining the claims and not the Arbitrator. Thus, this Court should also observe that the claims so raised before the Arbitrator are arbitrable in nature.

- d) It has been argued by Mr.Kaul, learned Senior counsel that the mere fact that BSNL has issued circular under the contract, that does not imply, the said circular becomes final in all terms and the appellant can question the manner of the determination of the price by the respondent in the copper circulars and said question is nowhere mentioned to be final in the agreement. It is submitted that the power to issue circular does not entitle the respondent to determine copper prices at the rates which are arbitrary without considering the relevant factors or the market price.

It has been argued that the finality to the decision of the respondent in the present form as done by the learned sole Arbitrator when the agreement does not provide such finality in express terms would be justifying the arbitrary action without giving the appellant any right to dispute the said actions of the respondent at any forum. Thus, the respondent's stand and the learned Arbitrators order holding the dispute to be non arbitrable is completely unreasonable and against the public policy.

- e) It is contended by Mr.Kaul that the similar challenges to the unreasonable price fixation of the copper by the respondent are filed at the behest of other successful bidders are pending

consideration in other arbitrations. Similar case of the present nature is ***Vindhya Telelinks Ltd vs. Chairman Cum Managing Director BSNL*** pending before another Arbitrator who is the retired judge of this Court. The respondent has also not filed the application under Section 16 of the Act in the said case and as such the same should weigh before the Court to hold that the dispute submitted before the Arbitrator is arbitrable in nature and the objection under Section 16 of the Act should be overruled.

In view of the aforementioned submissions advanced by the learned Senior counsel for the appellant, it has been prayed that this Court should allow the appeal by setting aside the order dated 10<sup>th</sup> October, 2011 and proceed to hold that the claim submitted by the appellant before the learned Arbitrator are arbitrable in view of the clause 20 of the agreement dated 30<sup>th</sup> July, 2005.

14. Per contra Mr. Ankur Mittal, learned counsel appearing on behalf of the respondent has made his submissions which can be outlined in the following manner:

- a) It has been argued by the learned counsel for the respondent as well as mentioned in the written submission that the appellants have wrongly stated that the learned Arbitrator has returned the finding in the impugned order that the matter falls within the excepted matter and there cannot be any arbitration. Such finding cannot be read or made out from the reading of the impugned order. The argument of the appellant proceeds on erroneous basis which has no foundation in the impugned order.
- b) It has been argued by the learned counsel for the respondent that the learned Arbitrator has only given the finding that the



Arbitrator cannot go beyond the written agreement between the parties. The said finding as per the learned counsel for the respondent is distinct from the finding that the case falls within the excepted matter.

- c) It has been argued by the learned counsel for the respondent that the appellants have cited the judgment of **Asia Tech Limited** (supra) case which in turn places reliance upon **Port of Calcutta vs. Engineers-De-Space-Age**, (1996) 1 SCC 576 case. However, in **Tehri Hydro Development Corporation Ltd vs. Jai Prakash Associates Ltd.** AIR 2013 SC 920, the Supreme Court comprising three Judges Bench doubted the findings given in Asian Tech Case relying upon Port of Calcutta case in the following words:

"13. In this connection we may refer to clause 70 of the contract which is the arbitration clause. The said clause reads as follows:

"70. Arbitration. – All disputes, between the parties to the Contract (other than those for which the decision of the CWE or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Office to be appointed by the authority mentioned in the tender documents."

20. It has been held by this Court in **National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.**, (2009) 1 SCC 267 that even in the case of issuance of full and final discharge/settlement voucher/no-dues certificate the Arbitrator or Court can go into the question whether the liability has been satisfied or not. This decision has followed the view taken in **NTPC**

**Ltd. v. Reshmi Constructions, Builders and Contractors**, (2004) 2 SCC 663 (vide paras 27 and 28).

21. Apart from the above, it has been held by this Court in **Port of Calcutta v. Engineers-De-Space-Age**, (1996) 1 SCC 516, that a clause like Clause 11 only prohibits the department from entertaining the claim, but it did not prohibit the Arbitrator from entertaining it. This view has been followed by another Bench of this Court in **Bharat Drilling & Treatment (P) Ltd. vs. State of Jharkhand**, (2009) 16 SCC 705.”

In view of the same, as per the learned counsel for the respondent, this Court should also not believe the stand of the appellant that the excepted matters are arbitrable as the observations made in Asia Tech’s case are doubted by the larger bench of the Supreme Court in the later decision of **Tehri Hydro** (supra).

- d) Learned counsel for the respondent argued that the plea of Arbitrator does not have jurisdiction as well as exceeding the scope of its authority is to be understood in the wider context. In instant case, the learned Arbitrator though has not ruled that he has no jurisdiction to hear the claim submitted before him but the learned Arbitrator comes to a specific finding that the respondent has made fair effort to ascertain the copper price by appointing a committee and then declared the copper prices. It is submitted by the learned counsel that by observing to the said terms in the order, the learned Arbitrator has refused to go beyond the written terms of the contract and refused to entertain a claim for fixation of copper price.

In order to substantiate his submission, learned counsel for the respondent relied upon the judgment passed in the case of ***Food Corporation of India vs. Chandu Construction***, (2007) 4 SCC 697.

- e) Learned counsel for the respondent has argued that the tender documents confer BSNL/respondent with the sole authority to determine the copper prices on the basis of the monthly copper price circular. As such, the appellant cannot interfere with the decision making process of the respondent in any manner. Learned counsel relied upon the following provisions and references in order to state that the sole decision making authority to determine the copper prices is the respondent herein:

- 1) Clause 9 allows BSNL to fix copper prices as per schedule XI by issuing monthly price circulars.
- 2) Reduction of statutory levy is required to be passed on to the purchaser i.e. BSNL.
- 3) Reduction of customs duty for telecom section from 15 % to NIL.
- 4) HCL gives sample calculation and ask BSNL to arrive at its own prices by including component of reduction of custom duty.
- 5) Telecom Cable Developers Association (TCDA) quoted the multiplication factor of 1.07
- 6) MMTC agreed to supply copper wire rods at the multiplication factor of 1.07

7) Committee constituted by BSNL to arrive at prices which gave a report on the aforesaid lines by reducing the effect of the reduction of custom duty.

For all these reasons, learned counsel for the respondent submits that the appellant has no role to play in the fixation of the price of the copper and as such the finding of the Arbitrator is unexceptionable when he holds that he cannot go beyond the written terms of the contract.

- f) It has been argued by the respondent that the appellant could have challenged the decision making process of fixation of the price of the copper by filing the writ before the Court prior to acceptance of the purchase order. However, seeking to participate in the decision making process to arrive at the copper prices would amount to going beyond the written terms of the agreement which is impermissible in law and as such the order passed by the learned Arbitrator cannot be faulted with.

Learned counsel for the respondent has relied upon the judgment of the apex Court in the case of ***Assistant Excise Commissioner and Others v. Issac Peter***, (1994) 4 SCC 104 in support of the proposition that the doctrine of fairness or reasonableness cannot be invoked to alter or add the terms of the contract.

- g) Learned counsel for the respondent has also argued that though the learned Arbitrator has not made the finding that the claim submitted before him falls within the excepted matter, still, the respondent argued that operation of clause 20 which is the arbitration clause read with the other provisions of the agreement

especially schedule XI would show that the decision to fix the copper prices is specifically provided in the agreement and the same is excluded from the purview of the arbitration.

- h) It has been argued by the learned counsel for the respondent that the appellant's reliance upon the case of **Vindhya Telelink** (supra) is misplaced as the said case is at the different stage as against the present one. It has been argued that not raising the objection in relation to jurisdiction will not take away the respondent's right to assail the arbitrability of the subject matter or claim in another arbitration. Thus, the said case of **Vindhya Telelink** (supra) does not aid the case of the appellant in any manner.

In view of the submissions advanced by the learned counsel for the respondent, it has been prayed that the present appeal be dismissed by the Court.

15. I have gone through the appeal, reply filed by the respondent and the rejoinder thereof and the documents filed by the parties in the present case. I have also carefully considered the submissions advanced by the learned counsel for the parties at the bar. I shall now proceed to discuss various aspects which fall for consideration in the present case.

16. Firstly, it is noteworthy to mention that the order dated 10<sup>th</sup> October, 2011 passed by the learned Arbitrator was a decision on the application filed by the respondent under Section 16 of Act. The said order as per the respondent's counsel own saying does not hold that the Arbitrator has no jurisdiction to entertain the claim submitted before him but proceeds to observe that as the respondent had made

the fair attempt to determine the copper prices and then provided for the prices in the circular, the Arbitrator has further held that he cannot go outside the purview of the agreement, which as per the learned counsel for the respondent is well within the domain of the Arbitrator as the Arbitrator cannot act in excess of the authority.

17. Perusal of the order dated 10<sup>th</sup> October, 2011 would show that the learned Arbitrator proceeds to justify the determination of the prices by the respondent by issuance of the circular on various grounds and proceeds to hold that the Arbitrator cannot entertain such claim submitted before him. The said order dated 10<sup>th</sup> October, 2011 passed by the Arbitrator does not test the arbitrability of the dispute submitted before the Arbitrator on the basis of the authority of the Arbitrator emanating from the agreement or as a matter of law to rule on the dispute submitted before him nor the order arrives at the conclusive finding as to by operation of which clause under the agreement, the dispute cannot be submitted before the Arbitrator and consequently affects his authority to hear the matter. The Arbitrator though frames the issue on the jurisdiction of the Arbitrator to hear the matter but does not answer the same by placing reliance upon the clauses of the agreement dated 30<sup>th</sup> July, 2005 or giving any other justifiable cause either on facts or in law which bars him from entertaining the claim submitted before him except by deciding the dispute on merits by referring the stand of the respondent as fair attempt to determine the prices and hence he cannot go outside the agreement. I find that such an approach by the arbitrator is non speaking order as it does not accord any reasoning for non

arbitrability of the claim prior to adverting on merits or tenability of the claim.

18. It is clear from the plain reading of Section 16 of the Act that the arbitral jurisdiction is competent to rule on its jurisdiction. Once, the party raises the plea of lack of jurisdiction or non arbitrability of the dispute submitted before the arbitrator and the arbitrator entertains such plea, then the arbitrator must decide the said plea on the issue relating to arbitrability or non arbitrability prior to deciding merits of the said claim. This can be seen from reading of Section 16 (5) of the Act wherein it is statutory mandate upon the arbitral tribunal to decide the said plea as referred to in sub section (2) and subsection (3). Subsection (5) of Section 16 consciously uses the wordings “the arbitral tribunal shall decide on a plea” where “shall” denotes the mandate and statutory command to rule on the pleas raised before the arbitral tribunal. The arbitrator cannot avoid deciding the issue or plea of arbitrability by giving it a different colour or deciding some aspect which he would decide subsequent to deciding the issue of arbitrability. The said decision not deciding arbitrability but upholding the plea without reasons would in that sense be a non speaking order and would be against the mandate given by the statute as per the provisions of Section 16 (5) of the Act.

19. The legal principle that the arbitrator is bound to rule on the legal issue submitted before him prior to adverting to merits is no longer *res integra* and the said principle was same and analogous under the Arbitration Act, 1940 with only difference being in the present Act of 1996 that mandates as a matter of law for arbitral tribunal to decide the said question as against the earlier Act wherein

the court may refer the said question to the arbitrator to decide. In the case of ***Tamil Nadu Electricity board vs. Bridge Tunnel Construction***, (1997) 4 SCC 121, the Supreme Court was concerned with the similar question and the court has held that the arbitrator cannot arrive into the merits of the controversy prior to the deciding the question of the arbitrability submitted before him and the same amounts to jurisdictional error and error apparent on the face of the record. In the words of the Supreme Court, it was observed thus:

**“13. In the light of the above facts, the question arises; whether the arbitrator was not obliged to decide the non- arbitrability of some of the items claimed by the respondents before/while giving a non-speaking award and whether a deemed decision could be given credence.** In Tarapore Co.'s case relied on by Shri Poti, a Bench of two judges of this court had gone into the question of jurisdiction of the arbitrator to decide the arbitrability of the dispute. In para 10 thereof, it is stated thus : "What is the effect of referring the specific question of law to arbitration without prejudice to one's right to contend to the contrary will be presently examined."

“If this issue specifically raises a question as to jurisdiction of the arbitrator to arbitrate upon the dispute set out in Point No.2, it appears to have been specifically referred to the arbitrator for his decision. Parties, therefore, agreed to submit the specific question even with regard to the scope ambit width and the construction of the arbitration clause so as to define its parameters and contours with a view to ascertaining whether the claim advanced by the appellant and disputed by the respondent would be covered by the arbitration clause. Whether upon its true construction the arbitration clause would include within its compass the dispute thus raised between the parties was specifically put in issue because parties were at variance about it.”



**“The arbitrator was thus required and called upon first to decide whether the dispute is arbitrable as falling within the width and answer is in the affirmative, then alone the second point need be examined.** If the answer to the first point of reference is in the negative in that if the **arbitrator were of he opinion that the dispute is not arbitrable as it would not fall within the scope, width an ambit of the arbitration agreement, it would not be necessary for him to determine whether the appellant was entitled to recover anything by way of compensation.** This aspect is being analysed in depth to point out that the parties specifically referred the question of construction of arbitration agreement, its width, ambit and parameters vis-a-vis the dispute raised so as to decide whether the dispute would fall within the purview of the arbitration agreement, in other words the jurisdiction of the arbitrator.” (Emphasis Supplied)

Thus, it could be seen that therein that when the question is specifically referred to the arbitrator, **the arbitrator is required to decide the question referred to him and decide the point on the question. Then only he gets the jurisdiction to go into the merits.** In para 12 of the judgment that point was elaborated holding that : "The first point extracted hereinbefore would clearly show that the specific question about the jurisdiction of the arbitrator to arbitrate upon the dispute set out in Point Nos. 2, 3 and 4 was specifically referred to the arbitrator. (Emphasis Supplied)

On the first point, the arbitrator had to decide whether the claims made by the appellant and disputed by the respondent would be covered by clause 40, i.e. the arbitration clause. In other words, the specific question referred to the arbitrator was about his jurisdiction to arbitrate upon the disputes covered by Points Nos. 2, 3 and 4, if and only if, upon a true construction of the arbitration clause that is first paragraph of clause 40, would cover the disputed claim for compensation he can enter into the merits of the dispute and decide it."

**This ratio clearly establishes that the arbitrator gets jurisdiction to decide the dispute on merits only when he is specifically called upon to decide the dispute in terms of the contract.”** (Emphasis supplied)

20. From the reading of the aforementioned observations of the Supreme Court in ***Tamil Nadu Electricity Board*** (supra), it can be said that the arbitral tribunals decision on merits prior to decision on the arbitrability is an error apparent on the face of the record and of the jurisdictional nature warranting interference of the court. After deciding the point on the arbitrability by a speaking award giving reasons, the arbitrator gets the jurisdiction to advert on the merits of the controversy and as such applying the ratio of ***Tamil Nadu Electricity*** (supra) to the facts of the present case, it is can safely said that the decision of the Arbitrator in the form of impugned order is a non speaking award and the decision on merits with some reference that the arbitral tribunal cannot travel beyond the agreement without given cogent reasons as to preclusion of the authority for the arbitrator to decide the merits of the claim submitted before him cannot be considered as deemed decision on arbitrability and warrants interference of this court in appeal.

21. On facts, I also find that the decision on the merits that the prices determined by the respondent due to their prior efforts and by eventually issuing the circular is not the decision affecting the arbitrability of the dispute submitted before the Arbitrator and rather the said finding of the learned Arbitrator is contradictory to the latter part of the observations wherein the learned Arbitrator holds that the

Arbitrator cannot go beyond the written agreement and thus dispute cannot be entertained. The decision on merits of the controversy or claim by preference of one set of facts presented by the party as against the other itself implies that the Arbitrator can rule over the claim submitted before him. Otherwise, the Arbitrator had no occasion to advert to the merits of the claim and had to simply test the arbitrability of the claim. This is clear contradiction to ruling on arbitrability which goes into the root of the matter and takes away the authority of the arbitrator to decide even on merits of the claim.

22. If the learned Arbitrator were to determine the fairness of the method of computation of the prices done by the respondent, then the evaluation of the stand of both the parties was essential. In that respect, the order dated 10<sup>th</sup> October, 2011 is procedurally irregular and the said observations of the learned Arbitrator cannot be passed in the application under Section 16 of the Act.

23. I also do not agree with the submission advanced by the learned counsel for the respondent that the impugned order passed by the learned arbitrator should be considered as decision on the plea of Section 16 (3) wherein the arbitrator can decide whether he is exceeding his authority or not at any stage of the proceedings. My reasons of variance with the submission advanced by the learned counsel for the respondent are as under:

- The said question of excess of authority or exceeding the jurisdiction by the arbitrator has to be decided by the arbitrator by referring to the clauses of the agreement and inextricably connected with the answer to the question whether the dispute as such referred before the arbitrator is covered by the

arbitration clause or not and how the authority of the arbitrator is affected by ruling on the claim submitted before him. The learned arbitrator while passing the impugned order does not delve into these inquiries at all on facts and just quotes the decision of Supreme Court that he cannot travel beyond the agreement and the same amounts to misconduct. Such a decision is non speaking award not only for the purposes of Section 16 (2) as observed above but also for the purposes of the decision on the plea under Section 16 (3) of the Act of 1996.

- As the learned arbitrator has not arrived at any conclusive finding as to how he is exceeding his authority, then as per dictum of ***Tamil Nadu Electricity Board*** (supra), no deemed inference as to decision making on the point of the arbitrability or excess of jurisdiction can be drawn.

In such a case, it is not possible to accept the submission advanced by the learned counsel for the respondent that the decision of the learned arbitrator is a deemed decision on the plea of Section 16 (3) of the Act.

24. I shall now proceed to discuss as to whether the dispute submitted before the arbitrator is arbitrable or not. For doing the needful, the relevant clauses 9, 20, 30 and Section XI of the agreement/bid document dated 12<sup>th</sup> January, 2005 are reproduced as under:

**“9. BID PRICES**

9.1 The bidder shall give the total composite price inclusive of all Levies & Taxes i.e. Sales Tax & Excise Duty, packing, forwarding, freight and insurance etc. but

excluding Octroi/Entry Tax which will be paid extra as per actual, wherever applicable. The basic unit price and all other components of the price need to be individually indicated against the goods it proceeds to supply under the contract as per the price schedule given in Section VII. Prices of incidental services should also be quoted. The offer shall be firm in Indian Rupees. No Foreign exchange will be made available by the purchaser.

9.2 Prices indicated in the Price Schedule shall be entered in the following manner:

(i) The Basic Unit price (Ex-Factory Price) of the goods, Excise duty, Custom duty, Sales Tax, Freight, Forwarding, Packing, Insurance and any other Levies/Charges already paid or payable by the supplier shall be quoted separately item wise.

(ii) The supplier shall quote as per price schedule given in section VII for all the items given in schedule of requirement.

9.3 The price quoted by the bidder shall remain fixed during the entire period of contract and shall not be subject to variation on any account. A bid submitted with an adjustable price quotation will be treated as non – responsive and rejected.

9.4 The prices quoted by the bidder shall be in sufficient detail to enable the Purchaser to arrive at the price of equipment/system offered.

9.5 “DISCOUNT, if any, offered by the bidders shall not be considered unless specifically indicated in the price schedule. Bidders desiring to offer discount shall therefore modify their offers suitably while quoting and shall quote clearly net price taking all such factors like Discount, free supply, etc., into account”.

9.6 The price approved by BSNL for procurement will be inclusive of Levies and Taxes, packing, forwarding freight and insurance as mentioned in Para 9.1 above. Breakup in various heads like excise duty, sales tax, insurance, freight and other taxes paid/payable as per clause 9.2 (i) is for the information of the purchaser and any change in these shall have no effect on price during the scheduled delivery period.

9.7 The freight by sea for transportation of equipment/Stores from the nearest port in the main land to Andaman & Nicobar Islands will be reimbursed to the supplier at the concessional rates levied by ministry of Water and Surface Transport on production of proof.

9.8 The prices will be quoted at copper wire prices of Rs.1,83,366/- (Rupees One Lac Eighty Three thousand three hundred sixty six only) per MT excluding Excise Duty as on January 2005. Price variation will be applicable on copper as per standard Price variation table given in Section XI of the Bid Document.”

## “20. Arbitration

20.1 In the event of any question, dispute or difference arising under the agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole Arbitrator arbitration of the CMD, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole Arbitrator arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or unwilling to act as such, then to the sole Arbitrator arbitration of some other person appointed by the CMD, BSNL or the said officer. The agreement to appoint an arbitrator will be in

accordance with the Arbitration and Conciliation Act, 1996. There will be no objection to any such appointment on the ground that the matter to which the agreement relates or that in the course of his duties as a Government Servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.

20.2 The arbitrator may from time to time with the consent of both the parties enlarge the time frame for making and publishing the award. Subject to the aforesaid, Arbitration and Conciliation Act, 1996 and the rules made there under, any modification any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.

20.3 The venue of the arbitration proceeding shall be the office of the CMD, BSNL, New Delhi or such other places as the arbitrator may decide.”

“30. COURT JURISDICTION : The contract shall be governed by Indian laws and courts at Delhi/New Delhi will have jurisdiction to entertain any dispute or claim arising out of this tender till issue of authorization letters to Circles for placement of Purchase Orders (P.O.s).”

“SECTION-XI  
PRICE VARIATION TABLE  
PRICE VARIATION TABLE FOR PIJF, (U/G) CABLES

For increase/decrease of Price of Raw materials by Rs.100.00 per MT, the corresponding increase/decrease of Price of the related stores is tabulated as under:

Raw Material: Copper wire rod					
Stores: Jelly Filled UG Cable (Armoured/Unarmoured)					
Size (Prs) :	1200/.40 mm	1600/.40 mm	2000/.40 mm	2400/.40 mm	10/.50 mm
PV in RS/KM:	270.18	365.57	456.96	548.86	3.85
Size (Prs) :	20/0.50 mm	50/.50 mm	100/.50 mm	200/.50	400/.50 mm
PV in Rs/Km:	7.35	17.85	35.70	71.40	142.80
Size (Prs) :	800/.50 mm	1200/.50 mm	800/.4 mm	400/.4 mm	20/.63 mm
PV in Rs/Km:	285.60	428.40	182.79	91.39	408.00
Size (Prs) :	50/.63 mm	100/.63 mm	200/.63 mm	400/.63 mm	800/.63 mm
PV in Rs/Km:	25.50	51.00	102.00	204.00	408.00
Size (Prs) :	20/.90 mm	50/.90 mm	100/.90 mm	200/.90 mm	400/.90 mm
PV in Rs/Km:	23.73	57.63	115.26	230.52	461.04

Note: (1) The price variation will be calculated on the Basic Price element of the approved date and the same shall be used to arrive at the composite price to be offered to all the vendors. The composite price of each size accordingly or mounty basis, based upon the Copper Price Circulate issued by BSNL.

This price variation shall be applicable within original delivery schedule.

(2) In case of supplies made under extended delivery period, the price variation will be regulated as follows:-  
In case of any decease due in reduction in Copper Wire Rod Price, benefits will be passed on to the Purchaser. However, no increase in price will be allowed by the supplier due to the hike in Copper Wire Rod price during the extended delivery period. In such cases, the price of Copper Wire Rod prevailing in the last month of the original supply schedule shall prevail.”



From the conjoint reading of the aforesaid clauses, the following position can be discerned:

- a) That the Clause 9.3 of the agreement provides that the **price quoted by bidder** shall remain fixed during the currency of the contract and shall not be subject to variation on any account.
- b) Clause 9.8 of the agreement provides that the prices will be quoted at the copper wire prices of Rs. 183366 per MT as on January 2005 and variation in the prices of the copper shall be applicable as per the variation table given in schedule XI of the bid document.
- c) Schedule XI of the agreement provides the mode of the computation of the variation in the price of raw materials viz copper wire rod and also provides in the explanatory notes the guidelines to be taken into consideration while ascertaining the said variation. The explanatory note 1 gives a hint that the price variation shall be calculated on the basic price element of the approved rate and the shall be used to arrive at the composite price to be offered to vendors. The said composite price shall be worked on the basis of the circular issued by the respondent.
- d) Clause 20 of the agreement provides that any question or dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is **specifically provided under this agreement**), the same shall be referred to the sole arbitration of CMD, BSNL.
- e) Upon the careful reading of the clause 9, read with clause 20 of the agreement and schedule XI appended to the agreement, it can be seen that though clause 9.8 provides that the price

variation of the copper shall be ascertained in the manner provided in schedule XI, it nowhere provides specifically that the same shall be termed as decision of BSNL to determine the said copper prices.

- f) Upon meaningful reading of the said schedule XI appended to the agreement, it is seen that the said schedule provides the mode of computation of the price variation and also in explanatory note provides that basic price of the approved rate shall be taken into consideration while computing the price variation of the copper. The said schedule XI also does not give any mandate that the said computation done by BSNL shall be termed as decision in the agreement. If that is so provided specifically in the agreement or the schedule XI which may be termed as a part of the agreement, only then it can be said that aspect is ousted or can be termed as excepted matter within the meaning of the agreement. In cases of ambiguity where the arbitration clause is broad enough to cover each and every dispute arising out of or in connection therewith with the agreement as against the excepted matters which is confined to specific mention of the decision under the agreement. No deemed inference as to specificity or decision making of BSNL may be drawn once it is not clearly evinced from the agreement or the schedule appended thereto in the agreement.
- g) As against the absence of any specific mention in the agreement or the schedule thereto relating to the decision of BSNL under the agreement, Schedule XI provides the mode of computation of the prices and the guidelines for doing such computation

which include taking into consideration of base price of the approved rate in order to arrive at composite price. The said schedule also merely provides that BSNL may issue circular in this respect for working out such composite price. The schedule XI also nowhere attaches any finality to the prices ascertained by the respondent nor calls it as a decision under the agreement. In such circumstances, a dispute as to mode of computation of the prices when it is not specifically categorized as a decision under the agreement can be raised and can conveniently fall within the ambit of clause 20 of the agreement. This is also the reason the respondent has failed to point out any provision in the agreement during the argument and not even in the written submissions as to which provision specifically provides that the price circular issued by the respondent is a decision within the meaning of the agreement and hence excluded matter. In the absence of the said provision, dispute is clearly arbitrable in nature.

In view of the position discussed above, upon fair and meaningful reading of the clauses of the agreement, it can be safely said that the dispute as to the mode of computation of the prices or effect of variation of prices in Copper can be made in the event the dissatisfied contractor assails the computation carried out by BSNL in form issuance of the circular on the grounds permissible to him be it is not fair or is not as per past practice or without following the mode of computation as per the representation given at the earlier occasion by giving its justifications as to what can be the actual computations as per the contractors and the arbitrator can decide the same

depending upon the merits of the claim. In such cases, as there is no indication as to finality attached to the circular which can be evinced from the agreement or schedule XI appended to the agreement, the dispute is clearly arbitrable and can be subjected to the arbitration.

25. I also do not agree with the submission of the learned counsel for the respondent that the writ petition could be preferred if the prices were found to be arbitrary in nature by the contractor prior to accepting the purchase order by the petitioner. This is due to the reason that the jurisdiction of the courts is also excluded in the agreement by operation of clause 30 which only permits filing of such writ petition only prior to the working of the contract by curtailing the judicial interference. In the instant case, the appellant's grievance is that after working of the agreement, in between the respondent started issuing the circulars without considering the rates issued by HCL which were earlier considered in the circular and departed from the past practice prejudicial to the interest of the claimant/ appellant. Thus, the writ petition challenging the arbitrary nature of computation in pricing done after the commencement of the working of the agreement or issuance of the purchase order cannot be assailed even in writ petition due to the operation of clause 30 of the agreement. Accordingly, it is incumbent that the doors of atleast one forum should remain open so that the dispute as to wrong computation of the prices of copper when the copper is essential ingredient and subject on the basis of which prices of PIJF cables are determined should be adjudicated in the form of arbitration, more so when the arbitration clause is broad enough to cover such disputes and there is no indication in the agreement in specific terms that it is

an excepted matter. The said view is also necessary as the judicial review of the state actions is basic structure of Indian constitution and absolute finality to the departmental actions impermissible in law as the said actions cannot remain beyond judicial review absolutely. In view of the same, I reject the submission advanced by the learned counsel for the respondent that the writ remedy was available to the petitioner in alternative to the arbitration proceedings.

26. So far as the judgments relating to the excepted matters being non arbitrable as cited by the learned counsel for the respondent including the judgments of Apex court in **Tehri** (supra) where the view in **Asia Tech** (supra) has been doubted, the said judgments are not applicable and are distinguishable in view of the difference in facts of the said cases with that of the present case. In the instant case, there is no clearly borne out from the agreement as to which of the clause under the agreement calls the determination of the prices by issuance of the price circular by the respondent as a decision within the meaning of the agreement. In such a case when the arbitration clause is of widest amplitude and exception is narrower, it is difficult to put the claim submitted before the arbitrator under the bracket of the excepted matter and once my finding is that it is not the excepted matter, then the judgments of the Apex Court or this court laying down that the excepted matters are non arbitrable do not aid the case of the respondent.

27. The matter can also be seen from another angle which is that the petitioner is not challenging the authority or competency of the respondent to issue circulars containing the prices of copper so that the contracts should follow the same, the respondent is attempting to

dispute the mode of computation of the prices of the copper and effect of variation of the prices. The contract is concerning supply of PIJF cables and talks about the prices of the copper in clauses 9 of the agreement which is an essential ingredient having its role to play in pricing of copper. In such circumstances, the dispute concerning the computation of pricing of copper is not the one which is outside the agreement but is inextricably connected with that of subject matter of the contract. The said dispute disputed either way can effect the pricing consideration in contract and thus the same cannot be the one which can be said to be non arbitrable one especially when the agreement does not specifically provide it as an excepted matter under the agreement. For this reason also, the dispute submitted before the arbitral tribunal is arbitrable in nature.

28. In view of the aforementioned discussed, the impugned order dated 10<sup>th</sup> October, 2011 is set aside and it is observed that the claim submitted before the arbitrator is arbitrable as per the operation of clause 20 of the agreement/bid document dated 12<sup>th</sup> January, 2005. List the matter before the arbitrator for further proceedings.

29. With these observations, present appeal is accordingly disposed of so as the pending application. Parties shall appear before the learned Arbitrator on 12<sup>th</sup> August, 2014. Copy of the order be communicated to the learned Arbitrator.

30. No costs.

**(MANMOHAN SINGH)**  
**JUDGE**

**JUNE 11, 2014**