Mahanagar Telephone Nigam Limited vs Tata Communication Limited on 27 February, 2019

Equivalent citations: AIR 2019 SUPREME COURT 1233, 2019 (5) SCC 341, 2019 (3) ADR 190, (2019) 2 CIVILCOURTC 810, (2019) 2 ICC 705, 2019 (2) KCCR SN 83 (SC), (2019) 2 RECCIVR 321, (2019) 3 PAT LJR 67, (2019) 3 RAJ LW 2070, (2019) 3 SCALE 864, (2020) 1 MAH LJ 795, (2020) 1 MPLJ 316, AIR 2019 SC (CIV) 1259, AIRONLINE 2019 SC 128

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Bench: Vineet Saran, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1766 OF 2019

MAHANAGAR TELEPHONE NIGAM LTD. … APPELLANT

VERSUS

TATA COMMUNICATIONS LTD. … RESPONDENT

JUDGMENT

R.F. NARIMAN, J.

1. The present appeal arises out of a dispute under the Telecom Regulatory Authority of India Act, 1997. The relief sought through a petition before the Telecom Disputes Settlement and Appellate Tribunal, New Delhi [“TDSAT”] by the respondent, Tata Communication Ltd. against the appellant, Mahanagar Telephone Nigam Ltd., is for a Reason: question that arose between the parties is whether the appellant was justified in adjusting this amount from the dues payable to the respondent by deduction from the bills raised by the respondent. Since the Purchase Order dated 01.10.2008 forms the basis for the claim, it is important to set out clauses 4 and 8 of the said Purchase Order as under:

"4. SCOPE OF ORDER xxx xxx xxx iv. Termination of the bandwidth on STM-1 would be done at the MTNL sites/locations in Delhi (Kidwai Bhawan and Nehru Place) and Mumbai (Fountain Head & Prabha Devi) respectively as per the requirement with redundancy in last mile connectivity. For this bandwidth termination purpose, optical/electrical converter, cable and any other hardware/software etc. required, if any, would be arranged by the bidder free of cost." xxx xxx xxx "8. DELIVERY SCHEDULE

(i) The physical connectivity for bandwidth should be completed within two months from the date of place of Purchase Order." The TDSAT, on considering this Purchase Order, held:

"25. At this stage, it falls for consideration as to what relief the petitioner is entitled to on the basis of strength of its own case. For this purpose, it is useful to note at the outset that the petitioner was required to provide the last mile connectivity as per paragraph 4(iv) of the P.O. within two months. It is also not in dispute that petitioner did not provide the required connectivity not only by December 2008 but even by time when it chose to terminate the contract on 11.01.2011. The defence pleaded and argued on behalf of petitioner is that it was neither given access to the buildings/premises of the respondents nor the permission for affecting the last mile connectivity. This stand was sought to be justified by placing reliance on Emails written by the petitioner on 01.06.2010 which is more than a year after grant of permission by Delhi and Mumbai units around March and April 2009. On going through the communication dated 01.06.2010, it is evident that the plea that respondents did not allow entry to the petitioner into their premises in Mumbai has been raised quite belatedly and does not appear to be correct and convincing. Hence, we find petitioner's case to be weak and unacceptable in so far as it puts the blame totally upon the respondent for its inability or failure to provide the last mile connectivity. No doubt there was some delay by the respondents at the initial stage but that alone cannot justify or absolve petitioner's total failure.

26. If we had reliable materials to find out the exact cost of providing the last mile connectivity at each of the two premises in Mumbai and Delhi, we would have reduced that much amount from the claim of the petitioner and allowed the rest. That would have served the interest of justice and prevented unjust enrichment of the petitioner.

However, in absence of such reliable materials as to actual costs which the petitioner has saved by non- compliance with the requirements of paragraph 4(iv) of the P.O., we have looked closely at the case of both the parties and we find that at best the respondents could have invoked clause 16 and more particularly, clause 16.2 which provide for liquidated damages in certain eventualities like failure to deliver the stores/services or to install and commission the project in whole or in part. The admitted default on the part of the petitioner can safely be treated as failure or delay affecting the installation/commissioning of a part of the project requiring last mile connectivity. In such a case,

as per clause 16.2(b) of the Agreement (P.O.), liquidated damages can be levied on the affected part of the project. As per clause 16.2(c), the liquidated damages must be limited to a maximum of 12%. In the present case the full amount billed and receivable by the petitioner for services rendered is disclosed as Rs.2,15,25,512/-, hence, on account of limitation of 12%, the respondents could not have levied and deducted an amount more than Rs.25,83,181/-. Instead of adopting this lawful course, the respondents proceeded to unilaterally impose rentals at their own rate of dark fibre. Such action of the respondents amounts to adjudicating a claim in its own favour without any authority for such unilateral act either under Section 70 of the Contract Act or under any of the provisions of the Contract(P.O.). xxx xxx xxx

28. As a result of aforesaid discussion, the claim of the petitioner is allowed but in part only. The principal amount which the respondent must refund or pay back to the petitioner would be Rs.1,10,57,268 – Rs.25,83,181= Rs.84,74,087/-. Petitioner has also claimed an amount of Rs.66,33,414/- by way of interest from the date the amounts became due and upto 15.07.2012. It has calculated this amount by applying a rate of 18%. The calculations are in Annexure P-14 which discloses the dates when the short payments were made after deductions. We are not persuaded to allow interest @ 18% in absence of any such stipulation in the Agreement (P.O.). Hence, while allowing the principal amount of Rs.84,74,087/- in favour of the petitioner, we direct payment of interest at the rate of 9% from the date the amounts became due upto the date of this judgment/order."

2. Having heard the learned counsel for both sides, one neat question arises before this Court, which is, whether, when parties are governed by contract, a claim in quantum meruit under Section 70 of the Indian Contract Act, 1872 ["Contract Act"] would be permissible.

Section 70 of the Contract Act reads as under:

> "70. Obligation of person enjoying benefit of non- gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered." This Section occurs in Chapter V of the Contract Act, which chapter is headed, "of certain relations resembling those created by contract".
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> There are five sections that are contained in this Chapter. Each of them is posited on the fact that there is, in fact, no contractual relationship between the parties claiming under this Chapter. For example, under Section 68, if a person incapable of entering into a contract is supplied necessaries by another person, then the person who has furnished such supplies becomes entitled to be reimbursed from the property of the person so incapable of entering into the contract. Section 69 also deals with a case where a person has no contractual relationship with the other person mentioned therein, but who is interested in the payment of money which the other person is bound by law to pay, and who, therefore, pays it on behalf of such person. Such person is entitled to be reimbursed by the other person.

> Under Section 71, again, the finder of goods spoken of is a person who is fastened with the responsibility of a bailee as there is no contractual relationship between the finder of goods and the goods which belong to another person. Equally, under Section 72, a person to whom money has been paid or anything delivered by mistake or coercion must repay or return it, or else, such person would be unjustly enriched. Here again, there is no contractual relationship between the parties. It is in this setting that Section 70 occurs.

3. An early judgment reported as Moselle Solomon v. Martin & Co., ILR (1935) 62 Cal 612 resulted in a split verdict between the two judges on the point of whether Section 70 of the Contract Act can apply when there is, in fact, a contract between the parties. Lort-

Williams, J. held:

> "There remains to be decided the question whether the second defendant is liable under section 70 of the Indian Contract Act and to what extent. The remedy provided by this section is not dependent upon the law relating to the liabilities of principal and agent. It is an independent remedy, which is based upon a different cause of action, namely, upon whether a person has lawfully done anything for another or has delivered anything to him not intending to do so gratuitously, and such other person has enjoyed the benefit thereof. If so, he must either make compensation in respect of, or restore the thing so done or delivered." (at page 619) On the other hand, Jack, J. held:
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> "As regards the appeal, it is clear that the second defendant cannot be held liable under section 70 of the Contract Act, in as much as this is a case of contract and, where there is an express contract, section 70 has no application, as shown by the heading of Chapter V of the Act, in which the section finds a place. It is headed "Of Certain Relations Resembling Those Created by Contract", evidently excluding relations actually created by contract, as in this case. The Contract Act is, however, not exhaustive." (at page 623)

4. In Kanhayalal Bisandayal Bhiwapurkar (Dr.) v. Indarchandji Hamirmalji Sisodia, AIR 1947 Nag 84, a learned Single Judge of the High Court was dealing with an application by an eye-specialist of repute who wished to recover an amount of INR 188/- as the price of professional work, i.e., getting a cataract removed in accordance with an agreement with one Mt. Laxmibai and her son-in-law, Mohan Lal, by which agreement, the said operation was to be performed. An appeal to Sections 68 and 70 of the Contract Act was turned down in the following terms:

> "10. In the course of the argument, an appeal was made to the principles underlying Ss. 68 and 70, Contract Act, for making the husband liable. Indeed S. 68, deals with the supply of necessaries but that is in respect of a person incapable of entering into a contract or "any one whom he is legally bound to support", i.e. the dependent of a person incompetent to contract. Indarchandji was not incompetent to contract and

> this section is inapplicable to him. As to S. 70, it must be observed that this section cannot be availed of by a person who relies on an express contract as the plaintiff alleged to have entered into with Mt. Laxmibai in this case. The husband never entered into the picture when the plaintiff settled the terms with her. Nor is there anything to show how the husband received any benefit. It is only actual benefit which will famish a ground of action. If the wife had been cured of her ailment completely, perhaps that circumstance might be material; but there is no evidence on the point."

5. In Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793, this Court dealt with an arbitration award which, inter alia, awarded certain amount on the basis of quantum meruit. In setting aside the Award on the ground of error apparent on the face of the record, this Court held:

> "..... Ghee having been supplied by the Agents under the terms of the contract, the right of the Agents was to receive remuneration under the terms of that contract. It is difficult to appreciate the argument advanced by Mr. Chatterjee that the Agents were entitled to claim remuneration at rates substantially different from the terms stipulated, on the basis of quantum meruit. Compensation quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable in that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable....." (at page 809)

6. In Mulamchand v. State of M.P., (1968) 3 SCR 214, this Court held that the provisions of Section 175(3) of the Government of India Act are mandatory in character and based on public policy. Therefore, the formalities that are stipulated when contracts are entered into on behalf of the Government cannot be waived or dispensed with. In dealing with a claim made under Section 70 of the Contract Act, this Court then went on to hold:

> "..... In other words, if the conditions imposed by Section 70 of the Indian Contract Act are satisfied then the provisions of that section can be invoked by the aggrieved party to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the

> contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something.

So where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution……" (at pp. 221-222)

7. This judgment has been recently referred to and followed in Orissa Industrial Infrastructure Development Corpn. v. Mesco Kalinga Steel Ltd., (2017) 5 SCC 86 at paragraph 21.

8. Indeed, the aforesaid position in law is made clearer by Section 73 of the Contract Act. Section 73 reads as follows:

> "73. Compensation for loss or damage caused by breach of contract.— When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
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> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
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> Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
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> Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."
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> 9. This Section makes it clear that damages arising out of a breach of contract is treated separately from damages resulting from obligations resembling those created by contract. When a contract has been broken, damages are recoverable under paragraph 1 of Section
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> 73. When, however, a claim for damages arises from obligations resembling those created by contract, this would be covered by paragraph 3 of Section 73.
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> 10. Indeed, the present case is really covered by Section 74 of the Contract Act, which occurs in Chapter VI, which is headed, "of the consequences of breach of contract".

Section 74 states:

"74. Compensation for breach of contract where penalty stipulated for.— When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail- bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein. Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

11. In Kailash Nath Associates v. DDA, (2015) 4 SCC 136, after considering the case law on Section 74, this Court held:

"43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-

known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded."

12. In the present case, clauses 16.2 to 16.4 are relevant, and are set out as under:

> "16.2 (a) FOR DELIVERY OF STORES:
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> Should the supplier fail to deliver the store/services or any consignment thereof within the period prescribed for delivery, the purchaser shall be entitled to recover 0.5% of the value of the delayed supply for each week of delay or part thereof for a period up to 10 (TEN) weeks and thereafter at the rate of 0.7% of the value of the delayed supply for each week of delay or part thereof for another TEN weeks of delay. In the case of package supply where the delayed portion of the supply materially hampers installation and commissioning of the systems, L/D charges shall be levied as above on the total value of the concerned package of the Purchase Order.

However, when supply is made within 21 days of QA clearance in the extended delivery period, the consignee may accept the stores and in such cases the LD shall be levied upto the date of QA clearance.

16.2 (b) FOR INSTALLATION & COMMISSIONING Should the supplier fail to install and commission the project within the stipulated time the purchaser shall be entitled to recover 0.5% of the value of the purchase order for each week of delay or part thereof for a period upto 10 (TEN) weeks and thereafter @ 0.7% of the value of purchase order for each week of delay or part thereof for another 10 (TEN) weeks of delay. In cases, where the delay affects installation/commissioning of part of the project and part of the equipment is already in commercial use, then in such cases, LD shall be levied on the affected part of the project.

16.2 (c). The Liquidated Damages, as per Clause 16.2

(a) and 16.2 (b) above shall be limited to a maximum of 12%, even in case the DP extension is given beyond 20 weeks.

16.3. Provisions contained in Clause 16.2(a) shall not be applicable for durations (periods) which attract L.D. against clause 16.2(b) above.

16.4. Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier."

13. As has been correctly held by the impugned judgment, a maximum of 12% can be levied as liquidated damages under the contract, which sum would amount to a sum of INR 25 lakh. Since this clause governs the relations between the parties, obviously, a higher figure, contractually speaking, cannot be awarded as liquidated damages, which are to be considered as final and not challengeable by the supplier. This being the case, the appellant can claim only this sum. Anything claimed above this sum would have to be refunded to the respondent.

14. In this view of the matter, we uphold the impugned judgment of the TDSAT and dismiss the present appeal.

.....J. (R.F. NARIMAN) .....J. (VINEET SARAN) New Delhi;

February 27, 2019.