$~P-1 to 4

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

Decided on: 31st May, 2024

\+ **O.M.P. (COMM) 34/2017**

MAHANAGAR TELEPHONE NIGAM LTD ..... Petitioner

versus

M/S MAFATLAL INDUSTRIES LTD ..... Respondent

\+ **O.M.P. (COMM) 42/2017**

GAUTAM GUHA ..... Petitioner

versus

MTNL ..... Respondent

\+ **O.M.P. (COMM) 62/2017**

MAFATLAL INDUSTRIES LTD ..... Petitioner

versus

MTNL ..... Respondent

\+ **OMP (ENF.) (COMM.) 255/2018**

MAFATLAL INDUSTRIES LIMITED & ANR. ..... Decree Holders

versus

MAHANAGAR TELEPHONE NIGAM LIMITED ..... Judgement Debtor

Appearances:

Mr. Vikalp Mudgal, Mr. Akshit Gupta, Mr. Prakhar Khanna, Advocates

for MTNL.
Mr. D.K. Rustagi, Mr. J. Karan Malhotra, Mr. Nayan Mishra, Mr. Ashok Kumar Malhotra, Advocates for Mafatlal and Gautam Guha.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

O.M.P. (COMM) 34/2017, O.M.P. (COMM) 42/2017 and O.M.P. (COMM) 62/2017

1. These three petitions under Section 34 of the Arbitration and Conciliation Act, 1996, ["the Act"], are directed against an Arbitral Award dated 21.12.2009, by which a Sole Arbitrator has adjudicated disputes between the parties under a purchase order issued by Mahanagar Telephone Nigam Limited ["MTNL"] in favor of Mafatlal Industries Ltd. ["Mafatlal"] on 19.04.2001.

2. The purchase order was for the supply of 1,91,507.40 meters of winter suiting [woollen cloth for winter uniform] at the rate of Rs.369.50/- per meter. The total value of the order was thus Rs.7,07,61,984.30/-. The purchase order provided that bills would be raised by one M/s Sandhya Textiles ["Sandhya"], a proprietorship concern of Mr. Gautam Guha.

3. In the circumstances more fully described below, all three parties have challenged the Award.

I. Facts

4. The transaction commenced with the publication of a tender by MTNL on 10.08.2000. The tender was for clothing material of various

types, including for woollen clothes. The approximate quantity of the woollen cloth was mentioned as 1,87,101 meters, and an indicative price of Rs.375/- per meter was specified. Mafatlal was the successful bidder in two categories. Purchase orders dated 17.02.2001 and 19.04.2001 were issued to it, in respect of cloth for summer uniforms and cloth for winter uniforms, respectively. No dispute has been raised with regard to the purchase order dated 17.02.2001.

5. In the purchase order dated 19.04.2001, MTNL and Mafatlal alone were parties. The following provisions are relevant for the purposes of the present petitions:

> *"2. Quantity Ordered - As detailed below: -*
>
> *Winter Suiting (Woolen Cloth for Winter Uniform)*
>
> *(ACCENT)*
>
> *Sample – A - 63615.80 mtrs.*
>
> *Sample – B - 127231.60 mtrs.*
>
> *Sample – C - 660.00 mtrs.*
>
> *191507.40mtrs*
>
> *(Samples enclosed) – Samples enclosed with this Purchase Order is to be considered only for shade purpose. The quality of material is to be supplied as per specifications in the tender.*
>
> *<u>Rate Per Metre:</u>*
>
> *a) Winter Suiting - Rs 369.50 per metre.*
>
> *(Price are all Inclusive)*
>
> *xxx xxx xxx*
>
> *8. Packing: The material will be supplied In Eco-Friendly paper bags, for each piece as per details given below:-*
>
> *Sample A: a) 3672 pieces in the length of 1.90 mtrs*

b) 20596 pieces in the length of 2.75 mtrs.

Sample B: a) 7344 pieces in the length of 1.90 mtrs.

b) 41192 pieces in the length of 2.75 mtrs.

Sample C: 240 pieces in the length of 2.75 mtrs.

And on bag the word "Specially made for "MTNL". Be indicated The shade of cloth must be indicated on each packing.

xxx xxx xxx

11.5 Bill for supplies will be raised by M/s. Sandhya Textiles duly verified by M/s Mafatlal Industries Ltd and payment will be made to :

M/s. Sandhya Textiles

GF-14, R-23, Nehru Enclave

New Delhi 110019

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15. ARBITRATION:
15.1 If a dispute arises out of or in connection with this contract or in respect of any defined legal relationship associated therewith or derived legal relationship associated therewith or derived therefrom, the parties shall agree to submit that dispute to arbitration under the ICADR Arbitration Rule, 1996. The authority to appoint the Arbitrator(s) shall be the international center for Alternative Disputes Resolution. Jurisdiction for such dispute shall be court of Delhi"

6. In the Conditions of Contract, Clause 6 is of relevance, and is reproduced below:

> *"6. The Chef General Manager, Mahanagar Telephone Nigam Ltd. New Delhi has the option of terminating the contract either partly or wholly at any stage /without assigning any reasons by giving one months notice in writing to that effect and shall not be liable to pay compensation to the Contractor therefore."*

7. Supply under the present purchase order commenced as contracted, but by a letter dated 28.11.2001, MTNL directed Mafatlal to wait for a decision of higher authorities, who were considering the case regarding supply and payment for winter/summer uniforms. The contract was then

terminated by the communication dated 22.05.2002, in purported exercise of the power under Clause 6 of the Conditions of Contract, extracted above.

8. It has been placed on record that these actions were taken by MTNL in the context of an investigation by the Central Bureau of Investigation into the circumstances in which the contract was awarded to Mafatlal. The criminal proceedings were ultimately terminated in a closure report filed during the pendency of the arbitral proceedings, and accepted by order dated 07.08.2004.

9. At the time of termination, 68,546.25 meters of cloth remained to be delivered. Mafatlal and Sandhya contended that the termination was wrongful and, *inter alia*, demanded the contract price for the balance quantum.

10. The disputes were ultimately referred to arbitration, in which Mafatlal and Sandhya were both claimants. Sandhya is described as the "*institutional coordinator*" representing Mafatlal in the purchase order, and as the agent authorised by Mafatlal in this regard. Prior to the reference, the claimants first filed a petition under Section 9 of the Act before this Court [OMP 394/2001]. By an order dated 03.05.2002, this Court directed MTNL to make certain payments in respect of quantities of cloth already received.

11. The claimants thereafter filed a statement of claims before the learned Arbitrator, in which the claims may be summarised as follows:

a. Claim No.1 & 2: liquidated damages for late payment of invoices and reimbursement of deductions – Rs.34,59,520.59/-, and further damages till full payment.

b. Claim No.3: claim of damages on account of the balance quantity not accepted by MTNL – Rs.2,99,25,110.71/-.

c. Claim No.4: for loss of working capital and business loss– Rs.1,10,72,360.20/-.

d. Claim No.5: for storage of the balance quantity and insurance thereupon – Rs.29,97,705.92/-.

e. Claim No.6: compensation for use of space in the claimant's facility for storage of the balance quantities – Rs.5,91,780.82/-.

f. Claim No.7: loss of goodwill – Rs.70,00,000/-.

g. Claim No.8 & 9: cost of litigation.

12. MTNL filed a statement of defence, and also made counterclaims. The counterclaims were on account of alleged defects in quality, shortfall in quantities, interest and costs.

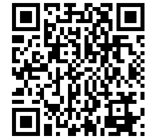
13. During the pendency of the arbitral proceedings, Mafatlal made an application under Section 17 of the Act, for a direction upon MTNL to accept the remaining supplies or to provide a storage facility where the balance quantity of goods could be stored. The application was disposed of by an order of the learned Arbitrator, dated 02.11.2002, declining the relief sought with regard to acceptance of balance quantity, which was akin to specific performance, but directing MTNL to make payment of 50% of the amount incurred for storage of the material from 19.04.2002 until 31.10.2002, and thereafter until the final decision in the arbitral

proceedings. MTNL thereafter also made an application under Section 17 of the Act on 15.11.2002, challenging the quantum of maintenance cost demanded by Mafatlal. It placed on record the rate for rental of godowns, obtained from Central Warehousing Corporation, Mumbai and Delhi. The learned Arbitrator disposed of this application on 22.02.2003, fixing an *ad-hoc* amount of Rs.2.5 lakhs to be paid by MTNL on this account for the period of 19.04.2002 until the passing of the award.

14. Ultimately, upon consideration of these claims and counterclaims, the learned Arbitrator has awarded a sum of Rs.2,22,77,450/- to Mafatlal against claim No.3, upon the condition that the balance quantity of cloth is delivered by Mafatlal to MTNL, and a sum of Rs.32,60,368/- on account of claim No.6. Interest and costs have also been awarded. All other claims and all the counterclaims, have been rejected. The learned Arbitrator has also, in the impugned award itself, deleted Sandhya from the array of parties on an application which had been filed by MTNL.

15. The Award has been challenged by all three parties. MTNL's challenge pertains to the amounts awarded in favor of Mafatlal, and the denial of its counterclaims. Mafatlal challenges the deductions made from its claims for damages and awarding of interest at a lower rate. Sandhya assails its deletion from the array of parties.

16. In the course of arguments, Mr. D.K. Rustagi, learned counsel who appears both for Mafatlal and Sandhya, submitted that MTNL's challenge may be heard first, and that he was instructed not to press the petitions filed by Mafatlal and Sandhya, unless claim No. 3 was, in any event, being re-opened at the instance of MTNL.

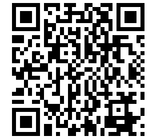


17. Mafatlal also filed OMP 189/2011, a post-award petition under Section 9 of the Act, for an order that MTNL be directed to maintain the goods during the pendency of its challenge to the Award. The petition was rejected by an order dated 31.03.2011, holding that the proper course would have been for Mafatlal to sell the goods and claim damages for the shortfall in the sale, rather than to preserve the goods until the resolution of the disputes. Mafatlal challenged the order in FAO (OS) 327/2011, but was permitted to withdraw the appeal by order of the Division Bench dated 02.08.2011, particularly because it had been noted in the order dated 31.03.2011 that the observations made therein would not prejudice the parties at the final hearing of these petitions.

18. During the pendency of these proceedings, Mafatlal filed I.A. 15141/2011 in OMP (COMM) 62/2017,[1] for the appointment of a receiver to dispose of the balance quantity of goods lying with it. The application was disposed of by an order dated 27.09.2011, which reads as follows:

> *"**I.A. No.15141/2011***
>
> *This application has been preferred by the petitioner under Order 26 Rule 9 CPC for appointment of a receiver for disposing of the goods which are lying with the petitioner. Upon issuance of notice, reply has been filed by the respondent.*
>
> *Mr. Malhotra, learned senior counsel for the respondent submits that the petitioner is free to dispose of the said goods on its own. However, Mr. Rustagi submits that the petitioner does not wish to dispose them of on its own, so as to prevent the raising of any further dispute by the respondent with regard to the price at which the goods have been sold in the market. He, therefore, prays for the appointment of a local commissioner, who should be directed to sell the goods in a*

[1] Then numbered as OMP 274/2010.



transparent manner so as to realize the correct market value for the goods.

Since the petitioner is willing to undertake the said exercise at its own expense, learned counsel for the respondent does not opposes the application. Accordingly, the same is allowed, without prejudice to the contentions and pleas of the parties in proceedings under section 34 of the Act.

I appoint Mr. Vikas Singh, Advocate, Mobile No.9891115402 as the local commissioner to dispose of the goods in question He shall dispose of the gods within the next two months. The petitioner shall bear all the expenses towards travel and stay of the local commissioner at Bombay and of all the expenses incurred towards conduct of the sale. The local commissioner shall be paid a fee of Rs.75,000/-: He shall be entitled to take the assistance of persons in the wholesale trade of clothing, if necessary. The sale shall take place in a transparent manner.

O.M.P. 274/2010

List for arguments on 13.12.2011."

19. The goods were sold to one M/s Vaishnavi Textiles for a sum of Rs. 25,58,967/-, pursuant to a report of the local commissioner, which was accepted by the Court by order dated 08.02.2012 in OMP (COMM) 62/2017.[2] The final report of the local commissioner, recording the sale, was taken on record by order dated 10.07.2012 in OMP (COMM) 62/2017.[3]

II. Submissions of learned counsel for the parties

20. As far as MTNL's challenge under claim No. 3 is concerned, Mr. Vikalp Mudgal, learned counsel for MTNL, submitted as follows:

a. The learned Arbitrator erred in granting damages to Mafatlal, quantified at the "cost price" of the cloth, despite finding that

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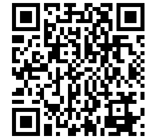
[2] Then numbered as OMP 274/2010.
[3] Then numbered as OMP 274/2010.



MTNL had not made any effort to mitigate its damages by sale of the cloth in open market. The Award is contradictory in this regard, by holding Mafatlal to the obligation of mitigation, but nonetheless awarding damages without mitigation having been proved.

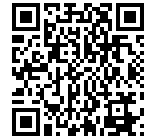
b. The Award is in fact in the nature of an award of specific performance, which ought not to have been granted.

c. The learned Arbitrator has erred in awarding the amount on account of the price of the cloth to Mafatlal, as the contractual entitlement to the price was Sandhya's. The contract did not provide for recovery of the price by Mafatlal at all and the Award, to that extent, provides a bounty to Mafatlal.

d. The cost price has been erroneously computed by the learned Arbitrator at Rs.325/- per meter, which was the cost at which the material was supplied by Mafatlal to Sandhya, instead of Rs.303.40/- per meter, which is the actual cost of production available from Mafatlal's cost calculations.

e. Mafatlal has sold the balance quantities pursuant to orders of the Court and is no longer in a position to perform its obligation under the Award, i.e., to deliver the balance quantity of cloth to MTNL.

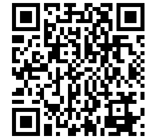
21. With regard to the Award on claim No.6, Mr. Mudgal submitted that the claim is bereft of evidence, as noticed by the learned Arbitrator himself. However, the learned Arbitrator has nonetheless awarded damages for use of Mafatlal's godown at the rate of Rs.50 per sq. foot per



month, and for moth-proofing of the goods at the rate of Rs.1 per meter, done once a year.

22. Mr. Rustagi, on the other hand, submitted that the learned Arbitrator has come to the conclusion that the goods in question were specifically manufactured for MTNL and therefore, rightly accepted claim No.3, without insisting upon mitigation. The learned Arbitrator has also found that the goods were in fact offered by Mafatlal to MTNL but not accepted, which gave Mafatlal the statutory right to exercise a lien on the goods and to resell the goods under Sections 44 and 46 of the Sale of Goods Act,1930. He submitted that, under Sections 21 and 26 of the Sale of Goods Act,1930, the goods were tendered to MTNL in a deliverable state and the property, therefore, passed to MTNL with the associated risk. Mr. Rustagi relied upon the judgment of the Supreme Court in *Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.*[4] to submit that no question of mitigation would arise where the goods are customized for a particular purchaser. He also submitted that in the facts of the present case, Mafatlal was not obliged to sell the goods, but was bound to preserve the goods by virtue of the orders passed by the learned Arbitrator under Section 17 of the Act. He pointed out that, even in the application under Section 17 of the Act filed by MTNL, it did not suggest that the goods ought to have been or could have been disposed of, but only disputed the quantum of storage charges payable by it to Mafatlal. On these findings, Mr. Rustagi submitted that the learned Arbitrator ought to have granted recovery of the entire contract price to

[4] (2018) 3 SCC 133.

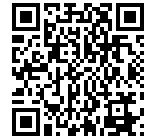


the claimants. The deduction was thus in the nature of a benefit conferred upon MTNL.

23. Mr. Rustagi disputed Mr. Mudgal's characterisation of the Award as an award of specific performance, on a similar argument. He submitted that the Award contains no direction upon MTNL to accept the balance quantity of goods, which would have been the fundamental consequence of an order of specific performance. Instead, the condition imposed with regard to handing over of the balance quantity of goods was an additional benefit granted to MTNL.

24. Mr. Rustagi submitted that, viewed in this light, the sale of the goods after making of the Award cannot render the Award vulnerable to challenge. The sale was, in any event, pursuant to an order of the Court, to which MTNL consented. He submitted that the sale was undertaken by a local commissioner appointed by the Court, whose report was accepted by the Court *vide* order dated 08.02.2012. It fetched a value of Rs.25,58,967/-, for which Mafatlal is willing to give credit to MTNL, in lieu of handing over of the goods in terms of the Award.

25. With regard to the entitlement of Mafatlal, as opposed to Sandhya, to recover payment of the contract price, Mr. Rustagi emphasised that the statement of claim had in fact been filed by Mafatlal and Sandhya, both. In the impugned Award, the learned Arbitrator has deleted Sandhya from the array of parties at the instance of MTNL itself. In any event, he submitted that there was no dispute between Sandhya and Mafatlal [both of whom are represented by him in these proceedings]. He accepted and



undertook that Sandhya would not have any separate claim in respect of the same goods if the Award is satisfied in favor of Mafatlal.

26. With regard to the quantification of claims for storage and maintenance of the goods, Mr. Rustagi submitted that the goods are being stored in Mafatlal's own facility for which it claimed damages, rather than in a third-party facility, which would have entitled it to reimbursement of actual costs paid. In such circumstances, Mr. Rustagi submitted that the learned Arbitrator was entitled to arrive at an estimate for the purposes of quantification. He relied upon the judgments of this Court in *Connaught Plaza Restaurants Pvt. Ltd. v. Mr. Niamat Kaur*[5] and *National Highways Authority of India v. Sunway Construction SDN BHD.*[6] He further submitted that the claimed amounts had been proved by Mafatlal's witness in his affidavit of evidence and MTNL had not tendered any evidence to the contrary.

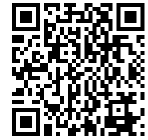
27. Mr. Rustagi, however, fairly submitted that the award of Rs. 1 per meter per year, towards the cost of moth-proofing the balance quantity of cloth, was unsupported by evidence of actual expenditure, and would therefore not be pressed.

III. <u>Analysis</u>

A. Re: Claim No. 3

a. Whether Mafatlal was required to mitigate its losses?

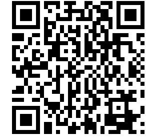
[5] 2013 SCC OnLine Del 2320.
[6] 2019 SCC OnLine Del 8273.



28. The analysis of the learned Arbitrator on claim No.3 arises out of a finding that the contract had been breached by MTNL. This finding is found in paragraph 49 of the Award, which reads as follows:[7]

> *"49. Now the next point to be examined in the present case is as to* ***whether the respondent could invoke the clause 6 of the Conditions of Contract after the claimant had already manufactured and had offered the respondent to accept the supplies of the balance quantity well within the stipulated period as per the schedule of delivery.*** *As stated in para 35 here-in-above, as per initial schedule of delivery the supply in respect of the PO No.35 was to be completed by 17.09.2001 but the deadline for the deliveries was rescheduled as follows :*
>
> *a. 30% of the ordered quantity by 30.09.2001*
>
> *b. 30% by 30.10.2001 and*
>
> *c. 40% by 30.11.2001*
>
> *The balance supply of 68,546.25 meters which is the subject matter of the present dispute was covered under 40% of the total supply and this supply was to be made on or before 30.11.2001 in terms of the schedule of supply mentioned herein above. As stated in para 37 herein-above, the claimant vide letter dated 09.11.2001, Annexure C-6 (colly), had informed the respondent that out of the said balance supply: 35,000 meters of fabric was lying at the transporters godown since 22.10.2001 and 33,000 meters was lying at the factory of the claimant no.01. Again vide letter dated 09.11.2001, Annexure C-6 (colly), addressed by the claimant no.01 to the CMD of the respondent, it was specifically stated that the entire quantity of 68,546.25 meters was lying ready at transporters godown and factory duly packed and stamped as per the requirement of the respondent MTNL. Again vide letter dated 20.11.2001, Annexure C-6 (colly), addressed to the respondent, the claimant no.01 reiterated that the entire material was lying ready and they would like to deliver the same to the respondent The respondent, however. vide letter dated 2811.2001, Annexure C-7 (colly), informed the claimant no.01 that the matter with regard to the said supplies was under consideration with the higher authorities and asked the claimant to withhold the supplies till further communication.* ***These facts have not been controverted by the respondent and by these facts it is clear that the claimant no.01 on its part had got the entire balance quantity ready for delivery to the respondent well***

[7] MTNL and Mafatlal are described in the award as "respondent" and "claimant no.01," respectively in the Award.



> ***before the deadline for deliveries.*** *Thus, the claimant had fulfilled its obligation with regard to the terms of the contract. Since the respondent refused to accept the supplies before the deadline for delivery and asked the claimant to withhold the supply till further communication from the office of the respondent, but failed to issue any communication till 30.11.2001 which was the last date for the supply, the execution of the contract stood completed after the expiry of 30. 11 2001. It may be noted here that Clause 12 of the Purchase Order dated 19.04.2001 provided for levy of heavy liquidated damages in case the claimant failed to deliver the consignment to the respondent within the period prescribed for delivery.* ***The respondent could invoke clause 6 of the conditions of contract on or before 30.11.2001 but once the execution of the contract stood completed as per the terms of the contract, the respondent could not invoke clause 6 of the Conditions of Contract.*** *It is true that Clause 6 of the Contract provides that the respondent could terminate the contract at any stage. out I am of the considered opinion that the words at any stage' could not be stretched beyond the period when the contract stood completed i.e 30.11.2001. Admittedly, the respondent terminated the contract with regard to the supply of the balance quantity vide letter dated 22.05.2002 which was much beyond the date (30.11.2001) on which the contract for supply stood completed. As stated here-in-above, the claimant had offered the entire balance quantity to the respondent well before the said date and it was the respondent who failed to accept the delivery of the said goods. Thus, on the part of the claimant the contract was duly executed. It may also be relevant to note here that in terms of clause 12 of is the PO dated 19.04.2001, in case the claimant no.01 had failed to deliver the stores or my consignment thereof with on the period prescribed for delivery, the respondent MTNL was entitled to recover liquidated damages as per the details given under the said clause.* ***In view of the above facts it is held that the respondent committed the breach of the contract by not accepting the balance quantity of uniform cloth and terminating the contract with regard to the supply of the balance quantity vide letter dated 22.05.2002.*** *Annexure C-II (colly)"*[8]

29. Relying upon this reasoning, the learned Arbitrator has allowed claim No.3 in the following terms:

> *"58. Under claim no.03 (i) the claimant has claimed a sum of Rs.2,53.27.839.38 towards the value of the balance quantity of 68.546.25 Meters of uniform cloth and under claim no.03 (ii), the*

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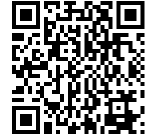
[8] Emphasis supplied.



claimant has claimed a sun of Rs.45.97,271.33 on account of damages for delay in not accepting the supplies till 16.07.2002 (the date on which the contract was terminated) and under claim no.03 (iii) the claimant has claimed further damages from 16.07.2002 onwards. ***First of all it has to be seen as to whether the claimants had tried to find out the buyers in respect of the said balance quantity of cloth to mitigate or minimize the losses. The case of the claimants, as stated in para 15 of the affidavit dated 28.03.2003 of Sh.M.B. Raghunath filed by way of evidence, is that the cloth which is the subject matter of the Purchase Order dated 19.04.2001 (Annexure C-3), was tailor made and strictly as per the specifications of the respondent MTNL and did not conform to the winter cloth generally available in market****. It is further stated in this paragraph that each cut piece carried a stamp specifically made for MTNL, Delhi and this stamping could not be removed without washing the cloth. In his cross examination dated 21.11.2003 this witness stated that "We tried to find out the buyer(s) in respect of the balance quantity of cloth lving with us. We, however, did not give any advertisement in any newspaper for the sale of this cloth. We did not write any letter to any prospective buyer(s). I deny the suggestion that we made no efforts for the sale of the said cloth. The stamping is always done on the outer side of the cloth. Every piece of 2.75 mtrs bears the stamping. This is as per the purchase order. However. there is no such requirement in the purchase order that the stamping can be removed by washing the cloth." But clause 8 of the Purchase Order dated 19.04.2001, Annexure C-3, shows that as per the terms of the PO, the claimant no.01 was not required to print the words 'Specifically made for MTNL on every piece of 2.75 mtrs but on the contrary these words were to be indicated on every bag containing the cloth. The relevant words in clause 8 read as under:*

> *"And on bag the word "Specially made for MTNL". Be indicated The shade of cloth must be indicated on each packing."*

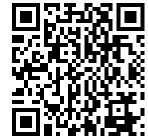
Thus it is clear that the words 'Specifically made for MTNL' were to be indicated only on the bag and not on every piece of 2.75 mtrs of cloth as per the terms of the PO. When confronted with the said words the witness Sh.M.B. Raghunath volunteered that there was correspondence between the MTNL and the claimant no.01 that these words should be printed on every piece of 2.75 mtrs but this witness failed to point out any such correspondence.

59. From the above facts it is clear that witness of the claimant no.01 has given only a bald statement that they tried to find out buyers in respect of the balance quantity of cloth but they could not find any buyer as the stamping of the words "Specially made for MTNL" was done on every piece of 2.75 meters. From the PO, dated 19.04.2001,

I, however, find that the said cloth was manufactured as per specific samples 'A' 'B' & 'C' provided by the respondent MTNL and further the cloth was to be cut into pieces in the length of 1.90 mtrs and 2.75 mtrs as mentioned in clause 8 of the PO. *It is true that in case the claimant no.01 had made strenuous efforts for sale in the market, this cloth would have fetched some price. Keeping in view all these facts.* ***I am of the considered opinion that the claimant no.01 is entitled to only the actual cost price of the cloth, in stead of the contractual price, subject to the condition that the said balance quantity of 68,546.25 Meters of woolen cloth for winter uniform cloth is handed over by the claimant no.01 to the respondent.*** *The claimant no.01, however, is not entitled to any liquidated damages*

xxx xxx xxx

61. In view of the above discussion it is held that the claimant no.01 is not entitled to any amount under claim no.03 (ii) & (iii). As regards claim no.03 (i), as stated here-in-above, ***the claimant is entitled to the cost price of the balance quantity of cloth on his handing over the balance quantity of cloth to the respondent.*** *The contractual price of this price is Rs.2,53,27,839/-. The witness of the claimant no.01, namely, Sh.M.B. Raghunath in his cross examination dated 20.08.2003 stated that 'With regard to the questions put to me on 19.08.2003. on the share of the claimant no. 01 in respect of the amount mentioned in para no. 17 of the claim statement and also the amount mentioned in the order dated 03.05.2002 passed by the Hon'ble Delhi High Court in OMP No. 394/2001, I submit that the ratio of the amount divided between the claimant no.01 and M/s. Sandhya Textiles was 87:13.* ***I further submit that cost of the material supplied by the claimant no.01 to M/s Sandhya Textiles was Rs. 325/- per meter and the amount received by M/s. Sandhya Textiles from the respondent was Rs. 369.50 per meter. Thus total cost price of the balance quantity of cloth which is 68,546.25 mts at cost price of Rs.325/- per meter comes to Rs.2,22.77,450/- Accordingly, it is held that the claimant no.01 is entitled to recover a sum of Rs.2,22.77,450/- from the respondent against claim no.03(i) subject to the condition that the claimant no.01 shall hand over the said balance quantity of 68.546.25 Meters of uniform cloth to the respondent.*** *The claimant has also claimed liquidated damages @ 5% per week on the said amount for delay in not accepting the remaining quantity w.e.f 31.10.200l till the date of payment under claims no.03(ii) & 03 (iii). Though claims no.3(ii) and 3(iii) claiming liquidated damages have been rejected but the question as to whether the claimant no.01 is entitled to any amount towards*



> *interest on the amount awarded under claim no.03(i) has been dealt with under the separate head "Interest".*"[9]

30. The Explanation to Section 73 of the Indian Contract Act, 1872 provides that a party claiming damages is under an obligation to mitigate its losses to the extent reasonable. However, in a case of sale of goods, the principle does not apply if the goods are produced to the specification of a particular customer, as illustrated in *Maharashtra State Electricity Distribution,*[10] cited by Mr. Rustagi. In the present case, the learned Arbitrator has clearly found that the goods were produced as per specific samples provided by MTNL, and the cloth was to be cut in specific lengths according to the purchase order. These provisions are borne out by clause 8 of the purchase order, and cannot be assailed as arbitrary, irrational, or perverse. I am therefore of the view that grant of damages by the learned Arbitrator, on this account, does not warrant interference under Section 34 of the Act.

b. Whether the award is in the nature of specific performance?

31. Although Mr. Mudgal's argument that the learned Arbitrator has in fact awarded specific performance of the contract, looks attractive at first blush, upon a closer reading of the Award, I have come to the conclusion that it is not so.

32. The confusion arises because, despite rendering a factual finding on the basis of which Mafatlal was absolved of its duty to mitigate damages, the learned Arbitrator has in fact cut down the quantum of damages on the basis of "*actual cost price of the cloth*", instead of the

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[9] Emphasis supplied.

contractual price. He has also directed Mafatlal to hand over the balance quantity of cloth to MTNL. Both these directions are, in my view, essentially ancillary directions which qualify the quantum of damages. Both these directions benefit MTNL. Very significantly, there is no direction on MTNL to accept the cloth, which would have been the essence of an award of specific performance, as properly understood.

33. On normal principles of damages in contract, in the absence of a duty to mitigate, MTNL would have been liable to pay for the goods manufactured for it at the contractual price. It has been given the benefit of a deduction on this account, and the Award, in my view, is not susceptible to challenge by MTNL on this ground. The argument is, in fact, a misconstruction of the true implication of the Award, by taking advantage of certain aspects advantageous to MTNL itself.

c. Whether the arbitrator has rightly computed the cost price?

34. In light of the above understanding of the Award, this question does not really arise for adjudication, as any such deduction in the amount payable to MTNL was by way of an equitable benefit, rather than a strict entitlement. However, the argument of Mr. Mudgal was that in the cost sheets submitted by Mafatlal, it showed a profit of Rs.23.60/- per sq. meter upon a total price of Rs.327/- per meter, leading to a cost price of Rs.303.40/- per meter, as opposed to the award of Rs.325/- per meter. The Award, according to him, was based instead upon a ratio of 87:13 between Mafatlal and Sandhya on the total quoted price of Rs.369.50/- per meter.

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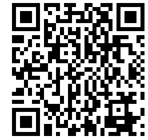
[10] *Supra* note 4.



35. I do not find this argument persuasive. As stated above, the reduction from the contract price was a benefit accorded to MTNL. The learned Arbitrator has relied upon the evidence of the claimant's witness to show that the cost of the material supplied by Mafatlal to Sandhya was Rs.325/- per meter and computed his Award on this basis. It is apparent from paragraph 61 of the Award, extracted above, that the cost price upon which the learned Arbitrator has quantified the damages is not the production cost incurred by Mafatlal, but the cost at which Sandhya was to procure the goods from Mafatlal.

36. I do not find any defect in this reasoning which goes to the root of the Award, failing which the Court is not entitled to interfere with the Award.[11]

d. Whether the Award is susceptible to challenge as the goods have been sold?

37. Mr. Mudgal argued that the Award is conditional upon delivery of the balance quantity of goods by Mafatlal to MTNL, which cannot now be complied with, as the goods have been sold. At the outset, I am of the view that this contention does not really arise in the context of a challenge to the Award.

38. However, I do not also find any merit in the challenge, for the reason that the sale was affected under orders of the Court, to which MTNL consented. The order dated 27.09.2011 in OMP (COMM)

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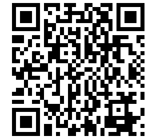
[11] *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.* [(2019) 20 SCC 1].



62/2017,[12] clearly records the submission on behalf of MTNL that Mafatlal would be free to dispose of the goods "*on its own*", which was opposed by Mafatlal, specifically to avoid a dispute by MTNL with regard to the price. The Court noted that Mafatlal was willing to undertake the exercise of sale under the supervision of a local commissioner at its own expense, and that this was not opposed by MTNL. A local commissioner was, therefore, appointed to dispose of the goods. The goods were sold in accordance to this mechanism and the report of the learned local commissioner was accepted by the order of this Court dated 08.02.2012, which reads as follows:

> ***"IA No.15141/2011***
>
> *1. The report of the Local Commissioner (`LC') has been perused. It has been pointed out that when the stocks were examined, different kinds of cloths were found. The LC met several traders in the cloth market in Mangaldas Market, Mumbai. They informed him that the stocks were nearly 10 years old, the colour of fabric was not of a marketable quality and the cut-piece length was not appropriate for making suits. The LC received ten sealed envelopes of quotations from different traders and dealers on 28th November 2011.*
>
> *2. Upon opening the envelopes, the quotation by various cloth traders was examined. These are set out in a tabular form in the report of the LC. The LC has opined that the best rate is that proposed by M/s Vaishnavi Textiles at 329-A, Mangaldas Market, 5th Lane, Mumbai for all green, grey and plain grey fabric at the flat rate of Rs.37 per meter for a total sum of Rs.25,58,967.*
>
> *3. **This Court is satisfied that given the number of years the stocks have remained unsold and the other features pointed out in the report of the LC, the price offered by M/s Vaishnavi Textiles appears reasonable**. Accordingly, the stocks be permitted to be lifted by M/s Vaishnavi Textiles on their making payment of the sum of Rs.25,58,967/- either by a demand draft in the name of the Registrar General of this Court which will be handed over by them to the LC or by way of wire transfer to the account of the Registrar General, the*

[12] Then numbered as OMP 274/2010.

relevant details of which will be provided to the LC by the Registry of the Court forthwith. The stocks will be handed over by the LC to M/s Vaishnavi Textiles on receiving confirmation from the Registry of the receipt of the aforementioned sum of Rs.25,58,967/-. A proper acknowledgement will be obtained by the LC from M/s Vaishnavi Textiles. A report be submitted to this Court by the LC on the completion of the above exercise.

4. The Petitioner, Mafatlal Industries Ltd. ('MFL') will bear all the expenses towards the travel and stay of the LC at Mumbai. Additionally MFL will pay him a further sum of Rs.50,000/- towards his fees.

5. The amount recovered from M/s Vaishnavi Textiles will be placed in a fixed deposit by the Registry and kept renewed till further orders of this Court.

6. The application is disposed of.

<u>O.M.P. 274/2010</u>

7. List for arguments on 10th July, 2012.

8. Order dasti to the counsel for the parties as well as to the LC."[13]

39. The Court thus satisfied itself as to the value of the goods. This order was also passed in the presence of learned counsel for MTNL, and was not assailed by MTNL. The sum of Rs.25,58,967/-, alongwith interest accrued thereupon, has been withdrawn by Mafatlal in accordance with the order of this Court dated 03.11.2014 in OMP (COMM) 62/2017.[14] Mr. Rustagi has clearly stated that the amount will be adjusted to the credit of MTNL, in satisfaction of the Award.

40. The contention is, therefore, rejected.

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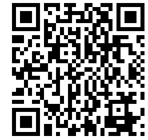
[13] Emphasis supplied.
[14] Then numbered as OMP 274/2010.



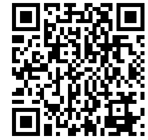
e. Whether the award has rightly been made in favour of Mafatlal?

41. Mr. Mudgal's submission that the learned Arbitrator has erred in awarding the value of the cloth to Mafatlal, whereas payment was to be made to Sandhya is, in my view, an attempt to reverse a position of MTNL's own making. It is on the application of MTNL that Sandhya was deleted as a claimant in the impugned Award.[15]

42. MTNL had filed an application under Section 16 and 19 of the Act on 17.09.2003, contending that there was no arbitration agreement between it and Sandhya. The following paragraphs of the application are relevant in this context:

> *"2. That the second Claimant is one Shri Gautam Guha, proprietor of M/s Sandhya Textiles, which is described as an institutional coordinator of the Claimant No. 1, i.e. M/s Mafat Lal Industries Limited. He is further described is an agent to represent the Claimant No. I throughout the tender process. In the tender documents, which have been place on the record of this Hon'ble Tribunal pursuant to the order 26.7.2003, the Claimant No 2 is further declared as an agent of the Claimant No. 1.*
>
> *3**. It is an admitted fact that there is no privity of contract between the Claimant No. 2 and the Respondent.** The Claimant No. 2 has not bid in the tender process. As admitted by the witness of Claimant No. I in his cross examination, **it is only the Claimant No. 1, who was the bidder and was awarded the contract.***
>
> *4. Further **the Respondent not placed the purchase orders on Claimant No 2**. It is at the highest only the named agent as is required by the bid documents.*
>
> *5. That there is no arbitration agreement between Claimant No. 2 and the Respondent. Consequently, no arbitration can be initiated or continued between the Claimant No. 2 and the Respondent.*

[15] This aspect is dealt with in paragraphs 21 to 23 of the impugned Award.



> *6. That in the above circumstances the **<u>Claimant No. 2 is not a necessary party and certainly not a proper party.</u>***
>
> *7. It is humbly submitted that **<u>the present arbitration cannot continue with Claimant No. 2 as one of the Claimants. It can only continue between Claimant No. I and the Respondent, between whom there was a contract and purchase orders, which is the subject matter of the present dispute."</u>**[16]*

43. The application was opposed by Mafatlal and Sandhya, on the ground that Sandhya, being the institutional coordinator for Mafatlal, was to raise invoices and accept payment.

44. The learned Arbitrator has allowed the application only on the basis that the tender was submitted by Mafatlal alone and the purchase order was placed upon Mafatlal alone. It has, therefore, been held that Mafatlal alone was entitled to maintain the claims.

45. The deletion of Sandhya as a party to arbitration having been undertaken at the instance of MTNL itself, I find no merit in this contention. MTNL took the unequivocal position, in paragraph 7 of its application, extracted above, that the disputes would have to be adjudicated between it and Mafatlal. Any potential prejudice to MTNL is also obviated by Mr. Rustagi's undertaking on behalf of Sandhya that Sandhya will not raise any independent claim if the impugned Award is satisfied.

B. Re: Claim No.6

46. The Award on the point of maintenance has two elements – being the value of the storage facility of Mafatlal, used for storage of the balance quantity of cloth, and cost of moth-proofing the cloth. On both

these elements, the learned Arbitrator has found that Mafatlal did not adduce any documentary evidence in support of its claims, but had filed an affidavit by way of evidence supporting the claims. The claim of Rs. 67,800/- per month for use of the storage facility was found by the learned Arbitrator to be "*quite exorbitant*" but the claimant was allowed to recover Rs. 50 per sq. foot per month, amounting to Rs.28,250/- per month from the date when the goods became ready for delivery until the date of the Award.

47. Mr. Rustagi submitted that the amount of Rs.50 per sq. foot, allowed by the learned Arbitrator, is in fact far less than the estimates given by the Central Warehousing Corporation, which were placed on record by MTNL itself in its application under Section 17 of the Act dated 28.11.2002.

48. The said estimates, however, do not, in fact, support this submission, as the estimates by Central Warehousing Corporation, Mumbai and Delhi, were for storage charges of Rs. 150 per sq. meter and Rs. 34 per sq. meter per month, which are equivalent to Rs. 13.93 per sq. foot and Rs.3.15 per sq. foot per month respectively.

49. The question then arises as to whether the uncontroverted evidence of Mafatlal on this account, could have been taken into account. The learned Arbitrator notes that Mafatlal's witness had stated in his affidavit of evidence that the warehousing charges would amount to Rs.67,800/- per month.

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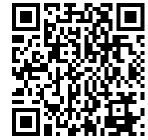
[16] Emphasis supplied.



50. Mr. Rustagi relied on the judgment in *Connaught Plaza*,[17] wherein evidence led by the claimant with regard to *mesne* profits was accepted, and no evidence to counter the same had been produced. This Court upheld the award of *mesne* profits on the basis of the claimant's evidence. In the present case, although MTNL had not produced any evidence to counter the evidence produced by Mafatlal in its affidavit, the learned Arbitrator has specifically rejected Mafatlal's quantification.

51. The learned Arbitrator expressly noted that the claim was "*exorbitant.*"[18] He has thus, on an assessment of the evidence, rejected the evidence led by Mafatlal, even though it was uncontroverted. In these circumstances, the assessment of damages at Rs. 50 per sq. foot per month is, in my view, entirely without evidence. There is no basis upon which the learned Arbitrator has arrived at this estimate. That an award has been made without any supporting evidence, is one of the limited grounds available to a petitioner under Section 34 of the Act.[19]

52. Although Mr. Rustagi cited the Division Bench judgment in *Sunway*[20] in connection with these arguments, I do not find it relevant to assess the validity of an award on a question of quantification of damages.

53. I am, therefore, of the view that the award of ₹50 per sq. foot per month, on account of storage charges, is liable to be set aside.

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[17] *Supra* note 5.
[18] Paragraph 66 of the Award.
[19] *Ssangyong Engg. & Construction Co. Ltd. v. NHAI* [(2019) 15 SCC 131], paragraph 41 and *Associate Builders vs. Delhi Development Authority* [(2015) 3 SCC 49], paragraph 31 and 32.
[20] *Supra* note 6.

54. The same reasoning applies to the award with regard to the claim of moth-proofing also. During the course of arguments, in any event, Mr. Rustagi submitted that Mafatlal does not seek to defend the Award, to the extent of the amount awarded for moth-proofing.

55. The Award on claim No.6, asserted by Mafatlal, is therefore liable to be set aside. Mafatlal will, however, be free to invoke arbitration afresh on this claim, if it is so advised.

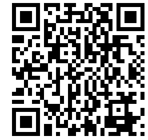
C. Re: Claim No. 9

56. Although the award of costs under claim No.9 has been challenged, the award is only in respect of the arbitral fees paid by Mafatlal. An award of costs is discretionary and the quantum, in these circumstances, is unquestionable. This challenge is, therefore, rejected.

D. Denial of Counterclaims

57. The principal counterclaim raised by MTNL was on account of the quality of cloth supplied by Mafatlal, which was stated to be inferior to the quality supplied by Mafatlal to the Airport Authority of India. As far as this aspect is concerned, the learned Arbitrator found on the evidence placed before him, that the specifications of the cloth in the two contracts were different. Mr. Mudgal did not raise any specific arguments to counter this finding.

58. The second counter-claim was for an amount towards short supply of goods. The learned Arbitrator recorded that this amount had already been deducted from Mafatlal's bills, and Mafatlal's claim on this account



had been rejected. The claim was, therefore, rightly held not to survive for adjudication.

59. The only other substantive counter-claim was for a refund of "commission at the rate of 15%" paid by Mafatlal to Sandhya. The learned Arbitrator has rejected the claim, noting the terms of the contract which provided for the composite contract price of Rs. 369.50/- per meter. There is no infirmity in this finding.

IV. <u>Conclusion</u>

60. For the reasons recorded above, OMP(COMM) 34/2017, filed by MTNL, is partly allowed to the extent that the Award for claim No.6 is set aside. Mafatlal will be free to invoke arbitration afresh on this claim, if it is so advised. The challenge to the rest of the claims, and denial of counterclaims, is rejected.

61. Since claim No. 3 is not being reopened at the instance of MTNL, Mr. Rustagi does not press Mafatlal and Sandhya's challenges to the Award. O.M.P. (COMM) 42/2017 and O.M.P. (COMM) 62/2017 are thus dismissed as not pressed.

62. There will no order as to costs.

<u>OMP (ENF.) (COMM.) 255/2018</u>

1. Learned counsel for the parties are directed to re-compute the dues under the Award, in light of the judgement passed today in OMP(COMM) 34/2017, and to prepare a statement, giving credit to MTNL for the amounts deposited, and for the amount recovered by sale of the balance quantity of cloth in terms of the orders of the Court dated

27.09.2011 and 08.02.2012, as recorded in the order dated 10.07.2012 in OMP (COMM) 62/2017.[21]

2. The statement be placed on record within six weeks from today.

3. List on 22.08.2024.

PRATEEK JALAN, J.

MAY 31, 2024
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[21] Then numbered as OMP 274/2010.