

**No patent illegality or perversity where rate not fixed in the agreement was fixed by the arbitrator on common business sense and proposals submitted by the respondent;
Award patently illegal where the contract was interpreted based on a circular that was not in evidence (Delhi High Court)**

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Published on 10 April 2020

Bharat Sanchar Nigam Limited v. Aksh Optifibre Limited

Court: High Court of Delhi | **Case Number:** OMP (Comm.) 131 of 2017 | **Citation:** (2021) 277 DLT 348 (DB) | **Bench:** Jyoti Singh J | **Date:** 04 March 2020

Mohan Steels Limited v. Steel Authority of India (SAIL)

Court: High Court of Delhi | **Case Number:** OMP 488 of 2015 | **Citation:** 268 (2020) DLT 539 | **Bench:** Jyoti Singh J | **Date:** 04 March 2020

On 04 March 2020, Jyoti Singh J of the High Court of Delhi delivered two judgments in cases which were filed under Section 34 ACA to set aside the arbitral awards. These are *Bharat Sanchar Nigam Ltd. v. M/s Aksh Optifibre Limited*, OMP Comm. 131 of 2017 and *Mohan Steels Limited v. Steel Authority of India*, OMP 488 of 2015. She upheld the award in *Bharat* and set it aside in *Mohan*.

A. Bharat Sanchar Nigam Limited (BSNL) v. Aksh Optifibre Limited

Under a franchise agreement, Aksh had to provide to BSNL's broadband customers content through a content delivery network. A dispute arose between the two on the question of charges payable by Aksh for using inter-city bandwidth connectivity. BSNL raised some demand, which Aksh challenged by initiating arbitration.

The arbitral tribunal framed three issues. One, was the provision by BSNL of (intercity) bandwidth connectivity chargeable? Two, if yes, did the FA specify the rate? Three, if no rate was specified, could the tribunal fix it?

As the court would note, the tribunal concluded, after examining the agreement, that the parties had agreed under the FA that intercity bandwidth was chargeable. It found that there was no agreement as to the calculation of the charges. Then, on the third issue, which was "the most crucial issue between the parties", the tribunal concluded that it had the power to fix the rate. It relied on *Rajkishore Mohanty and another v. Banabehari Patnaik*, MANU/OR/0020/1951¹ and also noted that parties agreed that the tribunal could fix the rate, and, therefore, it was within its jurisdiction.

Jyoti Singh J concluded that the tribunal's findings as to the payment of charges and absence of agreement on rates was neither patently illegal nor perverse. She relied on (a) the tribunal's reliance in the contractual clauses; (b) the record which showed that each time BSNL sent a demand notice it contained a different provisional figure; (c) the tribunal's finding that the different figures "fortified"

¹Decided on 08 August 1949 by a 2-judge bench of Bachu Jagannadha Das & Lingaraj Panigrahi JJ. While Jyoti Singh J says that the tribunal relied on this case, the passage from the award citing the case is not reproduced.

Aksh's argument that there was no fixed rate; (d) Additionally, BSNL was unable to point to any clause in the contract regarding the rates.

She then upheld the tribunal's findings on fixation of rate and rejected BSNL's arguments that it was arbitrarily fixed without any supporting material. She noted that it was based on common business sense and the proposals submitted by Aksh. She noted that BSNL neither gave any proposal nor controvert Aksh's proposals. She found the finding "well-reasoned" and "not only a possible but a plausible view."

She then reproduced some passages from three decisions of the Supreme Court² and noted that Section 34 had "strict parameters on which interference is called for by the Courts." She concluded that "none of the parameters laid down permit this Court in its powers of judicial review to interfere with the impugned Award."

B. Mohan steels limited v. Steel authority of India (SAIL), OMP 488 of 2015

SAIL appointed Mohan Steels as a Conversion Agent (for conversion of semi-finished steel into TMT bars).³

First, there was a contract for three years, from 2006 to 2009. The conversion charges under this contract were increased every year by SAIL under the price escalation clause of the contract, and Mohan Steels was paid accordingly.

In 2009, there was a second contract for three years. Its price escalation clause stated that "at the end of one year, the conversion charges will be revised". SAIL revised the price at the end of each year and paid Mohan Steels. At the end of this contract, a no-dues certificate was issued, and Mohan's bank guarantees were released by SAIL.

There was a third contract in 2012 for three years. The price escalation clause was similar to the second contract. SAIL kept on revising the conversion charges at the end of every year.

In 2014, SAIL raised a demand for recovery of the escalation amount paid under the second contract. It also unilaterally recovered some money from the conversion charges which was paid under the third contract payable under the third contract.

Mohan Steels initiated arbitration challenging the demand made under the second and the recovery under the third contract.

The arbitrator rejected Mohan Steel's claims and held that the conversion charges finalised in the tender were firm for one year and were liable to be revised at the end of one year alone, not year after year. The arbitrator relied on some "Master Circulars" of SAIL which were not part of the contract and said, "...I am of the opinion that present contract is clearly non-ambiguous for this clause based on perusal of the circulars placed on record..."

Setting aside the award, Jyoti Singh J held that the award was patently illegal because:—

²*Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, paragraphs 19 and 74; *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*, 2019 SCC OnLine SC 677, paragraphs 35 to 42; *Hindustan Construction Company Limited & another v. Union of India & others*, 2019 SCC OnLine SC 1520, paragraphs 55-56

³SAIL is India's largest steel-making company owned by the government. Conversion Agents convert semi-finished steel products (semis) supplied by manufacturers like SAIL into finished products (TMT Bars, Wire rods etc.). TMT (Thermo Mechanically Treated) Bars are typically supplied in straight length or folded bundles for use in civil construction.

- (a) Though the interpretation of the contract is purely in the domain of the arbitral tribunal, the arbitrator is a creature of the contract, therefore, the arbitrator cannot decide contrary to or outside the ambit of the terms of the contract between the parties. Section 28 (3) ACA mandates so, and it has been so held in *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49 (citing paragraphs 42.3 and 44).
- (b) The tribunal interpreted the escalation clause based purely on the circulars placed on record by SAIL with their written arguments. It was neither pleaded nor annexed to the reply. Mohan Steels did not have the opportunity to rebut its applicability. Significantly, the circulars are internal guidelines of SAIL and did not form part of the tender conditions or the contract.