

M/S. Sterlite Technologies Limited vs Bharat Sanchar Nigam Limited, on 25 February, 2021

Author: Vibhu Bakhru

Bench: Vibhu Bakhru

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 473/2020

M/S. STERLITE TECHNOLOGIES LIMITED

Through Mr Rajiv Tyagi, Advocate.

versus

BHARAT SANCHAR NIGAM LIMITED,

Through None.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% 25.02.2021 [Hearing held through videoconferencing]

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), inter alia praying as under: -

"Appoint the Arbitrator as proposed under the request for Arbitration dated 16.06.2020 issued by the Petitioner or any other suitable person, as an Arbitrator to adjudicate the disputes between the Petitioner and the Respondent under the Tender No. CA/CNP/NFS/OFC/T-441-2013 issued on 21.6.2013 and the Purchase Order No. CT/Po/02/2014-15 dated 24.7.2014."

2. The respondent (hereafter 'BSNL') had invited tenders for procurement, supply, trenching, laying, installation, testing and maintenance of Optical Fiber Cables, P.L.B., Duct and accessories for construction of exclusive Optical NLD backbone and optical access routes on turnkey basis for Defence Network being under the Tender No. CA/CNP/NFS/OFC/T -441

- 2013 issued on 21.06.2013, which were to be executed link wise with each link installed and commissioned separately.

3. In response to the tender invited by BSNL, the petitioner submitted its bid for laying of cables in the State of Jammu & Kashmir.

4. The said financial bids were opened on 03.12.2013 and the petitioner was declared the lowest bidder (L-I) for Package- 'A' of the said contract. Thereafter, BSNL placed an Advance Purchase Order dated 30.06.2014 on the petitioner.
5. The Advance Purchase Order was followed by a Purchase Order dated 24.07.2014.
6. The petitioner claims that it successfully completed the contract awarded to it.
7. It is relevant to note that the Advance Purchase Order also included an Arbitration Clause (Clause 71 of Section III of the Tender Documents). The said Clause was also included in the Purchase Order. The relevant clause is set out below: -

7.1. Arbitration 71.1 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 up to the installation and commissioning stage), the same shall be referred to the sole arbitration of the CMD, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (where 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, BSNL or the said officer is unable or unwilling to act as such, then to the sole 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 not objection to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with 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.

71.2 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 thereunder, any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.

71.3 The venue of the arbitration proceeding shall be the officer of the CMD, BSNL or such other places as the arbitrator may decide.

71.4 The venue of the arbitration proceeding shall be the office of Arbitrator appointed by Ministry of Defence (MoD) or such other places as the arbitrator may decide.

8. According to the petitioner, BSNL has not paid a sum of 37,34,70,219/-, which is due and payable to the petitioner. Accordingly, by a letter dated 16.06.2020, the petitioner issued a notice under Section 21 of the A&C Act invoking the said Arbitration Clause and articulating its claims.

9. BSNL responded to the said notice by a letter dated 20.07.2020. BSNL disputed the claims raised by the petitioner. However, it did not dispute the Arbitration Clause.

10. The petitioner moved the present petition on 13.10.2020. At the hearing held on that date, the learned counsel appearing for BSNL accepted notice and six weeks' time was granted to BSNL to file a reply. However, BSNL has not filed a reply. The matter was thereafter, listed on 21.01.2021, but was not taken up as this Court was not functioning on that date.

11. None appears for BSNL today. Considering that BSNL was provided sufficient time to file a reply, this court does not consider it apposite to defer the hearing of the present petition.

12. It is apparent from the record that there is no dispute as to the existence of the Arbitration Agreement between the parties. It is also evident that the petitioner had invoked the Arbitration Clause and the parties have been unable to concur on the appointment of an Arbitrator.

13. In terms of the said Clause, the Chairman and Managing Director of BSNL was required to act as an Arbitrator or appoint any other person. In view of the decision of the Supreme Court in TRF Ltd. v. Energo Engineering Projects Ltd.: (2017) 8 SCC 377 and Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited: Arbitration Application No 32 of 2019, decided on 26.11.2019, it is not permissible for the Chairman and Managing Director of BSNL to either act as an Arbitrator or appoint any other person to do so. In any event, BSNL has not appointed any person as an Arbitrator.

14. In view of the above, this Court considers it apposite to allow the present petition. Accordingly, Justice Aftab Alam, a former Judge of the Supreme Court (mob: 9868219005), is appointed as the Sole Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the Arbitration Clause.

15. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

16. The parties are at liberty to approach the learned Arbitrator for further proceedings.

17. The petition is disposed of.

VIBHU BAKHRU, J FEBRUARY 25, 2021 pkv