

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 28.03.2022

+ **O.M.P. (COMM) 431/2019 & I.A. 14326/2019**

BHARAT SANCHAR NIGAM LIMITED Petitioner

versus

TERACOM LIMITED Respondent

Advocates who appeared in this case:

For the Petitioner : Ms Ruchi Gour Narula, Advocate.

For the Respondent : Ms Iram Majid, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter '**BSNL**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an arbitral award dated 28.06.2019 delivered by an Arbitral Tribunal constituted by a Sole Arbitrator (hereafter the '**Arbitral Tribunal**').

2. On 15.07.2010, BSNL had issued a Notice Inviting Tenders (**NIT**), being no. MM/NWP-CDMA/072010/000393, for purchase of 9,80,000 units of Integrated Fixed Wireless Terminal Devices (IFWT), CDMA Terminals. The respondent (hereafter '**Teracom**') participated in the said tender and was declared as the successful bidder.

3. Accordingly, BSNL issued an Advance Purchase Order (hereafter '**APO**') on 02.12.2010, in favour of Teracom for purchase of

3,75,000 units of WLL CDMA 2000 1x IFWTs. In terms of the APO, on 18.12.2010, Teracom furnished a Performance Bank Guarantee bearing number 21641LG025810 for an amount of ₹2,12,97,000/-, which was valid for a period of three years.

4. On 02.02.2011, BSNL placed a Purchase Order bearing P.O no. CE/PO/009/2010-2011 (hereafter the '**Contract**') for procurement of 3,75,000 units of WLL CDMA 2000 1x IFWTs (L1, PKG-1) from the respondent, for a total value of ₹ 42,59,29,581/-.

5. In terms of Article 11 of the Contract, the respondent was entitled to 80% of the total payment on supply of the IFWT equipment at site, and the balance 20% payment after one year of the equipment's satisfactory performance and on signing of the Annual Maintenance Contract (AMC) with the respective State Telecom Circles under BSNL along with submission of the Performance Bank Guarantee.

6. Admittedly, there was delay in payment of 80% of the total payment that was due under the Contract. By its letter dated 09.04.2012, Teracom informed BSNL that even though it had provided complete supply of the IFWT equipment, several State Telecom Circles of BSNL had failed to release 80% of the payment due to it.

7. Correspondence was exchanged between Teracom and various State Telecom Circles from May, 2014 till December, 2016. Teracom states that most State Telecom Circles had thereafter, released the payments, which were due to Teracom; however, an amount of ₹1,52,91,987/- remained outstanding.

8. The Performance Bank Guarantee dated 18.12.2010 was initially for a term of three years but Teracom had extended the same from time to time, at the instance of BSNL. It was last extended till 30.09.2017. On 01.08.2017, BSNL, once again, called upon Teracom to extend the Performance Bank Guarantee till 30.09.2018. Teracom resisted the said request. Thereafter, by its letter dated 10.08.2017, Teracom stated it had met all its obligations under the Contract and requested that the Performance Bank Guarantee be released. BSNL did not do so and invoked the Performance Bank Guarantee on 09.01.2018.

9. In view of the disputes between the parties, Teracom issued a notice dated 27.01.2018 to the Chairman and Managing Director, BSNL, invoking the Arbitration Agreement and seeking reference of the disputes to arbitration.

10. Before the Arbitral Tribunal, Teracom raised the following claims:

“Claim no. 1:- Entitlement to refund an amount of Rs. 21,297,000.00 which is equivalent to PBG by the claimant in terms of APO dated 02-12-2010.

Claim no. 2:- Payment towards outstanding dues of Rs.1.53 Crores towards the bills raised by the claimant.

Claim no. 3:- Interest at the rate of 18% per annum on the claims of the claimant till the date of passing the award at the first instance. Further to treat the amount as Principal Sum awarded and grant further interest at the rate of 18% per annum till the amount is paid to the claimant in total.

Claim no. 4:- Litigation cost.

Claim no. 5:- Payment of Rs. 1 crore by the respondent for breach of contract, harassment, mental agony and damages

Claim no. 6:- Any further reliefs for the claimant as found entitled.”

11. BSNL filed its Statement of Defence, however, it did not raise any Counter-claims.

12. By the impugned award, the Arbitral Tribunal has awarded an amount of ₹2,12,97,000/- in favor of Teracom, which was the amount recovered by BSNL by encashing the Performance Bank Guarantee (Claim No. 1). Further, the Arbitral Tribunal awarded an amount of ₹1,37,97,207/- as the balance amount due to Teracom under the Contract, from various State Telecom Circles (Claim No. 2). The Arbitral Tribunal also awarded interest at the rate of 16% per annum from 15.08.2019 till realization of the total amount of ₹3,50,94,207/- (₹2,12,97,000/- plus ₹1,37,97,207/-), if it was not paid on or before that date.

Submissions

13. Ms Narula, learned counsel appearing for BSNL, has assailed the impugned award, essentially, on two fronts. First, she submitted that the Arbitral Tribunal had grossly erred in directing refund of the amount recovered by BSNL by encashment of the Performance Bank Guarantee. She submitted that in terms of the Contract, BSNL was entitled to forfeit the Performance Bank Guarantee and since Teracom had not extended the Performance Bank Guarantee as was required, BSNL had encashed the same. She contended that once the Performance

Bank Guarantee was encashed, there was no obligation on the part of BSNL to refund the same and the amount stood forfeited.

14. Second, she submitted that the Arbitral Tribunal had grossly erred in rejecting BSNL's claim for a set off. She submitted that there was ample evidence on record to show that BSNL had levied penalty *albeit*, in respect of another purchase order and in terms of the Contract, BSNL was entitled to retain the amounts payable to Teracom in respect of the supplies made under the Contract, on account of dues owed by it to BSNL.

Reasons and Conclusion

15. The contention that BSNL was entitled to forfeit the Performance Bank Guarantee even though Teracom had performed the Contract, is bereft of any merit. Teracom had submitted the Performance Bank Guarantee, which was initially for a term of three years with effect from 18.12.2010. Thus, the Performance Bank Guarantee expired on 17.12.2013. However, BSNL had insisted that the same be extended as at the material time; the Contract had not been fully performed. The Arbitral Tribunal noted that the Performance Bank Guarantee was successively extended eight times. The last extension was up to 30.09.2017. However, since the Performance Bank Guarantee was not extended thereafter, BSNL had invoked the same. It is important to note that the Performance Bank Guarantee was invoked not because BSNL had claimed that any amount was due to it or that Teracom had failed to perform the Contract; it was done solely for the

reason that the No Claim Certificates (NCCs) had not been issued by various Circles and therefore, BSNL was required to be secured for due performance of the Contract in question. There was no occasion for BSNL to forfeit any amount recovered against the Performance Bank Guarantee because BSNL had not made any claim regarding failure on the part of Teracom to perform its obligations under the Contract.

16. The contention that BSNL is entitled to forfeit the amount on encashment of the Bank Guarantee, apart from being unmerited, runs contrary to the defence set up by BSNL in its Statement of Defence. Paragraph 7 of its Statement of Defence filed before the Arbitral Tribunal is relevant and set out below:

“7. Further, the bank guarantee was a security given by the Claimant to ensure that the goods were supplied to the Respondent in terms of the Purchase Order dated 02.02.2011. The successful delivery of the goods could only be ascertained once the Respondent received NCC/ TOC from the respective Circles. Since the Respondent had not received the required NCC/ TOC from all its Circles, the bank guarantee had to be kept alive. However, the Claimant failed to keep the bank guarantee alive and therefore in December, 2017 when the Bank refused to extend the bank guarantee any further and asked the Respondent to encash it instead. Therefore, the Respondent was constrained to encash the bank guarantee only because the Bank refused to extend the same. It is pertinent to mention that the same has been encashed in terms of the Performance Bank Guarantee itself. As mentioned above, even though the same has been encashed, it is kept as a security deposit and the amount shall be released to the Claimant once it

completes its contractual obligations towards the Respondent.”

17. It is clear from the above that it was BSNL’s contention that it was holding the money recovered from invoking the Performance Bank Guarantee as a security deposit, which would be refunded to Teracom after the NCCs were received from various Telecom Circles.

18. The Arbitral Tribunal had noted that the witness examined by BSNL [Mr Sanjesh Kumar Kaim, AGM (SE), BSNL] had affirmed in his affidavit dated 04.01.2019 that BSNL had received the Takeover Certificates / No Claim Certificates (TOC/NCC) from all the concerned twenty-four State Telecom Circles of BSNL. The Arbitral Tribunal also noted that BSNL had clarified by a clarification dated 03.06.2019, that the last NCC was received from the Kolkata Circle on 20.10.2018. The aforesaid findings of the Arbitral Tribunal are not disputed.

19. In view of the above, the Arbitral Tribunal had rightly directed refund of the amount recovered by BSNL from invocation of the Performance Bank Guarantee in question. There is no principle in law whereby BSNL could be permitted to retain the Performance Security after it had acknowledged due performance of the Contract.

20. The contention that the impugned award is vitiated by patent illegality as the Arbitral Tribunal had rejected BSNL’s claim for a set off, is also unmerited. There is no dispute that in terms of the Contract between the parties, BSNL was entitled to claim a set off of any amount due to it against any amount payable to Teracom under the Contract.

However, in this case, there was no such effective claim for various reasons as noted hereafter.

21. It is relevant to note that the issue of set off was raised in respect of two State Telecom Circles of BSNL – the Kerala Circle and the Madhya Pradesh Circle. In the case of the Kerala Circle, it was contended on behalf of BSNL that it was entitled to adjust penalty of a sum of ₹54,19,728/-, which was imposed in respect of PO No. CE/PO/020/2007-2008 dated 26.02.2008. In respect of the Madhya Pradesh Circle, BSNL contended that it was entitled to adjust penalty of a sum of ₹2,60,87,800/- imposed in connection with PO No. CE/PO/006/2003-04 dated 01.09.2003.

22. Teracom had countered the aforesaid contentions. The Arbitral Tribunal had examined BSNL's contention and rejected the claim, essentially, on four grounds. First, it found that there was no such claim for a set off made in the Statement of Defence filed by BSNL. Second, it found that in respect of the Kerala Circle, BSNL had claimed levy of penalty by four letters (letters dated 03.03.2016, 05.04.2016, 21.07.2016 and 09.01.2017); however, perusal of the said letters did not indicate that BSNL had made a case for a set off. Third, that the issue of levy of penalty was disputed and the same had not crystallised. And fourth, the Arbitral Tribunal noted that BSNL's claim for imposition of levy of penalty appeared to be, *ex facie*, barred by limitation.

23. Concededly, BSNL had not raised the claim for a set off in its Statement of Defence. Ms Narula had submitted that no such defence

could have been raised as the claim for a set off had arisen after the Statement of Defence/Reply to the Statement of Claims, was filed. Undisputedly, in order to claim a set off, it was necessary for BSNL to have established that an ascertained sum of money was due and payable to it. And, since no such defence was raised, this Court is unable to fault the decision of the Arbitral Tribunal to reject the said claim.

24. The contention that the claim for a set off had arisen after filing of the Statement of Defence also appears to be erroneous considering that it was BSNL's case that the set off pertains to a Purchase Order dated 26.02.2008, in respect of the Kerala Circle and, a Purchase Order dated 01.09.2003, in the case of the Madhya Pradesh Circle. However, even assuming that any claim for a set off was crystallised after filing of the Statement of Defence, it was open for BSNL to have sought an amendment to its Statement of Defence. However, admittedly, no such amendment was sought.

25. In view of the above, this Court finds no ground to fault the impugned award.

26. The petition is unmerited and accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

MARCH 28, 2022

RK/v