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

+ ARB.P. 1314/2023

HFCL LIMITED

..... Petitioner

Through: Mr Zeeshan Hashmi and Mr Ankit P,
Advs.

versus

BHARAT BROADBAND NETWORK LIMITED Respondent

Through: Mr Chandan Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

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08.02.2024

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“*Act 1996*”) seeking appointment of the Sole Arbitrator to adjudicate the disputes between the parties.
2. The case of the petitioner is that the respondent on 15.12.2017 circulated a Tender No. BBNL/MM/2017/PIA for BharatNet Phase-II/PB & BHI004 (“*Tender*”) for Selection of Project Implementing Agency (PIA) for BharatNet Phase-II Project in the states of Punjab & Bihar. The scope of work of the said tender was survey, planning, supply, installation, commissioning, end to end integration and testing of OFC (Underground or Aerial), GPON network and radio network & also, to undertake the responsibility for operations & maintenance (O&M) and facilitating service provisioning of the established network for 8 years. The petitioner participated in said tender was declared as successful bidder and was awarded two Award of Contract (“*APO*”) under the said tenders.



3. The respondent issued two APO No. BBNL/MM/APO/Bharat Net Phase-II/PIA/002/2018-2019 dated 09.07.2018 and BBNL/MM/APO/Bharat Net Phase- II/PIA/003/2018-2019 dated 09.07.2018 for package- P-2 and P-3 respectively, in the state of Punjab to the petitioner and the same were part of the tender. Subsequently, the respondent issued two work orders for the above mentioned APO's to the petitioner bearing Work Order No. BBNL/MM/WO/Bharat Net Phase- II/PIA/002/2018-2019 dated 09.08.2018 (“*WOI*”) and Work Order No. BBNL/MM/WO/Bharat Net Phase-II/PIA/003/2018-2019 dated 09.08.2018 (“*WOII*”)

4. Subsequent to the work orders, the petitioner performed his obligations and raised all the invoices. The respondent released the payment for the first tranche whereas the payment for the second tranche was denied and refused by the respondent without any reason for the package P-2 and P-3 in an arbitrary and unlawful manner. The outstanding amount for the package P-2 and P-3 are Rs.5,24,34,481/- and Rs.5,39,75,813/- respectively, total amounting to Rs. 10,64,10,294.

5. As the respondent failed to clear the outstanding dues to the petitioner, the petitioner invoked arbitration vide legal notice dated 23.09.2022 as per Clause 31 of the said tender. Hence, the instant petition.

6. Mr Kumar, learned counsel appearing for the respondent states that the notice invoking arbitration dated 23.09.2022 is not a valid notice as the arbitration has been invoked as per clause 31 of the said tender.

7. He states that both the work orders are separate and in case there were any disputes with regard to the work orders, the notice invoking arbitration should have been invoked separately under the particular work orders (i.e. Clause 228 and 214 under separate work orders).



8. It is further contented that the petitioner has invoked Clause 31 of the tender document being the arbitration clause. Clause 29.7 of both the Work Orders itself states that in case of any inconsistency in terms of any clauses of the work order and the tender document, the Work Order will prevail over the tender document. Clause 29.7 reads as under:

“29.7 The entire supply shall also be governed as per all terms & conditions as laid down in the bid document of the tender enquiry and as modified from time to time. Any amendment/clarification/modification issued/to be issued shall also be applicable for this supply. However, wherever there is a conflict, special conditions as given in section IV of bid document and conditions given in this Purchase Order will prevail over the general conditions given in Section-II & III in the bid document.”

9. Hence, the invocation is bad in law.

10. He further relies on the judgment of ***Amit Guglani and Another v. L and T Housing Finance Ltd. Through-Managing Director and Another, 2023 SCC OnLine Del 5206*** and more particularly on paragraphs 32 to 34 which reads as under:

“32. The next and the only other objection of Respondent No. 1 is that mandatory notice invoking arbitration under Section 21 of the Act was not given by the Petitioners and hence the petition deserves to be dismissed. Petitioners have countered the argument by making twofold submissions, one being alternative to the other. The first submission is that in view of Section 12(5) and the judgment in Perkins Eastman Architects DPC (supra), there was no purpose in sending a notice to Respondent No. 1 for appointment, as unilateral appointment cannot be made. The



alternative submission, which though not pleaded but raised during the course of hearing, was that even assuming that the notice was required to be given, Petitioners have by their e-mail dated 13.09.2022 intimated Respondent No. 2 that the matter could be only resolved by a third party and this e-mail should be construed as an invocation notice.

33. Having given my thoughtful consideration to both the limbs of submissions of the Petitioners, this Court is unable to agree with the Petitioners, on both aspects. Section 11(6) of the Act comes into play when the contingencies stipulated therein occur which includes failure of a party to act as required under the procedure agreed by the parties. Therefore, by a plain reading of the statutory provision, it is only when the agreed procedure does not lead to appointment of Arbitrator, on account of failure on the part of either party, that jurisdiction of a Court can be invoked under Section 11(6) of the Act. Therefore, invocation of the Court's jurisdiction under Section 11(6) presupposes initiation of procedure agreed upon by the parties under the Arbitration Clause.

*34. Section 21 comes into play as a part of this procedure. A reading of the Section makes it clear that the crucial words in the provision are “the date on which a request for that dispute to be referred to arbitration” and thus, there is little room for doubt that for commencement of arbitral proceedings, either party has to make a request to the other party for reference of the dispute to Arbitration. In this context, I may refer to the judgment of this Court in *Alupro Building Systems Pvt. Ltd. (supra)*, relevant paragraphs of which are as under:—*

“Is the notice under Section 21 mandatory?”

23. While the above ground is by itself sufficient to invalidate the impugned Award, the Court proposes to also examine the next ground whether the Respondent could have, without invoking the arbitration clause and issuing a notice to the



Petitioner under Section 21 of the Act filed claims directly before an Arbitrator appointed unilaterally by it?

24. Section 21 of the Act reads as under:

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the



party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be 'disqualified' to act an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of Section 11(6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

29. Of course, as noticed earlier, parties may agree to waive the requirement of such notice under Section 21. However, in the absence of such express waiver, the provision must be given full effect to. The legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purposes of limitation, when arbitration proceedings commenced. For a moment, even assuming that the provision serves only that purpose viz. fixing the date of commencement of arbitration proceedings for the purpose of Section 43(1) of the Act, how is such date of commencement to be fixed if the notice under Section 21 is not issued? The provision talks of the 'Respondent' receiving a notice containing a request for the dispute "to be referred to arbitration". Those words have been carefully chosen. They indicate an event that is yet to happen viz. the reference of the disputes to arbitration. By overlooking this important step, and straightaway filing claims before an



arbitrator appointed by it, a party would be violating the requirement of Section 21, thus frustrating an important element of the parties consenting to the appointment of an arbitrator.

30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law.”

11. He also relies on the judgment of ***Bharat Chugh v. MC Agrawal HUF, 2021 SCC OnLine Del 5373*** and more particularly paragraphs 31 and 35 which reads as under:-

“31. A notice invoking arbitration, to my mind, must necessarily do that. It has to invoke arbitration. At the very least, it has to refer to the clause in the contract which envisages reference of the dispute to arbitration. Merely sending a notice, setting out the disputes between the parties and informing the addressee that civil and criminal legal remedies would be availed in the event of failure, cannot, in my view, constitute a notice invoking arbitration.

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35. Alupro Building Systems [2017 SCC OnLine Del 7228] is an authority for the proposition that a Section 21 notice is indispensable before an arbitral proceeding is initiated. The law in that regard has been elucidated with commendable clarity in



the said decision, and it hardly lies on me to reinvent the wheel. I express my respectful agreement with the decision in Alupro Building System [2017 SCC OnLine Del 7228] which, according to me, covers the case in favour of the petitioner and against the respondent on this issue.”

12. He further states that there has been no default on the part of the respondent for invocation of the arbitration.

13. I have heard learned counsel for the parties.

14. A perusal of the notice invoking arbitration dated 23.09.2022 shows that all the Work Orders have duly been mentioned which reads as under:

“Sub: Notice for invocation of arbitration as per clause 31 of BBNL Tender No.BBNL/MM/2017/PIA for BharatNet- Phase-II/PB & BH/004 dated 15-12-2017 for BharatNet Ph-II in the states of Punjab & Bihar.

Ref:

- 1. BBNL Tender No. BBNL/MM/2017/PIA for BharatNet- Phase-II/PB & BH/004 dated 15-12-2017*
- 2. BBNL APO No. BBNL/MM/APO/BharatNet-Phase-II/PIA/002/2018-19 dated 09-07-2018*
- 3. BBNL APO No. BBNL/MM/APO/BharatNet-Phase-II/PIA/003/2018-19 dated 09-07-2018*
- 4. BBNL W.O. No.: BBNL/MM/WO/BharatNet-Phase-II/PIA/002/2018-19 dated 09-08-2018*
- 5. BBNL W.O. No.: BBNL/MM/WO/BharatNet-Phase-II/PIA/003/2018-19 dated 09-08-2018*
- 6. Our Letter No. HFCL/BBNL/ Package 2 & 3/817 dated 12-05-2022*



Dear Sir,

This is with reference to above referred APOs and WOs issued to us against the above referred Tender.

.....”

15. Hence, it is not that there is no reference to the Work Orders and APOs in the notice. The petitioner has invoked the arbitration clause by referring to both the work orders. In this view, judgment of ***Bharat Chugh (supra)*** does not help the respondent as the notice invoking arbitration dated 23.09.2022 is a valid notice.

16. In addition, the arbitration clause contained in the said tender reads as under:

“31.1. In the event of any question, dispute or difference arising under this agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the Arbitrator appointed by the CMD as per the Arbitration and Conciliation Act, 1996 and the Arbitration and Conciliation Act, 2015. 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, BBNL shall appoint another person to act as an arbitrator in accordance with the Arbitration and Conciliation Act, 1996 and the Arbitration and Conciliation Act, 2015 and the person so appointed shall be entitled to



proceed from the stage at which it was left out by his predecessors.

31.2. 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 Arbitration and Conciliation Act, 2015 and the rules made there under, any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.

31.3. The venue of the arbitration proceeding shall be the office of the CMD, BBNL, New Delhi or such other places as the arbitrator may decide.”

17. The Clause No. 27.1 of the WOI reads as under:

“27.1 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), the same shall be referred to the sole arbitration of the Arbitrator appointed by the CMD as per the Arbitration and Conciliation Act, 1996 and the Arbitration and Conciliation Act, 2015. 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, BBNL shall appoint another person to act as an arbitrator in accordance with the Arbitration and Conciliation Act, 1996 and the Arbitration and Conciliation



Act, 2015 and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.”

18. Clause 29.6 of WOI read as under:

“29.6 This PO shall be governed by the Tender document and its Technical Specifications as per TEG GR (Annexure-A of the Tender document) (amendment No. 1 & Amendment No.2 of Addendum No.2 dated 13-03-2018) attached as Annexure-D. Engineering Instructions (Annexure-B. B(1) & B(2) of the Tender document) attached as Annexure-E and Technical Specifications of GPQN & Solar Power Equipment (Annexure-C of the Tender document) (Amendment No.6 of Addendum No. dated 13-03-2018) attached as Annexure-F.”

19. It is evident on perusal of the arbitration clause of the tender and arbitration clause of the work orders are verbatim. In this view of the matter, Clause 29.6 of the Work Orders quoted above comes into play and Clause 29.7 also helps the petitioner as there is no conflict between the two arbitration clauses of the tender and work orders and hence, the tender document shall also apply for invocation of arbitration.

20. The judgment of *Amit Guglani (supra)* relied upon by the learned counsel for the respondent does not help the respondent as in that case, no notice under Section 21 had been issued in the first place.

21. For the said reasons, the petition is allowed. Since the parties are still having disputes between them, the following directions are issued:-

- i) Ms. Justice Mukta Gupta (Retd.) (Mob. No. 9650788600) is appointed as a Sole Arbitrator to adjudicate the disputes



- between the parties.
- ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
 - iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
 - iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
 - v) The parties shall approach the learned Arbitrator within two weeks from today.
22. The petition is allowed and disposed of in the aforesaid terms.

JASMEET SINGH, J

FEBRUARY 8, 2024

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Click here to check corrigendum, if any