

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

Reserved on: 17th November,, 2011
Pronounced on: 14th December, 2011

+ **C.M. (M) 872/2010**

UNITED INDIA CONSTRUCTION
& COMMUNICATION PVT. LTD. Petitioner
Through: Mr. Pradeep K. Bakshi, Adv.

Versus

BHARTI INFOTEL LTD. Respondent
Through: Mr. P. S. Bindra, Adv.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The Petitioner United India Construction & Communication Pvt. Ltd. impugns the order dated 14.05.2010 passed by the learned Addl. District Judge whereby application under Section 8 of the Arbitration and Conciliation Act, 1996 filed by the Petitioner (Defendant before the Trial Court) was dismissed.
2. The facts of the case are not in dispute. There was an agreement dated 08.03.2001 between the parties whereby the Appellant being a sub-contractor was to carry out the work for installation of Local Access & Transport Network together with

laying of copper/ OFC cables and related activities for the installation of Telephone network in the state of Haryana. Clause 18 of the agreement talked about sub-contractor's (the Petitioner) liability during the execution of the work on site and/or damages notified or caused during the warranty period relating to the scope of work and not limited to (a) Any cost/ penalty imposed by the Govt./ Local authorities/ third parties or suffered by BTNL for any damages caused to the existing underground/ over ground cables, services and other utilities of the Govt./ Private operator or any third party, bridges culverts, properties, poles, trees, cattle, vehicles etc. (b) Any claims or damages raised by any person due to injury or death caused to any person/ cattle etc. There was an indemnity clause in the agreement (clause 19) whereby the sub-contractor i.e. the Petitioner was to indemnify the main contractor i.e. the Respondent. It goes without saying that there was an arbitration clause in the agreement, which is extracted hereunder: -

“24.1 In the event of any dispute or disagreement arising out of or in connection with this Agreement, the parties shall use their best endeavor to resolve the same amicably. If the dispute or disagreement is not resolved, the same, except the matter excluded from the main Agreement, shall be referred to sole Arbitrator in accordance with Arbitration & Conciliation Act, 1996. The venue of arbitration will be New Delhi, (India)”

3. A subsequent agreement in the form of 'bond of indemnity' was entered into between the parties whereby the Petitioner undertook to indemnify the Respondent for a sum of ₹ 12,00,000/-.
4. The sole question for consideration is whether the agreement (undated) of indemnity is an independent agreement or it flows from the main agreement dated 08.03.2001.
5. The Petitioner's contention is that the agreement of indemnity flows from the main agreement whereas the Respondent's plea is that at the time of execution of the indemnity agreement – the work was completely over and even the warranty period of one year in terms of the agreement was completed, therefore, the agreement of indemnity will have no connection with the main agreement.
6. Learned counsel for the Appellant urged that even on termination of a contract due to breach or otherwise the arbitration clause in an agreement binds the parties and dispute, if any, in respect of such an agreement and the same can be only decided through arbitration. Reliance was placed on *Branch Manager, Magma Leasing & Finance Ltd. & Anr. v. Potluri Madhavalata & Anr.*, (2009) 10 SCC 103 where it was held as under: -

*“14. The statement of law expounded by
Viscount Simon, L.C. in Heyman as noticed*

above, in our view, equally applies to the situation where the contract is terminated by one party on account of the breach committed by the other particularly in a case where the clause is framed in wide and general terms. Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor is rendered inoperative; rather it survives for resolution of disputes arising “in respect of” or “with regard to” or “under” the contract. This is in line with the earlier decisions of this Court, particularly as laid down in Kishorilal Gupta.

15. In the instant case, Clause 22 of the hire-purchase agreement that provides for arbitration has been couched in the widest possible terms as can well be imagined. It embraces all the disputes, differences, claims and questions between the parties arising out of the said agreement or in any way relating thereto. The hire-purchase agreement having been admittedly entered into between the parties and the disputes and differences have since arisen between them, we hold, as it must be, that the arbitration Clause 22 survives for the purpose of their resolution although the contract has come to an end on account of its termination.”

7. It is true that in this case the agreement had not been terminated on account of any breach. It is borne out from the agreement dated 08.03.2001 that it was valid for a period of 12 months i.e. up to 08.03.2002. As per clause 15, the warranty period was for 12 months, which was also over when the bond of indemnity was executed by the Petitioner in favour of the Respondent.

8. It is urged by the learned counsel for the Respondent that the Petitioner was aware that BSNL had issued demand notes for an amount of ₹ 13,00,000/- against cable damage done by the Petitioner and an amount of ₹ 7,20,000/- had already been paid by the Respondent to BSNL. It is averred that a survey was jointly done by the authorized representative of BSNL and the Respondent; BSNL acknowledged by a letter dated 03.03.2005 that an amount of ₹ 7,20,000/- had been received by it from the Respondent and it further requested the Respondent to pay the balance amount of ₹ 5,12,500/-.
9. The tenor of the bond of indemnity clearly indicates that it flows from the main agreement dated 08.03.2001. I would quote some of the clauses of the bond of indemnity hereunder: -

“AND WHEREAS the INDEMNOR company entered into a contract with the INDEMNEE company [“Contract”] for providing certain services as per terms and subject to conditions detailed therein.

AND WHEREAS during the execution of the said services, certain claims were raised upon the INDEMNEE company, on account of the acts and deeds of INDEMNOR by another public sector telecom service provider by the name of Bharat Sanchar Nigam Ltd., from its office located at Ambala, Haryana [hereinafter “BSNL”]

AND WHEREAS the INDEMNEE company, under the terms of the said contract, called upon the INDEMNOR company to pay a sum of ₹ 12,00,000/- (Rs. Twelve Lac Only) being the

amount of claim allocable directly to the INDEMNOR,

AND WHEREAS the INDEMNOR has represented to the INDEMNEE that the said demand has been sorted out by the INDEMNOR directly with the said BSNL, and that no such demand survives pursuant to such settlement arrived at between the INDEMNOR and the said BSNL, and that the INDEMNEE is in no way responsible for nor liable to pay any amount to the said BSNL for and on behalf of the INDEMNOR.

AND WHEREAS the INDEMNOR has requested the INDEMNEE to release such amounts to it as may be payable by the INDEMNEE under the said Contract, which has since concluded,

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1. The INDEMNOR holds the INDEMNEE, its officers, directors and employees and the like, indemnified and harmless against any and every liability, both past, present and future, arising out of, as a result of or in relation to the aforesaid demands raised by the said BSNL.

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5. That this Bond of Indemnity is limited to an overall value of ₹ 12,00,000/- (Rs Twelve Lac Only)”

10. From a close reading of the bond of indemnity it would be evident that there was a dispute whether any amount with regard to the damage to the underground cable was recoverable from the Petitioner or not. There was an indemnity clause in the

main agreement dated 08.03.2001, which is extracted hereunder: -

“19 INDEMNITY

CONTRACTOR shall indemnify/ keep indemnified and hold harmless BCTL and/or its affiliates from liability claim, demands for damages caused by CONTRACTOR to a third party assets due to CONTRACTOR's act of Commission or omission, during the execution of the project, CONTRACTOR agrees, to bind its sub-Contractors (if any) to indemnify and harmless BCTL and/or its Affiliates from any liabilities, claims or demands that may be made:

a) By anyone for injuries including theft, resulting from CONTRACTOR's,

OR

b) By persons furnished by CONTRACTOR and its subcontractor (if any) under Workmen's compensation Act 1923 or similar Act, BCTL or its Affiliates will notify CONTRACTOR of any written claims or demands against them for which CONTRACTOR is responsible hereunder.”

11. Thus the indemnity bond was in a way continuation of clause 19 of the agreement and it was not open to the Respondent to plead that the agreement of indemnity was an independent contract between the parties.
12. The learned Addl. District Judge fell into error in taking a view that since the duration of the main agreement was over the arbitration clause did not survive and bond of indemnity was a

separate agreement. The impugned order cannot be sustained. The same is accordingly set-aside and the petition is allowed.

13. The parties are directed to appear before the learned Addl. District Judge, on 04.01.2012 who shall appoint an arbitrator in terms of clause 24 of the agreement dated 08.03.2001.

(G.P. MITTAL)
JUDGE

DECEMBER 14, 2011

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