

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

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Date of Decision : 12.01.2012

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WP (C) No.4947/2011

M/s. STARNET COMMUNICATIONS PVT. LTD..... Petitioner

Through: Mr.Darpan Wadhwa, Mr.Rajat
Vohra and Mr.Shankh Sengupta,
Advocates.

versus

BHARAT SANCHAR NIGAM LIMITED (BSNL).... Respondent

Through: Mr. H.S. Phoolka, Sr. Adv. with
Mr. Sharat Kapoor, Mr. Noor Alam,
Mr.C.B.Tiwari & Mr. Kunwar
Faisal, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

SANJAY KISHAN KAUL, J. (ORAL)

1. The petitioner lays a challenge to the action of the respondent in issuing the impugned termination letter dated 08.03.2011 and cancelling the Letter of Intent ('LOI' for short) dated 16.04.2010 in favour of the petitioner who was the L-1 qua the Haryana Licence Service Area ('LSA' for short) for deployment of WiMAX 'e'

Wireless Broadband Solution. The respondent/BSNL issued an Expression of Interest ('EOI' for short) for inviting bids for deployment of the said WiMAX 'e' Wireless Broadband Solution in 16 Licence Service Areas on a non exclusive, revenue sharing basis. The EOI involved a two-stage bid process in terms whereof the bidder was required to submit both – the techno-commercial bids and financial bids, at the initial stage itself. At the time of submitting the bid, a bid security was to be furnished in favour of the respondent for an amount of Rs.20 lakhs for each LSA from a Scheduled Bank and based on the evaluation of the techno-commercial bids, the financial bids were to be opened for the successful bidders. The successful bidder was to be then issued the LOI resulting in signing of the franchisee agreement. At the stage of signing of the franchisee agreement, the successful bidder was required to furnish an irrevocable performance bank guarantee ('PBG' for short) for the requisite amount for each of the LSA. The petitioner submitted bids for 3 LSAs – Chennai, Haryana and Himachal Pradesh along with the bid security from an Indian Scheduled Bank. The petitioner was identified as the successful bidder for Chennai (Type-A), Haryana (Type-B) and Himachal Pradesh (Type-C) LSAs resulting in LOIs being issued to the petitioner for the said LSAs.

2. Under the terms of the LOI qua the Haryana LSA, which is in dispute, the petitioner was required to furnish an irrevocable PBG of Rs.7.5 crores at the time of signing of the franchisee agreement. The

franchisee agreements for Chennai and Himachal Pradesh LSAs were finalized and signed on 29.10.2010. It is significant to note that the PBG submitted by the petitioner for these two LSAs were issued by the Standard Chartered Bank, Malaysia. The petitioner vide its letter dated 29.11.2010 submitted an irrevocable PBG dated 16.11.2010 for the sum of Rs.7.5 crores issued by the Standard Chartered Bank, Malaysia for the Haryana LSA. The controversy appears to have started at that stage when the respondent insisted that even the PBGs already submitted should be replaced by one from an Indian Scheduled Bank. It is the say of the petitioner that as per the terms of the EOI and LOI, there was no such term, but the petitioner in good faith undertook to replace the currently submitted PBGs for the two circles subject to a written request by the respondent in this regard and communicated the same vide letter dated 29.11.2010. The same issue also arose qua the PBG for the Haryana LSA resulting in exchange of certain communications.

3. On 18.02.2011, the petitioner informed the respondent that it was in the process of replacing the PBG from the Standard Chartered Bank, Malaysia with PBGs issued by a local Indian Scheduled Bank. This was followed up by the petitioner sending a letter dated 23.02.2011 submitting undertaking from Standard Chartered Bank, Malaysia that all demands under the PBGs should be delivered to the Standard Chartered Bank, India, New Delhi Branch which is an Indian Scheduled Bank. However, this appears not to have still resolved the issue and a letter dated 08.03.2011 was issued by the petitioner

to return the original PBGs so that they can be replaced by the PBGs by the Stand Chartered Bank's local counterpart. The respondent, however, vide its letter dated 08.03.2011 rejected the PBGs submitted for the Haryana LSA and terminated the LOI informing that the PBGs submitted by the petitioner with amendment dated 22.02.2011 was not acceptable to the respondent and consequently the LOI was cancelled.

4. The petitioner vide their letter dated 14.03.2011 protested and vide a communication dated 24.03.2011 sought clarification as regarding the status of the PBGs submitted for Chennai and Himachal Pradesh LSAs. However, the respondent vide letter dated 13.04.2011 returned the PBGs submitted by the petitioner for Haryana LSAs.
5. It is in these circumstances that the petitioner vide letter 19.05.2011 requested the respondent to furnish a letter on its letter head releasing the PBGs. A further development which arose *inter se* the parties was the invocation of the PBG for the Chennai and Himachal Pradesh LSAs by the respondent on the alleged ground of breach of franchisee agreement. The petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 ('the said Act' for short) and vide order dated 26.05.2011, the learned single Judge on the Original Side has been pleased to stay the invocation of the PBGs subject to them being kept alive. We are informed that these applications have been disposed with a direction that the petitioner may move the arbitral tribunal for necessary relief within eight weeks by filing an interim application under Section 17 of the

said Act and till such time, the interim stay granted by the learned single Judge would continue to enure for the benefit of the petitioner.

6. We have set out the history of the dispute though the controversy in the present case is within a narrow compass. It is not in dispute that the EOI/LOI did not stipulate any condition requiring the petitioner to submit a PBG from a Scheduled Bank much less an “Indian Scheduled Bank”. The PBGs furnished by the petitioner for the Haryana and Himachal Pradesh LSAs were from Standard Chartered Bank, Malaysia. It is after the issuance of the LOI for the Haryana Circle that the respondent sought to vary the original requirements of furnishing of the PBG to a condition of furnishing of a PBG from an Indian Scheduled Bank. The common term both in the EOI and LOI dealing with the issue is being reproduced hereunder for convenience:

“BID SECURITY & PERFORMANCE BANK GUARANTEE (PBG)

18. BID SECURITY The bidder shall furnish Bid Security valid for 365 days (from the date of bid opening) amounting to Rs.20,00,000/- (Rupees Twenty Lakhs only) against each bid for each LSA applied for in the form of an irrevocable Bank Guarantee issued by a scheduled bank in favour of BSNL as per annexure II B.

18.1 A bid not secured in accordance shall be rejected by the BSNL being non-responsive at the bid opening stage and returned to the bidder unopened.

18.2 A bid security of the unsuccessful bidder will be discharged/returned as promptly as possible but not later than 30 days after the expiry of the period of the bid validity prescribed by the BSNL.

18.3 The successful bidder's bid security will be discharged upon the bidder's acceptance of the respective LSA and furnishing the performance security of respective LSA.

The bid security may be forfeited:

a) If the bidder withdraws his bid during the period of bid validity specified in the bid/EOI document or

b) In the case of successful bidder, if the bidder fails:

i) to sign the agreement in accordance with clause 32.6 or

ii) to furnish performance security in accordance with clause 32.7.

18.4 PERFORMANCE BANK GUARANTEE (PBG) Franchisee shall furnish an irrevocable Performance Bank Guarantee for Rupees Ten Crore for Type A/ Metro LSA, Rs.7.5 Crore for Type B LSA & Rs.5 Crore for Type C LSA (main PBG) for each LSA at the time of signing of the agreement and shall keep valid all times upto one year beyond currency of the Agreement.

18.4.1 The Performance Bank Guarantee Peforma (PBG) is attached as Annexure II B to this Agreement. Initially all PBG's shall have a

minimum validity period of 36 months. There after each PBG shall have to be extended at least 3 months before the expiry of existing PBG validity for a period of 36 months at a time & so on and kept valid at all times upto one year beyond the currency of this Agreement or settlement of all due between both the parties (i.e. BSNL and franchisee) whichever is earlier.”

(emphasis supplied)

7. A reading of the aforesaid clause would show that insofar as the bid security amount of Rs.20 lakhs is concerned, an irrevocable bank guarantee issued by a “Scheduled Bank” in favour of BSNL was to be enclosed. However, the PBG to be furnished by the franchisee was stipulated as “irrevocable Performance Bank Guarantee”. The aforesaid position is undisputed before us and there is a dual plea urged by learned counsel for the respondent. The first plea is that since the words used are “Scheduled Bank” for a bid security, as per common parlance and as per the Purchase Manual the same should be construed as by an Indian Scheduled Bank. It is, however, not in dispute that there is no term contained in the EOI/LOI specifying that the terms contained in the Purchase Manual would apply to the bid. Linked with this is the plea that the absence of stipulation of the PBG to be furnished by an Indian Scheduled Bank should not be read in isolation, but should be read with the requirement of providing such a bank guarantee of the bid security amount.
8. We are unable to appreciate this plea. As noticed above, the requirement of furnishing even of the bid security from an Indian Scheduled Bank is not contained in the terms. The requirement of

furnishing of a bank guarantee qua bid security is by a Scheduled Bank. There is no such stipulation qua the PBG. When different terms are used in the same clause, obviously it has to be assumed that the draftsman intended a different meaning to be assigned in the two places. The fact that there is change in the future tenders as invited by learned counsel for the respondent, would not assist the respondent. If they have committed a mistake, then it cannot be that the petitioner should be penalized for their mistake. We may also note, as pointed out by learned counsel for the petitioner, that the plea of Purchase Manual is an oral plea urged before us and has not been taken in the counter affidavit.

9. The second limb arises from the plea that the terms of the tender stood altered in view of the undertaking given by the petitioner. In this behalf, on a specific request of the respondent, the petitioner issued a letter dated 29.11.2010 in the form of an undertaking for all the three LSAs in respect of which LOI had been issued to the petitioner i.e. Chennai, Haryana and Himachal Pradesh. The relevant portion of the undertaking is as under:

“.....This is with reference to the performance bank guarantees already submitted to BSNL for the signing of the WiMAX franchisee agreements for Chennai, Haryana and Himachal Pradesh.

As per request of officers of BSNL WiMAX cell, we hereby wish to give the following undertaking:

Starnet Communications Pvt Ltd hereby undertakes that subject to written request from GM – WiMAX cell of BSNL, Starnet will replace

the currently submitted Standard Chartered Bank Malaysia Performance Bank Guarantees for Chennai, Haryana and Himachal Pradesh with Local Bank PBG's for the respective circles and amounts within 30 days of receipt of the written request. This has the approval of Starnet's Board of Directors...."

(emphasis supplied)

10.The aforesaid is stated to have been repeated on 18.02.2011 on a reminder being sent by the respondent on 15.02.2011.

11.It is the case of the respondent that a demand notice had been issued by it to the petitioner in the interregnum i.e.10.01.2011. In response to the respondent's letter dated 15.02.2011, the petitioner sent a communication dated 23.02.2011 in the following terms:

"Dear Sir,

This is with reference to the PBG's already submitted by Starnet for our franchise territories of Chennai, Haryana and Himachal Pradesh LSA's as per the WIMAX EOI/LOI conditions. We wish to reiterate that these are in line with the PBG requirements as per the EOI clauses and the same has also been confirmed by our external Legal Counsel.

However, as per the request of BSNL WIMAX cell, we hereby attach three undertaking from Standard Chartered Bank (SCB) stating that SCB India – New Delhi branch will honour any request or claim against each of the submitted PBG's. As you are aware SCB India is a recognized scheduled Bank in India as per Reserve Bank of India (RBI) Act, 1934. Hence this undertaking by SCB effectively converts the submitted PBG into a Local PBG. BSNL may in the event of any default by Starnet in execution of contract, raise a claim on the

Standard Chartered Bank's New Delhi Branch and the same will be honoured by the Bank.

We hope this satisfies in full the requirements of BSNL for the PBG.

As you are also aware, we have already made significant progress on overall technical architecture and circle-level interaction with the circle teams. We have now also appointed our SI partners and will be initiating POC activities shortly for all the three LSA's."
(emphasis supplied)

12. The aforesaid communication was accompanied by three separate, but identical undertakings for each of the three LSAs issued by the Standard Chartered Bank, Malaysia in the following terms:

"AT REQUEST OF STARNET COMMUNICATION PVT LTD. LEVEL 6 JMD REGENT SQUARE, MG ROAD, GURGAON, THE ABOVE MENTIONED LETTER OF GUARANTEE IS AMENDED AS FOLLOWS:

PARA 9 SHOULD READ AS FOLLOWS:

ALL DEMANDS UNDER THIS GUARANTEE MUST BE MADE IN WRITING AND MUST BE DELIVERED BY HAND OR BY POST AND RECEIVED BY STANDARD CHARTERED BANK INDIA AT TRADE SERVICES, 2ND FLOOR H-2, CONNAUGHT CIRCUS NEW DELHI-110001 ON OR BEFORE 2:00 P.M. (INDIA TIME) OF THE LAST DAY OF THE EXPIRY DATE, WHO WILL THEN NOTIFY TO STANDARD CHARTERED BANK MALAYSIA BERHAD (SWIFT ADDRESS: SCBLMYKxxxx) WITHIN 24 HOURS VIA AUTHENTICATED SWIFT QUOTING GUARANTEE NO.300020911487, AFTER WHICH THIS GUARANTEE SHALL AUTOMATICALLY BE CANCELLED AND SHALL BE CONSIDERED NULL AND VOID IRRESPECTIVE OF WHETHER OR NOT THIS GUARANTEE IS RETURNED TO US FOR

CANCELLATION AND NO DEMAND HEREUNDER WILL BE ACCEPTED OR ENTERTAINED. IN THE EVENT SUCH DEMANDS ARE NOT RECEIVED BY US ON OR BEFORE THE ABOVESTATED TIME AND DATE DUE TO ANY REASON WHATSOEVER, WE SHALL BE TOTALLY DISCHARGED AND SHALL HAVE NO LIABILITY WHATSOEVER UNDER THIS GUARANTEE.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED."

13. In respect of the Chennai and Himachal Pradesh LSAs, curiously enough the PBGs as furnished were accepted without demur. It is, however, the say of the respondent that there was an oral understanding in October, 2010, when the franchise agreement was signed, that even these PBGs would be replaced. Needless to emphasize that in a matter of this nature, such oral understanding can hardly be appreciated when communications were being exchanged between the parties on every issue.
14. Learned counsel for the petitioner has pointed out (and it is not in dispute) that the petitioner filed proceedings before the learned single Judge seeking injunction in respect of the two PBGs which were sought to be encashed, when no plea was taken that these PBGs were not encashable in Delhi as they were furnished by Standard Chartered Bank, Malaysia.
15. In a nutshell, thus the plea of the petitioner is that a different stand about the validity of the PBG is sought to be taken only in respect of the undertaking given for Haryana Circle apart from the fact that such stipulation is absent in the EOI/LOI.

16.A perusal of the impugned letter dated 08.03.2011 shows that not only did the respondent find the PBG submitted by the petitioner unacceptable and cancelled the LOI, but also encashed the bank guarantee for the bid security amount. The contents of the letter are reproduced hereunder:

“Please refer to this office tender mentioned above (ref-1). Being H1 for Haryana LSA, LOI was issued to you (Ref-2) and the same was unconditionally accepted by you (Ref-3).

As per tender conditions and LOI you have to submit the required Performance Bank Guarantee and enter into agreement with BSNL for roll out of WiMAX in Haryana LSA.

But as per Co letter cite above, you have submitted PBG form Standard Chartered Bank, Malaysia with amendment dated 22-02-2011 which is not acceptable to BSNL.

In view of the above, the LOI issued to you (vide ref-2) is hereby cancelled as per clause 2(b) of Annexure IIA and action has been taken for encashment of bid security submitted by ou in the form of Bank Guaranteee (BG23/2009) Dated 11/Nov/09 for Rs.20,00,000/-).

This is for your kind information.”

17.We may notice at this stage that in the counter affidavit, apart from the merits of the controversy, a plea is sought to be raised that the disputes are liable to be adjudicated in the arbitral proceedings in

view of the arbitration clause and that the petitioner should have filed OMPs on the Original Side of this Court as happened in the other two cases.

18. We fail to appreciate the aforesaid plea since the present case is on a different footing. Insofar as the Chennai and Himachal Pradesh LSAs are concerned, the franchisee agreement was executed which was sought to be cancelled and thus arbitration clause was invoked. In the present case, the LOI issued was cancelled and the bank guarantee sought to be encashed with bid security amount forfeited without even the franchisee agreement having been executed. Apart from this, learned counsel for the petitioner has rightly relied upon the observations of the Supreme Court Harbanslal Sahnia and Anr. v. Indian Oil Corporation Ltd & Ors.; (2003) 2 SCC 107 where regarding a similar plea qua an arbitration clause, the following observations were made:

“7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are

wholly without jurisdiction or the vires of an Act and is challenged [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., AIR 1999 SC 22. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.”

19. The present case really falls within the exercise of jurisdiction under Article 226 of the Constitution of India qua the issue of award of a tender for which the writ is maintainable and in view of the limited compass of the dispute, requires no trial and in view of the undisputed facts, we see no reason to relegate the parties to civil proceedings/arbitration. The writ court is not emasculated of such powers.

20. Now coming to the merits of the controversy, we are of the view that once the terms of a tender are finalized (it is after due and deliberate exercise), the parties must strictly be bound by the same. We may say that if the respondent was on the other side, it would have insisted on a strict adherence to the terms and conditions of the tender. There cannot be a legal uncertainty in this behalf and the parties cannot be taken by surprise nor can the parties be compelled, having been successful in the tender, to vary the terms and conditions. If the interpretation of the respondent was to be

accepted, it would be like an ambush clause where a party is first made to apply and after succeeding in the tender, is compelled to vary the terms and conditions of the tender. In respect of the aforesaid principle, we are supported by the observations of the Supreme Court in Reliance Energy Ltd. and Anr. v. Maharashtra State Road Development Corporation Ltd. and Ors; (2007) 8 SCC

1. We reproduce the relevant para nos.38 & 39 as under:

“24. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

25. In the case of Reliance Airport Developers (P) Ltd. v. Airports Authority of India and Ors. : (2006) 10 SCC 1, the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, "but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified

norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of rule of law. In the case of Reliance Airport Developers (supra), the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks had different stages. Objectivity was thus provided."

21. The tender terms and conditions are crystal clear; they brook no two interpretations. Thus, the bank guarantee furnished at the stage of the bid security was to be through a scheduled bank and not an Indian Scheduled Bank (though the petitioner furnished one from an Indian Scheduled Bank). The PBG did not even contain this clause. Be that as it may, on the insistence of the respondent, after the petitioner had furnished the PBG from the Standard Chartered Bank, Malaysia, they even furnished a further undertaking in the form of

an appropriate letter from the Standard Chartered Bank, Malaysia clearly permitting encashment of the bank guarantee from the Delhi Office of the Standard Chartered Bank. If one may say so, the petitioner even succumbed to the whim and fancy of the respondent in order to get the franchisee agreement executed. As noticed, what is more surprising is that qua two of the LSAs, the same kind of PBG was accepted. The story of oral understanding inter se the parties of October, 2010 is clearly a hogwash and is not apparent from any such subsequent communications. The respondent invoked the bank guarantee qua those two circles and it was not as if the Standard Chartered Bank, Delhi Office refused to honour the bank guarantees; qua which an order interdicting encashment was passed by the learned single Judge of this Court.

22. We are thus of the unequivocal view that the action of the respondent terminating the LOI of the petitioner on the ground of non furnishing of a PBG from an Indian Scheduled Bank is clearly unsustainable and has to be quashed. The sequitur is that the impugned letter dated 08.03.2011 is also quashed. Resultantly, further steps taken in pursuance to the letter dated 08.03.2011 i.e., the encashment of bid security amount and return of the PBG are invalid and quashed and status quo ante would prevail. The respondent will intimate the petitioner about the furnishing of the fresh PBG as per the terms of the EOI/LOI, the time for which will be stipulated in the letter.

23. The respondent will also refund the amount of Rs.20 lakhs deposited

by the petitioner as bid security amount as the said bank guarantee was to remain in force till the franchisee agreement was entered into duly supported by a PBG. The needful be done by the respondent within 10 days.

24.The writ petition is accordingly allowed with costs quantified at Rs.50,000/-.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

JANUARY 12, 2012/dm