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

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Judgment delivered on: 06.11.2013

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ARB.P. 259/2013

NOVATIUM SOLUTIONS PVT LTD

..... Petitioner

Versus

BHARAT SANCHAR NIGAM LTD.

..... Respondent

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioner: Mr. J.K. Singh and Mr. Pankaj Kumar, Advocates

For the Respondent: Ms. Tanushree Sinha, Advocate

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

ARB.P. 259/2013 and IA No.13328/2013 (u/s. 151 CPC for modification of order dated 05.07.2013)

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the Act). Notice in this petition was issued on 05.07.2013. The captioned interlocutory application is filed by the petitioner for modification of order dated 05.07.2013. The reasons which propelled the petitioner to seek modification, are, set out in order dated 26.08.2013.

2. The respondent entered appearance on 13.09.2013 when, time was granted to file a reply to the main petition as well as to the interlocutory application.

2.1 Ms.Sinha, who appears for the respondent, says that replies have been filed to both the main petition as well as the captioned application. To be noted, the replies are, however, not on record. They appear to be in objection. However, copies of the same have been shown to me by Ms.Sinha.

3. The moot point, which arises for consideration is: whether the petitioner made a demand for appointment of an arbitrator and if so, by which communication/ notice. For this purpose, the following broad facts need to be noticed:-

3.1 There is no dispute that the parties had entered into a contract dated 24.12.2008. An addendum was also executed in that behalf on 02.03.2009. The aforesaid would be hereinafter referred to as the agreement.

3.2 Broadly, in terms of the agreement, obtaining between the parties, the petitioner was to offer Nova NetPC and Utility Computing Services bundled with its broad band services to the respondent. It appears that, disputes have arisen between the parties pertaining to the services purportedly rendered by the petitioner. The petitioner claims that it is entitled to an amount of Rs.5,04,42,842/- towards subsidy under the USOF Scheme. Apart from the above, an amount of Rs.6,12,81,833/- is claimed towards subscription. Interest, at the rate of 24% p.a., is also claimed. There are other amounts also claimed by the petitioner.

3.3 The respondent disputes the amounts claimed by the petitioner.

3.4 What is important, is that, the petitioner issued a notice in this behalf to the respondent on 04.02.2013, followed by a notice dated 07.05.2013. The learned counsel for the respondent does not dispute the receipt of the said notices. It is not disputed that no reply was sent to the first notice dated

04.02.2013. In so far as the second notice is concerned i.e., notice dated 07.05.2013, the respondent appears to have sent a communication dated 07.06.2013, whereby it appointed an arbitrator in terms of clause 5.7 of the agreement obtaining between the parties.

3.5 In the interregnum, the petitioner filed the captioned petition with the Registry of this court, on 28.05.2013. The petition came up for hearing before this court, as indicated above, on 05.07.2013 when, notice was issued in the petition.

3.6 As adverted to above, an application for modification of order dated 05.07.2013 was moved in which notice was issued on 26.08.2013 by me, after referring to the broad averments made in the said application.

3.7 The petitioner's purpose in moving the said application was to make a disclosure of the fact that letter dated 07.06.2013, issued by the respondent, was received by its Chennai office after the institution of the present petition, though prior to the hearing held on 05.07.2013. It was averred that this fact was somehow not within the knowledge of its employees at the Gurgaon office, which was responsible for the institution of the present petition.

SUBMISSIONS OF COUNSELS

4. Ms. Sinha, who appears for the respondent opposes the prayer made in the main petition, on the ground that, the same has been rendered infructuous. It is Ms. Sinha's contention that in the first notice i.e., notice dated 04.02.2013, there was no demand made by the petitioner for appointment of an arbitrator. She says that in so far as the second notice is concerned, i.e., notice dated 07.05.2013, it was received by the respondent on 10.05.2013, and therefore, appointment of an arbitrator vide

communication dated 07.06.2013 was within the time frame of thirty (30) days, and therefore, no orders need to be passed on the petition filed.

4.1 On the other hand, Mr. Singh, the learned counsel for the petitioner says that a careful reading of the notice dated 04.02.2013 would show that there is a demand made for reference of disputes to arbitration. It is his contention that, it was incumbent upon the respondent, to appoint an arbitrator in terms of clause 5.7 of the agreement obtaining between the parties. It is, therefore, his contention that notice dated 07.05.2013 only reiterated the demand since there was no response, admittedly, to the request made in that behalf vide notice dated 04.02.2013.

4.2 Mr. Singh, therefore, says that the fact that the petition was moved on 28.05.2013, is of no relevance from the point of view of the respondent. In other words, the petition is not pre-mature, as contended by the learned counsel for the respondent.

REASONS

5. I have heard the learned counsel for the parties and perused the record.

5.1 The principal question therefore, which arises for consideration is: as to whether the notice dated 04.02.2013, triggered the arbitration agreement obtaining between the parties. The consequential issue being whether the appointment of arbitrator by the respondent, albeit after institution, could lead to denial of relief sought for by the petitioner.

5.2 Towards this end and for the sake of convenience, clause 5.7 of the agreement obtaining between the parties, is extracted hereinbelow :-

“..Except as provided in this agreement, in case of any dispute or differences, breach or violation relating to the terms of the Agreement. The said matter or dispute, difference shall be referred to sole arbitration of Chairman and Managing Director (CMD) of BSNL or any other person appointed by him. In the event of such Arbitrator to whom the matter is originally referred to is being transferred or vacates his office on resignation or other wise or refuses to do work or neglecting his work or being unable to act as Arbitrator for any reasons whatsoever, the CMD BSNL shall appoint another person to act as Arbitrator in place of out going Arbitrator and the person so appointed shall be entitled to proceed further with the reference from the stage at which it was left by his predecessor. The Franchisee will have No Objection in any such appointment, that arbitrator so appointed is employee of BSNL. The said Arbitrator shall act under the Provisions of the Arbitration and conciliation Act, 1996 or any statutory modifications or re-enactment there of or any rules made thereof...”
(emphasis is mine)

5.3 A careful perusal of the clause would show that once disputes or differences have arisen between the parties then, the matter is required to be referred for arbitration by the Chairman and Managing Director of the respondent or any other person appointed by him. The petitioner, undoubtedly, in the notice dated 04.02.2013, raised disputes to which no response was admittedly issued by the respondent. The petitioner, crucially, in last but one paragraph of the said letter has stated as follows :-

“..That the aforesaid violation has resulted into a serious dispute between you and my client as the such act is totally illegal, unreasonable, unjustified which therefore gives cause of action in favour of my client to refer the said dispute to be settled through Arbitration by the sole Arbitrator as agreed between the parties vide Agreement dated 24.12.2008..”

5.4 A reading of the averments extracted hereinabove, which are made in the notice dated 04.02.2013, alongwith the arbitration clause referred to above, leaves no doubt in mind that the arbitration agreement was triggered by the petitioner. To explain this away, Ms Sinha had sought to contend

that if arbitration had been demanded by notice dated 04.02.2013 then, where was the need for the petitioner to send a second notice dated 07.05.2013. In other words, the submission was that because no demand for arbitration was made earlier, the petitioner felt the need to issue a second notice i.e., notice dated 07.05.2013.

5.5 To my mind, Ms Sinha would be right that if arbitration had been demanded vide notice dated 04.02.2013, ordinarily there would be no need for issuance of second notice dated 07.05.2013, though such a conduct by itself cannot lead to any definitive conclusion either, especially in the circumstances that there was a gap of at least three (3) months between the two notices.

5.6 This apart, the fact, however, is that in so far as the petitioner was concerned there was no confusion in its mind that a demand for arbitration had been made vide notice dated 04.02.2013; a fact, which is evident upon a bare perusal of the subject reference made in the notice dated 07.05.2013. For the sake of convenience the same is extracted hereinafter:

“Sub: Reference for Arbitration of Claim asked from you vide my Legal Notice dated 05.02.2013 (sic.04.02.2013).”

5.7 A reading of the aforesaid extract would show that Ms Sinha’s contention is untenable.

5.8 If that be the position, the argument of the respondent that petition was filed pre-maturely on 28.05.2013 would be of no consequence; as the period of thirty (30) days would count from the date of receipt of notice dated 04.02.2013. Pertinently, as facts called out above would demonstrate that the respondent had not, admittedly, appointed an arbitrator, prior to the institution of the petition under Section 11 of the Act. The petition was

filed on 28.05.2013, while the respondent vide a letter dated 07.06.2013 sought to appoint an arbitrator in the matter.

5.9 Therefore, the appointment by the respondent, of a sole arbitrator vide communication dated 07.06.2013, would be of no relevance as, the petitioner had moved this court much after the expiry of the thirty (30) days from the date of receipt of the first notice dated 04.02.2013 by the respondent. What made the respondent's case worse was the fact that the appointment of an arbitrator was sought to be made post the date of institution of the present petition. The petitioner is thus entitled to relief not only under Section 11(4) and 11(5) but also under Section 11(6) of the Act. (See *Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr. (2000) 8 SCC 151.*)

6. Accordingly, the petition is allowed. Hon'ble Mr. Justice R.V. Raveendran, a former Judge of the Supreme Court (Contact No.080-26601279), is appointed as an arbitrator. As a logical corollary, the mandate of Mr. R.N. Bhardwaj, who was appointed as an arbitrator by the respondent vide communication dated 07.06.2013 would stand terminated.

6.1 The counsels are also agreed that the fee schedule as well as the rules which are applicable to the Delhi International Arbitration Centre (DIAC) should govern the present proceedings. It is ordered accordingly. The parties and their counsels shall appear before the DIAC on 22.11.2013 at 3.00 p.m. Needless to say, the parties shall be free to prefer their claims and counter claims, if any, before the learned arbitrator who shall decide the same in accordance with law.

7. In view of the order passed in the main petition, order dated 26.08.2013 passed in IA No.13328/2013 shall stand confirmed.

7.1. At this stage, Mr. Singh, the learned counsel for the petitioner says that the respondent is seeking to invoke the bank guarantee furnished by the petitioner. There is no petition filed before me seeking an order qua the bank guarantee. Mr. Singh says that he will make an appropriate application, in that behalf, under Section 17 of the Act, before the learned arbitrator. Liberty is given to the petitioner to move such an application before the learned arbitrator.

8. With the aforesaid directions in place, the captioned petition and the pending application are disposed of.

RAJIV SHAKDHER, J

NOVEMBER 06, 2013

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