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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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+ **ARB.P. 601/2014**

STERLITE TECHNOLOGIES LTD ..... Petitioner
Through: Mr. Rohan Dheman, Advocate.

versus

BHARAT SANCHAR NIGAM LTD ..... Respondent
Through: Mr. Rajiv Tyagi with Mr. Divakar Kumar and Mr. P. Sharma, Advocates.

CORAM: JUSTICE S.MURALIDHAR

O R D E R
% **30.11.2016**

1. This petition has a chequered history. The facts have been set out in some detail paras 2 to 11 of the judgment dated 11th June 2014 passed by the learned Single Judge of this Court in Arbitration Appeal No. 4 of 2012 which read as under:

> "2. Brief facts are that Appellant had been supplying the Respondent with PIJF underground cables for some time and has been a successful bidder in several earlier tenders. The contract between the parties was for supply of PIJF underground cables, on a long-term recurrent basis. There was a clause in the contract which entitled the Respondent, BSNL to come out with circulars indicating the price of copper, one of the basic raw materials used for manufacture and supply of PIJF cables. Based on the said circulars, it was envisaged that the price payable to the Appellant for supply of the cables could change from time to time.
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> 3. On 12th January, 2005, the Respondent floated a tender bearing No.MM/SW/012005/000283 ("Tender Document") for the

procurement of 120 LCKM PIJF underground cables.

4. The cable supplying companies declined to accept the price offered in the APO including the Appellant. Therefore, a Price Negotiation Committee (PNC) was constituted by the Respondent- BSNL on 30th June, 2005 to negotiate with the bidders referred in APO. This PNC negotiated with respect to all other raw material prices except copper, which was to be the exclusive right of the Respondent to issue monthly price bulletin/circular. During this course, the Union Budget in February, 2005 reduced import duty from 15% to Zero percent on copper for Telecom Sector.

5. Further, the Respondent issued APO dated 30th July, 2005 to all successful bidders and asked for unconditional and unequivocal acceptance to the same, to which the Appellant complied on 9th August, 2005. As well the Appellant on 30th June, 2006 and 8th February, 2006 gave unconditional and unequivocal acceptance to all terms and conditions of APO and the Appellant was fully aware that the Respondent would be issuing provisional pricing of copper and the final prices of copper were under the consideration of appropriate committee of the Respondent.

6. For the first few months of the Contract, the Respondent issued circulars indicating the price of copper as per the market rate indicated in HCL's circulars. HCL being a manufacturer of copper had the expertise to indicate the price for the same and in fact, all throughout, BSNL in past tenders has adopted the price given by HCL. The Appellant having participated in earlier tenders was aware of and expected this practice to continue, which it did, but only for the first few months of the present tender.

7. It is the case of the Appellant that the Respondent-BSNL suddenly and arbitrarily started coming out with "Provisional Circulars" which indicated the rate of copper at a flat 10% lesser value than the rate indicated by HCL. At first, the Appellant was made to understand that there would be some form of rationalization and reconciliation of these rates and thus continued supplying. However, in spite of repeated requests no such reconciliation took place and the

Respondent stuck to its arbitrary stance.

8. The Appellant was thus left with no option but to initiate arbitration by submitting the claim for recovery of the loss suffered by it on account of the arbitrary act of the Respondent by challenging the mode of computation of the prices and determination thereof by the Respondent in the form of circular.

9. The Arbitration clause as contained in the agreement reads as follows :

"Clause 20. Arbitration

20.1 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 CIVID, BSNL The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996...." (Emphasis Supplied)

10. The Respondent's application under Section 16 of the Act was based on the ground that the dispute submitted by the Appellant was not arbitrable as the authority of BSNL to issue circulars indicating the price of copper was specifically provided in the agreement and thus fell in the exception clause.

11. The learned arbitrator after hearing the parties passed the impugned order dated 10th October, 2011 whereby the learned arbitrator allowed the application under Section 16 of the Act filed by the Respondent and terminated the arbitration proceedings. Hence, the Appellant has challenged the impugned order dated 10th October 2011 in the present appeal."

2. The above appeal came to be allowed by the Court. One of the central issues considered by the Court was whether the dispute was arbitrable? Para 24 of the judgment which dealt with that issue reads as under:

"24. I shall now proceed to discuss as to whether the dispute submitted before the arbitrator is arbitrable or not. For doing the needful, the relevant clauses 9, 20, 30 and Section XI of the agreement/bid document dated 12'^^ January, 2005 are reproduced as under:

"9. BID PRICES

9.1 The bidder shall give the total composite price inclusive of all Levies & Taxes i.e. Sales Tax & Excise Duty, packing, forwarding, fright and insurance etc. butexcluding Octroi/Entry Tax which will be paid extra as per actual, wherever applicable. The basic unit price and all other components of the price need to be individually indicated against the goods it proceeds to supply under the contract as per the price schedule given in Section VII. Prices of incidental services should also be quoted. The offer shall be firm in Indian Rupees. No Foreign exchange will be made available by the purchaser.

9.2 Prices indicated in the Price Schedule shall be entered in the following manner:

(i) The Basic Unit price (Ex-Factory Price) of the goods, Excise duty, Custom duty. Sales Tax, Freight, Forwarding, Packing, Insurance and any other Levies/Charges already paid or payable by the supplier shall be quoted separately item wise.
(ii) The supplier shall quote as per price schedule given in section VII for all the items given in schedule of requirement.

9.3 The price quoted by the bidder shall remain fixed during the entire period of contract and shall not be subject to variation on any account. A bid submitted with an adjustable price quotation will be treated as non -responsive and rejected.

9.4 The prices quoted by the bidder shall be in sufficient detail to enable the Purchaser to arrive at the price of equipment/system offered.

9.5 "DISCOUNT, if any, offered by the bidders shall not be considered unless specifically indicated in the price schedule.

Bidders desiring to offer discount shall therefore modify their offers suitably while quoting and shall quote clearly net price taking all such factors like Discount, free supply, etc., into account".

9.6 The price approved by BSNL for procurement will be inclusive of Levies and Taxes, packing, forwarding freight and insurance as mentioned in Para 9.1 above. Breakup in various heads like excise duty, sales tax, insurance, freight and other taxes paid/payable as per clause 9.2 (i) is for the information of the purchaser and any change in these shall have no effect on price during the scheduled delivery period.

9.7 The freight by sea for transportation of equipment/Stores from the nearest port in the main land to Andaman & Nicobar Islands will be reimbursed to the supplier at the concessional rates levied by ministry of Water and Surface Transport on production of proof.

9.8 The prices will be quoted at copper wire prices of Rs. 1,83,366/- (Rupees One Lac Eighty Three thousand three hundred sixty six only) per IVIT excluding Excise Duty as on January 2005. Price variation will be applicable on copper as per standard Price variation table given in Section XI of the Bid Document."

"20. Arbitration

20.1 In the event of any question, dispute or difference arising under the 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 Arbitrator arbitration of the CMD, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole Arbitrator arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or unwilling to act as such, then to the sole Arbitrator arbitration of some other person appointed by the CMD, BSNL or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996. There will be no objection to any such appointment on the ground that the matter to which the agreement relates or that in the course of his duties as a Government Servant he has expressed his views on all or any of the matters in dispute. 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, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.

20.2 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 rules made there under, any modification any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.

20.3 The venue of the arbitration proceeding shall be the office of the CMD, BSNL, New Delhi or such other places as the arbitrator may decide."

"30. COURT JURISDICTION: The contract shall be governed by Indian laws and courts at Delhi/New Delhi will have jurisdiction to entertain any dispute or claim arising out of this tender till issue of authorization letters to Circles for placement of Purchase Orders (P.O.s)."

"SECTION-XI

PRICE VARIATION TABLE
PRICE VARIATION TABLE FOR PIJF, (U/G) CABLES

For increase/decrease of Price of Raw materials by Rs. 100.00 per MT, the corresponding increase/decrease of Price of the related stores is tabulated as under:

Raw Material: Copper wire rod
Stores: Jelly Filled UG Cable (Armoured/Unarmoured)

Size (Prs) :	1200/.40 mm	1600/.40 mm	2000/.40 mm	2400/.40 mm	10/.50 mm
PV in RS/KM:	270.16	365.57	456.96	548.86	3.85
Size (Prs) :	20/0.50 mm	50/.50 mm	100/.50 mm	200/.50	400/.50 mm
PV in Rs/Km:	7.35	17.85	35.70	71.40	142.80
Size (Prs) :	800/.50 mm	1200/.50 mm	800/.4 mm	400/.4 mm	20/.63 mm
PV in Rs/Km:	285.60	426.40	182.79	91.39	408.00
Size (Prs) :	50/.63 mm	100/.63 mm	200/.63 mm	400/.63 mm	800/.63 mm
PV in Rs/Km:	25.50	51.00	102.00	204.00	408.00
Size (Prs) :	20/.90 mm	50/.90 mm	100/.90 mm	200/.90 mm	400/.90 mm
PV in Rs/Km:	23.73	57.63	115.26	230.52	461.04

Note: (1) The price variation will be calculated on the Basic Price element of the approved date and the same shall be used to arrive at the composite price to be offered to all the vendors. The composite price of each size ccordingly or mounty basis, based upon the Copper Price Circulate issued by BSNL. This price variation shall be applicable within original delivery schedule.

(2) In case of supplies made under extended delivery period, the price variation will be regulated as follows:-
In case of any decease due in reduction in Copper Wire Rod Price, benefits will be passed on to the Purchaser. However, no increase in price will be allowed by the supplier due to the hike in Copper Wire Rod price during the extended delivery period. In such cases, the price of Copper Wire Rod prevailing in the last month of the original supply schedule shall prevail."

From the conjoint reading of the aforesaid clauses, the following position can be discerned:

a) That the Clause 9.3 of the agreement provides that the **price quoted by bidder** shall remain fixed during the currency of the contract and shall not be subject to variation on any account.

b) Clause 9.8 of the agreement provides that the prices will be quoted at the copper wire prices of Rs. 183366 per MT as on January 2005 and variation in the prices of the copper shall be applicable as per the variation table given in schedule XI of the bid document.

c) Schedule XI of the agreement provides the mode of the computation of the variation in the price of raw materials viz copper wire rod and also provides in the explanatory notes the guidelines to be taken into consideration while ascertaining the said variation. The explanatory note 1 gives a hint that the price variation shall be calculated on the basic price element of the approved rate and the shall be used to arrive at the composite price to be offered to vendors. The said composite price shall be worked on the basis of the circular issued by the respondent.

d) Clause 20 of the agreement provides that any question or 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 CMD, BSNL.

e) Upon the careful reading of the clause 9, read with clause 20 of the agreement and schedule XI appended to the agreement, it can be seen that though clause 9.8 provides that the price variation of the copper shall be ascertained in the manner provided in schedule XI, it no where provides specifically that the same shall be termed as decision of BSNL to determine the said copper prices.

f) Upon meaningful reading of the said schedule XI appended to the agreement, it is seen that the said schedule provides the mode of computation of the price variation and also in explanatory note provides that basic price of the approved rate shall be taken into consideration while computing the price variation of the copper. The said schedule XI also does not give any mandate that the said computation done by BSNL shall be termed as decision in the agreement. If that is so provided specifically in the agreement or the schedule XI which may be termed as a part of the agreement, only then it can be said that aspect is ousted or can be termed as excepted matter within the meaning of the agreement. In cases of ambiguity where the arbitration clauses is broad enough to cover each and every dispute arising out of or in connection there with the agreement as against the excepted matters which is confined to specific mention of the decision under the agreement. No deemed inference as to specificity or decision making of BSNL may be drawn once it is not clearly evinced from the agreement or the schedule appended thereto in the agreement.

g) As against the absence of any specific mention in the agreement or the schedule thereto relating to the decision of BSNL under the agreement, Schedule XI provides the mode of computation of the prices and the guidelines for doing such computation which include taking into consideration of base price of the approved rate in order to arrive at composite price. The said schedule also merely provides that BSNL may issue circular in this respect for working out such composite price. The schedule XI also no where attaches any finality to the prices ascertained by the respondent nor calls it as a decision under the agreement. In such circumstances, a dispute as to mode of computation of the prices when it is not specifically categorized as a decision under the agreement can be raised and can conveniently fall within the ambit of clause 20 of the agreement. This is also the reason the respondent has failed to point out any provision in the agreement during the argument and not even in the written submissions as to which provision specifically provides that the price circular issued by the respondent is a decision within the meaning of the agreement and hence excluded matter. In the absence of the said provision, dispute is clearly arbitrable in nature.

In view of the position discussed above, upon fair and meaningful reading of the clauses of the agreement, it can be safely said that the dispute as to the mode of computation of the prices or effect of variation of prices in Copper can be made in the event the dissatisfied contractor assails the computation carried out by BSNL in form issuance of the circular on the grounds permissible to him be it is not fair or is not as per past practice or without following the mode of computation as per the representation given at the earlier occasion by giving its justifications as to what can be the actual computations as per the contractors and the arbitrator can decide the same depending upon the merits of the claim. In such cases, as there is no indication as to finality attached to the circular which can be evinced from the agreement or schedule XI appended to the agreement, the dispute is clearly arbitrable and can be subjected to the arbitration."

3. The Court also negatived the submission of the BSNL that if the price were found to be arbitrary in nature by the Petitioner, they should have preferred a writ petition for challenging the computation of price. The Court further negatived BSNL's submission that this was an excepted matter and therefore not arbitrable. Thereafter in paras 27 to 29, the Court held and directed as under:

"27. The matter can also be seen from another angle which is that the Petitioner is not challenging the authority or competency of the Respondent to issue circulars containing the prices of copper so that the contracts should follow the same, the respondent is attempting to dispute the mode of computation of the prices of the copper and effect of variation of the prices. The contract is concerning supply of PIJF cables and talks about the prices of the copper in clauses 9 of the agreement which is an essential ingredient having its role to play in pricing of copper. In such circumstances, the dispute concerning the computation of pricing of copper is not the one which is outside the agreement but is inextricably connected with that of subject matter of the contract. The said dispute disputed either way can effect the pricing consideration in contract and thus the same cannot be the one which can be said to be non arbitrable one especially when the agreement does not specifically provide it as an excepted matter under the agreement. For this reason also, the dispute submitted before the arbitral tribunal is arbitrable in nature.

28. In view of the aforementioned discussed, the impugned order dated 10th October, 2011 is set aside and it is observed that the claim submitted before the arbitrator is arbitrable as per the operation of clause 20 of the agreement/bid document dated 12th January, 2005. List the matter before the arbitrator for further proceedings.

29. With these observations, present appeal is accordingly disposed of so as the pending application. Parties shall appear before the learned Arbitrator on 12th August, 2014. Copy of the order be communicated to the learned Arbitrator."

4. It requires to be noticed that a Special Leave Petition by BSNL challenging the above order was dismissed by the Supreme Court on 29th February 2016. The above order dated and thus attained finality.

5. Today it is sought by Mr. Rajiv Tyagi, learned counsel for BSNL, that the above appeal challenged only one finding of the Arbitrator viz., the competence of the Arbitrator under Section 16 of the Act and not the finding on the arbitrability of the dispute.

6. A reading of the above judgment of the learned Single Judge of the Court which is affirmed by the Supreme Court leaves no manner of doubt that the Court dealt with both the issues of the competence of the Arbitrator as well as the arbitrability of the dispute. The Respondent, BSNL having unsuccessfully challenged the said judgement of the learned Single Judge cannot now contend that some part of the order of the Arbitrator survives and therefore, this petition seeking the appointment of an Arbitrator to substitute the above arbitrator cannot be entertained.

7. The second submission is that in terms of Clause 20 of the Contract, the Petitioner had to write to the Chairman-cum-Managing Director (CMD) of the BSNL seeking the appointment of an Arbitrator to substitute the Arbitrator who passed the order declining to act as such. The Court notes that the BSNL was aware of the facts that after dismissal of the SLP on 29th February 2016, an Arbitrator was required to be appointed to substitute the Arbitrator who ceased to act as such. This did not require the Petitioner to have to write to the CMD of BSNL.

8. Learned counsel for the Respondent has drawn the attention of the Court to the judgment in ***Yashwith Constructions (P) Limited v. Simplex Concrete Piles India Limited (2006) 6 SCC 204*** which discusses the term 'Rules' under Section 15(2) of the Act. On the facts of that case, the MD of the Respondent therein had exercised the powers in terms of the arbitration agreement and had appointed a substitute Arbitrator by the time the matter was considered by the Court. However, in the present case the BSNL has not taken any action to appoint the substitute Arbitrator.

9. A third aspect requires to be adverted to is that for a long time in this matter no reply was filed by BSNL. By an order dated 21st March 2016, a final opportunity was granted to it to file a reply within four weeks from that date subject to costs of Rs.20,000 being paid to the Petitioner within the same time. This order was passed in the presence of Mr. Rajiv Tyagi, learned counsel appearing for BSNL. On the next hearing on 4th May 2016, the Court was informed that the costs had not been paid. Again one "final opportunity" was granted to BSNL to pay costs within two weeks. Further

the Court dismissed the application filed by BSNL for waiving the costs imposed by the order dated 21st March 2016. The Court further noted that the Supreme Court had by an order dated 29th February 2016 dismissed the Respondent's SLP.

10. Again on 2nd August 2016, the Court was informed that the costs of Rs.20,000 had not been paid. Mr. Tyagi then sought time to verify the facts. It was then made clear that in case the costs are not paid, the reply filed by the Respondent would not be considered.

11. Today Mr. Tyagi has placed before the Court a sanction memo dated 17th May 2016 along with a covering letter stating that a cheque dated 19th May 2016 of Rs.18,000 in favour of the Petitioner had been issued. The photocopy of the said letter bears signature of a person with a date of 31st August 2016. The said letter appears to have been sent only on 24th August 2016. It appears from the signature on the said letter that the cheque was valid only till 31st August 2016 and could not have been encashed. In any event learned counsel for the Petitioner denies knowledge of such cheque. His instruction is that the Petitioner has till date not received costs as directed by the Court in its order dated 21st March 2016.

12. It is unfortunate that despite many opportunities granted to the Respondent, the costs as directed by the Court has not been paid to the Petitioner till date. In any event, the cheque shown to have been made was for a sum of Rs.18,000 and not Rs.20,000 as directed by the Court. There was no question of deducting TDS from costs as directed by the Court. If costs of Rs.20,000 had been ordered, then that amount and nothing less

should be paid by the Respondent to the Petitioner.

13. For deliberate disobedience of the orders of the Court for several hearings, the Court directs the Respondent BSNL now to pay further costs of Rs.40,000 to the Petitioner not later than 12th December 2016 and a proof of payment of such costs will be placed on record. It is made clear that this is irrespective of whether the earlier costs were paid or not. If there is any disobedience of this order it will be open to the Petitioner to move the Court for appropriate directions.

14. The Court finds no merit in any of the objections raised by the Respondent to the prayer made in the present petition that an Arbitrator should be appointed by the Court in place of Mr. R.C. Gupta who has acted as an Arbitrator in the first instance. The statement of claims has already been filed by the Petitioner and so the arbitration will have to resume from that stage before the new Arbitrator.

15. Accordingly, the Court appoints Justice A.P. Shah, a former Chief Justice of this Court (Mobile No. 9810160007) as an Arbitrator to adjudicate the disputes between the parties including claims and counter-claims. The fees will be consistent with the Schedule to the Arbitration and Conciliation Act, 1996 as amended from 23rd October 2015. The parties are directed to appear before the learned Arbitrator on 19th December 2016 at 4 pm or such changed time and/or date that the learned Arbitrator finds convenient which will be communicated to the parties at least ten days in advance. The venue for the first hearing will be fixed by the Petitioner and communicated to the learned Arbitrator and the Respondent at least one week prior to the date

fixed. The expenses incurred for the hearings shall be equally shared by the parties.

16. The petition is disposed of in the above terms. A certified copy of this order be delivered to the learned Arbitrator forthwith.

17. Order be given *dasti.*

S.MURALIDHAR, J

NOVEMBER 30, 2016
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