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

\+ **<u>O.M.P.(I) (COMM.) 461/2016</u>**

ALCATEL-LUCENT INDIA LIMITED ..... Petitioner

Through: Mr Amit Chadha, Senior Advocate with Mr Abhishek Tewari, Mr Tanmay Singh, Ms Maya Nirula and Mr Sahil Mongia, Advocates.

versus

MAHANAGAR TELEPHONE NIGAM LIMITED & ANR. ..... Respondents

Through: Ms Ekta Sikri along with Mr Deepank Yadav, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% 30.11.2016

<u>IA No.14816/2016</u>

1. Allowed, subject to all just exceptions.

2. The application is disposed of.

<u>O.M.P.(I) (COMM.) 461/2016</u>

3. Issue notice. Ms Sikri learned counsel for MTNL accepts notice.

4. With the consent of the parties, the petition is taken up for final hearing.

5. The petitioner (Alcatel) has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter*

alia, praying as under:-

> "Restrain the Respondent No.1 from invoking bank guarantee no. ND/VQD/23/94 for Rs.2,33,65,000 dated April 8, 1994 drawn on the Respondent No.2 during the pendency of the present proceedings as well as those in O.M.P. (Comm.) No. 367 of 2016 before this Hon'ble Court."

6. The aforementioned bank guarantee - bank guarantee no. ND/VQD/23/94 for ₹2,33,65,000 dated April 8, 1994 - was furnished by Alcatel to MTNL in connection with the Purchase Order dated 11.08.1994 issued by MTNL for procurement of Digital Local Telephone Exchange Equipment. Certain disputes arose between the parties relating to the amount payable by MTNL for the equipment supplied by Alcatel in terms of the said Purchase Order. Alcatel claimed release of ₹1.73 crores stated to be outstanding at the material time. MTNL disputed Alcatel's claim and claimed a refund of ₹1,28,34,831/- alleging that excess amount was paid by MTNL to Alcatel. Alcatel also sought release of the subject bank guarantee.

7. The disputes between the parties were referred to arbitration and the arbitrator has made and published his award on 11.03.2016 *inter alia* awarding a sum of ₹1,85,50,000/- to Alcatel and also directing the return of the subject bank guarantee.

8. Mr Amit K. Chadha, learned Senior Counsel appearing for Alcatel earnestly contends that the bank guarantee in question was a performance bank guarantee and there is no dispute between the parties that Alcatel has

performed its obligations in terms of the Purchase Order. He states that the only dispute between the parties related to MTNL's claim for refund of excess payment.

8. He further pointed out that MTNL had invoked the subject bank guarantee against its claims, which was disputed by Alcatel. Alcatel contended that the subject bank guarantee - being for due performance of the Purchase Order - could not be invoked by MTNL against a claim for alleged excess payments.

9. The foresaid aspect was considered by the arbitrator and he has held as under:-

> "Alleging that excess payment had been made by the respondent to the claimant, the respondent threatened to invoke the performance bank guarantee of the value of Rs.2,33,65,000 for recovery of the amount allegedly due to it. The Tribunal by its order dated 28th November 2005 had already held that it was only in the event of defects and deficiencies in the equipment supplied by the claimant to the respondent and/or such equipment not giving satisfactory performance that the respondent was entitled to invoke the bank guarantee. The Tribunal had further held that no reason whatsoever had been given as to why the bank guarantee was being invoked and the respondent could not invoke the bank guarantee as the same has to be invoked strictly in terms of the guarantee and not otherwise. The Tribunal further held that even assuming over payment had been made by the respondent to the claimant, the same could not be a ground for invoking the bank guarantee and there was no term in the agreement whereby the respondent had been given a right to invoke the bank guarantee in case of over payment made to the claimant. In view of the findings already given in order dated 28th November 2005, though over payment had been

> made, the same could not be recovered by invoking the bank guarantee and the respondent had to take recourse to proceedings as may have been advised in accordance with law for recovery of the amount overpaid to the claimant. In my view, therefore, the claimant is entitled to the relief claimed in claim no.1 for return of bank guarantee no. ND/VQD/23/94 dated 08.04.1999 for a sum of Rs.2,33,65,000 drawn on the Society General Bank. ”

10. Mr Chadha further submitted that although MTNL has challenged the arbitral award dated 11.03.2016 under Section 34 of the Act [in O.M.P. (Comm.) No. 367 of 2016], MTNL has not challenged the arbitrator's finding that subject bank guarantee in question could not be invoked against the alleged claims raised by the MTNL.

11. Ms Sikri fairly concurs that the arbitrator's conclusion that MTNL could not have invoked the subject bank guarantee, is not a subject matter of challenge in the petition under Section 34 of the Act.

12. Thus, it is clear from the above that Alcatel has prevailed in some of its claims before the arbitrator including its contention that the performance bank guarantee could not be invoked against MTNL's claim of alleged over payment.

13. Since, it is not in dispute that the performance guarantee in question has now been invoked only against a claim of excess payment and arbitrator's decision in regard to the disputes regarding invocation of subject bank guarantee is not a subject matter of challenge before this Court in O.M.P. (Comm.) No. 367 of 2016, MTNL cannot be permitted to encash the subject bank guarantee.

14. In view of the aforesaid, MTNL is restrained from invoking bank guarantee no. ND/VQD/23/94 for ₹2,33,65,000 dated April 8, 1994 drawn on the Respondent No.2 during the pendency of O.M.P. (Comm.) No. 367 of 2016.

15. The petition is disposed of.

VIBHU BAKHRU, J

NOVEMBER 30, 2016
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