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

\+ **<u>O.M.P.(I) (COMM.) 503/2016</u>**

UNITED TELECOMS LIMITED ..... Petitioner

Through Mr Pragyan Sharma, Mr S.S. Sastry, Mr Shikhar Garg and Mr Ganesh Bapu, Advocates.

versus

BHARAT BROADBAND NETWORK LIMITED & ORS. ..... Respondents

Through Mr Pradeep Dewan, Senior Advocate with Mr Atul Bandhu, Advocate for R1.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

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

% 28.02.2017

<u>IA No.16286/2016</u>

Allowed, subject to all just exceptions.

<u>O.M.P.(I) (COMM.) 503/2016</u>

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

> "(a) restraining the Respondent No.1 from invoking and/or encashing the Bank Guarantees bearing (i) PBG No. 2014 BG 255 dated 28.10.2014 for an amount of Rs.5 Crores issued by Canara Bank, Prime Corporate Branch, Shankaranarayana Building, 25, MG Road, Bangalore-560 001 and (ii) PBG No. 172 BG 01143100001 dated 05.11.2014 for an amount of Rs.24.22 Crores issued by Dhanalaxmi Bank, Kasturba Road, Bangalore-560 001 till

further Orders from this Hon’ble Court;

(b) Restrain Respondent No.2 & 3 from remitting the proceeds of the Bank Guarantee No. 2014 BG 255 dated 28.10.2014 and PBG No. 172 BG 01143100001 dated 05.11.2014 to the account of Respondent No.1 during the pendency of the instant proceedings and/or adjudication of the disputes between the petitioner and Respondent No.1 by the Arbitral Tribunal whichever is later.”

2. It is not disputed that the bank guarantees in question (PBG No. 2014 BG 255 dated 28.10.2014 & PBG No. 172 BG 01143100001 dated 05.11.2014) were furnished by the petitioner pursuant to the Advance Purchase Order dated 30.09.2014 (hereafter 'the APO'). Admittedly, in terms of the APO, the delivery of the goods were to be made by the petitioner within a period of eight months thereof; that is, eight months from 30.09.2014. It is also not disputed that the purchase order (PO) in respect of the APO was not issued till 15.03.2016. Prior to the issuance of the PO, the petitioner had already terminated the APO by its letter dated 14.03.2016, stated to have been served on 15.03.2016.

3. Mr Sharma, learned counsel appearing for the petitioner earnestly contended that in the circumstances, there was no occasion for the petitioner to effect any delivery of goods pursuant to the APO and in any event, the period of making the supplies had already elapsed. He contends that even if the termination of the APO was ignored, nonetheless, the APO would stand frustrated on its own terms since the same was not followed by a PO within the period specified for effecting the delivery of the product in question.

4. Mr Pradeep Diwan, learned Senior Counsel appearing for the

respondent points out that the APO referred to by the petitioner was the second APO. Prior to issuing the APO, the respondent had issued another APO (hereafter 'the first APO') on 23.05.2014 for supply of 40% of the tendered quantity; this was so because the petitioner was declared as the lowest bidder (L1). He states that the PO in respect of the first APO was issued on 03.09.2014 but the petitioner had failed to supply the goods in terms of the said PO. He contends that since the petitioner had failed to perform the contract in respect of the first APO, the question of issuance of a PO pursuant to the APO issued subsequently on 30.09.2014 did not arise.

5. Mr Sharma countered the aforesaid submission. He pointed out that the disputes in relation to the first APO dated 23.05.2014 and the APO dated 30.09.2014 are pending adjudication before an arbitral tribunal. He submits that a petition under Section 9 of the Act was also filed in respect of the bank guarantees furnished in respect of the first APO. He further submits that the bank guarantees in question involved in the present petition are not connected with the disputes relating to the first APO.

6. I have heard the learned counsel for the parties.

7. It is not disputed that the bank guarantees in question only pertain to the APO dated 30.09.2014. In the circumstances, the question whether APO dated 30.09.2014 was issued after the first APO may not be relevant. Clearly, the petitioner could not have been expected to perform the APO dated 30.09.2014 because no purchase order pursuant to the same was issued within the specified delivery period. It follows that the respondent's invocation of the bank guarantees submitted pursuant to the APO dated

30.09.2014 - which are admittedly performance bank guarantees - cannot be invoked since the question of whether the APO dated 30.09.2014 was required to or could be performed is in serious dispute. *Ex facie*, the petitioner was not called upon to perform the APO as no PO was issued.

8. In the aforesaid circumstances, the present petition is allowed and the respondents are restrained from invoking the bank guarantee No. PBG No. 2014 BG 255 dated 28.10.2014 & PBG No. 172 BG 01143100001 dated 05.11.2014. However, this is subject to the petitioner keeping the bank guarantees alive till the conclusion of the arbitral proceedings. Needless to mention that since the bank guarantees are being kept alive at the instance of the respondent, the petitioner would be at liberty to make an appropriate claim for costs and charges incurred for keeping the bank guarantees alive, before the arbitral tribunal. The respondent is also at liberty to apply to the arbitral tribunal for such orders and for such relief as may be advised.

9. It is clarified that the arbitral tribunal shall consider any such application uninfluenced by the observations made by this court in the present order.

10. The petition is disposed of.

VIBHU BAKHRU, J

FEBRUARY 28, 2017
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