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

Date of Judgment: 15th March, 2018

\+ FAO(OS) (COMM) 46/2018

M/S TECHNOSAT COMM (INDIA) PVT. LTD. ..... Appellant
Through: Mr. Aaditya V. K., Advocate.

versus

BHARAT SANCHAR NIGAM LTD & ANR. .....Respondents
Through: Mr. Rajat Arora and Ms. Vishalakshi Singh, Advocate for BSNL.

Mr. P. K. Mullick, Mrs. Soma Mullick and Mr. S. K. Deuzia, Advocates for Bank of India.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

O R D E R

% **15.03.2018**

1. This is an appeal filed by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13(1) of the Commercial Courts Act, 2015 assailing the order dated 09.03.2018 passed in O.M.P (I) (COMM.) 14 of 2018.

2. Pursuant to a tender floated on 15.01.2015 by the respondent No.1, the appellant submitted its bid and quoted Rs. 26,78,73,214/- as the big price for supply of Satellite Communication Ground Segment Equipment. Upon evaluation of the bid, the bid of the appellant herein was accepted on 27.08.2015 and an advance purchase order

(APO) was issued. The appellant submitted a Fixed Deposit Receipt in the name of the respondent No.1 in the amount of Rs. 1 crore as per the clause 10.10 of the BSNL Revised Procurement Manual 2012. On account of disputes between the parties, a Short Closure Notice has been given to the appellant and the Fixed Deposit Receipt was sought to be encashed which led to the filing of a petition under Section 9 of the Arbitration and Conciliation Act, 1996.

3. The Learned Single Judge dismissed the Section 9 petition primarily on the ground that since the Section 9 petition was premised on the ground that the appellant had furnished a Bank Guarantee and in fact no Bank Guarantee was furnished but the appellant had submitted a Fixed Deposit Receipt in the name of respondent No. 1 as a bid security in lieu of a Bank Guarantee. Observing that the appellant (Petitioner before the Learned Single Judge) had already parted with the funds which was lying in the fixed deposit in the name of BSNL, no irretrievable loss or injury would caused to the petitioner. A reading of the petition under Section 9 so filed by the appellant herein would show the appellant had disclosed that a Fixed Deposit Receipt was handed over to the respondent No.1 but the nomenclature used by the appellant before the learned Single Judge and in the appeal describing the FDR as a Bank Guarantee. An identical stand has also been taken in this appeal so filed by the appellant

4. The Clause 10.10 of the BSNL Revised Procurement Manual 2012 reads as under:-

"**10.10 Acceptable Forms of Performance Security**
The Performance Security should be in the form of a Bank Guarantee issued by a scheduled bank in favour of BSNL. Performance Security in the form of Account Payee Demand Draft, Fixed Deposit Receipt or Banker's Cheque, safeguarding the purchaser's interest in all respects, shall also be acceptable. However, no interest shall be payable on this account."

5. The prayer made by the appellant before the learned Single Judge is extracted below :

"(a) Pass an ex-parte ad-interim order of temporary injunction restraining the respondent No. 2 and its officers and any one claiming through or under the Respondent No. 2 from, in any manner, from adhering, acting upon or disbursing or encashing the Bank Guarantee dated 23.12.2015 for a sum of Rs.1,00,00,000/- (Rupees One Crore Only) bearing customer ID 107353990 / account No. 004645[]002465;
(b) Pass an ex-parte ad-interim order of injunction restraining the Respondent No. 1 and its officers and any one claiming through or under the Respondent No. 1 from, in any manner, giving effect to the said communication dated 19.12.2017;
(c) Pass an ex-parte ad-interim order or temporary injunction restraining the Respondent No. 1 from appointing any other vendor to replace the Petitioner till the final adjudication of the disputes;
(d) Pass an ex-parte ad interim order of temporary injunction restraining the Respondents and its officers and any one claiming through or under the Respondents from, in any manner, from taking any coercive steps against the Petitioner, in the nature of encashment of bank guarantees and/or any other step;

(e) Pass such other or further order(s) or direction(s) as this Hon'ble Court may deem fit in the facts and circumstances of the above matter and in the interest of justice and equity."

6. A reading of Clause 10.10 of the BSNL Revised Procurement Manual 2012 would show that options were available to the APP were to provide the Performance Security either in the form of (i) Bank Guarantee issued by a scheduled bank in favour of BSNL; (ii) Performance Security in the form of Account Payee Demand Draft, Fixed Deposit Receipt or Banker's Cheque. The objective of furnishing the Performance Security was to safeguard the interest of BSNL in all respects. It was made clear that no interest would be payable on this account. The appellant herein decided to hand over a fixed deposit receipt to the respondent No.1. A copy whereof has been placed on record.

7. The appellant as evident upon the reading the prayer Clause of the Section 9 petition based his entire arguments and sought an injunction against the respondent No. 1 and respondent No.2 bank from encashing the bank guarantee dated 23.12.2015 in the sum of Rs. 1,00,00,000/-. A perusal of the documents so relied upon by the appellant leaves no room for doubt that the same is not a Bank Guarantee as rightly held by the learned Single Judge but the same is a Fixed Deposit Receipt in the name of respondent No. 1/Bharat Sanchar Nigam Limited.

8. The effect of issuance of the Fixed Deposit Receipt in the name of respondent No.1 would be that the amount of Rs. 1 Crore stands

transferred in favour of the beneficiary of Fixed Deposit i.e. respondent No. 1 on the date of issuance of the Fixed Deposit Receipt. Even in the appeal neither an alternate argument has been raised nor foundation has been laid in support of seeking an injunction from appropriating the amount of the Fixed Deposit Receipt by the respondent No. 1.

9. At this stage, we are informed by the learned counsel of the appellant that a sole Arbitrator since has been appointed to adjudicate upon the disputes, claims and counter claim of the parties, counsel submits that he would make an appropriate application under Section 17 of the Arbitration and Conciliation Act, 1996 before the Arbitrator to safeguard the interest of the appellant raising all grounds available including the ground that the Fixed Deposit Receipt was only a Security furnished by the appellant to the respondent No. 1 and the Fixed Deposit Receipt cannot be encashed till the disputes between the parties resolved and settle.

10. Learned counsel for the respondent No. 1, who enters appearance on an advance copy, submits that the appellant is a defaulter. He did not supply the equipment within the time frame and thus respondent No.1 was well within its right to short close the agreement and encash the Fixed Deposit Receipt.

11. Leaving all grounds open to enable the parties to agitate before the learned Arbitrator, the present appeal is dismissed as not pressed. As prayed, the learned Arbitrator is directed to hear the petition under Section 17 of the Arbitration and Conciliation Act, 1996 at

the first instance and decide the same preferably within one month from filing the petition under Section 17.

12. We make it clear that any observations made in the order passed by the learned Single Judge or by this Court, would not stand in way of Arbitrator in deciding the matter.

13. Copy of this order be given dasti under the signatures of the Court Master.

CM No.9794/2018 (stay)

The application stands disposed of, in view of order passed in the present appeal.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 15, 2018
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