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

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Date of Decision: 25.4.2019

+ **O.M.P.(I) (COMM.) 125/2019**

M/S UNITED TELECOMS LTD.

..... Petitioner

Through: Mr. Pawan Upadhyay with Mr.
Rajesh Chhetri, Mr. Ratik Sharma,
Ms. Meenakshi Rawat and Mr.
Rajeev Chhetri, Adv.

versus

M/S. BHARAT BROADBAND NETWORK LTD..... Respondent

Through: Mr. Chandan Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

I.A. 5920/2019

1. Allowed, subject to just exceptions.

O.M.P.(I) (COMM.) 125/2019

2. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act") wherein certain interim reliefs are sought.

3. Before I proceed further, the background in which the petition has been filed requires to be noticed.

3.1 Upon disputes erupting between the parties, the respondent i.e. M/s Bharat Broadband Network Ltd (in short "BBNL") appointed an Arbitrator. While the arbitration proceedings were in progress, BBNL, on its own, proceeded to challenge the appointment of the Arbitrator, since it was not in consonance with the mandate of the law declared by the Supreme Court in

TRF Ltd. vs. Energo Engineering Projects Ltd., (2017) 8 SCC 377.

3.2 This aspect was carried by BBNL right upto the Supreme Court. The Supreme Court, vide judgment dated 16.4.2019, sustained the appeal filed by BBNL herein. Via the judgment dated 16.4.2019, which is rendered in Civil Appeal No.3972/2019 with 3973/2019, the Supreme Court passed the following operative directions:

“22. We thus allow the appeals and set aside the impugned judgment. The mandate of Shri Khan having terminated, as he has become de jure unable to perform his function as an arbitrator, the High Court may appoint a substitute arbitrator with the consent of both the parties.

23. Vide order dated 25.01.2018, we had issued notice in the Special Leave Petition as well as notice on the interim relief prayed for by the appellant. Since there was no order of stay, the arbitral proceedings continued even after the date of the impugned judgment, i.e., 22.11.2017, and culminated in two awards dated 11.07.2018 and 12.07.2018. We have been informed that the aforesaid awards have been challenged by the appellant by applications under Section 34 of the Act, in which certain interim orders have been passed by the Single Judge of the High Court of Delhi. These awards, being subject to the result of this petition, are set aside. Consequently, the appellant's Section 34 proceedings have been rendered infructuous. It will be open to the appellant to approach the High Court of Delhi to reclaim the deposit amounts that have been made in pursuance of the interim orders passed in the Section 34 petition filed in the High Court of Delhi.”

3.3 It may be relevant to note that while the appeal was pending in the Supreme Court, two awards were passed dated 11.7.2018 and 12.7.2018.

3.4 These awards were assailed by BBNL by preferring the petitions under Section 34 of the 1996 Act. These petitions are numbered as OMP(COMM.) No.411/2018 and 418/2018.

3.5 It may be relevant to note that petitions bearing No. OMP(COMM.) No.411/2018 and OMP(COMM.) No.418/2018 have been disposed of today formally by me in view of the aforementioned judgment passed by the Supreme Court.

3.6 I may also note that prior to the commencement of the arbitration proceedings, a Section 9 petition [i.e. OMP (I) (Comm.) 503/2016] was filed by the petitioner herein in which an interim order dated 28.02.2017 was passed. The operative directions passed in the order read as follows:

“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.”

4. Given this backdrop, Mr. Upadhayay, who, appears for the petitioner, says that on 8.2.2019, this Court passed an order in OMP(COMM.) No.418/2018 permitting substitution of bank guarantee bearing PBG No.2014BG255 dated 28.10.2014. I am informed that this bank guarantee has been substituted with PBG No.2018BG238, dated 16.2.2019, in the sum of Rs.5 crores, drawn on Canara Bank.

4.1 Insofar as the other bank guarantee is concerned, which is referred to in the order dated 28.2.2017, I am told it is valid till 04.05.2019. As would

be evident upon reading the extract of the order dated 28.02.2017, this bank guarantee is numbered as PBG 172BG01143100001, dated 5.11.2014 and is good for a sum of Rs.24.22 crores.

5. Given the foregoing circumstances, which includes the observations made in paragraph 22 of the Supreme Court judgment dated 16.4.2019, which allows for substitution of the Arbitrator, the petitioner seeks the following interim prayers:

“(a) restraining the Respondent from invoking and/or encashing the Bank Guarantees bearing (i) PBG No. 2018BG238 dated 16.2.19 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. 2018BG238 dated 16.2.19 and PBG No.172 BG 01143100001 dated 05.11.2014 to the account of Respondent during the pendency of the instant proceedings and/or adjudication of the disputes between the Petitioner and Respondent by the Arbitral Tribunal whichever is later;”

6. Counsel for the petitioner says that the petitioner will, shortly, be moving an application for substitution of the Arbitrator.

7. Issue notice to the respondent

8. Mr. Chandan Kumar accepts notice for BBNL.

9. Mr. Chanan Kumar says that a formal reply is not required to be filed though BBNL has an objection in the matter which concerns jurisdiction of the Arbitrator. Learned counsel says that since it is the petitioner's own stand that there was no concluded contract obtaining between the parties, the

Arbitrator cannot adjudicate upon the matter. Mr. Kumar, however, does not concede that, since it may, perhaps, be a mixed question of fact and law, BBNL could take recourse to Section 16 petition of the 1996 Act by filing an appropriate application in that behalf, once a substitute Arbitrator is appointed.

10. Accordingly, in consonance with order dated 28.02.2017, the invocation and/or encashment of bank guarantees referred to in prayer clause (a) and (b) of the captioned petition is stayed during the pendency of the arbitration proceedings subject to the bank guarantees being kept alive till further orders.

11. At this stage, counsel for parties submit that since the Supreme Court has permitted substitution of the earlier Arbitrator, this Court could appoint a common independent Arbitrator to hasten adjudication on merits in respect of contracts dated 3.9.2014 and 15.3.2016

12. It is ordered accordingly. Hon'ble Mr. Justice M. Jagannadha Rao, former Judge, Supreme Court of India (Cell No.040-23224533) is appointed as an Arbitrator in the matter.

12.1 Learned Arbitrator will be paid his fee in terms of the Fourth Schedule appended to the 1996 Act.

12.2 The burden qua boarding, lodging and travel expenses of the learned Arbitrator will be borne in equal measure by both the parties.

12.3 Needless to say, before entering upon the reference, the learned Arbitrator will file a declaration under Section 12 read with attendant provisions of the 1996 Act.

12.4 The learned Arbitrator will have liberty to affirm or vacate or even modify interim directions issued vis-a-vis the subject bank guarantees as

adverted to in paragraph 10 above.

13. The Registry, in these circumstances, will return the arbitration record to the counsel for the petitioner.

14. Since this is a case of substitution of the Arbitrator, learned counsel for the parties agree that the substitute Arbitrator can continue the proceedings from the stage it is presently positioned.

15. However, it is made clear that if the parties seek to amend their pleadings, the learned Arbitrator will take a decision in the matter upon an application being moved in that behalf.

16. For the convenience of the learned Arbitrator, the mobile number of the counsel for parties are setforth hereafter:

- (a) Mr. Pawan Upadhayay (Cell No.9811136356) and Mr. Rajesh Chhetri (Cell No.9891675255) – counsel for the petitioner.
- (b) Mr. Chandan Kumar (Cell No.9810312011) – counsel for the respondent.

17. The Registry will dispatch a copy of the order to the learned Arbitrator.

18. The captioned petition is disposed of in the aforementioned terms.

19. *Dasti.*

RAJIV SHAKDHER, J

APRIL 25, 2019/pmc