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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on 9th March, 2021

\+ O.M.P.(I) (COMM.) 432/2020

LINKQUEST QUIPPO INFRA LIMITED .....Petitioner

Through: Mr. Abhimanyu Bhandari, Mr. Chetan Lokur, Ms. Nattasha Garg and Mr. Harsimran Duggal, Advs.

Versus

A2Z INFRA ENGINEERING LIMITED ....Respondent

Through Mr. Rajiv Nayar, Sr. Advocate with Mr. Sudhir Sharma, Mr. Sanjeev Sharma, Mr. Arunav Guha Roy and Mr. Naman Singh Bagga, Advs. for Respondent No. 1

Ms. Ruchi Gour Narula and Ms. Surbhi Mehta, Advs. for Respondent No. 2

Ms. Sangeeta Sondhi, Adv. for Respondent No. 3/BSNL

Mr. Rajiv Kapur, Mr. Akshit Kapur, Advs. for Respondent No. 4/SBI

CORAM:
HON'BLE MR. JUSTICE C .HARI SHANKAR

JUDGMENT (ORAL)

% **09.03.2021**

(Video-Conferencing)

C .HARI SHANKAR, J.

O.M.P.(I) (COMM.) 432/2020

1. A contract, for laying optical fibre cable, PLB duct and accessories for construction of exclusive optical NLD Backbone for the defence was awarded by the Ministry of Defence to Bharat Sanchar Nigam Limited (BSNL-Respondent No. 3 herein). BSNL awarded the contract to a consortium led by ITI Limited-Respondent No. 2, on turnkey basis, which in turn, awarded the contract to Respondent No. 1, i.e. A2Z Infra Engineering Limited. Respondent No. 1 engaged the services of the petitioner as a subcontractor, under a Master Framework Agreement dated 8th April, 2015, in terms whereof an Escrow Agreement dated 23rd April, 2015 was also executed between the petitioner, and Respondent No. 1 and Respondent No. 4 (the escrow bank). The Master Framework Agreement was, subsequently, amended by two supplementary agreements dated 15th March, 2019 and 18th December, 2019, and the Escrow Agreement was also amended by an Escrow Addendum Agreement dated 18th December, 2019. In view of consensus *ad idem*, that has been arrived at between the parties, for disposal of these proceedings, it is not necessary to enter into the intricacies of these agreements.

2. Clause 22 of the Master Framework Agreement, which provided for resolution of disputes between the parties by arbitration, reads thus:

> "**22. DISPUTE RESOLUTION**
>
> All disputes among Parties with respect to this Agreement will be handled by way of arbitration to be conducted as per the provisions of the Indian Arbitration & Conciliation Act, 1996 by a panel of three arbitrators. Among the three arbitrators, one arbitrator will be appointed by the Company, second arbitrator will be appointed by LQI and the third arbitrator will be appointed by the other two arbitrators. The venue of arbitration shall be New Delhi and the cost of arbitration shall

be equally borne between the Parties."

3. The essential grievance of the petitioner is that Respondent No.1 illegally terminated the contract with the petitioner on 11th December, 2020. At that time, according to the petitioner, considerable amounts were due from Respondent No. 1 to the petitioner. It is in these circumstances that the petitioner moved to this Court by means of the present petition, which contains the following prayer clause:

> "In the circumstances stated herein above, it is therefore, necessary and in the interest of justice and to avoid abuse of process for this Hon'ble Court that this Hon'ble Court be pleased to:
>
> i) Pass ex parte ad interim injunction against the Respondent No. 1 from acting upon the Termination Letters dated 11.12.2020
>
> ii) Direct that all Respondents to maintain a status quo in respect of the pending sites under the Project from entering or carrying on any activity and/ or dealing with raw material and resources of the Petitioner lying at the sites;
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> iii) Direct the Respondent No. 2 and 3 to pay any and all amounts to the Respondent No. 1 in relation to Project G of the Tender CA/CNP/NFS OFC/T-441/2013 on June 21, 2013 ("**Project**") only into the Escrow Account No. 65230413762 IFSC Code STB00000732;
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> iv) Pass ex parte ad interim injunction against the Respondent No. 2 and 3 from opening any further Letters of Credit in relation to the Project other than in favour of Petitioner;
>
> v) Pass ex parte ad interim injunction against the Respondent No. 1 and in favour of the Petitioner from receiving any amounts from the Respondent No. 2 and/or Respondent No. 3

in any manner other than into the Escrow Account No. 65230413762 IFSC Code STB00000732;

vi) Pass ex parte ad interim injunction against the Respondent No.2 and 3 and in favour of the Petitioner from revoking, cancelling, terminating, en-cashing or in any other manner disturbing the Letters of Credit opened by the Respondent No. 2 on behalf of Respondent No. 1 in favour of the Petitioner;

vii) Appoint a local commissioner to inspect all the pending sites under the Project for assessment of the amount of work in progress and also the value of the raw material and resources of the Petitioner, cost of de-mobilisation charges or manpower resources of the Petitioner lying at the sites;

viii) Pass such other further order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

4. Notice was issued, in these proceedings, on 24th December, 2020. While doing so, this Court observed/directed thus:

"8. In the light of the aforesaid submissions made by the parties, I find that there is no denial by respondent no. l that in terms of the agreements it executed with the petitioner, all amounts payable by respondent nos. 2 & 3 for the work done were required to be remitted to the escrow account in question. The stand of respondent no. l, however, is that once the contract between the petitioner and respondent no. l stood terminated, there was no further contractual obligation binding respondent nos. 2 and 3 to remit the amount to the escrow account. Respondent no.2 has also taken a similar stand insofar as it has also denied any continuing obligation on it to remit outstanding amounts payable for work done into the escrow account in question, when the contract between petitioner and respondent no. l stood terminated, especially since it has no contractual relationship with the petitioner. In these circumstances, once it is the admitted case of the parties that the contract was terminated on 11.12.2020, I am of the prima facie view that in order to balance equities at this stage, it would not be appropriate to permit respondent no. 1 to receive any amounts for the work done by petitioner till

11.12.2020 in any account other than the designated escrow account. Accordingly, respondent no. 1 is restrained from receiving any amounts from respondent nos. 2 and 3, payable for the project work carried out till 11.12.2020, in any account other than the escrow account.

9. It will, however, be open to the respondent no. 1 to receive payments for work done after 11.12.2020, in any account of its choice. Furthermore, since it has been stated by the learned counsel for respondent no.4 that presently there is no money left in the escrow account, I deem it necessary to direct that in case any amounts are received in the said escrow account hereafter, none of the parties shall be entitled to withdraw the same without obtaining the leave of this Court."

5. Subsequently, paras 8 and 9 of the aforesaid order dated 24th December, 2020, were clarified by the order dated 1st March, 2021, paras 4 to 7 whereof read as under:

"4. The concluding sentence in para 8, and para 9, of the order dated 24th December, 2020 read thus:

"8….. In these circumstances, once it is the admitted case of the parties that the contract was terminated on 11.12.2020, I am of the prima facie view that in order to balance equities at this stage, it would not be appropriate to permit respondent no. 1 to receive any amounts for the work done by petitioner till 11.12.2020 in any account other than the designated escrow account. Accordingly, respondent no. 1 is restrained from receiving any amounts from respondent nos. 2 and 3, payable for the project work carried out till 11.12.2020, in any account other than the escrow account.

9. It will, however, be open to the respondent no. 1 to receive payments for work done after 11.12.2020, in any account of its choice. Furthermore, since it has been stated by the learned counsel for respondent no.4 that presently there is no money left in the escrow account, I deem it necessary to direct that in case any

> amounts are received in the said escrow account hereafter, none of the parties shall be entitled to withdraw the same without obtaining the leave of this Court."

5. Plainly read, the afore-extracted sentences from the order dated 24th December, 2020 are clear and categorical. They refer only to payments received by Respondent No. 1. This Court has observed, and directed, that (i) it would not be appropriate for Respondent No. 1 to receive any amounts for the work done by petitioner till 11th December, 2020, in any account other than the escrow account, (ii) Respondent No. 1 is, therefore, restrained from receiving any amounts from Respondent Nos. 2 and 3, in respect of the work carried out till 11th December, 2020, in any account other than the escrow account, (iii) Respondent No. 1 would, however, be at liberty to receive payments for work done after 11.12.2020, in any account of its choice and (iv) no party would be entitled to withdraw amounts received in the escrow account, without obtaining leave of this Court.

6. Clearly, insofar as the receipt of monies is concerned, the afore-extracted sentences referred only to receipt of money by Respondent No. 1. They would not, on their face, cover receipt of money by Respondent No. 2 from Respondent No. 3.

7. It is clarified accordingly."

6. Today, Mr. Bhandari, learned counsel appearing for the petitioner submits that it would be appropriate if the arrangement as it exists today subsequent to the aforesaid order passed by this Court is allowed to continue, and the present petition be disposed of by referring the entire dispute to the Arbitral Tribunal, which is in the process of being constituted.

7. In the interregnum, it appears that consequent to invocation of arbitration by the petitioner, and response thereto by Respondent No.1, the petitioner and Respondent No.1 had nominated one arbitrator each, but that the said two learned arbitrators are unable to agree upon a Presiding Arbitrator. The learned arbitrators appointed by the petitioner and Respondent No. 1 are Hon'ble Mr. Justice D.K. Jain and Hon'ble Mr. Justice Anil R. Dave, both Hon'ble retired Judges of the Supreme Court of India. Mr. Bhandari submits that, as the learned Arbitrators have not been able to arrive at a consensus regarding the third learned Arbitrator to complete the constitution of the Arbitral Tribunal, this Court may proceed to appoint the third, presiding Arbitrator.

8. Mr. Nayar, learned Senior Counsel, has no objection to the appointment of a Presiding Arbitrator to arbitrate on the disputes between the parties, while reserving all rights, to his client, to challenge the legality of the arbitral proceedings as well as all aspects thereof, including the arbitrability of the disputes and the existence of the arbitration agreement.

9. Learned counsel for Respondent Nos. 2 and 3, too, does not oppose the suggestion of Mr. Bhandari, even while pointing out that they are not privy to the arbitration agreement, which is exclusively between the petitioner and Respondent No. 1.

10. Needless to say, the arbitral proceedings, as initially initiated, would be between the petitioner and Respondent No. 1. In case either of the parties seeks any orders, which may be prejudicial to the interest of Respondent Nos. 2 or 3, the said respondents would ordinarily have the right to be heard before any such orders are passed. That non-signatories to an arbitration agreement may, in appropriate cases, be included in arbitral proceedings, is also trite. Even so, the issue of whether any orders could be passed against Respondent Nos.2 and 3, in the wake of them not being privy to the arbitration agreement, may also be on the consideration. These, however, are aspects which would be best left to the discretion of the learned Arbitral Tribunal, should an eventuality arise. I do not propose to express any opinion on these aspects, which would be better addressed by the learned Arbitral Tribunal.

11. In view thereof, the present petition is disposed of in the following directions:

(i) This Court appoints Hon'ble Dr. Justice Arijit Pasayat (retired) as the Presiding Arbitrator, to complete the composition of the Arbitral Tribunal, which would arbitrate on the disputes between the parties. The contact details of the learned Arbitrator are as under:

B-98, Sector-27, Distt. Gautam Buddha Nagar,
Noida-201301 (Uttar Pradesh).

Phone No.9971090200 / 0120-2544098
E-mail: apasayat@gmail.com

(ii) The petitioner is permitted to file the present petition before the learned Arbitral Tribunal as an application under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Act"), to be considered and disposed of in accordance with law.

(iii) This Court does not express any opinion either on the existence of the validity of the arbitration agreement or the arbitrability of the disputes between the parties or, for that matter, on any other defence, which may be open to Respondent No. 1 before the learned Arbitral Tribunal. All issues and defences open to Respondent No. 1, are, therefore, kept open to be agitated and decided by the learned Arbitral Tribunal.

(iv) The interim arrangement existing as on date shall continue to remain in operation pending and subject to, however, the decision of the learned Arbitral Tribunal, taken under Section 17 of the 1996 Act.

(v) Needless to say, should the petitioner seek any direction, which may prejudice the interest of Respondent Nos. 2 and 3, the learned Arbitral Tribunal would consider whether the said respondents would be required to be heard before any such directions are issued.

12. The present petition is, accordingly, disposed of in the aforesaid directions, with no orders as to costs.

I.A. 1973/2021 and I.A. 3104/2021 (both under Section 151 CPC)

In view of the order passed in the petition, these applications are disposed of.

C.HARI SHANKAR, J

MARCH 9, 2021
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