



IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: July 05, 2022

+ ARB.P. 84/2022

SIEMENS HEALTHCARE PVT. LTD.

..... Petitioner

Through: Mr. Govind Rishi, Adv.

versus

DIRECTOR GENERAL ARMED FORCES MEDICAL
SERVICES

..... Respondent

Through: Mr. Harish V. Shankar, CGSC
with Ms. S. Bushra Kazim and
Mr. Srish Kumar Mishra, Adv.
for UOI

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This is a petition filed under Section 11 (6) of the Arbitration & Conciliation Act, 1996 (for short, 'A&C Act, 1996') with the following prayers:

"In view of the facts and circumstances stated hereinabove, it is most respectfully prayed that this Hon'ble Court may be pleased to:

(i) pass an order appointing a sole Arbitrator for adjudication of the issue between the parties in consonance with the Arbitration and Conciliation Act



*2013 (Amended up to date); and,
and
(ii) pass any other further orders/directions as this Hon'ble
Court may deem fit and proper in the facts and
circumstances of the present case.”*

2. It is a case wherein Siemens Healthcare Private Limited (hereinafter referred to as ‘petitioner’) is a company incorporated under the provisions of Companies Act, 2013 having its registered office at Unit No. at 9A, 9th Floor, North Tower, Godrej One, Pirojshanagar, Eastern Express Highway, Vikhroli (E) Mumbai-400079.

3. It is stated that, pursuant to the provisions of Section 188 of the Companies Act, 2013, Rules framed under Companies Act, and SEBI (Listing and Disclosure Requirements) Regulations, 2015, Siemens Limited (hereinafter referred to as ‘SL’) has transferred its healthcare business, with effect from July 01, 2016, to Siemens Healthcare Private Limited (SHPL) with Siemens Healthineers AG as the parent company, with Siemens Aktiengesellschaft (Siemens AG), Munich, Germany as is the ultimate parent company of Siemens Group of Companies.

4. On the other hand, the respondent herein is the Director General Armed Forces Medical Services. According to the facts in the present case, the respondent floated a tender for supply, installation, testing, commissioning & handing-over of Intensity Modulated (IMRT) & Image-Guided (IGRT) (hereinafter referred to as ‘Medical Equipment’s) for Army Hospital, Delhi & CH (SC), Pune on Turnkey Basis vide Tender dated May 19, 2010.



5. Consequently, the petitioner and its parent company being eligible bidder, fulfilling the tender document's eligibility criteria submitted its bid for supply & installation, maintenance contract for ARTISTE-IMRT/IGRT SYSTEM and SOMATOM SENSATION OPEN-CT STIMULATOR on June 09, 2010, along with Earnest Money Deposit from State Bank of India dated June 03, 2010, for ₹1,12,00,000/-.

6. The respondent upon evaluation of bids, on June 06, 2012, accepted the bid of the petitioner and issued acceptance of Tender. In terms of the Acceptance of Tender dated June 06, 2012, the date of delivery of equipments was 270 days from the date of handing over of the site. The relevant term of the Acceptance of Tender is reproduced as under:

“

8. Date of Delivery Within 270 days from the date of handing over of the site by the consignee. The delivery period includes the turnkey, installation and commissioning of the equipment, failing which standard liquidated damages clause would apply. The validity of LC will be for 90 days from the date of opening of irrevocable LC. Extension of DP will be granted after Imposing liquidated damages as per Para 16(0) of this Contract.

.....”

7. It is stated that the site work can only be started after securing statutory and the Atomic Energy Regulatory Board (AERB) approvals qua layout plan and authorization of import of equipment for which application was to be made by the respondent. Accordingly, the petitioner wrote to the respondent vide letter dated June 12, 2012, that



the time for getting the afore-mentioned approvals from regulatory authorities will be excluded from the period of 270 days for the completion of the Project.

8. It is further stated that the petitioner also informed the respondent regarding the change of the third-party (from Nucletron India Private Limited to Varian Medical Systems International India Private Limited) for the supply of Treating Planning Systems (TPS) along with details and quotations of new third-party partner i.e., Varian Medical Systems International India Private Limited.

9. That apart, it is stated that pursuant to the tender requirement, the petitioner also submitted Performance Bank Guarantee on July 16, 2012, having bank guarantee number 0999612BG9991508 for ₹1,44,05,060/- towards 10% of the order value of local accessories drawn on State Bank of India.

10. The petitioner also requested the respondent to release a Letter of Credit (hereinafter referred to as 'L/C') to meet the project completion deadline and to avoid any Liquidated Damages on account of delay. In addition, vide letter dated August 27, 2012, the petitioner submitted a comparison of Treating Planning Systems (TPS) to the respondent.

11. On August 21, 2012, the respondent sent a letter to the petitioner and instructed the petitioner to commence turnkey scope for the Delhi consignee. Accordingly, as per the requirement and instructions of the respondent, the petitioner started the development of a turnkey scope for both the consignee. The said fact was also communicated to the respondent vide letter dated October 08, 2012.



The petitioner also informed the respondent that the equipments are ready for dispatch, and the petitioner was only waiting for opening of the L/C. However, the respondent informed the petitioner that since alternate Treating Planning Systems (TPS) is from a new third party i.e., Varian Medical Systems International India Private Limited, the same is still under evaluation and L/C opening is not being processed.

12. Thereafter, the petitioner again requested confirmation on alternate Treating Planning Systems (TPS) for local accessories. However, despite several follow up the respondent kept mentioning through several letters including a letter dated November 21, 2012, and December 07, 2012, that alternate Treating Planning Systems (TPS) is still under evaluation with appropriate authority, and hence, L/C opening is accordingly pending.

13. Moreover, with respect to the turnkey work executed by the petitioner after receiving directions from the respondent, the respondent assured that the work progress is being monitored proportionately.

14. It is submitted that the petitioner kept acting as per the scope of work and requirement of the respondent and regularly updated the respondent regarding the work progress. However, the respondent kept delaying the issue of L/C on the pretext that alternate Treating Planning Systems (TPS) is still under evaluation with the appropriate authority. Thus, the L/C opening was not processed till January 16, 2014, when the petitioner finally received a letter from the respondent stating that the alternate Treating Planning Systems (TPS) is under consideration and also shared observation regarding the increased cost



of ₹10,41,199.00 of Treating Planning Systems (TPS) manufactured by Varian Medical Systems International India Private Limited against the cost offered by the previous third party i.e., Nucletron India Private Limited. In this regard, the respondent sought confirmation from the petitioner regarding the reduction of the value of the supply of ₹10,41,199.00/-.

15. The petitioner vide a letter dated January 17, 2014, agreed to reduce the price by ₹10,41,199.00 (per site) treating the situation as a special case, and requested the respondent for amendment of the order. It is submitted that pursuant to the aforesaid fact, a meeting was also held between the parties for a status update regarding the development process and for explaining the features of the software offered by the latest third-party vendor.

16. Furthermore, the petitioner also informed the respondent, the reason for the change of alternate Treating Planning Systems (TPS) and why the original Treating Planning Systems (TPS) offered could not be supplied as agreed earlier. However, the respondent sent a letter to the petitioner dated January 15, 2015, terminating the contract, overlooking the fact that the complete scope for the Delhi consignee was already complete. That apart, it is further submitted that the petitioner has invested a massive amount of money and time which the respondent did not even consider before terminating the contract.

17. It is submitted that the respondent vide letter dated May 12, 2016, rejected the claim of the petitioner on account of having no provision for reimbursement of any amount after acceptance of the termination order. In this regard, it is submitted that the said



termination was never accepted by the petitioner. Moreover, vide letter dated August 12, 2016, addressed to the Additional Secretary, the petitioner had sought time to discuss the matter in person.

18. Furthermore, it is submitted that the respondent is in unauthorized possession of the petitioner's equipment. That apart, due to the nature of the property that had been built, at the sole expense of the petitioner pursuant to the work order issued by the respondent, which is in possession of the respondent it is impossible for the petitioner to amortize the value of the property, however, after long follow up with the respondent, the petitioner issued a final invoice dated May 14, 2021, upon the respondent.

19. It is submitted that the respondent is under legal and contractual obligation to discharge the liability of ₹1,35,70,000/- along with the interest (@18%) on the outstanding amount. Accordingly, the petitioner through its Advocate issued a legal notice dated October 25, 2021, to discharge the afore-mentioned liability within a period of seven days, commencing from the acceptance of the notice. The said notice has been served upon the respondent on October 26, 2021, however, despite receiving the aforesaid legal notice, the respondent failed to discharge its legal and contractual obligation / liability within the prescribed period. In addition, no reply is received from the respondent till date. The act of the respondent is not on agreed terms and conditions of the Tender Document and is completely arbitrary and against the spirit of the Tender Document.

20. It is submitted, the relevant arbitration clause is in terms of Clause 22 of Schedule B of General Conditions of Contract (subject to



revised Arbitration Clauses, Annexure-1 of Invitation to Tender). The relevant text in this regard is reproduced as under:

“..... REVISED ARBITRATION CLAUSE

1. Existing clause 22 of Schedule B of general conditions or contract for contracts concluded by Min of Def is substituted as under:

2. In the event of any question, dispute or differences arising under this contract or interpretation of the terms of or in connection of or in connection with the contract (except as to any matter the decision of Which is specially provided for in this contract) the same shall be referred to the Sole Arbitration of Addi Secy (DP & S) or in the case of pertaining to Department f Defense production and Supplier) Addl Secy (DP & S)/ Add Secy (DOD) or of some person appointed by him. Each of the parties hereby specifically waives his right to raise any objection that the Arbitrator so appointed is a government servant. The award of the Arbitrator shall be final and binding on the parties to this contract.

a) If the arbitrator be the Addi Secy (DP & SJ/Addi Secy (DOD) (i) in the event of his being transferred or vacating his office by resignation or otherwise, it shall be lawful for his successor in office to either proceed with the reference himself or to appoint Another persons Arbitrator, or (ii) in the event of his being unable to no, unwilling to act, becoming incapable of acting for any reason or the award given by him having been set aside by a Court of law it shall be lawful for him to appoint another person as Arbitrator.

b) If the Arbitrator be a person appointed by the Addi Secy (DP & SJ/Addi Secy (DOD), in the event of his dying, neglecting or refusing to act or being unable to become or incapable to act, for any reason it shall be lawful for the Addi Secy (DP & SJ/Addi Secy (DOD), to remove such Arbitrator and to terminate his mandate and either to proceed with the reference himself or to



appoint another person as Arbitrator (in place of the outgoing Arbitration).

c) In every such case, it shall be lawful for the Addi Secy (DP&S)/Addi Secy (DOD) or the Arbitrator appointed in place of outgoing Arbitrator, as the case may be to act on the record of the proceedings as then taken in the Arbitrator or to commence the proceeding de-novo as he may in his discretion decide.

d) Upon every and any such reference, the assessment of the cost incidental to the reference and award respectively shall be at the discretion of the Arbitrator.

e) Subject As aforesaid, the Arbitration and Conciliation Act, 1996 and the rules thereunder and any statutory provisions there of for the time being in force shall be deemed to the Arbitration proceeding under this clause.

f) Unless determined otherwise the Arbitrator/Tribunal, the place of Arbitration shall be the city where the contract is concluded. The Arbitrator/Tribunal may however meet at any place it considers appropriate for conducting any of the Arbitration proceedings.”

21. I have heard the learned counsel for the parties. The issue is whether the prayer of the petitioner for appointment of an Arbitrator need to be allowed. It is a fact that the respondent has not filed any reply to the petition. For the purpose of considering an application of this nature, the relevant aspect that needs to be seen are: (i) whether there exists an arbitration agreement between the parties; (ii) whether disputes have arisen between them which require to be arbitrated, and (iii) whether the dispute on a *prima facie* view is not barred by limitation.

22. In this case, pursuant to the tender issued by the respondent for supply, installation, testing, commissioning & handing-over of



Intensity Modulated (IMRT) & Image-Guided (IGRT) for Army Hospital, Delhi & CH (SC), Pune on Trunkey Basis. The petitioner and its parent company being eligible had also bid for the same and on June 06, 2012, the respondent accepted the bid of the petitioner vide acceptance of tender (Document P-4: Budget Srl. No. 13/DGAFMS/DG 2C/Capital/FY 2012-2013).

23. Suffice to state that one of the conditions of the contract as mentioned in the acceptance of Tender (Documents P-4: Budget Srl. No. 13/DGAFMS/DG 2C/Capital/FY 2012-2013) clearly reads as under:

“

7.	<i>a) Condition of Contract</i>	<i>As contained in General Condition of Contract For contract concluded by Ministry of Defence (Revised Nov. 1989) (Schedule 'B' & 'C') will apply.</i>
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.....”

24. Clause 22 of the Schedule B of General Conditions of Contract concluded by the Ministry of Defence is an arbitration clause on which reliance has been placed by the petitioner is mentioned/reproduced above in paragraph 20.

25. It is on the strength of the aforesaid clause / (clause 22 of the Schedule B) that the present petition has been filed. The submission of the learned counsel for the petitioner is that the aforesaid clause stipulates the appointment of an Officer as Sole Arbitrator and in view of the judgment of the Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd., Arbitration***



Application No.32/2019, the respondent cannot appoint its Officer as an Arbitrator. This stand of the petitioner is not contested by the counsel for the respondent.

26. Mr. Harish V. Shankar learned CGSC, appearing for the respondent has also not contested the existence of the arbitration clause in the contract. His only plea is that the termination of the contract has been affected in terms of the letter dated January 15, 2015, and no action has been taken by the petitioner except writing two letters in the year 2016 and 2021 respectively. He relied on the judgment of the Supreme Court in *Bharat Sanchar Nigam Limited & Anr. vs. Nortel Networks India Private Limited, (2021) 5 SCC 738* in support of his submission that the invocation is barred by time.

27. I agree with the submission of Mr. Shankar inasmuch as the petitioner has not contested the termination till it had sent the letter dated August 12, 2016, wherein the petitioner has requested the respondent for a meeting in person to discuss the matter. Thereafter, there was a lull, as no follow-up was made by the petitioner till May 14, 2021, when the petitioner issued a final invoice (Invoice No. DL3107000184) dated May 14, 2021, to the respondent. The said invoice has not been paid, which resulted in the petitioner through its Advocate issuing a legal notice dated October 25, 2021, calling upon the respondent to discharge its liability.

28. The aforesaid facts clearly demonstrate the cause of action if any, had arisen to the petitioner in the year 2015, when the respondent had terminated the contract. The reliance placed by the counsel for the petitioner on certain communications exchanged between the parties



till 2021 to state that the invocation is within the limitation is not appealing.

29. The Supreme Court in the case of ***Bharat Sanchar Nigam Limited & Anr. vs. Nortel Networks India Private Limited (supra)*** has held as under:-

“48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, when the claims made by Nortel were rejected by BSNL. The respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions.

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xxxx

xxxx

53. Conclusion

Accordingly, we hold that:

53.1 The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation



Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator;

It has been suggested that the Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings;

53.2 In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.”

30. Noting the above position of law, the petitioner having not invoked the arbitration clause within three years from the date of the termination of the contract i.e., till January 15, 2018, it cannot now seek an appointment of Arbitrator for adjudication of termination letter. The petition is dismissed.

31. There is one aspect which requires an observation, that is, it is the case of the petitioner that the equipment is in possession of the respondent. The relevant averments in the petition and the legal notice are as under:

Paragraph 10 of the petition:

“10..... It is further to be submitted that to date the Respondent is in unauthorized possession of the Petitioner's equipment.”

Paragraph 9 of the legal notice:

“9.It is further to be submitted that till date, you, the Addressee, are in unauthorized possession of Our Client's equipment's.”



32. Unfortunately, in the absence of any reply to the legal notice dated October 25, 2021 and reply to the petition, this stand of the petitioner is neither confirmed nor denied by the respondent. Even Mr. Shankar could not throw any light on this aspect. Appropriate shall be for the respondent to send a reply on this aspect to the petitioner within four weeks. Even after the receipt of reply, any dispute survives the parties are at liberty to seek such remedy as available in accordance with law.

V. KAMESWAR RAO, J

JULY 05, 2022/ds



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