

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

% *Decided on: 17th January, 2023*

+ **OMP (T) (COMM)52/2019**

**COUNCIL OF SCIENTIFIC AND INDUSTRIAL
RESEARCH**

having its registered office at
Anusandhan Bhawan, 2, Rafi Marg,
New Delhi- 110001.

..... Petitioner

Through: Mr. Jayesh Unnikrishnan and Mr.
Abhinav Hansaria, Advocates.

versus

M/S VIRTUAL –WIRE TECHNOLOGIES PVT. LTD.

having its registered office at B-1
New Adarsh Apartments, Sector-10,
Dwarka, New Delhi- 110075.

Also at:

3rd Floor, 125/1,
Shahpurjat, New Delhi 110049.

..... Respondent

Through: Ms. Shikha Sapra, Advocate.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA
J U D G E M E N T

NEENA BANSAL KRISHNA, J.

1. A Petition under Section 14(1) (a) and 15(2) of the Arbitration & Conciliation Act (*hereinafter referred to as "the Act"*), 1996 has been filed by the petitioner for appointment of an Arbitrator.

2. It is submitted that the petitioner is a Society registered under the Societies Registration Act, 1860. The Government of India initiated a research and development programme namely "*New Millennium Indian Technology Leadership Initiative*" (NMITLI) in public - private partnership mode in 2000-2001. The responsibility of conceptualizing, evolving and implementing the program was assigned to the Petitioner. The scheme envisaged synergistic networking of publicly funded institutions, academia and private industry. The Petitioner received various proposals from different entities who wanted to collaborate under the NMITLI. The proposal submitted by the Respondent for the "*development of chipset for wireless sensor networks based on ultra-wide band technology*" (hereinafter referred to as "Project") was admitted by the petitioner who agreed to provide financial support to the Respondent in the form of a soft loan in a sum of Rs. 4,60,00,000/- for the purpose of development of the Project. An Agreement dated 07th March, 2007 was accordingly, entered into between the parties. The loan amounts were disbursed from time to time and a total sum of Rs. 1,08,89,000/- was utilized and a sum of Rs. 19,78,000/- was unutilized and was in possession of the petitioner.

3. In terms of Agreement, the first installment for repayment of loan amount was to be made on 01st August, 2010 and the entire loan amount was payable in ten equal installments, last being payable on 01st August, 2019. The respondent failed to make the repayments of loan despite repeated reminders by the petitioner and it acted in complete breach of the Agreement. According to Clause 2.6 of the Agreement, default in

payment of two successive installments by the respondent entitled the petitioner to recall the entire loan amount.

4. A Legal Notice dated 20th December, 2013 was therefore issued by the petitioner, where the respondent was requested to repay the entire loan amount within fifteen days, failing which the matter would be referred to Arbitration in terms of Clause 15 of the Agreement. Since, no response was received by the petitioner to the Legal Notice, it was constrained to refer the matter to Arbitration.

5. In terms of Clause 15 of the Agreement, the Monitoring Committee comprising of three members, was to act as the Arbitral Tribunal. In furtherance of the same, the letters dated 21st February, 2014 and 26th May, 2014 were sent to the three members of the Monitoring Committee. Prof. S.C. Sahasrabudhe and Dr. V.S. Ramamurthy gave confirmation vide letters of acceptance dated 05th March, 2014 and 30th April, 2014 respectively. Prof. V.U. Reddy gave his confirmation vide email dated 26th May, 2014. After the nomination was accepted by the Monitoring Committee, the Arbitral Tribunal was formed in May, 2014 consisting of aforementioned three arbitrators.

6. The presiding arbitrator suggested that the arbitration proceedings may be commenced at Delhi and confirmed the venue as Delhi vide his letter dated 28th May, 2018. The arbitration was to be held in Delhi. However, Prof. V.U. Reddy vide his email dated 29th May, 2018 expressed his inability to attend the proceedings in Delhi. No response was received from Prof. S.C. Sahasrabudhe. In view of the aforesaid circumstances, the Monitoring Committee is *de facto* unable to perform its functions as Arbitral Tribunal. Hence, a prayer is made for

appointment of the Sole Arbitrator for adjudication of the disputes between the parties.

7. The **respondent in its reply** took a preliminary objection that the petition is hopelessly time barred. As per the petitioner itself the dispute arose between them in 2010 when the respondent failed to repay the first installment of loan. Even though this fact is denied but assuming that the assertions of the petitioner are correct, the present petition for appointment of arbitrator has been filed after nine long years. It is, therefore, barred by time.

8. It is further asserted that the petitioner cannot unilaterally file a petition on the premise that one of the arbitrator has withdrawn from the office of arbitration. The petitioner cannot arbitrarily invoke arbitration without any intimation to the respondent. Section 21 of the Act clearly stipulates that unless otherwise agreed between the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration, is received by the respondent. However, no such request was ever sent by the petitioner to the respondent in regard to initiation of arbitration, place of arbitration or appointment of the arbitrators. Even if for the sake of arguments, it is accepted that the petitioner had initiated the arbitration process, but it was incumbent upon the petitioner to have intimated the respondent about the same. The petitioner has failed to explain the delay from 2014 to 2018, the period from when the arbitrators were appointed and till they refused. The petitioner cannot wake up from its slumber and approach this Court. The limitation for reappointment has to be the same as for seeking appointment under Section 11 of the Act.

9. It is further submitted that though Section 15(2) of the Act provides for termination of the mandate of the arbitrator, the substitute arbitrator can be appointed according to the Rules which are applicable to the appointment of the arbitrator being replaced. This is not so as the petitioner is seeking the appointment of the Sole Arbitrator instead of the Monitoring Committee comprising of three experts which was intended to be the Arbitral Tribunal. It is claimed that the present petition is malafide and is liable to be dismissed.

10. On **merits**, all the averments made in the petition are denied and it is submitted that the petition may be dismissed.

11. **Submissions heard.**

12. It is not denied that the respondent had entered into an Agreement dated 07th March, 2007 with the petitioner for disbursement of loan as part of the NMITLI Scheme on public - private partnership. Clause 15 of the Agreement provided for the referral of the disputes to arbitration, which reads as under :

“Clause 15. Arbitration:

Except, as herein before provided any dispute arising out of this Agreement or relating to its interpretation, the same shall be referred to the Monitoring Committee comprising of three members. All the three members of Monitoring Committee shall act as the Arbitral Tribunal and the decision of the majority shall be final and binding on all the parties. The venue of the arbitration shall be such places as may be fixed by

such arbitral tribunal and the arbitration proceedings shall take place under the Indian Arbitration and Conciliation Act 1996. Each party shall bear and pay its own cost of the arbitration proceedings unless the arbitrator otherwise decides in the award. (or shall be shared equally).

The provision of this clause shall not become inoperative notwithstanding this Agreement expires or ceases to exist or is terminated or revoked.”

I. Unilateral Appointment of Arbitral Tribunal by the Petitioner:

13. The first objection taken on behalf of the respondent is that the petitioner unilaterally constituted the Tribunal without giving any intimation about the constitution of the Tribunal to the respondent.

14. This contention may not hold much merit as the petitioner has relied upon the Legal Notice dated 20th December, 2013, which was duly issued by the petitioner asking for initiation of arbitration proceedings by the Arbitral Tribunal. The respondent has conveniently neither responded nor tried to contact the petitioner thereafter either in regard to the honouring of the Contract or for repayment of the loans.

15. The objection of the respondent that it was not informed about the constitution of Arbitral Tribunal is not tenable in view of Clause 15 of the Agreement which itself provided that the Monitoring Committee would be the Arbitral Tribunal for the disputes between the parties. The Notice of Invocation of Arbitration was duly served upon the Respondent

and it cannot now assert that he had no information about the constitution of the Arbitral Tribunal. It was for the Arbitral Tribunal which had been duly constituted to have initiated the arbitral proceedings and given Notice to the respondent. It is the Arbitral Tribunal which has failed to act or to initiate the arbitral proceedings.

II. Constitution of Arbitral Tribunal comprising of Three Members:

16. The second objection taken on behalf of the respondent is that according to arbitration Clause 15, the Monitoring Committee comprising of three experts was to act as the Arbitral Tribunal. The petitioner by way of present petition is seeking appointment of Sole Arbitrator which is contradictory to the terms of the Agreement. This aspect was also considered in Union of India (UOI) vs. Singh Builders Syndicate (2009) 4 SCC 523. The High Court rejected the contention on behalf of the Government that the Court was not vested with any powers to appoint a Sole Arbitrator in distinction to the Arbitration Agreement which provided for the Tribunal of three members. The Apex Court upheld the order of this Court appointing a Sole Arbitrator by observing that the order of the High Court terminating the mandate of the Arbitral Tribunal was flawless and the appointment of the Sole Arbitrator was upheld.

17. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties' choice. In North Eastern Railway vs. Tripple Engineering Works, AIR 2014 SC 3506 the Apex Court

observed that in the Government Contracts where Senior Officers like Managing Directors are nominated to Arbitral Tribunal to act as a Sole Arbitrator, if the persons/officers so nominated are unable to devote time or become incapable of acting as Arbitrators, then the principle of default procedure at least in the case where Government has assumed the role of appointment of Arbitrator to itself, has to be applied and the Court may step in to appoint the Arbitrator by keeping aside the procedure which is agreed to between the parties and pass appropriate orders. There can be no hard-and-fast rule, but there should be a conscious effort to ensure that the Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades. In the factual background of delay of more than a decade, it was held that the appointment of a Sole Arbitrator instead of constituting an Arbitral Tribunal comprising of three Members, does not call for interference and must be upheld.

18. The facts in the present case are quite similar. Even though the Tribunal was constituted way back in 2014 by the petitioner, it has practically not commenced any arbitration till date and the arbitral Tribunal members having expressed their difficulty to hold meetings at New Delhi, it amounts to *de facto* and *de jure* incapacity of the Tribunal entitling the petitioner to seek appointment of the Sole Arbitrator.

III. Limitation:

19. The next objection taken on behalf of the respondent is that the Claim is barred by Limitation. According to the petitioner, the disputes had arisen in the year 2010 while the present petition had been filed only in 2019 i.e. after about ten years and is barred by time. In this regard it

may be observed that the disputes had purportedly arisen in 2010. The Legal Notice for invocation of arbitration had been given on 20th December, 2013. Indisputably the Legal Notice of Invocation dated 20th December, 2013 was given by the petitioner to the respondent to repay the entire loan amount within fifteen days, failing which the matter would be referred to Arbitration in terms of Clause 15 of the Agreement. Prof. S.C. Sahasrabudhe and Dr. V.S. Ramamurthy gave confirmation vide letters of acceptance dated 05th March, 2014 and 30th April, 2014 respectively. Prof. V.U. Reddy gave his confirmation vide email dated 26th May, 2014. The presiding Arbitrator vide his letter dated 28th May, 2018 suggested that the arbitral proceedings may be commenced at Delhi, which was not acceptable to Prof. V.U. Reddy and Prof. S.C. Sahasrabudhe. From this, it is evident that the petitioner had acted with promptitude and within the period of limitation, in constituting the Arbitral Tribunal in terms of Clause 15 of the Agreement, but it is the absolute inaction on the part of the arbitrators to act to commence the arbitration proceedings in an expeditious manner as it was only in 2018 that the Presiding Arbitrator issued letter for holding the arbitration proceedings in Delhi.

20. In terms of Section 21 of the Act, the date of commencement of the arbitration is the date on which Notice for invocation of arbitration is given. Moreover, the petitioner has averred that the tenure for repayment of loan was to commence in 2010 and the last instalment was payable in 2019. Therefore, it cannot be out rightly said that this claim is barred by limitation.

21. In the case of *Vidya Drolia vs. Durga Construction* (2021) 2 SCC 1, it has been held that where the issue of limitation involves detailed enquiry, the same may be left to be undertaken by the Arbitrator. The respondent is therefore at liberty to raise his objection about the limitation before the learned Arbitrator.

IV. *Defacto/ Dejure incapacity of the Arbitral Tribunal:*

22. The aforementioned facts clearly reflect the inability of the Tribunal to have effectively undertaken the arbitration despite its constitution in 2014. Further, the two members have expressed their difficulty in joining the arbitral proceedings at Delhi as suggested by the Presiding arbitrator. In the circumstances *de facto/ de jure* incapacity of the Arbitral Tribunal it writ large. The petitioner is held entitled to seek appointment of the sole arbitrator.

23. In view of the discussion, the petition is allowed with the following directions:

- a. Keeping in consideration, the submission of the parties, that an Arbitrator be appointed to adjudicate the disputes between the parties, Ms. Nisha Bhambhani, Advocate (Mobile No.9811042721) is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.
- b. At the suggestion of learned Counsel for the parties, it is directed that the arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi.

- c. The learned Arbitrator is requested to make a declaration in terms of Section 12 of the Act prior to entering upon the reference.
 - d. The remuneration of the learned Arbitrator will be computed in terms of Schedule IV of the Act, or as mutually consented by the parties and the Arbitrator.
 - e. A copy of this Order be sent by the registry to the learned Arbitrator for information.
24. The petition is disposed of accordingly.

(NEENA BANSAL KRISHNA)
JUDGE

JANUARY 17, 2023

va

नस्यमेव जयते