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

+ **ARB.P. 196/2024**

TELECOMMUNICATIONS CONSULTANTS INDIA LTD

..... Petitioner

Through: Mr.Manish Sharma, Mr.A.S.Anand,
Mr.Ninad Dogra, Ms.Adya Rao and
Mr.Antu Das, Advts.

versus

GOVT OF NCT OF DELHI & ANR.

..... Respondents

Through: Mr.Mohit Bhardwaj, Adv. for R-1.
Mr.Vibhor Garg and Mr.Keshav
Tiwari, Advts. for R-2.
Mr.Abhimanyu Garg (through VC)

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

22.04.2024

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1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of a Sole Arbitrator for adjudication of disputes having arisen between the parties with two Master Service Agreements both dated 03.01.2020 who are entered into between the parties. Both agreements contain the arbitration clause with certain steps to be exhausted before resorting to arbitration. The steps include mutual talks, mediation and appointment of an expert and settlement through the Administrative Mechanism for Resolution of CPSC Disputes (AMRC).
2. Learned counsel for the petitioner submits that the petitioner has



repeatedly offered the settlement of disputes through mutual talks, mediation and through AMRC. Learned counsel submits that the expert could not have been appointed as the respondent did not come forward for mediation. Learned counsel further submits that prior to this petition, the petitioner had also filed a petition under Section 9 bearing O.M.P.(I)(COMM) 370/2023.

3. Learned counsel submits that in this proceeding, the respondent though offered to go for the mediation but did not come forward except for the communication dated 20.12.2023. Learned counsel submits that this communication was only after the notice under Section 21 of the Act dated 18.11.2023 was sent by the petitioner. Learned counsel further submits that even communication dated 20.12.2023 was sent only by the Transport Department but respondent No.2 DTC did not respond.
4. Learned counsel submitted that vide notice/communication dated 04.01.2024, the petitioner informed the respondent that since the arbitration has already been invoked, therefore, the request of the Transport Department of Sh. Manoj Kumar as a mediator is not accepted. However, the petitioner suggested the three names which include two former judges of the High Court to be appointed as Sole Arbitrators. Learned counsel submits that the respondent did not respond to.
5. Learned counsel submits that there is a claim of around 27 crores. It has further been submitted that it was a very important and sensitive matter whereby the petitioner was required to design, commission and install the panic buttons and CCTV in the DTC buses.
6. Pursuance to the issuance of the notice to the respondent vide order dated 27.02.2024, Mr. Manoj Kumar, retired I.A.S. was appointed as a



Mediator by this court. The mediator was also given the liberty to take the help of an expert from IIT Delhi. The mediator has sent his report in a sealed cover. The mediator's report has duly been taken on record. Copy of the same is supplied to the learned counsel for the parties. Perusal of the report indicates that the parties could not reach on an amicable settlement. The report also indicates that the transport department has suggested the name of Mr. Girish Aggarwal, IIT Delhi and Ms. Deepti Jain, IIT Delhi. However, the parties could not agree on the name of the experts and their scope of work. Learned counsel for the petitioner submits that in these circumstances, there is no possibility of the matter being resolved amicably or with the help of experts, therefore, an arbitrator may be appointed.

7. Learned counsels for the respondents submit that (clause 2.9) of the Master Service Agreement dated 03.01.2020 specifically provides that if mediation does not succeed, then the matter should be referred to the experts for advice on the issue. Mr. Om Dhule, (Deputy Commissioner, Transport) submits they have already written to the department for the appointment of an expert and therefore the arbitrator may not be appointed and the report of the Expert Committee may be awaited.
8. The execution of the Master Service Agreement dated 03.01.2020 is not in dispute. The factum of the dispute between the parties is also admitted. However, the dispute is regarding the scope of clause 2.9. which is reproduced as under:

2.9 Dispute Resolution/ Arbitration

- i. The Agreement shall be governed by and construed in accordance with the laws of India, without giving effect*



- to conflict of law rules.*
- ii. Any dispute arising out of or in connection with Agreement or the SLA shall in the first instance be dealt with in accordance with the escalation procedure mutually agreed between the Department and the Implementation agency.*
 - iii. In case the escalations do not help in resolution of the problem within 3 (three) weeks of escalation, both the parties should agree on a mediator for communication between the two parties. The process of the mediation would be as follows:*
 - iv. Aggrieved party should refer the dispute to the identified mediator in writing, with a copy to the other party. Such a reference should contain a description of the nature of the dispute, the quantum in dispute (if any) and the relief or remedy sought suitable*
 - v. The mediator Shall use his best endeavours to conclude the mediation within 30 days of the appointment*
 - vi. If no resolution can be reached through mutual discussion or mediation then the matter should be referred to experts for advising on the issue.*
 - vii. In case the mediation does not help in resolution and it requires expertise to understand an issue, a neutral panel of 3 experts, agreeable to both parties should be constituted. The process of the expert advisory would be as follows.*
 - viii. Aggrieved party should write to the other party on the failure of previous alternate dispute resolution processes within the timeframe and requesting for expert advisory. This is to be sent with a copy to the mediator*
 - ix. Both parties should thereafter agree on the panel of expertise who are well conversant with the issue under dispute*
 - x. The expert panel shall use his best endeavours to provide a neutral position on the issue.*
 - xi. If no resolution can be reached through the above means within 30 (thirty) days, then the matter should be referred to Arbitration. Any dispute or difference whatsoever arising between the parties to this Agreement out of or relating to*



the construction, meaning, scope, operation or effect of this Agreement or the validity of the breach thereof shall be referred to a sole. Arbitrator to be appointed by mutual consent of both the parties herein. If the parties cannot agree on the appointment of the Arbitrator within a period of one month from the notification by one party to the other of existence of such dispute, then the Arbitrator shall be appointed by the High Court of New Delhi, India. The provisions of the Arbitration and Conciliation Act, 1996 will be applicable and the award made there under shall be final and binding upon the parties hereto, subject to legal remedies available under the law. Such differences shall be deemed to be a submission to arbitration under the Indian Arbitration and Conciliation Act, 1996, or of any modifications, Rules or re-enactments thereof. The Arbitration proceedings will be held at Delhi, India. Any legal dispute will come under the sole jurisdiction of New Delhi, India. AMRCD clause will be applicable for Govt. Departments.

- xii. **Compliance with laws:** *Each party will comply with all applicable export and import laws and regulations.*
- xiii. **Risk of Loss:** *For each hardware item, Implementation Agency bears the risk of loss or damage up to the time it is delivered to the Implementation/Department-designated carrier for shipment to Department or Department's designated location.*
- xiv. **Third party components:** *Implementation Agency will provide all third-party components solely on a pass-through basis in accordance with the relevant third-party terms & conditions.*

9. In accordance with the clause 2.9, it is not disputed that the escalation procedure was duly followed by the parties. It is also not disputed that the matter was referred to the mediator.

10. Perusal of clause 2.9 makes it clear that if the mediator is unable to reach to resolution through mutual discussion or mediation, then the matter



should be referred to an expert for advise on the issue. It further provides that in case the mediation does not help in resolution and it requires experts, a neutral panel of 3 experts, agreeable to both parties should be constituted. Thus, the perusal of sub-clauses (vi) and (vii) of clause 2.9 makes it clear that the neutral panel of 3 experts has to be constituted with the agreement of both the parties. The report of the learned mediator reveals that the parties could not reach on any settlement on the panel of experts.

11. The scope of jurisdiction under Section 11 of the Arbitration and Conciliation Act while making the reference is no longer *res integra*. The courts have time and again enumerated that the jurisdiction of the Court under Section 11 of the Act is limited to the extent that the court is only required to see whether there is an arbitration agreement and whether an arbitrable dispute exists between the parties. Reliance can be placed upon ***M/S Duro Felguera, S.A. vs Gangavaram Port Limited*** (2017) 9 SCC 729.
12. The clauses in the agreement are sacrosanct and cannot be done away with. However, at the same time, the clauses have to be read in a pragmatic manner and not in a manner that frustrates the purpose. The resolution of the dispute through mutual discussion or with the help of experts is in fact to give a party an opportunity to resolve their dispute, if possible, even before entering into the arbitration. However, the background of this case shows that the parties have failed to reach any settlement in the escalation procedure as well as before the learned mediator.
13. It is pertinent to mention here that even the name of the mediator initially



proposed by the respondents was opposed by the petitioner, but this court posing the faith on the learned mediator, appointed the mediator. During the mediation, the parties failed to reach on any agreement on the panel of experts.

14. There is no doubt that the dispute in the present case is technical and commercial in nature and the parties will be at liberty to move an appropriate application before the learned arbitrator for taking help of an expert. The claim amount is around Rs.40 crores.
15. In the facts and circumstances, the present petition is disposed of with the following directions:-
 - i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.
 - ii) Mr.Justice Vipin Sanghi (Mob. No.9871300037) is appointed as the sole Arbitrator to adjudicate the disputes between the parties.
 - iii) The arbitration will be held under the aegis of the DIAC. The remuneration of the learned Arbitrator shall be in terms of Schedule IV of the A&C Act or as the parties may agree.
 - iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
 - v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.



- vi) The parties shall approach the learned arbitrator within two weeks from today.
16. The parties undertake that they shall clear the dues of the learned arbitrator within four weeks.
17. The present petition is disposed of in the above terms.

DINESH KUMAR SHARMA, J

APRIL 22, 2024

rb/ak..