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

+ ARB.P. 1030/2023

M/S PRIMATEL FIBCOM LIMITED

..... Petitioner

Through: Mr. Anuj Kumar and Mr. Abhijeet
Kr. Pandey, Advocates.

versus

ITI LIMITED

..... Respondent

Through: Ms. Rashmi Malhotra, Mr. Shalinder
Saini and Mr. Arnab Chawla,
Advocates.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

24.01.2024

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At the outset, learned counsel appearing for the parties are informed that the spouse of the undersigned has a small shareholding in M/s Sterlite Technologies Limited, which company, though not a party to the present proceedings, is noticed as being one of the contracting parties to the Tripartite Supply Agreement dated 24.07.2018 ('Tripartite Supply Agreement'). All counsel submit, that they have no objection to the undersigned hearing and deciding the present petition.

2. By way of the present petition under section 11(5) of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner seeks appointment of a Sole Arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondents from the Tripartite Supply Agreement.



3. Mr Anuj Kumar, learned counsel for the petitioner has drawn the attention of this court to clause 7.3 of the Tripartite Supply Agreement which comprises the arbitration agreement; and contemplates reference of disputes between the parties to arbitration in accordance with the A&C Act; with the 'seat' and 'venue' of arbitration being at New Delhi; further specifying that the parties shall be entitled to seek interim reliefs from the courts at New Delhi.
4. For completeness, it may be recorded that a separate territorial jurisdiction provision is also contained in clause 7.4 of the Tripartite Supply Agreement, which subjects the contract between the parties to the jurisdiction of competent courts at Delhi.
5. The record shows that the petitioner had issued to the respondent notice dated 26.05.2023, setting-out its claims and also invoking arbitration; apart from nominating its arbitrator; and calling upon the respondent to concur in such nomination; to which the respondent did not send a reply.
6. Notice on this petition was issued on 06.10.2023; consequent to which the respondent has filed its reply-affidavit dated 04.11.2023; and the petitioner has filed its rejoinder dated 22.01.2024.
7. Furthermore, in compliance of order dated 16.11.2023, the respondent has also filed affidavit dated 15.12.2023 in the context of producing the original Tripartite Supply Agreement, in which affidavit the respondent has said that the original of the said document is not traceable, and could therefore not be produced. Ms. Rashmi Malhotra, learned counsel appearing for the respondent however submits, that she has instructions to say, that the respondent does not dispute the



existence or the terms of the Tripartite Supply Agreement, a copy of which has been filed by the petitioner.

8. In its reply dated 04.11.2023 filed to the present petition, the respondent has principally raised the objection that the petition is bad for non-joinder of necessary parties, inasmuch as, according to the respondent, as per clause 2.2 of the Tripartite Supply Agreement the terms of payment were on a back-to-back basis, that is to say, the respondent was to disburse payment to the petitioner from an Escrow Account *only* upon receipt of payment from Bharat Sanchar Nigam Limited ('BSNL'). It is accordingly contended that since BSNL has not been made a party-respondent in the present proceedings, the petition is not maintainable for non-joinder of necessary parties.
9. Ms. Malhotra has also placed reliance on Commercial Understanding dated 24.08.2017 signed between the petitioner and the respondent, in particular clause 1.4 thereof, to stress that the petitioner was only entitled to receive payment from the respondent on the aforesaid back-to-back basis.
10. In response, Mr. Anuj Kumar, learned counsel appearing for the petitioner submits, that the petitioner has no claim against BSNL as is seen *inter-alia* from invocation notice dated 26.05.2023 issued by the petitioner to the respondent; and therefore, there is no reason for the petitioner to implead BSNL as party-respondent to the present proceedings. He submits that this has also been explained in rejoinder dated 22.01.2024 filed on behalf of the petitioner in the matter.
11. Upon a conspectus of the averments contained in the petition, the claims for which reference to arbitration is being sought, and the



submissions made, this court is of the view that non-joinder of BSNL is not fatal to the present petition. This court is further satisfied, that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties, as set-out *inter-alia* in invocation notice dated 26.05.2023, do not appear *ex-facie* to be non-arbitrable.

12. Though the arbitration clause contemplates that the parties would jointly appoint a sole arbitrator, failing which each party would nominate one arbitrator, who would then appoint the third presiding arbitrator, learned counsel for the parties jointly request that this court may appoint a sole arbitrator in the matter; and then refer the matter for arbitration under the aegis of the Delhi International Arbitration Centre, New Delhi ('DIAC'), keeping all their respective factual and legal contentions open.
13. Accordingly, the present petition is allowed and **Hon'ble Mr. Justice Sanjib Banerjee**, former Chief Justice of the Meghalaya High Court (Cellphone No.: +919836268256) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties; with arbitration proceedings to be conducted under the aegis of the DIAC, in accordance with applicable rules.
14. The learned Sole Arbitrator would furnish to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.



15. The learned Arbitrator shall then proceed with the arbitral proceedings in accordance with the rules and regulations of DIAC and subject to arbitrator's fee and arbitration costs, as may be applicable.
16. All rights and contentions of the parties in relation to the claims/counter-claims, including the contentions raised in the reply filed in the present proceedings, in particular the contention as to non-joinder of necessary parties, are kept open, to be decided by the learned Sole Arbitrator on merits, in accordance with law.
17. A copy of this order be communicated *forthwith* to the Co-ordinator, DIAC, for information and compliance.
18. A copy of this order be sent by e-mail to the learned Sole Arbitrator, as also to learned counsel for the parties.
19. The petition stands disposed-of in the above terms.
20. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

JANUARY 24, 2024

V.Rawat