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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: 13th March, 2024***+ **ARB.P. 1342/2023****MILLENNIUM AUTOMATION PRIVATE LIMITED..... Petitioner****Through: Counsel for petitioner.****versus****HFCL LIMITED (FONNALLY HIMACHAL FUTURISTIC
COMMUNICATIONS LTD) Respondent****Through: Mr. Zeeshan Hashmi, Mr. Ankit
Parashar and Mr. Joshita Mohanty,
Advocates.****CORAM:****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)**

1. A petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 has been filed on behalf of the petitioner.
2. It is submitted that in the year 2018, Bharat Sanchar Nigam Limited (BSNL) vide Purchase/Work Orders under GOFNMS Tract-I Project under Tender Ref. BSNL PO NO.CT/PO/14/2018 dated 19.07.2018 awarded a composite Work Order to respondent for procurement, supply, installation, testing and maintenance of GIS based Optical Fibre Cable Network Management Systems (GOFNMS), to be used by Defence Forces.
3. The respondent sub-contracted the three sub-projects namely: (i) 'Precision Air Conditioner' (PAC-Project), (ii) 'Electrical Integration Work



at Communication Nodes' (Electrical-Project) and (iii) 'Uninterruptible Power Supply Project' (UPS-Project) to the petitioner vide separate composite Work Order/ Purchase Orders for each of the said three sub-projects. The petitioner successfully and timely completed all the awarded works under the three sub-projects.

4. The respondent paid and released part of the invoiced amount for each of the sub-project and unjustifiably withheld the remaining part of the payable amount for each sub-project illegally and arbitrarily. Cumulatively, a total sum of Rs.2,58,52,855/- has been withheld under the three sub-projects by the respondent arbitrarily on which interest @ 18% per annum w.e.f. 31.03.2020 amounting to Rs.1,66,88,903/- up to 31.10.2023 is payable.

5. The petitioner served a Demand Notice dated 20.05.2023 claiming a total sum of Rs.3,68,52,217/- along with interest. The respondent vide its reply dated 09.06.2023 refuted the entire payment of the petitioner for the demanded amount.

6. The petitioner thus, issued an *Invocation Notice dated 08.06.2023* for referring the disputes to Arbitration in the light of Arbitration clause in all the three sub-contracts and suggested three names for appointment of the Arbitrator. *The respondent vide its Reply dated 12.06.2023* in suppression of the three names, proposed alternate names to be appointed as the Sole Arbitrator. *Vide rejoinder dated 24.06.2023* both the parties agreed to one name, but the Ld. Sole Arbitrator vide email response dated 10.07.2023 expressed his inability to take up the appointment.

7. The petitioner then vide letter dated 05.07.2023 requested the respondent to propose additional names. The respondent suggested two



additional names of the retired judges of the High Court and upon deliberation via email dated 13.07.2023, the petitioner agreed for the appointment of one retired Hon'ble Judge of Delhi High Court. However, the respondent failed to take requisite steps for formal appointment of the learned Sole Arbitrator which necessitated the petitioner to send letter dated 23.08.2023 to the learned Sole Arbitrator informing him of the consent for his appointment and to enter reference. However, because of the email dated 24.08.2023 of the respondent, the whole matter came to a standstill. Hence, the present petition has been filed for appointment of the Arbitrator.

8. A *formal Reply* has been filed on behalf of the respondent, wherein the objections are taken that the petitioner has sought appointment of the Arbitrator in respect of 74 Purchase Orders issued at different times for different part of the Projects pertaining to different works. The petitioner has failed to disclose and specify under which of these Purchase Orders the petitioner is seeking reference of the disputes to arbitration. He has also failed to specify which dispute under which Purchase Order is to be referred to arbitration.

9. The other objection is that the Purchase Orders attached to the petition, *do not contain any arbitration clause*.

10. The petitioner has further submitted that the Purchase Orders which have been annexed with the petition *prima facie are barred by limitation* except few Purchase Orders. Further, the Notice dated 08.06.2023 under Section 21 of the Arbitration & Conciliation Act seeks reference of disputes to arbitration, but it neither refers to the arbitration clause nor does it refer to the specific Purchase Orders under which the disputes are sought to be raised. It is asserted that Section 21 Notice does not contain the essential



constituents. Furthermore, the amounts specified in the Legal Notice and the Notice of Invocation are different and it is absolutely unclear which dispute is sought to be referred and for what amount. There is a mismatch between list of Purchase Orders annexed as Annexure-1, 2, 3 and 4 and Purchase Orders annexed from page 48 to 61 of the petition.

11. Furthermore, a plea is taken that *there cannot be a composite Tribunal* appointed for the amounts alleged claimed to be due under different Purchase Orders issued at different times for different projects. All these disputes cannot be referred to a single Arbitrator and cannot be decided in the single arbitration.

12. The respondent has asserted that *the respondent never consented for the appointment of the Sole Arbitrator*. In the reply to Section 21 Notice, name of the Arbitrator was stated by the petitioner, but it was made conditional on informing the nature of dispute the POs which were involved and the said claim being made. However, these particulars have not been disclosed and, therefore, the alleged consent to appointment of the Arbitrator cannot be considered effective. It is further asserted that even if it had given its consent for appointment of the Arbitrator, the said consent had been subsequently withdrawn.

13. *On merits*, all the averments made in the petition are denied and the pleas taken in the preliminary objections are reiterated.

14. **Submissions heard.**

15. At the outset, it is evident from the pleadings that BSNL had awarded a Composite Work Order to respondent for procurement, supply, installation, testing and maintenance of GIS based Optical Fibre Cable Network Management Systems (GOFNMS) to be used by Defence Forces.



This project was sub-contracted by the respondent to the petitioner as follows :

- (i) *Precision Air Conditioner*’ (PAC-Project);
- (ii) *Electrical Integration Work at Communication Nodes*’ (Electrical-Project); and
- (iii) *Uninterruptible Power Supply Project*’ (UPS-Project).

16. It is quite evident that there were three sub-contracts which had been awarded to the petitioner. The various works were done through Purchase Order under each of the three projects. The petitioner has claimed that a total sum of Rs.2,58,52,855/- is due which has been illegally and arbitrarily denied by the respondent. These facts are clearly stated in the Notice of Demand dated 20.05.2023. It has also been clarified in the petition that there was a discrepancy/typographical error in mentioning the figure which had been corrected in the rejoinder and the correct disputed amount is Rs.3,68,52,217/-. There is apparently no contradiction in the amounts being claimed by the petitioner. It is also pertinent to observed that the petitioner has been claiming 18% interest on the claimed amount which has been changing with the passage of time. *The first objection taken on behalf of the respondent that there is a changing demand amount is not tenable.*

17. The *second aspect* which is evident from the pleadings itself is that there are in fact three Sub-Contracts while one petition under Section 11 has been filed in respect of the three independent sub-contracts. In the Demand Notice dated 20.05.2023, the amounts due under the three projects and infrastructure project have been separately indicated and there is no confusion in respect of the amounts due under each sub-contract. The



learned Arbitrator is at liberty to register them as three separate arbitrations and take up dispute pertaining to each project independently.

18. The *third objection* taken on behalf of the respondent is that some of *the claims are time barred*. In the case of *Vidya Drolia and Others vs. Durga Trading Corporation (2021) 2 SCC 1* it is held that at the stage of considering the application under Section 11(6) the two facts essentially which are required to be considered is: whether there is an arbitration clause and the disputes are arbitrable. The issue of limitation should be left for the learned Arbitrator except where the claims are blatantly on the face, barred by limitation.

19. In the present case, the respondent itself has stated that some of the amounts raised under certain Purchase Orders are barred by limitation. At this stage while considering the application for appointment of the Arbitrator, this Court cannot go in to the details of the disputes on merits to adjudge which disputes are barred by limitation. *The plea of limitation may be raised by the respondent before the learned Arbitrator.*

20. The respondent has further taken an objection that *the Notice of Invocation of arbitration under Section 21 fails to comply with the pre-requisite conditions*. It does not specify the details of the contract or the invoices or the exact amounts which are due and payable and in respect of which disputes have been raised by the petitioner, which are required to be submitted to the learned Arbitrator.

21. The perusal of the Notice of Invocation dated 08.06.2023 shows that it specifically mentions and is in continuation of its earlier legal Demand Notice dated 20.05.2023. All the details along with the details about the sub-contracts, disputes and the disputed amounts are well explained in the



Demand Notice along with the rejoinder Notice, the service of which has not been denied by the respondent. Pertinently, the respondent had agreed to the appointment of the Sole Arbitrator and had even entered into exchange of emails for finalizing the name of the learned Sole Arbitrator. They even agreed on the name of one Sole Arbitrator, though he expressed his inability to enter into the arbitration. The name of another Sole Arbitrator as suggested by the respondent was agreed to by the petitioner, but subsequently the respondent resiled.

22. From the perusal of the Notice of Demand read with Notice of Invocation and the correspondence that were exchanged between the parties, it can be inferred that the details of the Contract and the disputes were clearly defined and were well understood by the respondent. The entire purpose of Notice of Invocation is only to apprise the opposite party about the nature of disputes and the claims raised, which have been sufficiently complied in the present case.

23. The respondent had also asserted that *there was no reference to the arbitration clause and that there is no arbitration clause in Purchase Orders* which have been annexed along with the petition. However, the petitioner has annexed the three Work Orders pertaining to three sub-contracts which contain the Arbitration clause. The Purchase Orders have been issued under these Work Contracts. Moreover, while a technical objection has been taken, there is no denial by the respondent that there does not exist a valid arbitration clause in the three Sub-Contracts which had been awarded to the petitioner. There thus, exists valid arbitration clause and arbitral disputes.



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24. Therefore, **Hon'ble Mr. Justice Ajit Bharihoke (Retired)**, Mobile No. **9650110057**, is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties, who is at liberty to register three separate arbitrations for the three sub-contracts.
25. The parties are at liberty to raise their respective objections before the Arbitrator.
26. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996.
27. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule to A&C Act, 1996 or as consented by the parties.
28. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry.
29. A copy of this Order be also forwarded to the learned Arbitrator, for information.
30. The petition is accordingly disposed of in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

MARCH 13, 2024
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