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

+ **ARB.P. 14/2024**

M/S AKSH OPTIFIBRE LIMITED Petitioner
Through: Mr. Abhishek Kumar and Mr.
Vivek Gupta, Advocates.

versus

BHARAT SANCHAR NIGAM LIMITED Respondent
Through: Ms. Leena Tuteja, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER
% **05.01.2024**

I.A. No. 194/2024 (for exemption)

The application for exemption is allowed, subject to the plaintiff granting inspection of the documents filed, as and when required to do so, or filing the original documents at the stage of admission/denial.

The application stands disposed of.

ARB.P. 14/2024

1. Issue notice. Ms. Leena Tuteja, learned counsel, accepts notice on behalf of the respondent.
2. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of an arbitrator to adjudicate the disputes arising between the parties, under two purchase orders, both dated 16.07.2018, issued under a tender dated 15.12.2017 for procurement of optical fibre cables.



3. According to the petitioner, various payments against its invoices were made belatedly and late delivery charges were also wrongly deducted. The petitioner, therefore, claims interest on the belated payments and refund of the amounts deducted alongwith interest thereupon.

4. The purchase orders contain an arbitration clause [Clause 23] which provides for sole arbitration of the Chairman and Managing Director [“CMD”] of the respondent or his nominee. The jurisdiction of the Courts in Delhi has been provided under Clause 24 of the purchase orders.

5. The petitioner issued a legal notice dated 22.02.2023 to the respondent, claiming various amounts under the aforesaid heads. As the legal notice failed to elicit a response, learned counsel for the petitioner invoked arbitration by a notice dated 10.04.2023. The respondent has not responded to the said letter also.

6. Ms. Tuteja submits that the claims of the petitioner arise out of payments made in the year 2019 and are *ex facie* barred by limitation. She therefore submits that the reference to arbitration would lead to the respondent being subjected to costs for claims which are *ex facie* stale.

7. Mr. Abhishek Kumar, learned counsel for the petitioner, on the other hand, submits that the claims are in respect of interest upon payments which were belatedly made at various times from 2019 to 2022. He also relies upon the order of the Supreme Court dated 10.01.2022 in M.A. 21/2022 in *Suo Moto W.P.(C) 3/2020* by which the period of limitation was extended during the Covid-19 pandemic.

8. Having heard the learned counsel for the parties, I am of the view



that it would be appropriate to refer the parties to arbitration in the present case, leaving all objections of the respondent, including on the question of limitation, open for adjudication by the learned Arbitrator. The judgment of the Supreme Court in *BSNL v. Nortel Networks (India) (P) Ltd.* [(2021) 5 SCC 738] clearly provides that the Court, at the stage of a reference to arbitration, can enter into the question of limitation only if the claims are undoubtedly time-barred. In case of any doubt, the Supreme Court has emphasised that the matter is best left to the arbitral tribunal, being the parties' tribunal of choice, vested with jurisdiction both on questions of fact and of law. In the present case, having regard to the submissions noted above, I am unpersuaded that the claims are capable of rejection at this threshold stage.

9. The apprehension of Ms. Tuteja, with regard to the burden of costs which may be incurred by the respondent, is allayed by the provisions in the Act for award of costs in favour of the successful party. It is always open to the learned Arbitrator to make an appropriate order of costs after adjudication of disputes.

10. It is not disputed that unilateral appointment of the Arbitrator by the CMD of the respondent is impermissible in view of the judgments of the Supreme Court in *TRF Limited vs. Energo Engineering Projects Limited* [(2017) 8 SCC 377] and *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Limited* [(2020) 20 SCC 760], and other judgments following them.

11. For the aforesaid reasons, the petition is allowed and the parties are referred to arbitration of Hon'ble Ms. Justice Indira Bannerjee, Former Judge, Supreme Court of India, (Tel No. 9560808777).



12. With the consent of learned counsel for the parties, it is directed that the arbitration will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi [“DIAC”], and will be governed by the Rules of DIAC, including as to remuneration of the learned Arbitrator.

13. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

14. It is made clear that this Court has not expressed any view on the merits of the disputes or on the preliminary objection raised by Ms. Tuteja. All rights and contentions of the parties are reserved for adjudication by the learned Arbitrator.

15. The petition is disposed of with these directions.

PRATEEK JALAN, J

JANUARY 05, 2024/ssc/