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

% ***Reserved on: January 11, 2022***

Pronounced on: January 24, 2022

\+ **ARB.P. 365/2019**

HUAWEI TELECOMMUNICATIONS (INDIA) CO. PVT. LTD. & ANR. ..... Petitioners

Through: Mr. Devashish Bharuka, Mr. Ravi Bharuka, Ms. Jaya Bharuka& Mr. Ankit Agrawal, Advocates

Versus

WIPRO LIMITED ..... Respondent

Through: Mr. Gaurav Bahl, Advocate

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. Petitioners claim to be engaged in the business of designing, developing, manufacturing, marketing and/or sale of telecommunications related products worldwide. According to petitioners, Bharat Sanchar Nigam Limited (BSNL) invited bids for planning, supply, installation and commissioning of IMPCS 20/30 Combo Network (Phase V) vide tender No.: MM/CMTS/032006/000301 dated 22.03.2006 and B&CCS (Billing and Customer Care System including DR) and COTS Solution, which were part of overall IMPCS 20/30 network (Phase V) solution

designed by petitioners, were to be delivered to the BSNL as per tender specifications and requirement. For this purpose, petitioners entered into Cooperation Agreement Nos. PACIND3009032002RUB & PACCHNHW09032002 RUA dated 20.03.2009 with the respondent.

2. During the course of hearing, learned counsel for the petitioners submitted that Clause 4.4 of the Agreement clearly stipulated that time is of the essence under the agreement and the respondent is obligated to follow the project time line and ensure that no delay is there in supply and implementation; Clause 4.5 of Agreement stipulated that the respondent was to provide (one) year Operation and Maintenance support; Clauses 4.6 and 10.3 of the Agreements read with Clause 1.2.1 stipulated that respondent was required to provide three years' 7X24 warranty services from the date of commissioning of the complete network in the service area. It was also submitted that respondent was responsible for bearing all the expenses for repair and replacement of the supplied solution and provide the same free of charge to the petitioners during the subsistence of the warranty period. It was also stipulated in both the Agreements that in case BSNL imposes any penalty on the petitioners due to delay in restoration/replacement/fixing of the fault with

B&CCS and COTS solution, the respondent shall pay the complete penalty imposed and also if the respondent has to get the defects remedied from a third party, that shall be at complete risk and expense of the respondent.

3. Learned counsel for the petitioners further submitted that based on the aforesaid agreements and assurances, the petitioners issued four purchase orders to respondent for hardware implementation, integration of B&CCS and other components, integration of new element with billing system and performance tuning with expanded billing system, disaster recovery and business continuity system, application, software, drives, modem, printer, web based application with customizable OUI for data analysis and COTS package. According to petitioners, the aforesaid work was commissioned after a delay on 25.06.2012 and was valid till 24.06.2013 and the associated warranted for complete solution/products supplied was valid till 24.06.2015.

4. Learned counsel next submitted that during the subsistence of warranty period under the said agreements, BSNL raised several issues with regard to solution and products supplied by the respondent, however, respondent in direct breach of its contractual obligation did not

rectify/resolve certain issues. Several e-mails and communications were made by the petitioners to the respondent during that one year requesting respondent to fix the issues and admittedly, in a few of the communications, respondent acknowledged the pending issues and assured the petitioners that all the issues will be resolved/rectified. In order to rectify the defects and due to inaction of respondent, petitioners engaged a Third-Party Vendor and in terms of the agreements, the third party vendor was wholly at the risk and cost of respondent and the same was informed to the respondent.

5. According to counsel for petitioners, thereafter meetings were held between petitioners and respondent on 26.10.2016; 06.12.2016; 15.11.2018 and 27.11.2018 wherein respondent always assured the petitioners that their team will check the claims of petitioners and revert, however, respondent failed to perform its contractual obligation.

6. Learned counsel further submitted that due to non-resolution/ rectification of open/pending issues with the Servers and Storage, BSNL imposed penalty amounting to INR3,62,46,055 on petitioners for the period 2015-2017, which accrued only due to voluntary inaction, breach of warranty terms and non-adherence to contractual obligations by the

respondent. Additionally, BSNL has withheld Huawei's Bank Guarantee (BG) amounting to INR7,72,23,487, which may be encashed by BSNL due to inaction of respondent.

7. Further, during subsistence of the Agreements respondent did not avail technical support from ORACLE and petitioners got to know about it only when it demanded the complete payment of Technical Support charges from December 2010 onwards from the petitioners before providing any further service, which respondent is solely liable to pay.

8. Learned counsel for petitioners next submitted that due to respondent's inaction to resolve the issues with BSNL and upon failure of discussions between the parties, petitioners sent Legal Notice dated 21.12.2018 to respondent to come up with resolution plan within seven days. Though the said letter was replied by the respondent vide communication dated 03.01.2019, however, it only stated that the detailed response shall follow, which respondent never did. Thereafter, petitioners were constrained to send legal notice dated 14.03.2019 to respondent invoking arbitration under Clause 18 of the Agreements and proposed name of Justice (Retd.) R.C. Chopra as the sole arbitrator to adjudicate the disputes and called upon the respondent to consent to the

same. However, the said communication was not replied to and therefore, this petition has been filed seeking appointment of sole Arbitrator by this Court.

9. On the other hand, learned counsel appearing on behalf of respondent submitted that the disputes between the parties are not at all arbitrable and hence, the present petition deserves outright rejection. Learned counsel submitted that the claims raised by the petitioners are highly time barred, which purportedly pertain to Agreements dated 20.03.2009, according to which respondent were to provide warranty services for three years and the cause of action is not a continuous cause of action and also that the maximum period of three years under the limitation expired in December, 2017 and, therefore, the present petition deserves to be rejected on the point of limitation alone. Learned counsel submitted that even if it is assumed that the purported e-mails were exchanged between the parties, yet the e-mail was written by the respondent in the year 2016 and notice invoking arbitration by the petitioners is of the year 2019 and thereby, this petition fails on limitation.

10. Reliance was placed upon Hon'ble Supreme Court's decision dated 06.03.2021 in ***BSNL Vs. Nortel Networks (India) (P) Ltd.,*** (2021) 5 SCC 738 to submit that merely by exchange of letters and discussions, period of limitation for issuing of notice invoking arbitration, shall not be extended and also that Section 5 to 20 of the Limitation Act do not exclude the time taken on settlement discussions. Reliance was also placed upon another decision of Hon'ble Supreme Court in ***Geo Miller Vs. Chairman, Rajasthan Vidyut Utpadadan Nigam Limited***2020 (14) SCC 643 to submit that petition under Section 11(6) of the Act was rejected as the claims were hopelessly time barred.

11. It was submitted by learned counsel for respondent that by filing this petition, petitioners are trying to revive the dead claims and there is no continuing cause of action in the present case. Reliance was also placed upon Hon'ble Supreme Court's decisions in ***Balkrishna Savalram Pujari &Ors. Vs. Shree Dnyaneshwar Maharaj Sansthan&Ors.*** AIR 1959 SC 798 and ***M. Siddique Vs. Mahant Suresh Das*** 2019 SCC OnLine SC 1440 in support of above submissions.

12. Learned counsel next submitted that neither Agreement was executed nor any breaches were committed within the territorial

jurisdiction of this Court, therefore, this Court has no jurisdiction to entertain the present petition under the provisions of Section 11 of the Arbitration and Conciliation Act. It was next submitted that neither of the parties work for gain at New Delhi; the cause of action has not accrued at New Delhi; the agreement was not executed in New Delhi but in Gurgaon and none of the payments has been received in New Delhi, moreover no breached were committed within the territorial jurisdiction of this Court, therefore, this Court has no jurisdiction to adjudicate this petition under Section 11 of the Act.

13. Learned counsel further submitted that the arbitration clause contained in Para-18.2.1 notes that the place of arbitration shall be New Delhi and this would not confer any jurisdiction upon this Court to entertain this petition. It was submitted that seat and venue are two different legal issues and place of arbitration cannot give the status of the juridical seat.

14. Learned counsel submitted that all disputes between the parties were settled in a meeting dated 21.12.2015, whereunder petitioners and respondent had agreed to liquidate the damages at 6.5% of total Purchase Order value and thereby, differential amount of INR 16,151,717.51 was

paid by respondent to petitioners on 11.03.2016, which fact is concealed by the petitioners.

15. To refute petitioners' claim that the defects were got rectified by a third party on 19.05.2017 at the risk and cost of respondent, learned counsel placed reliance upon decision of a Division Bench of this Court in ***Ancient Infratech Vs. NBCC*** wherein it was held that the cause of action has to have a cut-off date of determination irrespective of letters demanding completion of work and therefore, rectification of work by a third party cannot renew the period of limitation.

16. Reliance was also placed upon Hon'ble Supreme Court's decision in ***Sundaram Finance Vs. NoorjhanBiwi*** **2003 (16) SCC 1** to submit that where there was a breach in payment of instalments, the limitation ran from the date of the first default of payment.

17. Learned counsel further submitted that both the Agreements in question are independent of each other and cannot be bound for the purpose of Section 11 of the Act. With regard to claims raised by the petitioners, learned counsel submitted that these are false, baseless and without any merit. Hence, dismissal of the present petition is sought.

18. In rebuttal, learned counsel for petitioners submitted that

respondent's plea seeking dismissal of the present petition on the ground of limitation is to be rejected as even though the warranty period got over by 24.06.2015, thereafter, petitioners and respondent have been in continuous exchange of e-mails and holding meetings on regular intervals from 2015 till 2018. It is only when on 27.11.2018 that the *respondent* for the first time declined to rectify the pending issues, the petitioners sent a legal notice on 21.12.2018 and finally, invoked arbitration on 14.03.2019. Hence, the claims raised by petitioners cannot be treated as "dead wood" as stated by respondent. Reliance was placed upon decisions in ***BSNL v. Nortel Networks (India) (P) Ltd.,*** (2021) 5 SCC 738 and ***Vidya Drolia Vs. Durga Trading Corpn.*** (2021) 2 SCC 1.

19. The arguments advanced by both the sides were heard at length and the material placed on record as well as decisions relied upon have been perused.

20. The foremost question which is first required to be answered is whether this Court has jurisdiction to entertain the present petition.

21. In reply to the present petition, it is averred by the respondent that since one of the parties to the Agreements is not an Indian national, therefore, disputes, if any, shall be governed under the international

arbitration as defined under Section 2(f) of the Act and also that the provisions of Section 11(4) of the Act make it clear that in case where international commercial arbitration has to take place, only the Hon'ble Supreme Court shall have the exclusive jurisdiction to appoint the arbitrator. However, during the course of hearing, no submission was made in this regard and therefore, this Court has not gone into this question.

22. Relevantly, it is not disputed that the Cooperation Agreement dated 20.03.2009 in question contains the arbitration clause, which reads as under:-

> **"18.2 Resolution of disputes**
>
> *18.2.1 The Agreement will be governed by the laws of India All disputes. controversies or claims arising out of or in connection with or in relation to this Contract or itsnegotiation, performance, breach, existence or validity, whether contractual or tortuous, shall be referred to arbitration in accordance with the Arbitration and Conciliation Act, 1996 and conducted by a single Arbitrator to be appointed by the Parties by mutual consent. The cost of the arbitration shall be shared by the Parties. The place of the arbitration shall be New Delhi, India. The arbitration proceedings shall be conducted in English language. The award of the arbitration shall be final and binding against the Parties hereto.*

23. The Hon'ble Supreme Court in ***BGS SGS SOMA JV Vs. NHPC*****, (2020) 4 SCC 234** has held as under:-

> *"82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. In an international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of*

arbitration."

24. Hence, the contention of respondent that seat and venue are two different legal issues and place of arbitration cannot give the status of the juridical seat, is liable to be rejected and this Court is well within its jurisdiction to entertain this petition.

25. Another question, which is raised in the present petition is that the claims raised by the petitioners are *ex facie* highly time barred. To seek dismissal of present petition on this ground, respondent has placed reliance upon various decisions and this Court has gone through the same.

26. In ***Geo Miller Vs. Chairman (Supra)*** relied upon by the respondent, the final bill was handed over on 10.08.1989; three years period ended on 10.08.1992; notice invoking arbitration was sent in 2002 and petition under Section 11 was filed in the year 2003 and thereby, the Hon'ble Supreme Court observed that there was inordinate delay of 14 years and upheld the decision passed by High Court of Rajasthan dismissing petition under Section 11 of the Act.

27. The decision of Hon'ble Supreme Court in ***Balkrishna Savalram Pujari (Supra)***and***M. Siddique (Supra)*** relied upon by the respondent, are distinguishable on facts and is of no assistance to the case in hand.

28. In ***Vidya Drolia (Supra)*** relied upon by the petitioners, the Hon'ble Supreme Court has dealt with the scope of judicial review under Sections 8 and 11 of the Act.

29. The Hon'ble Supreme Court in ***BSNL Vs. Nortel Network (India) (P) Ltd. (Supra)***has extensively dealt with the issue of determining limitation period in filing a petition under Section 11 of the Act as well as issue whether a Court exercising jurisdiction under Section 11 of the Act is obligated to appoint an Arbitrator where the claims are ex-facie time barred.

30. With regard to first issue i.e. determining the period of limitation in filing petition under Section 11 of the Act, the Hon'ble Supreme Court in ***BSNL Vs. Nortel Network(Supra)***has held as under:-

> *"15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular*

claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budhraja v. Orissa Mining Corpn. Ltd. [J.C. Budhraja v. Orissa Mining Corpn. Ltd., (2008) 2 SCC 444 : (2008) 1 SCC (Civ) 582] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows : (SCC p. 460)

> *"26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such*

a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Inder Singh Rekhi v. DDA [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] , Panchu Gopal Bose v. Port of Calcutta [Panchu Gopal Bose v. Port of Calcutta, (1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [Utkal Commercial Corpn. v. Central Coal Fields Ltd., (1999) 2 SCC 571] also make this position clear."

19. The reasoning in all these judgments seems to be

that since an application under Section 11 is to be filed in a court of law, and since no specific Article of the Limitation Act, 1963 applies, the residual Article would become applicable. The effect being that the period of limitation to file an application under Section 11 is 3 years from the date of refusal to appoint the arbitrator, or on expiry of 30 days, whichever is earlier."

31. Applying the afore-noted observations to the case in hand, this Court finds that in the present case, the agreement in question contains an arbitration clause. For resolution of disputes with regard to work order in question, petitioners first sent Legal Notice dated 21.12.2018 to respondent calling upon to provide a resolution plan within seven days, which was replied by the respondent vide its communication dated 03.01.2019 stating therein the respondent was under the process of reviewing the allegations and claims raised by the petitioners and a details response shall be shared shortly. Thereafter, petitioners sent a legal notice dated 14.03.2019 to respondent invoking arbitration wherein name of Justice (Retd.) R.C.Chopra was proposed for appointment as Arbitrator, which was not replied to. The period of limitation of three years will be counted from the expiry of refusal to reply to appointment of Arbitrator within 30 days of invoking arbitration by notice, which in

this case shall be 13.04.2019. The present petition was filed before this Court on 24.05.2019 and in this manner, there is no delay in filing the present petition.

32. On the second question raised in the present petition by the respondent that the claims raised by the petitioners are *ex facie* highly time barred, reliance was again placed by respondent upon decision in ***BSNL Vs. Nortel Network (Supra)***to submit that the period of limitation in issuing the notice of arbitration would not get extended by mere exchange of letters or mere settlement discussions and the case of petitioners is a deadwood. Relevantly, in ***BSNL Vs. Nortel Network (Supra),*** the Hon'ble Supreme Court had dealt with a case where the notice invoking arbitration was issued after 5½ years of rejection of claims and there was no averment either in the notice of arbitration or the petition filed under Section 11 of the Act or before the Supreme Court any intervening facts which would have extended the limitation period. However, in the said case the Hon'ble Supreme Court on this question has observed as under:-

> *"47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make*

the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

33. In view of afore-noted observations of Hon'ble Supreme Court, this court has once again tested the minute details of this case to find out whether the claims raised by the petitioners are stale and *ex facie* time barred and liable to be rejected.

34. Pertinently, with regard to Agreement dated 20.03.2009, work was commissioned after a delay on 25.06.2012 and respondent was required to give one year maintenance and three years operation warranty and so, the Operation and Maintenance period was valid till 24.06.2013 and the warranty was valid till 24.06.2015. With regard to issues raised by their client-BSNL, petitioners had written several e-mails dated 1.09.2015, 23.09.2015, 17.11.2015, 21.12.2015, 25.01.2016, 03.02.2016, 08.03.2016, 27.04.2016 and 26.10.2016 to respondent for rectification and resolution of pending issues and a few of them were replied by the respondent vide e-mail dated 28.12.2015, 07.01.2016, 03.02.2016. Besides, both sides held meetings on 15.11.2018 and 27.11.2018. The first legal notice was sent on 21.12.2018, which was replied by the respondent 03.01.2019 stating that the detailed response shall be given

and thereafter, on 14.03.2019 notice invoking arbitration was sent by the petitioners nominating its Arbitrator. However, since the said notice was not replied to within 30 days, petitioners filed the present petition on 24.05.2019. Without going into the details of these e-mails and minutes of meeting held between the parties, this Court finds that there has been continuous cause of action and persistent demand raised on the part of petitioner and thereby, the claims raised cannot be said to be decayed.

35. So far as plea of respondent that the claims raised by respondent that all disputes stood already settled in terms recorded in the Minutes of Meeting dated 21.12.2015 or that there are two distinct agreements which cannot be consolidated or that the defects which were got rectified by a third party at the risk and cost of respondent, are questions of claims which shall be considered and decided by the learned Arbitrator.

36. Pertinently, execution of Cooperation Agreement dated 20.03.2009 between the parties; existence of arbitration Clause-18.2 therein and invocation of arbitration by virtue of notice dated 14.03.2019 is not disputed. Also, terms of Clause -18.2 the disputes have to be referred to a single Arbitrator

37. Accordingly, the present petition is allowed and **Mr. Justice G.S. Sistani (Retd.) Mobile: 9871300034** is appointed the sole Arbitrator to adjudicate the dispute between the parties.

38. The fee of the learned Arbitrator shall be governed by the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

39. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

40. The present petition and pending application, if any, are accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 24, 2022
r