(2009) 02 DEL CK 0146

In the Delhi High Court

Case No : Arbitration Application No. 365 of 2008

U.M. Cables Ltd. APPELLANT

Vs

Chairman-cum-Managing Director, BSNL and Others RESPONDENT

Date of Decision : 11-02-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6)

Citation : (2009) 02 DEL CK 0146

Hon'ble Judges : S.N. Aggarwal, J

Bench : Single Bench

Advocate : Deepak Sinhmar, for the Appellant; Dinesh Agnani, for the Respondent

Judgement

S.N. Aggarwal, J.—This is a petition filed by the petitioner seeking appointment of an Arbitrator u/s 11(6) of the Arbitration and Conciliation Act, 1996.

2. The petitioner is a manufacturer and supplier of telecom cables to telecom service providers including the respondents. The respondents are engaged in providing telecommunication service throughout the country. For providing telecommunication service, Respondent No. 1 purchases/procures cables of various sizes and parameters from various manufacturer of cables. The BSNL (MM Section), New Delhi has issued a Notice Inviting Tender being Tender No. MM/OF/032002/000239 dated 22.03.2002 for supply of 11000 km of 24F Optical Fiber Cable. The said tender, inter alia, gave instructions to the bidders so as to enable them to participate in the bid process. The tender was primarily divided into various sections, which, inter alia, gave the general conditions and special conditions of the contract. The cable was agreed to be purchased by the respondents from the petitioner at price stipulated in the purchase order dated 09.09.2002. It is stated that the respondents have placed a purchase order dated 09.09.2002 on the petitioner for the supply of 3300 km of 24F optical fiber cable. As per the purchase order dated 09.09.2002, the petitioner was required to supply 24F optical fiber cable of 80 kms out of which approx 75.112 Kms was

supplied to BSNL, Faridabad and 5.2 Km to the BSNL, Ghitorni. The above mentioned supply was made by the petitioner to the respondents through its factory at Silvassa, UT of Dadra & Nagar Haveli. In respect of the supplies made to the respondents, the petitioner raised two invoices being OFC-199 to BSNL, Faridabad dated 11.01.2003 for supply of 75.112 km of cable and for Rs. 29,94,629/- and OFC-200 to BSNL, Ghitorni dated 11.01.2003 for the supply of 5.200 km of cables for Rs. 2,06,283/-. Further, the petitioner, vide raising above invoices also made a request to the respondents for furnishing Form-C by mentioning the same at the bottom of the said invoices. However, the BSNL, Delhi (Ghitorni & Faridabad), did not adhere to the petitioner''s request and the ''Form-C'' was not issued to the petitioner. It is stated that in the meanwhile, sales tax assessment of the petitioner was being finalized and the sales tax assessing authorities started pressurizing for submission of the Form-C. The petitioner vide its letter dated 24.05.2004, requested the respondents for the issuance of Form-C in order to avoid payment of Central Sales Tax (CST) @ 10% plus interest. However, the respondents are stated to have not supplied the ''Form-C'' till the time the sale-tax assessment was completed by the concerned sales tax authorities. It is stated that on account of default on the part of the respondents in not supplying the ''C-Form'' in time, the petitioner had to pay Rs. 3,55,494/- to the Sales tax authorities pursuant to the assessment order dated 30.03.2007.

3. The contract for supply of cables between the parties contained an arbitration Clause being Clause 20 which reads as under:

20.1 In the event of any question, dispute or difference arising under this agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BSNL, New Delhi or in case his designation is changes or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD, BSNL or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CMD, BSNL or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996.

There will be no objection to any such appointment on the ground that the arbitrator is a Govt. Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Govt. Servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.

20.2 The arbitrator may from time to time with the consent of both the parties enlarge the time frame for making and publishing the award. Subject to the aforesaid Arbitration and Conciliation Act, 1996 and the rules made there under, any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.

20.3 The venue of the arbitration proceeding shall be the office of the CMD, BSNL, New Delhi or such other places as the arbitrator may decide.

4. Mr. Dinesh Agnani, learned Counsel appearing on behalf of the respondents has contended that the respondents have supplied the ''C-Form'' to the petitioner, in terms of the purchase order and according to him, no dispute exists between the parties under the contract which need to be adjudicated by the Arbitrator in terms of Arbitration Agreement. To meet this argument advanced on behalf of the respondents, learned Counsel appearing on behalf of the petitioner has taken me through Sales tax assessment order dated 30.03.2007 (at Page No. 98 of paper book) and also to inter department letter of the respondents dated 07.12.2007 (at page No. 96 of the paper-book) and by reference to these two documents, Counsel appearing on behalf of the petitioner has contended that the respondents themselves agreed to settle the claim of Sales tax for default on their part in not supplying the ''C-Form''. To appreciate this arguments of the Counsel for the petitioner, it would be relevant to refer to the letter dated 07.12.2007 relied upon by the Counsel for the petitioner, which is at page 96 of the paper-book and the same is extracted below:

To, Dated-07.12.2007 The Asstt. General Manager (MM),

O/o CGM NTP,

New Delhi

Subject: Payment of bills to M/s UM Cables Silvasa against the PO No. CT/ PO/16/2002-03 dated 09.09.2002

Ref: Your letter No. 200-138/2002-CGMP/CS/10-92/18 dated 22.10.2007

Kindly refer to your letter under reference on the above said subject, it is intimated that this office has already issued the amendment regarding the issue of form ''C'' against the above said PO. It is therefore requested that follow the BSNL letter No. 80-27/2002-MMC dated 26.09.2002 vide which the copy of an amendment No. 11-05/2002-MMT (OF) was forwarded for the release of form ''C'' and settle the claim of Sale Tax.

All other terms and conditions of the PO shall remain unchanged.

This issues with the approval of competent authority.

Encl.: As above

Asstt. Director General (CT)

5. It is a matter of record that the Sales tax assessment in respect of the petitioner was done on 30.03.2007 and the inter-department letter of the respondents referred above is of subsequent date i.e. 07.12.2007 in which the respondents themselves have agreed to settle the claim of the petitioner on account of Sales tax liability. There appears to be dispute between the parties regarding the sales tax liability arising under the contract for supply of cables between the parties. This Court exercising its power u/s 11 of the Arbitration and Conciliation Act, 1996 cannot decide the dispute as to whether the ''C-Form'' in terms of the contract were supplied by the respondents in time or not and as to whether, the petitioner had to pay the amount of Rs. 3,55,494/- to the sales tax authority on account of default on the part of the respondents in not supply the ''C-Form'' in time. This dispute regarding the sales tax liability has to be decided by the mechanism agreed upon between the parties at the time of entering into the contract for supply of cables. The parties have consciously agreed to get their disputes decided under the contract by reference to the arbitration. Admittedly, the respondents failed to appoint an arbitrator to decide the dispute regarding the Sales tax liability pursuant to notice demanding arbitration served upon by the petitioner and therefore, the respondents have lost their right to appoint an Arbitrator in terms of Arbitration Agreement between the parties.

6. In view of the above and having regard to the submission made by the Counsel for the parties, Mr. S.M. Chopra, former Additional District Judge, Delhi (R/o 181, Deshbandhu Aptts, Kalkaji, New Delhi-110019 Mobile No. 9213230349) is hereby appointed as the sole Arbitrator to decide the dispute regarding sales tax liability between the parties under the contract after giving hearing to both of them. The fees of the learned Arbitrator is fixed at Rs. 50,000/- to be shared equally by both the parties. The Arbitrator is requested to decide the dispute as expeditiously as possible. The parties are directed to appear before the learned Arbitrator for necessary directions at 4:00 P.M on 21st February, 2009.

7. A copy of this order be sent to the Learned Arbitrator for information forthwith and compliance.

8. In view of the above, this petition stands disposed of.