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**(2013) 05 DEL CK 0558**

**In the Delhi High Court**

**Case No :** Arbitration Petition No. 100 of 2013

HCL Infosystems Ltd.

APPELLANT

Vs

Government of NCT Delhi

RESPONDENT

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**Date of Decision :** 14-05-2013

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 11(5), 11(6), 11(8)

**Citation :** (2013) 05 DEL CK 0558

**Hon'ble Judges :** Manmohan Singh, J

**Bench :** Single Bench

**Advocate :** V.N. Koura and Mr. S. Sirish Kumar, for the Appellant; Sushil Dutt Salwan, for the Respondent

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## **Judgement**

Manmohan Singh, J.—By this order, I propose to decide the abovementioned petition u/s 11(6) of the Arbitration and Conciliation Act, 1996 filed by the petitioner. The petitioner is a company incorporated under the provisions of Companies Act, 1956 dealing in software and information technology. The respondent is the Government of National Capital Territory of Delhi, Department of Information Technology.

2. The respondent issued Request for Proposal (in short, called the "RFP") dated 2nd April, 2009 inviting bids for "Secured Communication Network (TETRA) for Commonwealth Games (CWG) 2010". By the said RFP, the respondent invited bids for the design, manufacture, supply, installation, testing and commissioning of the above said Network and the operation of the TETRA Network on Wet Lease for the period of 87 months after the formal acceptance of the said Network ("the Legacy Period").

3. Pursuant to the bid by the petitioner, the respondent awarded the contract for the aforesaid work to the petitioner, leading to the execution of the Master Service Agreement dated 29th December, 2009 (hereinafter referred to as the "MSA") for "Establishment of Secured Communication Network (TETRA) for Commonwealth Games (CWG) 2010 and Legacy Period thereafter on Wet Lease

Basis" between the President of India through the Secretary, Department of Information Technology (IT) of the respondent and the petitioner. The gross estimated value of the aforesaid contract is Rs. 99,81,08,555/-.

4. It is submitted that the execution of the CWG 2010 TETRA Project comprised three broad areas of activity:-

(i) Delivery and installation of infrastructure.

(ii) Training and familiarization of Radio users in the various departments.

(iii) Programming of radios as per Fleet Mapping Data of user departments and delivery of radio sets.

5. It is further submitted that in discharge of its contractual obligations, the petitioner had completed all the aforesaid three activities well before the start of the Commonwealth Games 2010. The radio sets were also handed over to the user departments and, after training, most of the departments put the sets to use in August, 2010.

6. The various user departments, including Delhi Police, extensively used the TETRA Radio sets from 1st September, 2010 onwards, including during the Commonwealth Games in September and October, 2010, during which they utilized additional TETRA Radio sets to meet their requirement during Commonwealth Games and the TETRA system was a significant contributor to the success of the Games.

7. The Radio sets are still being used by the various departments and the various entities/bodies under the respondent. In terms of Article 2.8 of the MSA, subject to the license conditions, the ownership of the Network developed and installed by the petitioner, including all hardware, software, components, designs, computer and other programmes etc. used and developed therein shall vest with the petitioner.

8. It is also submitted that in terms of Schedule V of the MSA, relating to Invoicing and Settlement, for payment for rentals for the TETRA Radio sets, the petitioner is to raise its invoices on a quarterly basis. The project envisaged the provision of the services by the petitioner under the MSA for Legacy Period, including the period of Commonwealth Games 2010 (for 2 months, i.e. September and October 2010) during which, as stated, additional sets were required by various key departments of the respondent.

9. The petitioner further submits that as stated earlier, well prior to the final acceptance of the system, since 1st September, 2010, the TETRA system was in continuous and uninterrupted use by the user departments/nominees of the respondent, as is apparent from the use logs maintained by the petitioner. The petitioner was, during this period, also required to fund, maintain and operate the TETRA System and Network without break in the same manner as during the Legacy Period in respect of which the respondent was liable to pay the petitioner

in terms of the written clarification to the bid document(s) circulated by the respondent.

10. It is the contention of the petitioner that the respondent is liable to make payment in full, not only for Legacy Period but also for the period beginning from the commencement of the use of the TETRA System with effect from 1st September, 2010 to 1st March, 2012 when the TETRA System was finally accepted. The petitioner raised invoices for such use on all the user departments as stipulated in the MSA. However, despite Circular No. F.7(11)/2008/IT/2369-71 dated 19th April, 2012 issued by the respondent to the various user departments for payment of rental of the TETRA sets used by them both for the period prior to as well as during the Legacy Period, payment to the petitioner has not been forthcoming.

11. It is further submitted that in the meeting held on 19th November, 2012 under the Chairmanship of the Chief Secretary, GNCT of Delhi, it was decided that, based on the recommendations of TCIL (Project Management Consultant, an agency appointed by the respondent), the user departments would make payment for the period between 1st September, 2010 to 29th February, 2012 (i.e. before the commencement of Legacy Period). Despite the aforesaid decision, TCIL, till date, has not given its recommendations nor has any payment been made by the user departments for the said period. It is further contended by the petitioner that the aggregate value of the invoices for the period between from 1st September, 2010 to 1st March, 2012, is Rs. 30,11,34,498/-. However, except for some partial payments i.e. Rs. 8,96,20,925/- by a few departments, the major user departments have not made payment in respect of the said period, leaving an unpaid balance of Rs. 21,15,13,573/- for the use between 1st September, 2010 to 29th February, 2012.

12. The petitioner by letter dated 21st December, 2012 addressed to the respondent to consider the request of the petitioner and to intimate about its stand within 10 days of receipt of the letter, failing which, the said letter be treated as notice of dispute under Article 10(b) of the MSA and the Director 2010 CWG TETRA be requested to appoint an Arbitrator within 30 days of receipt of the letter. The said notice was not replied by the respondent. Thus, the present petition has been filed.

13. Notice of the present petition filed by the petitioner was issued to the respondent who filed its reply, raising therein various contentions. During the course of hearing of the petition, the respondent has also filed the additional affidavit which was taken on record with the consent of the petitioner who has chosen not to give response to the said affidavit. By way of preliminary submissions, it is submitted by the respondent that the petitioner has not come to this Court with clean hands and has suppressed facts. It is stated that the petitioner has breached and defaulted in fulfilling its contractual obligations as contemplated in MSA. Certain decisions have been taken by the competent authorities, which are final and binding upon the parties. Hence, those decisions,

which have become final, cannot be referred to arbitration.

14. The respondent denied the allegation that the petitioner has completed all the activities/obligations as contemplated in the agreement. It is stated that almost every department, specially the Delhi Police, has lodged complaints against the petitioner vis-?-vis its services, provided under the agreement. In fact, for a substantially long period i.e. from November, 2010 up to February, 2012 the petitioner was unable to provide the services in terms of the contract and hence, the petitioner is not entitled to any payment for the said period.

15. It is also stated that in view of the various breaches by the petitioner, penalties were levied and accordingly appropriate deductions have been made on the recommendations of Project Management Consultant, M/s. TCIL. It is further submitted that the present petition is misconceived and pre-mature. In terms of Article 10 of the MSA, in case of any dispute or difference whatsoever arising between the parties to the contract, parties shall in the first instance try to settle the same amicably through discussions to be carried out within 30 days of serving of a written notice by one party to the other clearly setting out the dispute in question. In terms of the said clause, only after the dispute cannot be amicably resolved, the matter has to be referred to arbitration. The petitioner has approached the respondent in terms of the said clause and the issues raised by the petitioner are under deliberation in a series of meetings which have been held and are continuing to be held.

16. In nut-shell, the case of the petitioner is that the respondent has recommended to the user departments a deduction of 6% from the bills payable for the period, without indicating the basis on which the penalty of 6% has been levied. It is stated by the petitioner that the petitioner has complied with all the terms and conditions of MSA, therefore, the question of any contractual penalty does not arise, and any penalty levied is arbitrary and unsustainable. The respondent has, without any justification, authorized the user departments to deduct certain percentage from the bills for the games period. Therefore, the balance amount in this respect is also payable for the Commonwealth Games period even after the expiry of more than two years. It is stated that the petitioner has incurred tremendous costs to set up, operate and maintain the system. The usage charges alone for the period from 1st September, 2010 up to 29th February, 2012 work out to Rs. 20,65,00,908/- as per the details of statement annexed to the notice dated 21st December, 2012.

17. It is also a matter of fact that during the pendency of the present proceedings, the respondent by order dated 10th April, 2013 has appointed Sh. J.K. Roy, Member (Technology) - Retd. Department of Telecommunications, Govt. of India, as Arbitrator for resolving the disputes arising out in context of the MSA signed between the parties on 29th December, 2009 for Secured Communications Network (TETRA) Project. The details of the disputes to be resolved are also given in the said order dated 10th April, 2013. As far as these details are concerned, learned counsel for the petitioner agrees for the same to

be correct. However, the petitioner is not agreeable for the appointment of Sh. J.K. Roy as Arbitrator. The simple submission of the learned counsel for the petitioner is that the respondent has lost its right to appoint the Arbitrator as per its choice, after the expiry of 30 days from the date of receipt of notice dated 29th December, 2012. Thus, this Court may appoint an independent sole Arbitrator. He has relied upon certain judgments in support of his submission.

18. Mr. Salwan, learned counsel for the respondent, on the other hand, states that the benefit of 30 days cannot be derived by the petitioner, as during this period, the conciliation proceedings between the parties were going on. In support of his contention, he has referred various letters and communications between the parties, in order to show that after the issuance of the notice, there were various meetings which were also attended by the representatives of the petitioner. He submits that the effect of issuance of notice is lost in view of the said meetings. Thus, the appointment of Sh. J.K. Roy, who is an expert in this line, is correct. Thus, the petitioner should not have any objection to his appointment as sole Arbitrator to adjudicate disputes between the parties. In any case, if this Court is not satisfied with his appointment, being a technical subject, an expert person be appointed as Arbitrator.

19. Mr. V.N. Koura, learned counsel appearing on behalf of the petitioner has informed the Court that as far as the conciliation proceedings between the parties are concerned, the same were not with regard to the payment payable by the respondent to the petitioner. Most of the said meetings were held in order to improve the coverage and performance of TETRA System. It is not denied by him that the said meetings were attended by the representative of the petitioner. He submits that the appointment of Sh. J.K. Roy is not acceptable to his client, mainly on the reason that the said appointment was made after the expiry of period of 30 days after the receipt of notice and during the pendency of present proceedings. As the respondent has lost right for such appointment, therefore, this Court may appoint an independent sole Arbitrator to decide the disputes between the parties. He also submits that no technical person is necessary to be appointed. If necessary, sole Arbitrator appointed by this Court would be entitled to take the assistance of an expert person.

20. After having considered the material placed, I find no concrete prima-facie evidence to show that after the receipt of notice from the petitioner in order to invoke the arbitration, there were any serious discussions and suggestions made by the respondent with regard to balance payment claimed by the petitioner. No doubt, there are some documents which would suggest that the meetings were attended by the representatives of the petitioner but there is no direct material which may establish about the discussion of balance amount claimed by the petitioner, though prior to issuance of notice minutes of the meeting held on 19th November, 2012 have been produced where decision on payment to the implementing Agency was taken. However, the petitioner's counsel has informed that no positive steps were taken by the respondent to make the payment,

rather the respondent issued a letter dated 17th December, 2012 indicating the petitioner to levy penalty of 6%. Despite of that, entire payment was made by the respondent leaving a balance. Therefore, the petitioner has no alternative but to press the relief claimed in the petition. It is also pertinent to mention that the respondent itself has appointed the sole Arbitrator to adjudicate the disputes between the parties. The said action of the respondent defeats its own argument.

21. In *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another*, , the Supreme Court explained as under:

19. So far as cases falling u/s 11(6) are concerned, such as the one before us, no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed u/s 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court u/s 11 that would be sufficient. In other words, in cases arising u/s 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application u/s 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator u/s 11(6) is forfeited.

20. In the present case the respondent made the appointment before the appellant filed the application u/s 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

21. We need not decide whether for purposes of Sub-clauses (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not.

The decision in *Datar Switchgears* (supra) was further affirmed in *Punj Lloyd v. Petronet MHB Ltd.*, (2006) 2 SCC 151.

22. In the case of *Sikka Promoters Pvt. Ltd. Vs. Municipal Corporation of Delhi*, decided on 17th November, 2011 in Arb. P. No. 106/2011 and I.A. No. 5815/2011 by S. Muralidhar, J. who has taken the same view after discussing both the decisions referred above as well as *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.*, in which case it was held that Section 11(8) of the Act would come to the aid of the appellant therein only if "the appellant appointed the arbitrator within 30 days from the date of receipt of request to do so from the respondent or the extended time, as the case may be." Since that

was not done "the appellants are estopped from making an appointment of the arbitrator in terms of Clause 24 of the agreement after Section 11(6) petition is filed by the respondent. Once Section 11(6) petition is filed before the Court seeking appointment of an arbitrator, the power to appoint an arbitrator in terms of arbitration clause of the agreement ceases."

23. In view of the settled law, it is clear that the respondent had forfeited its right to appoint the arbitrator after the expiry of statutory period. The discretion of appointment of sole arbitrator is now left with the Court. Thus, the appointment of Sh. J.K. Roy, Member (Technology) - Retd., Department of Telecommunications is not a valid appointment in accordance with law. Thus, the prayer made in the petition is allowed.

24. In view of the above, Hon"ble Mr. Justice R.C. Lahoti, Former Chief Justice of India (R/o. B-56, Sector 14, Noida, U.P., Mob. No. 9868858999) is appointed as sole Arbitrator to adjudicate the disputes between the parties as mentioned in this petition. The Arbitrator shall conduct the proceedings under the provisions of the Arbitration and Conciliation Act, 1996 and shall give prior notice before commencing the proceedings. The fees of the Arbitrator be also paid under the rules of Delhi High Court Arbitration Centre.

25. The petition is accordingly disposed of.

26. Copies of this order be given dasti to the learned counsels for the parties. Registry shall also issue communication immediately to the learned sole Arbitrator.