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

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ARB.P. 158/2011

M/S TAKE SOLUTIONS LIMITED

..... Petitioner

Through: Mr. N.K. Kaul, Senior Advocate with
Mr. Kapil Rastogi, Advocate.

versus

BHARAT SACHAR NIGAM LIMITED

..... Respondent

Through: Mr. H.S. Phoolka, Senior Advocate with
Mr. Sharat Kapoor and
Mr. Kanwar Faisal, Advocates.

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O.M.P. 391/2011

M/S TAKE SOLUTIONS LIMITED

..... Petitioner

Through: Mr. N.K. Kaul, Senior Advocate with
Mr. Kapil Rastogi, Advocate.

versus

BHARAT SANCHAR NIGAM LTD

..... Respondent

Through: Mr. H.S. Phoolka, Senior Advocate with
Mr. Sharat Kapoor and
Mr. Kanwar Faisal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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18.11.2011

ARB. P. No. 158/2011 and OMP No. 391/2011

1. Arbitration Petition No. 158 of 2011 under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') has been filed by M/s Take Solutions Ltd. ('TSL') against the Respondent Bharat Sanchar Nigam Ltd. ('BSNL') prayer, *inter alia*, for the appointment of an Arbitrator, who is

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By:AMULYA

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2. O.M.P. No. 391 of 2011 is by TSL, against BSNL, under Section 9 of the Act seeking interim relief to restrain the BSNL from exercising its rights under a contract dated 3rd November 2010 pertaining to financial conditions of the franchisee agreements of that date and further restrain the BSNL from invoking/encashment three performance bank guarantees forwarded to it by TSL.

3. In O.M.P. No. 391 of 2011 this Court passed an interim order on 20th May 2011 against the encashment of bank guarantees provided by the TSL to the BSNL:

“Accordingly, subject to the petitioner keeping the said bank guarantees alive till further orders, the encashment of the following bank guarantees shall remain stayed till the next date:

i) Bank Guarantee No. 053410IGPER0081 dated 03.11.2010 in the sum of Rs. 10,00,00,000/- furnished by the petitioner under the franchisee agreement for provision of WiMAX (IEEE 802.16e-2005) Based Wireless Broadband Services in the urban areas of Tamil Nadu LSA (except Chennai) being No. BSNL CO/NWP-WiMAX/EoI/2010-11/Agreement/Take-Tamil Nadu.

ii) Bank Guarantee No. 053410IGPER0082 dated 03.11.2010 in the sum of Rs. 7,50,00,000/- furnished by the petitioner under the franchisee agreement for provision of WiMAX (IEEE 802.16e-2005) Based Wireless Broadband Services in the urban areas of Uttar Pradesh (Wes) LSA being No. BSNL CO/NWP-WiMAX/EoI/2010-11/Agreement/Take-Up (West).

iii) Bank Guarantee No. 053410IGPER0083 dated 03.11.2010 in the sum of Rs. 5,00,00,000/- furnished by the petitioner under the franchisee agreement for provision of WiMAX (IEEE 802.16e-2005) Based Wireless Broadband Services in the urban areas of Orissa LSA being No. BSNL Co/NWP-WiMAX/EoI/2010-11/Agreement/Take-Orissa.”

4. As far as Arbitration Petition No. 158 of 2011 is concerned notice was directed to issue on 20th May 2011. On 6th September 2011 learned Senior counsel for the BSNL sought time to take instructions regarding the appointment of an Arbitrator.

5. However, at the hearing on 18th October 2011 Mr. H.S. Phoolka, learned Senior counsel appearing for the BSNL informed the Court that the BSNL has already appointed the named Arbitrator in three of the connected petitions and, therefore, was not agreeable to the matters being referred to an Arbitrator other than one named in the arbitration clause of the agreement.

6. Mr. Neeraj Kishan Kaul, learned Senior counsel appearing for the Petitioner submitted that in view of the conduct of the BSNL in dealing with the Petitioner, and the stand taken by it, the Petitioner was not confident that a nominee of the Managing Director ('MD') of BSNL would be impartial in adjudicating the dispute. He further submitted that to the

best information of the Petitioner, the BMW Spectrum allotted to BSNL had been surrendered by BSNL. This contention was, of course, disputed by Mr. Phoolka, learned Senior counsel for Respondent BSNL. Mr. Kaul further referred to the decisions in *Datar Switchgears v. Tata Finance Ltd. (2000) 8 SCC 151*, *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd. (2007) 5 SCC 304* and *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd. (2007) 7 SCC 684* and submitted that this Court did not have to necessarily appoint the named arbitrator.

7. As regards the petition under Section 9 of the Act, it is submitted by Mr. Kaul that this would be a remedy independent of the remedy available to the Petitioner before the arbitrator under Section 17 of the Act and, therefore, the interim relief should be made absolute during the pendency of the proceedings before the learned arbitrator.

8. Mr. Phoolka, learned Senior counsel appearing for the BSNL on the other hand informed the Court that there is no warrant to make an exception for the Petitioner when in similar contracts an arbitrator had already been appointed by the BSNL pursuant to the arbitration clause and such appointment had been accepted by those parties. The person so appointed as Arbitrator was not an employee of the BSNL as alleged by the Petitioner. The arbitrator Mr. J.M. Mishra was a retired senior officer of the Department of Telecommunications ('DoT'), Ministry of Communications

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and Information Technology, who had worked as Member (Production) and ex-officio Chairman of the Telecom Commission. He was earlier also the Chief General Manager in the Assam Telecom Circle and, therefore, highly qualified and experienced to act as an arbitrator. He submitted that it would be open to the Petitioner to seek appropriate interim relief before the learned arbitrator under Section 17 of the Act.

9. Having considered the submissions of the learned counsel for the parties, it appears to this Court that in the present case there is no warrant to presume that the nominee of the MD, BSNL would fail to act impartially only on that score. It has been explained by the Supreme Court recently in *Indian Oil Corporation Ltd. v. Raja Transport Private Ltd. (2009) 8 SCC 520*, in the context of a named arbitrator under the arbitration clause, that “the Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.”

10. Consequently, this Court appoints Mr. J.M. Mishra, a retired Senior Officer of the DoT, Ministry of Communications and IT as the Sole Arbitrator to adjudicate the disputes between the parties. His fees will be governed by the terms and conditions applicable to the arbitrators nominated by the MD, BSNL in terms of the arbitration clause.

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11. As regards the interim relief, this Court directs that the interim orders passed in OMP No. 391/2011 by this Court on 20th May 2011 will continue for a period of eight weeks or till the disposal of the application being filed by the Petitioner under Section 17 of the Act by the learned arbitrator whichever is earlier and further subject to the condition that the Petitioner should file such an application before the learned arbitrator within a period of two weeks from today.

12. With the above directions, the AP No. 158 of 2011 and OMP 391 of 2011 are disposed of.



S. MURALIDHAR, J.

NOVEMBER 18, 2011

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- Fresh FA 19095/11 for direction CP-8 part II A)

***IN THE HIGH COURT OF DELHI AT NEW DELHI**
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+ **O.M.P. 391/2011**

M/S TAKE SOLUTIONS LIMITED Petitioner
Through: Mr. N.K. Kaul, Senior Advocate with
Ms. N. Shobha with
Mr. V. Adhimohan and
Mr. J. Sriram, Advocates.

versus

BHARAT SANCHAR NIGAM LTD Respondent
Through: Mr. H.S. Phoolka, Senior Advocate with
Mr. Sharat Kapoor, Advocate.

CORAM: JUSTICE S. MURALIDHAR

% **ORDER**
17.01.2012

IA No. 1018/2012 (for directions)

1. This application seeks extension of the interim order passed by this Court on 20th May 2011 in OMP No. 391 of 2011 till the disposal of the arbitration proceedings.

2. Having heard the counsel for the parties, the interim order passed by

this Court on 20th May 2011 in OMP No. 391 of 2011 is continued till the disposal of Section 17 application by the learned Arbitrator.

3. The application is disposed of.

4. Order dasti to the parties.



S. MURALIDHAR, J.

JANUARY 17, 2012
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