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

+ **ARB.P. 227/2016**

SCORE INFORMATION TECHNOLOGIES
LTD.

..... Petitioner

Through Mr Rakesh Sinha and Mr Pradeep Gupta,
Advocates.

versus

CENTRAL ORGANISATION, EX-SERVICEMEN
CONTRIBUTORY HEALTH SCHEME

..... Respondent

Through Mr Rahul Sharma, CGSC Senior Panel
with Mr Kavindra Gill, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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09.11.2016

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to an agreement dated 31.05.2010 (hereafter 'the Agreement') for supply of personalized Smart Cards.
2. The petitioner states that certain disputes have arisen between the parties in relation to the aforesaid agreement. The said agreement includes an arbitral clause; the relevant extracts of which are set out below:-

“21 DISPUTE RESOLUTION

21.1 Any and all claims, disputes, questions or controversies involving the Parties and arising out of or in

connection with this agreement on the execution, validity, interpretation, implementation, breach or termination hereof (“Dispute”), during the subsistence of the Agreement or thereafter, which cannot be finally resolved by the Parties within thirty (30) days of the arising of a Dispute by amicable negotiation and conciliation shall first be submitted for settlement by informal mediation to a panel consisting of one senior officer nominated by each Party as its representative. If any such panel, negotiating in good faith is unable to resolve and settle the Dispute within thirty (30) days after the Dispute is first submitted to it then any party shall be entitled to cause the Dispute to be submitted for arbitration in accordance with the procedure outlined herein below.

21.2 Any Dispute which is not settled after an attempt by the parties to the Dispute at amicable negotiations and conciliation under Clause 21.1 shall be resolved by final and binding arbitration held in New Delhi in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 as amended (the “Arbitration Act”)

21.3 The dispute shall be referred to three arbitrators one to be appointed by the department, other to be appointed by SITL and the third to be jointly appointed by the two arbitrators appointed by the Parties. In the event the arbitrators fail to agree a sole arbitrator shall be appointed by the Arbitration Council of India in accordance with the Arbitration Act and the terms and conditions contained herein.”

3. The respondent does not dispute the existence of the Agreement or the arbitral clause; the only objection advanced on behalf of the respondent is that the present petition is pre-mature as the parties have not exhausted their option for an amicable resolution of the disputes.

4. The learned counsel for the petitioner has strongly contested the

aforesaid submission and submitted that the petitioner had requested for an amicable resolution in terms of the said clause but had not received any response thereto. This fact is disputed and the learned counsel for the respondent states that the respondent had responded positively to the petitioner's request for an amicable resolution of the disputes.

5. I have heard learned counsel for the parties.

6. The dispute resolution clause (Article 21.1 of the Agreement) requires the parties, in the first instance, to try and resolve the disputes amicably. If the said disputes are not resolved within thirty days, the same are to be submitted for settlement by informal mediation to a panel consisting of one senior officer nominated by each party as its representative. If the mediation fails and the disputes are not resolved within a period of thirty days, the disputes are to be referred to arbitration.

7. After the disputes had arisen, the petitioner sent a letter dated 15.07.2015, *inter alia*, articulating its claims and requiring the same to be resolved. It is not disputed that the claims made by the petitioner were not resolved within a period of thirty days. Consequently, the petitioner followed its request by another letter dated 17.12.2015 requesting that the disputes be settled by mediation of panel of two senior persons. The petitioner also nominated its senior officer for mediation. Paragraph 5 of the said letter is relevant and is reproduced below:-

“5. In terms of Clause 21.1 of the Agreement, SITL nominates Mr. Sunil Goswami, President, SITL as its representative on the panel of mediators for settlement of the above disputes by informal mediation. You are thus

requested to nominate your nominee in the panel of mediators and inform us the venue, date & time of the meeting when the mediators can meet to negotiate and resolve the disputes within 30 days of the present notice.”

8. The petitioner has affirmed that it received no response to the aforesaid letter dated 17.12.2015. The learned counsel for the respondent counters the aforesaid statement and states that the petitioner’s letter dated 17.12.2015 was responded to by a letter dated 20.01.2016. However, there is no evidence that the letter dated 20.01.2016 was received by the petitioner.

9. Since the petitioner did not receive any response from the respondent, it sent another letter dated 25.01.2016 invoking the arbitration clause and appointing its nominee as an arbitrator. The petitioner further called upon the respondent to nominate its arbitrator so that the arbitral tribunal could be constituted in terms of Article 21.3 of the Agreement. The respondent responded to the aforesaid letter by a letter dated 05.02.2016 by merely referring to the letter dated 20.01.2016, without indicating its contents or appending a copy thereof.

10. The postal cover of the aforesaid letter dated 05.02.2016 indicates that the same was received at the post office only on 14.03.2016 and the petitioner affirms that the same was received only on 17.03.2016.

11. There is a serious controversy as to whether the letter dated 20.01.2016 was ever sent by the respondent. This is so for several reasons. First of all, this letter was never received by the petitioner and there is no material to indicate that it reached the petitioner. Secondly, the respondent

did not take any further steps in furtherance of this letter; there is no communication produced by the respondent which indicates that they took any steps for ensuring that the mediation panel met; there is also no communication to the mediators which would indicate any reference to the letter dated 20.01.2016. Thirdly, the letter of 20.01.2016 has not been filed - although the learned counsel for the respondent stated that the same was available. Fourthly, a copy of the despatch register produced by the respondent indicates the despatch of the said letter as the last entry on 20.01.2016 and there are several blank spaces thereafter.

12. The learned counsel for the petitioner has also drawn the attention of this Court to Article 20.9 of the agreement in question , which requires the communications to be sent either personally or by facsimile transmission or by registered post at the addresses stated in the Agreement. The letter dated 20.01.2016 stated to have been sent by respondent was, admittedly, not sent in terms of the Article 20.9 of the Agreement.

13. However, it is not necessary to enter into that controversy at this stage. Since it is clear that the petitioner had taken all steps in accordance with Article 21.1 of the Agreement and despite the efforts of the petitioner, the parties could not resolve their disputes amicably. Further indisputably, response to the said letter had not been served in accordance with Article 20.9 of the Agreement.

14. Even after invoking the arbitration clause, the respondent has not taken any steps for appointment of an arbitrator and apart from sending the letter dated 05.02.2016 - which was also apparently despatched at a much

later date because it was received at the post office only on 14.03.2016 - the respondent has not taken any other active steps.

15. In view of the fact that the arbitration clause is not disputed and the respondent has not appointed the arbitrator, it is necessary that an arbitral tribunal is to be constituted.

16. At this stage, the learned counsel for the petitioner earnestly contended that the petitioner's claim is not substantial and therefore, a sole arbitrator be appointed; however, the learned counsel for the respondent has insisted on appointment of an arbitral tribunal of three members.

17. Accordingly, it is proposed to appoint an Arbitral Tribunal comprising of three members. Mr. Anil Sharma, Advocate (Mobile No. 9811006742) and Mr. Sanjeev Kumar, Advocate (Mobile No. 9818340105) are appointed as arbitrators and Mr. Padam K. Saxena, ADJ (Retd) (Mobile No. 9910384668) is appointed as the Presiding Arbitrator. The Registry is directed to communicate a copy of this order to the aforesaid arbitrators for eliciting the disclosure under Section 12 of the Act. The parties are also at liberty to approach the arbitral tribunal for necessary disclosure.

18. Order *dasti* under the signature of Court Master.

VIBHU BAKHRU, J

NOVEMBER 09, 2016

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