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

+ O.M.P.(I) (COMM.) 390/2016 & IA No. 12310/2016

HCL INFOTECH LIMITED

..... Petitioner

Through: Mr Sonal Kumar Singh and Ms Swati
Sehgal, Advocates.

Versus

MAHANAGAR TELEPHONE NIGAM
LIMITED

..... Respondent

Through: Mr Pankaj Garg and Mr Miling Garg,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **18.11.2016**

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

"a. Pass an order restraining the Respondent from invoking Performance Bank Guarantee No. 0031BG00029410 for Rs. 99,97,231/- (Rupees Ninety Nine lakhs ninety seven thousand Rupees two hundred thirty one only)."

2. By an order dated 03.10.2016, this Court had restrained the respondent from invoking the bank guarantee in question till the next date of hearing. The respondent was further given opportunity to file a reply to the petition within a period of two weeks from that date. However, no reply has been filed as yet.

3. The learned counsel appearing for the respondent states that on 07.10.2016, the respondent had proceeded to appoint an arbitrator and requests that the present matter be referred to the arbitrator for his decision.

4. The learned counsel appearing for the petitioner states that although the arbitrator has been appointed, the petitioner has a serious challenge to its appointment as (a) the arbitrator is a retired officer of Department of Telecom which is the Government Department exercising administrative control over of the respondent company and (b) the arbitrator has not made the necessary disclosure under Section 12 of the Act prior to his appointment.

5. Insofar as the petitioner's objections as to the appointment of the arbitrator are concerned, it will be open for the petitioner to agitate the same in accordance with law. However, since at present the arbitrator has been appointed, I consider it fit to direct that the present petition be considered as an application under Section 17 of the Act by the Arbitral Tribunal. It is so directed.

6. It is also clarified that this is without prejudice to the petitioner's challenge to the appointment of the arbitrator and in the event the petitioner succeeds in its challenge, the application under Section 17 (the present petition) shall be decided by the Arbitral Tribunal which may be constituted thereafter. The interim order passed on 03.10.2016 shall continue to be operative till the disposal of the application under Section 17 of the Act. This is also subject to the petitioner keeping the bank guarantee alive during the pendency of the application. In the event the concerned bank is unwilling to extend the bank guarantees for any reason whatsoever, the subject bank

guarantees shall be considered as invoked and the concerned banks shall make the payment on the strength of this order.

7. The present petition is disposed of with the aforesaid directions. It is clarified that this order shall be subject to further order(s) that may be passed by the Arbitral Tribunal.

8. The learned counsel for the parties shall file a copy of the present petition along with orders passed herein before the Arbitral Tribunal.

VIBHU BAKHRU, J

NOVEMBER 18, 2016
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