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

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Date of Decision: 12.05.2017

+ ARB.P. 72/2017

ATC TELECOM INFRASTRUCTURE
PRIVATE LIMITED

..... Petitioner

Through Mr.Ajit Warriar, Mr.Dushyant
Manocha and Mr.Angad Kochhar, Advs.

versus

RELIANCE COMMUNICATIONS LIMITED..... Respondent

Through Mr. Chaitanya Sapaya and
Ms.Sayaree Basu Mallik, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

1. Present petition is filed under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) to appoint a second arbitrator on the Arbitral Tribunal to be constituted to adjudicate upon the disputes that had arisen between the parties.
2. Some of the basic facts are that on 23.9.2009 the parties entered into Passive Telecom Infrastructure Sharing Agreement. Disputes having arisen between the parties the petitioner on 10.9.2016 issued notice invoking the arbitration clause and appointing Hon'ble Mr. Justice (Retd.) R.C.Chopra as the nominee Arbitrator. The petitioner also filed a petition under Section 9

of the Act being OMP (I) (Comm.)378/2016 which is said to have been disposed of on 21.9.2016. As respondent failed to nominate its Arbitrator as per agreed procedure the petitioner has filed the present petition under section 11(6) of the Act seeking appointment of an Arbitrator on behalf of the respondent.

3. Learned counsel for the respondent has today placed on record a communication dated 10.5.2017 whereby the respondent has appointed Hon'ble Mr.Justice V.V.S.Rao (Retd.) as a co-arbitrator. Learned counsel further submits that in view of the said appointment having been made the present petition has become infructuous.

4. Learned counsel for the petitioner has, however, vehemently relied upon judgment of the Supreme Court in ***Deep Trading Company vs. Indian Oil Corporation and Others, (2013)4 SCC 35*** to contend that in terms of the legal position stated in the said judgment the respondent has forfeited their rights to appoint an Arbitrator in terms of the Agreement between the parties and now it is for this court to nominate an Arbitrator on behalf of the respondent. It is urged that the action of the respondent in issuing a communication dated 10.5.2017 is contrary to the legal position and the said communication is void.

5. Learned counsel for the respondent has in rebuttal relied upon clause 26 of the Agreement dated 16.9.2008 to contend that certain attempts for settlement had to be made before arbitration proceedings could commence. Hence, the delay on the part of the respondent was for bona fide reasons.

6. There is some dispute about the relevant applicable arbitration clause. I may first see the arbitration agreement as contained in the Passive Telecom Infrastructure Sharing Agreement dated 23.9.2009. Said agreement is relied

upon by the petitioner and reads as follows:-

“15 DISPUTE RESOLUTION

15.1 Any dispute, disagreement or controversy between parties arising out of or in connection with this Agreement or breach thereof or relating to it's construction or performance shall be submitted for arbitration in accordance with the Arbitration and Conciliation Act, 1996. All arbitration proceedings shall be conducted in the English language. For the purpose of such arbitration, there shall be three (3) arbitrators (the “Arbitral Tribunal”) appointed in the following manner:-

- (i) One(1) arbitrator shall be appointed as Customer.
- (ii) One(1) arbitrator shall be appointed by Service Provider, and
- (iii) The arbitrators appointed by Customer and Service Provider shall jointly appoint the third arbitrator, within a period of fifteen (15) days of their appointment and where such third arbitrator has not been selected on account of a difference of opinion amongst the arbitrators, the third arbitrator shall be appointed in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

15.2 The award of the Arbitral Tribunal shall be final and binding on parties.

15.3 Arbitration shall be held in New Delhi. Each Party shall co-operate in good faith to expedite, to the maximum extent practicable the conduct of any arbitral proceedings commenced under this agreement.

15.4 The costs and expenses of the arbitration including, without limitation, the fees of the arbitration, and including, without limitation, the fees of the Arbitral Tribunal, shall be borne by either or both the parties as may be determined by the Arbitral Tribunal.”

7. Clause 21.8 of the agreement states that it would supersede any other

agreement between the parties. Clause 21.8 reads as follows :-

“Clause 21.8-Supersession

Except as otherwise agreed among Parties, this Agreement (and in the case of each Site, along with the relevant Site Agreement) constitutes the entire agreement of parties as to its subject matter and supersedes any previous understanding or agreement on such subject matter.”

8. The respondent, however, seeks to rely upon Multipartite Agreement for Passive Infrastructure dated 25.1.2011 to contend that this was the last agreement executed between the parties and that the applicable arbitration clause as contained in clause 10 is the relevant clause. The said clause 10 first part reads as follows:-

“10. Any dispute, difference, controversy or claims ("Disputes") arising between the parties out of or in relation to or in connection with this Agreement or the breach, termination, effect, validity, interpretation or application of this agreement or to their rights, duties or liabilities hereunder, shall be settled by the parties by mutual consultation. If for any reason such Disputes cannot be resolved amicably by the parties, the same shall be referred to and settled by Arbitral Tribunal consisting of three arbitrators. The arbitration proceedings shall be held in accordance with the Arbitration and Conciliation Act,1996, or any subsequent enactment or amendment thereto (the "Arbitration Act").

Infrastructure Provider and Customer shall appoint an arbitrator within 30 days of the receipt by a party of the other party's request to initiate arbitration proceedings. The two arbitrators so appointed shall then jointly appoint a third arbitrator within 30 days of the date of appointment of second arbitrator. Such third arbitrator shall act as the Presiding Arbitrator. Arbitrator not appointed within the time limit set forth herein above, shall be appointed in

accordance with provisions of the Arbitration Act. The decision of the arbitrators shall be final and binding upon the parties.

The venue of arbitration proceedings shall be Delhi.

The language of the arbitration proceedings and award shall be in English.”

9. The controversy above does not materially affect the issue at hand. Both the Arbitration Clauses state that the disputes are to be referred to the Arbitral Tribunal comprising of three Arbitrators. One to be appointed by each side and the third to be appointed by the Arbitrators. Clause 10 in the Multipartite Agreement for Passive Infrastructure relied upon by the respondent in addition, provides that the Arbitrator shall be appointed within 30 days of receipt by a party of the other party’s request to initiate proceedings.

10. As far as the legal position is concerned the same is covered by the judgment of the Supreme Court in *Deep Trading Company vs. Indian Oil Corporation and Others (supra)* Relevant paragraphs of the said judgment read as follows:-

“1. Leave granted. The questions that arise for consideration in this appeal, by special leave are, whether Respondent No. 1 has forfeited its right to appoint the arbitrator having not done so after the demand was made and till the Appellant had moved the court under Section 11(6) and, if the answer is in the affirmative, whether the appointment of the arbitrator by Respondent No. 1 in the course of the proceedings under Section 11(6) is of any legal consequence and the Chief Justice of the High Court ought to have exercised the jurisdiction and appointed an arbitrator?

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15. In *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.*: (2000) 8 SCC 151, a two-Judge Bench of this Court considered the scheme of Section 11 noted the distinguishing features between Section 11(5) and Section 11(6) and then considered the question whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of thirty days from the date of demand. This Court held that in cases arising under Section 11(6), if the opposite party has not made an appointment within thirty days of the demand, the right to make appointment is not forfeited but continues, but such an appointment has to be made before the first party makes application under Section 11 seeking appointment of an arbitrator. If no appointment has been made by the opposite party till application under Section 11(6) has been made, the right of the opposite party to make appointment ceases and is forfeited.

16. In *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638, the agreement entered into between the parties contained arbitration clause. The disputes and differences arose between the parties. Punj Lloyd (Appellant) served a notice on Petronet (Respondent) demanding appointment of an arbitrator and reference of disputes to him. Petronet failed to act. On expiry of thirty days, Punj Lloyd moved the Chief Justice of the High Court for appointment of the arbitrator under Section 11(6). Petronet had not made appointment till the date of moving the application. The designate Judge refused to appoint the arbitrator holding that the remedy available to it was to move in accordance with the agreement. Aggrieved by the said order, a writ petition was filed which was dismissed and the matter reached this Court. A three-Judge Bench of this Court referred to *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.*: (2000) 8 SCC 151 and held that the matter was covered squarely by that judgment and the view taken by the designate Judge in dealing with the application under

Section 11(6) and the Division Bench was not right. This Court restored the application under Section 11(6) before the Chief Justice of the High Court for fresh consideration and appointment of the arbitrator in accordance with Section 11(6).

17. We are in full agreement with the legal position stated by this Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* : (2000) 8 SCC 151 which has also been followed in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638.

.....”

11. In the present case, the petitioner invoked the arbitration clause on 10.09.2016 and appointed Justice R.C.Chopra (Retd.) as the first Arbitrator for the Tribunal. Request was made to the respondent to nominate the second Arbitrator to the Arbitral Tribunal. It was also pointed out that the petitioner will not hesitate to initiate legal proceedings for constitution of the Tribunal. The respondent received the said communication dated 10.09.2016 and also sent a reply on 20.10.2016. However, they did not initiate any steps to appoint an Arbitrator.

12. On 21.09.2016 a petition under section 9 of the Act was filed by the petitioner and was heard. The said petition was, however, dismissed as withdrawn with liberty to approach the Arbitral tribunal for the same relief. The respondent entered appearance in the said proceedings.

13. Despite the above, no steps have been taken by the respondent to nominate their own arbitrator. In terms of the arbitration clause relied upon by the petitioner, namely, clause 10 of the Agreement dated 25.1.2011 the parties shall do the needful within 30 days on receipt of a request from other side. Even as per section 11(4) of the Act where a party fails to appoint an

Arbitrator within 30 days from the receipt of a request to do so from the other party where three Arbitrators are to be appointed, the appointment shall be made upon request by the concerned court.

14. It is noteworthy that in the present case the respondents after service of notices entered appearance on 20.3.2017. They have now on 10.5.2017 i.e. even beyond 30 days after having entered appearance chosen to appoint an Arbitrator.

15. Clearly, keeping in view the ratio of the judgment of the Supreme Court in *Deep Trading Company vs. Indian Oil Corporation and others (supra)* the respondent has lost its right to appoint their own Arbitrator. The communication dated 10.5.2017 issued by the respondent is unenforceable and invalid.

16. Accordingly, I appoint Mr. Justice M.L. Mehta, (Retd.) (Mobile No. 9910384620) as an Arbitrator on behalf of the respondent. The two learned Arbitrators may now appoint the third Arbitrator.

17. Petition stands disposed of. All pending applications, if any, also stand disposed of.

JAYANT NATH, J

MAY 12, 2017

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