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

+ **ARB.P. 81/2018 and IA No. 1263/2018**

SMART DIGIVISION PRIVATE LIMITED Petitioner
Through: Mr Prateek Kumar and Ms Sneha
Jankiraman, Advocates.

versus

BHARAT SANCHAR NIGAM LIMITED Respondent
Through: Mr Sameer Agrawal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **09.03.2018**

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 10.12.2007 (hereafter 'the Agreement').

2. The Agreement includes an arbitration clause, which reads as under:-

“5.8 Arbitration

Except as provided in this agreement, in case of any dispute or differences, breach & violation relating to the terms of the Agreement. The said matter or dispute, difference shall be referred to sole arbitration of Chairman and Managing Director (CMD) of BSNL or any other person appointed by him. That the award of the arbitrator shall be final and binding on both the parties. In the event of such Arbitrator to whom the matter is originally referred to is being transferred or vacates his office on resignation or other wise or refused to do work

or neglecting his work or being unable to act as Arbitrator for any reasons whatsoever, the CMD BSNL shall appoint another person to act as Arbitrator in place of out going Arbitrator and the person so appointed shall be entitled to proceed further with the reference from the stage at which it was left by his predecessor. The Franchisee will have No Objection in any such appointment, that arbitrator so appointed is employee of BSNL. The said Arbitrator shall act under the Provisions of the Arbitration and conciliation Act, 1996 or any statutory modifications or reenactment thereof or any rules made thereof.”

3. In view of the disputes that are stated to have arisen between the parties, the petitioner issued a notice dated 08.12.2017 invoking the arbitration clause. The petitioner further submitted that in view of the introduction of Sub-section 5 in Section 12 of the Act, a person listed in the Seventh Schedule to the Act would be ineligible for being appointed as an Arbitrator. Accordingly, the petitioner proposed the name of a former judge of this Court to be appointed as the sole arbitrator by mutual consent to adjudicate the disputes between the parties. The respondent did not respond to the said letter. Consequently, the petitioner has filed the present petition.

4. The learned counsel appearing for the respondent submits that after the petition was filed, the CMD of the respondent had taken steps for appointment of an arbitrator and, therefore, the petitioner’s grievance does not survive.

5. The said contention is unmerited. First of all, it is well settled that if a party fails to appoint an arbitrator prior to the petition being filed under Section 11 of the Act, the said party would forfeit its right to do so. (See: ***Datar Switchgears Ltd v. Tata Finance Ltd and Anr.: (2000) 8 SCC 151***

and Deep Trading Company v. Indian Oil Corporation and Ors.: (2013) 4 SCC 35).

6. There is yet another aspect of the matter. In **TRF Ltd. v. Energo Engineering Projects Ltd.: (2017) 8 SCC 377**, the Supreme Court had held that “*once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person*”.

7. Following the aforesaid decision, this Court in **Crayons Advertising Private Limited v. Bharat Sanchar Nigam Limited: 2018 SccOnline Del 6662**, while interpreting a clause similar to Clause 5.8 of the Agreement, observed that appointment of an arbitrator by the CMD or his nominee would be invalid.

8. In view of the above, the present petition is liable to be allowed.

9. Ms. Justice Usha Mehra, Retired. Judge, Delhi High Court (Mobile No. 9818421144) is appointed as the sole arbitrator to adjudicate the disputes that have arisen between the parties. This is subject to the Arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12(5) of the Act.

10. The learned counsel appearing for the parties agree that the arbitration be conducted under the aegis of Delhi International Arbitration Centre (DIAC) and in accordance with its Rules. It is so directed.

11. The parties shall appear before the Coordinator, DIAC on 20.03.2018 at 11:00 p.m.

12. The petition and the pending application are disposed of.

VIBHU BAKHRU, J

MARCH 09, 2018
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