



2024:DHC:1324



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

+ **ARB.P. 882/2023, I.A. 16462/2023**

EIT SERVICES INDIA PRIVATE LIMITED Petitioner

Through: **Mr. Dayan Krishnan, Sr.**
Adv. with Ms. Sneha
Janakiraman, Mr.
Madhav Khosla, Ms.
Saloni Gupta, Advs.

versus

INDIA POST PAYMENTS BANK LIMITED Respondent

Through: **Mr. Rajesh Kumar**
Gautam, Mr. Anant
Gautam, Ms.
AnaniAchumi, Ms.
Shivani Sagar, Mr.
Dinesh
Sharma, Ms. Anani A.,
Mr. R. P. Daida, Advs.

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Date of decision 09.02.2024.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (ORAL)

1. The present petition has been filed under Section 11 of the Arbitration



and Conciliation Act, (*hereinafter referred as “Act”*) 1996 for the appointment of an arbitrator for adjudication of disputes *inter-se* the parties.

2. Briefly stated the facts of the present case are that the Petitioner herein formerly known as Hewlett Packard Global Soft Private Limited is a private company incorporated under the provisions of the Companies Act 1956 having its registered office at Digital Park, 39/40 Electronics City, Phase II Hosur Road, Bangalore - 560100 and the Respondent is a public limited company wholly owned by the Government of India and set up under the Companies Act, 2013 and the Banking Regulation Act, 1949 offering services in rural semi-urban and urban areas through doorstep banking services, powered by a network of postman/global distribution system.

3. On 17 October 2016, Respondent issued an RFP for the selection of a System Integrator (“SI”) for of inviting bids for the development, supply, and installation of applications and systems, necessary central hardware, deployment, training, and maintenance of such solution with the ultimate objective of providing various payment services and direct benefits to the population in an efficient, transparent and convenient manner.

4. Subsequently, in response to the RFP, the Petitioner submitted its proposal to the Respondent. The Petitioner was selected as the successful bidder to undertake the Project, as per the scope of work detailed in Volume- 1 of the RFP read with Technical Submissions dated 8.12.2016 provided by the Petitioner in response to the RFP. Pursuantly, the Petitioner and Respondent No. 1 entered into the Master Services Agreement (*hereinafter referred to as “MSA”*), with the Petitioner as the ‘SI’ for the Project. In terms of Clause 3.1.5 of the MSA, the Petitioner and Respondent No. 1 also simultaneously entered into the Service Level Agreement



(hereinafter referred as “SLA”) for operating and maintaining service level requirements under the MSA.

5. Further, in terms of Clause 2.1.6 (a) and 2.2.1 of the MSA, read with Clause 6.5 of Volume II of the RFP, a performance bank guarantee dated 11.09.2017 bearing Bank Guarantee No. LG/6216/GT013210/17 was issued by Bank of America NA (“PBG”) on behalf of the Petitioner to the Respondent for a cumulative amount of INR 68,92,59,908/-. The PBG was valid up to 30.05.2023, with the claim expiry dated 30.05.2024. However, pursuant to the Respondent’s request, the validity of the PBG was extended up to 09.09.2023, with a claim period up to 30.05.2024.

6. In terms of the MSA, the Scope of Work agreed upon between the parties provided for 4 “Releases”, namely Release 1, Release 2, Release 3, and Release 4, each of which was a separate milestone under the MSA. The timelines provided under the Agreements for the Scope of Work could not be adhered to, on account of various reasons.

7. Further, Respondent withheld due payments against the Petitioner’s invoices amounting to roughly Rs. 163,70,86,384/- out of which Rs. 68,92,59,908/- had been withheld for the alleged delay and defects in completion of the services. Thereafter, one day before the expiry of the term of the MSA, i.e., on 10.07.2023, the respondent issued a Termination Notice terminating the Agreements followed by Respondent issuing another letter dated 10.07.2023 to the Bank of America seeking invocation of the PBG. Hence, the petitioner issued the notice invoking arbitration vide notice dated 25.08.2023 in terms of clause 8.4 of the MSA seeking the constitution of an arbitral tribunal.

8. It is pertinent to mention here that prior to the filing of the present



petition, the petitioner also filed a petition under Section 9 of the A&C Act bearing OMP. (I) (COMM) 215/2023. However, the same was dismissed by this Court vide order dated 18.09.2023. The present petition under Section 11 of the Act seeking the appointment of an arbitrator was filed during the pendency of the petition filed under Section 9 of the Act by the Petitioner.

9. Sh. Dayankrishanan, learned senior counsel for the petitioner has submitted that predominantly, the claim of the petitioner is first, withholding of the legitimate due amount of the petitioner by the respondent and secondly, illegal invocation of the bank guarantee furnished by the petitioner in favour of the respondent.

10. The respondent has filed a detailed reply to the petition and in the preliminary objection of the reply the respondents have stated that the petition is not maintainable in view of clause -8 of the Master's Service Agreement ('MSA') dated 14.08.2017. Clause 8 of the MSA is reproduced as under:

"8. Disputes and amendments

8.1. Dispute Resolution

1. Any dispute arising out of or in connection with this Agreement or the SLA shall in the first instance be dealt with in accordance with the escalation procedure as may be mutually agreed between the Parties as indicated in the Governance Schedule to this Agreement.

2. Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Agreement or the validity of the breach thereof, which cannot be resolved through the application of the provisions of the Governance Schedule, shall be dealt in accordance with the provisions set forth herein.

8. 2. Scope of Dispute Resolution



Except where otherwise provided in this Agreement, any and all claims, causes of action, disputes or proceedings arising out of or in connection with this Agreement, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used by the SI or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to this Agreement, designs, drawings, specifications, estimates, instructions, orders or conditions or otherwise concerning the services and deliverables or the execution or failure to execute the same whether arising during the progress of the Project or after the cancellation, termination, completion or abandonment thereof ("Dispute") shall be dealt with as mentioned hereinafter:

8. 3. Expert Determination

An independent expert shall be a person appointed in accordance with this Clause 8. 3 to resolve any technical dispute, including interpretation of the specification or relating to the functions or} capabilities of the SI Software ("Expert").

Within 7 (seven) days of receipt of Notice by a Party for resolution of a Dispute through an expert, an independent Expert shall be mutually appointed by the Parties. Provided however, that, if the Parties are unable to agree on appointment of any Expert within seven (7) days then such dispute shall be resolved through arbitration in accordance with Clause 8. 4 below.

The Expert shall prepare a written decision and give notice (including a copy) of the decision to the Parties within a maximum of 1 (one) month from the receipt of requisite information and documents required by the Expert to make his/her decision on the Dispute, provided that the Expert should conclude his entire proceeding with 60 days from the date the Dispute/matter is referred to him/her for resolution.

If the Expert dies or becomes unwilling or incapable of acting, or does not deliver the decision within the time required by this Clause 8. 3 then:



1. The Parties may mutually discuss to discharge the Expert and to appoint a replacement Expert with the required expertise; and

2. This Clause 8. 3 shall apply in relation to the new Expert as if he were the first Expert appointed. All matters under this Clause 8.3 must be conducted, and the Expert's decision shall be written, in the English language. The Parties shall be entitled to make submissions to the Expert, including oral submissions, and shall provide, or cause to be provided, the Expert with such assistance and documents as the Expert reasonably requires for the purpose of reaching a decision. To the extent not provided for by this clause, the Expert may in his reasonable discretion determine such other procedures to assist with the conduct of the determination as he considers just or appropriate, including (to the extent the Expert considers necessary) instructing professional advisers to assist him in reaching his determination. Each Party shall with reasonable promptness supply each other with all information and give each other access to all documentation and personnel as the other party reasonably requires to make a submission under this Clause 8.3. For the avoidance of doubt it is clarified that the Expert shall act as an expert and not as an arbitrator, the Expert shall determine the Dispute, including any issue involving the interpretation of any provision of this Agreement, his jurisdiction to determine the matters and issues referred to him or his terms of reference. The Expert's written decision on the matters referred to him shall be final and binding on the Parties. Each Party shall bear its own costs in relation to the reference to the Expert, The Expert's fees and any costs properly incurred by him in arriving at his determination (including any fees and costs of any advisers appointed by the Expert) shall be borne by the Parties equally or in such other proportions as the Expert shall direct. All matters concerning the process and result of the determination by the Expert shall be kept confidentially among the parties and the Expert.

8. 4 Arbitration

1. Subject to provisions of Clause 8.3 above, in case, a Dispute is referred to arbitration, the arbitration shall be under the Indian Arbitration and Conciliation Act, 1996 and any statutory modification/ amendment or re-enactment thereof The arbitration of the Disputes shall be conducted by a sole arbitrator in accordance



with the Indian Arbitration and Conciliation Act, 1996. The sole arbitrator shall be mutually decided amongst the Parties and in case of a disagreement on appointment of arbitrator within [45] days from the date the Dispute was referred to arbitration under this Clause, any Party to the Dispute shall be entitled to approach the High Court of Delhi for appointment of sole arbitrator.

2. Arbitration proceedings shall be held in Delhi and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

3. The decision of the sole arbitrator shall be final and binding upon both parties. The expenses of the sole arbitrator shall be shared equally by Payment Bank and the SI. However, the expenses incurred by each party in connection with the preparation, presentation shall be borne by the party itself. All arbitration awards shall be in writing and shall state the reasons for the award.

4. Notwithstanding the foregoing, the Parties agree that arbitration proceedings with respect to all subsequently arising Disputes ("Subsequent Disputes") shall be consolidated with arbitration proceedings with respect to the Dispute that arises first in time ("Primary Arbitration Proceedings"), be it under this Agreement or the SLAs. Such consolidation shall not take place unless the sole arbitrator (appointed in accordance with this Clause) conducting the Primary Arbitral Proceedings determines that (i) there are issues of fact or law common to the proceedings so that a consolidated proceeding would be more efficient than separate proceedings; and (it) no party would be prejudiced as a result of such consolidation through undue delay or otherwise. Pursuant to such consolidation, all subsequent Disputes shall be referred to and be decided by the same arbitrators that are conducting the Primary Arbitration Proceedings, and any award made by such arbitration proceedings shall be final and binding on the Parties who are party to the Subsequent Dispute. The aforementioned provisions of this Clause shall apply accordingly to all Subsequent Disputes.

5. Pending the submission of and/or decision on a dispute, difference, or claim or until the arbitral award is published; the Parties shall



continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.

6. The provisions of this clause 8 shall survive the expiry or termination of this Agreement."

11. The plea of the respondent is that since the petitioner has not followed the procedure specifically laid down in clause 8.3, the present petition is premature and not maintainable. Learned counsel for the respondent has submitted that clause 8.3 mandatorily provides that an expert was to be appointed for the disputes having arisen and as the petitioner did not comply with the provision in terms of clause 8.3 of the MSA, the petition is not maintainable. Learned counsel further submitted that the petitioner has acted in haste as the present petition was filed during the pendency of the petition filed under Section 9 before this court. Learned counsel has also submitted that the arbitration was invoked vide notice dated 25.08.2023 and on the very next date, the present petition was filed.

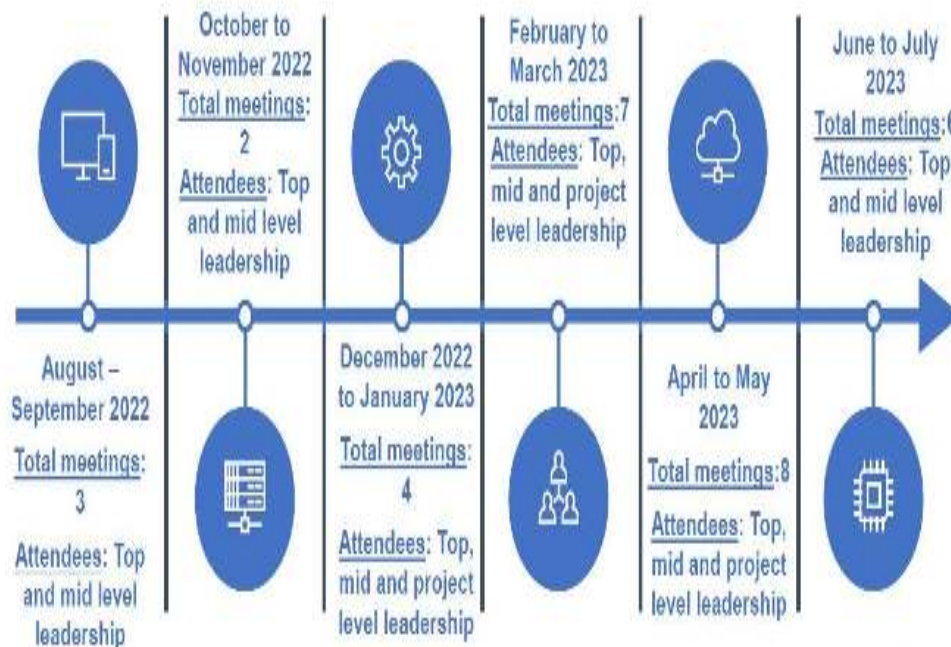
12. Learned counsel, therefore, submits in view of the agreed terms and conditions between the parties as contained in the MSA dated 14.08.2017, the petition is liable to be dismissed due to the non-compliance of the agreed terms and conditions by the petitioner.

13. Learned senior counsel for the petitioner submits that prior to invoking the arbitration there have been several rounds of meetings between the parties for an amicable settlement. Learned senior counsel for the petitioner has invited the attention of the court to the document filed along with a rejoinder to show that the following meetings took place between the parties:



DOCUMENT-A Timeline Chart

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14. Learned senior counsel for the petitioner has also invited the attention of the Court to Document-H wherein on 10.08.2022, a meeting was held between top-level management personnel of the Petitioner Company and respondent company. It has been submitted that minutes of the meeting were duly prepared and it was *inter-alia* agreed that a committee will further share recommendations and agree with that.

15. Learned senior counsel for the petitioner has also submitted that dispute resolution as contained in clause 8.1 of the MSA dated 14.08.2017 was subject to the provisions of the governance schedule. However, the learned



senior counsel for the petitioner has submitted that the committees to be constituted in terms of the governance schedule were never constituted by the respondent.

16. Learned senior counsel for the petitioner has invited the attention of the court to clauses 8.1, 8.2, and 8.3 of the MSA and “submitted” that clause 8.3 is not a mandatory clause. It has been further submitted that the bare reading of clause 8.3 makes it clear that this was only an option given to the party to appoint an expert, subject to the fact that the other party agrees to the same. Learned senior counsel for the petitioner has further submitted that in order to invoke clauses 8.1, 8.2, and 8.3 of the MSA, it was a prerequisite that there has to be a “Technical Dispute”. Learned senior counsel for the petitioner has submitted that the dispute between the parties was not a technical dispute. Learned senior counsel for the petitioner has categorically submitted that dispute being not technical in nature, the petitioner would never had argued to the appointment of an expert.

17. Learned counsel for the petitioner has relied upon ***Demerara Distilleries Private Limited and Another vs Demerara Distillers Limited (2015) 13 SCC 610.***

18. Per Contra, learned counsel for the respondent has submitted that clause 8.3 is a mandatory provision. It was agreed between the parties that before resorting to clause 8.4 it would be necessary to meet the requirements of Clause 8.2 and 8.3. Learned counsel for the respondent has further submitted that there were technical issues behind the monetary disputes arisen between the parties. It has further been submitted that the meetings which have been referred to by the petitioner as contained in documents A and B were only before the actual dispute took place. Learned senior counsel for the



respondent submits that therefore these meetings cannot fulfil the purpose as contained in clauses 8.2 and 8.3. Learned senior counsel for the respondent has placed his reliance *M/s Welspun Enterprises Ltd. V. M/s NCC LTD.* in FAO (OS) (COMM) No.9/2019 dated 10.10.2022 stating that if there are agreed terms between the parties, the parties are required to fulfil the same before resorting to invoke the arbitration.

19. The jurisdiction under Section 11 of the Act is well-defined. It is no more *res integra* that at this stage the Court is only required to see whether there is an agreement between the parties which contains the arbitration clause and whether there are arbitrable disputes between the parties. As far as these facts are concerned, there is no dispute. The dispute in the present case is whether the terms and conditions which are required to be filled before referring the matter to the arbitration have been fulfilled or not. The plea of the petitioner is that clause 8.3 is not mandatory whereas the plea of the respondent is that clause 8.3 is a mandatory provision. Before coming to the discussion in the present case, it is very advantageous for the judgement to be referred by the learned counsel for the respondent in *M/s Welspun Enterprises Ltd.* (supra).

20. In *M/s Welspun Enterprises Ltd.* (supra) case the basic question before the Court is when the limitation would start for the purpose of arbitration in the case, where in the agreement there is pre-requisite for mediation and conciliation before invoking the arbitration. In this case, it was *inter alia* held that the limitation would start running after such remedies are exhausted. While deciding so the Court *inter alia* observed that if in the agreement there is a condition for resolution of dispute through mediation or conciliation it should be exhausted before invoking the arbitration.



21. Learned counsel for the respondent thus submitted that before invoking the arbitration if there is a provision for an amicable settlement or any pre-requisite conditions to be completed between the parties that should be duly complied. The plea of the petitioner is that the condition which is not mandatory should not be insisted upon if compliance of the same is only a sheer formality. The point is whether for such formality to be completed, only to fulfil certain terms, it will be advisable to refuse the reference of the matter to the arbitration. Coming back to clauses 8.1, 8.2, and 8.3, firstly, in case of any dispute that was required to be dealt with in accordance with the escalation procedure as may be mutually agreed between the parties as indicated in the governance schedule to this agreement. The governance schedule is as under:

Governance Schedule		
Review Forum	Participants	Function
Program Implementation Committee (PIC)	- Payment Bank Members - External members nominated by Payment Bank - Payment Bank Project Director - SI Executive Sponsor - SI Engagement Manager - SI Project Manager (Post Release 2, this will be represented by IT Operations Leader)	PIC is the highest governing body providing strategic direction to the program. It is responsible for reviewing the progress of the Program and taking all decisions regarding the overall vision, policy and technology matters. The function of the Committee is to periodically review the program, and to provide a formal channel of authority and guidance to the project. The role of the PIC is to: - Provide high level direction - Ultimate authority and responsibility for the program - Resolve conflicts concerning policies and objectives - Review progress of the program on a regular basis - Taking all decisions regarding the overall vision, policy and technology matters - Handle exceptions that are unresolved in the Project management Unit.
Project Management Unit (PMU)	- Payment Bank Project Director (Chair) - SI Engagement Manager - SI Project Manager - Payment Bank Project Manager	The function of the PMU is to meet weekly to assess project in an schedule, discuss day to day execution / escalation issues, identify risk and initiate plan of action for mitigation of the same.
Project Stream Wise Review	- Payment Bank Project Manager Stream Wise - SI Project Lead Stream wise - SI PMO	At the project level, SI programs to have a project level review between the SI Project Manager and Payment Bank Project manager. Issues not resolved at the project manager level will be brought to the PMU for escalation and resolution support.

22. The plea of the petitioner is that committees as given were required to be constituted, as per the governance schedule, but the same were not



constituted as per the governance schedule, which has not been disputed by the learned counsel for the respondent. So, as far as clause 8.1 is concerned, it becomes redundant.

23. Now a bare perusal of clause 8.2 provides that any dispute relating to the meaning of specifications, design, drawings, and instructions and as to the quality of workmanship or materials used by the 'SI' (petitioner herein) or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to this Agreement, designs, drawings, specifications, estimates, instructions, orders or conditions or otherwise concerning the services and deliverables or the execution or failure to execute the same whether arising during the progress of the Project or after the cancellation, termination, completion or abandonment thereof ("Dispute") shall be dealt with as mentioned hereinafter. For the purpose of Clause 8.2, clause 8.3 provides that an independent expert shall be a person appointed in accordance with Clause 8.3 to resolve any technical dispute, including interpretation of the specification or relating to the functions or capabilities of the SI Software ("Expert").

24. Firstly, the bare reading of clause 8.3 gives the impression that first of all it has to be a technical dispute or the specific disputes as mentioned in the clause and secondly, the person to be appointed under this provision has to be an expert. Going further the procedure for appointing such an independent expert was that within 7 days of the receipt of notice by a party an independent expert had to be mutually appointed by the parties. Thus, for the appointment of an independent expert, it is necessary that both the parties agree. If the consent of both parties is required, it shows that the parties did not consider it to be mandatory. Thus, reading clause 8.3 as



mandatory would make the agreement otiose. Further as per clause 8.1 admittedly the committees were not constituted as per governance schedule.

25. I consider that the facts and circumstances of the case, the judgement in *M/s Welspun Enterprises Ltd.* (supra) is respectfully distinguished. The Court has to consider the facts of every case objectively in its peculiar circumstances. By non formation of the committees, as required under Clause-8.1, it seems that since beginning parties were not having the intention to make this mandatory. Secondly, the appointment of an expert was also only if both parties agree, therefore, it can't be termed as mandatory. The series of meetings between the parties, as brought on record, would indicate that any initiative/direction at this stage to resolve the dispute through any other means would be an empty formality. The Court has also to see and keep in mind the intention of the legislature before passing any order. The arbitration and conciliation Act has been enacted and amended from time to time in order to encourage disputes through alternative dispute remedies. The legislature and the Courts have always encouraged the adjudication of disputes through such alternative dispute remedies. Hence, the objections of the respondent are respectfully rejected.

26. In view of the discussion made hereinabove, I consider that there is an agreement between the parties which contains the arbitration clause and the same is to be invoked. Thus, the present petition is disposed of with the following directions:

- I. The disputes between the parties under the said agreement are referred to the arbitral tribunal.



- II. Mr. Justice D. K. Jain, (Former Judge, Supreme Court of India) is appointed as an Arbitrator to adjudicate the disputes between the parties.
- III. The remuneration of the learned Arbitrator shall be fixed by the learned Arbitrator with the consent of the parties.
- IV. The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- V. It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- VI. The parties shall approach the learned arbitrator within two weeks from today.
27. The petition along with pending application stands disposed of in the above terms.

DINESH KUMAR SHARMA, J

FEBRUARY 9, 2024

Pallavi/SJ