THE HIGH COURT OF JUDICATURE FOR MADHYA PRADESH AT JABALPUR

(Single Bench: Hon'ble Shri Justice Mohammad Rafiq, Chief Justice)

Arbitration Case No. 38 of 2020

M/s. HCL Technologies Limited …….. Applicant

Vs.

Madhya Pradesh Computerization of Police Society (MPCOPS) …… Non-applicants

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Presence :

Mr. Akshay Sapre, Advocate for the applicant.

Mr. Bramhadatt Singh, Government Advocate for the non-applicant.

Whether approved for reporting: **Yes**

***Law Laid Down*:**

➔ Appointment of Arbitrator u/S 11(5) and (6) of the **Arbitration and Conciliation Act, 1996** – Arbitration Clause 1.23 (Dispute Resolution) and sub-clause (a) whereof stipulating to first exhaust the inhouse mechanism of dispute resolution – Governance Procedure in Clause 2.5.3 of the Agreement does not provide issuing disputed notice in a particular format - Applicant invoked Clause 1.23 of the Agreement proposing the name of arbitrator to resolve the dispute – Non-applicant failed to respond to the request or otherwise failed to appoint anybody else as an arbitrator and then objected that notice did not mention invoking sub-clause (a) of Clause 1.23 of the Agreement – **HELD** - Even if the applicant did not mention about sub-clause (a) of Clause 1.23 of the agreement in its notice, which the respondents are relying yet it simplicitor mentioned Clause 1.23. Therefore, it could not be a reason to hold that no notice was served by the applicant on the non-applicant for invoking arbitration i.e. Clause 1.23 of the agreement - In fact, the notice which was served by the applicant on the non-applicant categorically mentioned that it was invoking arbitration clause contained in Clause 1.23 of the agreement. Nothing prevented the non-applicant if they wanted to first exhaust inhouse mechanism. The non-applicant having not acted within 30 days from the date of service of notice, thus

forfeited its right to appoint the sole arbitrator in view of the ratio of the judgment of the Supreme Court in ***Datar Switchgears Ltd. vs. Tata Finance Ltd. (2000) 8 SCC 151*** *and* ***Deep Trading Company vs. Indian Oil Corporation & others (2013) 4 SCC 35***. Further **HELD** - Since the non-applicant itself being in dispute with the applicant, therefore, in view of the mandate of Section 12(5) read with the stipulations contained in Fifth and Seventh Schedules of the Act of 1996, it cannot now appoint the arbitrator - ***Relied - TRF Limited vs. Energo Engineering Projects Ltd. (2017) 8 SCC 377*** and ***Perkins Eastman Architects DPC vs. HSCC (India) Ltd. (2019) SCC Online SC 1517.***

Significant paragraphs: 8 to 12

O R D E R

(26th day of February, 2021)

This application under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for short "the Act of 1996") has been filed by the applicant- M/s. HCL Technologies Limited, praying for appointment of sole arbitrator to adjudicate the disputes between the applicant and the non-applicant, arising out of an agreement dated 27th September, 2012 (Annexure-A/4).

2. The applicant is a Company incorporated under the provisions of Companies Act, 1956, having its registered office at 806 Siddharth, 96, Nehru Place, New Delhi. The applicant-Company claims to have done research and development work and have innovation labs and delivery centers. It claims to be working in 46 different countries. It offers an integrated portfolio of products, solutions, services etc. to help enterprises re-imagine their businesses for the digital age. The non-applicant- Madhya Pradesh Computerization of

Police Society, State Crime Record Bureau, Bhopal was desirous to implement the Mission Mode Project Crime and Criminal Tracking Network and Systems (for short "CCTNS") which is an initiative of National Crime Record Bureau under the Ministry of Home Affairs, Government of India. This was intended to create a comprehensive and integrated system for enhancing efficiency and effectiveness of policing at all levels, especially at the Police Stations level, through the principles of e-governance (hereinafter be called as "Project"). In order to implement the Project, the non-applicant issued a comprehensive Request for Proposal (for short "RFP") dated 20th December, 2011. The non-applicant therein prescribed the technical and commercial terms and conditions for undertaking the Project. The applicant submitted its technical and financial proposals in response thereto. The applicant quoted Rs.86,46,41,753/- (Rupees Eighty-Six Crores Forty-Six Lakhs Forty-One Thousand Seven Hundred Fifty-Three Only), inclusive of all taxes and dues etc., for the entire implementation and maintenance in response to the RFP. Subsequently, after applying "error correction" method as stated in Clause 4.2 Volume II of the RFP, the said amount was corrected and considered as Rs.86,45,88,236/- (Rupees Eighty-Six Crores Forty-Five Lakhs Eighty-Eight Thousand Two Hundred Thirty-Six Only). Since the applicant obtained the highest techno-commercial score, it was awarded the work of the Project by the non-applicant vide Letter of Intent dated 16th July 2012. The parties entered into the agreement on 27th September, 2012, according to which the applicant was to undertake the development and implementation of the Project, its roll out and sustain the operations of the Project. The State-wide Go-live activities were to be completed by the

applicant before 30th June 2016. Additionally, as per the agreement the applicant was to provide necessary operations and maintenance support post the Go-live date for a period of five (5) years from the Go-live date. The applicant in terms of the agreement furnished an advance bank guarantee and performance security.

3. According to the applicant, it successfully prepared furniture, creation of LAN, electrical works etc. during the phase after verification and approval by the non-applicant. The applicant also provided support in deployment and commissioning of networking equipment and provisioning of desired connectivity required to support the functioning of the Core Application Software (for short "CAS") modules. Subsequently, parties executed an amendment to the agreement on 24th February, 2016, which was limited to the changes in the existing payment terms, timeliness associated with minimum deliverables, project implementation period and service level agreement for implementation of the Project, in the light of the decision of the State Cabinet, Government of Madhya Pradesh. According to the amended agreement, "State-wide Go-live" was required to be completed by the applicant by 30th June, 2016, which the applicant claims to achieved before that date. The Project went live on 01st July, 2016. The non-applicant required the applicant to show outstanding invoices since the Project was given "Go-live" by the State Apex Committee and approved by the State Cabinet. The non-applicant vide letter dated 22nd October, 2018 reiterated that as per the directions of the State Government, 01st July, 2016 will be taken to be the "Go-Live" date of the

CCTNS Project in addition to considering the hand-holding support as completed after waiving off the same for the balance 163 Police Stations against a pro rata deduction in payment for the milestone. According to the applicant it has duly performed all its functions and obligations under the agreement and abided by the timeliness as envisaged in the agreement. The applicant thereafter issued invoices dated 30th November, 2018; 30th April, 2019; 26th September, 2019 and 26th September, 2019 for a total sum of Rs.9,06,05,419.72/- (Rupees Nine Crores Six Lakhs Five Thousand Four Hundred Nineteen and Seventy-Two Paise Only). In addition to this, invoices for a sum of Rs.58,20,861.84/- (Rupees Fifty-Eight Lakhs Twenty Thousand Eight Hundred Sixty-One and Eighty-Four Paise Only) also remained outstanding towards various bills which were pending since May, 2013. The applicant vide communications dated 13th September, 2019 and 14th October, 2019 requested the non-applicant to release the payment for 3½ year periods i.e. July-December, 2016; January-June, 2017 and July-December, 2017 for the aforementioned O&M invoices, which were against the milestones of "Other Project Team for the Entire Project" and "O&M". On being demanded the applicant also produced documents on 16th August, 2019.

4. Mr. Akshay Sapre, learned counsel for the applicant contended that the applicant pleaded before the non-applicant several times to clear the outstanding dues, as it has spent nearly 1.5 times the Project cost and may have to bear the cost for the next two years. The applicant also highlighted that the extended period implies extended costs towards various heads including but

not limited to manpower, costs, license renewals. The applicant has time and again incorporated the changes at the request of the non-applicant and has solely borne the burden of the extension of the Project beyond the originally contracted end date. The applicant in order to maintain continuity of the Project requested the non-applicant to have dialogue and settle the underlying disputes between the parties by letter dated 04th January, 2020. The applicant thereafter pursuant to the discussion between the parties in its letter dated 27th January, 2020 provided points for consideration regarding its request for Operation and Management payment for 3½ years periods, which were not considered by the non-applicant, as would be evident from their letter dated 04th April, 2020. It is contended that even after multiple meetings, amicable discussions between the parties did not fructify in any positive outcome. The applicant was once again constrained to issue a communication reiterating that it was waiting for the requisite outstanding payments and has been unilaterally sustaining the Project ever since. In fact, the applicant renewed the performance security twice i.e. on 27th February, 2019 and 29th February, 2020 respectively, which is valid till 01st of March, 2021. The non-applicant ought to have paid a sum of Rs.9,64,26,282/- (Rupees Nine Crores Sixty-Four Lakhs Twenty-Six Thousand Two Hundred Eighty Two Only) to the applicant on a running account basis, which continues to be due till date alongwith an amount of approximately Rs.1,32,12,844/- (Rupees One Crore Thirty-Two Lakhs Twelve Thousand Eight Hundred Forty-Four Only) towards services provided for O&M, DC Manpower and Other Project Team from 01st July, 2019 to 31st December, 2019. The payment of outstanding dues is still not made to the applicant.

5. It is further contended that since the non-applicant failed to address the issue and release the outstanding amount, the applicant served a notice dated 16th June, 2020 on the non-applicant invoking the arbitration clause contained in Clause 1.23 of the agreement proposing to nominate the name of a Retired Acting Chief Justice of this Court as the sole arbitrator to resolve the dispute between the parties. However, the non-applicant failed to respond to the request of the applicant or otherwise also failed to appoint anybody else as an arbitrator. Learned counsel for the applicant submitted that the stipulation contained in Clause 1.23 of the agreement requiring the applicant to first exhaust the inhouse mechanism of dispute resolution is bad in law inasmuch as the power given to the MPCOPS to appoint the sole arbitrator therein is opposed to the provisions of Sections 12(1)(b) & 12(5) and stipulations contained in Schedules Fifth & Seventh of the Act of 1996. In support of his arguments, the learned counsel placed reliance on the judgments of Supreme Court in ***TRF Limited vs. Energo Engineering Projects Ltd.*** reported in **(2017) 8 SCC 377** and ***Perkins Eastman Architects DPC vs. HSCC (India) Ltd.*** reported in **(2019) SCC Online SC 1517**. Since the non-applicant failed to give reply to the notice invoking arbitration clause or otherwise appoint arbitrator within 30 days of the service of notice or even prior to filing of the present application, its right to appoint such arbitrator stands forfeited. The prayer is therefore made to appoint an independent arbitrator to resolve the dispute between the parties.

6. Mr. Bramhadatt Singh, learned Government Advocate for the non-applicant opposed the application and submitted that as per Clause 1.23 of the agreement filing of the present application is premature and is therefore, not maintainable for the simple reason that the procedure prescribed in the agreement for appointment of arbitrator has not been followed. Referring to sub-clause (a) of Clause 1.23 of the agreement, learned Government Advocate submitted that according to the procedure contained therein any dispute shall be first dealt in accordance with the escalation procedure as set out in the Governance Schedule mentioned in Schedule V of the agreement, which provides that each party shall appoint his Project Manager as per Clause 2.5.2 of Schedule V and, thereafter, as per Clauses 2.5.2 and 2.5.3 of the agreement the Project Managers and the parties shall at first seek to amicably resolve the matter through negotiation and discussion. As per Clause 2.5.3 of Schedule V of the agreement, a disputed matter can also be submitted by one party to another for negotiation, discussion and resolution. This process was mandatorily required to be followed, which the applicant failed to do. It is contended that the present application can only be maintained after exhausting inhouse mechanism provided in sub-clause (a) of Clause 1.23 of the agreement. Even though the applicant has served the notice on the non-applicant on 16th June, 2020, but he did not therein specifically mention about sub-clause (a) of Clause 1.23 of the agreement. The respondents therefore rightly did not agree for appointment of the arbitrator on the name proposed by the petitioner. Therefore, the present application is liable to be dismissed.

7. I have given my anxious consideration on the rival contentions of the parties and perused the record.

8. Clause 1.23 of the agreement, which is required to be interpreted in the present case, reads as under:

> "**1.23. Dispute Resolution**
>
> a) 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 set out in the Governance Schedule set out as Schedule V of this Agreement.
>
> b) Any dispute or difference whatsoever arising between the parties to this Contract out of or relating to the construction, meaning, scope, operation or effect of this Contract or the validity of the breach thereof shall be referred to a sole Arbitrator to be appointed by MPCOPS only. If the System Integrator cannot agree on the appointment of the Arbitrator within a period of one month from the notification by one party to the other of existence of such dispute, then the ultimate arbitrator shall be designated authority by MP Police. The provisions of the Arbitration and Conciliation Act, 1996 will be applicable and the award made there under shall be final and binding upon the parties hereto, subject to legal remedies available under the law. Such differences shall be deemed to be a submission to arbitration under the Indian Arbitration and Conciliation Act, 1996, or of any modifications, Rules or re-enactments thereof. The Arbitration proceedings will be held at Bhopal, India.
>
> c) Any legal dispute will come under Bhopal (Madhya Pradesh) jurisdiction."

9. The objection of the non-applicant is that unless the inhouse mechanism for amicable settlement of the dispute as per the escalation procedure as set out in Governance Schedule as Schedule V of the agreement was not followed, the present application is to be treated as premature. The applicant served a notice

invoking Clause 1.23 of the agreement on the non-applicant on 16th June, 2020. After detailing out the entire case, it was stated in the notice by the applicant that under dispute resolution provided under Clause 1.23 of the agreement, MPCOPS is the sole authority to appoint an arbitrator to try and adjudicate the dispute between the parties. However, in view of judgment of the Supreme Court in ***Perkins Eastman Architects DPC (supra)***, a person or a party who has an interest in the outcome of the dispute shall not have the power to appoint a sole arbitrator. The applicant therefore proposed the name of a Retired Acting Chief Justice of this Court but also simultaneously proposed that in case non-applicant is not agreeable to his appointment as a sole arbitrator, they may nominate any other reputed person as the sole arbitrator within a period of five days from the receipt of said notice.

10. The applicant by aforesaid notice dated 16th June, 2020 reserved its right to make any additional or further claim in the arbitration proceedings as may come to its knowledge. Even if the applicant did not mention about sub-clause (a) of Clause 1.23 of the agreement in its notice, which the respondents are relying yet it simplicitor mentioned Clause 1.23 therein. Therefore, it could not be a reason to hold that no notice was served by the applicant on the non-applicant for invoking arbitration i.e. Clause 1.23 of the agreement, which was mentioned under the caption of the notice dated 16th June 2020 (Annexure-A/19) served by the applicant on the non-applicant. Sub-clause (a) of Clause 1.23 of the agreement *inter-alia* provides that any dispute arising out of or in connection with the agreement or the SLA shall in the first instance be dealt

with in accordance with the escalation procedure as set out in the Governance Schedule as Schedule V. A perusal of Schedule V of the agreement would show that it contains Governance Procedure in Clause 2.5.3 thereof. Sub-clause (e) thereof would be relevant for the present purpose, which reads as under:

> "**2.5.3 Governance Procedure**
>
> a) xxxxx
>
> b) xxxxx
>
> c) xxxxx
>
> d) xxxxx
>
> e) In order formally to submit a Disputed Matter to the aforesaid for a, one Party ("Claimant") shall give a written notice ("Dispute Notice") to the other Party. The Dispute Notice shall be accompanied by (a) a statement by the Claimant describing the Disputed Matter in reasonable detail and (b) documentation, if any, supporting the Claimant's position on the Disputed Matter."

The aforesaid sub-clause (e) requires that in order to formally submit a disputed matter, one party (claimant) shall give a written notice (disputed notice) to the other party. The disputed notice shall be accompanied by a statement by the claimant describing the disputed matter in reasonable details and documentation, if any, supporting the claimant's position on the disputed matter. It has not been provided that the disputed notice shall be given in a particular format. In fact, the notice which was served by the applicant on the non-applicant categorically mentioned that it was invoking arbitration clause contained in Clause 1.23 of the agreement dated 27th September, 2012. Nothing prevented the non-applicant if they wanted to first exhaust inhouse mechanism while dealing this matter as per the escalation procedure according to the

stipulation contained in Governance Schedule set out as Schedule V of the agreement. The applicant served notice on the non-applicant on 16th June, 2020 and when the non-applicant failed to respond to notice and failed to act within a reasonable time, the applicant filed present application under Sections 11 (5) & (6) of the Act of 1996 before this Court on 29th July, 2020. Since the non-applicant failed to act within 30 days from the date of service of notice by the applicant, either by referring the dispute to the escalation procedure or otherwise appointing the arbitrator, the non-applicant forfeited its right to appoint the sole arbitrator in view of ratio of the judgment of the Supreme Court in ***Datar Switchgears Ltd. vs. Tata Finance Ltd***. reported in **(2000) 8 SCC 151.**

11. The Supreme Court in ***Deep Trading Company vs. Indian Oil Corporation & others*** reported in **(2013) 4 SCC 35** held that Section 11(6) of the Act of 1996 makes provision for making an application to the Chief Justice of appointment of an arbitrator in three circumstances: (a) a party fails to act as required under the agreed procedure or (b) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure. If one of the three circumstances is satisfied, the Chief Justice may exercise the jurisdiction vested in him under Section 11(6) of the Act of 1996 and appoint the arbitrator. The Supreme Court in aforesaid judgment reiterated the law laid down by its earlier judgment in ***Datar Switchgears Ltd. (supra)*** and held that the dealer called upon the Corporation

on 09.08.2004 to appoint the arbitrator in accordance with the terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6) of the Act of 1996. Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6) of the Act of 1996. In view of aforesaid, it must be held that the non-applicant forfeited its right to appoint arbitrator in the present case.

12. A three Judges Bench of the Supreme Court in ***TRF Limited (supra)*** was called upon to consider whether the appointment of the arbitrator made by the Managing Director of the respondents therein was valid one and at that stage an application moved under Section 11(6) of the Act of 1996 could be entertained by the Court. The relevant clause of arbitration therein provides that any dispute or difference between the parties in connection with the agreement shall be referred to sole arbitrator of the Managing Director of Buyer or his nominee. The aforesaid agreement was entered into between the parties prior to the Arbitration and Conciliation (Amendment) Act, 2015 (No.3 of 2016) which came into force w.e.f. 23.10.2015, by which sub-section (5) of Section 12 was amended and Fifth and Seventh Schedules were inserted in the Act of 1996. It was held that the Managing Director of the respondent would be the person directly having interest in the dispute and therefore he could not

act as an arbitrator. Moreover, since the Managing Director himself was disqualified and disentitled to act as an arbitrator, he could not nominate any other person to act as an arbitrator. The ratio of aforesaid judgment has been followed and reiterated in a recent judgment by the Supreme Court in ***Perkins Eastman Architects DPC (supra)***, in Para-20 of which it was held as under:

> "20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited (supra) where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited (supra), all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator."

13. In view of the above analysis of law, it must be held that since the request for dispute resolution was made to the President, Madhya Pradesh Computerisation of Police Society (MPCOPS), State Crime Record Bureau (SCRB) vide notice dated 16th June, 2020 (Annexure-A/19) and since it failed to refer the matter for resolution of dispute under the escalation procedure or

otherwise appoint the arbitrator within 30 days or even prior to filing of the present application before this Court, the right of the respondent to appoint arbitrator stands forfeited. The MPCOPS itself being in dispute with the applicant, therefore, in view of mandate of Section 12(5) read with the stipulations contained in Fifth and Seventh Schedules of the Act of 1996, it cannot now appoint the arbitrator. As the non-applicant not only failed to act on the notice served by the applicant but also failed to give consent for appointment of arbitrator as proposed by the applicant, this Court is persuaded to allow the present application. Accordingly, I deem it appropriate to appoint **Hon'ble Shri Justice Amitava Roy, Former Judge of the Supreme Court of India, presently residing at A-9, Second Floor, Defence Colony, New Delhi – 110024**, having Mobile No.**9667300346** as provisional arbitrator in the present case to arbitrate the dispute between the parties. The Registry of this Court is directed to obtain consent/declaration from the learned provisional arbitrator as per sub-section (8) of Section 11 of the Act of 1996 and place the matter before this Court on **26th March, 2021**. Needless to mention that the learned arbitrator shall be entitled to fees only and strictly as per the stipulation contained in Fourth Schedule of the Act of 1996.

(MOHAMMAD RAFIQ)
CHIEF JUSTICE

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