

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 546 OF 2013

(Against the Order dated 07/06/2013 in Complaint No. 30/2010 of the State Commission
Andhra Pradesh)

1. M/S. INTEC INFONET PVT. LTD.

HAVING ITS OFFICE AT:- 703, MANJUSHA BUILDING, 57,
NEHRU PLACE,
DELHI-110019

.....Appellant(s)

Versus

1. NORTH EASTERN REGION INSTITUTE OF SCIENCE
AND TECHNOLOGY (NERIST)

REPRESENTED BY ITS REGISTRAR, PO & PS, NIRJULI,
PAPUMPARE DISTRICT,
ARUNACHAL PRADESH

.....Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE A. P. SAHI, PRESIDENT

FOR THE APPELLANT : MR. ASHISH VERMA, ADVOCATE
 MR. KARTIKAY BHARGAVA, ADVOCATE
FOR THE RESPONDENT : MR. DHANANJAY BHASKAR RAY

Dated : 20 October 2023

ORDER

1. The North Eastern Region Institute of Science and Technology (in short NERIST) entered into a contract after inviting tenders on 01.09.2006 for the installation and commission of electrical equipments and expansion of existing fiber optical lines adopting latest technology for meeting the requirements of the Institute. The said invitation was responded by several firms and ultimately the work was awarded to the appellant vide work order/acceptance dated 18.12.2006. An agreement following the same was signed on 05.01.2007 and the supply order was placed as a sequel there to on 23.01.2007.

2. The supply order was for a sum of ₹91,35,689/-. The material was supplied through different consignments by the appellant and as against the same a sum of ₹80,17,600/- was released to the appellant.

3. According to the Institute the contract contemplated the delivery, installation and commission of the entire project on or before 21.05.2007. This date of completion according to

the complainant was extended on the request of the complainant as there were floods in the state of West Bengal and the supply was being delayed. This request had been made because two show cause notices dated 22.05.2007 and 28.05.2007 were issued by the Institute to show cause regarding the delay and further action in the matter. The Institute accordingly vide letter dated 28.05.2007 amended the said period and granted time till 21.07.2007 which fact remains undisputed.

4. It appears that the show cause notice again was issued on 09.08.2007 alleging violation of the terms of the agreement to which a reply was given on 10.08.2007. It is also stated that to the satisfaction of the Institute, all installations were completed by 10.10.2007 when an acknowledgment of the successful completion of the work came to be recorded in a letter of appreciation issued by the coordinator of the Education Technology Cell on 27.11.2007.

5. It is also on record that another contract was awarded for connectivity on 24.12.2007 to the opposite party the documents of which have also been filed on record to demonstrate satisfactory services.

6. There is another dispute between the parties with regard to the completion of the R&D center which is also part of the project and for which a letter was issued on 21.01.2008 by the university that it would be formerly issuing a letter for handing over the site of the place where the R&D center is to be housed. Subsequently on 13.04.2009 also the Institute informed the contractor about offering the room for the establishment of the said center.

7. The contractor raised his demand bills as his balance remain unpaid where after a legal notice was served on the opposite party by the Institute on 28.05.2010 calling upon the contractor to respond regarding the deficiencies as pointed out therein. It appears that the Institute on 15.06.2010 lodged a complaint before the State Consumer Forum alleging deficiency in service on various grounds which was entertained. A preliminary objection was raised as to whether the complainant is consumer under the Consumer Protection Act, 1986. On 13.12.2012 an order was passed holding that the Institute is a Deemed University and is neither a commercial institute nor profit making body. Hence, the Institute was a “consumer” within the meaning of said act.

8. The complaint was opposed by the appellant herein and one of the issues raised here is about limitation contending that the complaint was lodged after more than two years of the alleged cause of action and therefore it was barred by limitation in terms of section 24 (A) of the

Consumer Protection Act, 1986. However, the said provision also provides that in case sufficient cause is shown by the complainant for not filing the complaint within the said period the same can be condoned provided the commission records its reasons for condoning such delay.

9. This issue of limitation does not appear to have been either framed as an issue or contested before the State Commission. The contention that has been raised in this appeal is contained in paragraph 5 where it is alleged that, if limitation from the date of the cause of action is to be counted, then it should be with effect from 10.10.2007 whereas the present complaint was instituted in 2010.

10. The State Consumer Commission proceeded to allow the complainant recording that the appellant had committed gross deficiencies in service. After analysing the terms of the agreement the State Commission came to the conclusion that the complainant had suffered loss due to deficiencies in the service rendered by the opposite party, and their negligence to perform by not completing the project within the stipulated time was established. The findings would be discussed hereinafter but while drawing conclusions it was also observed that the complainant had to incur an additional expenditure of ₹16,21,722/-, the facts whereof were brought on record through an additional affidavit before the State Commission.

11. Consequently the appellant was held responsible for having adopted an unfair trade practice, and upon a calculation, accepted the contention of the claimant to award compensation as per the terms of the agreement to the extent of ₹2500/- per day delay and awarded a sum of ₹2 lakh as compensation, and for harassment, mental agony and inconvenience another additional sum of ₹1,50,000/-. The Institute was also found entitled to a sum of ₹3,00,000/- as compensation for the expenses incurred in order to reopen the internet system which had been erroneously blocked by the engineer of the appellant and this was rounded off with ₹20,000/- as costs. The entire amount was to carry an interest of 8% per annum from the date of filing of the complaint till the date of payment.

12. Curiously enough a mandatory injunction was also issued that the complainant is not required to pay the remaining bill amount of ₹12,37,487/- as raised by the appellant.

13. In sum total an amount of ₹10,22,500/- was awarded to be paid within a period of two months and of course with the injunction that the remaining bill amount of the contractor is not to be paid.

14. Aggrieved the appellant filed this appeal in 2013 praying for setting aside the impugned order, the operation where of was stayed by a three member Bench of this Commission vide order dated 12.08.2013. This order was made absolute on 03.02.2014 subject to the appellant depositing a sum of 50% of the decretal amount within four weeks.

15. The matter was taken up on 13.09.2023 when orders were passed calling upon the ld. Counsel for the complaint to bring on record the additional affidavit that had been filed before the State Commission that was noticed in the impugned order referred to herein above. The affidavit, after service on the other side has been filed and learned Counsel for the respondent has not disputed the fact that it is the same affidavit along with the documents that had been filed before the State Commission.

16. Learned Counsel for the appellant has alleged that the complaint ought to have been dismissed on the ground of limitation itself and not only this the approach of the State Commission in proceeding to assume that there was deficiency in service on the part of the appellant is erroneous and is based on incorrect appreciation of facts. It is also urged that the inferences drawn with regard to deficiency in the completion of the transaction is bereft of the consideration of the documents on record including the fact that the period of computation of default of 141 days is wrong. Ld. Counsel submits that if the period of completion had been extended by two months by the Institute itself as per the document dated 28.05.2007, the same appears to have been totally ignored and therefore the computation of 141 days is perverse.

17. He then submits that it is admitted that there was balance of payment of ₹12,37,487/- but the commission has issued an injunction against the appellant and in favour of the complainant to the effect that the complainant shall not pay the remaining bill amount. It is urged that such a direction amounts imposing a penalty without recording any findings as to why such condition is being imposed and for what purpose. It is urged that this finding is perverse and beyond the jurisdiction of the State Commission and therefore the order deserves to be set aside.

18. He further submits that the inference drawn on the basis of the additional affidavit filed by the Institute that ₹16,21,722/- was an additional expenditure incurred by the complainant on account of the deficiency of the appellant is also perverse, in as much as, it is evident from the items referred to there in that they have absolutely no concern with the terms and conditions of the contract and are transactions beyond the same in respect of supplies made much later which

were not even covered under the warranty period. Thus, this inference is contrary to the weight of evidence on record. Hence, the order of the State Commission deserves to be set aside.

19. He has then raised the issue about the findings recorded that the concerned engineer had left the campus without any notice leaving the entire LAN/internet connectivity system unworkable. The contention is that this switch core password remained with Mr. Jyoti Prakash Soni, the engineer who did not part with it and as such the entire installation came to a standstill. The contention is that the switch core password was available and the very same engineer came under the employment of the institute after the dispute had arisen. There was no deficiency on the part of the appellant and the system could have been very easily made operative. The conclusion that this action had been taken by the appellant as a protest of non-settlement of bills is incorrect and without any substance.

20. It is also urged that non supply of machinery beyond time is also not borne out from the record.

21. It is also contended that the date of handing over of the completion of the project as 10.10.2007 was never disputed and it is after three years that the complaint was filed which is beyond limitation and even otherwise fails to point out any evidence contrary to the letter dated 10.10.2007. The certification by the coordinator may be in the name of an individual, namely Mr. Sourabh Choudhary, who was the employee of the appellant, but the satisfaction with regard to the entire work is detailed therein and hence the contention that the installation had not been carried out or was deficient is incorrect. It is urged that had it not been so, there was no occasion for the coordinator of the institute to have issued satisfaction regarding the devices that were installed. The contention is that the said document dated 27.11.2007 confirms the completion of the project the final work where off was done on 10.10.2007. It is also urged that the satisfaction is also reflected by the award of another contract of more than ₹50 lakhs, thereafter.

22. As a natural sequel to this argument it is urged that even assuming though not admitting that there was a delay in the handing over of the project, the same can be calculated only from the date of 21.07.2007, which is the extended date of delivery schedule. The State Commission therefore overlooked this vital aspect and came to a wrong calculation by counting it from May, 2007.

23. The last submission of Ld. Counsel for the appellant is that the finding of the commission about non installation of the research and design part of the project is also

incorrect, in as much as, it was the University itself that had not provided the space for such installation which stands confirmed by the letters dated 21.01.2008 and 13.04.2009. Inviting the attention of the bench to the said letters it is urged that since the space including the land itself was not available to the Institute, any delay on that count cannot be foisted on the appellant.

24. Controverting this contention Ld. Counsel for the opposite party submits that the cause of action was continuing as the defaults pointed out and the deficiencies remained on record and it is in these circumstances that the institute was compelled to file the complaint in the year 2010. It is urged that when the Institute suffered due to the defaults and deficiencies of the appellant, that it very promptly filed the complaint which cannot be said to be beyond time. Even otherwise the State Commission did not reject the complaint on the ground of limitation.

25. He further contends that the default in supply and completion after installation is now admitted as the appellant has indicated that they have allegedly handed over the project upon completion on 10.10.2007. It is urged that no such handing over certificate is on record nor was it handed over in fact. The entire work was incomplete and it was only a part of the installation that was carried out and mentioned in the document dated 27.11.2007 which is being erroneously harped upon as evidencing the handing over of the project. The argument of the appellant's Counsel is incorrect on this issue in as much as if a certificate of appreciation for installing just 9 items has been issued by the coordinator, the same is not a certification of the completion of the entire project and hence no such inference can be drawn as alleged. The deficiency continued and therefore inferring the date of completion as 10.10.2007 is based on no evidence.

26. He then submits that all the deficiencies regarding supply were hopelessly delayed and the research and design part of the contract has not been fulfilled even till date. He contends that the additional affidavit supports the complain of the Institute which was experienced considerable distress on account of the non-functional installation that too even due to the sudden departure of the engineer who took away the password of the core switch that was essential for running the installation. This was deliberately done in order to coerce the Institute for balance of the payments to which the appellant was not entitled as the work had not been completed. It is for this reason that the commission was justified in observing that the complainant will not have to pay balance of the amount.

27. It is also urged that in spite of repeated letters no steps for rectification of the deficiency was carried out as a result whereof immense loss was suffered by the Institute that disrupted its functioning extensively. All this was in violation of the terms of the agreement and the project

was not completed at all. It is urged that the last consignment of material was delivered on 06.12.2007 which continued to be installed till 2008. It is urged that in spite of the delivery schedule having been extended, more than six months were taken to complete this supply & delivery of the goods. In the said background there was absolutely nothing led in evidence by the appellant to demolish the contention raised on behalf of the complainant.

28. The complaint was, therefore, rightly allowed and hence in the absence of any infirmity in the findings of the State Commission, the present appeal deserves to be dismissed.

29. Having heard the learned counsel for the parties and having perused the records, the terms of the contract, as executed, did indicate that all the components of the contract were to be concluded on or before 21.05.2007. It is also now clear from the pleadings that the said period was extended vide letter dated 28.05.2007 for a period of 2 months, i.e., till 21.07.2007. This needs to be clarified at the outset in as much as in paragraph 12 of the impugned judgment this fact even though noticed, the calculations made in paragraph 21 is of a delay of 141 days for the purpose of imposing penalty of ₹2,500/- for per day delay. This is evident as the date of completion has been taken to be 10.10.2007. If the extended period of contract ends on 21.07.2007, then the number of days would be only 81 till 10.10.2007 and not 141. This is, therefore, a clear error on facts in the impugned judgment which the learned counsel for the appellant has been able to establish.

30. The second issue at the very outset, which deserves to be noticed, is about another calculation component which has been referred to in paragraph 16 of the impugned judgment which is about incurring of an expenditure of ₹16,21,722/- that was noticed through an additional affidavit filed by the complainant. This additional affidavit has been relied on by the complainant to urge that the amount was incurred as additional expenditure to make the system operative as this was necessary to restore the functioning of the system. This fact of the deficiency alleged on the appellant has further found voice in the impugned judgment of the State Commission while deciding issue no. 3 where in paragraph 21, while computing the quantum, it has been mentioned that ₹3,00,000/- is awarded as compensation for undertaking necessary expenditure to reopen the system. As noticed above, the said facts were responded to by bringing on record the details of the said amount as contained in that affidavit, through the affidavit dated 20.09.2023 which has been taken on record and has not been disputed by the learned counsel for the complainant. The description given by the complainant in the said affidavit is in respect of three items. The first is a Distribution Switch – Nortel Ethernet Routing Switch that was installed at the Degree Block, which became non-functional. Learned counsel for the appellant has invited the attention of the Bench to the invoice No. 132 which is dated 15.02.2012, the payment whereof was made on 31.03.2012. It is submitted that the said amount of ₹7,80,508/- was incurred on the purchase of a switch after 5 years of its installation.

Learned counsel for the appellant rightly submits that if the said switch was being replaced after 5 years, that too even after the expiry of its warranty period about which no complaint had been made earlier, then any such expenditure incurred after 5 years of its installation in no way is an expenditure incurred for any default or deficiency in service on the part of the appellant under the contract.

31. Thus the said additional affidavit was based on a fact which is unconnected with the service under the contract and even otherwise was an expenditure incurred after 5 years of the contract, which cannot be made the basis for any loss in the year 2012.

32. Similarly in respect of the second item, namely, Firewall System & Intrusion Detection System with TPS for a sum of ₹7,17,009/- was also invoiced on 22.03.2011, the payment whereof was made on 31.03.2011. This was also an expenditure on a similar footing as above, after more than four years of the installation. For the same reason this expenditure also could not have been included as well for any deficiency in service of the appellant. The other component in the same item No. 2 is with regard to a Router which was procured for a sum of ₹5,19,723/- in November 2009 and the payment whereof was made in October 2010. It is rightly submitted that this aspect also has been overlooked by the State Commission while awarding compensation towards unfair trade practice on incurring expenditure to revive the system.

33. The last component item No. 3 in the letter is with regard to non-installation of a software worth ₹81,689/-. This fact could not be disputed by the learned counsel for the appellant in as much as the same was not installed at all. The aforesaid discussion, therefore, indicates that it is only the non-installation of the 3rd component of ₹81,689/- that resulted in deficiency. The award of ₹3,00,000/- as against the incurring of additional expenditure does not appear to be justified in any manner as the said quantum does not appear to be proportionate as it is more than 3 times the cost of the component that was not installed.

34. The State Commission appears to have been influenced by the above mentioned factors also while issuing the injunction that the complainant is also not liable to pay the remaining bill amount as raised by the respondent. Learned counsel submits that this direction is neither based on equity nor on any principle of tortious liability or in conformity with the terms and conditions of forfeiture or otherwise under the contract. The direction, therefore, is beyond the terms of the contract, against facts and against law as well. In effect it is submitted that such an adjustment for unpaid bills of the appellant for ₹12,37,487/- with interest, could not have been enjoined and rather deserved to be adjusted in favour of the appellant. The said amount cannot

be imposed as a penalty against the appellant who did not receive that amount as against the work already concluded by it. A payment which is due cannot be withheld in the name of any penalty without indicating justification for adjustment. It is urged that the State Commission committed this error which deserves to be rectified.

35. Learned counsel for the appellant is correct in his submission to the aforesaid extent and it appears that the State Commission was influenced by the circumstances of the case to have erroneously made an adjustment of the said amount also as part of the compensation and award of damages to the complainant. This in the opinion of this Commission would be impermissible unless it could be demonstrated that the said amount was not receivable by the appellant or it could have been adjusted against any of the components awarded by the State Commission.

36. Having said so, one of the main contentions on behalf of the complainant is non-completion of the Research Station, the State Commission has also noted this after referring to the letter dated 13.04.2009 in paragraph 15 of the impugned judgment and recording a finding in paragraph 19. The State Commission came to the conclusion that the said defect was not rectified and this amounted to gross unfair trade practice. In this regard, the appellant's contention is that the letter dated 21.01.2008 issued by the Institute would itself explain that the site had not been handed over where the R&D Centre was to be housed, not only this it was on 13.04.2009 that the Institute informed the appellant about providing the room for the establishment of the said Centre. It is urged by the learned counsel for the appellant that no delay can be attributed to the complainant for non-establishment of the same. The contention is correct to an extent, in as much as, the letters dated 21.01.2008 and 13.04.2009 demonstrate that the site and the room were not available and as such the entire delay could not be attributed to the appellant. The said provisions were delayed by the Institute beyond the period of the contract over which the appellant had no control nonetheless the appellant is still obliged to perform as per the contract to install and establish the R & D Centre. There is therefore, no deficiency as such nor can it be suggested that it was an unfair trade practice.

37. Having considered the aforesaid issues the findings recorded by the State Commission needs to be assessed further. In order to analyse as to whether the complaint deserves to be accepted in its entirety, in paragraph 12 of the impugned order there is a reference of consignment being delivered after the expiry of six months and the installations being completed in the first part of 2008. The conclusion that this work of supply was completed after the expiry of six months is not exactly as per the evidence recorded. The consignments were delayed beyond May 2007 for which the institute itself has extended the time till July 2007. Thus, according to the conclusions drawn herein above, the delay was not 141 days but was of 81 days. The assumption that the delay extended to the first part of 2008 is therefore not correct

and the approximation of six months delay is also not exactly borne out of the record. In view of this, the delay on the part of the appellant stands reduced to 81 days only.

38. The deficiency of service as alleged by the appellant with regard to non-completion of the LAN Internet connection as the switch core password of the internet system was taken away by Mr Jyoti Prakash Soni, Engineer without any notice, this factor has been dealt with in the impugned order and to an extent it is correct and that this certificate issued by Mr N Khargoria on 27.11.2007 certifies the completion with regard to installation of the devices that are referred to.

39. In the complaint it is alleged that the concerned engineer Mr. Soni left the campus without any notice for making the system workable as the switch core password of the internet system was with him. In the absence of the password the entire internet system was blocked and left idle. This was intimated by a letter dated 14.05.2010. To this extent the findings may have to be taken to be correct but at the same time Mr. Soni subsequently was employed by the institute itself. Not only this, in addition to the contract in question the appellant has been awarded a fresh contract amounting to ₹50 lakh by the complainant institute.

40. However, what is surprising is that the State Commission recorded that the subsequent expenditure had to be incurred by the institute to support the installation and make it functional. The institute relied on the additional expenditure of ₹16,21,722/- as stated in the additional affidavit about which findings have been recorded herein above in paragraph 30 onwards.

41. It is thus clear that only the 3rd component of ₹81,689/- was not installed. No invoice was raised nor any payment was made in respect of this component to the appellant. The conclusion therefore of the State Commission that due to deficiency of service there was an incurring of an additional expenditure cannot be supported.

42. The conclusion drawn by the Commission is that Mr. Soni walked away with the password of the internet was only with a view to compel the institute to pay the balance amount. This conclusion is based on are hypotheses in as much as, if this conduct of Mr. Soni was against the institute then why did the institute relied upon him and again engaged him on its own. The fact remains that the bills payable to the complainant were withheld admittedly to the tune of ₹12,37,487/-. Consequently, the entire blame cannot be put on the appellant for non-compliance of the terms of the agreement. Deficiency is therefore, was to a small extent and not

of that magnitude so as to construe an additional expenditure being incurred by the institute to the tune of ₹16 lakhs and odd.

43. In the said background the impugned order of the State Commission does not record findings in tune with the evidence on record.

44. Consequently for all the reasons stated above, the impugned order of the Commission cannot be sustained in its entirety and has to be modified in the light of the observations made herein above. Accordingly, the deficiency which has occurred deserves to be recalculated as there appears to be violation of some of the terms of the agreement accepting the date of completion as 10.10.2007 which has also been made the basis of the findings recorded by the State Commission. The delay in completion of the project will therefore, be 81 days and hence the penalty under the terms of the agreement @ ₹2500/- per day would be ₹2,02,500/-. On the second count with regard to non-completion of the installation of one component costing ₹81,689/-, this resulted in a deficiency of service even if no bill was raised. Hence, a compensation of ₹20,000/- for not having installed the said component deserves to be imposed on the appellant.

45. The third issue with regard to departure of Mr. Soni, Engineer along with the password resulting in non-functioning of the system for some time. This is a deficiency that appears to be apparent on the face of the record, therefore, a sum of ₹2.00 lakh is imposed as compensation on account of deficiency in this service. The subsequent engagement of Mr. Soni by the institute does not absolve the appellant of its responsibility under the agreement.

46. The fourth issue is with regard to the injunction issued by the State Commission for not paying the balance amount of the bills for the goods which have already been supplied by the complainant to the tune of ₹12,37,487/-. There is no justification for passing such an order as the balance of payment cannot be converted into a penalty or compensation automatically for no valid reasons. The appellant would therefore be entitled to the said amount after deducting the amounts as indicated above and herein after.

47. The last component is with regard to non-completion of the research station. From the facts stated and pleaded, the own documents of the respondent/ complainant Institute namely letters dated 21.01.2008 and 13.04.2009 demonstrate that the institute could not provide the site and the premises for such installation and was delayed by them. This delay cannot be attributed to the appellant in view of the findings recorded herein above and therefore, the State

Commission erred in recording this as a deficiency in service on the part of the appellant. The fact that the appellant was also awarded a fresh contract of ₹50 lakh indicates that the Institute had engaged the services of the appellant for its other works and which also is a mitigating factor in favour of the appellant.

48. The impugned order of the State Commission dated 07.06.2013 is therefore, modified and set aside to the extent indicated herein above, and the appellant would be entitled to the balance amount of its payment after deducting and adjusting the aforesaid amounts together with ₹20,000/- as litigation expenses which the institute will be entitled to receive.

49. The amount of interest awarded by the State Commission @ 8% per annum from the date of filing of the complaint till the date of payment would be available against the amount which is payable to complainant as held hereinabove but at the same time the balance amount which is payable to the Appellant would also carry interest at the same rate with effect from the date of the complaint.

50. The appeal stands disposed of accordingly.

.....J
A. P. SAHI
PRESIDENT