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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **ARB.P. 301/2012**

JALAN INFOTECH PVT LTD. ..... Petitioner
Through: Mr. Shambo Nandy, Advocate.

versus

HEWLETT PACKARD INDIA SALES PVT LTD. ..... Respondent
Through: Mr. Siddharth Aggarwal and Mr. Rohit Bhardwaj, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

% **21.10.2016**

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the parties arising out of a purchase agreement entered into by the Petitioner with the Respondent on 1st December 2003 as amended on 1st July 2005.

2. The claim of the Petitioner stems from the termination of the said agreement by the Respondent by a letter dated 18th June 2009.

3. The Petitioner seeks to rely on an arbitration clause in the purchase agreement. The Petitioner states that invoking the said clause, it sent the Respondent a notice dated 28th May 2012 where *inter alia* it claimed a sum

of Rs.8,52,68,000.

4. The petition is resisted by the Respondent. It is first pointed out that the Petitioner failed to make payments for various equipments/goods purchased from the Respondent for the period from September 2008 to April 2009. Reference is made to the emails exchanged between the parties where the Petitioner admitted to its liability. In particular, reference is made to email dated 18th April 2009 where the Petitioner accepted its liability and proposed a payment plan. It is only after the Petitioner failed to adhere to the payment plan that a notice terminating the agreement was sent to the Petitioner on 18th June 2009.

5. It is pointed out by Mr. Siddharth Aggarwal, learned counsel for the Respondent, that in para 7(ix) of the petition, it has been stated by the Petitioner itself that in January 2008 the Petitioner learnt that it was no longer a distributor of Respondent. Further, a notice was sent on 1st October 2010 by the Respondent to the Petitioner consequent upon termination of the agreement calling upon it to pay a sum of Rs.4,10,03,260.98. In response thereto, the Petitioner while denying its liability claimed that the Respondent owed it Rs.7.95 crores. This was followed by the Respondent filing a winding up petition in the High Court of Calcutta. The order passed by the learned Single Judge in the said petition being CP No. 93 of 2010 on 3rd December 2012 was taken up in appeal by the Respondent before the Division Bench (DB) of that High Court. By an order dated 18th July 2013, the DB partly allowed the appeal and directed the Petitioner to secure the claim of the Respondent by offering cash security or other collateral security

to the satisfaction of the Registrar (Original Side) of the High Court at Calcutta. The DB further ordered that in default "the winding up petition would stand admitted for a sum of Rs.4,10,03,260.98 together with interest at the rate of 9% per annum on and from the date of receipt of the statutory notice of demand until payment...". The DB also directed that the petition for winding up would stand revived and the Respondent would be entitled to approach the Company Judge for appropriate directions.

6. Mr. Aggarwal points out that in the said order of the DB observations were made to the effect that even if the counter claim of the Petitioner herein were to be accepted to be genuine, the Petitioner would not be in a position to resist the specific claim of the Respondent. In fact, the DB doubted whether the Petitioner's defence was bona fide or not.

7. It appears that the said order of the DB was challenged by the Petitioner in SLP (Civil) CC No. 20306/2013 which came to be dismissed on 29th November 2013 by the Supreme Court both on the ground of delay as well as merits. Consequently, the order of the DB recognising the Petitioner's liability towards the Respondent in the sum of more than Rs.4 crores has attained finality.

8. The Court finds merit in the contention of the Respondent that in the above circumstances referring the claims that the Petitioner may have against the Respondent to arbitration will be a pointless exercise. In the first place, the Court is not convinced with the explanation offered regarding the claims not being barred by limitation. The Petitioner appears to have admitted its liability towards the Respondent way back on 18th April 2009

by an email, the fact of which does not appear to have been denied by the Petitioner. Its notice seeking to raise a claim against the Respondent was issued only on 28th May 2012.

9. Learned counsel for the Petitioner sought to place reliance on the decision in ***Schlumberger Asia Services Ltd. v. Oil and Natural Gas Corporation Limited(2013) 7 SCC 562*** to urge that the question regarding limitation should be left to be decided by the Arbitrator.

10. However, the Court finds that on facts the question of limitation in the said case before the Supreme Court was a complicated one and therefore referred to the learned Arbitrator for his decision. As far as the present case is concerned, the admitted facts show that the claim of the Petitioner related back to January 2008 as the losses claimed arise stemmed from the events that occurred since then and without there being any acknowledgment of liability by the Respondent thereafter.

11. There is yet another issue for which there is no satisfactory answer. During the pendency of the present petition, the deponent of the affidavit, who happened to be the Director of the Petitioner, expired. At the hearing of the present petition on 16th October 2014, learned counsel for the Petitioner had undertaken to file a fresh affidavit of another Director "along with a Board of Director's resolution". While an affidavit has been filed thereafter of Mr. Arun Jalal describing himself as Director of the Petitioner, the Board Resolution authorising him has not been placed on record.

12. For all of the aforementioned reasons, the Court is not inclined to accept

the prayer made in the present petition for referring the disputes between the parties to arbitration.

13. The petition is dismissed.

S. MURALIDHAR, J

OCTOBER 21, 2016
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