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

+ ARB.P. 609/2016

INDUS TOWER LTD.

..... Petitioner

Through: Mr Gopal Jain, Senior Advocate with
Mr Nishant Menon, Mr Abhishek
Birthray and Mr Shafiq Ahmed,
Advocates.

versus

VIDEOCON TELECOMMUNICATIONS
LIMITED

..... Respondent

Through: Ms Shikha Sarin and Mr Devender
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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22.11.2016

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 the respondent's nominee arbitrator be appointed for constitution of the arbitral tribunal to adjudicate the disputes that have arisen between the parties in connection with the "Master Service Agreement" dated 28.08.2009.

2. The said agreement includes an arbitration clause, which is set out below:-

“21.3 Arbitration

21.3.1 The arbitration shall be conducted as follows:

- (i) all disputes between the Parties arising out of or in connection with this Agreement shall be referred to or submitted for arbitration in New Delhi;
- (ii) the arbitration shall be conducted in English by an arbitral tribunal consisting of three arbitrators. For the purpose of such arbitration, each Party shall appoint one arbitrator and the third arbitrator shall be appointed by mutual agreement by the two arbitrators so appointed (the “Arbitration Panel”);
- (iii) the Arbitration Panel shall have the power to award interest on any sums awarded;
- (iv) notwithstanding the power of the Arbitration Panel to grant Interim relief, the Parties shall have the power to seek appropriate interim relief from the courts of New Delhi;
- (v) the arbitration award shall be final and binding on the Parties and the Parties agree to be bound thereby and to act accordingly;
- (vi) the Arbitration Panel may award to a Party that substantially prevails on the merits, its costs and expenses (including fees of its counsel);
- (vii) the Parties shall bear their respective costs incurred in the arbitration unless otherwise awarded or fixed by the Arbitration Panel: and
- (viii) the parties shall co-operate in good faith to expedite, to the maximum extent practicable, the conduct of any arbitral proceedings commenced pursuant to this Agreement.”

3. The petitioner invoked the aforesaid clause by a letter dated

13.08.2016 and nominated its Arbitrator, Justice Sunil Hali (Retired), former Judge of the Allahabad High Court as its nominee arbitrator and called upon the respondent to nominate its Arbitrator in accordance with Clause 21.3 of the Master Service Agreement.

4. The aforesaid notice was responded to by the respondent by a letter dated 19.09.2016. The only objection taken by the respondent in its response was that by virtue of Section 14 of the Telecom Regulatory Authority Act, 1997 (hereafter ' the TRAI Act') only the Telecom Disputes Settlement and Appellate Tribunal (hereafter 'TDSAT') has the jurisdiction to adjudicate the disputes between the parties and, therefore, the same could not be referred to arbitration.

5. Ms Sarin, the learned counsel appearing for the respondent does not dispute the existence of the Master Service Agreement or the existence of the arbitration clause. She has opposed the present petition only on the ground as reflected in the respondent's letter dated 19.09.2016; that in view of Section 14 of the TRAI Act, TDSAT has the exclusive jurisdiction to decide the disputes between the parties and the same cannot be referred to arbitration.

6. Mr Gopal Jain, senior counsel appearing for the petitioner points out that this issue is no longer *res integra* and has been decided by a coordinate bench of this Court in **Viom Network Ltd. v. S. Tel Pvt. Ltd.: AIR 2014 DELHI 31**. He drew the attention of this Court to para 27 of the said judgment, which reads as under:-

“27. I therefore hold the petitioners as infrastructure providers

to be not service providers within the meaning of the TRAI Act. Resultantly, TDSAT would not have jurisdiction over disputes between the petitioners on the one hand and respondent on the other hand. Axiomatically, the remedy of arbitration under the Arbitration Act is not ousted.”

7. He further submitted that the aforesaid judgment was followed by another coordinate bench of this Court while considering a petition under Section 9 of the Act between the same parties - in **Indus Towers v. Videocon Telecommunications Limited** (OMP (I) (Comm.) 186/2016 decided on 14.09.2016. He further referred to another order passed by this Court in a petition under Section 11 of the Act (in ARB.P. No.346/2016 delivered on 15.09.2016: **Viom Networks Limited v. Videocon Telecommunications Limited**) wherein a similar petition was allowed and the contentions now advanced by the respondent regarding the exclusive jurisdiction of TDSAT under the TRAI Act had been rejected.

8. Ms Sarin submits that although the point in issue has been decided against the respondent in the aforementioned cases, however, appeals impugning the said decisions are pending before the Division Bench of this Court.

9. In view of the fact that coordinate benches of this Court have decided the issue against the respondent, the contention canvassed by Ms Sarin cannot be accepted by this Court. Accordingly, it is directed that Justice Vikramajit Sen (Retired) (Mob. No. +91 8447333366) a former Judge of the Supreme Court of India be appointed as the respondent’s nominee Arbitrator in terms of the arbitration clause. Both the arbitrators shall jointly concur

with appointment of the presiding Arbitrator for constitution of the arbitral tribunal within a period of four weeks from today. This is subject to the necessary disclosure being made under Section 12 of the Act and the arbitrator meeting the eligibility criteria under Section 12(5) of the Act.

10. The petition is disposed of.

11. Order *dasti*.

NOVEMBER 22, 2016
MK

VIBHU BAKHRU, J