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

+ **ARB.P. 629/2016**

TOWER VISION INDIA PRIVATE LIMITED Petitioner

Through: Mr Ashim Sood, Mr Dhruv Sood, Mr
Tine Abraham, Mr Vishal Sagar and
Ms Pallavi Sengupta, Advocates.

versus

**VIDEOCON TELECOMMUNICATIONS
LIMITED**

..... Respondent

Through: Mr Yashvardhan and Mr Devender
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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22.11.2016

IA No.12612/2016

1. Allowed, subject to all just exceptions.

ARB.P. 629/2016

2. 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 respect of Passive Infrastructure Sharing Agreement dated 31.10.2008.

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

“1.27 DISPUTE RESOLUTION:

In the event that any dispute arises between the Parties in connection with this Agreement, the construction of any provision of this Agreement or the rights, duties or liabilities of the Parties hereto under this Agreement, the Parties shall conduct negotiations in good faith to solve such dispute. If mutual resolution cannot be reached within thirty (30) days after the commencement of such negotiations, either of the Parties shall be free to refer such dispute to arbitration under the Arbitration and Conciliation Act, 1996 by three (3) arbitrators. One arbitrator shall be appointed by each Party and the third arbitrator shall be appointed by the arbitrators so appointed. The venue of arbitration shall be New Delhi. The arbitration proceedings shall be conducted in English. Any award made in such arbitration will be final and binding on the Parties. During pendency of any arbitration proceedings, performance of the Services payments and all other obligations under this Agreement or any Service Order(s) by the Parties shall continue uninterrupted.”

4. The petitioner invoked the aforesaid clause by a notice dated 26.05.2016 and nominated its Arbitrator, Justice Rekha Sharma (Retired), former Judge of this Court as its nominee Arbitrator and called upon the respondent to nominate its Arbitrator in accordance with clause 1.27 of the Passive Infrastructure Sharing Agreement.

5. The aforesaid notice was responded to by the respondent by a letter dated 28.06.2016. 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.

6. Mr Yashvardhan, the learned counsel appearing for the respondent does not dispute the existence of the Passive Infrastructure Sharing Agreement or the existence of the arbitration clause. He, however, has canvassed two contentions to oppose the present petition. First, he submits that TDSAT - by virtue of Section 14 of the TRAI Act - has the exclusive jurisdiction to adjudicate the disputes between the parties and, therefore, the arbitration clause is inoperative and unenforceable.

7. Secondly, he submits that the arbitration clause requires the parties to try and resolve the disputes amicably before proceeding to refer the same to arbitration. He submits that no such endeavour has been made by the petitioner and therefore the petition is premature. He contends that although an averment is made in the petition that the parties have held mutual discussions beginning as early as in October, 2015 to resolve the issues but no particulars of such discussions have been provided by the petitioner.

8. Insofar as the contention that the TDSAT has the exclusive jurisdiction, the same issue was considered by the coordinate bench of this Court in **Viom Network Ltd. v. S. Tel Pvt. Ltd.**; AIR 2014 DELHI 31. And, in paragraph 27 of the said judgment, the court had held 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.”

9. 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. The said view was also followed in another 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**) and the contentions now advanced by the respondent regarding the exclusive jurisdiction of TDSAT under the TRAI Act were rejected. Thus, the contention that the arbitration clause is ineffective or inoperable cannot be accepted.

10. Insofar as the contention that the parties have not endeavoured to mutually resolve the disputes and, therefore, the present petition is premature, the same cannot be accepted for the reason that no such plea had been taken by the respondent at the relevant time. The petitioner in its notice dated 26.05.2016 had specifically stated that the parties have held discussions beginning October 2014 and the same were not fruitful. This was not denied by the respondent in its response dated 28.06.2016. The averments made in the petition have also not been denied by the respondent. Although, the notice on the petition was issued on 07.10.2016 and the respondent had entered appearance on 16.11.2016, neither any affidavit has been filed in response to the petition nor has the respondent indicated any

desire to do so.

11. Since, the petitioner has already appointed its nominee arbitrator and the respondent has failed to do so, a nominee arbitrator on behalf of the respondent is required to be appointed. Accordingly, it is directed that Justice Vikramajit Sen (Retired) (Mob. No. +91 8447333366) former Judge of the Supreme Court of India be appointed as a respondent's nominee Arbitrator in terms of the arbitration clause. Both the arbitrators shall jointly concur and appoint the presiding arbitrator for constitution of the arbitral award, 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 not being ineligible under Section 12(5) of the Act.

12. The petition is disposed of.

13. Order *dasti*.

VIBHU BAKHRU, J

NOVEMBER 22, 2016
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