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

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Date of Decision: 06.09.2017

+ **ARB.P. 563/2017**

ATC TELECOM INFRASTRUCTURE PVT. LTD..... Petitioner
Through Mr.Amar Gupta, Mr. Divyam
Agarwal and Ms. Ritika Gambhir Kohli, Advs.
versus

QUADRANT TELEVENTURES LTD. & ANR..... Respondents
Through Mr. Yashvardhan and Mr.Devender
Singh, Advs. for R-1 & 2.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

IA No.10214 /2017 (exemption)

Exemption is allowed subject to all just exceptions.

Application stands disposed of.

ARB.P. 563/2017

1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking appointment of a sole arbitrator to adjudicate the disputes between the parties.

2. The case of petitioner is that the petitioner is a Telecom Infrastructure Service Provider. Respondent No.1 is a telecom operator and is said to be one of the customers of the petitioner. The parties have entered into an Infrastructure Sharing Agreement on 18.05.2006. A Master Service Agreement was executed on 20.11.2007. Subsequently, on account of

amendments, fresh agreements have been executed on 14.08.2009 and a Supplementary Agreement on 12.09.2013.

3. Disputes having arisen between the parties, the petitioner has invoked the arbitration clause on 13.07.2017. The respondent have sent a reply on 26.07.2017 to the notice invoking arbitration. An objection has been taken in the said reply that the respondent is a telecom operator providing telecom services and that the disputes which are being raised by the petitioner are not arbitrable and that TDSAT has the exclusive jurisdiction to adjudicate the disputes between the parties.

4. I have learned counsel for the parties.

5. Learned counsel for the petitioner has relied upon the judgment of this court in the case of ***Viom Networks Ltd. vs. Videocon Telecommunications Ltd.***, OMP (I) (COMM.) 95/2016 dated 14.09.2016 to contend that this court has already taken a decision that an arbitrator can be appointed under similar facts and circumstances. It is pointed out that the issue is pending before the Division Bench but there are no interim orders. It is further submitted that under Section 11(6)(A) of the Amended Act, this court has only to go into the examination of the existence of an arbitration agreement and all other issues are to be adjudicated upon by the arbitrator. He also relies upon the judgment of the Supreme Court in the case of ***Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.*** (2000) 8 SCC 151 to contend that despite service of notice on the respondent, they have not taken any steps to nominate an arbitrator and have now lost their right to nominate an arbitrator in terms of the arbitration clause.

6. Learned counsel for the respondent has reiterated that the disputes are not arbitrable and it is for the TDSAT to adjudicate the disputes raised.

Without prejudice to this contention, he submits that in view of the arbitration clause, an arbitral tribunal comprising of three member/arbitrators has to be constituted.

7. The arbitration clause between the parties, namely, Clause 17.1 of the Master Service Agreement dated 14.08.2009 reads as follows:-

“17. DISPUTE RESOLUTION, GOVERNING LAW AND VENUE

17.1. Any disputes arising between WTTIL and Datacom in connection with this Master Agreement and/or any IP Set-vice Orders, including any disputes in respect of the validity thereof, shall be settled by arbitration. Such disputes or differences shall be referred to a sole arbitrator to be mutually appointed by the Parties, and if the Parties shall not agree on a single arbitrator, then each Party shall nominate an arbitrator, and the two arbitrators shall nominate the arbitrator that shall preside over the arbitration procedures. The arbitration shall be held at New Delhi and the arbitration proceedings shall be carried out under Indian Law and in accordance with the Arbitration and Conciliation Act 1996 or any statutory modification or re-enactment thereto. The arbitration proceedings shall be conducted in the English language and the award shall be written and final, conclusive and binding upon the Parties whether on questions of law or fact.”

8. Hence, as per the above clause, the differences are to be referred to a sole arbitrator to be mutually appointed by the parties. In case the parties do not agree on the name of the sole arbitrator, in that eventuality, each party has to nominate an arbitrator and the two arbitrators are to nominate the presiding arbitrator

9. Despite receipt of notice invoking the arbitration clause on 13.07.2017, the respondent have not taken steps within 30 days on receipt of the said notice. Receipt of the notice dated 13.07.2017 is not disputed.

Accordingly, in view of the judgment of the Supreme Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.*, the respondent have lost their right to nominate an arbitrator in terms of the above agreement.

10. As far as the plea of the jurisdiction of the TDSAT is concerned, this court in *Viom Networks Ltd. vs. Videocon Telecommunications Ltd.(supra)* held as follows:-

“40. The objection of the respondent about the maintainability of the present petition was also urged by the respondent in Viom Networks Ltd. (supra) which was duly examined and rejected by this Court. In this matter also, this Court has considered the decision of TDSAT in Reliance Infratel (supra) matter in para 28. Therefore, the reliance of the respondent on the aforesaid judgment of TDSAT OMP(I)(COMM.) No.95/2016 Page 31 of 71 in Reliance Infratel (supra) matter is misplaced. Even otherwise, the judgment of the TDSAT is not binding upon this Court. As far as this Court is concerned, the judgment of this Court in Viom Networks (supra) will hold the field though I have been informed by the parties that an appeal against the said judgment is subjudice. Once after considering the similar objections, learned Single Judge has taken the view that this Court has jurisdiction, I am not inclined to take a different view although, I am informed that appeal is pending against the order passed by the learned Single Judge. Both sides have confirmed that the operation of the order has not been stayed. Thus, at this stage, in my view, the said order is also applicable in the facts of the present matter also.”

11. An appeal before the Division Bench is said to be pending but there is no stay of the said judgment. Even otherwise, in view of Section 11(6A) of the Act, this issue has not to be gone into at this stage. This issue is left open to be adjudicated upon by the learned Arbitrator to be appointed by this court.

12. Accordingly, I appoint Mr. Justice A.P. Shah (Retd.) (Mobile

No.9910160007) as the sole Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator may fix his fees in consultation with the learned counsel for the parties. Copy of the order be sent to Mr.Justice A.P.Shah (Retd.)

13. The petition stands disposed of.

JAYANT NATH, J

SEPTEMBER 06, 2017

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