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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(COMM) 792/2017 & IAs No.13480/2017 (u/O XXXIX R-1&2 CPC) & 15260/2017 (u/S 8 of the Arbitration & Conciliation Act, 1996)

PACE POWER SYSTEMS PRIVATE LIMITED Plaintiff
Through: Mr. Parag Tripathi, Sr. Adv. with Mr. Anirudh Wadhwa, Mr. Vipul Kumar, Mr. Bhargav R. Thali and Ms. Mishika Bajpai, Advs.

Versus

BHARTI INFRATEL LIMITED Defendant
Through: Mr. Rohit Aggarwal and Ms. Gunjan Sinha Jain, Advs.

AND

+ CS(COMM) 920/2018 & IAs No.7678/2018 (u/O XXXIX R-1&2 CPC), 11631/2018 (u/S 5&8 of the Arbitration & Conciliation Act, 1996), 11632/2018 (of defendant u/O VII R-11 CPC) & 16190/2018 (for consolidation of suits)

BHARTI INFRATEL LIMITED Plaintiff
Through: Mr. Sandeep Sharma, Mr. Sharthak Mannan and Ms. Kanika Mitra, Advs.

Versus

LINEAGE POWER PRIVATE LIMITED Defendant
Through: Mr. Parag Tripathi, Sr. Adv. with Mr. Anirudh Wadhwa, Mr. Vipul Kumar, Mr. Bhargav R. Thali and Ms. Mishika Bajpai, Advs.

AND

+ CS(COMM) 1158/2018 & IAs No.13728/2018 (u/O XXXIX R-1&2 CPC) & 16189/2018 (for consolidation of suits)

LINEAGE POWER PRIVATE LIMITED Plaintiff
Through: Mr. Parag Tripathi, Sr. Adv. with Mr. Anirudh Wadhwa, Mr. Vipul Kumar, Mr. Bhargav R. Thali and Ms. Mishika Bajpai, Advs.

Versus

CS(COMM) Nos.792/2017, 920/2018 & 1158/2018

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BHARTI INFRATEL LIMITED

..... Defendant

Through: Mr. Sandeep Sharma, Mr. Sharthak
Mannan and Ms. Kanika Mitra, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

22.02.2019

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1. The controversy in all the three suits is, whether the arbitration, of disputes which have arisen between Pace Power Systems Private Limited ('hereinafter referred to as Pace') and Bharti Infratel Limited ('hereinafter referred to as Bharti') on the one hand and Lineage Power Private Limited ('hereinafter referred to as Lineage') and Bharti on the other hand, are to be subject matter of arbitration in accordance with four agreements each entered into between Lineage and Bharti on the one hand and Pace and Bharti on the other hand, or in accordance with the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act).

2. The procedure under the MSME Act has already been initiated by Pace and Lineage, and Bharti has already invoked arbitration in accordance with the agreement and in exercise of its right under the agreements, appointed an Arbitrator.

3. Vide interim order in these suits, both sets of proceedings have been stayed.

4. The senior counsel for Pace and Lineage and counsels for Bharti were heard at length yesterday, and during the hearing it transpired:

(I) that Micro and Small Enterprises Facilitation Council ('hereinafter referred to as Council') constituted under the MSME Act

has already reported failure of conciliation within the meaning of Section 18(2) of MSME Act and has already referred the disputes between Lineage and Bharti to the Arbitration Centre annexed to the High Court of Karnataka at Bangalore. There is however some controversy, whether the conciliation was under Section 18(2) of MSME Act or outside. However, a perusal of the order dated 4th April, 2018 of the Council shows that the parties reported that the conciliation attempted “outside”, as well as by the advocates for the parties before the Council, had failed. As far as disputes/claims raised by Pace against Bharti are concerned, it is not in dispute that the conciliation before the Council has failed, but reference under Section 18(3) of MSME Act to arbitration has not been made as yet.

(II) All are *ad idem* that conciliation now is not possible.

(III) It is not in dispute that once the conciliation has failed and reference under Section 18(3) of MSME Act is made/to be made to arbitration, the arbitration has to be in accordance with the Arbitration and Conciliation Act, 1996 (Arbitration Act).

(IV) There is thus unanimity of opinion, that the arbitration henceforth is to be in accordance with the Arbitration Act.

(V) It thus appeared that there was no controversy left and arbitration, whether under the MSME Act or under the Agreements, in terms of Arbitration Act, could proceed.

(VI) However attention was drawn to Sections 16, 18 & 19 of the MSME Act which contain different provisions than the Arbitration Act.

(VII) While under the Arbitration Act, interest to be awarded to the succeeding party on the amount found to be due, is in the discretion of the Arbitrator, under Section 16 of the MSME Act, if the amounts are found due to an entity registered under the MSME Act, as Pace and Lineage are, interest mandatorily has to be awarded at the rates as specified therein.

(VIII) Under Section 18(5) of the MSME Act, the arbitration has to be concluded within a period of 90 days, as distinct from the time lines provided under the Arbitration Act, though there is some controversy, whether Section 18(5) of the MSME Act applies only to a reference under Section 18(1) of the MSME Act or also to a reference under Section 18(3) of the MSME Act.

(IX) Further, under Section 19 of the MSME Act, in the event of the arbitral award being in favour of an entity registered under the MSME Act, the opposite party, as a pre-condition to preferring a petition under Section 34 of the Arbitration Act, is required to deposit 75% of the awarded amount or as may be directed by the Court.

(X) Depending upon whether the arbitration is under the Agreements or under the MSME Act, would also be the decision, whether the arbitration has to be at Bangalore in accordance with the MSME Act or at Delhi in accordance with the Agreements between the parties.

5. Finding, that the suits had already been pending before this Court for nearly two years and during the interregnum, the resolution of the actual disputes between the parties is in abeyance, I had proposed that since the

questions of applicability of Sections 16 & 19 of the MSME Act would arise for adjudication only when after the arbitral award is rendered on the claims and counter-claims of Pace and Bharti on the one hand and Lineage and Bharti on the other hand, whether not it is expedient to defer the adjudication on the said aspect. It was felt that any decision by this Court even today on the aforesaid aspects, would be subject matter of appeals and during which time, the resolution of disputes is likely to remain stayed. It was thus proposed to arrive at an amicable settlement, so that the arbitration can be proceeded with.

6. The counsels today, under instructions have agreed:

(A) that both sets of disputes be referred to the arbitration of a retired Judge of this Court under the aegies of the Delhi International Arbitration Centre and the arbitration proceedings be held at Delhi and be governed by the timelines as provided in the Arbitration Act;

(B) that it will be open to Pace and Lineage to contend before the Arbitrator, that MSME Act is applicable to it and it will similarly be open to Bharti to, before the Arbitrator, oppose the same and also contend that if MSME Act is applicable, then Bharti even is entitled to the benefit of Section 16 of the MSME Act;

(C) that neither party will raise objection to the jurisdiction of the Arbitrator to decide the said aspect, or on the ground of lacking jurisdiction in view of the MSME Act;

(D) that the Arbitrator will decide claims as well and counter-claims in both sets of disputes;

(E) the aforesaid will be without prejudice to the rights and contentions of the parties and will not prevent any of the parties from, before the Arbitrator or in challenge if any to the arbitral proceedings, taking all pleas as were raised in these suits;

(F) that nothing contained in this order be taken as expression of any view by this Court on any of the contentions;

(G) that the aforesaid course has been agreed, to expedite arbitration of claims and counter-claims of parties and to defer adjudication of legal questions aforesaid, which have no relevance today, to thereafter.

7. With the consent of the counsels, Justice Badar Durrez Ahmed (Retd.) is appointed as the Arbitrator to decide the claims as well as the counter-claims of the parties under the aegis of the Delhi International Arbitration Centre.

8. The parties to forthwith take steps for arbitration.

9. With the aforesaid, all the other arbitration proceedings *inter se* the parties are terminated.

10. The suits are disposed of.

No costs

RAJIV SAHAI ENDLAW, J.

FEBRUARY 22, 2019

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