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

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Date of Decision: 7.5.2019

+ **ARB.P. 704/2018**

NETPLUS BROADBAND SERVICES PVT. LTD..... Petitioner

Through: Ms. Meneesha Dhir with Mr. Karan
Batura, Advs.

versus

CISCO SYSTEMS CAPITAL (INDIA) PVT. LTD..... Respondent

Through: Mr. Punit K. Bhalla, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act"). The relief sought for by the petitioner is that an arbitrator be appointed since the respondent has failed to appoint an arbitrator despite a notice being served in that behalf on the respondent.
2. Concededly, the petitioner had invoked the arbitration agreement, which obtains in Clause 12.7 of the Master Lease and Financing Agreement dated 11.9.2015 (in short "Master Agreement") obtaining between the parties. Admittedly, Clause 12.7, which stands incorporated in the agreement gives respondent the right to appoint an Arbitrator.
3. The nub of the matter is as to whether the agreement encapsulates the dispute, which the petitioner seeks adjudication by the arbitrator. It is not disputed that pursuant to the execution of the Master Agreement, the parties entered into ten (10) lease agreements, whereby, the respondent had

financed and thus facilitated the lease of the subject equipment to the petitioner. These ten (10) lease agreements which were executed between the petitioner and the respondent, as stated by Mr. Bhalla, are detailed out below:

<i>Agreement Number</i>	<i>Lease Amount (in Rs.)</i>
<i>E016002165</i>	<i>4,66,68,300.00</i>
<i>E016002286</i>	<i>68,080,196.00</i>
<i>E016002310</i>	<i>95,696,573.00</i>
<i>E016002349</i>	<i>2,735,100.00</i>
<i>E016002545</i>	<i>6,359,387.00</i>
<i>E016002600</i>	<i>34,247,696.00</i>
<i>E016002601</i>	<i>21,962,637.00</i>
<i>E016002607</i>	<i>25,102,944.00</i>
<i>E016002621</i>	<i>5,454,502.00</i>
<i>E016002639</i>	<i>25,281,8123.00</i>
<i>Total</i>	<i>Rs.55,71,25,458.00</i>

4. According to the respondent, the petitioner has failed to pay the lease rents in respect of the aforementioned lease agreements. The respondent claims that a sum of Rs.12,87,66,904/-, as on 19.9.2018, is payable by the petitioner. It may be relevant to note that after the petitioner had triggered the arbitration agreement vide its notice dated 30.7.2018, the respondent terminated the Master Agreement as well as the lease agreements referred to hereinabove vide its notice dated 4.9.2018.

4.1 I may also indicate that the respondent in its reply to the petition has placed on record the communication dated 23.8.2018, which purportedly,

was issued in response to the petitioner's notice dated 30.7.2018.

5. Ms. Dhir, who, appears for the petitioner, says that the reply is ante-dated, as it refers to a subsequent communication dated 4.9.2018.

6. Be that as it may, a perusal of the petitioner's notice dated 30.7.2018, in sum, demonstrates that the petitioner claimed damages to the extent of Rs.75 crores on account of faulty leased equipments and resultant loss to its reputation.

6.1 It is in this broad framework that the petitioner seeks appointment of an Arbitrator in the matter.

7. Before I proceed further, it may be relevant to set forth hereafter the relevant clause in the Master Agreement which encapsulates the Arbitration Agreement obtaining between the parties:

***“12.7 Governing Law and Jurisdiction.** This Agreement and other Lease Documents shall be governed by the laws of India. Any and all disputes, controversies, and conflicts between the parties in connection with this Master Lease and Financing Agreement, including any Lease or Financing Schedules shall, so far as is possible, be settled amicably between the parties. Failing an amicable settlement, any and all disputes, controversies and conflicts arising out of or in connection with this Master Lease and Financing Agreement and/or any of the Lease or Financing Schedules that refers to this Master Lease Agreement or their performance (including the enforcement or validity of this Master Lease Agreement or its Schedules) shall be settled by arbitrating in the English language, in accordance with the Arbitration and Conciliation Act, 1996, and by a sole Arbitrator appointed by the Lessor, to be held in New Delhi, India. The arbitration award shall be final and binding on the parties. The courts of New Delhi shall have exclusive jurisdiction with respect to the Application and granting of interim reliefs, and the enforcement and execution of the arbitral awards under the Arbitration and Conciliation Act*

1996. Except for the matters under dispute, the Parties shall continue to exercise their remaining respective rights and fulfil their remaining obligations under this Agreement. ”

8. Based on the aforementioned clause, Ms. Dhir has argued that the arbitration agreement envisages adjudication of any or all disputes between the parties which arise in connection with the Master Agreement including any lease or financing schedules.

9. In sum, it is Ms. Dhir's contention that the petitioner's claim which relates to the faulty equipments also comes within the sway of the arbitration agreement.

10. Mr. Bhalla, who, appears for the respondent, on the other hand, has referred to two letters which form part of the record. The first one is a letter dated 22.6.2018, which is addressed by the petitioner to the respondent and the second is a letter dated 4.7.2018, which was written by the respondent in response to the petitioner's letter dated 22.6.2016.

10.1 Based on these letters, Mr. Bhalla says that it was indicated to the petitioner that its disputes and/or its grievance with regard to the working of the equipment(s) had to be put to the manufacturer and that they malfunctioned could not be the reason for not paying the lease rent.

10.2 In support of his submission, Mr. Bhalla referred to Clause 1.3 and Clause 8.2 of the Master Agreement.

10.3 Mr. Bhalla says that a conjoint reading of aforementioned clauses would show that the disputes with regard to the defect in the equipment are not covered under the Master Agreement or even under the follow-up the lease agreement and/or financing schedules.

11. Having heard the learned counsel for the parties, I am of the view that

Mr. Bhalla's submissions are required to be sustained. The reason that I have come to this conclusion is based on a plain reading of Clause 1.3 and 8.2 of the lease agreements. For the sake of convenience, these clauses are set forth hereafter:

"1.3 Term Not Cancelable and Obligations Absolute. The Original Term of a Lease with respect to each item of Equipment leased or the Financing Transaction with respect to each Financed Item under under a Schedule shall commence on the date as specified in the Schedule (the "Commencement Date") and shall continue for the-term provided in that Schedule, except in cases provided in Sections 5.4, 10.2 and 11. ONCE THE TERM OF ANY LEASE OR ANY FINANCING TRANSACTION HAS BEGUN, LESSEE'S OBLIGATION TO PAY RENT AND ALL OTHER AMOUNTS DUE UNDER A LEASE OR FINANCING TRANSACTION IS ABSOLUTE AND UNCONDITIONAL, AND SHALL NOT BE AFFECTED BY ANY CIRCUMSTANCE WHATSOEVER, INCLUDING ANY RIGHT OF SET OFF, DEFENCE, COUNTERCLAIM WHATSOEVER, INCLUDING ANY RIGHT OF SETOFF, DEFENSE, COUNTERCLAIM, INTERRUPTION, DEFERMENT OR RECOUPMENT OF ANY KIND INCLUDING, WITHOUT LIMITATION, CLAIMS OF LESSEE AGAINST LESSOR OR AGAINST ANY MANUFACTURER OR SUPPLIER OF THE EQUIPMENT, OR ANYONE ELSE, FOR ANY REASON WHATSOEVER.

8.2 Warranties and Disclaimer of Warranties. Lessor warrants to Lessee that so long as no Event of Default has occurred and is continuing, Lessor will not disturb Lessee's quiet and peaceful enjoyment, possession and use of the Equipment. Lessor assigns to Lessee all manufacturer and Supplier warranty rights, to the extent Lessor holds such rights, without representation or warranty for the Lease Term, upon the execution and delivery of a Schedule with respect to the applicable Equipment. Enforcement of any such rights shall be at Lessee's sole cost and expense. EXCEPT AS EXPRESSLY

SET FORTH ABOVE, LESSOR MAKES OR SHALL BE DEEMED TO HAVE MADE, NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, AS TO THE TITLE, CONDITION, DESIGN OR OPERATION, MERCHANTABILITY, FITNESS FOR USE OF ANY EQUIPMENT OR ANY EQUIPMENT OR ANY PART THEREOF, THE ABSENCE OF ANY LATENT OR OTHER DEFECTS, THE ABSENCE OF ANY INFRINGEMENT OF ANY PATENT TRADEMARK OR COPYRIGHT, THE ABSENCE OF OBLIGATIONS BASED ON STRICT LIABILITY IN TORT, OR ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, WITH RESPECT TO ANY EQUIPMENT OR ANY PART THEREOF. IN NO EVENT IS LESSOR RESPONSIBLE FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR FOR LOSS OF DATA.”

12. A careful perusal of Clause 1.3 set forth above would show that once the term of any lease or transaction has begun, the petitioner’s application to pay rent and all other amounts due under the lease or financing transaction is absolute and unconditional and the same remains unaffected, *inter alia*, even in a situation where the petitioner has any claims against respondent or even against the manufacturer or supplier.

13. Likewise, Clause 8.2, *inter alia*, provides that the respondent gives no warranty or representation expressed or implied as to the title, condition, design or operation, “merchantability” or “fitness” for use of any equipment or any part thereof.

14. Clearly, therefore, disputes with regard to the manufacturing defects or *qua* functioning of the equipment(s) or any part thereof ought to be directed to the manufacturer or the supplier. Admittedly, the respondent is not the manufacturer or the supplier of the equipment(s). Concededly, the

manufacturer/supplier is a company by the name: Cisco Systems Inc., which is an entity separate from the respondent.

15. Ms. Dhir, on the other hand, has sought to place reliance on Clause 5.6 to contend that the equipment bears permanent markings to evidence respondent's ownership, security and other interest in same.

16. Likewise, Ms. Dhir also relies upon clause 9.1 of the Master Agreement to buttress her submission that once the original term or the extended term of the lease expired, the petitioner *inter alia* is obliged to return the equipment to the respondent at the location so specified.

17. In my view, these clauses are factored in the Master Agreement only to secure the interest of the respondent in its capacity as a lessor, perhaps, to enable it to claim benefit under the Income Tax law such as depreciation; etc. These clauses by itself will not bring in the dispute with regard to claim for damages *qua* equipment(s) and/or loss of reputation within the realm of Clause 12.7 of the Master Agreement which otherwise encapsulates the arbitration agreement obtaining between the parties.

18. Ms. Dhir says that in view of the provisions of Section 11(6A) having been introduced in 1996 Act, these are the matters which should be left to wisdom of the arbitrator. In other words, it is learned counsel's submission that whether or not Clause 12.7 of the Master Agreement is applicable should be decided by the learned arbitrator.

19. To my mind, as a broad proposition, this submission is correct, but this submission has a caveat, which is that the Court while dealing with the petition under Section 11 of the 1996 Act has to come to a *prima facie* conclusion that the dispute, which has erupted between the parties is referable to the arbitration agreement obtaining between the parties. What

the Court is required to see is as to whether there is a broad fit between the dispute which is raised and the contours of the Arbitration Agreement. The Court does not examine as to whether or not there is an exact fit, but it certainly is required to form a *prima facie* view that the dispute raised is referable to the arbitration agreement obtaining between the parties. In my opinion, Ms. Dhir's submission is, thus, not tenable given the facts obtaining in this case.

20. For the foregoing reasons, I am not inclined to entertain the captioned petition.

21. The petition is accordingly dismissed.

22. It is made clear though that the dismissal of petition will not come in the way of the petitioner taking recourse to an appropriate remedy *qua* the manufacturer and/or supplier.

22. Needless to say, since I have not examined the merits of the disputes, the dismissal of this petition, will not impact the merits of the petitioner's claim.

RAJIV SHAKDHER, J

MAY 07, 2019/pmc