

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

% **Order delivered on: 15th September, 2016**

+ **ARB. P. No.351/2016**

ATC TELECOM TOWER CORPORATION PVT. LTD. Petitioner
Through Mr.Amar Gupta, Adv. with
Mr.Manish K. Jha & Mr.Divyam
Agarwal, Advs.

versus

VIDEOCON TELECOMMUNICATIONS LIMITED Respondent
Through Mr.Sndeeep S. Ladda, Adv. with
Mr.Soumik Ghosal & Mr.Devender
Singh, Advs.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J. (ORAL)

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for seeking the appointment of an Arbitrator on behalf of the respondent, in the arbitration initiated by the petitioner vide its letter dated 21st April, 2016 for resolving the disputes and differences that have arisen under the Agreements between the parties. The prayer is also made to appoint an Arbitrator who would act as the Presiding Arbitrator, in the event that the Arbitrator nominated by the petitioner and the Arbitrator appointed by this Court on behalf of the respondent fail to agree upon the name of the third Arbitrator within the time frame as fixed by this Court.

2. The relevant dates and events are referred as under:-

- (i) On 18th March, 2011, the Ministry of Communications & IT had taken on record the change in name of the petitioner-Company from 'Essar Telecom Infrastructure Private Limited' to 'ATC Telecom Tower Company Private Limited'.
- (ii) On 1st June, 2009, a Passive Infrastructure Sharing Agreement ("ETIPL MSA") was entered into between Essar Telecom Infrastructure Pvt. Ltd. ("ETIPL") (now ATC Telecom Tower Company Private Limited) and Datacom Solutions Private Ltd. (now Videocon Telecommunication Limited) for providing passive telecom infrastructure facilities and services all over India.
- (iii) On 15th December, 2014, the parties had entered into the Settlement Agreement for providing the passive telecom infrastructure facilities. Thereafter, on 5th May, 2015, parties had entered into a subsequent Addendum for providing the passive telecom infrastructure facilities.
- (iv) By letter dated 27th November, 2015, the respondent had informed the petitioner that it would be shutting down its mobile operations in Gujarat Service Area with effect from the midnight of 26th December, 2015 and had requested the petitioner to immediately stop the billing for the sites. On 11th December, 2015, the respondent had modified its number of sites. However, the petitioner had rejected the request of the respondent for an Early Exit without imposition of the Exit Penalty. The respondent had revised its date of closure of services to 26th January, 2016, thereafter to 31st March, 2016 and still thereafter to 31st May, 2016.

(v) By letter dated 7th April, 2016, the petitioner had asked the respondent to clear the dues which was more than Rs.1 crore (excluding the exit fee). In reply to the said letter, the respondent without denying its liability, had simply stated that since the matter is sub judice, they will not make any payments.

2.1 It is further stated by the petitioner that the mechanism for resolution of disputes between the petitioner and the respondent, for the sites under the Passive Infrastructure Sharing Agreement dated 1st June, 2009 provides for the reference of disputes to arbitration under the Act by three Arbitrators. One Arbitrator is to be appointed by each party and the third Arbitrator is to be appointed by the Arbitrators so appointed. Accordingly, the petitioner had appointed Mr.Sanjeev Puri, Senior Advocate, as its nominee Arbitrator to adjudicate the disputes between the parties.

2.2 Since the respondent had continuously defaulted in making the payment towards the invoices raised by the petitioner for the services provided under the Agreement, the petitioner was constrained to invoke the Arbitration Agreement on 21st April 2016 for the settlement of disputes under the two Master Infrastructure Provisioning Agreements as per the dispute resolution clause.

2.3 Since there is a continuous liability on account of non-payment of monthly fee and accumulated interest, the petitioner had restricted its claim of such dues as on 21st April, 2016 in the arbitration notice but with a right to claim all monthly fee with accumulated interest (on the date of filing of the Claim) till the respondent continues to avail the services of the petitioner. The petitioner has filed the present

arbitration petition for the appointment of an Arbitral Tribunal to adjudicate the above said claim of the petitioner.

3. The petitioner states that till the filing of the present petition, (which is more than thirty days from the date of notice of invocation of arbitration calling upon the respondent to nominate their Arbitrator), it has not received any communication from the respondent for the appointment of their nominee Arbitrator.

4. Learned counsel for the petitioner further states that there is a valid and binding arbitration agreement between the parties. It is just, necessary and equitable that this Court may appoint an Arbitrator on behalf of the respondent for the Arbitral Tribunal consisting of three Arbitrators for adjudication of the disputes/claims as stated in the present petition as well as other claims, disputes or differences as may be submitted by the petitioner before the Tribunal.

5. Notice of this petition was issued to the respondent. Time was also given to the respondent to file the reply. However, the reply was not filed and further, time was sought which was opposed by the petitioner.

6. The only contention of the respondent is that the disputes between the parties are to be decided by the TDSAT and not under the Act. When it was pointed out to him that the similar issue has already been decided by another Bench in **Viom Networks Ltd. v. S-Tel & Ors.**, AIR 2014 Del. 31, as well as by this Court in *O.M.P.(I) (COMM.) No.107/2016* between the same parties vide judgment dated 14th September, 2016, counsel states that the respondent intends to contest the said decision, however, it is not denied by the

counsel for the respondent that there is valid agreement executed between the parties which contains the arbitration clause.

7. I have heard the learned counsel for the parties. In case the averments made in the petition and the documents placed on the record are read in a meaningful manner, I am of the view that the prayer made in the above said petition is liable to be allowed. As far as the objection of the respondent is concerned, the respondent is at liberty to raise the same before the Arbitral Tribunal. There is no stay by any Court about the findings of two Courts, thus, there is no impediment to pass this order.

8. Accordingly, Justice Vikramajit Sen, Retired Judge of the Supreme Court (Mobile No.9818000290/8447333366) is appointed as an Arbitrator on behalf of the respondent. Both the Arbitrators, as appointed by the petitioner as well as by this Court, will mutually appoint a Presiding Arbitrator within one month. The Arbitral Tribunal shall adjudicate the disputes and differences that have arisen under the agreements between the parties and as mentioned in the present petition. The parties are also allowed to file their respective claims and counter-claims before the Arbitral Tribunal.

9. The Arbitral Tribunal shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fee of the Arbitrators constituting the Arbitral Tribunal shall be in terms of the schedule of the amended Act.

10. The petition is accordingly disposed of.

11. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrators forthwith.

**(MANMOHAN SINGH)
JUDGE**

SEPTEMBER 15, 2016

