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

Judgment Reserved: 11.9.2018
Judgment Pronounced:21.12.2018

\+ ARB.P. 662/2017

M/S BRIGHTSTAR TELECOMMUNICATIONS INDIA LTD. ..... Petitioner

Through Mr. Ashwini Kumar, Sr. Adv with Mr. Harsh Kaushik, Ms. Savita Panda and Mr. K. Tama, Advs.

versus

M/S IWORLD DIGITAL SOLUTIONS PRIVATE. LTD. ..... Respondent

Through Mr. Abhishek Manu Singhvi, Sr. Adv with Mr. Pulkit Deora, Mr. Roopesh Singh Bhardwaj, Mr. Nikhil Rohtagi and Mr. Nikhil Kohli, Advs.

\+ ARB.P. 663/2017

M/S BRIGHTSTAR TELECOMMUNICATIONS INDIA LTD. ..... Petitioner

Through Mr. Ashwini Kumar, Sr. Adv with Mr. Harsh Kaushik, Ms. Savita Panda and Mr. K. Tama, Advs.

versus

M/S IWORLD BUSINESS SOLUTIONS PRIVATE. LTD. ..... Respondent

Through Mr. Abhishek Manu Singhvi, Sr. Adv with Mr. Pulkit Deora, Mr. Roopesh Singh Bhardwaj and Mr. Nikhil Kohli, Advs.

\+ O.M.P.(I) (COMM.) 526/2017

M/S BRIGHTSTAR TELECOMMUNICATIONS INDIA PRIVAT LTD ..... Petitioner

Through Mr. Ashwini Kumar, Sr. Adv with Mr. Harsh Kaushik, Ms. Savita Panda and Mr. K. Tama, Advs.

versus

M/S IWORLD BUSINESS SOLUTIONS PRIVATE. LTD. ..... Respondent

Through Mr. Abhishek Manu Singhvi, Sr. Adv with Mr. Pulkit Deora, Mr. Roopesh Singh Bhardwaj, Mr. Nikhil Rohtagi and Mr. Nikhil Kohli, Advs.

\+ O.M.P.(I) (COMM.) 527/2017

M/S BRIGHTSTAR TELECOMMUNICATIONS INDIA LTD. ..... Petitioner

Through Mr. Ashwini Kumar, Sr. Adv with Mr. Harsh Kaushik, Ms. Savita Panda and Mr. K. Tama, Advs.

versus

M/S IWORLD DIGITAL SOLUTIONS PRIVATE LTD. ..... Respondent

Through Mr. Abhishek Manu Singhvi, Sr. Adv with Mr. Pulkit Deora, Mr. Roopesh Singh Bhardwaj and Mr. Nikhil Kohli, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. The captioned petitions, though four in number, they are, in fact, two sets comprising two arbitration petitions and corresponding petitions for interim reliefs.

1.1 Therefore, Arbitration Petition No.662/2017, which is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act") is relatable to OMP(I) (Comm.) No.527/2017, which is a petition filed under Section 9 of the 1996 Act. Likewise, Arbitration Petition No.663/2017, filed under Section 11 of the 1996 Act, is connected with OMP(I) (Comm.) No.526/2017, which is also preferred under Section 9 of the 1996 Act.

2. Counsel for the parties, who have appeared before me, submitted that the facts obtaining in these matters are similar and therefore, the assertions made are also similar. Thus, the arguments advanced by either side before me qua the captioned petitions are also identical.

2.1 The only difference being that in Arbitration Petition No.662/2017, the respondent is described as M/s. iWorld Digital Solutions Private. Ltd. (in short "IDS"), while in Arbitration Petition No.663/2017, the respondent is described as M/s iWorld Business Solutions Private Ltd. (in short "IBS").

2.2 Though, the petitioner has taken the stand that IDS is the subsidiary of IBS, this aspect is refuted by the aforesaid entities. Thus, for the purpose of narration of the events and otherwise, I would be referring to IDS and IBS collectively as the respondents unless they need to be referred to separately.

2.3 It may also be relevant to note that IDS and IBS had entered into two separate agreements of even date, that is, 12.2.2015, which are also, concededly, identical. Therefore, they would be collectively referred to hereafter as "subject agreement(s)".

3. However, before I proceed further, it would useful to note at the very outset that the subject agreements contain Clause 26, which, purports to be the arbitration agreement obtaining between the parties qua the dispute at hand. This is an aspect which I will elaborate upon in the latter part of my judgment. Suffice it to say at this juncture that a perusal of the record and the pleadings would show that while the respondents have taken the stand that they signed the subject agreements, they insist that the petitioner did not hand over the counter-signed counterpart to either IDS or IBS.

3.1 The defence of the respondents is that they never conducted business with the petitioner in pursuance of the subject agreements; and that the agreements have schedules appended thereto which describes the product qua which transactions were to be undertaken by the parties.

3.2 Simply put, the stand of the respondents is that since the product referred to in Schedule-I appended to the subject agreements is "Landline Telephones", therefore, this Court cannot appoint an Arbitrator in respect of the moneys claimed by the petitioner *vis-à-vis* another product, i.e. Apple iPhones, said to have been supplied to the respondents.

4. Thus, the moot point which I need to address is: was the reference to landline telephones in Schedule-I annexed to the subject agreements an inadvertent typographical error or was it, as the respondents put it, an attempt by the petitioner to slip in a product, that is, Apple iPhones, which was never intended to be covered vide the subject agreements.

5. Therefore, the following facts and/or assertions are required to be noticed in order to adjudicate upon the issue at hand.

5.1 As alluded to hereinabove, the petitioner claims that the respondents entered into two separate agreements of even date, that is, 12.2.2015 with the petitioner. It is the petitioner's case that the respondents are "authorised premium resellers" of Apple products. It is also the petitioner's stand that the petitioner being a distributor of Apple iPhones, the subject agreements, amongst others, covers Apple iPhones.

5.2 It is the petitioner's case that the subject agreements provided that in order to procure the products in issue, the respondents would raise a Purchase Order (in short "P.O.") from time to time and that the petitioner would supply the products against the P.O. followed by an invoice on the terms ruling on the date of dispatch of the consignment.

5.3 The petitioner also avers that the terms and conditions mentioned in the invoices were to prevail over the subject agreements and the P.O.s. Furthermore, it is averred that the subject agreements made a provision for according incentives to the respondents, which included target incentives and reimbursement of moneys against trade and/or consumer schemes, as also loyalty programmes or sales assistance as approved by the petitioner from time to time.

5.4 According to the petitioner, once the respondents were found amenable to the benefits of the incentive schemes in operation, a system generated credit note would be made in favour of the respondents. Each credit note, according to the petitioner, bore a unique ten digit number.

5.5 The petitioner avers that it has maintained a running account in respect of the transactions made with the respondents.

5.6 It is the case of the petitioner that P.O.s were raised between April 2015 to May 2017 and between February 2015 to June 2017 by IDS and IBS respectively. Thus, the first P.O. was raised by IDS in April 2015 while the last P.O. was raised on 8.5.2017. Likewise, the first P.O. was raised by IBS in February, 2017 and the last P.O. was raised on 3.6.2017.

5.7 According to the petitioner, in and around June, 2017, an amount to the tune of Rs.8,36,21,362/- was payable by IDS and a sum of Rs. 28,40,71,245/- by IBS, *albeit*, after adjustment of sums, reflected in the credit notes.

5.8 The petitioner asserts that since the outstanding amounts were not being paid, a decision was taken not to entertain any further P.O.s from the respondents.

5.9 It appears that in order to reconcile the accounts, the parties held conciliation meetings between June and August, 2017.

5.10 It appears that since the negotiations failed (which basically pertained to the amount for which credit had to be given to the respondents), two separate demand notices of even date, i.e. 21.8.2017, were issued by IDS and IBS demanding issuance of Credit Notes worth Rs.5,61,59,383/- and Rs.10,83,46,583 respectively.

5.11 The petitioner claims that on 4.9.2017, it issued reply-cum-demand notices. Via these communications, the petitioner raised a demand amounting to Rs. 10,01,95,430 on IDS and Rs. 33,53,87,330 on IBS. Furthermore, the petitioner also triggered the arbitration mechanism,

which, as indicated above, is contained in Clause 26 of the subject agreements.

5.12. In response, the respondents wrote back on 8.9.2017, wherein, *inter alia*, the stand taken by them was that the subject Agreements were not finalized and hence not executed by them. The respondents aver that they, reiterated this stand in a reply dated 27.9.2017, issued via its counsel; though this communication is not placed on record.

6. It is in this background that the petitioner has instituted the captioned petitions.

7. Upon notice being issued, the respondents have filed a reply. The respondents have labelled their reply as "preliminary reply", reserving the right to file a reply on merits. The stand taken in the reply filed on behalf of the respondents, to which I have also made a reference above, is that the subject agreements do not refer to mobile phones.

7.1 In sum, the respondents contend that Apple iPhones qua which the petitioner raised a demand vide its communications dated 4.9.2017, do not fall within the ambit of the subject agreements.

8. I may also note that the respondents have filed two additional affidavits, which are, more or less, identical. These affidavits have been filed by, one, Mr. Lalit Sharma.

8.1 In these affidavits, the stand taken by the affiant is that IDS and IBS are sister concerns. It is further averred that while IBS was incorporated in the year 2005, IDS was incorporated in 2014. According to the affiant, IBS entered into a relationship with Appl Inc. via their office, situate, in India,

in 2005, to launch its flagship store in a premium South Delhi mall in Ansal Plaza

8.2 It is claimed that the respondents are running their business in the name and style "iWorld". There is also reference in the affidavits to the products which the respondents deal in. These products include accessories, such as cables, tri-pod stands, cases, battery back-ups, sleeves for iPads/MacBook Air/MacBook Pro and other products of like kind. It is averred that it markets products of other manufacturers as well, such as, IBM, HP, Lenovo, Microsoft, Bose, B&O, Beats, etcetra.

8.3 In paragraph 6 & 7 of the additional affidavits filed on behalf of IDS and IBS respectively there is reference to the shareholding pattern of the petitioner and to the fact that it merged with its parent company Bharti Teletech Limited in the Financial Year, 2009-2010. The affiant asserts that this resulted in the expansion of business, which led to the manufacture of landline telephones under the brand name "Beetel". The case sought to be made out is that alongside its business of distributing Beetel branded phones, it was a distributer for other products, such as, Blackberry and Apple iPhones as well. The affiant also claims that since the petitioner was keen on expanding its base for Beetel brand landline telephones, the "purported" subject agreements came to be executed. The affiant asserts that since the petitioner was keen on promoting and marketing its Beetel landline telephones, it entered into the subject agreements to take advantage of the existing customer base of the respondents.

8.4 There is an explicit averment in the affidavit that the subject agreements were signed on behalf of the respondents. This assertion,

however, is made with a caveat, which is, that the focus of the parties was to develop a relationship and stipulate terms governing transactions relatable only to landline telephones.

8.5 Given this context, the affiant tried to explain the e-mail dated 31.1.2015 sent by, one, Mr. Satyendra Kumar, an employee of the petitioner to, one, Mr. Tript Singh, Director of the respondents. The emphasis was laid on the fact that Schedule-I to the drafts sent of the subject agreements adverted only to landline telephones.

8.6 Reliance was placed on the contents of the notice pertaining to the 16th Annual General Meeting of the petitioner and in the Explanatory Statement, dated 10.8.2015, attached thereto.

8.7 Based on these documents, it is sought to be projected that the petitioner intended to launch its landline phones to enhance its market share. The affiant, thus, takes the stand that the petitioner via its reply-cum-demand notice dated 4.9.2017, tried to wrongly base its demand on the subject agreements which relate to landline telephones and not Apple iPhones.

8.8 It is, as indicted above, the stand of the respondents that though the subject agreements were signed, its counter-signed counterpart were not received by them. In support of its stand, the affiant places reliance on the communications dated 8.9.2017 and 27.9.2017, whereby, a demand was made for copies of validly executed subject agreements being supplied to the respondents. Pertinently, the copies of the subject agreements filed in this Court have the same content as the draft agreements, which were sent

via e-mail dated 31.1.2015 by Mr. Satyendra Kumar; an employee of the petitioner.

8.9 In sum, the stand taken is that Apple iPhones were never part of the subject agreements and the inference sought to be drawn by the petitioner based on Clause 13.2 of the subject agreements, which refers to International Mobile Equipment Identity (IMEI) number would necessarily include Apple iPhones, is, according to the affiant, completely untenable. The affiant also disputes the fact that the sales report were sent to the petitioner by the respondents as provided in Clause 13.2 of the subject agreements. Furthermore, the case set up by the affiant is that the petitioner does, in fact, manufacture its own branded Beetel products, which bear the IMEI number.

9. There are an examples cited in Paragraph 21 and 22 of the affidavits filed on behalf of IDS and IBS respectively, alluding to the transactions executed between the parties, based on which, it is suggested that the manner in which the transactions took place were not as per the terms stipulated in the subject agreements.

9.1 Thus, in effect, it is averred that there is no valid arbitration agreement in existence qua the product in issue, which is the requirement under Section 11(6A) of the 1996 Act.

9.2 In response to the additional affidavits, a reply has been filed on behalf of the petitioner. In the reply to the additional affidavits, the petitioner, apart from reiterating its stand taken in the petition, has briefly made the following assertions:-

(i) The respondents have been acting in accordance with the subject agreements and that, the parties have engaged in transactions relating to Apple iPhones over a period of 2 ½ years.

(ii) In and about October, 2014, the petitioner took over the majority stakes in Beetel Teletech Ltd.

(iii) The petitioner, thereafter, on 02.12.2014, entered into an Authorized Apple National Distributor India Agreement (hereafter referred to "iPhone Authorization Agreement") with Apple Inc. which permitted it to supply and market Apple iPhones to resellers, including Premium Resellers such as the respondents.

(iv) The respondents already had in place an agreement with Apple Inc. whereby they stood appointed as Apple Premium Reseller and that, it is the policy of Apple Inc to supply their products to premium resellers only via entities such as the petitioner— therefore, the question of the petitioner signing an agreement *vis-a-vis* landline phones does not arise.

(v) The parties have never entered into a transaction with respect to landline phones. The respondents, thus, had no occasion to issue the P.O.s with respect to landline phones. The respondents are, thus, taking advantage of an inadvertent typographical error/omission which has crept in Schedule-I appended to the subject agreements.

(vi) That similar agreements were executed between the petitioner and other distributors which contained an identical typographical error. In this regard, reference was made to two sample agreements executed with other distributors which were marked as Annexure- P1 (Colly).

(vii) There is intrinsic evidence available in the subject agreements which would point in the direction that the parties had acted in accordance with terms of the subject agreements. Reference in this behalf was made to Clause 8.4 of the subject agreements which required the respondents to furnish signed cheques to the petitioner with authority vested in the petitioner to fill in the particulars with regard to the amount *albeit* after fixing the price which prevailed soon as the products were dispatched. This amount had to commensurate with the price indicated in the invoice generated *vis-a-vis* the products. Reference in this behalf was also made to the e-mail dated 10.03.2015. This e-mail, *inter alia*, adverted to the fact that the respondents were willing to issue cheques with no limits as cheques already issued were insufficient and had a limit of Rs. 50,00,000/-/.

(viii) The petitioner had in fact filled the cheques as per the agreement between the parties, which, upon being presented were dishonored. Therefore, the petitioner initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 (in short "NI Act")

(ix). It is averred that other clauses which point to the fact that the parties were acting in consonance with the subject agreements are Clauses 7.1 and 15.5.

(ix)(a) The fact that orders were placed as envisaged in clause 7.1 is sought to be demonstrated by referring to the respondents' e-mail dated 20.08.2016.

(ix)(b) Likewise, it was averred that the respondents' claim for issuance of credit notes is rooted in Clause 15.5 of the subject agreements.

(x) It is stated that the landline phones produced by the petitioner do not have IMEI Numbers, contrary to what has been alleged by the respondents. Therefore, the IMEI Number referred to in Clause 13.2 would relate only to the mobile phones.

(xi) As per the subject agreements, the respondents were under an obligation to submit the sales report and since it was not done, as a measure of goodwill, the petitioner prepared the sales report and sent the same to the respondents for their approval. The respondents in their communication to the petitioner only raised the issue that the generation of sales report was not required

10. That post the merger of Beetel Teletech Ltd. and the petitioner, there has been a complete overhaul of the management and, therefore, while, it cannot be stated whether any transaction took place during 2013 and 2014 based on the personal knowledge of the employees of the petitioner, what can, however, be said based on the record, is that, there is nothing to suggest that transactions occurred in the aforementioned two years between Beetel, the petitioner and the respondents.

Submissions of counsel

11. Based on the stand taken in the pleadings by the parties before me, arguments on behalf of the petitioner were advanced by Mr. Ashwini Kumar, Senior Advocate, instructed by Mr. Harsh Kaushik, Advocate, while those on behalf of the respondents, were made by Dr. Abhishek Manu Singhvi, Senior Advocate, instructed by Mr. Pulkit Kohli, Advocate.

11.1 The submissions of Mr. Ashwini Kumar were, broadly, as follows:-

(i) The petitioner stepped into the shoes of Beetel Teletech Ltd. in October, 2014.

(ii) The petitioner thereafter entered into an iPhone Authorization Agreement which allowed it to distribute its products to resellers including Premium Resellers.

(iii) Since the respondents were appointed as premium resellers by Apple Inc., they sold only Apple iPhones.

(iv) The parties have entered into transactions only after execution of the subject agreements that too towards the end of 2015

(v) Insofar as IDS is concerned, it owes the petitioner (till the date of the demand notice), a sum of Rs. 8,36,21,362/-. Likewise, IBS owes the petitioner (till the date of the demand notice), a sum of Rs. 28,40,71,245/-.

(vi) The petitioner and the respondents have not conducted any business for the period spanning between 2013 and 2014. The petitioner and the respondents have also not carried out any business in respect of landline phones. The only dispute which obtains between the parties is as to whether the subject agreements will include dispute relating to Apple iPhones. This is an aspect which can only be adjudicated upon by the Arbitral Tribunal.

(vii) Post the amendment of the 1996 Act, and in particular, with the insertion of Sub-Section (6A) in Section 11, the jurisdiction of this Court is confined to ascertaining whether an arbitration agreement exists or not. While exercising powers under Section 11 of the 1996 Act, the Court is not required to adjudicate on merits of a case and therefore, necessarily is not

required to look into the evidence as to whether the agreement would cover iPhones or landline phones.

(vii)(a) In support of this contention, reference was made to the following judgments:-

(i). *Duro Felguera, S.A. Vs Gangavaram Port Limited*, (2017) 9 SCC 729 (relevant paras 47, 48 and 58 and 59).

(ii). *KSC Construction Co. Vs UOI*, (2017) SCC OnLine Del 12539 (relevant paras - 11 and 12)

(iii). *Hyundai Engineering and Construction Co. Ltd & Anr. Vs United India Insurance Co. Ltd & Ors.*, (relevant para 8 and 9)

(iv). *Booz Allen and Hamilton Inc. Vs SBI Home Finance Limited and Others*, (2011) 5 SCC 532 (relevant paras - 20(i), 32 and 34).

(vii)(b) Furthermore, reliance was also placed on Clauses 7.1, 8.4, 13.2 and 15.5 of the subject agreements to demonstrate that parties had, broadly, acted in consonance with the terms of the subject agreement.

(viii) Lastly, it was contended the mere fact that the subject agreements, which were commercial documents, should propel this Court into making an endeavour to interpret the same in a manner which would give effect to the arbitration agreement contained therein rather than result in invalidating the same.

(viii)(a) In support of this submission, reliance was placed on the following judgments of the Supreme Court:

(i). *Govind Rubber Limited Vs. Louis Dreyfus Commodities Asia Private Limited*, (2015) 13 SCC 477

(ii). *Shailesh Dhairayanwan Vs Mohan Balkrishna Lulla*,

12. On the other hand, on behalf of the respondents, Dr. Singhvi contended that IBS has been carrying on the business under the trademark iWorld via the number of stores set up by it in Delhi and the National Capital Region. IBS was transacting business with Beetel since 13.01.2010 and that the business related to Apple iPhones. IBS is a retailer and the distributor both for Beetel as well as for the petitioner now in respect of various branded goods including Apple. The dispute arose between the parties in and about June 2017 with regard to the value of credit notes.

12.1 Beetel/the petitioner since 2010 had cumulatively raised invoices worth Rs. 340 crores whereas IBS has been paid a sum of Rs. 300 crores.

12.2 Beetel/the petitioner has issued credit notes worth Rs.15 crores, the dispute between the parties has arisen with respect to the balance amount.

13 The management of the petitioner circulated a draft of the subject agreement for appointment of IBS as the distributor qua its landline phones. This is evident upon the perusal of the e-mail dated 31.01.2015. The respondents signed the subject agreements, though, the original counter parts were not returned to them.

14. The arbitration clause i.e. Clause 26, which is included in the purported subject agreements not only restricts the applicability of the disputes to landline phones but also provides for amicable settlement of

disputes within 90 days followed by a reference to the Delhi High Court Arbitration Centre. The procedure prescribed in Clause 26 of the subject agreements has not been followed.

15. There is no reference in the subject agreements to Apple iPhones or even mobile phones for that matter. The purported distribution agreements also do not advert to the fact that it is predicated on the respondents being appointed as the premium resellers by Apple Inc.

16. The dispute between the parties pertains to the pre-existing trade in Apple iPhones which is beyond the scope of the subject agreements which relate to landline phones. The invoices which had been issued in relation to Apple iPhones advert to exclusive jurisdiction of Delhi Courts, which by implication would mean that the chosen forum for adjudication of disputes was Courts, to the exclusion of an arbitration mechanism. Therefore, inferentially the only conclusion one can draw is that Apple iPhones do not fall within the scope and ambit of the arbitration agreement which is incorporated in subject agreements.

16.1. Notably, neither the invoices nor the purchase orders bear any reference to the subject agreements.

16.2. The rule of *Contra Proferentem* should apply since the petitioner is the maker of the document and the words contained therein, though, are not ambiguous would have to be construed against the petitioner.

16.3. Schedule-I appended to the subject agreement only refers to Landline Phones, and thus, applying the rule of *Contra Proferentem* the

scope of the subject agreements would necessarily have to be confined only to landline phones.

16.4. Reliance in this behalf was placed on the judgment of the Supreme Court in *Industrial Promotion & Investment Corpn. of Orissa Ltd. Vs. New India Assurance Co. Ltd. & Anr.*, (2016) 15 SCC 315 (para 10 at page 320).

17. The petitioner has not approached the Court with clean hands. It was only when the respondents pointed out that the subject agreements referred only to landline telephones that the petitioner sought to explain the error by referring to Clause 13.2 of the subject agreements.

18. The petitioner does manufacture its own branded Beetel products which have allocated to them IMEI Numbers.

19. The petitioner has falsely taken the stand that their business relationship commenced only after the execution of the subject agreements and that there was no privity of contract between the parties prior to that date. In this behalf reference was made to the invoice dated 30.1.2010.

20. That IBS was procuring Apple products from various distributors and that therefore, the contention that because it was appointed as the premium resellers and therefore the products of Apple Inc. were sold to it is far from truth. In support of this contention reliance was placed on the petitioner's reply cum demand notice dated 04.09.2017 which adverted to the fact that the respondent had direct relation with Apple Inc since 2011. It therefore, makes no sense for the respondents to enter into the subject agreements for Apple iPhones as contended by the petitioner.

21. If parties are to be governed by the subject agreements, they should be incorporated by reference in the purchase order/invoices.

21.1 Reliance in this behalf was placed on the following judgments:

(i) *Elite Engg. & Construction (Hyd.) (P) Ltd. Vs. Techtrans Construction India (P) Ltd.*, (2018) 4 SCC 281

(ii) *M.R. Engineers and Contractors (P) Ltd. Vs. Som Datt Builders Ltd.*, (2009) 7 SCC 696.

22. This Court should look beyond the mere existence of the arbitration agreement and in that exercise, should examine as to whether the arbitration clause provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

22.1 Reliance in this behalf was placed on the judgment of the Supreme Court in *Duro Felguera S.A. vs. Gangavaram Port Limited* (2017) 9 SCC 729 (para 36 and 37 at page 755)[which was cited by the petitioner as well] and on another judgment of the Supreme Court rendered in *Himangi Enterprises vs. Kamaljeet Singh Ahluwalia* (2017) 10 SCC (para 21 and 22 at page 711).

22.2. In support of the very same contention reference was also made to the following judgments:

(i) *Ved Prakash Mithal & Sons Vs. Delhi Development Authority & Anr.* (2018) SCC OnLine Del 9884

(ii) *Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra* (2012) 2 SCC 144 (para 15 at page 148)

(iii) *United India Insurance Co. Ltd. Vs. Hyundai Engineering and Construction Co. Ltd.* 2018 SCC OnLine SC 1045

23. That Sections 91 and 92 of the Evidence Act, 1872, does not permit the parties to lead oral evidence regarding terms and conditions of a written contract. Besides this, submission was made to the effect that the public policy of India requires that agreements to be interpreted on the basis of what is written in them and not on the basis of what should have been written in them.

Reasons

24. I have heard the learned counsel for the parties and perused the record as well as the written submissions filed by them.

25. A consideration of the aforesaid has, in a nutshell, revealed the following:

(i)(a) IBS prior to the execution of the subject agreements was dealing with the petitioner's predecessor-in-interest, that is, Beetel Teletech Limited. These transactions between Beetel Teletech Limited and the IBS were undertaken prior to 2015. It is the submission of the respondents that the transactions commenced in 2010. In support of this claim, the respondents have taken the stand in their written submission that since 2010 they have raised cumulative invoices worth Rs.3,40,00,000/-, out of which IBS has paid Rs.300 crores. Furthermore, a reference has been made by the respondents to the petitioner's own demand-cum-reply dated

4.9.2017, wherein, *inter alia*, it is stated that the respondents claims to have entered into a business relationship with Apple Inc. since 2011.

(i)(b) The petitioner, on the other hand, is ambiguous about the period for which its predecessor-in-interest was dealing with IBS. The stand taken by the petitioner is that since the merger of Beetel Teletech Limited and the petitioner, there has been a "reformation" of management and therefore, it can only say what is available in its records.

(i)(c) The material placed before me by the parties seems to indicate that the preponderance of the probability is that there have been dealings in Apple iPhones between the petitioner's predecessor-in-interest and the IBS prior to the execution of the subject agreement.

(ii) There is nothing on record which would show that before or after the execution of the subject agreements, parties transacted in any landline telephones. There are invoices on record produced by IBS, which suggest that there have been dealings in Apple products other than iPhones as well.

(iii) The petitioner's grievance is premised on non-payment of its outstanding dues. According to the petitioner, the respondents are required to pay a sum amounting to Rs 10,01,95,430 and Rs.33,53,87,330. The respondents, on the other hand, seek adjustment of their credit notes. In this behalf, it is important to note that IDS seeks adjustment of credit notes worth Rs.5,04,13,444/-, whereas, IBS seeks adjugment of credit notes worth Rs.4,11,84,000/-.

(iv) Clearly, the respondents, despite taking the stand that they have not received counterpart of subject agreements, had conceded that they have signed and executed the same.

(v) While, broadly, the pattern of the transactions that were entered into between the parties before and after the execution of the subject agreements was that, P.O.s were raised by the recipient whereupon supplies were made, which were accompanied by invoices followed by issuance of credit notes to incentivize the purchase.

(v)(a) Pertinently, there is no clear and explicit reference in any of the documents placed before me to the subject agreements.

(vi) The invoices placed on record have a clause, which appears on the face of the document and adverts to the fact that "*all dispute subject to exclusive jurisdiction of the Courts in Delhi only*". As against this, Clause 25 of the subject agreement vests jurisdiction in a competent court in Gurgaon*, albeit*, with respect to a 'suit' instituted to enforce rights by either party under or in respect of the subject agreement. The said clause also refers to the fact that the subject agreement has been signed and executed in Gurgaon.

(vii) Clause 26 of the subject agreement says that if the parties fail to resolve the disputes amicably within a period of 90 days, the same shall be decided by an Arbitrator appointed by the Delhi High Court Arbitration Centre. Furthermore, the very same clause fixes Delhi as the venue of arbitration. There is no dispute that the petitioner is the maker of the contract. Therefore, if the invoices were generated pursuant to the execution of the subject agreements, then, insofar as enforcement of rights

was concerned, one would have expected the petitioner to iron out the discrepancies, insofar as the jurisdiction clause was concerned.

26. Therefore, to my mind, upon a perusal of the material placed before me, I would go with the stand taken by the respondents that there was no reason to make Apple iPhones part of the subject agreements. Schedule-I attached to the subject agreements clearly refers to only landline telephones. Beetel Teletech Limited was, at the time when the subject agreements were executed, manufacturing landline telephones. The subject agreements have been executed and signed by the authorized signatory of Beetel Teletech Limited. If one were to accept the arguments advanced on behalf of the petitioner that the absence of reference to Apple iPhones in Schedule-I of the subject agreements was an inadvertent typographical error, it would require one to literally take a leap of faith without any document being placed on record, which adverts to the fact that transactions in Apple iPhones were undertaken under the sway of the subject agreements.

27. Mr. Kumar submits that after the insertion of sub-section (6A) to Section 11 of the 1996 Act, the Court is required only to ascertain that the arbitration agreement is in "existence" – while this submission, to my mind, has much merit, however, that being said, the expression "existence" of an arbitration agreement is an expression of wide import, which would require the Court to *prima facie* ascertain as to whether the agreement in issue relates to dispute arising out of the parent agreement which requires adjudication via the arbitration mechanism. The inquiry is not, in my view, about, as to whether the dispute is arbitrable, which after the insertion of

sub-clause (6A) to Section 11, in my opinion, falls within the domain of the arbitrator. The limited inquiry which the Court has to carry out is: as to whether the arbitration mechanism agreed to by the parties is relatable to the disputes arising out of the transactions, which are the subject matter of the parent contract. In other words, the Court has to relate the existence of arbitration agreement to the disputes, which the parties had anticipated that would arise in connection with and/or in relation to the transactions that they had undertaken. The captioned petitions have shown that this difficulty typically arises where parties transact in commodities/articles, etcetra and therefore, where parties disagree or where disputes arise as whether or not a particular article/commodity is covered by the arbitration clause, the Court will have to carry out that limited exercise of correlating the two. The line of judgments cited by Mr. Kumar, especially the judgment of the Supreme Court in ***M/s Duro Felguera, S.A. vs. M/s. Gangavaram Port Limited*** (2017) 9 SCC 729 does not take a different position. Following extracts from the judgment makes this amply clear:

> ***….48.*** *Section 11(6-A) added by the 2015 Amendment, reads as follows:*
>
> > *"**11. (6-A)** The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."*
> >
> > *(emphasis supplied)*
>
> *From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. <u>The resolution to that is simple—it</u>*

needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

XXXXXXX XXXXXX

59. *The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to inimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected…"*

(emphasis is mine)

28. The other argument of Mr. Kumar that the subject agreement being a commercial document and therefore, an interpretation should be given which would give effect to the arbitration clause is a robust submission, which in another fact situation I may have accepted, but in the instant case, I am not persuaded to apply that proposition for two reasons: Firstly, I may end up including a product in Schedule I, which parties never intended to and thereby, in a sense, rewrite the subject agreements. Secondly, it is not that if these petitions are rejected, the petitioner would be without a remedy. All that the petitioner would be required to do to claim its dues is to take recourse amongst others, to Civil Courts. In my opinion, any other course that I may adopt may result in dragging the respondents to a forum, *albeit*, a private forum for adjudication qua which parties are not *ad idem*.

The mere fact that the parties have dealt with Apple iPhones is not a good enough reason to have them agree to an adjudicatory process to which they have not agreed.

29. Therefore, for the foregoing reasons, I am not persuaded to accept the pleas of the petitioner. Needless to say, nothing mentioned above will impact the stand of the parties with regard to the tenability of their respective claims and counter claims. The enquiry of this Court was restricted to whether or not disputants had agreed to have their grievances addressed via an arbitral mechanism.

30. Accordingly, the captioned arbitration petitions as well as the accompanying Section 9 petitions are dismissed.

RAJIV SHAKDHER
(JUDGE)

DECEMBER 21, 2018
pmc/c