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M/S BASIC TELE SERVICES LTD Plaintiff

Versus

Through: Mr. Dalip Mehra and Rahul Sood,
Advocates for the defendant No.1.
Mr Amar Gupta, Advocate for the defendant
No.2.

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. The plaintiff has sued for declaration that the invocation dated 30th October, 1996 by the Ministry of Communications Department of Telecommunications of the defendant No.1 Union of India of the bank guarantee issued by the defendant No.2 Bank at the instance of the plaintiff in favour of the defendant No.1 is contrary to the terms of the guarantee and that the defendant No.1 is not entitled to invoke the said guarantee and for permanent injunction restraining the defendant No.2 from making payment under the guarantee and also for mandatory injunction directing the defendant No.1 to negotiate in good faith the terms and conditions of the licence and the interconnect agreement for which the bid of the

plaintiff to the defendant No.1 had been accepted by the defendant No.1.

2. Vide interim order dated 1st November, 1996 after issuance of notice to the defendants and finding that the defendant No.1 had already invoked the bank guarantee, the defendant No.2 bank was restrained from remitting the proceeds of the bank guarantee to the defendant No.1. The plaintiff was, however, asked to keep the bank guarantee alive. On 28th August, 1998 on an application of the plaintiff for exemption from extension of bank guarantee it was held that there was no need for formal extension of bank guarantees and non-extension of the bank guarantee will not affect the rights of the defendant No.1 to get the remittance from the defendant No.2 bank in the event of the matter being decided finally in favour of the defendant No.1 on the basis of invocation made earlier during the term of validity of the bank guarantee. The defendant No.1 preferred FAO(OS) 217/1998 against the said order; on the concession of the counsel for the plaintiff and the counsel for the defendant No.2 bank, in the said appeal on 31st August, 1998, it was ordered that in the event of the plaintiff failing in the suit and the defendant No.1 succeeding therein, neither the plaintiff nor the defendant No.2 bank would object to payment of the bank guarantee amount being made to the defendant No.1 notwithstanding the non-extension of the validity of the bank guarantee. The counsel for the bank also stated that the defendant No.2 bank would not deny payment of the bank guarantee impugned, to the defendant No.1 on the ground that the bank guarantee had not been extended.

3. The order restraining the defendant No.2 bank from remitting the amount of the bank guarantee to the defendant No. 1 was confirmed vide order dated 5th October, 1999 during the CS(OS) 2686/1996

pendency of the suit. The defendant No.1 Union of India preferred an appeal being FAO(OS)384/1999 against the said order and which was admitted. In the meanwhile, the suit proceeded. On change in pecuniary jurisdiction of this court, the suit was transferred to the district court. The plaintiff applied for amendment of the plaint to enhance the valuation of the suit and the said amendment was allowed and the suit transferred back to this court and given the original number. The FAO(OS) 384/1999 came up before the Division Bench of this court on 18th February, 2008 when finding that the trial in the suit had already been completed, the same was disposed of with direction for earlier disposal of the suit.

4. On the pleadings of the parties in the suit, the following issues were framed on 7th September, 2001.

- “1. Whether the present suit is liable to fail for want of legal notice contemplated under Section 80 of the Code of Civil Procedure?
2. Whether the plaint does not disclose a cause of action?
3. Whether there was no concluded contract between the plaintiff and the defendant No.1?
4. Whether the plaintiff is entitled to the relief for declaration and injunction as prayed?
5. Relief.”

The defendant No.1 applied for allowing it to raise an objection that the suit is barred by Section 15 of the Telecom Regulatory Authority of India Act 1997. This court, on 7th October, 2002 finding that the issue sought to be raised is a pure and simple legal issue, allowed the amendment of the written statement to incorporate the said plea and framed the following additional issue.

“Whether the present suit is barred by virtue of Section 15 of the Telecom Regulatory Authority of India Act, 1997, as amended?”

5. The plaintiff filed affidavit by way of examination in chief of only one witness who was cross examined by the counsel for the defendant No.1. The defendant No.1 also examined only one witness who was cross examined by the counsel for the plaintiff. The defendant No.2 did not lead any evidence.

6. The senior counsel for the plaintiff has been heard. The defendant No.1, inspite of several opportunities, did not make any oral submissions and while reserving judgment, opportunity was given to the defendant No.1 to file synopsis of submissions, if any. Written arguments have been filed on behalf of the defendant No.1. Thereafter, the plaintiff also filed synopsis of arguments. The counsel for the defendant no.2 bank stated that the defendant No.2 shall abide by whatever order is made by the court.

My issue-wise findings are as under:

Re: Issue No. 1: Whether the present suit is liable to fail for want of legal notice contemplated under Section 80 of the Code of Civil Procedure?

7. The suit was accompanied by IA.No.11071/1996 under sub-section (2) of Section 80 of the CPC. Notice of the suit as well as of the said application and of the application for interim relief was ordered to be issued to the defendant No.1 Union of India, when the suit came up first before the Court on 31st October, 1996. The application under Section 80(2) of the CPC was thereafter being listed alongwith the application for interim relief. The order dated 5th October, 1999 confirming the interim injunction during the pendency of the suit, in para 36 thereof also deals with the plea of the defendant No.1 of the suit being barred by Section 80 of the

CPC. It was then held that a suit to obtain an urgent and immediate relief could be instituted against Government of India with the leave of the court without serving the notice as required under Section 80(1). On the basis of the order dated 31st October, 1996 (supra) it was held that the plaintiff was, vide the said order, granted the permission to institute the suit without serving the notice. This was deciphered from issuance of notice to the defendant No.1 before granting the relief of injunction. It was further held that it thus did not lie in the mouth of the defendant No.1 to plead that the suit was bad for want of notice under Section 80 of the CPC. Again when the matter came up for framing of issues on 7th September, 2001 it is recorded that IA.No.11701/1996 had already been disposed of on 5th October, 1999 and need not be listed again. Notwithstanding the same this issue was framed.

8. I may also record that it is the admitted position that a notice dated 30th October, 1996 under Section 80, CPC was given by the plaintiff to the defendant No.1. However, the suit was filed immediately thereafter, without waiting for two months.

9. In the written arguments of the defendant No.1 it is contended that on 31st October, 1996 the plaintiff was not granted leave to file the case against the defendant No.1; that the relief of declaration as prayed cannot be granted inasmuch as no notice under Section 80 had been given and the declaratory relief claimed is barred under Section 80 of the CPC and for which reason the suit is liable to fail.

10. Though undoubtedly the interim order on an application under Order 39 Rules 1 and 2 of the CPC, as the order dated 5th October, 1999 in which it was as aforesaid observed/held that the plaintiff had on 31st October, 1996 been granted leave to sue without complying with the provisions of Section 80(1) of the CPC, is not to colour the

decision at the stage of final disposal of the suit but an order under Section 80(2) of the CPC is not such which once granted in a suit can be adjudicated again at the time of final disposal of the suit. Undoubtedly, the order dated 31st October, 1996 does not in as many words states that leave under Section 80 (2) CPC is granted to the plaintiff. The language thereof is as under:

“IA.No.11071/1996

This is an application under sub Section (2) of Section 80 of the Code of Civil Procedure for leave of the court for institution of the suit without serving any notice as required under sub-section (1) of Section 80. The suit has been filed against the Union of India and, therefore, Section 80, notice is required before filing of the suit. However, sub section (2) of Section 80 may be utilized by the plaintiff for seeking leave of the court but before granting the leave that very sub section says that notice has to go to the Union of India giving it a reasonable opportunity of showing cause in respect of the limitation prayed for in the suit. Therefore, notice without process fee to go to Mr Madan Lokur, Standing Counsel for the Union of India for 1-11-1996. Notice be given dasti.”

11. The aforesaid order was interpreted by this court on 5th October, 1999 as granting leave. The principles of res judicata / constructive res judicata apply to successive stages in the same proceedings also. In my view, this part of the order dated 5th October, 1999 cannot be relooked by this court at this stage of final decision of the suit.

12. Independently, of the above also in my view the suit is not barred by Section 80 of the CPC. A suit to obtain an urgent or immediate relief is permitted to be instituted with the leave of the court without serving any notice as required by Section 80(1) of the CPC. If the court is satisfied after hearing the parties that no urgent or immediate relief need be granted in the suit, the court is required to return the plaint for presentation after complying with the

requirements of section 80(1). In the present case the suit was accompanied with the application for leave of the court. This court also on 31st October, 1996 though not in express words granting such leave, in compliance with the procedure in Section 80(2) issued notice to the defendant No.1. The counsel for the defendant No.1 on receipt of notice did not urge that no urgent or immediate relief was required to be granted in the suit. On the contrary, on the very next date i.e., 1st November, 1996 consent was given for restraining remittance of the proceeds of the bank guarantee. No arguments, on any subsequent dates, also appear to have been made in this regard. The court also did not return the plaint with finding that no urgent or immediate relief need be granted in the suit. On the contrary urgent relief sought was granted.

13. At the fag end of the suit, it cannot be argued that the suit was not for urgent relief. The argument of the defendant that the suit for the relief of declaration cannot be for an urgent relief is also misconceived. No objection is raised to the urgency of the relief of injunction. The same is also borne out from the conduct of the proceedings not only by the plaintiff but also by the defendant No.1. A declaratory relief consequential whereto the urgent relief of injunction is sought, would not defeat the urgency of the relief. The two reliefs could not be split up and if as ancillary to the urgent or immediate relief claimed, any other relief is also sought, the provisions of Section 80(2) would not become inapplicable for such reason. I am also of the view that the relief of declaration in the present case is superfluous. The plaintiff even without claiming the said relief could have sought the relief of injunction averring that the invocation of the bank guarantee was not in terms thereof. The grant of every injunction necessarily entails an inquiry / adjudication

by the court of the right or entitlement to the said injunction and with respect whereto declaration can also be claimed. Considering the purpose for which the suit was filed, the suit is held to be falling within the domain of Section 80(2) of the CPC.

14. The issue No.1 is accordingly decided in favour of the plaintiff and against the defendant No.1.

Re: Additional Issue: Whether the present suit is barred by virtue of Section 15 of the Telecom Regulatory Authority of India Act, 1997, as amended?

15. The Telecom Regulatory Authority of India Act 1997 came into force on 25th January, 1997 first as the Telecom Regulatory Authority of India Bill. Section 15 of the said Act, on the basis whereof the jurisdiction of this court is pleaded to be barred, as amended w.e.f. 24th January, 2000 is as under:

“15. Civil Court not to have jurisdiction – No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.”

16. The Appellate Tribunal is established under Section 14 of the said Act to adjudicate the disputes of the nature mentioned therein and or to dispose of appeals against any direction, decision or order of the Authority constituted under the Act. Under Section 14 A application to the Appellate Tribunal for adjudication of the said disputes is to be made and in the case of appeal period of 30 days for preferring the same has been prescribed. Section 14M provides for transfer of all applications pending for adjudication of disputes before the Authority immediately before the date of establishment of the Appellate Tribunal to the said Appellate Tribunal. Section 14N

provides for transfer of all appeals pending before the High Court, before the commencement of the Telecom Regulatory Authority of India (Amendment) Act 2000 to the Appellate Tribunal on its establishment under Section 14.

17. There is no provision for transfer of the suits as the present one to the Appellate Tribunal. The present suit was instituted on or about 30th October, 1996 i.e., prior to the coming into force of the Telecom Regulatory Authority of India Act 1997 or the Amendment Act, 2000 thereof. There being no provision therein for transfer of the pending suits even if the subject matter thereof is covered by a dispute to be adjudicated by the Appellate Tribunal, it cannot be said that the Appellate Tribunal is empowered to adjudicate this suit. Hence, the question of the jurisdiction of this court being barred does not arise.

18. Similarly, the action of the defendant No.1 impugned in this suit had been taken not in pursuance of any power conferred by or under the TRAI Act but prior to the coming into force thereof. Thus, under the second limb of Section 15 of the said Act also it cannot be said that this court does not have any power to grant the injunction claimed.

19. The defendant No.1 has in its written arguments quoted Section 15 of the TRAI Act 1997 as it stood prior to the Amendment Act thereof of 2000. The same also does not provide for transfer of the suits instituted prior to the coming into force of the Act in 1997 to the Regulatory Authority. The objection in this regard itself was taken by the defendant No.1 for the first time after the coming into

force of the Amendment Act, 2000 and thus the reliance on the provisions in the Act as originally passed is misconceived.

20. A perusal of the Act as it stood prior to the 2000 Amendment also shows that under Section 14 thereof if a dispute arose which the Authority was empowered to adjudicate the aggrieved person was required to make application with respect thereto to the Authority. The dispute within the meaning of Section 14 could only mean the dispute arising after the coming into force thereof and could not refer to the dispute which had already arisen and had been the subject matter of a lis before a Fora competent to adjudicate the same prior to coming into force of the said provision. There was no provision in the Act prior to 2000 Amendment also of transfer of pending disputes to the Authority which under the Act was empowered to adjudicate the same.

21. The additional issue is thus answered in favour of the plaintiff and against the defendant No.1.

Re: Issue No.2: Whether the plaint does not disclose a cause of action?

Issue No. 3: Whether there was no concluded contract between the plaintiff and the defendant No.1?

Issue No. 4: Whether the plaintiff is entitled to the relief for declaration and injunction as prayed?

22. The discussion under these issues is found to be interconnected and hence they are taken up together. The plea of the plaint not disclosing any cause of action is taken on the ground that invocation/payment under the bank guarantee can be enjoined only on the ground of fraud and irretrievable loss or damage. It is contended that, neither of the two grounds are pleaded or made out;

there is neither any pleading or averment of fraud nor of irretrievable loss or damage. It is also the contention of the defendant No.1 that though improper invocation could also be a ground for injunctioning payment under the bank guarantee but the same has not been pleaded. It is further the contention in the written arguments that such an objection also could be available only to the defendant No.2 bank and not to the plaintiff and the defendant No.2 bank had not raised any such objection and thus the payment under the bank guarantee, on the ground / for the reason of the invocation being not proper, could not be injunctioned.

23. The contention of the defendant No.1 of there being no plea of the plaintiff of the invocation being not proper is incorrect. The plaintiff has in para 7 of the plaint pleaded that clause 3 of the bank guarantee requires that the Letter of Invocation should clearly state the breach which has occasioned the invocation of the bank guarantee. It is further pleaded that the impugned Letter of Invocation does not state or specify the reason why the guarantee has been invoked by the defendant No.1. It is yet further pleaded that the impugned invocation is not in accordance with the terms of the guarantee itself and is thus bad in law, illegal and non-est. It is further the plea that " it is well settled law that invocation of a bank guarantee has to be in terms of the guarantee. An invocation not in terms of the guarantee is bad and liable to be set aside".

24. The defendant No.2 has also filed an affidavit dated 31st August, 1998 in this court in which also it is inter alia the case of the defendant No.2 bank that the Invocation Letter dated 19th October, 1996 of the defendant No.1 was not in conformity with the terms of the bank guarantee and as such the purported invocation was totally

improper. It is further pleaded therein that the defendant No.2 bank had by its letter dated 31st October, 1996 to the defendant No.1 stated that the invocation of the said bank guarantee vide letter dated 19th October, 1996 was improper and invalid and accordingly the defendant No.2 bank was under no obligation to make any payment under the bank guarantee. The same plea has been taken by the defendant No.2 in its written statement also.

25. The only witness examined by the defendant No.1 did not deny the receipt of the letter dated 31st October, 1996 from the defendant No.2. Thus, the plea of the defendant No.1 of the defendant no.2 bank having not taken the plea of the invocation being not in terms of the agreement is also not found to be correct. Even otherwise, I am of the view that the plea of the invocation not being in terms of the bank guarantee is available to the person at whose instance the bank guarantee has been given and is not required to be taken by the bank alone. The bank has no personal interest in the matter and does not want to be a privy to any dispute. It is the person at whose instance the guarantee has been issued, who has vital interest in encashment or in restraining encashment thereof and if the invocation is not in terms of the bank guarantee, the plea is certainly available to that person. The matter can be looked at also from another angle. Even if the bank is to contend that the invocation is not in terms of the bank guarantee and the beneficiary of the bank guarantee contends otherwise, the matter will have to be resolved by some authority. In the facts of the present case, such authority could be the court only. The bank could not be expected to rush to the court for the said adjudication. For this reason also I am unable to uphold the contention of the said plea being not available to the plaintiff.

26. Thus I find that there was cause of action for the plaintiff to approach the present court for restraining the encashment of bank guarantee and the reason of the invocation being not in terms of the bank guarantee is pleaded by the plaintiff.

27. The plaint in the circumstances discloses the cause of action. The issue No.2 is decided in favour of the plaintiff and against the defendant No.1.

28. The plaintiff has sued for restraining the encashment of the bank guarantee, besides on the ground of the invocation thereof being not in terms of the guarantee on the ground –

(A) that the defendant No.1 had on 16/01/1995 issued tender for providing basic telephone services under a licence to be issued for that purpose on non exclusive basis for various telecom territories. The bidders were alongwith their bids required to submit bank guarantee valid for six months for each service area for which the bid was made and of the value prescribed in the tender document. The plaintiff in term of its bid furnished the bank guarantee of the defendant no.2 bank, in the sum of Rs 50 crores;

(B) that the extended time for submission of the tender was till 23rd June, 1995. On 27th May, 1995 the defendant No.1 issued clarifications/replies to the queries of the prospective bidders on/to various terms and conditions of the tender and in pursuance to clause 4 of Section II of the tender document – these clarifications in terms of the tender document were to form a part of the tender document. One

of the said queries was as to – could an awardee decline the

award without forfeiting the earnest money. In response to the said query it was clarified that the awardee i.e. the person whose bid has been accepted and who had been allotted the licence will not forfeit the earnest money if he refuses to accept the counterbid offered by the telecom authority. Yet another query was whether the selected bidder had the right to decline to accept the licence under the terms specified by the Government if they have changed from the original tender, without forfeiting the earnest money. The response thereto was "yes, if there is a substantial change". Yet another demand of the prospective bidder was for supply of a draft licence copy with all terms and conditions at that stage or at least prior to the issue of Letter of Intent. The reply was that the draft licence agreement will be given to the selected bidders alongwith the Letter of Intent. In response to another query it was clarified that the inter connect agreement will be open to review by mutual agreement between the DoT and the licensee;

(C) It is further the case of the plaintiff that the plaintiff was not found successful qua any of the bids made by it; however, the defendant No.1 came out with a policy to impose a cap on the number of circles that could be awarded to a single successful bidder. This necessitated fresh bids being invited for those circles which had been vacated by the successful bidders. Some of the circles were re-tendered. A notice dated 1st December, 1995 inviting fresh bids for some circles was issued;

- (D) The plaintiff made fresh bid for the area of Tamil Nadu. Since the bank guarantee of Rs 50 crores by way of earnest money submitted by the plaintiff alongwith its earlier bid was still valid, the same was offered against the fresh bid also of the plaintiff and was got renewed for a further period of upto 30th June, 1996. The bid aforesaid of the plaintiff for Tamil Nadu was found to be highest and a Letter of Intent dated 13th March, 1996 was issued by the defendant No.1 to the plaintiff. The plaintiff was called upon to convey its acceptance and to furnish performance bank guarantee and financial guarantee in the requisite amount. The Letter of Intent was, however not accompanied with the draft licence and interconnect agreements as had been assured in pursuance to the clarifications aforesaid. The plaintiff accordingly vide its letter dated 29th March, 1996 to the defendant No.1 demanded the draft licence and inter connect agreements and without which it was contended that the performance and financial guarantees could not be furnished. Certain other details / information were also sought by the plaintiff from the defendant No.1. The plaintiff in these circumstances also sought extension of time for submitting the Letter of Acceptance;
- (E) The licence and interconnect agreement were, however, not furnished to the plaintiff and for this reason the validity of the bid, of the bank guarantee aforesaid of Rs 50 crores by way of earnest money as well as the time for the plaintiff conveying unequivocal acceptance of the Letter of Intent was extended from time to time;

(F) The defendant No.1 on 1st July, 1996 furnished to the plaintiff the draft of the licence and interconnect agreements and called upon the plaintiff to convey its unequivocal and unconditional acceptance of the same by 31st July, 1996;

(G) It is the case of the plaintiff that the terms and conditions of the draft licence and interconnect agreement had been substantially changed from the terms specified in the original tender and the clarifications. Discussions/correspondence commenced between the parties in this regard and the time for plaintiff to convey its acceptance of the Letter of Intent was again extended from time to time. Similarly, the validity of the bid and the bank guarantee was extended. Pursuant to the said discussions, certain revised drafts of the licence and interconnect agreement were also forwarded by the defendant No.1 to the plaintiff but according to the plaintiff the same still contained substantial changes from the tender document and the clarifications issued earlier;

(H) It is the case of the plaintiff that the defendant No.1 instead of resolving several issues which had been raised by the plaintiff, by its letter dated 19th October, 1996 signed on 30th October, 1996 and to the defendant No.2 bank, invoked the earnest money bank guarantee of Rs 50 crores.

It is the case of the plaintiff that earnest money bank guarantee is conditional bank guarantee which can be invoked only

in the circumstances provided therein and neither of which circumstances had occurred.

29. At this stage, it would be appropriate to set out the relevant terms of the bank guarantee as under:

“The conditions of this Obligation are :

1. If the bidder withdraws its bid during the period of bid validity specified by Authority or
2. If the bidder having been notified of the acceptance of its bid by the Authority during the period of the bid validity
 - a) fails or refuses to execute the contract form if required; or
 - b) fails or refuses to furnish the Performance Bank Guaratnees and/or Financial Bank Guarantee in accordance with the Instructions to Bidders;
3. We undertake to pay to the Authority, an amount not exceeding Rs 50,00,00,000/- upon receipt of its first written demand, without any demur if the Authority note that the amount claimed by is due or owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions.”

30. It is the case of the plaintiff that the plaintiff, at the time of invocation of the bank guarantee by the defendant No.1, was still in the process of negotiation with the defendant No.1 and had neither failed or refused to accept the contract nor to furnish the performance and financial bank guarantee, the stage whereof would also have arisen on the finalization of the contract/agreement. It was in these circumstances that the relief of mandatory injunction in the nature of specific performance was also claimed in the plaint, though not pressed and no issue was framed thereon and which is even otherwise infructuous today.

31. It is further the case of the plaintiff that the draft agreement forwarded by the defendant No.1 to the plaintiff as well as the revisions therein pursuant to representation of the plaintiff contained substantial changes from the tender document and were thus in the nature of counter offer by the defendant No.1 and for non acceptance whereof the earnest money bank guarantee could not be encashed. The plaintiff, of course, contended that it was bona fide still negotiating with the defendant No.1 but the defendant No.1 put pressure on the plaintiff by invoking the bank guarantee.

32. The defendant No.1 in its written statement has not controverted the factual pleas aforesaid of the plaintiff including as to the clarifications issued to the prospective tenderers on 27th May, 1996. It is, however, the case of the defendant No.1 that the plaintiff as well as others to whom Letters of Intent had been issued after receiving copies of the licence / interconnect agreement had made some suggestions; that the defendant No.1 had clarified that it would consider such suggestions to the extent acceptable and accordingly some modifications were made and revised drafts issued. The defendant No.1 denies that the draft agreements as revised contained substantial changes from the tender document. It was denied that any counter offer had been made by the defendant No.1 to the plaintiff. The defendant No.1 thus pleaded that the plaintiff having failed to give acceptance to Letter of Intent and having failed to submit the performance and financial bank guarantees, the defendant No.1 had no option but to invoke the bank guarantee. It was contended that the plaintiff had neither declined to sign the documents nor given acceptance thereof.

33. In response to the pleading of the plaintiff of the invocation of the bank guarantee being not in terms of the guarantee the defendant pleaded that clause 3 of the bank guarantee did not require reasons to be stated and it was enough that there was already a breach committed by the plaintiff. It is pleaded that the plaintiff itself knew that it was in breach in not giving acceptance of Letter of Intent and not furnishing the performance and financial bank guarantees as required and thus could not challenge the invocation on the ground of the said facts having not been mentioned in the invocation letter.

34. At this stage, it is appropriate also to set out the invocation letter dated 19/30th October, 2006 whereby the bank guarantees were invoked.

“To,

The Manager,
Deutech Bank, Tolstoy House,
15-17, Tolstoy Marg,
New Delhi - 110001.

Sub: Encashment of Bank Guarantee
No.796/372/95 dt 22-6-95 for Rs Fifty Crores.

Dear Sir,

Please refer your above mentioned Bank Guarantee and Extensions submitted on behalf of M/s Basic Teleservices Ltd for Tamil Nadu Circle Area in Tender No. 314-7/94-PHC. The Director General Telecom, the Telecom Authority, has ordered that above mentioned bank guarantee be forfeited.

You are, therefore, requested to encash the above mentioned Bank guarantee and remit the amount through a crossed account payee demand draft in favour of Pay and Accounts Officer, Dept of Telecom (HQ) payable at Delhi.
Please acknowledge the Receipt.”

35. Most of the documents filed by the plaintiff in support of its case have been admitted by the defendant No.1. Thus, the factual controversy requiring oral evidence was confined only to prove documents which were not admitted and as to whether there were substantial changes in the draft licence / interconnect agreements forwarded by the defendant No.1 to the plaintiff, from the tender documents or not. The cross examination of the witness of the plaintiff, particularly on 10th December, 2002, 13th January, 2003 and 14th January, 2003 to a large extent is found to be relating to matters on which issues had not been framed and which are not to be adjudicated.

36. The witness of the plaintiff in cross examination deposed that the defendant No.1 had in the agreement proposed after issuance of Letter of Intent taken away the right of renewal of the agreement available to the plaintiff under the tender document, thereby making a substantial change in the agreement. He further deposed that while under the tender document, the licence could be revoked only on breach of licence conditions, under the proposed agreement, the licence was made revocable merely by giving 180 days notice and for reasons not necessarily of breach of licence conditions by the plaintiff. Similarly, it was deposed that while the tender document did not contain any stipulation for providing specifications of the services being provided to the subscribers, under the proposed agreement the plaintiff was obliged to give specifications of the services being provided to its subscribers, to the defendant No.1.

37. Yet another substantial change deposed by witness of plaintiff was of giving prior information to the department of the rates to be fixed by the plaintiff. The counsel for the defendant No.1 of course

suggested to the witness of plaintiff that the other substantial changes listed in annexure 3 to the letter dated 18th October, 1996 of the plaintiff to the defendant No.1 were not substantial and which was denied.

38. The witness of the defendant No.1 in his affidavit by way of examination in chief denied that the draft agreement contained any deviations and deposed that essentially and substantially it was in line with the tender document. He further deposed that the substantial changes listed out by the plaintiff were in fact in consonance with the tender conditions. It was also deposed that the plaintiff having expressed its willingness to go forward was not entitled to object. On invocation of the bank guarantee it was deposed that the conditions for invocation thereof existed since the plaintiff had failed to furnish the performance and the financial bank guarantees. He further deposed that the draft agreements being in terms of the tender document were not a counter offer which required an acceptance of the plaintiff. It was further deposed that the plaintiff had been raising new issues in its successive letters. Evidence was also given to the effect that M/s HFCL Benzeq Telecom Limited had also instituted a suit in this court restraining encashment of earnest bank guarantee given by them in similar circumstances and the others to whom Letters of Intent had been issued had accepted the Letters of Intent and furnished performance and financial bank guarantees. It was further deposed that extensions were given from time to time not because there were any negotiations but by way of grace and the sister company of the plaintiff to which Letter of Intent with respect to another circle had been issued had executed the agreement even with the alleged amendments.

39. The witness of the defendant in his cross examination deposed that he was not personally aware of the transaction with the plaintiff and had no personal knowledge of the contents of his affidavit by way of examination in chief and the same was based on official records. He replied that he was not carrying the official records forming the basis of his affidavit with him. He denied the suggestion that there were substantial deviations between the tender conditions and the draft agreements.

40. In the face of the aforesaid material I will take up the aspect of invocation of the bank guarantee first. From the language of the bank guarantee set out hereinabove the defendant No.2 bank had bound itself to pay the amount thereof if either of the two conditions mentioned therein existed. However, the bank had further agreed / undertaken to pay the said amount "without any demur if the authority note that the amount claimed by is due to or owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions."

41. Both counsels have filed plethora of judgments with respect to injunctions relating to Bank Guarantees, mentioned in their written arguments/synopsis but it is not found necessary to burden this judgment with those.

42. What follows from a reading of the aforesaid bank guarantee is that though payment thereunder was conditional upon the happening / existence of the conditions mentioned therein but the bank was not to conduct its own enquiry to determine whether the contingency had occurred or not but was to be bound by the statement of the defendant No.1 to the effect that the conditions on the occurrence of

which the payment under the guarantee was to fall due had occurred / existed. Once the defendant No.1 being the beneficiary of the guarantee informed the defendant No.2 Bank of happening of the contingency, the defendant No.2 Bank had no right to contest such claim of the defendant No.1.

43. “Demur” is defined in the shorter Oxford Dictionary, 6th Edition as delay, waiting, procrastination or objecting or a state of indecision. Black’s Law Dictionary 6th Edition defines the same as “to take an exception to the sufficiency in point of law of a pleading or state of facts alleged”. Thus when the defendant No.2 bank agreed/undertook that it shall pay the amount of the bank guarantee upon receipt of first written demand from the defendant without any demur, it agreed to pay the money without delay, procrastination, lingering and without taking any objection as to the existence or happening of the conditions on happening of which the money was payable.

44. However, the guarantee does not end on that. The bank was to pay immediately without demur only if the telecom authority “noted” that the amount claimed under the bank guarantee upto a maximum of Rs 50 crores was due to the authority owing to the occurrence of one or both of the two conditions. Not only so the said writing of the telecom authority was also required to specify the occurred condition or conditions. Thus, the Letter of Invocation was required to note, i.e., contain a writing (i) that the amount claimed under the bank guarantee was due to the defendant No.1, and; (ii) that the said amount had fallen due owing to the occurrence of one or both of the two conditions on occurrence of which the money under the

guarantee was payable, and; (iii) specify the condition/conditions which had occurred leading to the bank guarantee being invoked.

45. If the written demand was to contain all of the said ingredients, then it was not open to the defendant No.2 bank or for that matter even to the plaintiff to dispute or controvert or to seek proof of the statement of the telecom authority to the effect that the amount was due or owing or that the condition had occurred or not occurred. The letter of invocation only intimates to the defendant No.2 that the Telecom Authority has ordered that the bank guarantee be forfeited and the Director General Telecom had requested the bank to encash the bank guarantee and remit the amount thereof through a crossed account payee demand draft in favour of the Pay and Accounts Officer, Department of Telecom. The letter nowhere notes either that the amount claimed was due or owing or that any of the conditions on the occurrence whereof the amount was payable had occurred and hence the question of specifying a condition does not arise.

46. The defendant No. 1 would contend that since the guarantee was invocable only on the conditions aforesaid and not otherwise, the mere issuance of the invocation letter should be deemed to imply the occurrence of the conditions on which the guarantee could be invoked. The question which arises for adjudication is whether occurrence of such conditions is to be read into the letter aforesaid or not. The effect thereof would be to do injustice / violation to the language of the bank guarantee and to ignore the terms thereof requiring the written demand of the Telecom authority to note therein that the amount was due or owing and that the conditions had occurred and to specify the condition/s.

47. The bank guarantee is an instrument of trade and commerce. The courts have adopted the policy of restraining themselves from interfering therewith for the reason of the same interfering in the trade and commerce. It has been held that where the parties have agreed that the payment under the bank guarantee issued at the instance of one in favour of the other shall be made, unconditionally, without any demur and simply on demand being made and the parties have acted on the said premise, the courts ought not to come in the way. Most of the bank guarantees are unconditional and expressly state so. In those cases, where payment is agreed to be made on mere demand without requiring any conditions to be specified, the law aforesaid has developed. However, the defendant No.1 in the present case though presumed to be aware of the possibility of obtaining such an unconditional guarantee, opted not to do so but was satisfied with a bank guarantee which as per its own terms was conditional i.e., invocable only on the happening of the conditions specified therein. Though the defendant No.1 took care to provide that the bank should make the payment on demand and without any demur on its unilateral statement of conditions prerequisite invocation of the bank guarantee having occurred but nevertheless imposed a further restriction on itself of notifying the bank of the occurrence of the conditions as well as specifying the condition.

48. The requirement aforesaid of the demand under the bank guarantee stating that the amount was due and that the condition on which it was to fall due had occurred and specifying the said condition cannot be said to be superfluous or unnecessary or of no effect or a mere formality. The effect / purport thereof is that the official of the defendant No.1 making the demand should apply his

mind and take responsibility, of the conditions only on happening of which the guarantee could be invoked having occurred. The mere invocation of bank guarantee and payment thereunder does not prevent the person at whose instance the guarantee had been furnished from averring that the guarantee had been wrongly invoked and the payment received thereunder was not due. Such person can initiate proceedings not only for recovery of amount wrongfully received under the decree but also for damages/compensation for wrongful invocation of the bank guarantee. Thus invocation of the bank guarantee is not a mindless matter and the guarantee cannot be invoked at the whims and fancy of the person in whose favour it is given. Invocation thereof carries with it the responsibility / liability for wrongful invocation if any.

49. In the present case the department of Telecom of the Government of India which then was foraying for the first time into allowing private players in the field of telecommunication which till then was in the domain of the Government only, deemed it appropriate that its official invoking the bank guarantee, before doing so, should take responsibility of ascertaining that the conditions only on the occurrence which the guarantee could be invoked had occurred. In the circumstances it is well nigh possible that in that era of uncertainty of how the telecom sector was to be opened to the private sector it was deemed appropriate that before guarantees in such huge amounts were encashed by the Government, a senior/appropriate officer / authority takes responsibility for invocation thereof. The Bank Guarantee in question does not admit of encashment on the basis of a mere demand or mere averment of plaintiff being in breach or default or on mere averment of Telecom Authority ordering forfeiture thereof.

Thus, in my view the terms/language aforesaid of the bank guarantee cannot be dismissed as irrelevant and to be not given effect to. The court will intervene to prevent any action on the part of beneficiary which is contrary to the terms to the terms of Bank Guarantee. Strict adherence to the terms of the Bank Guarantee has to be ensured. It has to be given full effect to and if it is given effect to, the conclusion is inescapable that the letter of invocation/demand does not fulfill the terms of the invocation of the bank guarantee. If that be so, it has to be necessary held that the invocation is not in terms of the bank guarantee. Axiomatically it follows that the invocation being bad, no liability for payment thereunder occurred. The defendant No.2 bank is therefore found justified in taking the stand in its letter dated 31st October, 1996 and the plaintiff found entitled to claim injunction restraining payment under the bank guarantee.

50. The Division Bench of this court in **M/s Har Prashad & Co Ltd Vs Sudershan Steel Mills** AIR 1980 Delhi 174 has held that the duty of the beneficiary in making the demand on the bank is like the duty of the plaintiff to disclose the cause of action in the plaint; just as a plaint is liable to be rejected for non disclosure of the cause of action, a demand by the beneficiary of the bank guarantee is liable to be rejected by the Bank if it does not state the facts showing that the conditions of the bank guarantee have been fulfilled; if this obligation is not fulfilled by the beneficiary, he is not entitled to payment of the amount of the bank guarantee.

51. In **M/s Ansal Properties & Industries P Ltd Vs Engineering Projects India Ltd** AIR 1998 Delhi 176 the Bank had undertaken to pay forthwith on demand in writing and without

protest or demur moneys payable by the contractor to the Company as specified in any notice of demand made by the Company to the bank with reference to the guarantee. The invocation letter did not mention if any loss was caused nor was the amount of loss suffered mentioned. Relying on **United Commercial Bank Vs Bank of India** AIR 1981 SC 1426 and other judgments of this court, it was held that the invocation letter did not fulfill the requirements agreed in the bank guarantee for invoking the same. It was further held that the person at whose instance bank guarantee is furnished is not a stranger to the transaction and has a right to contend that the invocation is not in accordance with the terms and conditions agreed and incorporated in the guarantee.

52. I may mention that another Single Judge of this Court in **Delhi Lotteries Vs Rajesh Aggarwal** AIR 1998 Delhi 332, in para 35 of the judgment inter alia held that **Har Prasad & Co. Ltd** (supra) was modified by the Division Bench in, also **M/s Har Prasad & Co. Ltd Vs M/s Sudershan Steel Rolling Mills** AIR 1983 Delhi 128. However, that is not correct. The latter judgment is of, after the bank guarantee had been invoked in terms thereof.

53. This court again in **Maihar Cement Vs Krishna Gears (P) Ltd** AIR 2000 Delhi 362 distinguished all cases where the bank guarantees contained express stipulations that the amount would be due and payable on demand from the beneficiary stating that the amount claimed was due by way of demand/damage caused by the breach of the terms and conditions of agreement and as such loss had occurred from those where money under the bank guarantee was payable merely on demand and unconditionally.

54. With respect to a bank guarantee having identical language as in the present case, interim injunction was also issued in ***Gujarat Optical Communications Ltd. Vs. Deptt. of Telecom*** 87 (2000) DLT 859. In the trial in the present, nothing has come out to persuade me to take a contrary view.

55. Another Division Bench of this court in ***M/s Punj Sons (P) Ltd. Vs. Hong Kong & Shanghai Banking Corp.*** 1994 (1) Vol. 22 All India Banking Law Judgments 364 also held that where the terms of the bank guarantee required the demand to state that the amount was due by way of loss & damage but the invocation letter straightaway sought to enforce the bank guarantee, the invocation was not in terms of bank guarantee and injunction at instance of party who had furnished the bank guarantee should follow. Similarly, in ***V.V. Gupta Vs. NDMC*** 2006 (3) A.D. Delhi 619, ***Puri International (P) Ltd. Vs. N.B.C.C.*** 66 (1997) DLT 698 and ***Mahalingham Shetty Co. Vs. N.P. C. Corp.*** 1990 Rajdhani Law Reporter 410 injunctions were issued on the ground of invocation being not in terms of the bank guarantee. The principle that where the guarantee is limited on its terms, enforcement has to be within the conditions/limitations was also reiterated in ***Intertoll I.C.S. Ceccons O&M Co. P. Ltd. Vs. N.H.A.I.*** 2006 II AD (Delhi) 402 and recently in ***N.H.A.I. Vs. Elasmex-TWS-SNC Joint Venture*** 150 (2008) DLT 215.

56. Reference must also be made to ***Hindustan Construction Co. Ltd. Vs. State of Bihar*** AIR 1999 SC 3710. The bank guarantee as per its terms was to be invoked by the Chief Engineer. Invocation by the Executive Engineer was held to be wholly wrong and the Bank held to be under no obligation to pay.

57. The beneficiary is not to parrot like repeat the language of the bank guarantee while invoking the same (though it is desirable, to leave no controversy as to valid invocation). However, I find in the present case the defendant No.1, in the invocation letter, besides stating that the Authority has ordered forfeiture of bank guarantee and instructing manner of payment, does not say anything else. There is nothing in it from which it can be deduced that any of the conditions, only on happening of which the defendant No.2 Bank was obliged to pay had occurred. It does not even say that demand for payment was being made in terms of bank guarantee.

58. Though the decision on the aspect aforesaid is sufficient for granting injunction to the plaintiff but as required by the CPC, decision on the other aspects of challenge to the invocation is also to be rendered. It is also the contention of the plaintiff that in the circumstances aforesaid there was no concluded contract between the parties and for this reason the guarantee could not be invoked.

59. The tender issued is an invitation to offer and the bid is the offer pursuant to the said invitation. The tender usually contains detailed terms and conditions and immediately on acceptance of the bid/tender, a binding contract comes into existence. Nothing is then left for the parties to negotiate or agree upon. Even if there is a requirement of executing a formal agreement, draft thereof is annexed to the tender; execution thereof is a formality of putting signatures on dotted lines; generally the coming into force of binding contract on acceptance of bid is not dependent on such execution. A binding contract is one in which all the terms and conditions necessary for the contract have been settled/agreed to. An agreement to agree in future on certain aspects is not a contract or

an enforceable agreement in law. In these cases, when merely on acceptance of the bid, the contract comes into existence, if thereafter the successful bidder does not act in terms of the contract, the earnest money is forfeitable by encashment of bank guarantee. However, the pleadings in this case show that the present case is not of such a kind. The tender was not accompanied with the draft agreements to be executed on acceptance of the bid by issuance of Letter of Intent. Though the tender contained certain terms and conditions, but in the clarifications given on 27th May, 1996 and which admittedly formed part of the tender conditions, it was stated that the draft of the agreements to be signed would be given alongwith the letter of intent. Presumably, the draft agreements containing all the terms and conditions were not ready till then.

60. I may at this stage record that the original tender and the clarifications forming part of the tender and which are not controverted as aforesaid are contained in the part II instead of part III file of the suit. Similarly several of the documents are also to be found in part II instead of part III file of the suit.

61. The Letter of Intent dated 13th March, 1996 itself provides that the detailed terms and conditions shall be enumerated in the licence agreement and the interconnect agreement to be signed subsequently and that a copy of these documents would be made available within a short span of time. The aforesaid state of affairs shows that no binding contract was to come into force between the parties on the acceptance of the bid of the plaintiff or on issuance of Letter of Intent by the defendant No.1 to the plaintiff and upon breach whereof the earnest money bank guarantee could be invoked

/ forfeited. The question of invoking/forfeiting earnest money bank guarantees arises only when inspite of a binding enforceable agreement having come into existence the plaintiff fails to act in terms thereof. It is only then that the plaintiff can be said to be in breach. However, when after the acceptance of the bid and issuance of Letter of Intent the detailed terms and conditions are still to be worked out between the parties, the parties, even after issuance of Letter of Intent / acceptance of bid cannot be said to be bound to each other by an enforceable agreement. It could at best be an agreement to enter into a contract the terms and conditions whereof were still to be negotiated between the parties. The position would have been different had the plaintiff unequivocally undertaken to accept, sign and execute whatever agreement containing whatever detailed terms and conditions were to be put up by the defendant No.1 to the plaintiff. In that case it could have been argued that the plaintiff had agreed to accept the detailed terms and conditions as stipulated by the defendant. Here the successful bidder was given right to decline to accept the licence without forfeiting the earnest money if the change was substantial. If there was to be a difference between the parties as to whether the change is substantial or not, there could be no forfeiture without decision by the appropriate fora whether the changes were substantial or not. Whichever way we look at it, the only conclusion which follows is that there could be no breach by the plaintiff of a binding contract owing where to the bank guarantee could be encashed.

62. From all the documents on record it follows that the position was quit fluid. There is on record at page 771 of part III of the file, a letter dated 22nd April, 1996 of the defendant No.1 to the plaintiff. While replying to the queries of the plaintiff, the defendant No.1

admitted that while in the tender documents the figure of 3904 was furnished as the number of villages where the telephones were yet to be provided, in accordance with the data of the National Informative Centre documents but as per further clarifications from directorate the figure had been revised to 6072. The said figure was apparently given owing to having a nexus to the bid to be made in pursuance to the tender. A perusal of annexure 3 (listing the deviations in the licence agreement from the tender conditions), to the letter dated 18th October, 1996 of the plaintiff to the defendant No.1 shows as many as 53 deviations. The deviations are not disputed by the defendant No.1. The controversy is whether the same are substantial or not. As aforesaid, the telecom sector till then was under State control. The State was not operating the same from the point of view of profitability. The State did not carry on the business of telecommunication to earn profits and was as such not concerned with whether the expenses were justified or not justified or could be reduced. The perspective of the defendant No.1 and of the plaintiff of the said operation is entirely different. What could be substantial for a person intending to run the business for profit motive may be only operational for the State carrying on the same activities as a service to the citizens of the country. Without examining each and every of the 53 deviations and even if one were to limit to the deviations brought out in the cross examination as aforesaid, to me they appear to be substantial. A private player was to make investment in the business and the yield whereof in the initial years was bound to be small on the basis of certainty of the terms of the licence and of renewal thereof. If the said terms were to be changed, it would certainly be substantial. Similarly, it is pointed out that while as per the tender document, the grant of other licence in the service area was to be after taking into account the commercial

interest of the existing operator the said condition was sought to be removed from the licence agreement. This change, by no means can be said to be not substantial.

63. I therefore find this aspect also in favour of the plaintiff.

64. The very fact that an option had been given to the plaintiff to not opt to accept the letter of Intent without entering forfeiture of earnest money bank guarantee in the event of the changes in the proposed agreement being substantial shows that the matter was subject to review by mutual agreement. It is for this reason only that the draft proposed agreements were to be sent alongwith the Letter of Intent. Not only were the drafts not so sent but even otherwise the drafts delivered subsequently show substantial changes from the tender documents. In this regard, in the clarifications, in reply to question No.6 pertaining to clause 13.6 of the tender document pertaining to interconnect agreement it was provided that the interconnect agreement will be open to review by mutual agreement between the DoT and the licensee. This is yet another indicator of there being no binding agreement till the time when the bank guarantee was invoked.

65. The senior counsel for the plaintiff during the course of hearing also had handed over another compilation listing the crucial deviations from the tender condition. Though it is not felt necessary to discuss the same, suffice it is to record my satisfaction that on perusal thereof the changes are found to be substantial by me.

66. I thus find that there was no concluded agreement between the plaintiff and the defendant No.1 till the date of invocation of the bank guarantee.

67. Though the Senior counsel for the plaintiff has also referred to **HFCL Bezeq Telecom Ltd V UOI** 69 (1997) DLT 317 wherein, an identical suit for identical relief and relating to the same tender was decreed and encashment of the bank guarantee restrained but I find another judgment of this court in **D.S. Constructions Ltd Vs Rites Limited** 127 (2006) DLT to be more apposite. In that case also upon finding that there was no concluded contract between the parties, this court held the invocation of the bank guarantee to be fraudulent. It was held that an action of invocation of the bank guarantee despite knowledge that there was no right to invoke the same is fraudulent and constitutes a ground for injunction. This court had also invoked the provisions of Section 134 of the Contract Act to hold that the bank in the position of a surety, stood discharged when the principal is discharged. It was held that in the absence of a binding contract, there can be no occasion for furnishing a guarantee for breach thereof. The present case stands on a much better footing. Here the defendant No.1 was probably aware that it was legally not entitled to invoke the bank guarantee; perhaps for this reason only the words required to be stated for demanding the money under bank guarantee were intentionally not stated in the letter of invocation.

68. In the light of the discussions above I also find that the plaintiff is entitled to the relief of declaration that the invocation by the defendant No.1 of the bank is contrary to the terms of the guarantee and to injunction on that ground as well.

Re: Issue No. 5: Relief ?

69. In the light of my findings above, the suit of the plaintiff is entitled to be decreed for the reliefs claimed in para 21(a) to (c) of

the plaint. The whole conduct of the defendant not only prior to the suit but even after the institution of the suit also leads me to impose costs on the defendant No.1. Counsels fee assessed at Rs 1 lac.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**May 28, 2009
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