

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

Reserved on: 8th August, 2012
Pronounced on: 20th December, 2012

+ **CONT. CAS (C) 823/2011**

MATRIX CELLULAR SERVICES PVT. LTD.

through CAPT. RAKESH WALIA

..... Petitioner

Through : Mr. Sandeep Sethi, Senior Advocate with
Ms. Kanika Agnihotri, Adv.
Mr. Karan Minocha, Adv.

versus

SANJOY MUKHERJI & ORS.

..... Respondents

Through : Mr. Rajiv Nayar, Senior Advocate with
Mr. Manu Nair, Adv.
Mr. Anuj Berry, Adv.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This Petition under section 12 of the Contempt of Courts Act, 1971 (the Act) has been filed by the Petitioner Matrix Cellular Services Private Limited (MCS) against the five Respondents, namely, Sanjoy Mukerji, Director, Vodafone Essar Limited; Mr. Rajiv Kohli, CEO (Delhi Circle), Vodafone Essar Mobile Services Ltd.; Mr. Marten Pieters, Managing Director & CEO, Vodafone Essar Ltd.; Shaina Subramaniam, General Manager, Vodafone Essar Ltd. and Ms. Monika Pathak, Deputy General Manager, Vodafone Essar Mobile Services Ltd. for punishing them for Contempt of Court for wilful disobedience of the orders of this Court dated 20.10.2011 and 24.10.2011 passed by the learned Single Judge in OMP No.748/2011.

2. Before advertizing to the allegations with regard to the alleged violation, it would be necessary to give the background leading to the filing of OMP No.784/2011 preferred by the Petitioner wherein the orders dated 20.10.2011 and 24.10.2011 were passed.
3. As per the Agreement dated 10.07.2003 entered between MCS with Hutchison Essar Telecom Limited (HETL), the predecessor of Vodafone Essar Mobile Services Ltd. (VEMSL), the Petitioner (MCS) is engaged in the business of identifying specialized clients and provides support services and assistance to such specialized clients for and on behalf of Telecommunication Services Providers. The Agreement dated 10.07.2003 was entered into between HETL and MCS, whereby MCS offer its services to develop post paid subscription for specialized client base for Cellular Mobile Telecommunication Services of HETL. HETL accepting MCS's offer appointed MCS to act as its specialized Customer Management Unit for the Consolidated Post Paid Subscribers (CPPS) in the territory of the National Capital Region. Some of the Clauses which are relevant for the decision of the Contempt Petition are extracted hereunder:-

“1. DEFINITION

(a) Consolidated Post Paid Subscribers: For the purpose of this Agreement the term Consolidated Post Paid Subscribers shall mean:

(i) The existing specialized clients of MCS who are availing the services of HETL and being acquired by HETL as its subscribers through MCS and

(ii) The clients developed by MCS in future and acquired by HETL as HETL's subscribers through MCS pursuant to this Agreement.

2. SCOPE OF SERVICES

(a) HETL being competent hereby authorizes MCS to act on a non-exclusive basis, as its specialized Customer Management Unit

(CMU) for the Consolidated Post Paid Subscribers, in the territory of National Capital Region. MCS shall provide the following services to HETL, for consideration and as per the terms and condition mutually agreed between the parties.

(i) To acquire for and on behalf of HETL new Post-paid subscribers on such terms and conditions and tariff plans as approved by HETL.

(ii) To provide specialized support services and assistance, as mentioned hereunder to Consolidated Post Paid Subscribers.

The specialized support services shall among various other things include the following:

- a. To HETL: subscriber verification, credit and risk cover and control, etc.*
- b. To consolidated Post Paid Subscribers: host of customer relationship management services, including collection, call centre support etc.*

x x x x x x x x x

4. OBLIGATIONS OF MCS

a. MCS is allowed hereunder to acquire only Post paid subscribers for HETL and to provide services and assistance to Consolidated Post Paid Subscribers on behalf of HETL. MCS shall not provide any service in respect of Pre-Paid business of HETL.

b. For acquiring new Post paid Subscribers, MCS shall cause the new post paid subscribers to duly fill & sign a Customer Application Form, as provided by HETL, HETL's Customer Application form would state that MCS is a specialized customer management unit of HETL. A copy of the HETL's Customer Application Form (marked as Annexure 2) is annexed to and forms part of this Agreement. MCS shall also obtain the subscriber's photograph and other identification proof in accordance with the verification directives issued by the Department of Telecommunications, Government of India, from time to time.

HETL shall provide to MCS copy of such directions in force and shall forthwith notify to MCS of all and any amendment in the aid directions. All duly completed HETL's Customer Application Forms and other documents shall be countersigned by MCS authorized representative and shall be submitted to the authorized person of HETL for activation of new connection.

c. MCS and HETL shall jointly sign and send written intimation to all the existing Consolidated Post Paid Subscribers, informing them about HETL being the service provider, the respective client is subscriber of HETL and that MCS is its specialized CMU and all the support services/including receiving remittance of payments/query resolution/information, risk and credit management, customer care and service operation, etc. shall be provided to that client by MCS on behalf of HETL, who will be agents of HETL.

x x x x x x x x x x
j. MCS shall also provide security to HETL in form of unconditional bank guarantees in favour of HETL from a scheduled bank. The amount of such bank guarantee shall be equal to ___% of the average monthly billing by HETL to the Consolidated Post Paid Subscribers in a quarter less the security deposit actually received by HETL from the Consolidated Post Paid Subscribers. The bank guarantee of such amount shall be valid for at least a year and shall be furnished by MCS to HETL by 10th day of the month following such quarter. Initially MCS shall provide unconditional bank guarantees of ₹125 lakhs to HETL. HETL can en-cash these bank guarantees in case of any default by MCS relating to shortfall in payment to HETL or due to any default under this agreement having direct financial implication on HETL.

k. MCS agrees that it has understood the terms of the HETL's Customer Agreement Form that it will cause to be executed between HETL and Consolidated Post Paid Subscribers and also that the terms of such agreement shall be binding between HETL and Consolidated Post Paid Subscribers. MCS further acknowledges and agrees that it shall not enter into any separate agreement between itself and the Consolidated Post Paid

Subscribers, whether orally or in writing, which relates to or has any bearing on the services being provided by HETL to the Consolidated Post Paid Subscribers or the terms of HETL's Customer Agreement Form. However, for timely receipt of all or any payments and charges due from the Consolidated Post Paid Subscribers, MCS shall be free to enter into necessary agreement/arrangements with the Consolidated Post Paid Subscribers as may be decided by MCS from time to time. Such agreement between MCS and Consolidated Post Paid Subscribers shall be in relation to endorsement/standing instructions/authorization from Consolidated Post Paid Subscribers in favor of MCS to charge all payments due from him to his nominated credit and/or charge card.

x x x x x x x x x x

q. During the term of this Agreement, MCS agrees that it shall not be associated in any such manner, which has a negative implication on business of HETL, with any such competitor of HETL in Delhi who is operating as a mobile service provider (either as GSM or CDMA or as WLL (M) in the Delhi Metro area. For the sake of clarity, it is stated that MCS can sell roaming services of international operators.

x x x x x x x x x x

7. TERM AND TERMINATION

a. This agreement shall be valid for a period of 10 years from the date of this agreement and may be renewed for such further term as may be agreed by the parties from time to time.

*b. During the term, this agreement may be terminated by either party by giving two months prior written notice to the other party
.....*

x x x x x x x x x x

c. In the event of termination of this Agreement for any reason, whatsoever:

(iii) HETL undertakes that till 60 days from the termination notice it would not effect any change in the services offered and/or payments charges from any subscriber under the Consolidated Post Paid Subscribers, unless necessitated because of change in general tariff, charges, services, payment plans, etc. of HETL. HETL undertakes that each subscriber under the Consolidated Post Paid Subscribers would be free to end services received from HETL and seek service from MCS pursuant to the termination of this agreement.....” (emphasis supplied).

4. Thus, it is important to note that all the CPPS were required to submit an application form as per Annexure-2. All of them were aware that they were the subscribers of HETL/VEMSL. As per Clause 4 (c) of the Agreement, all the existing CPPS were to be addressed a joint communication by MCS and HETL that, MCS was a specialized CMU (Customer Management Unit) of HETL and that the services shall be provided to the subscribers by MCS on behalf of HETL. As per Clause 4 (k) of the Agreement, MCS was specifically prohibited not to enter into any separate agreement with any of the CPPS whether orally or in writing in relation to the services being provided by HETL to the CPPS or the terms of HETL’s Customer Agreement Form. Thus, the subscribers availing services through MCS were aware that their service provider is Vodafone and that the services were being managed by MCS only as an agent for and on behalf of HETL/VEMSL. The term of the Agreement was for ten years from the date of the Agreement i.e. 10.07.2003 and was ending on 09.07.2013. The parties were at liberty to terminate the Agreement on giving two months prior notice to the other party. However, for a period of 60 days from the termination notice HETL was not to effect any change in the services offered or payment charged from the Post Paid Subscribers handled by MCS.

5. It appears that sometime after June, 2011 and, particularly, from September, 2011 onwards, the parties wanted to put an end to the earlier said Agreement. Certain e-mails were exchanged between the representatives of MCS and VEMSL. Siddhartha Nigam from Grant Thornton Advisory Private Limited addressed an e-mail dated 24.09.2011 to the officers of MCS and VEMSL in pursuance to their meeting on the previous day regarding the discussion on MCS. The e-mail dated 24.09.2011 was replied by Rajiv Kohli of VEMSL by an e-mail dated 26.09.2011 with copies sent to Gagan Duggal of MCS and Sanjoy Mukerji of VEL. Further e-mails were exchanged between the parties which indicates that the terms and conditions for takeover of the 65,000/- Consolidated Post Paid Subscribers (CPPS) were being settled between MCS and VEMSL. It would be appropriate to extract the said e-mails hereunder for ready reference:-

*“From: Siddhartha Nigam [mailto:Siddhartha.Nigam@IN.GT.COM]
Sent: Saturday, September 24, 2011 1:51 PM
To: Rajiv Kohli (DEL)
Cc: Gagan Dugal; Jain Gaurav; SANJOY MUKERJI (COR)
Subject: Our meeting yesterday*

Dear Rajiv,

*Further to our meeting yesterday , to take discussions on Matrix forward, I am summarizing the agreed timelines as follows:
Vodafone to appoint advisor by 30 September
GT and Vodafone advisor to have discussions/negotiations on transaction construct (valuation, structure etc.) October 3 to October 6
Meeting between Rajiv and Advisors on 7 October to agree transaction construct
Meeting between Sanjoy and Gagan in Week of October 10 to finalize the transaction*

Do let me know if you have any thoughts on the above timelines or wish to discuss the process.

Kind Regards

Siddhartha

*Siddhartha Nigam| Partner, Mergers & Acquisitions
Grant Thornton Advisory Private Limited*

x x x x x x x x

*From: RAJIV KOHLI "<Rajiv.Kohli@vodafone.com>
Date: 26 September 2011 17:10:41 GMT +05:30
To: "Siddhartha Nigam" <Siddhartha.Nigam@IN.GT.COM>
Cc: "Gagan Dugal" gagan@matrix.in , "Jain Gaurav"
Jain.Gaurav@IN.GT.COM , "SANJOY MUKERJI"
Sanjoy.Mukerji@vodafone.com
Subject:RE: Our meeting yesterday*

Hi Siddhartha,

Point#1 is fine .

*Point #2 should be till Oct 7 , since anyway Oct 6 is a holiday.
Accordingly, date for our meeting shifts to Oct 10 in Point#3.
Further, dates may be fixed depending on stage of interaction till
this timeframe.*

We remain hopeful of resolving the issue through this process.

*Best Wishes,
Rajiv*

x x x x x x x x

*From: Gagan Dugal [mailto:gagan@matrix.in]
Sent: Thursday, October 06,2011 12:57 PM
To: SANJOY MUKERJI (COR); Rajiv Kohli (DEL)
Subject: Meeting*

*Good morning gents,
I just wanted to know when and what time are we meeting up next week. I am currently in London and am heading back on Sunday. I had a reminder that we are meeting on Monday but I have no confirmation for the same.*

Warm Regards

Gagan Dugal

x x x x x x x x

RAJIV KOHLI Rajiv.kohli@vodafone.com wrote:

Hi Gagan,

Siddharth and our chap are meeting on Friday. We can discuss post their meeting and fix up accordingly. I shall revert on same.

*Best wishes,
Rajiv*

x x x x x x x x

*From: Gagan Dugal [mailto:gagan@matrix.in]
Sent: Thursday, October 06, 2011 01:21 PM
To: Rajiv Kohli (DEL); SANJOY MUKERJI (COR)
Subject: Re: Meeting*

Many thanks, I would appreciate if we could still meet on Monday/Tuesday to close this as post that I have the whole leadership team of t mobile UK visiting me for the rest of the week.

Warm Regards

Gagan Dugal

x x x x x x x x

From: "SANJOY MUKERJI" <Sanjoy.Mukerji@vodafone.com>

Date: 6 October 2011 14:48:18 GMT +05:30
To: "Gagan Dugal" <gagan@matrix.in> , "RAJIV KOHLI"
<Rajiv.Kohli@vodafone.com>
Subject: Re: Meeting
Fair... "

6. It appears that the terms and conditions for directly servicing 65,000/- of the CPPS did not materialise between MCS and VEMSL. A letter dated 14.10.2011 was written by VEMSL through Respondent No.4 Shaina Subramaniam to MCS terminating the Agreement dated 10.07.2003 upon serving two months notice in terms of Clause 7 (b) of the Agreement. In the termination letter it was mentioned that *"consideration as per the above mentioned Agreement to be given to MCS by VEMSL as may have earned by it during this period of two months written notice."*
7. The Petitioner (MCS) filed OMP No.784/2011 under Section 9 of the Arbitration and Conciliation Act, 1996 against Vodafone Essar Limited (VEL) and VEMSL alleging the termination of the Agreement to be mala fide and illegal. The Petitioner averred that on 14.10.2011 at about 6:30 P.M. without any prior intimation, the termination notice was served upon them and the entire customer base of the Petitioner was hijacked by VEMSL. The Petitioner contended that the 65,000/- CPPS belonged to the Petitioner. However, immediately after the issuance of the termination letter services to the helpline of the Petitioner at number 9811188888 were stopped and the calls were diverted to the Respondent's Call Centre where the callers were greeted with the message "Welcome to Vodafone". In the OMP, the Petitioner further alleged that its 65,000/- CPPS were not given information sought by them about their accounts etc. The customers were informed that they could not be given the details of their accounts. The Petitioner alleged

that its MD himself called up the helpline number and was shocked to hear that at the Petitioner's helpline number the customers were not only greeted with "Welcome to Vodafone" but the customers were also misled with the statement that Vodafone is taking care of the Matrix product; Vodafone is handling Matrix; calls made to the Matrix numbers will now land with Vodafone; Matrix will be handled by Vodafone; Vodafone has always been handling Matrix, etc. etc. The Petitioner averred that on account of the illegal action and misinformation disseminated by VEMSL, the Petitioner would not only suffer huge financial loss but would also suffer immense loss of goodwill and reputation. In the OMP, the Petitioner prayed for the following reliefs:-

“(a) Pass an appropriate order declaring the letter dated October 14th 2011 as illegal and malafide in light of the conduct of the Respondents;

(b) Pass an appropriate order of injunction restraining the respondents, its servants and agents from in any manner dealing with the customer base of the Petitioner;

(c) Pass an appropriate order of injunction restraining the Respondents, its servants and agents from representing to be the Petitioner, its principal or its concern or vice-versa;

(d) Pass an appropriate order of injunction directing the Respondents, its servants and agents to issue a clarification reversing the effect of the text messages and calls that have been made on their behalf to the subscriber base of the Petitioner (acquired or otherwise);

(e) Pass an appropriate order of injunction restraining the Respondents, its servants and agents from in any manner interfering with or disrupting the services provided to the customers of the Petitioner;

(f) Pass any other and further orders that this Hon'ble Court may deem fit and proper in the facts and circumstances of this case."

8. The learned Single Judge of this Court by an order dated 20.10.2011 passed a consent order on the basis of the settlement reached between the counsels for the Parties. Para 5 of the order is extracted hereunder:-

"5. After discussion and deliberations, the parties have agreed that till the expiry of the period of two months beginning 14th October 2011, their inter se relationship will be governed by the following arrangement:

(i) Vodafone will forthwith restore services to the Mobile No. 9811188888, which is in the name of Matrix, and make the same operational as it was on 13th October 2011, i.e., prior to the issuance of the letter dated 14th October 2011;

(ii) The number of hunting lines in relation to the above mobile number 9811188888 would be limited to 20;

(iii) Representatives of Vodafone can be positioned in the office of Matrix to monitor the calls received in the above mobile number 9811188888 being attended by Matrix; they can install parallel monitors and listen in on the conversations through headphones;

(iv) Matrix undertakes to this Court that it will access the data base of Vodafone only in respect of the 65,000 Consolidated Post Paid Subscribers as defined in the agreement dated 10th July 2003. Matrix will also undertake that it will comply with all the applicable laws. An affidavit of undertaking to the above effect will be filed by the authorized representative of Matrix in this Court on 21st October 2011.

(v) The technical team of Vodafone will be permitted to restrict, within a period of two weeks from today, the access by Matrix to the data base of Vodafone to the extent of attending to the service calls made by the 65,000 Consolidated Post Paid Subscribers;

(vi) Vodafone and Matrix will, within a week from today, address a joint communication to each of the 65,000 Consolidated Post Paid Subscribers apprising them of the letter dated 14th October 2011 and the fact that the agreement dated 10th July 2003 between them will stand terminated on the expiry of two months

from 14th October 2011. The said joint letter, which will be sent by surface mail and where possible by e-mail, will give each such Consolidated Post Paid Subscriber the option of either subscribing to Vodafone directly or to any other mobile service provider through Matrix;

(vii) Any communication sent by Vodafone to any of the Consolidated Post Paid Subscribers after 14th October 2011 till date will stand withdrawn in light of the joint communication as in (vi) above.”

9. An IA No.17109/2011 was moved by the Petitioner alleging non compliance of the order dated 20.10.2011 on the basis of an e-mail dated 21.10.2011 sent at 9:20 P.M. by Mr. Manu Nair, learned counsel for VEMSL to Ms. Kanika Agnihotri, learned counsel for MCS. In the e-mail, it was stated that the services to helpline No.9811188888 had been restored in the forenoon (on 21.10.2011) along with 20 hunting lines. Mr. Manu Nair requested the counsel to make arrangements for 23 of VEMSL's officials being deputed to the call centre of MCS for the purpose of installation of parallel monitors so as to listen in on the conversation through head phones. The Petitioner's counsel took exception to this e-mail as the customer's entire database was to be made available to the Petitioner immediately. The said IA No.17109/2011 was disposed of by an order dated 24.10.2011. Para 3 of the order dated 24.10.2011 is extracted hereunder:-

“3. The arrangement agreed upon between the parties and as set out in this Court's order dated 20th October 2011 made it clear that the above mobile number No.9811188888 will be made operational “as it was on 13th October 2011, i.e., prior to the issuance of the letter dated 14th October 2011”. While the Petitioner was permitted to service the calls of the subscribers it was conditional upon the representatives of the Respondent being positioned in the office of the Petitioner to monitor the service

calls being attended to by the Petitioner; they were permitted to install parallel monitors and listen in on the conversations through headphones. The grievance of the Respondent is that the latter condition has not been met by the Petitioner. This Court is informed that the representatives of all the Respondents are at present physically present in the office of the Petitioner at Allahabad. The Petitioner will permit the representatives of the Respondent who are present in its office at Allahabad to install parallel monitors and listen in on the conversations through headphones. Subject to this, the Petitioner is permitted to service the calls of subscribers received on the aforementioned mobile number in the same manner as it was doing as on 13th October 2011. All other terms of the agreed arrangement recorded in the order dated 20th October 2011 remain unchanged.”

10. It is therefore evident that till 24.10.2011 the Petitioner (MCS) had not allowed VEMSL's representatives to listen to the calls. Prior to the termination of the Agreement on 14.10.2011 there was a healthy business relationship between the parties and, therefore, the entire VEMSL's database could be accessed by MCS although the number of CPPS who were being serviced by MCS was only 65,000. VEMSL's apprehension to allow access to the database, subject to hearing the conversation on parallel monitors could be mainly because, first, the MCS may not access the database of any customer other than the 65,000 CPPS and, second, MCS's representatives may not provide any mis-information to 65,000 CPPS as they were VEMSL's subscribers, though they could change their service providers at their option. By way of IA No.17627/2011 and IA No.17630/2011 MCS as well as VEMSL respectively complained of the breach of the orders dated 20.10.2011 and 24.10.2011. I would advert to the averments made in the IAs at the appropriate stage. It is suffice to say, at this stage that both the IAs were dismissed by the

learned Single Judge of this Court on the ground that the main Petition had already been disposed of.

11. The present Contempt Petition has been filed by the Petitioner (MCS) alleging that the orders dated 20.10.2011 and 24.10.2011 passed in OMP No.784/2011 have been violated by the Respondents (the contemnors). It is stated that although VEMSL had undertaken to provide access to 65,000 CPPS within a period of two weeks, but the same had not been done. Although, the Petitioner had been granted access to a large chunk of the database some parts still continued to be inaccessible. It is stated that on account of this, the Petitioner was unable to perform many tasks which it could perform earlier. The Petitioner, therefore, had to send requests to VEMSL for tasks as menial as barring and debarring of services, issuance of duplicate SIMs, activation and deactivation, etc. The Petitioner relied on some of the e-mails it had addressed to VEMSL in support of its contention.
12. It is also the Petitioner's grievance that it has not received the bills after 14.10.2011 in respect of the 65,000 CPPS, to forward them to the customers, yet VEMSL continued to ask the Petitioner for payments.
13. It is further the Petitioner's case that the joint communication which was required to be issued in terms of the order dated 20.10.2011 passed by the learned Single Judge was not issued as VEMSL insisted that the mode of payment be altered and the customers be given a choice of paying the bills either to the Petitioner or to VEMSL.
14. According to the Petitioner the contemnors are the officers of VEMSL who are in control of the affairs of the company. They were present or were represented during all three hearings, they were aware of the orders

passed by the Court and have wilfully disobeyed the orders and are, therefore, liable to be punished for contempt of Court.

15. Separate replies to the Contempt Petition have been filed by the Respondent Rajiv Kohli (Contemnor No.2/Respondent No.2), Shaina Subramaniam (Contemnor No.4/Respondent No.4) and Ms. Monika Pathak (Contemnor No.5/Respondent No.5). In their respective replies all the Respondents have taken similar pleas. It is stated that the Contempt Petition has been filed by an individual Capt. Rakesh Walia, Senior Vice President, MCS who was not even party to the original proceedings, malafidely with a view to avoid VEMSL becoming aware of its filing so as to enable it (MCS) to obtain ex-parte orders in the absence of VEMSL.
16. It is the Respondent's plea that Respondent No.3 Marten Pieters (MD & CEO of Vodafone Essar Limited) was dropped from the array of parties while passing of the order dated 20.10.2011 by the learned Single Judge of this Court, yet Gagan Duggal, Managing Director of the Petitioner (MCS) approached Respondent No.3 vide an email without marking a copy to VEMSL or any of its officials raising the issue concerning the alleged non compliance of the order of this Court. Mr. Gagan Duggal, sent threatening e-mails to Respondent No.3 which would show that MCS and its officers had no regard for the orders of this Court and themselves committed contempt by leveling false and frivolous allegations against VEMSL.
17. It is stated that the replying Respondents at all times acted in a bona fide manner and never had any intention to indulge in any means that may tantamount to lowering the high esteem in which the orders passed by

this Court have been held by the Respondents. It is stated that the Respondents (the answering Respondents) were not directly involved in the day to day commercial operations of VEMSL much less with VEMSL's contractual relationship and project transactions with third parties. It is denied that the Respondents are overall in charge of or responsible for the conduct of the business of VEMSL. It is stated that it was the Petitioner who disrupted VEMSL's endeavour to ensure timely and effective execution of the Court's orders dated 20.10.2011 and 24.10.2011. It is stated that the Petitioner itself prevented VEMSL by circumstances entirely beyond its control from successfully ensuring that the operational modalities of the contractual relationship between the parties is maintained as per the original Agreement for the intervening period of two months after the termination of the Agreement ending on 13th December, 2011. It is asserted that the Petitioner's conduct amounts to wrongfully defaming and tarnishing its clean business reputation in the market and risking it to significant economic loss. It is asserted that to establish contempt there has to be conscious and wilful disobedience of the order of the Court. A casual, accidental or unintentional act of disobedience, however, would not amount to contempt of the Court.

18. The Respondents (the answering respondents) have stated that the Petitioner has no intention to arbitrate the dispute and is repeatedly approaching the Court only to obtain interim reliefs.
19. The Respondents have taken up a plea that as a regular process VEMSL had carried out audit checks on 29.10.2011 when Matrix helpline No.9811188888 was said to be switched off. Vide e-mail dated 29.10.2011 VEMSL informed MCS about the same and requested it to have the number switched on again and have some recording play on the

IVR for service disruption so as to enable the customers to avail services in an uninterrupted manner. The Petitioner instead of addressing the concern raised by VEMSL, raised baseless allegations stating that VEMSL's e-mail was not in line with normal business practice. The Respondents alleged that in the said mail it was falsely stated by MCS that restoration of full services is yet to be made whereas Captain Rakesh Walia had already confirmed in an earlier email that full CRM (software) had been restored.

20. It is averred that on 17.11.2011 VEMSL had sent an e-mail to the authorized representatives of MCS explaining that *“(a) Bills for the September cycle have not yet been generated, however, that VEMSL is still to hear back from Matrix as regards whether the latter would collect the bills from the VEMSL's office once the same were processed, for onward delivery to the customers. (b) Upon investigation of its backroom support operations, VEMSL noticed that while all calls were being forwarded by VEMSL to Matrix for servicing, the same were however getting aborted on account of server problems at Matrix's end. (c) Issues as regards non-tagging of calls on CRM and outstanding payments were still outstanding, despite repeated requests by VEMSL to the Answering respondent to address/ clarify the same.”*
21. On merits, the answering Respondents denied that the Petitioner was not able to access database of the entire 65,000 CPPS. The Respondents have stated that VEMSL was engaged in extensive correspondence with MCS on 25.10.2011 with regard to the aspect of full access/viewership being provided on all the customers' numbers through Customer Relationship Management Identifications (CRM). MCS, however, did not revert back with a status update despite requests from VEMSL to confirm whether

the CRM identification of the customers could be accessed/viewed as facilitated by them.

22. The answering respondents stated that VEMSL had created User wise Restricted Right in relation to the 65,000 CPPS database which was the subject matter of OMP No.784/2011. Accordingly, CRM system was segmented for the restricted database of 65,000/- CPPS only. According to the Respondents all facilities which were available to MCS prior to 14.10.2011 were provided through the segmented CRM. The Petitioner's employees, however, could not access the system due to incorrect password usage and in appropriate usage of the system. At times, ID was automatically blocked as per the normal security which is embedded in the system. As and when MCS informed about such blockage VEMSL promptly attended to such complaints and restored the full access to the system so as to enable MCS to enjoy the full facilities as it was enjoying prior to 14.10.2011, as directed by this Court. The Respondents denied that the services of activation/deactivation was not being facilitated at VEMSL's behest as claimed by the Petitioner. It is stated that MCS had infact already succeeded in processing activation/deactivation requests and a number of reactivation requests on approximately 107, 50 and 101 counts respectively.
23. With regard to the bills to be issued to the CPPS, the Respondents averred that VEMSL had directly dispatched bills to approx. 18,972 subscribers prior to the issuance of the order dated 20.10.2011. Subsequent to the passing of the said order, VEMSL had not dispatched any bills rather requested MCS to collect the same from VEMSL's office which were actually collected on 17.11.2011 by MCS and the

confirmation slip dated 18.11.2011 by MCS regarding the collection of the same was placed on the record.

24. I have heard Mr. Sandeep Sethi, learned senior counsel with Ms. Kanika Agnihotri, Advocate for the Petitioner and Mr. Rajiv Nayyar, learned senior counsel with Mr. Manu Nair, Advocate for the Respondents.
25. The question for consideration is whether there was a wilful disobedience of the orders of this Court dated 20.10.2011 and 24.10.2011 by the Respondents.
26. This question has to be analyzed and answered in view of the conduct of the parties and the surrounding circumstances.
27. It is admitted case of the parties that the Agreement dated 10.07.2003 was to be operative between MCS and HETL/VEMSL for a period of ten years. It could be extended for a further period as per the terms which could be mutually agreed between the parties. It is borne out from the record that MCS and VEMSL were negotiating for directly servicing of the 65,000 CPPS by VEMSL which were being serviced by MCS and which (subscribers) were acquired by VEMSL through MCS. There were series of talks between the senior officers of the two companies in September and October, 2011. The Petitioner in fact says that the talks had taken place even on 14.10.2011, when the notice dated 14.10.2011 was issued by VEMSL terminating the Agreement.
28. As per order dated 20.10.2011 VEMSL was to restore services to the helpline No.9811188888 of MCS as it was on 13.10.2011. The number of hunting lines in relation to the abovesaid number was to be restricted to 20. In return, VEMSL was permitted to position its representatives in Petitioner's (MCS) office to monitor the calls received at the phone

number and they could listen to the calls by parallel monitors. As a part of this arrangement, MCS undertook to have access to the database of VEMSL with regard to 65,000 CPPS only. As per order dated 20.10.2011 both the parties were to address a joint communication to each of the 65,000 Consolidated Post Paid Subscribers apprising them of the letter dated 14.10.2011 and the fact that the Agreement dated 10.07.2003 between them would stand terminated on the expiry of two months from 14th October 2011. The said joint letter, was to be sent by surface mail and where possible by e-mail and each of such CPPS was to be given an option of either subscribing to Vodafone directly or to any other mobile service provider through Matrix.

29. From the order dated 20.10.2011 it is apparent that VEMSL had certain apprehension in making available the database and permitting MCS to talk to the 65,000 CPPS as it (MCS) could access VEMSL's customers other than these 65,000 CPPS and also that it (MCS) could misinform them (65,000 CPPS) about the arrangement between the parties or mislead them. It is not in dispute that immediately after the order dated 20.10.2011 mobile no.9811188888 belonging to MCS was operationalised along with 20 hunting lines. There were some issues between the parties regarding making the database available as according to VEMSL its representatives were not permitted to be positioned in MCS's office (to hear the conversation of the service calls to 65,000 CPPS) by installing parallel monitors, headphones, etc. etc.
30. When IA No.17109/2011 was preferred by the Petitioner (MCS) stating that the VEMSL had not operationalised the entire directions contained in the order dated 20.10.2011 passed by the learned Single Judge, the learned Single Judge clarified that the Petitioner was permitted to service

the calls of the subscribers, subject to the condition that VEMSL's representatives shall be positioned in Petitioner's office to monitor the service calls being attended to by the Petitioner's employees. On behalf of VEMSL it was represented that the latter condition had not been met by the Petitioner. The learned Single Judge again directed that the Petitioner would permit the Respondents' representatives (who were present in its office at Allahabad) to install parallel monitors and to listen to the conversation through headphones. Subject to this, the Petitioner was permitted to service the calls of subscribers received on the aforementioned mobile number in the same manner as it was doing as on 13.10.2011. Thus, for 3 days after the order dated 20.10.2011 MCS did not permit VEMSL's representatives to install parallel monitors and listen to the calls through headphones.

31. It is urged by the learned senior counsel for the Petitioner that four softwares, that is, BSCS (Business Supportive Control System), EPOS (Electronic Points of Sale), CRM (Customer Relationship Management) and OssApps Surrounding Systems were being accessed and used by the Petitioner to service the 65,000 CPPS. It is stated that some of the tasks which could be performed through these four softwares overlapped each other but all the four softwares were being used for the convenience of the customers. It is urged that if all the tasks could be performed by one or the other software, there was no point in making available the four softwares to the Petitioner (before termination of the Agreement by letter dated 14.10.2011). Petitioner's main grievance is that access to BSCS software was not at all given and full access to CRM was not provided as the function of bulk tagging was removed from it which could not be performed. Some instances are given by the learned senior counsel for

the Petitioner to demonstrate that access was not being provided to the softwares despite repeated requests by MCS. Mr. Sandeep Sethi, learned senior counsel for the Petitioner has referred to the e-mails dated 1.11.2011, 02.11.2011 and 03.11.2011 which remained unattended.

32. On the other hand, Mr. Rajiv Nayyar, learned senior counsel for the Respondents urges that these e-mails were addressed to wrong persons and, therefore, the same were not attended to. The learned senior counsel has taken me through the previous e-mails (when the relations between the parties were not sour). It is true that even on earlier occasions Pritika Ghai (VEMSL) was in the loop regarding providing of Ids etc. but she was not the only person to whom the earlier mails were addressed. A perusal of the e-mail dated 18.08.2011 shows that it was addressed to Hemant Kumar (of Vodafone) and a copy was forwarded to Pritika Ghai (VEMSL). Similarly, e-mail dated 08.09.2011 was addressed by Monika Kohli (MCS) to Hemant Kumar (VEMSL) and a copy was forwarded to Pritika Ghai (VEMSL) amongst others. Therefore, VEMSL's contention that she (Pritika Ghai) was not the person concerned and that as soon as the mail was addressed to the right person, the same was attended to, cannot be brushed aside. A copy of the e-mails dated 01.11.2011, 02.11.2011 and 03.11.2011 placed on the record reveal that these were address only to Pritika Ghai (VEMSL). Copy of these e-mails was not even forwarded to any other person from VEMSL. Moreover, after 03.11.2011 there was a lull from the Petitioner's side. It was only on 15.11.2011, when one Vishamber Gupta from MCS wrote to Amarjeet Singh (VEMSL) with copies sent to Rakesh Singh (VEMSL) and Monika Kohli (MCS) to whom the e-mails were being addressed or copies were sent earlier, that there was a response from VEMSL. An email dated

17.11.2011 shows that Vishamber again informed Rakesh Singh (VEMSL) that the password was not working. There was immediate response from Rakesh Singh (VEMSL) to Vishamber (of MCS) *to check and then confirm*. Thus, on this count, it cannot be said that there was any disobedience much less a wilful disobedience of the orders passed by the learned Single Judge.

33. It is true that the BSCS software was not made available to the Petitioner (MCS) after termination notice dated 14.10.2011 was issued to them and then after orders dated 20.10.2011 and 24.10.2011 were passed. The learned senior counsel for the Petitioner argues that in the order dated 24.11.2011 it was specifically directed that Matrix was to be permitted to service the calls of 65,000 CPPS in the same manner as it was doing on 13.10.2011. It is urged that even if there was duplication of the functions which could be performed by various softwares, this did not entitle VEMSL to block some of the softwares. It is very vehemently canvassed on behalf of the Petitioner that there must be some purpose behind making multiple softwares available to the Petitioner to serve the customers which was defeated by VEMSL.
34. Mr. Sandeep Sethi, learned senior counsel argues that if there was any doubt as to the true import of the order dated 20.10.2011 and 24.10.2011, VEMSL ought to have approached the Court for clarification. But, it took the risk of taking out its own interpretation of the orders and is thus guilty of wilful disobedience of the orders passed by the learned Single Judge. In support of his contention, the learned senior counsel places reliance on *Kapildeo Prasad Sah v. State of Bihar*, (1999) 7 SCC 569 to emphasize that even negligence and carelessness would amount to disobedience of the orders of the Court, particularly when the attention of

the person is drawn to the Court's orders and its implications. The learned senior counsel presses into service *All Bengal Excise Licensees Association v. Raghabendra Singh & Ors.* (2007) 11 SCC 374; and *Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors.*, (2002) 4 SCC 21 to convass that when the order of the Court is clear, it cannot be subverted on an ex-facie faulty and deliberately distorted interpretation.

35. In the order dated 20.10.2011 and 24.10.2011 it was not specifically directed that all the softwares which were used by the Petitioner to service the 65,000 CPPS were to be made available. However, connotation of the order dated 24.10.2011 that Matrix is to be permitted to service the calls received on mobile number 9811188888 as before would be that VEMSL was to provide the complete database and the softwares as were being made available to the Petitioner before 14.10.2011. At the same time, would non-providing of BSCS software, particularly, when services to the customers could be provided by other softwares amount to wilful disobedience of the order of the Court so as to amount to civil contempt? Mr. Sandeep Sethi, learned senior counsel says, it would.
36. In *Kapildeo Prasad Sah* the facts of the case as extracted from Paras 3, 4 & 5 of the report are as under:-

3. The appellants were working as Assistant Teachers in different elementary schools in Godda District in the State of Bihar. They are in the category of untrained teachers. Their services were terminated. Some of the teachers similarly placed filed writ petitions in the High Court against their termination and the matter ultimately reached this Court. It is not necessary to go into the various stages of the litigation except to note that this Court by order dated 30-11-1992 in Birendra Kumar v. State of Bihar [CA

No. ... of 1992 decided on 30-11-1992 (printed below at p. 574)] directed as under:

“We, therefore, direct once again that if there are vacancies and if there are not trained teachers available the untrained teachers who were employed prior to the new rule coming into operation, would be reinstated in service if after subjecting them to the selection process they are found suitable. If there are no vacancies, they would be empanelled according to their seniority and would be appointed according to their seniority in the vacancies arising in future. Unless this panel is exhausted, no new appointment of untrained teachers will be made from outside. It is understood that those eligible for being so appointed will be the ones who were appointed before the new rule came into operation.

While making the appointments of those who were so in service prior to the date of appointment, the State Government will relax the age-limit, if necessary.

We are informed that the appellants involved in the present case were paid salaries till 30-6-1991. We also understand from Mr B.B. Singh, learned advocate appearing for the State that all the vacancies have been filled in till 1-1-1992. If there were vacancies and yet the appellants were not appointed in the said vacancies such of the appellants who were eligible to be appointed and yet were not appointed in spite of the vacancies, would be entitled to the salaries from 1-7-1992 till their appointment. However, if there were no vacancies and all the appellants or some of them have to be appointed in the new vacancies which may be available hereafter, they will not be entitled to the salaries from 1-7-1992, till the date of their appointment. However, when they are appointed the period of break in service not exceeding one year will be taken into consideration for benefits other than salary.

The appeal is disposed of accordingly with no order as to costs.

4. The appellants and some other teachers like them got similar orders from the High Court in their respective writ petitions. The main order passed by the High Court is dated 20-1-1993 in CWJC No. 7000 of 1992. In this judgment the High Court noticed the

appointments made in some districts and the number of existing vacancies. The State had contended that only one regular vacancy existed when according to the petitioners, there were not less than 2000 vacancies. Counter-affidavit filed by the State did not indicate if all the 2000 vacancies had been filled up. With the consent of the counsel for the petitioners and the Advocate General that these petitions may also be disposed of in the light of the aforementioned direction of the Supreme Court the High Court directed it accordingly. The High Court said: "We may, however, direct the State to fill up posts in terms of the aforementioned direction of the Supreme Court with utmost expedition and preferably within two months from the date of receipt of a copy of this order." Similar orders were passed in other writ petitions filed by untrained teachers as well.

5. Under the orders of the Supreme Court and those of the High Court which followed, the State Government was to fill up the existing vacancies, if any, by appointing the appellants and other untrained teachers who were eligible to be appointed against those vacancies and in case vacancies did exist as on 1-1-1992 the teachers so appointed against those vacancies would be entitled to salary from 1-7-1992 till their appointment. This was so as the salaries had been disbursed up to 30-6-1991. If there were no vacancies, these untrained teachers had to be appointed in the new vacancies which might be available thereafter and in that case they were not entitled to the salary from 1-7-1992 till the date of their appointment.

37. In *Kapildeo Prasad Sah*, the Appellant's case before the Supreme Court was that vacancies were in existence on 01.01.1992 and, therefore, they were entitled to the salary w.e.f. 01.01.1992 and not from the date of their appointment in the year 1994. The case was remanded back by the Supreme Court to the High Court. At the same time, the Supreme Court observed that for holding the Respondents guilty of Civil contempt it has to be shown that there has been wilful disobedience of the judgment or the order of the Court. The Supreme Court observed that even

negligence and carelessness can amount to disobedience particularly when attention of the person is drawn to the Courts orders and its implications.

38. In *All Bengal Excise Licensees Association* the policy decision for issuance of excise licenses for opening new foreign liquor off-shops and country spirit shops in West Bengal was challenged by the Appellant Association as being violative of the provisions of Bengal Excise Act, 1909 and the Rules framed thereunder. The Supreme Court passed an interim order permitting the Respondents (the Govt. of West Bengal and its officials including the Principal Secretary, Excise) to process the application but not to finalize the same and issue the licence without leave of the Court. During the period of continuance of the interim order, the Respondents got an advertisement published in the newspaper for holding lottery for final selection of excise shops on 20.03.2005, 21.03.2005 and 22.03.2005. One N. filed a writ petition impleading the Appellant Association as a party respondent. The High Court passed an interim order dated 04.01.2005 permitting the Respondents to process the applications for grant of licences, but restrained from making any final selection in respect of such shops or holding any lottery for that purpose without obtaining specific leave of the Court. The said interim order was extended from time to time and was continuing at the time of the hearing. In pursuance of the aforesaid advertisement, a lottery was held on 23.03.2005 for the purpose of final selection of the excise shop. It was in this context, that is, when there was a specific order for not holding any lottery for the purpose of selection, that the Supreme Court held that the plea of mistake in understanding the order cannot be accepted, which is not the case here.

39. In *Anil Ratan Sarkar* the Petitioners who were science graduates were appointed as Laboratory Assistants at various Govt. and non Govt. colleges. Their duties included assisting the teachers and helping the students during practical classes. According to the Petitioner's case till issuance of the GO No.288 dated 21.03.1969 they had been treated as teaching staff and were given appropriate pay and allowances. The effect of the GO was to put them in the category of non teaching staff and thus they had to suffer loss of allowances and pay given to them as teaching staff. Their representations remained unattended. In the writ petition filed before the High Court, the learned Single Judge issued a writ of mandamus in favour of the Petitioners directing the State Govt. to give them status of teachers and to pay them accordingly w.e.f. 10.08.1983. The State's Appeal and SLP were dismissed on 15.05.1992 and 26.07.1994 respectively. The order of the learned Single Judge was upheld by the Supreme Court except that the date of the entitlement was changed to 01.08.1987 as against 10.08.1983.
40. On 26.12.1994 the State Govt. purportedly in compliance of the order of the Supreme Court issued a Circular ordering that the pay scales of Graduate Lab Instructors of non Governmental Colleges was to be revised and they were to continue to enjoy teaching status. Pay scales granted was, however, not same as comparable to teaching staff. The Petitioners' challenge to the circular was allowed by the learned Single Judge of the High Court, although, the State Appeal was allowed. The Petitioners' SLP was allowed by the Supreme Court by order dated 20.04.2001. It was in these circumstances that the Supreme Court observed that it was neither fair nor reasonable on the part of senior civil

service personnel to plead ignorance or misunderstanding when the directions of the Court were crystal clear in the judgment.

41. The learned senior counsel also relied on *Rama Narang v. Ramesh Narang*, (2006) 11 SCC 114 which laid down that wilful disobedience of the consent order passed on the basis of the representation of a party would amount to contempt. The proposition of law cannot be disputed.
42. There is general agreement in the precedents that to hold a person guilty of contempt, there must be wilful disobedience of the order of the Court. In *Ashok Paper Kamgar Union v. Dharam Godha & Ors.* (2003) 11 SCC 1, the Supreme Court analysed the concept of wilful disobedience of the order of the Court. Para 17 of the report is extracted hereunder:

“17. Section 2(b) of the Contempt of Courts Act defines “civil contempt” and it means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of undertaking given to a court. “Wilful” means an act or omission which is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or to disregard the law. It signifies a deliberate action done with evil intent or with a bad motive or purpose. Therefore, in order to constitute contempt the order of the court must be of such a nature which is capable of execution by the person charged in normal circumstances. It should not require any extraordinary effort nor should be dependent, either wholly or in part, upon any act or omission of a third party for its compliance. This has to be judged having regard to the facts and circumstances of each case…….”

43. In *Kapildeo* relied upon by the learned senior counsel for the Petitioner it was indicated that although even negligence and carelessness may amount to contempt but it was reiterated that the Petitioner who complained of breach of the Court order must allege and prove deliberate

or contumacious disobedience of the Court order and if such allegation is proved only then contempt is said to have been made out and not otherwise.

44. *In State of Bihar v. Sonabati Kumari, (1961) 1 SCR 728*, the Constitution Bench of the Supreme Court held that the question whether a party has understood the order in a particular manner and has conducted himself in accordance with such a construction is primarily one of fact, and where the materials before the Court do not support such a state of affairs, the Court cannot attribute an innocent intention based on presumptions, for the only reason, that ingenuity of Counsel can discover equivocation in the order which is the subject of enforcement.
45. *In Chhotu Ram v. Urvashi Gulati, (2001) 7 SCC 530* the Supreme Court held that a contempt of Court proceeding being quasi-criminal in nature, the burden to prove would be upon the person who made such an allegation. A person cannot be sentenced on mere probability. Wilful disobedience and contumacious conduct is the basis on which a contemnor can be punished. Such a finding cannot be arrived at on ipse dixit of the Court. It must be arrived at on the materials brought on record by the parties.
46. Thus, in order to be guilty of contempt an intention has to be there to act in violation of the Court's order, that is, to consciously defy the Court. In a later judgment in *Dinesh Kumar Gupta v. United India Insurance Company Limited, (2010) 12 SCC 770*, the Supreme Court dealt in detail with the question of civil contempt and held that mere unintentional disobedience is not enough to hold anyone guilty of contempt. Absence of wilful disobedience on the part of the contemnor will not hold him

guilty unless the contempt involves the task of fault or misconduct. Paras 17, 23 and 24 of the report are extracted hereunder:-

“17. This now leads us to the next question and a more relevant one, as to whether a proceeding for contempt initiated against the appellant can be held to be sustainable merely on speculation, assumption and inference drawn from facts and circumstances of the instant case. In our considered opinion, the answer clearly has to be in the negative in view of the well-settled legal position reflected in a catena of decisions of this Court that contempt of a civil nature can be held to have been made out only if there has been a wilful disobedience of the order and even though there may be disobedience, yet if the same does not reflect that it has been a conscious and wilful disobedience, a case for contempt cannot be held to have been made out. In fact, if an order is capable of more than one interpretation giving rise to variety of consequences, non-compliance with the same cannot be held to be wilful disobedience of the order so as to make out a case of contempt entailing the serious consequence including imposition of punishment. However, when the courts are confronted with a question as to whether a given situation could be treated to be a case of wilful disobedience, or a case of a lame excuse, in order to subvert its compliance, howsoever articulate it may be, will obviously depend on the facts and circumstances of a particular case; but while deciding so, it would not be legally correct to be too speculative based on assumption as the Contempt of Courts Act, 1971 clearly postulates and emphasises that the ingredient of wilful disobedience must be there before anyone can be hauled up for the charge of contempt of a civil nature.

23. Besides this, it would also not be correct to overlook or ignore an important statutory ingredient of contempt of a civil nature given out under Section 2(b) of the Contempt of Courts Act, 1971 that the disobedience to the order alleging contempt has to satisfy the test that it is a wilful disobedience to the order. Bearing this important factor in mind, it is relevant to note that a proceeding for civil contempt would not lie if the order alleged to have been disobeyed itself provides scope for reasonable or rational interpretation of an order or circumstance which is the factual position in the instant matter. It would equally not be correct to infer that a party although acting due to misapprehension of the

correct legal position and in good faith without any motive to defeat or defy the order of the Court, should be viewed as a serious ground so as to give rise to a contempt proceeding.

24. To reinforce the aforesaid legal position further, it would be relevant and appropriate to take into consideration the settled legal position as reflected in the judgment and order delivered in Ahmed Ali v. Supdt., District Jail [1987 Cri LJ 1845 (Gau)] as also in B.K. Kar v. High Court of Orissa [AIR 1961 SC 1367 : (1961) 2 Cri LJ 438] that mere unintentional disobedience is not enough to hold anyone guilty of contempt and although disobedience might have been established, absence of wilful disobedience on the part of the contemnor, will not hold him guilty unless the contempt involves a degree of fault or misconduct. Thus, accidental or unintentional disobedience is not sufficient to justify for holding one guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment and this was the view expressed also in State of Bihar v. Rani Sonabati Kumari [AIR 1954 Pat 513] and N. Baksi v. O.K. Ghosh [AIR 1957 Pat 528].”

47. Turning to the facts of the instant case, I may mention that the orders dated 20.10.2011 and 24.10.2011 have been extracted hereinabove. What is very clear from the said orders that the Petitioner (MCS) was permitted to service the calls of the 65,000 CPPS received on mobile No.9811188888 in the same manner as it was doing as on 13.10.2011. So, what was of importance to the Petitioner was to be permitted to service 65,000 CPPS. A reasonable interpretation of the order dated 24.10.2011, as stated earlier, would be that if four softwares were earlier made available to the Petitioner, all four should have been made available after the order was passed. But, in the absence of any specific mention of the same or any question raised in the order dated 24.10.2011, if the Respondents take an interpretation that the Petitioner was only to be

permitted to service the 65,000 CPPS and it was not material by which software, the interpretation cannot be said to be totally unjustified.

48. In Annexure VI filed with the Contempt Petition it was stated that BSCS rights were not given, but it was admitted that CRM software was available to it. As stated earlier, IA No.17630/2011 was filed by VEMSL and its advance copy was supplied to the counsel for the Petitioner. In para 5 of this application it was specifically stated that VEMSL has provided complete access to Customers Right Management (CRM) software for the 65,000 CPPS as contemplated in the orders passed by the Court dated 20.10.2011 and 24.10.2011. Obviously, access to CRM was provided to the Petitioner to service the 65,000 CPPS. The Petitioner has not explained the Respondents' intention and purpose of not making BSCS (software) available to it (the Petitioner) which was essential to prove wilful disobedience of the Court's order. VEMSL also referred to certain threatening e-mails written to Marten Pieters, who was the Managing Director and CEO of the parent company Vodafone Essar Ltd. Paras 6 and 7 of the IA No.17630/2011 are extracted hereunder:-

“6. The Applicant states that in its email to Mr. Marten Pieters besides complaining about the alleged non-compliance with the orders of this Hon'ble Court; the Managing Director of the Petitioner made malicious statements and even threatened the representative of M/s Vodafone Essar Limited with action to damage the image and reputation of the Applicant and M/s Vodafone Essar Limited. Excerpts from the email dated 25th October 2011 addressed by the Managing Director of the Petitioner to the representative of M/s Vodafone Essar Limited are extracted hereunder for the convenience of this Hon'ble Court:

“On both court days, last Thursday and then yesterday the court took note of Vodafone's unfair practice and subsequently yesterday it took exception to Vodafone's stance of not following the court orders to the “T”.

“Imagine that to avoid a 50 crore (10 million US) penalty the number of false statements that Vodafone has given to the Government and other authorities, now if I was to launch a media campaign proving the lies with 100’s of documentary evidence then think of the impact it can have on Vodafone’s 2 billion dollar IT case”

“Why only that all of our 65000 subscribers are willing to go enmass and file cases against Vodafone with the TRAI for calling them repeatedly even though most of them are on the DND list.”

“I have restrained myself from doing any of the above but post today afternoon if you do not direct your team in Delhi to fail in line then I will go ahead and move court again.”

7. Thereafter on 27th October, 2011, Mr. Gagan Dugal again sent an e-mail to Mr. Marten Pieters with the subject “ I guess we will have to go public with this”. The mail also had an attachment purporting to be a press release with distorted facts and containing frivolous and false allegations leveled against the Applicant.”

49. It is not disputed that by an order dated 20.10.2011 with the consent of the parties the name of Vodafone Essar Limited (VEL) was deleted from the array of parties. Thus, it is evident that VEL was not a party to the OMP. The Petitioner may still have communication with VEL or its CEO as the same may be a holding company of VEMSL but the tone and manner of the email and the interpretation put and communicated to the Managing Director and Chief Executive Officer of VEL shows that the conduct of the Petitioner itself was not above board and it was using threatening language on the strength of the orders of this Court dated 20.10.2011 and 24.10.2011, (although the Court did not make any such observations).

50. The Petitioner complains that a joint communication which was to be addressed in terms of the order dated 20.10.2011 could not be addressed

because of the fault of the Respondents. It is not stated as to which of the Respondents was to address the said email or was to approve the email. A perusal of the communication placed on record by the parties reveal that for the first time on 28.10.2010 the email was addressed by Mr. Anuj Berry, Senior Associate, Amarchand & Mangaldas and Suresh A. Shroff & Co. to Ms. Kanika Agnihotri, Counsel for MCS whereby a draft of the proposed joint communication was enclosed. Ms. Kanika Agnihotri, responded to the email sending a draft of the joint communication to be addressed to 65,000 CPPS. At the same time, she complained that MCS did not have access to the entire subscribers base of 65,000 CPPS. On 31.10.2011 Ms. Kanika Agnihotri reminded Mr. Anuj Berry that MCS was still awaiting the joint communication. On that very day, Mr. Anuj Berry for VEMSL sent a revised draft to Ms. Kanika Agnihotri. Ms. Kanika Agnihotri agreed with most parts of the draft but stated that giving choice to the customers to pay (the bills) either to Vodafone or Matrix was not acceptable. By an email dated 04.11.2011 Mr. Anuj Berry informed that their email dated 31.10.2011 was responded by her only on 4.11.2011, i.e. after filing of the Contempt Petition. Thus, counsel for both the parties were in constant touch as to the contents of the joint communication to be addressed to 65,000 CPPS. The Counsel of VEMSL Mr. Anuj Berry was quick to respond to the emails sent by Ms. Kanika Agnihotri. There is no material on record to indicate that VEMSL or for that matter any of the five Respondents was to be blamed for not sending the joint communication. In fact, the Petitioner and VEMSL both were equally to be blamed for not finalizing the joint communication to be addressed to 65,000 CPPS.

51. The Petitioner claims the Respondents to be guilty of wilfully disobeying the orders of the Court. The Petitioner further claims that the Respondents were either present in the Court at the time of passing the orders on 20.10.2011 and 24.10.2011 or they were represented through their counsel. This is factually incorrect. None of the five Respondents were party to the OMP No.784/2011 wherein the orders alleged to be disobeyed were passed. Only VEMSL remained party after deletion of the First Respondent (VEL) from the array of parties. Of course, VEMSL was sued through Shaina Subramaniam. Thus, individual act of each of the Respondents was required to be depicted by the Petitioner to show that they or any of them wilfully and contumaciously disobeyed the Court's orders.
52. As far as Monika Pathak (Respondent No.5) is concerned, she is alleged to have written a letter dated 19.10.2011 to one Mr. A. Ravi of Amara Raja Batteries Ltd. informing him of the termination notice issued to Matrix (the Petitioner) and that he will be directly serviced by VEMSL. No specific allegations apart from this has been leveled against her. Thus, she cannot be said to have contumaciously defied the Court's order except that she was an officer of the VEMSL. Her liability as an officer shall be dealt with by me a little later.
53. With regard to Shaina Subramaniam (Respondent No.4) the allegations could be that he was the signatory authority of the letter dated 14.10.2011 terminating the Agreement dated 10.07.2003 and he responded to some of the emails sent by Gagan Duggal (of MCS) to Marten Pieters (of VEMSL).

54. Direct role of Rajiv Kohli (Respondent No.2) has also not been exhibited. Of course, he was party to certain discussions with Gagan Duggal (MCS) in September and early October, 2011. No direct role has been assigned to Respondents No.1 and 3 (Sanjoy Mukherji and Marten Pieters) who are not even the employees/officers of VEMSL and are the officers of Vodafone Essar Limited.
55. At this juncture, I would delve into the question whether the Respondents could at all be prosecuted for contempt for the violation of the orders dated 20.10.2011 and 24.10.2011 of this Court.
56. Section 2 (b) of the Contempt of Courts Act, 1971 defines civil contempt and Section 12 of the Act provides for punishment for contempt of Court. Petitioner claims that the Respondents are in control of the affairs of the company. To appreciate the averments, it would be appropriate to extract Section 12 of the Act hereunder:-

“12. Punishment for contempt of court -

(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation - An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub section for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person.

Provided that nothing contained in this sub section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(5) Notwithstanding anything contained in sub section (4) where the contempt of court referred to therein has been committed by a company and it is provided that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer.

Explanation - For the purpose of sub sections (4) and (5)-

(a) "Company" means anybody corporate and includes a firm or other association of individuals, and

(b) "Director" in relation to a firm, means a partner in the firm."

57. Thus, as per Section 12 (4) of the Act where a person found guilty of contempt in respect of an undertaking given to a Court is a company then every person who at the time the contempt was committed was in charge of and responsible to the company for the conduct of the business of the company as well as the company would be guilty of contempt and liable to be punished. The provision of Sub-Section (4) in fact makes the officer in charge of a company vicariously liable for the act of the company. The purpose is that the company being a juristic person cannot act, but only through its officer and, therefore, every person who is in charge of and responsible to the company for the conduct of the business shall be guilty of contempt.
58. I have already briefly dealt with the issue earlier that no material has been placed on record by MCS to prove that Respondents No.2, 4 and 5 were in charge of and were responsible to the company for the conduct of its business. But, assuming that they were so, could they be prosecuted without VEMSL being first prosecuted for the same? There was divergence of opinion on this aspect in the various judgments of the Supreme Court. One view was that liability of the persons in charge of the company only arises when the contravention is by the Company and where its non impleadment will be fatal and its officers cannot be prosecuted. (*State of Madras v. C.V. Parekh* 1970 (3) SCC 491), whereas the other view was that company being a juristic person, it cannot be sentenced to imprisonment. If it is prosecuted, it can be sentenced to pay fine only and irrespective of its impleadment, the person in charge of company can be prosecuted and punished. (*Sheoratan Agarwal v. State of M.P.* (1984) 4 SCC 352; and *Anil Hada v. Indian Acrylic Ltd.* (2000) 1 SCC 1).

59. The provisions similar to Section 12 (4) of the Act are contained in the Essential Commodities Act, 1955, Employees' Provident Fund & (Miscellaneous Provisions) Act, 1952, Employees' State Insurance Act, 1948 and Negotiable Instruments Act, 1881, etc. etc.
60. A three Judge Bench of the Supreme Court in *Aneeta Hada v. Godfather Travels & Tours Private Ltd. (2012) 5 SCC 661* while interpreting similar provisions under Section 141 of the Negotiable Instruments Act held that unless the company is prosecuted, any person alleged to be vicariously liable being in charge of the company cannot be prosecuted. Paras 32,37,38,39, 51, 53, 58 and 59 are extracted hereunder:-

“32. We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, Section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification.

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37. In State of T.N. v. Arooran Sugars Ltd. (1997) 1 SCC 326 the Constitution Bench, while dealing with the deeming provision in a statute, ruled that the role of a provision in a statute creating legal fiction is well settled. Reference was made to Chief Inspector of Mines v. Karam Chand Thapar AIR 1961 SC 838, J.K. Cotton Spg. and Wvg. Mills Ltd. v. Union of India 1987 Supp SCC 350, M. Venugopal v. LIC (1994) 2 SCC 323 and Harish Tandon v. ADM,

Allahabad (1995) 1 SCC 537 and eventually, it was held that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between which persons such a statutory fiction is to be resorted to and thereafter, the courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion.

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38. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term “deemed” has to be read in its context and further, the fullest logical purpose and import are to be understood. It is because in modern legislation, the term “deemed” has been used for manifold purposes. The object of the legislature has to be kept in mind.

39. The word “deemed” used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallises the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in S.M.S. Pharmaceuticals Ltd. [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee (sic drawer) company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied.

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*51. We have already opined that the decision in Sheoratan Agarwal (1984) 4 SCC runs counter to the ratio laid down in C.V. Parekh (1970) 3 SCC 491 which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada (2000) 1 SCC 1 has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted.*

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53. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

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58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself.....”.

61. In view of the three Judge decision of the Supreme Court in *C.V. Parekh and Aneeta Hada*, the Respondents could not have been prosecuted even being the persons in charge of and responsible for the conduct of the business of the company unless the company, i.e. VEMSL itself was prosecuted for the same which has not been done.

62. To sum up:

the Petitioner has failed to prove that there was any wilful disobedience of the orders of the Court dated 20.10.2011 and 24.10.2011; the Petitioner has also failed to attribute any specific act to any of the Respondents to show that any of them wilfully disobeyed the orders of the Court dated 20.10.2011 and 24.10.2011; the Company VEMSL against whom the orders dated 20.10.2011 and 24.10.2011 were passed has not been arraigned and prosecuted as a party and therefore it was not permissible to prosecute its officers being the persons in charge of and responsible for the conduct of its business. The Contempt petition therefore fails; it is accordingly dismissed.

63. Pending Applications including CM.15496/2012 also stand disposed of.

(G.P. MITTAL)
JUDGE

DECEMBER 20, 2012/vk