

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

% **Date of decision: 12th February, 2013.**

+ **O.M.P. 78/2013**

INDUS TOWERS LTD Petitioner
Through: Mr. Arvind Nigam, Sr. Adv. with Ms.
Ruchi Agnihotri Mahajan, Ms.
Smarika Singh, Mr. Jai Mohan & Ms.
Shreya Sircar, Advs.

Versus

UNITECH WIRELESS (TAMIL NADU) PVT
LTD & ANR Respondents
Through: Mr. Rajiv Nayyar, Sr. Adv. with Mr.
Ashish Bhan & Ms. Padmaja Kaul,
Advs. for R-1.
Mr. Sandeep Sethi, Sr. Adv. with Mr.
Ashish Dholakia & Mr. Ashish Bhan,
Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996, pending arbitration, seeks interim protection for the petitioner by restraining the respondent No.1 Unitech Wireless (Tamil Nadu) Private Limited from removing its active infrastructure from the passive infrastructure sites of the petitioner in the fourteen circles/service areas of Mumbai, Kerala, Karnataka, Tamil Nadu, Rajasthan, Punjab, Kolkata, West

Bengal, Haryana, Andhra Pradesh, U.P. East, U.P. West, Maharashtra, Goa and Gujarat and by further restraining the sale/transfer of business of the respondent No.1 to the respondent No.2 Telewings Communication Services Private Limited, till payment by the respondent No.1 of the dues of Rs.207.73 crores of the petitioner.

2. The Counsels for the two respondents appeared on advance notice. However, it appears that certain other petitions of similar nature are pending before this Bench and for which reason this petition was also transferred to this Bench.

3. The petition came up before me first on 5th February, 2013 when it was sought to be posted on the same day when other similar petitions are listed. However, the senior counsel for the petitioner urged for ad interim relief as granted in the other petitions and which was vehemently opposed by senior counsels for both the respondents who stated that they are prepared to argue without filing replies and without prejudice to their contention as to the arbitrability of the disputes and for consideration of which question the other petitions have been posted. It may be noticed that it is the contention of the respondents that the disputes as raised by the petitioner are entertainable exclusively by the Telecom Disputes Settlement

and Appellate Tribunal (TDSAT) and are not arbitrable. In the circumstances, the counsels were heard on merits.

4. The petitioner is carrying on business of providing passive telecommunication infrastructure sites across India and passive infrastructure services to various telecom operators. The petitioner was providing such services to the respondent No.1 also which was providing telecommunication services under license from the Government of India and an agreement titled 'Master Services Agreement' (MSA) dated 30th September, 2009 was entered into between the petitioner and the respondent No.1 for providing such services to the respondent No.1 in the fourteen circles/service areas aforesaid. Under the said agreement, the respondent No.1 placed its active infrastructure equipment on the petitioner's towers built on as many as 4271 sites of the petitioner in the fourteen circles/service areas aforesaid and was paying charges in terms of the MSA to the petitioner.

5. The respondent No.1 vide its letter dated 31st December, 2012 informed the petitioner that in furtherance to the judgment of the Supreme Court in *Centre for Public Interest Litigation Vs. Union of India*, the licenses of respondent No.1 under which it was providing telecom services

stands quashed with effect from end of 18th January, 2013 and consequently it was impossible for the respondent No.1 to carry on business of telecom services after 18th January, 2013; that in the Spectrum Auction held by the Government of India, the respondent No.2, an affiliate of Telenor, has been declared successful in circles/service areas of Gujarat, Andhra Pradesh, U.P. East, U.P. West, Maharashtra and Bihar and the two respondents had executed a 'Business Transfer Agreement' to transfer respondent No.1's business to respondent No.2 and to assign all rights and obligations under the MSA with the petitioner with respect to the said six circles/service areas. The respondent No.1 thus invoked its rights of assignment under Clause 21 of the MSA and informed the petitioner that the respondent No.1 shall no longer be liable for obligations or liabilities arising out of the said six circles/service areas and such liabilities and obligations shall be of the respondent No.2. Qua the remaining fourteen circles/service areas, the respondent No.1 informed that it would be switching off its network in the circles/service areas and will withdraw its active infrastructure installed at the passive infrastructure sites of the petitioner.

6. The petitioner treated the said letter dated 31st December, 2012 of the respondent No.1 as a termination notice qua the eight remaining

circles/service areas in which it was providing passive infrastructure services to the respondent No.1 and claims the Exit Compensation in the sum of Rs.207.73 crores to have become due to it from the respondent No.1 under the MSA. The respondent No.1 of course denies its liability for the said Exit Compensation to the petitioner and which according to the petitioner has resulted in arbitrable disputes having arisen.

7. It is the case of the petitioner that the respondent No.1 cannot remove its active infrastructure from the passive infrastructure sites of the petitioner without clearing the dues of the petitioner of Rs.207.73 crores towards Exit Compensation. It is further stated that the transfer of the assets and business of the respondent No.1 to the respondent No.2 would reduce the security available to the petitioner and the senior counsel for the petitioner has argued that such transfer would reduce the respondent No.1 to a shell company and from whom the petitioner would be unable to recover its claims of Rs.207.73 crores.

8. The senior counsel for the respondent No.2 during the hearing stated that the respondent No.2 was willing to continue the agreement with the petitioner as assignee of the respondent No.1 qua six of the aforesaid circles/service areas and also makes itself liable for any Exit Compensation

qua the remaining eight circles/service areas, if found payable to the petitioner. The senior counsel for the respondent No.1 also confirmed the same. The matter was adjourned to enable the senior counsel for the petitioner to obtain instructions, whether the petitioner was willing to the agreement qua the six circles/service areas with the respondent no.2 as assignee of the respondent No.1 and whether the security offered by the respondent No.2 was acceptable to the petitioner.

9. The senior counsel for the petitioner on 8th February, 2013 has argued that though the petitioner is willing to continue to provide services to the respondent No.2 in the six circles/service areas for which the respondent No.2 has been granted license but the security offered by the respondent No.2 by making itself also liable for the dues if any towards Exit Compensation, of the petitioner, is not sufficient. The petitioner seeks additional security as has been provided in order dated 21st December, 2012 of the Division Bench in FAO(OS) No.613/2012 titled ***Unitech Wireless (Tamil Nadu) Pvt. Ltd. Vs. Viom Networks Ltd.*** and FAO (OS) No.614/2012 titled ***Telewings Communication Services Vs. Viom Networks Ltd.*** It is informed that Viom Networks Ltd. is similarly situated as the petitioner herein and was claiming dues of Rs.4000 crores and has been

provided security by directing Rs.500 crores out of the moneys payable by the respondent No.2 to the respondent No.1 to be kept in an escrow account in the form of an interest bearing fixed deposit. The senior counsel for the petitioner contends that a similar security for appropriate amount out of the claim of Rs.207.73 crores of the petitioner be also provided to the petitioner.

10. The senior counsels for the respondents have objected averring that the agreement of the respondent No.1 with Viom Networks Ltd. was different than the agreement with the petitioner.

11. Though arguments concerning maintainability of the claim of the petitioner towards Exit Compensation in terms of the MSA have also been raised but I do not deem it appropriate to even render any *prima facie* opinion thereon, as the same, it is felt may prejudice the adjudication be it before the Arbitral Tribunal or TDSAT, inasmuch as the question revolves primarily around the interpretation to be given to the various clauses of the MSA and even a *prima facie* opinion may be difficult to distinguish from a final view on the matter and rendering which is not the jurisdiction of this Court in exercise of powers under Section 9 of the Arbitration Act.

12. I have therefore considered the matter purely from the point whether the petitioner has any right in law or under the MSA to retain the active

infrastructure of the respondent no.1 till its claims for Exist Compensation are settled and whether the security offered by the respondent No.2, of making itself liable for the said dues if any of the petitioner, is sufficient.

13. The active infrastructure, removal whereof from the passive sites of the petitioner is sought to be injuncted till clearance of the dues of the petitioner, admittedly belongs to the respondent No.1 and the petitioner has no right/claim thereto. The petitioner is seeking to restrain removal of the same only to recover its claims for Exit Compensation which are still to be adjudicated, whether by the Arbitral Tribunal or by TDSAT. It has as such been enquired from the petitioner whether under the MSA, the petitioner has any right to retain the same in such a situation. Though initially the senior counsel for the petitioner candidly admitted that there is no such right but subsequently drew attention to Clause (vi) of Clause 6.3.3 of the MSA and which is as under:

“Retain custody of any of the Sharing Operator Equipment at the Site till the payment in full is made to Indus.”

In the MSA, the petitioner is referred to as Indus and the respondent no.1 as Sharing Operator.

14. However on closer perusal of Clause 6.3.3, it is found to be a part of Clause 6 titled “Charges” and which pertains to the charges mentioned in Schedule 3 to the MSA and which admittedly does not include Exit Compensation. The right of retention of the active infrastructure equipment of the respondent No.1 at the sites, is thus not relating to the Exit Compensation. Clause 19.2 of the MSA pertaining to Exit Compensation, does not give any such right to the petitioner of retention of the active infrastructure equipment of the respondent No.1 till such claims of Exit Compensation are settled.

15. In the absence of any contractual right of the petitioner to so retain the equipment, such right has to be based in law only. As per the ordinary law of the land, a creditor has no lien over the assets of the debtor and can only invoke the principles of attachment before judgment. Of course, the senior counsels for the respondents, relying on judgment dated 24th August, 2012 of the Division Bench of this Court in Co.Pet.No.458/2010 titled ***Tower Vision India Pvt. Ltd. Vs. Procall Pvt. Ltd.*** also contends that there is no debt even, till adjudicated.

16. The senior counsel for the petitioner in this regard has argued that the respondent No.2 itself has a huge financial exposure and the petitioner may

not be able to recover its dues from the respondent no.2 also.

17. We are however not otherwise concerned with the financial health of the respondent no.2. Our concern is only to the extent of the respondent no.2 acquiring custody/possession of the active infrastructure equipment of the respondent no.1, which the petitioner wants to retain to satisfy its claims. The senior counsel for the respondent No.2 on enquiry states that the active infrastructure equipment of the respondent No.1 pertaining to the six circles qua which the respondent no.2 has acquired licence, will be used for continuing to provide telecom services which the respondent no .1 was earlier providing. He further states that the active infrastructure equipment pertaining to the sites (of the petitioner) qua which the respondent no.2 does not have a licence, will be removed from the sites of the petitioner but will be utilized by the respondent No.2 in the six sites for which it has been granted license, and will not be sold. It is re-emphasised that the respondent no.1 was entitled to assign its rights under the MSA and has so assigned in favour of the respondent no.2 and the respondent no.2 is entitled to continue the MSA with the petitioner, for the six circles/service areas for which it has been granted licence. On enquiry whether the respondent No.2 is willing to give an undertaking not to encumber the said active infrastructure

equipment assigned by the respondent no.1 to it, till the settlement of the claims of the petitioner, the senior counsel for the respondent No.2 states that the respondent No.2, for the purposes of its business may be required to raise loans/finances against the said equipment.

18. I am of the considered view that the petitioner will not have any better security for its dues under the injunction as claimed, than what is offered by the respondent No.2. The equipment of the respondent No.1 is a specialized one and it is not as if the petitioner, even if granted an injunction, would be entitled to immediately dispose of the same or use the same for any other purpose. Granting of an injunction as sought would lead to the said equipment lying idle and depreciating in value and may after some time be of no value whatsoever. The petitioner in that case would not have any right to make a claim against the respondent No.2 also. According to the petitioner itself, the possibility of recovery from the respondent No.1 does not exist.

19. On the contrary, the respondent No.2 which has been granted license qua six circles/service areas can reasonably be expected to be financially viable. The Government of India is not expected to grant a license to an entity without satisfying itself as to its credibility and financial soundness.

The argument of the senior counsel for the petitioner, that the offer of the respondent No.2 to make itself liable for the dues if any of the petitioner towards Exit Compensation (of all the fourteen circles/service areas and not merely six circles/service areas) is not sufficient / satisfactory security for the petitioner, is thus not found to be a reasonable one and intended only to create an obstacle in the transaction between the respondent no.1 and the respondent no.2, to compel them to settle the claim of the petitioner of Exit Compensation.

20. Though the senior counsel for the petitioner has argued that the petitioner is entitled to the same treatment as given by the Division Bench to Viom Networks Ltd. but in my view, such conditions imposed in one case while granting interim relief do not constitute a precedent qua another case. It is the contention of the respondents that the provisions for assignability as exist in the subject MSA and owing where to there is no termination and / or liability of Exit Compensation, did not exist in the agreement of the respondent No.1 with Viom Networks Ltd. It is thus felt that the petitioner will not be worse off, by the respondent No.2 being made liable for the dues if any of the respondent No.1 to the petitioner, then it would have been with the grant of injunction claimed.

21. This Court also cannot lose sight of the fact that such telecom equipment cannot be allowed to be wasted during the time of adjudication of the disputes and any injunction if granted may jeopardise the functioning of the respondent No.2 and / or license granted to it. The balance of convenience is also thus in providing security to the petitioner for satisfaction of its claims, of the respondent No.2, rather than of the active infrastructure equipment.

22. The petition is thus disposed of with the following directions:

- (i) the removal of the active infrastructure equipment of the respondent No.1 from the passive infrastructure sites of the petitioner, will *ipso facto* make the respondent No.2 jointly and severally liable to the petitioner for the dues if any found payable to the petitioner towards Exit Compensation;
- (ii) the respondent No.2 shall not sell or transfer the said equipment and shall retain the same in its own custody and possession. The respondent No.2 shall however be entitled to encumber the said equipment only for obtaining financial facilities;
- (iii) the petitioner shall have an option to continue to provide services to the respondent No.2 as being earlier provided to the

respondent No.1 for the six circles/service areas for which the respondent No.2 has already been granted the license and for any other circles/service areas for which the respondent No.2 may in the near future be granted a license and the petitioner will intimate to the respondent No.2 its willingness in this regard within three days of this order.

The petition, in so far as for other reliefs, is dismissed.

No costs.

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RAJIV SAHAI ENDLAW, J

FEBRUARY 12, 2013

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