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

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Date of Decision: February 21, 2013

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FAO(OS) 97/2013

INDUS TOWERS LIMITED

..... Appellant

Represented by: Mr.Arvind Nigam, Sr.Advocate
instructed by Ms.Ruchi Agnihotri, Ms.Smarika
Singh, Ms.Shreya Sircar, Advocates

versus

UNITECH WIRELESS (TAMIL NADU) PVT. LTD. AND
ANR

..... Respondents

Represented by: Mr.Rajiv Nayyar, Sr.Advocate
instructed by Mr.Ashish Bhan, Ms. Padmaja Kaul,
Advocates for R.1.
Mr.Sandeep Sethi, Sr.Advocate instructed by
Mr.Ashish Dholakia, Mr.Ashish Bhan, Advocate
for R.2.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE VEENA BIRBAL

PRADEEP NANDRAJOG, J.

1. Deciding FAO (OS) No.613/2012 and FAO (OS) No.614/2012 filed by the respondents herein i.e. Unitech Wireless (Tamil Nadu) Pvt. Ltd. and Telewings Communication Services Pvt. Ltd. respectively, on December 21, 2012, one of us : Pradeep Nandrajog, J. who had authored the decision, had referred to the fear of the unknown which had compelled 'Viom Networks Limited', the respondent impleaded in the said two appeals, to approach this Court on its Original Side by way of an application filed under Section 9 of the Arbitration and Conciliation Act, 1996. It was expressed in the order

dated December 21, 2012, that only if Viom Network Limited as also Unitech Wireless (Tamil Nadu) Pvt. Ltd. and Telewings Communication Services Pvt. Ltd. had acted with prudent business sense, they could have resolved the dispute without a voyage in the corridors of the Court. A suggestion had been expressed in the opinion dated December 21, 2012 and we are happy to note that as a result of the said suggestion, Viom Networks Limited and Unitech Wireless (Tamil Nadu) Pvt. Ltd. as also Telewings Communication Services Pvt. Ltd. have resolved their disputes with a fresh agreement being executed between Viom Networks Limited and Telewings Communication Services Pvt. Ltd.

2. We wonder why Unitech Wireless (Tamil Nadu) Pvt. Ltd. and Telewings Communication Services Pvt. Ltd. cannot likewise resolve their dispute with Indus Towers Limited for the reason Unitech Wireless (Tamil Nadu) Pvt. Ltd. is bound by near identically worded contract with Viom Networks Limited and Indus Towers Limited.

3. Not only the earlier litigation fought between Viom Networks Ltd. on one side and Unitech Wireless (Tamil Nadu) Pvt. Ltd. and Telewings Communication Services Pvt. Ltd. on the other side but also the instant litigation as also a large number of other commercial litigations witnessed by us in the recent past would evidence, if we may with apology say a '*Pomeranian*' gene in the Indian multinationals. What do we mean? Those who have kept Pomeranian dogs as pets would notice that as the master picks up the leash, the Pomeranian dog starts howling, growling and barking : rushing to the door, the dog scratches the door with passion, indicating to the master the desire to run out and enjoy the freedom as also to conquer the territory outside. The Pomeranian dog rushes out when the door is opened by the master, barking at all and sundry, and refuses to pay any heed to the

calling by the master. But the moment the Pomeranian dog sees darkness or there is unexpected ruffling in a bush or a big dog confronts, the Pomeranian, with tail between the legs rushes back to the master and goes round and round and in between the legs of the master; wanting to be leashed. The Pomeranian wants the master to protect him. Identical is the behaviour shown by the Indian Multinational. Wanting not to be leashed by the Government or by the law, the Indian Multinational goes about scampering like a Pomeranian, but the moment it encounters darkness i.e. unknown territory, it rushes back wanting a leash to be put. Refuge is sought in the safety of being leashed.

4. We wonder when the Indian Multinational would cease to be a Pomeranian!

5. Reverting to the facts. With the decision by the Supreme Court cancelling 2G licences issued on 'First-cum-First Serve' basis, various circles where spectrum became available were put to re-auction. The cancellation and the re-auction created a problem for the licensee of the spectrum, if at the re-auction, the licensee could not obtain the spectrum and had to deal with various service providers with whom the licensee had long term agreements.

6. Telecommunication has two infrastructure. Broadly classified as '*Passive Infrastructure*' and '*Active Infrastructure*', with passive infrastructure meaning the mobile towers, generator sets etc. which we commonly see at the mobile towers which are provided mostly by third parties to the licensee.

7. Those who bid and obtained the spectrum at the re-auction, if required to start from scratch, had to create new passive infrastructure and assuming this could be done, months would be consumed, and in the interregnum the

existing customers of the previous licensee would no longer be available as customers since they would obviously shift to other telecommunication service providers. The customer base is a good trading asset and thus it would be desirable that the new licensee of the spectrum should take over the telecommunication services with the existing infrastructure; warranting either existing contractual obligations of the previous licensee with the passive infrastructure provider to be taken over with all reciprocal obligations or the contracts to be re-negotiated. We just do not understand as to why good prudent business sense does not compel the parties to do so.

8. Unitech Wireless (Tamil Nadu) Pvt. Ltd. had obtained spectrum under the First-cum-First Serve policy in 13 circles in which passive infrastructure was provided by Viom Networks Limited in 6 circles. The spectrum being cancelled, Telewings Communication Services Pvt. Ltd. had bid for and obtained the licence for spectrums in said 6 circles. Unitech Wireless (Tamil Nadu) Pvt. Ltd. negotiated its brand name transfer, goodwill, consumers and other tangible and non-tangible assets sale to Telewings Communication Services Pvt. Ltd. pertaining to the said 6 circles and Viom Networks Limited came rushing to the court fearing that if assets of Unitech Wireless (Tamil Nadu) Pvt. Ltd. were dissipated, its monetary dues pertaining to exit by Unitech Wireless (Tamil Nadu) Pvt. Ltd. once crystallised before the Arbitrator would not be capable of being recovered and hence an interim measure was sought from the court to restrain Unitech Wireless (Tamil Nadu) Pvt. Ltd. to assign any asset or its right to Telewings Communication Services Pvt. Ltd..

9. Now, the passive infrastructure provide by Viom Networks Limited would physically remain where it was. The spectrum would be in the air literally, if the existing consumers could not be serviced by Telewings

Communication Services Pvt. Ltd. and this would mean the use of the passive infrastructure provided by Viom Networks Limited.

10. Permitting Unitech Wireless (Tamil Nadu) Pvt. Ltd. to transfer its assets to Telewings Communication Services Pvt. Ltd., order dated December 21, 2012 made the transfer subject to Telewings Communication Services Pvt. Ltd. assuming all liabilities and responsibilities under the contract between Unitech Wireless (Tamil Nadu) Pvt. Ltd. and Viom Networks Limited and additionally that Unitech Wireless (Tamil Nadu) Pvt. Ltd. would keep aside a sum of ₹500 cores in an escrow account from the sum of approximately ₹4000 crores which Telewings Communication Services Pvt. Ltd. would be paying to Unitech Wireless (Tamil Nadu) Pvt. Ltd. for purchasing its assets.

11. Happily, the suggestion given by the Division Bench to Viom Networks Limited to settle the matter since the solution was very simple, has resulted in Viom Networks Limited entering into a contract with Telewings Communication Services Pvt. Ltd. relieving Unitech Wireless (Tamil Nadu) Pvt. Ltd. from its obligations. Indeed, it was a win-win situation for all.

12. The origin of the instant dispute is the 7 remaining circles spectrum whereof was earlier with Unitech Wireless (Tamil Nadu) Pvt. Ltd., on being cancelled and re-auctioned, being acquired by Telewings Communication Services Pvt. Ltd. The existing infrastructure of Unitech Wireless (Tamil Nadu) Pvt. Ltd. has been agreed to be taken over by Telewings Communication Services Pvt. Ltd. in said 7 circles as well and we have the problem of Indus Towers Limited which has provided the *Passive Infrastructure* in these 7 circles. The same is as per a contract executed between Indus Towers Limited and Unitech Wireless (Tamil Nadu) Pvt. Ltd. requiring the latter to pay an agreed fixed monthly license fee for the towers

taken on lease by Unitech Wireless (Tamil Nadu) Pvt. Ltd. and in the event of a pre-mature exit having commitment to pay approximately a little over ₹200 crores to Indus Towers Limited. The liability is presumably questioned by Unitech Wireless (Tamil Nadu) Pvt. Ltd. pleading *force majeure* condition. The further problem is whether the obligations and the rights were assignable, for if not, Telewings Communication Services Pvt. Ltd. cannot use the *Passive Infrastructure* of Indus Towers Limited without the consent and permission.

13. We have already highlighted that existing consumer base is the most valuable asset. If the consumers are lost and they shift over to other telecom service providers in the 7 circles, Unitech Wireless (Tamil Nadu) Pvt. Ltd. would lose a valuable asset diminishing its credit worthiness and Telewings Communication Service Pvt. Ltd. would have to start from scratch. Assuming Indus Towers Limited would succeed at the arbitration proceedings, it would at best be entitled to the agreed exit amount as per its contract with Unitech Wireless (Tamil Nadu) Pvt. Ltd. which approximates a little over ₹200 crores. But in the bargain it would be losing a valuable client i.e. Telewings Communication Services Pvt. Ltd., which would either create a fresh passive infrastructure or obtain the same from some other parties.

14. It makes good sense to retain a hen which lays golden eggs every day and to nurture and nourish the hen rather than to kill the hen hoping to extract all the golden eggs from the womb of the hen.

15. But it is the fear of the unknown which prevents the parties to sit across the table and settle the dispute.

16. An injury has been caused to all the parties. Services provided in 1 circle i.e. Mumbai have been discontinued and of the 4 crores consumers in

the 7 circles acquired by Telewings Communications Services Pvt. Ltd., 1 crore consumers, being in Mumbai, have already shifted to other service providers. The credit worthiness of Unitech Wireless (Tamil Nadu) Pvt. Ltd. has been reduced and thus the very security for which Indus Towers Limited is fighting for, has been lost partially.

17. If at a tournament team 'A' is 2 points away from qualifying for the knock-out stage, and it is the last league match which remains to be played by it with team 'B'; and the rules of the game stipulate a point each to be split if the match is a draw or is abandoned for any reason, it is in the interest of team 'A' that team 'B' plays the match and the match is not abandoned. For the reason, it is only success at the league match, with 2 points earned, that team 'A' reaches the knock out round. The match being abandoned or lost would have the same effect on the fate of team 'A' for the reason point '0' or point '1' would be useless for it. Similarly, sometimes in business, it makes sense to play the game rather than to have the match abandoned.

18. So identical are the facts of the instant case and the one which was dealt with by the Division Bench when FAO(OS) No.613/2012 and FAO(OS) No.614/2012 were disposed of, that we see hardly any scope to take a view different from the one which was taken by the co-ordinate Bench, with the opinion authored by one of us : Pradeep Nandrajog, J.

19. The view taken by the learned Single Judge that the decision by the Division Bench would not constitute a precedent, being an interim order, may be technically correct, but overlooks the fact that the same would have great persuasive value and we wish that the learned Single Judge was informed that the little nudge by the Division Bench to the parties which were litigating then when decision dated December 21, 2012 was

pronounced made the parties open their eyes and the dispute got amicably resolved; the painful arbitration process was no longer required to be traversed upon by the parties.

20. There is one factual error in the impugned order dated February 12, 2013 : that there was no provision for assignability and no termination or exit compensation in the agreement between Viom Networks Limited and Unitech Wireless (Tamil Nadu) Pvt. Ltd. This is factually incorrect. This probably has weighed in the mind of the learned Single Judge. That apart, it was the very assignability which was pushed by the Division Bench in its order dated December 21, 2012 when it was directed that Unitech Wireless (Tamil Nadu) Pvt. Ltd. would be permitted to assign and transfer all its assets to Telewings Communication Services Pvt. Ltd. but subject to Telewings Communication Services Pvt. Ltd. assuming all liabilities and responsibilities under the contract between Viom Networks Limited and Unitech Wireless (Tamil Nadu) Pvt. Ltd. and additionally ₹500 crores being kept in an escrow account.

21. The claim of Viom Networks Limited as exit compensation was about ₹2500 crores and 20% thereof was secured by requiring ₹500 crores to be kept in an escrow account.

22. As per the impugned order, learned Single Judge has directed as under:-

“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.”

23. The three directions are pari materia with the Division Bench order dated December 21, 2012 which permitted Unitech Wireless (Tamil Nadu) Pvt. Ltd. to transfer its assets to Telewings Communication Services Pvt. Ltd.; making simultaneously Telewings Communication Services Pvt. Ltd. jointly and severally liable to the exit dues if any found payable by Unitech Wireless (Tamil Nadu) Pvt. Ltd. to Viom Networks Limited and in addition to pay the monthly license fee. The only thing missing is some cash security, by way of requiring certain money to be kept in an escrow account.

24. The percentage or a figure in a previous opinion, on identical facts, would be a good measure on the reason of fairness and consistency. Since in the past 20% of the claim amount was the percentage identified, we do so in the instant case and noting that at best, claim of Indus Towers Limited would be around ₹200 crores against Unitech Wireless (Tamil Nadu) Pvt. Ltd. towards pre-mature exit, we direct the respondents to keep aside, by putting in an escrow account ₹40 crores which shall be subject to final directions when the substantive dispute would be resolved between the parties; but would simultaneously commend upon the parties and especially Indus Towers Limited to sit at the negotiation table with Telewings

Communication Services Pvt. Ltd., the new entrant and player in the field in the 7 remaining circles, because it would make sense for Indus Towers Limited not to render sterile its passive infrastructure which would become sterile if Telewings Communications Services Pvt. Ltd. creates its own passive infrastructure or leases the same from other parties.

25. The appeal stands disposed of modifying the impugned order by making applicable another interim condition by way of an interim measure, as per paragraph 24 above.

26. Parties shall bear their own costs in the appeal.

PRADEEP NANDRAJOG, J.

VEENA BIRBAL, J.

FEBRUARY 21, 2013
skb/srb