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

% **Date of decision: 11th November, 2013**

\+ **ARB.P. 236/2012**

VIOM NETWORK LTD **..... Petitioner**

Through: Mr. Sanjay Jain, Sr. Adv. with Ms. Anuradha Mukherjee & Mr. Abhijit Mittal, Advs.

Versus

S TEL PVT LTD **..... Respondent**

Through: Mr. Dayan Krishan with Mr. Gautam Narayan, Mr. Amit Gupta, Ms. Asmita Singh, Mr. Nikhil Menon & Mr. S. Rana, Advs.

AND

\+ **ARB.P. 9/2013**

BHARTI INFRATEL LTD **..... Petitioner**

Through: Mr. J.P. Sengh, Sr. Adv. with Mr. Omar Ahmad & Mr. Manu, Advs.

Versus

S TEL PVT LTD **..... Respondent**

Through: Mr. Dayan Krishan with Mr. Gautam Narayan, Mr. Amit Gupta, Ms. Asmita Singh, Mr. Nikhil Menon & Mr. S. Rana, Advs.

AND

\+ **O.M.P. 206/2012**

BHARTI INFRATEL LIMITED **..... Petitioner**

Through: Mr. J.P. Sengh, Sr. Adv. with Mr. Omar Ahmad & Mr. Manu, Advs.

Versus

S TEL PVT LTD **..... Respondent**

Through: Mr. Dayan Krishan with Mr. Gautam Narayan, Mr. Amit Gupta, Ms.

Asmita Singh, Mr. Nikhil Menon & Mr. S. Rana, Advs.

AND

\+ **O.M.P. 173/2012, IAs No.12147/2012 (u/O 7 R-11 CPC) & 15653/2012 (u/S 151 CPC)**

VIOM NETWORK LTD **..... Petitioner**

Through: Mr. Sanjay Jain, Sr. Adv. with Ms. Anuradha Mukherjee & Mr. Abhijit Mittal, Advs.

Versus

S TEL PVT LTD **..... Respondent**

Through: Mr. Dayan Krishan with Mr. Gautam Narayan, Mr. Amit Gupta, Ms. Asmita Singh, Mr. Nikhil Menon & Mr. S. Rana, Advs.
Mr. Sudhir Nandrajog, Sr. Adv. with Mr. Sanjay Bhatt & Mr. Abhishek Anand, Advs. for IDBI.

AND

\+ **O.M.P. 312/2012, IAs No.12129/2012 (u/O 7 R-11 CPC) & 15715/2012 (u/S 151 CPC)**

VIOM NETWORK LTD **..... Petitioner**

Through: Mr. Sanjay Jain, Sr. Adv. with Ms. Anuradha Mukherjee & Mr. Abhijit Mittal, Advs.

Versus

S TEL PVT LTD **..... Respondent**

Through: Mr. Dayan Krishan with Mr. Gautam Narayan, Mr. Amit Gupta, Ms. Asmita Singh, Mr. Nikhil Menon & Mr. S. Rana, Advs.

Mr. Sudhir Nandrajog, Sr. Adv. with Mr. Sanjay Bhatt & Mr. Abhishek Anand, Advs. for IDBI.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The common objection of the respondent S Tel Pvt. Ltd. to all these petitions is that, notwithstanding the existence of the arbitration clause in the agreement, subject matter of each of these petitions, between the petitioner / its predecessor and the respondent, the remedy of arbitration under the Arbitration and Conciliation Act, 1996 (Arbitration Act) is not available for the reason of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) having the exclusive jurisdiction over the disputes raised, under Section 14 read with Section 15 of the Telecom Regulatory Authority of India Act, 1997 (TRAI Act).

2. Both the petitioners i.e. Viom Network Ltd. and Bharti Infratel Ltd. are a Telecom Infrastructure Service Provider registered as Infrastructure Provider Category-I (IP-I) with the Department of Telecommunications (DoT) and are engaged in the business of building, owning or validly possessing and operating passive infrastructure sites and providing passive

telecom infrastructure service to various telecom operators. The respondent S Tel Pvt. Ltd. was on the contrary, a telecom operator, having acquired Unified Access Service Licences to establish, install, operate and maintain Unified Access Service in the areas / circles of Jammu & Kashmir, Himachal Pradesh, Bihar, Orissa, Northeast and Assam. The licences of the respondent S Tel Pvt. Ltd. were however cancelled following the orders of the Supreme Court.

3. Under each agreement, titled 'Master Services Agreement', containing the arbitration clause, the petitioners Viom Network Ltd. and Bharti Infratel Ltd. had agreed to, i) make available and provide to the respondent S Tel Pvt. Ltd. access to their passive infrastructure sites to install S Tel's equipment and to operate and maintain the same; and ii) provide specified operation and maintenance services at each of the said sites.

4. Disputes and differences have arisen between the petitioners and the respondent under the said Agreements, which contained a clause for lock in period, with the petitioners claiming monies from the respondent under the Agreements. The petitioners have accordingly invoked the arbitration clause

in the agreement subject matter of each petition and have sought interim relief with respect to the active infrastructure equipment of the respondent installed at the sites of the petitioners and upon the failure of the respondent to appoint Arbitrator / join in appointment of Arbitrator, also sought appointment of Arbitrator. The petitioners, in the OMPs under Section 9 of the Arbitration Act, seek to restrain the respondent from removing, selling, encumbering the said equipment and also receivership of the said equipment to settle their dues for which award is sought in the arbitration proceedings.

5. M/s IDBI Trusteeship Ltd. applied for intervention in the OMPs preferred by M/s Viom Pvt. Ltd., claiming first charge over the said equipment.

6. Finding, that owing to the telecom licences of the respondent having been cancelled and the respondent being now no longer in need of the said active infrastructure equipment and further that the said equipment may with the passage of time deteriorate and become obsolete, vide order dated 18.04.2013, without prejudice to the respective contentions, provision was made for auction thereof and deposit of the sale proceeds with the Registrar

General of this Court. Subsequent orders dated 6th August, 2013 and 24th September, 2013 were also made in this regard.

7. The counsel for the respondent has contended that the petitioners as well as the respondent are 'service providers' within the meaning thereof in the TRAI Act and therefore it is the TDSAT which has exclusive jurisdiction to entertain and adjudicate the disputes between the two service providers. Reliance is placed on judgment of the TDSAT in ***Reliance Infratel Ltd. Vs. Etsalat DB Telecom P. Ltd.*** MANU/TD/0056/2012 holding that entities registered with DoT as Infrastructure Provider Category-I are service providers within the meaning of TRAI Act and Section 14 of the TRAI Act vests TDSAT with the jurisdiction to adjudicate disputes between service providers and that with regard to matters covered by Section 14 of the TRAI Act, only TDSAT has jurisdiction, notwithstanding the existence of an arbitration clause in a contract between two service providers. Reference is also made to ***Booz Allen & Hamilton Inc. Vs. SBI Home Finance Ltd.*** (2011) 5 SCC 532 in paras 35 to 37 whereof it was *inter alia* held that the Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute to adjudicate their dispute in place of Courts and per contra the Tribunals constituted under the laws of the country are public fora and that

adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Reference in this regard is also made to the judgment dated 15.03.1940 of the Privy Council in ***The Secretary of State Vs. Mask & Co.*** and to ***Modi Rubbers Ltd. Vs. Union of India*** MANU/DE/1148/2002 (DB). It is further contended that though the respondent had before the TDSAT and in the appeal against the judgment of TDSAT before the Supreme Court argued to the contrary but has now accepted the judgment of the TDSAT. It is yet further contended that though the appeal against the judgment of the TDSAT is pending but there is no stay therein. Attention is invited to Section 3 (1-AA) of The Indian Telegraph Act, 1885, (Telegraph Act) to contend that all appliances, instruments, apparatus, not only used but even capable of use for transmission and reception of signals, are included in the definition of 'Telegraph' and it is contended that the instruments and equipments of petitioners are so capable and thus 'telegraph' within the meaning of Telegraph Act and thus the need for petitioners to be within the jurisdiction of TDSAT. It is yet further contended that the services provided by petitioners are not akin to providing or letting office space. After the orders were reserved, copy of order dated 02.09.2013 of an Arbitral Tribunal in

arbitration between Vodafone Spacetel Ltd., a infrastructure provider as the petitioners herein and the respondent S Tel Pvt. Ltd. allowing the application of respondent S Tel Pvt. Ltd. under Section 16 of the Arbitration Act for the reason of the dispute being not arbitrable was also handed over.

8. Per contra the senior counsels for the petitioners have contended:

(i) that the services being provided by the petitioners are not telecommunication services within the meaning of Section 2(1)(k) of the TRAI Act and thus the petitioners are not service providers within the meaning of Section 2 (1) (j) of the said Act and the TDSAT has no jurisdiction over the petitioners; reliance is placed on paras 3.7 and 3.8 of the Recommendations dated 12th April, 2011 of the Telecom Regulatory Authority of India (TRAI) to show that the same also does not treat the IP-I certificate holders as licencees;

(ii) that the petitioners are neither a licensor or a licensee nor a service provider within the meaning of Section 14 of the TRAI Act;

(iii) that no consumer is affected at least today by the action of the petitioners inasmuch as the telecom licence of the respondent stands cancelled;

(iv) that today even the respondent is not a service provider; however on enquiry it was conceded that Section 14 may include an ex-service provider;

(v) that the petitioners are not 'Licensee' within the meaning of Section 2(1)(e) of the TRAI Act;

(vi) that the petitioners are akin to a landlord; reference is made to the judgment of TDSAT in ***Aircel Digilink India Ltd. Vs. Union of India*** MANU/TD/0001/2005;

(vii) that the certificate obtained by the petitioners from DoT was in pursuance to the clause in the agreements with the respondent and the said certificate, by no stretch of imagination can be construed as a licence;

(viii) attention is invited to ***HDFC Bank Ltd. vs. Satpal Singh Bakshi*** 193 (2012) DLT 203 where a full Bench of this Court in para

12 held that, all disputes relating to right in personam are arbitrable; on the other hand those relating to right in rem having inherent public interest are not arbitrable and the parties choice to choose forum of arbitration is ousted, and on the basis thereof it is contended that there is no public interest involved here as the respondent is dysfunctional and its licence has been revoked / cancelled and it is no longer engaged in telecom business and its customers have shifted to some other licensee;

(ix) with reference to the IP-I certificate issued to the petitioners by DoT, it is contended that the petitioners thereunder also are specifically prohibited from providing telecom services;

(x) that the registration of the petitioners with DoT is independent of the agreement with the respondent; and,

(xi) that the Telegraph Authority under Section 3(6) of the Telegraph Act is the Director General of Posts and Telegraph and is different from DoT which has issued the IP-I certificate to the petitioners; and

(xii) that the Supreme Court itself vide order dated 6th January, 2012 in Civil Appeal No.10076/2011 titled ***UOI Vs. M/s. Computer Science Corporation of India Pvt. Ltd.*** has directed the parties to arbitration provided under the agreement.

9. I have considered the rival contentions and perused the records.

10. The Master Service Agreement subject matter of Arbitration Petition No.236/2012 contains an arbitration clause as under:

> *"16.1 Any dispute arising between Service Provider and S Tel in connection with this Master Agreement and / or any IP Service orders, including any disputes in respect of the validity thereof, shall be settled by arbitration. Such disputes or differences shall be referred to a sole arbitrator to be mutually appointed by the Parties, and if the Parties shall not agree on a single arbitrator, then each Party shall nominate an arbitrator, and the two arbitrators shall nominate the arbitrator that shall preside over the arbitration procedures. The arbitration shall be held at Delhi and the arbitration proceedings shall be carried out under Indian law and in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereto. The arbitration proceedings shall be conducted in the English language*

and the award shall be written and final, conclusive and binding upon the Parties whether on questions of law or fact;

16.2 The courts of Delhi shall have exclusive jurisdiction regarding any issue arising out of the arbitration process above and with respect to injunctive relief, all in accordance with the Arbitration and Conciliation Act, 1996.

The Master Service Agreement subject matter of Arbitration Petition No.9/2013 contains an arbitration clause as under:-

"***21.3 Arbitration***

21.3.1 *The arbitration shall be conducted as follows:-*

(i) all Disputes between the Parties arising out of or in connection with this Agreement shall be referred to or submitted for arbitration in New Delhi;

*(ii) the arbitration shall be conducted in English by an arbitral tribunal consisting of three arbitrators. For the purpose of such arbitration, each Party shall appoint one arbitrator and the third arbitrator shall be appointed by mutual agreement by the two arbitrators so appointed (the "**Arbitration Panel")**;*

(iii) the Arbitration Panel shall have the power to award interest on any sums awarded;

(iv) notwithstanding the power of the Arbitration Panel to grant interim relief, the Parties shall have the power to seek appropriate interim relief from the Courts of New Delhi;

(v) the arbitration award shall be final and binding on the Parties and the Parties agree to be bound thereby and to act accordingly.

(vi) the Arbitration Panel may award to a Party that substantially prevails on the merits, its costs and expenses (including fees of its counsel);

(vii) the Parties shall bear their respective costs incurred in the arbitration unless otherwise awarded or fixed by the Arbitration Panel; and

(viii) the Parties shall co-operate in good faith to expedite, to the maximum extent practicable, the conduct of any arbitral proceedings commenced pursuant to this Agreement.

21.3.2 *The Parties agree that arbitration is the most appropriate and convenient forum to settle any Dispute and, accordingly, that they will not argue to the contrary.*

21.3.3 *Notwithstanding anything to the contrary in the Agreement, either Party shall be entitled at any time to seek injunctive or other urgent relief in any court that has jurisdiction over*

the Dispute or in connection with the Agreement.

21.3.4 *The Parties agree that the documents which start any proceedings and any other documents required to be served in relation to those legal proceedings may be served to the addresses specified in the notice provisions set out in the Agreement. These documents shall be served in any manner allowed by Law."*

11. Section 14 of the TRAI Act, providing for the establishment of TDSAT, prescribes its jurisdiction as under:-

> *"**14. Establishment of Appellate Tribunal.** – The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to-*
>
> *(a) adjudicate any dispute -*
>
> *(i) between a licensor and a licensee;*
>
> *(ii). between two or more service providers;*
>
> *(iii). between a service provider and a group of consumers:*
>
> *Provided that nothing in this clause shall apply in respect of matters relating to –*
>
> *(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);*
>
> *(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer disputes*

Redressal Commission or the National Consumer Redressal Commission established under Section 9 of the Consumer Protection Act, 1986 (68 or 1986);

(C) disputes between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act."

12. The counsels have addressed their arguments on the premise:

(a). That the respondent S Tel Pvt. Ltd. was a 'service provider' and notwithstanding the cancellation of its license to establish, install, operate and maintain unified access service, continues to be a service provider within the meaning of the TRAI Act.

(b). That the only clause under which the dispute can be within the jurisdiction of TDSAT is sub-clause (ii) of Clause (a) of Section 14 of the TRAI Act.

(c). That if the adjudication of the dispute between the parties is within the jurisdiction of TDSAT, the same shall not be subject to adjudication by arbitration provided for in the Master Service Agreement.

(d). That notwithstanding there being no bar in the TRAI Act to arbitration and the bar under Section 15 being confined to the

jurisdiction of Civil Court only, in the event of TDSAT having jurisdiction, arbitration under the Arbitration Act would also be barred.

13. Thus the only controversy for adjudication is whether the petitioners as Infrastructure Providers Category-I are a 'service provider' under the TRAI Act. If the petitioners are to be so held to be a service providers, then the disputes which have arisen between the petitioners and the respondent S Tel Pvt. Ltd. would be between two service providers as envisaged under Section 14(a)(ii) of TRAI Act. However if the petitioners were to be held to be not a 'service provider' within the meaning of Section 14(a)(ii), then the adjudication of the said dispute would be as per the arbitration agreement between the parties.

14. Section 2(1)(j) of the TRAI Act defines service provider as meaning the "government as a service provider" and including "a licensee". A licensee is defined in Section 2(1)(e) as meaning "any person licensed under sub-section (1) of Section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services". Section 2(2) of the TRAI Act provides that words and expressions used and not defined in the said Act but defined in the Telegraph Act or in the Indian Wireless

Telegraphy Act, 1933 shall have the meanings respectively assigned to them in those Acts.

15. The first question which thus arises is whether the petitioners can be said to be 'licensee' within the meaning of Section 2(1)(e) of TRAI Act in as much as if it were to be so, they would axiomatically fall under the definition of service provider in Section 2(1)(j) which as noticed above, includes a licensee. That takes us to the Telegraph Act. The said Act, by Section 4 thereof vests the privilege of establishing, maintaining and working telegraphs, exclusively in the Central Government. However the proviso to Section 4(1) enables the Central Government to grant a license to any person to establish, maintain or work a telegraph. The petitioners, notwithstanding being registered as a Infrastructure Provider Category-I, cannot be said to be having a license, at least to work a telegraph in as much as the Registration Certificate of the petitioners itself contains a clause as under:-

> *"In no case the company shall work and operate or provide telegraph service including end to end bandwidth as defined in Indian Telegraph Act, 1885 either to any service provider or any other customer".*

16. It next has to be considered whether the petitioners have been licensed, if not to work a telegraph, to establish or maintain a telegraph. The proviso to Section 4(1) of the Telegraph Act, as aforesaid, enables the Central Government to grant a license not only to work a telegraph but also to establish or maintain a telegraph. A connected question would also arise whether the license under Section 4(1) of the Telegraph Act can be either to only establish or to only maintain or only work a telegraph or only to establish, maintain and work a telegraph. However, need is not felt to answer the said question as Section 2(1)(e) of the TRAI Act though refers to a license under Section 4 of the Telegraph Act but only to a license 'for providing specified public telecommunication services'. Telecommunication Services are defined in Section 2(1)(k) as 'service...which is made available to users by means of any transmission or reception of signs or signals...'. The reference thus in Section 2(1)(e) of the TRAI Act to a licensee is to only such a licensee who is providing transmission or reception services to 'users' who are members of 'public' i.e. to consumers of such service and not to an intermediary or to a licensee providing public telecommunication services. In this view of the matter, the petitioners even if a licensee under Section 4(1) of the

Telegraph Act for the reason of having a license to establish or maintain a telegraph are not a licensee within the meaning of Section 2(1)(e) of the TRAI Act.

17. The next question which arises is whether the definition in Section 2(1)(j) of the TRAI Act of a service provider meaning the Government as a service provider and including a licensee is an exhaustive one inasmuch as if it is not found to be an exhaustive definition, it will still have to be seen whether the petitioners inspite of being neither the Government or a licensee can still be considered as a service provider.

18. The said question is however found to be no longer *res integra*. The Supreme Court in ***Mahalakshmi Oil Mills Vs. State of Andhra Pradesh*** (1989) 1 SCC 164 was concerned with the definition of tobacco in Item No.4 of the First Schedule of the Central Excise and Salt Act, 1944 and which was as under:

> *"Tobacco means any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth".*

It was held that definition which consists of two separate parts which specify what the expression means and what it includes is obviously meant to be exhaustive. Similarly in ***Karnataka Power Transmission Corporation Vs. Ashok Iron Works Pvt. Ltd.*** (2009) 3 SCC 240 it was held that though the resort to the word 'includes' by the legislature often shows the intention of the legislature that it wanted to give an extensive and enlarged meaning to such expression but sometimes the context may suggest that the word 'includes' may have been designed to mean 'means'. The setting, context and object of an enactment were held to be a guiding factor in this regard.

19. The Supreme Court recently in ***Kotak Mahindra Bank Vs. Hindustan National Glass and Industries Ltd.*** (2013) 7 SCC 369 has also held that words in a statute are to be interpreted in the context or subject matter in which the words are used and not according to their literal meaning. It was held that what is meant by saying that the words are to be understood first in their natural, ordinary or popular sense, is that the words must be ascribed that natural, ordinary or popular meaning which they have in relation to the subject-matter with reference to which and the context in which they have been used in the statute. The context, in the construction of statutes was held

to mean the statute as a whole, the previous state of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy.

20. Applying the ratio of the aforesaid two judgments also, notwithstanding the law unequivocally laid down in ***Mahalakshmi Oil Mills*** supra, I am of the view that the word 'includes' in Section 2(1)(j) of the TRAI Act is not intended to give a meaning beyond 'licensee' to a service provider. Had the legislature intended a licensee under Section 2(1)(e) of the TRAI Act to be a licensee under the proviso to Section 4(1) of the Telegraph Act and which as aforesaid includes a license not only to work but also to establish or maintain a telegraph, the legislature would have not qualified a licensee further as only that licensed for providing 'public' telecommunication services. Similarly, in that case the definition of telecommunication service in Section 2(1)(k) of the TRAI Act would not be further qualified as a service made available to users.

21. Notwithstanding my interpretation, to enquire whether the Central Government itself is treating Infrastructure Service Providers as the petitioners to be licensees, I have visited the website of TRAI (www.trai.gov.in) and which reveals a Consultation Paper No.I of 2011

dated 14th January, 2011 having been prepared on "Issues related to Telecommunication Infrastructure Policy" and "Recommendations" dated 12th April, 2011 having been made by TRAI on "Telecommunications Infrastructure Policy" with the intent of meeting the infrastructure requirements of the service providers (thereby carving out a difference between infrastructure providers and service providers) and to encourage sharing by service providers of infrastructure with the infrastructure providers to reduce transaction costs and for the sake of providing standardization of towers and improving aesthetics and preventing hazard from such towers. While making such recommendations, TRAI has in para 3.7, to which attention was drawn by the senior counsel for the petitioners also, expressly opined that since the infrastructure providers have not been issued licenses under Section 4 (of the Telegraph Act) they cannot seek Right of Way as provided in the Telegraph Act and suggested bringing the infrastructure providers under the licensing regime so that the infrastructure providers are also able to seek Right of Way for deployment of infrastructure.

22. The website of TRAI does not show the aforesaid recommendations to have been accepted by the Government or by the Telegraph Authority or of

the infrastructure providers having been otherwise brought under the licensing regime.

23. It would be an anomaly if this Court were to hold that the infrastructure providers are licensees under Section 4 of the Telegraph Act when neither the TRAI nor the Telegraph Authority or the Government are treating them to be so.

24. Rather, the nomenclature evolved itself furnishes the answer to the question under adjudication. The petitioners have been classified not as service provider but as infrastructure provider. The word 'service', on a conjoint reading of the definitions of licensee, service provider and telecommunication services in Section 2(1) of the TRAI Act is service to users who are members of the public and not providing service to another who in turn may be providing such services to users who are members of the public. Providing a service to users who are members of public will necessarily entail establishment of an infrastructure and a service provider may on its own establish the entire infrastructure required for providing the service or may avail of the infrastructure of another. However merely because infrastructure of such another is being used to provide service to

users who are members of the public would not make such another also a service provider under the TRAI Act.

25. I must admit that it had troubled me that if the petitioners were to be not considered as service providers and were to be thus outside the ambit of the TRAI Act, it may come in the way of the Government, in case of public emergency or in the interest of public safety, taking over the telegraph/telecommunication services. However, I find the powers of the Government as contained in Section 5 of the Telegraph Act in this regard to be encompassing all licensees, not only those who may be working the telegraph but also those who have established or are maintaining a telegraph. Thus, the Government would be entitled to take over the business also of those who are licenced merely to establish or maintain telegraph and who may not be service provider under the TRAI Act. The IP-I Registration itself is also found to provide for the Government taking over the equipment of the infrastructure provider in public interest in the case of emergency or in public interest. Thus non-inclusion of the infrastructure provider as a service provider would not pose any handicap in that respect also.

26. TRAI not only in the Consultation Paper and Recommendations on Telecommunication Infrastructure Policy aforesaid but also in

Recommendations dated 11th May, 2010 on Spectrum Management and Licensing Framework has clearly admitted the infrastructure providers to be currently not covered under any license but holding only a registration and recommended to bring such infrastructure providers into the fold of licensing regime. Para 2.75 of the said Recommendations further, while noticing the various licenses issued by the Government, expressly notices that Infrastructure Provider Category-I requires registration only and that there is no license fee and only registration fee for such Infrastructure Providers. Rather with respect to IP-I Registration, para 2.96 of the said Recommendations notices that (i) IP-I Registration was opened to private sector with effect from 13th August, 2000 to encourage growth in infrastructure and bandwidth capacity; (ii) all Indian registered companies are eligible to apply; (iii) there is no restriction on foreign equity and number of entrants; (iv) there is no entry fee and no bank guarantee; (v) the applicant company is required to pay Rs. 5000/- as processing fee along with the application; and (vi) the applicant companies are only required to be registered and no licence is issued. In fact the reason given in yet another document of TRAI i.e. Recommendations dated 16th April, 2012 on Guidelines for Unified Licence/Class Licence and Migration of Existing

Licences links recommendations to bring infrastructure providers in the licensing regime to the need to permit hitherto before passive infrastructure providers to provide active infrastructure apparatus/equipment also with a view to enable quicker roll-out of services by the licensees of telecommunication services. However the same axiomatically means that till the infrastructure provided is passive and not active, the infrastructure provider cannot be said to be providing any service to the public or to the user and which alone in the context of TRAI Act is a service provider.

27. I therefore hold the petitioners as infrastructure providers to be not service providers within the meaning of the TRAI Act. Resultantly, TDSAT would not have jurisdiction over disputes between the petitioners on the one hand and respondent on the other hand. Axiomatically, the remedy of arbitration under the Arbitration Act is not ousted.

28. Having held so, it is essential to notice the reasoning which prevailed with the TDSAT in ***Reliance Infratel Ltd.*** supra to hold such infrastructure providers to be service providers within the meaning of Section 2(1)(j) of the TRAI Act. An analysis of the said judgment shows the following reasons to have prevailed with the TDSAT. I have against each of the said reasons also given my own reasons for not agreeing therewith.

(A). The restrictions contained in the Registration Certificate could have been imposed only by way of a license envisaged under proviso to Section 4 of the Telegraph Act and not otherwise.

I have already held above that an infrastructure provider though may be licensed under Section 4(1) of the Telegraph Act to establish and maintain a telegraph, if not licensed to provide telecommunication services to users who are members of the public, would not be a service provider under the TRAI Act. The TDSAT has presumed a licensee under the Telegraph Act and a service provider under the TRAI Act to be one and the same without noticing that only such licensees who are licensed for providing public telecommunication services to users have been made service providers under the TRAI Act. Moreover, restrictions in the Registration Certificate can also be contractual and merely because of the petitioners having agreed to such restrictions, they cannot be made service providers when under the TRAI Act they are not.

(B). The service need not be provided to customers only and it may be provided to other service providers as well.

Undoubtedly so but the said reasoning does not take notice that a licensee included in the definition of a service provider is not merely a licensee who may be licensed to establish, maintain or operate telegraph but also a licensee to provide "public" telecommunication services and telecommunication services itself is defined as services being made available to "users" as distinct from other service providers and by means of transmission or reception of signals and not by providing infrastructure, particularly passive.

(C). The rendition of services can be affected at different stages.

This again loses sight of the service being required to be to the public and to actual users; and,

(D). The need for purposive interpretation of the word 'service provider' in the TRAI Act to bring the infrastructure provider within the regulatory regime of TRAI.

The Supreme Court in ***Nahar Industrial Enterprises Vs. Hong Kong & Shanghai Banking Corporation*** (2009) 8 SCC 646 has held that though the doctrine of purposive construction is a salutary principle, the same cannot be extended to a case which would lead to an anomaly; it can inter-alia be resorted to when difficulty or doubt arises on account of ambiguity and in the guise of purposive interpretation the Courts cannot rewrite a statute. It was yet further held that the Courts cannot legislate and enact the provision either creating or taking away substantial rights by stretching or straining a piece of legislation. Similarly in ***Commissioner of Income Tax, Orissa Vs. N.C. Budharaja & Company*** 1994 Supp (1) SCC 280, it was held that the principle of interpretation which advances the purpose or object underlying the provisions cannot be carried to the extent of doing violence to the plain and simple language used in the enactment in the name of giving effect to the supposed underlying object.

Once it is found that the legislature in the definition of licensee in the TRAI Act has not included all licensees under Section

4(1) of the Telegraph Act but only such licensees who are providing public telecommunication services, inclusion in the name of purposive interpretation of other licensees not providing public telecommunication services to users would in my opinion tantamount to violating the express language of the statute. Surprisingly the TDSAT did not take the view of TRAI or of the Government while forming such an opinion and also did not notice that TRAI in its various Consultation Papers and Recommendations has itself held infrastructure providers to be not licensees and IP-I Registrations to be not licenses under Section 4(1) of the Telegraph Act. The TDSAT thus could not have thrust infrastructure providers into the regulatory regime of TRAI without consulting TRAI and without TRAI itself claiming so. The recommendations of TRAI to bring IP-I registrants in the license regime is indicative of the TRAI, without the same, having no control or regulatory powers over such registrants.

I have also wondered that if the purposive interpretation adopted by TDSAT were to be accepted, then why others who

may be providing various services essential for the licensees under the Telegraph Act, should be excluded. On that parity of reasoning, the companies supplying electricity or manpower or fuel for DG Set to the infrastructure providers and licensees would also become service providers and fall within the ambit of the TRAI and which certainly does not appear to be the position and has not been claimed so by TRAI itself.

29. As far as the Order dated 02.09.2013 supra of the Ld. Arbitrator in the arbitration between Vodafone Spacetel and the respondent is concerned, the same at the outset records 'there is no dispute with respect to the fact that both the parties to the present dispute are / were service providers at the time when the dispute arose and the fact that the respondent subsequently ceased to be a service provider thus would not affect the dispute which arose during the period when the respondent was a service provider' and is thus an order on admissions and can have no persuasive value also. Otherwise the said Order merely follows the judgment of TDSAT in ***Reliance Infratel*** supra.

30. I therefore am unable to accept the objection of the respondent S Tel Pvt. Ltd. that the petitioners as infrastructure providers are service providers within the meaning of Section 2(1)(j) of the TRAI Act and that the disputes

which have arisen between the petitioners and the respondent S Tel Pvt. Ltd. are within the jurisdiction of TDSAT.

31. Once that is so, OMPs No.206/2012, 173/2012 & 312/2012 are held to be maintainable and no further orders are necessary therein, the interim protection sought having already been granted as aforesaid.

32. As far as Arbitration Petitions No.236/2012 & 9/2013 are concerned, the same have been filed upon the failure of the respondent S Tel Pvt. Ltd. to appoint its arbitrator inspite of being called upon to do so and seeking appointment of an arbitrator on behalf of the respondent S Tel Pvt. Ltd.

33. The respondent S Tel Pvt. Ltd. of course did not appoint the arbitrator contending the jurisdiction to be of TDSAT.

34. It cannot be lost sight of that TDSAT in ***Reliance Infratel Ltd.*** had held that notwithstanding the arbitration clause in such agreements, the resolution of disputes between infrastructure provider and a telecom licensee is to be before TDSAT and not by the agreed arbitral tribunal. In the light of the said judgment of TDSAT which held the fray at the time when the respondent S Tel Pvt. Ltd. was called upon to appoint/nominate its arbitrator, the conduct of the respondent S Tel Pvt. Ltd. in not nominating/appointing its arbitrator cannot be found fault with. In this light

of the matter, when this Court has differed with the view of TDSAT, it is not deemed appropriate to thrust an arbitrator on S Tel Pvt. Ltd. without giving them an opportunity to now appoint / nominate an arbitrator.

35. Accordingly, Arbitration Petitions No.236/2012 & 9/2013 are disposed of by granting an opportunity to S Tel Pvt. Ltd. to now within 30 days appoint / nominate its arbitrator. If it fails to do so, the petitioners shall be entitled to apply in these very petitions for appointment of an arbitrator on behalf of the respondent S Tel Pvt. Ltd.

In the circumstances, no costs.

RAJIV SAHAI ENDLAW, J

NOVEMBER 11, 2013
Gsr/pp