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

+ **O.M.P. 1682/2014**

Reserved on: 7th April 2015

Decision on: 30th April 2015

**TELEWINGS COMMUNICATION
SERVICES PVT LTD**

..... Petitioner

Through: Mr. Rajiv Nayar and Mr. Sandeep
Sethi, Senior Advocates with Ms. Padmaja Kaul,
Ms. Richa Kaushal and Mr. Ashish Dholakia,
Advocates.

versus

VIOM NETWORKS LTD

..... Respondent

Through: Mr. Arvind Nigam, Senior Advocate
with Mr. B. Susan and Mr. Jai Mohan,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

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30.04.2015

Background facts

1. The Petitioner, Telewings Communication Services Pvt. Ltd. belongs to the Telenor Group of companies which is stated to be amongst the world's largest telecom operators. The predecessor of the Petitioner was Unitech

Wireless (Tamil Nadu) Pvt. Ltd. which was in the business of providing telecom Services under telecom licenses granted to it by the Department of Telecommunications ('DoT'). Pursuant to the application made by the Petitioner, DoT permitted transfer of resources in six telecom circles from Unitech Wireless to the Petitioner. The Respondent, Viom Networks Ltd. operates as an infrastructure provider ((Category 1(IP-1) and has been issued a certificate of registration of DoT on 30th August 2007. It is stated that ever since Unitech Wireless and later the Petitioner, started providing telecommunication services in terms of the Unified Access Services License ('UASL') issued by the DoT, Viom started providing passive infrastructure. The predecessor of Viom was M/s Wireless II-Info Services Ltd.

Clauses of the Master Services Agreement

2. Unitech Wireless and Viom entered into a Master Infrastructure Services Agreement ('MSA') on 10th February 2009, whereby, Viom agreed to provide passive infrastructure services to the Petitioner on a non-exclusive basis on two types of sites i.e anchor sites and shared sites. It was stated that the MSA had subsequently been amended by the amendment agreement dated 27th April 2009, 27th June 2009 and 13th August 2009. Also relevant is the BSC amendment agreement dated 13th August 2009 and the final terms agreement dated 23rd December 2010 referred to as MOU and the amendment and settlement agreement dated 15th January 2013 ('Settlement Agreement').

3. The MSA defines the term 'site' as: "The Apparatus and the Land (GBT), Building or Structure (RTT)." GBT connotes ground base tower site and RTT connotes roof top tower. 'Apparatus' has been defined as: "Service Provider's passive telecom infrastructure, including antenna carriers (being the masts or towers), space for equipment (being Equipment Cabins, Shelters or Equipment Rooms), civil works for the foundation, support structures, DG sets and air conditioners, all of the type and specification shown on the Standard Site Specification attached as **Appendix A** herein."

4. The expressions 'building, land and structure' have been defined as:

"Building: The part of the building purchased/leased/licensed by Service Provider from the Landlord, the details of which are set forth in each Acquisition Contract.

Land: The part of the land acquired (by purchase, lease, license or otherwise) by Service Provider from the Landlord, the details of which are set forth in each Acquisition Contract.

Structure: An additional construction purchased, leased or licensed by Service Provider from a Landlord, other than the Building or Land, as set forth in any applicable Acquisition Contract for a period of at least twenty (20) years either directly or by way of extensions."

5. The expression telecommunication equipment ('TE') was defined as:

"RF antennae system, microwave or transmission antennae systems, switching equipment base station controller systems, BTS, Tower mounted amplifier (TMA), tower mounted booster (TMB), feeder cables and any other equipment used for wireless communication services that may be installed by the Operator at the Site in accordance with this Master Agreement."

6. Clause 2 defined the scope of agreement wherein 'service provider' i.e. Wireless II Info Services Ltd. (WTTIL) (predecessor of Telecom Infrastructure Ltd.) and Quippo Telecom Infrastructure Ltd. ('QTIL') was to provide the 'operator' i.e., Unitech Wireless (predecessor of the Petitioner) IP Services in all the twenty two telecom circles in India detailed in Appendix E to the agreement. Clause 2.1 of the MSA required the service provider to acquire, build and deliver to the Operator completely built up sites as per operator's requirements for the purpose of installing and operating TE. Those sites were the anchor sites which were to be owned by the service provider, maintained and operated by them. Under Clause 2.3 all anchor sites were to be designated and designed for the incorporation of additional operators as secondary sharers of such sites. The operator was to cooperate with the service provider in the offering of the anchor sites to additional tenants on a sharing basis. Under Clause 2.4, the service provider was also to deliver to the operator 'completely built up and operating shared sites' in terms of the standard site, specifications detailed in Appendix A and D for the purposes of operating the TE.

7. Appendix F to the MSA gave a list of the existing sites. These were divided into sites provided by WTTIL and those by QTIL. The grand total of both sites was 22180. The columns were 'Circle; RFI i.e., ready for installation, WIP i.e. work in progress, SAM in process. The detailed list of the sites was further attached to the MSA. In terms of the first amendment to the MSA entered into between the parties on 10th February 2009, certain

amendments were carried out in Clause 2.8.2. By the second amendment on 27th June 2009, certain further amendments were carried out.

The dispute between the parties

8. The genesis of the disputes between the parties was an order dated 2nd February 2012 passed by the Supreme Court in Writ Petition No. 423 of 2010 in terms of which the Petitioner's UASL was cancelled. As a result the Petitioner sought to exit from about 11000 sites in 14 telecom circles even prior to the expiry of the lock-in period stipulated in the MSA for such sites and without payment of the exit fees which the Petitioner was liable to pay upon premature exit in terms of Clause 10.6 of the MSA. After the cancellation of its UASL, the Petitioner chose to bid only in six telecom circles in the fresh auction for the spectrum. It decided to wind up its operations in the remaining circles. According to Viom it spent approximately Rs. 1183 crores in setting up the sites to provide passive infrastructure services to the Petitioner across India. As a result of the above development, Viom claims to have suffered huge losses. The dispute between the parties was settled by a settlement agreement dated 15th January 2013 which was also incorporated in the MSA.

9. Viom states that after the fresh auction of the spectrum in November 2013, it began providing IP services to the Petitioner in six telecom circles. According to Viom, the Petitioner continued to breach its contractual payment obligations and even failed to reimburse the Respondent for power and fuel costs. When the Respondent expressed its inability to service the

expenses incurred towards power and fuel charges for the sites, the Petitioner filed OMP No. 460 of 2014 seeking directions to restrain the Respondent from causing disruption of services. By an order dated 1st May 2014 in the said petition, the High Court referred the disputes to arbitration which is still pending.

10. On 13th May 2013, the Respondent informed the Petitioner that it was not possible for the Respondent to continue their agreement with the third party IP-1 companies. The Respondent requested the Petitioner to directly enter into a contract with third party IP-1 companies for the third party sites. According to the Respondent it made various efforts to facilitate the negotiations between the Petitioner and third party IP-1 companies but was unsuccessful. By an email dated 23rd December 2014, the Respondent provided extension of the deadline for withdrawal of the services of the third party sites till 31st January 2015.

11. According to the Petitioner Viom agreed to provide passive infrastructure services of the sites whether owned by it or not. In other words, the sites included sites owned by the Respondent and sites procured by the Respondent from other IP service providers, which the Petitioner termed as 'Third Party Sites'. According to the Petitioner, Clauses 2.1 and 2.2 spell out the obligations of the Respondent in relation to the provisions of both types of sites, i.e., (anchor sites) those owned by the Respondent and (shared sites) those procured from other IP service provider, which includes

Thirty Party Sites. The Petitioner states that the subject matter of the present dispute between the parties concerns 372 such Third Party Sites.

12. The Petitioner states that it was shocked and dismayed to receive a letter dated 23rd December 2013 from Viom which stated that it would be unable to continue to provide services from Third Party Sites with effect from 31st January 2014. The Petitioner by its reply dated 3rd January 2014 denied that there was any regulatory requirement which necessitated Viom having to Respondent to discontinue services at Third Party Sites. The case of the Petitioner is that it was serving around 33 million subscribers and discontinuation of the services at Third Party Sites by Viom would have an adverse impact on the business of the Petitioner causing it huge economic and reputational loss.

13. The Petitioner states that it received an email dated 15th January 2014 from one of the third party service provider - Tower Vision - informing the Petitioner that Viom Respondent had terminated its agreement with Tower Vision. Tower Vision expressed its willingness to have direct arrangement in respect of the said sites with the Petitioner. Meanwhile, Viom itself extended the deadline till 30th April 2014.

14. It is stated that during the period of March-early April 2014 both the parties had numerous discussions in relation to the issue of third party sites but no agreement could be reached. On 29th November 2014, Viom informed the Petitioner that its lock-in period on 89 sites was expiring on

30th November 2014 and accordingly it would be discontinuing its services on the said sites by 28th December 2014. On 4th December 2014, Viom sent another letter informing the Petitioner that it would discontinue the services on 39 sites in respect of which the lock-in period was expiring.

15. It is stated that further negotiations between the parties did not meet with any success. It is in the above circumstances, that the present petition was filed seeking, *inter alia*, the relief of restraining Viom from terminating any sites “whether provided directly or through a third party vendor under the MSA or causing, directly "or indirectly, any disruption or interference in the services being provided to the Petitioner”.

Viom's case

16. The case of Viom on the other hand is that the land, building and structure in relation to the Third Party Sites are not owned /leased/licensed by it. They were provided by the Third Party IP-1 companies themselves. Contracts had been entered into between Viom and the Third Party IP-1 companies in relation to such third party sites. Those contracts did not refer to any right of Viom to the land, building, and structure. Therefore, the third party sites could not be considered to be ‘sites’ under the MSA. Consequently they were outside the scope of Clause 18 of the MSA which contains the arbitration agreement. Viom's further case is that while the Petitioner has been paying the Respondent a flat fee of Rs. 25,000 per site per month for the Third Party Sites, Viom is required to pay the Third Party

IP-1 Companies higher rates for some of the Third Party Sites. Not willing to bear the burden of the losses, Viom sought an exit and insisted that the Petitioner should itself enter into contracts with the Third Part IP-1 companies.

17. An alternative argument of Viom Respondent is that the agreements entered into between it and the third party IP-1 companies are *void ab initio* as they are contrary to the terms of the certificate of registration issued to IP-1 companies by the DoT in terms of which they can provide services only to licensees under Section 4 of the Indian Telegraph Act, 1885 and not other IP-1 companies.

18. According to Viom, apart from the fact that any dispute in relation to the provision of service on third party sites is outside the purview of MSA and therefore not arbitrable, even on merits there was no obligation on it to continue to provide third party services. It had in fact facilitated discussions between the Petitioner and the third party IP-1 companies for possibility of entering into direct arrangements. Moreover, the third party IP-1 companies were not made parties to the present petition and therefore no direction not to discontinue the services on third party sites could be issued.

Petitioner's supplementary affidavit

19. Pursuant to an order passed by this Court on 27th January 2015, a supplementary affidavit was filed by the Petitioner on 3rd March 2015.

According to the Petitioner at the time of procurement of every site, including each third party site, both the parties strictly adhered to the procedure laid down in the MSA and executed the handover protocols in the format given under Appendix B of the MSA. It is stated that Viom has executed such handover protocols in relation to each Third Party Site in its capacity as service provider. According to the Petitioner “such conduct of the Respondent clearly establishes that in the deliveries of all these ‘third party sites’ to the Petitioner, Viom has treated these sites as part of the MSA and hence followed all the procedures contemplated under the MSA. It is stated that the handover protocols in relation to the Third Party Sites are identical to those executed in relation to the sites belonging to Viom itself.

20. Secondly, it is pointed out that under the MSA, the Petitioner is required to pay Viom the infrastructure provisioning fees (‘IP Fees’) and reimburse the actual costs incurred by it towards power and fuel charges (‘P&F charges’). It is stated that since the delivery of such Third Party Sites to the Petitioner in 2009-2010, Viom has been regularly raising invoices both towards IP Fees and P&F charges in the form contemplated under the MSA. It is stated that a mere glance at any of the invoices raised by Viom would show that all unpaid invoices beyond the due date would attract interest for late payment in terms of the MSA. This demonstrated that in addition to setting up of the Third Party Sites, Viom had raised invoices which were no different from the invoices for its own sites. Copies of the sample invoices of IP Fees for such Third Party Sites have been enclosed with the supplementary affidavit. It is also stated that when Viom failed to achieve uptime SLA, same penalties were imposed/paid regardless of whether the

site was a Third Party Site. It is accordingly contended that since the inception of the MSA “both parties have, by conduct, treated all sites, including the ‘third party site’ as provisioned under the MSA and that Viom “at this belated stage is now stopped from stating otherwise”.

Decision of the Court

21. As far as the clauses in the MSA are concerned they have to be taken as they read. The MSA contemplates two kinds of sites; the anchor sites (in terms of Clause 2.1 of the MSA) and the shared sites (in terms of Clause 2.4 of the MSA). There is no expression ‘Third Party Sites’ used or defined in the MSA.

22. What is also evident is that while a Third Party Site could be a shared site there exists a distinction between the two. Mr. Arvind Nigam, learned senior counsel appearing for Viom, sought to explain that a shared site is one which is used by more than one telecom service operator but is still under the control of Viom. On the other hand, as far as a Third Party Site is concerned, Viom Respondent has only individual arrangements/agreements and in turn provides services to the Petitioner for a consideration.

23. While Mr. Rajiv Nayar, learned senior counsel appearing for the Petitioner does not dispute that in relation to the Third Party Sites Viom has individual arrangements with other IP service providers, he states that Viom cannot during the pendency of those contracts with the other IP service

providers wriggle out of the MSA only because the differential cost is not paid to Viom by the Petitioner. In other words, Viom can at best claim the differential amount in the arbitral proceedings but cannot stop providing the services. Mr. Nayar, however, added that as of date none of the IP service providers have terminated their contracts with Viom. As and when they did that, then to that extent the Petitioner would not insist that Viom should continue to provide services on such Third Party Sites. In that event the Petitioner would contemplate separately negotiating with the third party IP-1 service providers. Mr. Nayar, sought to demonstrate that amongst the sites listed in the appendix to the MSA there were Third Party Sites and therefore they did form part of the MSA.

24. The question whether the 372 Third Party Sites in respect of which Viom sought to discontinue services form part of the MSA goes to the root of the maintainability of the present petition itself. This is because if Viom is right in its contention that these sites do not form part of the MSA, then the disputes in relation to such sites cannot be the subject matter of the petition under Section 9 of the Act. In that event the arbitration clause in the MSA would not apply to disputes concerning the Third Party Sites.

25. The Petitioner also appears to have acknowledged that Viom does have separate arrangements with third parties. An email dated 27th January 2014 of the Petitioner appears to indicate that the Petitioner expressed its readiness to consider moving the third party sites “under direct arrangement with respective Third Parties”. The Petitioner did assert that Viom's

obligation was “equally applicable to sites provided directly by VIOM and shared sites procured from third parties”.

26. The notes of the meeting held on 12th February 2014 indicates that on Third Party sites there was a separate discussion. The minutes of the meeting held on 18th February 2014 identifies Third Party Sites as a separate topic of discussion. It states “Uninor will share the tentative meeting schedule with 3rd parties in next week so that VIOM can organize the same”. The minutes of the meeting dated 26th February 2014 held between the parties shows that there was a separate discussion on Third Party Sites with both parties agreeing "to align on schedule by 28th February at least to start with ATC and other small IP's first".

27. The definition of 'shared sites' under the MSA refers to an existing site of the service provider “that was offered to the Operator as a secondary tenant and on sharing basis”. Reading the clauses of the MSA together with the exchange of correspondence between the parties and the minutes of their meetings, it is *prima facie* difficult to accept the plea of the Petitioner that the expression “an existing site of service provider” includes Third Party Sites which are not actually owned or licensed by Viom. The case of Viom that it entered into arrangements with third party IP-1 companies only to enable the Petitioner to fulfil its obligations under the USAL issued to it by DoT seems to be borne out from the correspondence exchanged between the parties. Viom's plea that it has become commercially unviable for it to continue to provide services on Third Party Sites cannot be said to be

improbable. By accepting the plea of the Petitioner, the Court would in effect be overlooking the express mandate of Section 18 (c) of the Specific Relief Act, 1963. It would tantamount to enforcing a contractual relationship which by its very nature can be terminated. The loss suffered by the Petitioner as a result of the non-availability of the services on Third Party Sites could be claimed by it as damages.

28. The Court is not *prima facie* satisfied from the pleadings and documents placed on record that the 372 Third Party Sites form part of the sites listed in the Appendices to the MSA. The invoices enclosed with the Petitioner's supplementary affidavit show that the amount charged by Viom for Third Party Sites in the invoices were on the same basis as the rates charged for anchor and shared sites. However, as explained by Viom in its reply, a standard format of invoice and billing may have been adopted by it even in respect of the Third Party Sites. However, that did not *per se* mean that the Third Party Sites formed part of the MSA. Consequently, the disputes in respect of Third Part Sites does not appear to be arbitrable.

29. The Court also finds merit in the submission of Viom that in terms of the conditions of registration, Viom cannot avail the services of another IP service provider and run the risk of violating the conditions of registration. The Court would not like to pass an order which may compel a party to not to adhere to its terms of license or registration.

30. The Court has also not been shown why the Petitioner is precluded from entering into direct arrangements with the Third Party service providers. As already noticed that if, as a result of such separate arrangements the Petitioner has to incur losses, that it can certainly seek to recover it in the litigation likely to ensue between the parties.

31. For all the above reasons the Court is not satisfied that the Petitioner has made out a prima facie case to seek continuation of the interim relief granted to it in the present petition.

32. It may be noticed at this stage that at the hearing on 24th December 2014, Viom stated that its statement as contained in the email dated 23rd December 2014 that it would provide services on the Third Party Sites up to 30th January 2015 would continue. That assurance has been continued by the subsequent orders dated 27th January 2015, 5th March 2015 and 7th April 2015.

33. In the circumstances, the Court directs that the said statement made on behalf of Viom will continue till 31st May 2015 to enable the Petitioner in the meanwhile to make alternative arrangements.

34. All other contentions of the parties are left open to be adjudicated in appropriate proceedings. It is clarified that the views expressed by the Court

in the present order are *prima facie* and shall not affect the independent decision to be arrived at on the issues raised in the arbitration proceedings.

35. The petition is dismissed but with no order as to costs.

S. MURALIDHAR, J

APRIL 30, 2015
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