

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

% *Judgment reserved on: 27th April, 2016*
Judgment pronounced on : 8th July, 2016

+ **O.M.P. 472/2014**

BHARTI INFRATEL LIMITED Petitioner
Through Mr.Sandeep Sethi, Sr. Adv. with
Mr.P.S.Bindra, Adv.

versus

SISTEMA SHYAM TELE SERVICES LIMITED Respondent
Through Mr.Akhil Sibal, with Mr.Shivek
Trehan, Ms.Fareha Ahmad Khan,
Mr.Rohan Sharma and
Mr.Yogendra Misra, Advs.

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CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this common order, I propose to decide both the abovementioned petitions which are between the same parties. Most of the facts and legal issues are also common.

2. As disputes arose between the parties with regard to payment of charges claimed by the petitioner who filed the first petition being OMP No.472/2014 wherein by order dated 2nd May, 2014 (while issuing notice), as agreed by the respondent, the following order was passed:-

“Issue notice. Counsel appearing on behalf of the respondent accepts notice. The petitioner at this stage is pressing prayers (a) and (b) of the petition. As far as prayer (a) is concerned, without prejudice, the respondent has no objection. Both the parties have made their submissions for some time. Reply be filed by the respondent within two weeks. List on 30th May, 2014.

As agreed by the respondent, the respondent shall commence removing its Active Infrastructure including but not limited to microwave/GSM antennae and Base Transceiver Station equipments from 5th May, 2014 and after removal of the same, the respondent shall not dispose of the said equipments till the next date of hearing.”

3. The Agreement provides arbitration Clause. It is admitted by both the parties that recently Arbitral Tribunal has been constituted.

4. In 2016, it has come to the notice of the petitioner that a scheme under Sections 391 to 394 of the Companies Act, 1956 has been filed for the demerger and vesting of undertakings of the respondent herein to Reliance Communications Limited (the Transferee Company). It is submitted that the said scheme is unenforceable and non-implementable, inasmuch as though various assets and liabilities of the respondent are proposed to be transferred to Reliance Communications Limited, the scheme clearly sets out that no pending litigation against the respondent is proposed to be transferred to Reliance Communications Limited, which would make any award/decree passed against the respondent incapable of being executed against them, in the event that the said Scheme is sanctioned. As petitioner, being an unsecured creditor of the respondent, which is the

Transferor Company, has already filed its objections to the said Scheme in the court convened meeting of the unsecured creditors.

5. Before dealing with the rival submissions of the parties, brief facts are necessary to be narrated as per pleadings of the parties and as per list of dates and event supplied.

6. In the year 2008, the Department of Telecommunications (DoT), granted 21 Unified Access Service License (UASL) to the respondent. In view therefore, the parties entered into a Master Services Agreement dated 1st April, 2008 (the MSA) wherein it was agreed that the petitioner shall provide the respondent with passive telecom infrastructure facilities and services in certain telecom circles of India. The performance of the MSA was co-terminus with the licenses issued by the DoT.

7. In the judgment and order dated 2nd February, 2012 in **Centre For Public Interest Litigation v. Union of India** (2G Judgment) passed in Writ Petition (Civil) No. 423/2010, the Supreme Court declared the licenses granted to the private operators on or after 10th January, 2008 (including those granted to the respondent) and the subsequent allocation of spectrum to the licensees as illegal and quashed the same.

8. Therefore, the respondent by letter dated 21st February, 2013 informed to the petitioner that in view of judgment delivered by Supreme Court, 21 unified access service licenses of the respondent had been quashed and it was committed to operate in India and desirous of participating in forthcoming Spectrum Auction of 800 MHZ Band being conducted by Government of India in service areas of Delhi, Gujarat, Karnataka, Kolkata, Kerala, Mumbai, rest of Maharashtra, rest of West Bengal, Tamil Nadu, UP East, UP West

(Priority Service Areas), however, by way of subsequent orders of Supreme Court it shall not be able to continue its operation in 10 service areas with effect from 23rd March, 2013. As per the respondent it was constrained to close down its operation in unviable service areas with effect from the aforesaid date.

9. Although the MSA and the service contracts thereunder stood automatically terminated on 2nd February, 2012 pursuant to the judgement and order dated 2nd February, 2012, the respondent, by way of abundant caution, issued a notice of termination dated 21st March, 2013.

10. The aforesaid letter of the respondent was replied by the petitioner vide letter dated 8th March, 2013 stating that lock in/exit charges were payable and quashing of licenses could not be construed as change of law and Clause 5.3.4 of the Agreement required the respondent to obtain, maintain and comply with all applicable laws and applicable permit including any sharing operators license and it was the respondent who had failed to do so. It was also stated that it would not be a force majeure situation and the respondent was liable to pay the lock in/exit amount.

11. Thereafter, the respondent sent letter dated 20th March, 2013 to the petitioner reiterating what had been stated by it in its earlier letter dated 21st February, 2013 requiring the petitioner to refund security deposit and provide unhindered and unrestricted access to the respondent and remove all its equipment installed at site.

The petitioner vide notice dated 27th April, 2013 sent through its advocate brought to the notice of the respondent that it was liable to pay to the petitioner exit outstanding charges.

12. By letter dated 29th April, 2013, the respondent replied to the letter dated 8th March, 2013 of the petitioner thereby refuting the contents of the said letter. It is stated that license of the respondent for UP West was also affected by the Judgment of Supreme Court but had participated in rebidding process and got a fresh licence.

13. In reply to the first petition, the respondent raised its objection that the petitioner has not taken any steps to initiate the dispute resolution mechanism, however, the petitioner vide its communication dated 27th May, 2014, invoked arbitration and appointed its nominee Arbitrator. The respondent, vide its communication dated 4th July, 2014, drew the attention of the petitioner to the fact that before invocation of arbitration, the parties must first attempt to resolve its disputes through informal discussions as mandatorily provided in the Dispute Resolution Mechanism of the MSA. Accordingly, the respondent appointed Mr. Vinay Mittal, Relationship Manager of the respondent to initiate informal discussions with the petitioner. On the failure of the parties to resolve its disputes through informal discussions held between July 2014 and January 2015, the respondent immediately appointed its nominee Arbitrator vide its communication dated 17th January, 2015.

14. It is alleged by the respondent that no steps were thereafter, taken by the petitioner for 11 months as alleged by the respondent to ensure the constitution of the Arbitral Tribunal for adjudication of its purported claim of Exit Charges. However, the Arbitral Tribunal has now been constituted on 24th December, 2015.

15. In the first petition, it is the case of the petitioner that the respondent is liable to pay exit-amount in view of the early termination of the Service Contracts executed under the MSA. The

petitioner has filed two petitions before this Court under Section 9 of the Arbitration and Conciliation Act, 1996. In OMP No. 472 of 2014 filed on 29th April, 2014, the petitioner has sought the following reliefs :

- a) Direct the respondent to remove its Active Infrastructure Equipment from 447 sites of the petitioner in telecom circles of Bihar, Haryana, Himachal Pradesh, North East, Uttar Pradesh East.
- b) Restraining the respondent from selling, alienating or creating third party rights over its Active Infrastructure Equipment.
- c) Direct the respondent to deposit a sum of Rs.67,57,13,820/- [Principal exit-amount = Rs. 58,50,34,988/- + Interest = Rs. 9,06,78,832/].

16. As far as relief a) and b) are concerned, on the basis of statement made on 2nd May, 2014 the consent order has already been passed and the respondent during argument has raised no objection if the same may continue without prejudice during the pendency of arbitration proceeding. The main relief is now sought by the petitioner to seek deposit of amount as mentioned in prayer (c).

The amount of security of which is sought by the petitioner, is exclusively towards exit charges. The prayer made by the petitioner with respect to furnishing security is prayer (c) (in OMP No. 472 of 2014) wherein the petitioner has prayed for a deposit of Rs. 67,57,13,820/-[Principal Exit Amount = Rs. 58,50,34,988/- + Interest = Rs.9,06,78,832/-] by the respondent.

17. In the second petition filed by the petitioner, being OMP (I) (COMM.) No.34 of 2016 [filed on 29th January, 2016], a single relief

has been sought on the ground that the respondent is disposing off its Wireless Business to Reliance Communications Limited and restrain order be passed.

18. The petitioner in the second petition, in fact, sought only restraint order on the transfer of the business of the respondent to RCOM. There is no prayer seeking security of amount in dispute in the second petition.

19. The objection is raised by the respondent in the second petition that in view of Arbitration and Conciliation (Amendment) Act, 2015 Section 9(3) mandates that once the arbitral tribunal has been constituted, the court shall not entertain application unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. There is a force in the submission of the learned counsel for the petitioner that since the respondent has taken the step of assignment, in case the present petition on urgent basis is not disposed of on merit. The relief sought in the second petition would become infructuous. It is submitted that if any fresh application under Section 17 is filed, by the time all formalities could be completed, the purpose of filing the petition would be defeated. The other reason is given that since the first petition was filed in 2014, thus the amended provision of Section 9(3) would not be applicable as the same came into force in October, 2015. The facts are common and first petition was filed prior to the amendment.

20. In view of the circumstances explained coupled with the fact that this objection is taken in the written submission, no arguments were addressed by both the parties when the matters were heard, therefore, I am inclined to decide the petitions within the scope of Section 9 of the unamended Act, due to the reason that the first

petition was filed prior to the amendment. Even after small discussion, both the parties were ready to address their arguments on merit. As the Arbitral Tribunal has already been constituted, the final conclusion of the disputes cannot be arrived. The claims raised by the petitioners are specifically denied by the respondents. At this stage, only prima facie view is to be taken as to whether the petitioner is entitled for any relief in view of facts, by granting any interim protection if necessary which is just and convenient.

21. On merit the case of petitioner is that as per such sharing and access to Passive Infrastructure, the respondent placed its active equipments on the towers of the petitioner on its Sites in the respective Circles. In each of such Sites, the respondent has placed active telecom infrastructure viz. microwave/GSM equipment and Base Transceiver Station ("BTS") equipments which is also known as the radio equipment. The BTS provides base station radio transmission and reception.

21.1 At optimum usage, the respondent had placed the said microwave equipments and BTS equipments at approximately 447 Sites of the Petitioner in the relevant circles

"Active Infrastructure" has been defined in Clause 1.1 of the MSA as under:

"Active Infrastructure" includes base terminal station equipment, associated antennae, and other requisite equipment and associated civil and electrical works to provide telecommunications services by the Sharing Operator at a telecommunications site except backhaul and transmission connectivity to the Sharing Operator's network and also Passive Infrastructure ..."

21.2 For such sharing and access to Passive Infrastructure, the respondent was under the obligation to pay charges as per Clause 6

read with Schedule 3 of the MSA. It was further agreed under Clause 6.2 of the MSA that the respondent would pay charges for using the Passive Infrastructure within fifteen days from the receipt of an invoice. Further, Clause 6.3 of the MSA provides that if any party has not paid any invoices, by their due date, of such unpaid sums will accrue interest at a rate equal to prevailing State Bank of India Prime Lending Rate.

21.3 It is stated that Clause 11 of the agreement provide for termination and Clause 12 provide consequences of such termination. Relevant Clauses 11 and 12 of the Agreement have been reproduced here as under:-

"11. Term and Termination

11.1 Term

Neither Party shall have the right to terminate the Agreement, except as set out in this Clause 11. The Parties shall review and discuss the terms and conditions of this Agreement on an annual basis, commencing from the first anniversary of the Effective Date.

11.2 Termination by either Party

Either Party may terminate this Agreement by written notice to the other Party at any time following:

- 11.2.1 the expiry or termination of all applicable Service Contracts;
- 11.2.2 the occurrence of an Insolvency Event in respect of the other Party; or
- 11.2.3 a change of Law or notification of any Government Authority (which has not been stayed by a court of law or by a competent authority within 30 days of its occurrence) which necessarily renders the existence or performance of this Agreement void or invalid. "

"12. Consequences of Termination

- 12.1 Upon expiry or termination of this Agreement for whatever reason, all Service Contracts granted hereunder shall immediately terminate and the Sharing Operator shall comply with its relevant obligations in relation to the termination of such Service Contracts in accordance with the terms of each Service Contract.
- 12.2 Any termination of this Agreement shall be without prejudice to either Party's rights to recover any sums payable or due by the other or to any rights accrued by one Party to the other in accordance with this Agreement on or prior to the date of such termination.
- 12.3 The provisions of this Clause 12 (Consequences of Termination) and Clauses 19 (Confidentiality), 20 (Dispute Resolution Procedure), 22.8 (Notices), 22.9 (Invalidity) and 22.13 (Governing Law) shall continue in full force and effect notwithstanding the termination or expiry of this Agreement. "

21.4 The contract further provides that in case the respondent terminates the agreement prior to expiry of its minimum fixed term, it shall be liable to pay to the petitioner Net Present Value (NPV) of the entire unpaid amount for the remainder of the term as per amount of respective service contract. Schedule 5 has been reproduced here as under:

Schedule 5

Standard Site Access Terms

1. Sharing Operator Exit.

- 1.1 In relation to any Service Contract with a specified term therein, the Sharing Operator may terminate the Service Contract prior to expiration of its minimum fixed term, provided that upon such termination, the Sharing Operator will pay to Infratel the Net Present Value (NPV) of the entire unpaid amount for the remainder of the term as per the amount of respective Service Contract. The said NPV shall be calculated at a discount rate of 12% per annum.

- 1.2 The amount payable to Infratel by the Sharing Operator upon such termination under paragraph 1.1 above shall be referred to herein as the "Exit Amount".
- 1.3 For the avoidance of doubt; while calculating the Exit Amount under paragraph 1.1 above, the annual escalation under paragraph 2.5.1 of Schedule 3 (Charges) for the remainder of the term shall be taken into account.
- 1.4 The consolidation of two or more operators at a Site into a single operator through any merger, acquisition, scheme of arrangement etc. shall amount to a termination of the Service Contract in respect of any operator that ceases to exist and the Sharing Operator that so ceases to exist {or its successor-in-interest} shall be liable to pay to Infratel the Exist Amount. Where the surviving operator continues to use any equipment of the operator who has ceased to exist at the site, such equipment shall be subject to excess charges, as applicable, in accordance with Schedule 3 (Charges)."

22. It is stated by the petitioner that the MSA does not have any fixed term and every Service Contract has mutually agreed term which cannot be less than 5 years and in the unlikely event, if any site is terminated prior to the agreed term, the respondent is liable to pay to the petitioner Net Present Value (NPV) of the entire unpaid amount for the remainder of the term as per amount of respective site. The term of 5 years as envisaged in clause 18.1 of MSA only stipulate the minimum term which the sharing operator like respondent has to compulsorily agree, however, the parties are at liberty to agree for any term more than five years. The charges shall vary according to the period agreed for by the parties. It is stated that charges for using the infrastructure of the petitioner to be paid by the respondent are provided in Schedule-3. Clause 2 of the aforesaid Schedule sets out the standard rate be paid by the respondent to the petitioner for using

petitioner's Infrastructure. Clause 2.4 deals with term based adjustment. The same provides that in case the term of the service contract is 7 years or more the respondent would pay standard rate whereas if the term is 5 years or more but less than 7 years, the respondent would pay 8% over and above the standard rate.

Relevant clause 2.4.1 has been reproduced here as under:-

"2.4.1 The Base Rate for each Site shall be subject to an adjustment depending on the term of the Service Contract in respect of that Site. The adjustment shall be determined in accordance with the table set out below:-

Term of the Service Contract	Upward Adjustment on Base Rate
7 years or more	0%
5 years or more but less than 7 years.	8%

23. It is contended that the petitioner has raised invoices charging the respondent on the basis of 10 year term and in few cases 15 years. It is argued on behalf of the petitioner that the same was accepted by the respondent without any protest or demur and paid every month over the years. It continued to pay lesser charges on the basis of term agreed for each site being more than 7 years. As such it paid lesser charges than it would have paid, had the term agreed was between 5 years to 7 years. The respondent is liable to make payment of exit charges for the remainder term as agreed upon for each exited site. It does not lie in the mouth of the respondent to contend that the term was 5 years unilaterally for each site at this stage relying on clause 18 of MSA, which is dis-conjunctive in nature that the period cannot be less than 5 years if no mutually agreed period is specified and if parties agree for any specific period then it

shall be that period which shall be considered for calculating the exit-amount.

24. The petitioner submits that the 2G Judgment did not constitute a Force Majeure event as per the MSA. The petitioner stated, in arguendo, that in case of a force majeure situation the Sharing Operator was liable to use all reasonable endeavours to mitigate the consequence of the Force Majeure event. However, the respondent did not take adequate steps to maintain their licences. In fact the respondent chose not to bid in the auctions that took place in November 2012 and March 2013 for licences for the Allotted Circles. Further, the respondent continued with its operations in some areas clearly reflecting its malafide to use the 2G Judgment to exit from certain concerned circles. Therefore, the respondent remained liable to pay the exit-amount as per the terms of the MSA due to default on its part to maintain the obligations under the MSA.

25. It is submitted that subsequently on 11th March, 2013, the respondent obtained spectrum in circles including Delhi, Kolkata, Gujarat, Karnataka, Tamil Nadu, Kerala, Uttar Pradesh (West) and West Bengal. The operations in Rajasthan were not affected due to the 2G Judgment. While bidding for spectrum in the auctions, the CEO's message, which is part of Annual Report 2013 of respondent would note that MTS India considered a range of variables including spectrum pricing, number of carrier slots available, levels of competition, future data potential in the circles etc. Based on such criteria, the Company also decided not to bid for Mumbai, Maharashtra and UP East circles and would be immediately initiating the process to inform its customers in 3 circles to port out to other telecom operators of their choice. Thus, it is evident from the above selective closure of

operations in certain circles is a careful and considered business decision of the respondent, post weighing all pros and cons, and therefore, it not the result of force majeure event.

26. It is stated by the petitioner that on 21st March, 2013, the respondent issued another letter stating that the performance of the MSA became “unlawful and inherently impossible” by virtue of the 2G Judgment as a result the MSA automatically stood frustrated and terminated. The respondent invoking Clause 11.2.3 of the MSA, terminated the MSA itself due to a purported change in law which rendered the existence or performance of the MSA void or invalid. Further, the respondent also invoking Clause 18.3.2 of the MSA contended that it was entitled to terminate the Service Contracts without payment of the exit-amount as per Clause 18.3.2 due to withdrawal/quashing of the licences under the 2G Judgment. The respondent reiterated that with the passing of the 2G Judgment, the MSA stood terminated and called upon the petitioner to refund the security deposit equivalent to one month’s fees and permit unhindered access to Sites to remove all equipment installed within 60 days.

27. In a nut shell, it is stated by the petitioner that once the business of the respondent is being transferred to the RCOM, the award if passed in favour of the petitioner by the Arbitral Tribunal, the petitioner may not be able to recover the award amount and the same would become as paper decree. Therefore, the interim protection is necessary at this stage to deposit the said amount by the respondent No.1 as per details mentioned.

28. It is the main case in the second petition that the transfer of liability by the respondent in favour of Reliance Communications Limited as provisioned under Serial No.6 in Part 2 of Schedule 1 along

with Annexure B thereto is in violation of Clause 21.1.1 of the MSA dated 1st April, 2008. The transfer of liability, it is alleged, is in derogation of the condition for assignment as provided under the MSA. The said clause referred reads as under:-

"21.1 Assignment

21.1.1 Subject to Clause 21.1.2, neither Party shall assign, novate or otherwise transfer any of its rights or obligations under this Agreement to any person without the prior written consent of the other Party, such consent not to be unreasonably withheld or delayed;..." [emphasis supplied]

29. Learned Senior counsel appearing on behalf of the petitioner has referred various decisions however, the main reliance in support of his argument is on two decisions rendered by the Division Bench of this Court, counsel submits that after the licenses of telecom operators were cancelled by Supreme Court similar disputes also arose between the other telecom companies and service providers. The Division Bench of this Court in FAO (OS) No.613/2012 and FAO (OS) No.614/2012 both titled "*Unitech Wireless (Tamil Nadu) Pvt. Ltd. v. Viom Networks Ltd. & Anr.*" and "*Telewings Communication Services v. Viom Networks Ltd & Anr.*" in similar facts directed Unitech to keep aside Rs.500 Crores in Escrow account out of approximately Rs.4000 Crores it was to receive by transferring its assets to Telewing.

Similarly, in an appeal being FAO (OS) No.97/2013 titled "*Indus Towers Ltd. v. Unitech Wireless (Tamil Nadu) Pvt. Ltd. & Anr.*" Division Bench of this Court adopting the aforesaid order in addition to restraining the respondent from selling the equipment removed, and also directed it to give cash security to the appellant by putting in Escrow Account 20% of the amount claimed.

30. It is stated by the learned Senior counsel appearing on behalf of the petitioner that the exit amount now payable by the respondent to the petitioner is Rs.114 Crores comprising of principal and with interest upto 22nd March, 2016. The said amount along with supporting documents for each site has been claimed before the Arbitral Tribunal. However, earlier before this Court the amount has been mentioned as Rs.82,10,00,447/- with interest upto 31st December, 2015 which is increasing every day on account of interest. The amount referred is calculated strictly in terms of the agreement. The respondent has calculated lesser amount on the ground that the term of the agreement was 5 years and exit amount is payable taking the said term into account. The agreement does not have a specific term. However, service contract relating to each term has a term which is mutually agreed between the parties (Clause 18.1). The said clause further provides that the term cannot be less than 5 years. The same does not mean that the lock in period for calculating the exit amount would be 5 years. The same is clear from Clause 18.2 of the agreement which requires the respondent to pay exit amount specified in para 1 of Schedule-5 upon termination of the service contract. Para 1 of Schedule 5 provides that the term for calculating exit amount shall be based on the term specified in the service contract agreed between the parties and it shall not be limited to 5 years as claimed by the respondent as the same was never proposed or agreed upon by either party. Therefore, after the conclusion of hearing the counsel for the petitioner submits that without prejudice the respondent be directed at least 20% of the award due in terms of the two decisions of the Division Bench to secure the said amount and for remaining

claim, parties be asked to raise their respective claims before the Arbitral Tribunal.

31. The case of the respondent is that as per MSA dated 25th February, 2009 no Exit Amounts are due to the petitioner who is not liable to pay the Exit Amount.

32. Exit Amount is payable in the event of termination of a service contract under specific grounds as stipulated in Schedule 5 Part 2 read with clause 18.2 of MSA.

The three grounds which are as follows:-

- i) Voluntary termination by sharing operator i.e. the respondent.
- ii) Termination on account of insolvency event with respect to the sharing operator i.e. the respondent
- iii) Termination by petitioner on account of the sharing operator being in material default of its obligation under the service contract.

33. The entire case of the respondent is that the termination of the service contracts by the respondent is on account of "change of law" which is neither voluntary nor a result of the respondent being in material default of its obligations. Admittedly, no insolvency event has occurred either. Termination of service contracts has been on the ground of "change of law" or decision of any Government Authority. Government Authority and law have been expressly defined at clause 1.1 of the Agreement which includes an order or judgment of Court.

34. It is stated by the respondent that the judgment dated 2nd February, 2012 passed in WP(Civil) No.423/2010, whereby the licenses granted in 2008 stood cancelled, amounts to a "change of law" under Clause 11.2.3. of the MSA within the meaning of Schedule

5 Part 2 and termination of the service contracts upon such "change of law" does not attract levy of Exit Amounts.

35. It is argued on behalf of the respondent that the petitioner has failed to *prima facie* establish its entitlement to payment of Exit Amount on the ground of the early termination of the Service Contracts under the MSA by the respondent.

36. Counsel for the respondent submits that a bare perusal of Clause 21.1.1 would reveal that the said clause for assignment requiring prior consent is only applicable in a situation where either party seeks to transfer its rights or obligations in the performance of the MSA to any third person. The aforesaid clause remains relevant only till such time as the Service Contracts under the MSA are alive and capable of being performed. Upon the termination of the Service Contracts under the MSA, Clause 21.1.1 of the MSA loses its relevance inasmuch as no rights or obligations remain to be enforced/performed under the MSA and therefore, there is no question of assignment of such rights/obligations to a third person.

37. It is also case of the respondent that there was no requirement, contractual or otherwise, for the respondent to seek the prior written consent of the petitioner before transferring a purported liability to a third party. Clause 21.1.1 mandates that a party shall seek the prior written consent of the other party only in the event that there is a transfer of its rights or obligations under the MSA. The "obligations" of the parties have been expressly mentioned in Clause 18.3.2 of the MSA. The purported liability for payment of Exit Charges is not an "obligation" of the respondent under the MSA and therefore, Clause 21.1.1 is wholly inapplicable and irrelevant to the facts of the present case. It is contended by the respondent that the purported liability

sought to be transferred is not an “obligation” of the respondent under the MSA; there was no requirement for the respondent to seek the prior written consent of the petitioner before transferring the same to a third party.

38. It is alleged by the respondent that the petitioner has also sought to place reliance on Clause 8 of the Demerger Scheme to allege that while, on the one hand, the respondent has transferred the purported liability to a third party, the legal proceedings pending against the respondent are not proposed to be transferred. Clause 8 of the Demerger Scheme has been reproduced herein below:

"8. Legal Proceedings

8.1 No legal or other proceedings pending against the Transferor Company whether in relation to the business, operations, affairs or conduct of the Transferred Undertaking or otherwise are proposed to be transferred to Transferee Company pursuant to the Scheme [Excluded Litigation]..." [emphasis supplied]

It is submitted by the counsel for the respondent that the De-Merger Scheme, in terms of Clause 4.5 read with serial No.6 of Schedule 1 Part 2 along with Annexure B, provides that the Identified Liabilities shall stand transferred to the transferee on the same terms and conditions as applicable to the transferor. Therefore, in the event of an arbitral award being passed against the respondent, Reliance Communications Limited shall assume the said liability. In addition to the said provision in the De-Merger Scheme, the respondent has, in terms of Clause 8.1 of the De-Merger Scheme, agreed to continue to remain a party insofar as the pending disputes with the petitioner is concerned. Therefore, in addition to Clause 4.5 read with serial No. 6 in Part 2 of Schedule 1 along with Annexure B; Clause 8.1 of the De-Merger Scheme is an additional security available to the petitioner

insofar as its purported claims for Exit Charges are concerned. Thus, in view of this situation it is clear that the intention of the respondent in safeguarding the interests of the petitioner is bonafide. On a plain reading of the aforesaid clauses, it cannot be said that the respondent has any intention to obstruct or delay the execution of any award that may be passed against the respondent. Therefore, petitioner is not entitled to any reliefs under Section 9 of the Arbitration and Conciliation Act, 1996.

39. It is stated by the respondent that even assuming that the respondent is liable to pay Exit Charges, the amount claimed by the petitioner is disputed inasmuch as the same has been calculated contrary to the terms of the MSA. The principal Exit Amount of Rs. 58,50,34,988/- has been calculated by the petitioner on the basis of 10 years. It is the case of the petitioner that the tenure of the Service Contracts, as per the invoices filed by the petitioner, is 10 years and therefore, Exit Charges have been calculated on the basis of 10 years i.e. on the tenure of the contract. The said contentions of the petitioner are contrary to the terms of the MSA including clause 1.1 of the Schedule 5 of the MSA.

The terms of the MSA including clause 1.1 of Schedule 5 of the MSA as per said clause is to be read with Clause 18.1 of the MSA which defines the term of the Service Contract as the term that is mutually agreed by the parties, provided that no Service Contract shall have a term of less than 5 years. The said clause therefore, contemplates two distinct terms: a) term/tenure of the service contract b) minimum fixed term/lock in period of the contract.

Clause 1 of Schedule 5 of the MSA, which provides for payment of Exit Charges has been reproduced herein below:

"1.1 In relation to any Service Contract with a specified term therein, the Sharing Operator may terminate the Service Contract prior to expiration of its minimum fixed term, provided that upon such termination, the Sharing Operator will pay to Infratel the Net Present Value (NPV) of the entire unpaid amount for the remainder of the term as per the amount of respective Service Contract. The said NPV shall be calculated at a discount rate of 12% per annum."

40. It is argued on behalf of the respondents that the petitioner is misreading that the terms "specified terms" and "minimum fixed term" are distinct and separate terms wherein the "specified term" refers to the tenure of the contract and the "minimum fixed terms" refers to the lock-in period. It is contended by the respondent that while the "specified term" may be mutually agreed by the parties, the "minimum fixed term" shall be governed by Clause 18.1 of the MSA. Notwithstanding the fact that the specified term of a service contract may be 10 years, Exit Charges are liable to be paid only for the remainder of the minimum fixed term [5 years] in the event that the Sharing Operator terminates the Service Contract prior to the expiration of the minimum fixed term. If the Service Contracts are terminated after the expiration of the minimum fixed term but before the specified term, no Exit Charges are liable to be paid. The lock-in period contemplated under Schedule 5 Part 1 is the minimum fixed term which is 5 years as per Clause 18.1. Therefore, while computing Exit Charges to be paid upon termination prior to minimum fixed term, it is the remainder of the minimum fixed term which has to be taken into account and not the remainder of the entire tenure.

In view of the aforesaid, it is alleged by the respondent that the petitioner's computation of the principle amount of Exit Charges at Rs. 58,50,34,988/- is erroneous and contrary to the terms of the MSA.

Without prejudice, in the event the respondent is held liable to pay Exit Charges, the same ought to be calculated on the basis of the lock in period i.e. 5 years. As per the respondent, the principle amount of Exit Charges, if found payable, amounts to Rs. 22,41,74,525/- even the liability to pay Exit Amount in case of early termination of the Agreement is not absolute.

41. The case of the petitioner is that the respondent is liable to pay the Exit Amount under Part II (iii) of Schedule 5 as the respondent is in material default of its obligations. It has been pleaded that the respondent under Clause 5.3.3. of the MSA was under an obligation to obtain, maintain and comply with all applicable laws and applicable permits, including any sharing operator license. The reliance on the aforesaid recital of the Schedule to claim Exit Amount by the petitioner is erroneous and the same is evident from a plain reading of the same. the recital at Part II (iii) of Schedule 5 reads as under:-

The Sharing Operator shall only pay to Infratel the Exit Amount upon termination of a Service Contract where:

... (iii) such termination is on account of the Sharing Operator being in material default of any of its obligations under the Service Contract.

42. On the other hand, Mr. Sibal submits that the petitioner cannot rely on the aforesaid recital for its claim of Exit Charges strictly as under the aforesaid recital, would have been payable in a situation where the petitioner had terminated the Service Contract on account of material defaults by the respondent [Sharing Operator] of its obligations. However, in the present case, the MSA has not been terminated by the petitioner on account of material default of the respondents obligations.

43. The other case set up by the petitioner is that the respondent ought to have "maintained" the licenses granted to it in 2008 despite the orders of the Supreme Court striking down the 2008 policy and the consequent quashing of the licenses granted thereunder. It is the case of the respondent that the termination of the service contracts was not voluntary.

44. Learned counsel appearing on behalf of the respondent submits that pursuant to the cancellation of licenses awarded to the petitioner in the year 2008, the respondent is not, statutorily or contractually, bound to bid for the same licenses, the auction of which was conducted under a different policy. Under the policy in 2008 which was based on first-come first-serve, the respondent secured Unified Access Service Licenses along with spectrum for 21 services areas for a total consideration of Rs.1,658 Crores. Based on this consideration paid by the respondent towards obtaining licenses and spectrum, and based on these licenses, the respondent entered into the MSA on certain terms and conditions. However, after the cancellation of the licenses by the Supreme Court on 2nd February, 2012, fresh auctions were conducted in 2013 under a new policy. It is pertinent to note that the policy for allocation of spectrum and grant of licenses in 2013 was wholly different and incomparable to the policy of 2008, on the basis of which the MSA had been entered into. In fact, in the auction for spectrum in 2013 the respondent secured spectrum in eight circles at a cost of Rs.3,639 Crores. The respondent cannot be expected to continue performance of the MSA under the same terms and conditions, whereas the foundation of MSA, which were the licenses, no longer remains the same. Clause 18.3.2 of the MSA expressly stipulates that if any of the approvals referred to in Clause 2.6.2,

including permits from DoT are withdrawn or not granted, the Sharing Operator i.e, the respondent shall be entitled to terminate the Service Contract prior to its specified term without the payment of the Exit Amount.

45. There is a force in the submission of Mr. Sibal that the obligation to maintain a license cannot continue even after the license has terminated due to unforeseeable circumstances beyond the control of the license holder. Reference in this regard may be made to the order and judgment dated 21st August, 2014 passed by the Telecom Disputes Settlement and Appellate Tribunal ["TDSAT"] in **Unitech Wireless (T.N.) Pvt. Ltd. v. Bharat Sanchar Nigam Ltd. and others**, as upheld by the Supreme Court wherein TDSAT, in similar facts, observed that the quashing of the licenses by the Supreme Court, which the license holder had no control over, would necessarily amount to frustration. The law, it was further observed, does not expect anyone to do something that has become impossible or completely impractical from the point of view of the original intent of the contracting parties as a result of some supervening circumstance.

The TDSAT has also held that the judgment and order dated 2nd February, 2012 passed by the Supreme Court was beyond the control of Unitech Wireless and had resulted in frustration of the agreement between the parties. In the said circumstances, Unitech Wireless was held not liable to pay Exit Charges on account of early termination. The Supreme Court maintained the judgment of TDSAT on appeals filed by BSNL impugning the judgment and order passed by TDSAT, was of the considered opinion that the appeals, being devoid of any merit, were liable to be dismissed. The said order of the Supreme Court was passed on 6th February, 2015 in Civil Appeal Na. 38102 of

2014. In view of the dismissal by the Supreme Court, the judgment and order of the TDSAT has attained finality.

In view of the above said reasons, prima facie it appears that there is a force in submission of Mr. Sibal that cancellation of the UAS licenses by the Supreme Court rendered the respondent incapable of performing its obligations under the service contracts and therefore, it may be resulted in frustration. However, I do not wish to express final opinion as this issue is to be considered by the Arbitral Tribunal who would naturally interpret the relevant clause.

46. Prima facie, this Court finds force in the submission of Mr. Sibal that the MSA has in fact, been terminated by the respondent under Clause 11.2.3 of the MSA. Clause 5.3.3 is not solely an "obligation" of the respondent under the MSA. The said clause is under the heading "Sharing Operator Warranties and Covenants". From a bare perusal, it is clear that the same has been made as a warranty by the respondent to comply with all applicable laws, including maintaining permits to the extent that it does not cause or result in any breach of any law by the petitioner. The petitioner, however, has relied upon Clause 5.3.3 by giving meaning that it casts an unreasonable and unconditional obligation on the petitioner to have kept the licenses alive despite an order from the Supreme Court. The said clause does not in any manner seek to cast such an onerous condition upon the respondent. The limited purpose of Clause 5.3.3 is to seek a warranty from the respondent that it shall comply with all applicable laws and ensure that no acts on its part result in breach of any law by the petitioner.

The petitioner cannot even seek to rely on Part II (i) of Schedule 5 as the same contemplates payment of Exit Charges only account of voluntary termination of the service contracts. Admittedly, the

termination of the service contracts and exit from 6 circles by the respondent arises out of the quashing of the licenses by the Supreme Court and the same has not been disputed by the petitioner.

47. It is the admitted position that the scheme of arrangement between the respondent and Reliance Communications Limited and their respective shareholders and creditors is pending before the High Courts of Maharashtra and Rajasthan under Sections 391 to 394 of the Companies Act, 1956.

It is submitted on behalf of the respondent that the petitioner has no force when it was argued that upon the transfer of the respondent's Telecom Business to Reliance Communications Limited, the respondent would be stripped off its assets as the position of respondent company would become solvent if the scheme is approved.

48. It is further submitted that in consideration of transfer of its business undertaking to Reliance Communications Limited, the respondent is acquiring Rs.27,65,53,305/- fully paid up equity shares in Reliance Communications Limited, aggregating to 10% of the total issued and fully paid up share capital of Reliance Communications Limited valued at Rs.2,115,60,00,000.00/-. The valuation of the said shares has not been disputed by the petitioner. Furthermore, the respondent will continue to retain its movable and immovable assets, which are to the tune of Rs, 171 crores [book value]. The market value of the said immovable assets is considerably higher than the book value.

49. It is also stated by the respondent that the value of the equipment is Rs.24,57,27,701/- which is 42% of the principal amount claimed by the petitioner.

Under these circumstances, it is argued by the learned counsel for the respondent that no case of securing of amount of exit charges is made out as the respondent would be in a position to pay the amount if the award is passed in favour of petitioner. Even otherwise the claim of the petitioner is time barred. The petitioner was aware about all the circumstances from the year 2012. After the expiry of couple of years, the petitioner is seeking the relief despite of fact that the petitioner has taken so much time to agree with the constitution of Arbitral Tribunal. As the petitioner is aware that it has no case on merit and chances of success are very dim, therefore, false relief sought is being pressed.

50. It is argued that even on merit for securing the amount as argued by the petitioner, no case is made out, as the respondent would become more solvent after arguments. The petitioner after assessment would be in a position of double benefit as the petitioner can recover the amount not only from the respondent but also from the assignee who has also taken liabilities as per Clause 4.5 of the Scheme, wherein all identified liabilities as set out in Part 2 of Schedule 1 is to be transferred and vested in the transferee company i.e. Reliance Communications Limited. The identified liabilities set out at Serial No.6 in Part 2 of Schedule 1 along with Annexure B thereto specific provision and account for the exit penalties claimed by the petitioner.

51. It is settled law that while granting the discretionary relief under Section 9 of the Arbitration and Conciliation Act, 1996, the Courts are guided by the following tests:

- (i) Test of Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 [for interim injunction]

(ii) Test of Order XXXVIII Rule 5 of the CPC [for securing the amount in dispute]

52. The Supreme Court has in ***Kashi Math Samsthan and another v. Shrimad Sudhindra Thirtha Swamy*** reported at 2010 (1) SCC 689 held, at paragraph 16, that when a party fails to prove *prima facie* case, the question of considering the balance of convenience or irreparable loss or injury to the party concerned would not be material at all. It is not open to the court to grant injunction in the petitioner's favour even if the petitioner has made out a case of balance of convenience being in his favour and that irreparable loss and injury shall be caused if no injunction is granted.

53. The party is entitled to be secured in terms of Order XXXVIII Rule 5 CPC only if the respondent intends to obstruct or delay the execution of the decree. It is not the case of the petitioner that the respondent intends to obstruct or delay the execution of the decree, there is no pleading to this effect.

54. The submissions of Mr. Sibal is that even books of account of petitioner do not reflect purported claims/outstanding amounts as the petitioner itself by its communication dated nil received by the respondent on 25th March, 2016 i.e. 5 days prior to the filing of the petition sought confirmation from the respondent, for purposes of a statutory audit, of a sum of Rs.20,64,96,765/- being the balance due to the petitioner by the respondent as on 29th February, 2016. Counsel for respondent submits that a sum of Rs.20,64,96,765/- is not due and payable by the respondent. Even as per the petitioner's own books of account, only a sum of Rs.20,64,96,765/- is taken as correct and not Rs.1,15,64,26,124/- as claimed by the petitioner payable by the respondent to the petitioner. The balance, the confirmation of which was sought by the petitioner, was merely for services rendered

to the respondent under the MSA and does not reflect the Exit Amounts purportedly payable by the respondent. The fact that the purported claim for Exit Charges is not reflected in the communication dated nil firmly establishes the fact that the said claim was abandoned by the petitioner.

In view of the aforesaid, it is argued by the respondent that there is no occasion to secure the petitioner for its claims of exit charges, which have been held to be not payable by the TDSAT in identical facts. The decision of the TDSAT was challenged before the Supreme Court and the Supreme Court, after going through the records of the case dismissed the same.

55. With regard to two decisions referred by the petitioner passed by the Division Bench, it is submitted by the respondent's counsel that the said orders are distinguishable on facts. The orders which were passed by the Division Bench in FAO (OS) No.613-614 of 2012 and FAO (OS) No.97 of 2013 are on different facts. The Court, while passing orders in FAO [OS] No.613-614 of 2012 and FAO [OS] No. 97 of 2013, was largely concerned with the fate of the respondent No.1's subscribers and customers and therefore, endeavoured to find an efficacious solution which would ensure continuity of business between the petitioners therein (Viom Networks Ltd. and Indus Towers Ltd., respectively) and respondent No.2 therein (Telewings Communication Services), the entity acquiring the respondent No.1 therein (Unitech Wireless (Tamil Nadu) Pvt. Ltd.). The orders in the said appeals were therefore, passed in peculiar facts and considerations, which are not same in the present case as the respondent in the present case has already exited from the concerned circles and has shut down its operations. Therefore, it is submitted that neither does the respondent

have any customers in the said circles who will be adversely affected, nor does the respondent have any active equipment installed upon the passive infrastructure of the petitioner in the said circles. Continuity of business is therefore, not a consideration before this Court in the facts and circumstances on the present case. These orders passed by the Division Bench of this Court in the aforesaid appeals were ad-interim orders constituting a binding judicial precedent until the petition is finally decided. It is submitted that even otherwise these orders dated 21st December, 2012 and 21st February, 2013 were passed by the Division Bench in the aforesaid appeals prior to the order and judgment of the TDSAT, the judgement which was later on upheld by the Supreme Court. It has been held by the TDSAT that no lock-in charges are liable to be paid on account of early termination of the contract due to the quashing of licenses by the Supreme Court.

56. In order to set the relief of this nature, I am clear in my mind that the conditions of Order XXXVIII Rule 5 CPC are satisfied. The following decisions are necessary to be referred to:-

- i) The Supreme Court while discussing Order XXXVIII Rule 5 CPC it has held in ***Raman Tech and Process Engg. Co. v. Solanki Traders*** reported at 2008 (2) SCC 302 that if the averments in the plaint and documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order XXXVIII Rule 5 CPC. The Supreme Court has further held that merely having a prima facie case will not entitle the plaintiff to an order of attachment before judgement, unless he also establishes that the defendant is attempting to remove or

dispose of his assets with the intention of defeating the decree that may be passed.

- ii) In ***Audio Advertising Agency v. Union of India*** reported at 1996 (2) AD (Delhi) 275 wherein the High Court has held that a party cannot be prevented from dealing with his property in any manner he likes unless it is shown to the satisfaction of the Court that any alleged transfer is malafide or is with the intention to defeat the execution of the decree that may be passed against him.

57. It is also stated that the security amount of Rs.1,31,00,000/- is lying with the petitioner. It is alleged that the petitioner has not disputed the said deposit.

58. After having gone through the entire gamut of the case, the following directions are passed by disposing of the present two petitions. As far as the interim injunction sought by the petitioner in the first petition, prayer (i) and (ii) are concerned, the statement made by the respondent's counsel on 2nd May, 2014 shall continue till the award is published until the same is modified or vacated.

59. As far as prayer iii) in the first petition and prayer in the second petition is concerned, the respondent in the present case has fairly made the offer without prejudice that after the approval of scheme and receipt of amount and share capital, the respondent shall always keep the share capital of the value of Rs.16 crore during the pendency of arbitration proceedings and if so required, they would take the permission however the respondent shall not dispose of without the permission of the Arbitral Tribunal subject to the condition that the

petitioner would not oppose the scheme of demerger which is pending before the competent Courts.

60. This Court is of the view that the said offer made by the respondent is fair and reasonable at this stage and the same is accepted and the order is being passed accordingly. The statement made on behalf of the respondent is accepted. The respondent is directed to file an undertaking within two weeks from today by way of an affidavit of Authorised person along with copy of resolution which should be duly certified.

61. The present petition is disposed of accordingly, however liberty is granted to move an application before the Arbitral Tribunal under Section 17 of the Act for interim measures in case of change of circumstances as per law and if any application is filed, the same would be decided as per its merit.

62. The findings arrived are tentative and prima facie, which shall have no bearing when the main matter is decided on merit.

63. No costs.

(MANMOHAN SINGH)
JUDGE

JULY 08, 2016