

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

% **Judgment reserved on: 24th May, 2016**
Judgment pronounced on: 14th September, 2016

+ **O.M.P.(I) (COMM.) 105/2016, I.A. Nos.4958/2016,**
4994/2016, 6254/2016, 8038/2016 & 9016/2016

TOWER VISION INDIA PRIVATE LIMITED Petitioner
Through Mr.P.Chidambaram & Mr.Parag P.
Tripathi, Sr. Advs. with Mr.Ashim
Sood, Mr.Vishal Sagar, Mr.Arnav
Dayal & Ms.Namrata Bhagwatula,
Advs.

versus

VIDEOCON TELECOMMUNICATIONS LIMITED Respondent
Through Dr.Abhishek Manu Singhvi and
Mr.Rajiv Nayar, Sr. Advs. with
Mr.Sndeeep S. Ladda, Ms.Shikha
Sarin, Mr.Akhil Sibal,
Mr.Yashvardhan, Mr.Nakul Mohta
& Mr.Devender Singh, Advs. for
the respondent.
Mr.Amit Singh Chadha, Sr.Adv.
with Mr.Anil Kumar Sangal,
Mr.Siddharth Sangal & Mr.Abhay
Kumar Tayal, Advs. for State
Bank of India.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 9 of the Arbitration & Conciliation Act, 1996 (for short, called "the Act").
2. The petitioner *inter alia* has sought the following reliefs against the respondent:-

“(a) Restraining from selling, transferring, alienating, creating any third party interest or otherwise dealing with its spectrum or business in all six of its licensed service areas,

(b) Directing the respondent to require Bharti Airtel Limited to reserve out of the consideration to be paid to the respondent for purchase of the respondent's spectrum in six circles, and hold in trust for the petitioner, the claimed amounts of Rs.113.7 Crore in an interest bearing escrow account to be administered by the Registrar of this Court, or any alternative security; or

(c) Directing the respondent to reserve out of the consideration and hold in trust for the petitioner, immediately upon completion of its proposed transaction with Bharti Airtel Limited, the claimed amount of Rs.113.7 Crore in an interest bearing escrow account to be administered by the Registrar of this Court, or any alternative security; and

(d) Restraining the respondent and its officers, employees or representatives from removing, reclaiming, selling, transferring, alienating, creating any third party interest or otherwise dealing with its active infrastructure including but not limited to microwave equipments and BTS equipments fixed at the petitioner's sites.”

However, after filing of the petition, by adding the subsequent period till the date of final hearing, the petitioner is seeking the relief to secure the following amount on the date of filing of written submissions:-

Claim	Amount
Overdue Invoices + interest thereon	Rs.52.62 Crore
Settlement waived off amounts	Rs.26.5 Crore
Lock-in liabilities	Rs.46.7 Crore
Total Claims	Rs.125.82 Crore

3. As far as selling and transferring of spectrum is concerned, the same has been sold/transferred to Bharti Airtel Ltd. on 24th May, 2016 after filing the present petition and in breach of the order/direction of the Court issued on 1st April, 2016.

4. The following relevant facts as per petition are mentioned below:-

a) The petitioner has entered into a passive infrastructure sharing agreement with the respondent dated 31st October, 2008 ("MSA"). Under the MSA, the petitioner provides passive infrastructure services to the respondent on two types of telecom sites, i.e. anchor sites (which are built and set up by the petitioner at the specific request of the respondent and at a location chosen by the respondent) and shared sites (which the petitioner has set up for another operator and which are shared by the respondent).

b) Under Clause 4.3.1 read with Schedule 2 of the MSA, the petitioner is entitled to monthly fees consisting of: a) monthly service charges for use of the sites; and b) reimbursements in respect of site rentals, electricity and diesel charges etc. Clause 16.2 of Schedule 2 to the MSA also provides that interest at the rate of 12 % per annum is payable by the respondent on dues remaining pending for more than sixty days.

5. The relevant terms and conditions as well as the clauses of MSA are common in the present case also which are the subject matter of O.M.P. (I) (COMM.) Nos.107/2016, 95/2016 & 186/2016. The same are not being repeated here and the same be read in the present case also.

6. It is alleged by the petitioner that the respondent began defaulting on its monthly payment obligations starting as early as November, 2009. As on 31st December, 2012, the respondent had accumulated outstanding dues of Rs.94.11 Crore. As a good gesture of the petitioner and with the consent, the parties executed a Settlement Agreement on 6th May, 2013 ("Settlement Agreement") to settle the petitioner's claims for the aforesaid outstanding amounts. As part of the settlement, the petitioner agreed to waive amounts of Rs.20.11 Crore subject to the prompt payment of: i) the balance of Rs.74 Crore and ii) the ongoing payments under the MSA with respect to the continuing sites.

7. The petitioner submits that despite of settlement, from next month itself i.e. June, 2013 onwards, the respondent once again started regularly defaulting on the ongoing payments with respect to the continuing sites, thereby breaching the second condition under Clause 1.3 of the Settlement Agreement.

8. The respondent on 27th November, 2015 had served a termination notice for all sites under service in the Gujarat circle. The termination date for such sites was amended by subsequent letters of the respondent to 31st May, 2016. Clause 1.5 of the MSA imposes a lock-in period of seven years on the respondent with respect to Anchor Sites and five years with respect to shared sites. By virtue of the Settlement Agreement, the lock-in periods were extended by two years (to nine years in respect of anchor sites and seven years in respect of shared sites).

9. On 17th March, 2016 the respondent and Bharti Airtel Ltd. ("Bharti") have made representation with the Bombay Stock Exchange that the respondent is selling its spectrum in all six service

areas to Bharti for Rs.4,428 Crore. Further, the respondent has issued public notices to its customers that it will cease to provide telecom services with effect from 11th May, 2016 thus, effectively terminating all of the sites under the MSA. As mentioned earlier, the transaction with Bharti for sale of spectrum has since completed on 24th May, 2016 despite of conditional order passed by this Court.

10. The respondent has filed the reply and has raised various objections by alleging that the petitioner is not entitled for any relief and even the petition is itself is not maintainable. The relevant details of the same are mentioned as below:-

- i. That this Court has no jurisdiction under Section 9 of the Act.
- ii. The petitioner is guilty of concealment of various material facts which has direct bearing on adjudication of present dispute as despite the cancellation of 2G Licenses, the petitioner has continued to make payments and till date has made substantial payments of about Rs.338.34 Crore. The petitioner has also suppressed and concealed the counter-claim of Rs.75 crore raised by the respondent against the petitioner because of disruption of services and the respondent's assets worth almost Rs.53.70 crore is lying in petitioner's possession.

11. It is alleged that transfer of spectrum was necessary in order to reduce the loan/liabilities of around Rs.3717 crore and interest liabilities of Rs.450 crore per year payable to secured creditors (Consortium of Banks) subject to fulfilment of various conditions precedent and subsequent obligations. The same is in larger public interest enshrined in TRAI Report and DOT guidelines.

12. There is a charge of Secured Creditors (Consortium of Banks) on the entire assets of the respondent's including the Spectrum. Therefore, the petitioner cannot claim the preference over secured creditors. The sum claimed by the petitioner is not included in the agreement. No primacy ought to be given to the petitioner by granting any interim protection without examining the counter claim of the respondent. The petitioner has no intention to invoke arbitration. The relief as prayed by the petitioner for restraining the respondent from selling, disposing or creating any third party interest in its entire movable and immovable property is contrary to the terms and conditions of Passive Infrastructure Agreement.

13. It is submitted that the respondent is neither shutting down its entire business nor transferring all its assets nor winding up the company. There is no transfer of even shares of the respondent to any third party. Therefore, even after the transfer of spectrum by the respondent, it will continue to conduct other businesses and continue fulfilling its obligations to other parties. The petitioner's submission that transfer of respondent would lead to closure of respondent's telecom business is misleading. As held by the Supreme Court in **Bharti Airtel Ltd. v. Union of India**, (2015) 12 SCC 1 under current licensing regime the spectrum and license is delinked. The relevant portion of the judgment has been extracted hereunder:

"20. The Union of India announced the NTP, 2012 in which it sought to delink the licences and allocation of spectrum in respect of future licences. Shortly thereafter on 2-2-2012, the judgment of this Court in 2G Case [Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1] was pronounced. On 15-2-2012, the Minister of Telecommunication and Information Technology issued a

statement. Insofar as the existing UAS, CMTS and Basic Services licences are concerned, it is stated therein that (i) no more UAS licences linked with spectrum will be awarded, (ii) all future licences will be Unified licences, (iii) allocation of spectrum will be delinked from the licence ...”

Therefore, even after transfer of spectrum respondent's license will remain valid for the full duration of its tenure i.e. upto 2033 and it can provide other telecommunication services.

14. It is alleged by the respondent that the following telecommunication services can be provided by respondent even without spectrum:

- a. National Long Distance Services (NLD)- This is under Licence from DOT and respondent is carrying STD traffic from one circle the other circle of its own GSM business and of other operators. It also carries inbound International traffic.
- b. International Long Distance services (ILD) - This is licenced from DOT and respondent is bringing traffic of overseas operators/callers into India and handing over to the domestic consumers through other operators.
- c. Hubbing/Trading of International Traffic - This business is being done under International Long distance (ILD) license. Respondent carries traffic from one country to the other Country and earn margins.
- d. Infrastructure Provider (Tower Leasing) - This Business is being done under UL (AS) License. Respondent has more than 150 towers, which are being leased to other operators.

15. All the above businesses are non spectrum based and under various licenses/registrations/approvals from relevant Authorities. Also, the respondent is in advance stage of diversifying into other non spectrum based business to leverage its assets and capabilities already built over time, such as:

- a) Virtual Operator Network - Respondent can buy in bulk minutes from other operators and providing to over more than 5 million loyal customers acquired in the 6 GSM service areas.
- b) Wallet services /payment Gate way - Respondent is starting the business under white labelling i.e. take distribution of others but sell under Videocon brand.
- c) Digital Marketing - Respondent is aggressively growing area. Digital Marketing is an Umbrella term for the targeted, measureable and interactive marketing of products or services using digital technologies to reach and convert business leads into customers and increase sales through.
- d) IT Solutions/ System Integration - Under this respondent can provide IT solutions to customers.
- e) Call Centre Operations - Respondent can operate domestic and international call centre under this vertical.
- f) Bulk SMS (Both domestic and International) - Under this vertical VTL can leverage its assets brand and relations of generating domestic and international business under application to person and Machine to machine in areas such as Ticket information/Transaction Notifications/ Various Alerts /Banking Transactions etc.

- f) E-recharge Distribution of other operators - Under this vertical VTL can leverage its own and sister concerns distribution network to buy and sell E recharge/Top up of GSM operators and D2H operators recharge.
- g) Respondent has over a period of time developed world class:
 - (i) Mobile Switching Centre (MSC),
 - (ii) Media Gateway (MGW),
 - (iii) ILD switch,
 - (iv) Data centre (Servers and Software)

16. These assets and resources will help the respondent to grow and have a regular business and profit streams even after the spectrum transfer. The respondent is expected to have gross revenue of more than Rs.1000 Crore plus from the above business during 2015-16 (Excluding the GSM operations). The respondent submits that more than 2/3rd of the Revenue will continue to be there even after the spectrum sale. It is stated that these assets/resources/customers and brand will help the respondent in gaining growth and market share and will be converted into profit streams. Thus, any legitimate claim of the petitioner, if allowed in its favour by the Arbitral Tribunal, can be satisfied by the respondent. Hence, the present petition is non-maintainable and devoid of merits and liable to be dismissed.

17. It is also alleged by the respondent that the petitioner is claiming a primacy over banks and financial institutions for repayment of dues, which is not permissible. The Supreme Court has held in **Mardia Chemicals Ltd. v. Union of India**, (2004) 4 SCC 311 that the interest of banks and financial institutions must receive

primacy over interest of individual. The relevant portion of judgment has been reproduced here as under:

"66 As discussed earlier as well, it may be observed that though the transaction may have the character of a private contract yet the question of great importance behind such transactions as a whole having far-reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions, more particularly when financing is through banks and financial institutions utilizing the money of the people in general, namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact on the socio-economic drive of the country. The two aspects are intertwined which are difficult to be separated. There have been many instances where existing rights of the individuals have been affected by legislative measures taken in public interest. Certain decisions which have been relied on behalf of the respondents, on the point are V. Ramaswami Aiyengar v. T.N. V. Kailasa Thevar [AIR 1951 SC 189: 1951 SCR 292]. In that case by enacting the Madras Agriculturalists' Relief Act, relief was given to the debtors who were agriculturists as a class, by scaling down their debts. The validity of the Act was upheld though it affected the individual interest of creditors ..."

The respondent submits that physical assets and equipment of respondent are pledged with banks as security. The petitioner is seeking a first charge on the assets and the proceeds from the transfer of spectrum which is legally not permissible as banks have a prior right.

18. It is submitted that out of the total sum of Rs.113.7 Crore claimed by the petitioner, a sum of Rs.40.50 Crore has been claimed towards overdue invoices and interest thereon. It is submitted that the petitioner has failed to prove or establish that any such amount has been ever admitted by the respondent. Rather, it is stated that no dues are due from the respondent much less the amounts aggregating to Rs.40.50 Crore. It is further stated that none of the aforesaid dues are undisputed and have been expressly acknowledged by the respondent in any correspondence or reconciliation exercises carried out between the parties.

19. The petitioner had been providing deficient services to the respondent and thus, the respondent claimed damages from the petitioner to the tune of Rs.75 Crore vide its letter dated 9th March, 2016, the details of which are being provided by the respondent in various paragraphs of the reply. A bare perusal of the said letter unambiguously establishes that it is the petitioner, which owes the respondent a huge sum of money.

20. It is also submitted that the out of the total sum of Rs.113.7 Crore claimed by the petitioner, a sum of Rs.46.70 Crore has been claimed towards lock-in liabilities which have not been expressly acknowledged by the respondent in any correspondence. It is also denied that the respondent is required to make payment towards lock-in liabilities in respect of all sites under the MSA (amounting to at least Rs.46.7 Crore) with the effective date of termination taken as 31st May, 2016.

21. It is submitted that the mere existence of lock-in period does not satisfy the claim of the petitioner. It is trite in law that party seeking compensation has to establish the loss suffered on account

of breach of the contract as lock-in period itself is not an admitted liability, as held by Division Bench of this Court in ***Tower Vision India Pvt. Ltd. v. Procall Pvt. Ltd.***, [2014] 183 Comp Cas 364 (Delhi).

22. It is submitted that the petitioner is not entitled to any relief under Section 9 of the Act as the respondent itself has a counter claim against the petitioner.

23. Both the parties have made their submissions. They have also filed their written submission.

24. The following applications are also filed after filing the petition under Section 9 of the Act:-

- i) I.A. No.4958/2016- For condonation of delay in filing reply in terms of order dated 1st April, 2016.
- ii) I.A. No.4994/2016-u/o 1 Rule 10 read with Section 151 CPC for intervention of half of the applicant-SBI, as facility agent for an on behalf of 18-banks consortium.
- iii) I.A. No.6254/2016-under order 39 Rule 4 r/w Section 151 CPC for vacation/modification of order dated 1st April, 2016 and other subsequent orders.
- iv) I.A. No.8038/2016-for an-interim relief.
- v) I.A. No.9016/2016-for recall/direction.

As far as I.A. No.4958/2016 is concerned, there is no opposition to prayer on behalf of petitioner. Thus, the delay in filing the reply is condoned.

With regard to I.A. No.9016/2016, the same is already listed on 5th October, 2016.

So far as the application being I.A. No.6254/2016 is concerned, the same is being decided along with the main petition.

25. In the rejoinder submissions, it is contended by the petitioner that the petition is maintainable under Section 9 of the Act, as the issue of maintainability of such a petition in case of disputes between an Infrastructure Service Provider and a telecom operator is no more a res-integra, as this Court in the matter of **Viom Networks Ltd. v. S-Tel & Ors.**, AIR 2014 Del 31, rejected the aforesaid contention of the respondent therein and held that the petition under Section 9 of the Act would be maintainable in respect of a dispute concerning an Infrastructure Service Provider and a telecom operator. The grounds taken in the reply by the respondent herein in support of their contention that TDSAT will have the exclusive jurisdiction to decide the present dispute were specifically dealt and rejected by this Court. The objection of the respondent S.Tel Pvt. Ltd. that Viom 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 Viom Networks and S.Tel Pvt. Ltd. are within the jurisdiction of TDSAT, was rejected by this Court. While deciding the aforesaid case, this Court had also considered the decision of TDSAT in the case of **Reliance Infratel v. Etisalat DB Telecom Ltd.** (2012) TDSAT 617. Therefore, the reliance of the respondent on the aforesaid judgment of TDSAT in **Reliance Infratel** matter is misplaced. The judgment of the TDSAT is not binding upon this Court. The issue of maintainability on the ground urged in the reply has already been examined and decided by this Court in favour of the petitioner in the aforesaid case. It is submitted that as far as this Court is concerned, this aforesaid judgment of this Court in Viom Networks matter will hold the field.

In view of the aforesaid, it is submitted that the present petition is maintainable.

26. Before dealing with rival submissions of the parties, it is necessary to first deal with the argument of the respondent for lack of jurisdiction of this Court to entertain the petition. It is argued on behalf of respondent that the disputes raised by the petitioner are not arbitrable. Admittedly, the petitioner holds IP-1 license/authorization granted by the DOT and the respondent holds Unified License granted by DOT under Section 4 of the Telegraph Act. The petitioner and the respondent are providing telecommunication services and they are service providers/licensees as defined in Section 2(e) and (j) of the TRAI Act.

Section 14 of the said Act provides that TDSAT shall have the exclusive jurisdiction to adjudicate disputes between two service providers/licensees, as the dispute raised by petitioner pertains to MSAs entered into between the petitioner and respondent in capacity of being licensees/service providers. It is submitted that in view of Section 14 of TRAI Act, only TDSAT, which has been conferred exclusive jurisdiction, can adjudicate such disputes and it cannot be a subject matter of Arbitration. Therefore, the arbitration clause is also null and void.

27. The respondent has further relied upon the judgment passed by TDSAT in **Reliance Infratel** (supra) to state that the decision passed by TDSAT in the aforesaid case is the correct law, and not the law pronounced by this Court in **Viom Network Ltd.** (supra). On the strength of the TDSAT judgment, contention has been made by the respondent to reconsider the judgment passed by this Court in Viom Network's matter.

28. The issue of maintainability of a petition under Section 9 of the Act in case of disputes between an Infrastructure Service Provider and a telecom operator has been considered by this Court in the matter of **Viom Networks Ltd.** (supra) wherein the Court had rejected the aforesaid contention of the respondent therein and held that the Petition under Section 9 of the Act would be maintainable in respect of a dispute concerning an Infrastructure Service Provider and a telecom operator.

29. The judgment of **Union of India v. Tata Teleservices** (2007) 7 SCC 517 cited by the respondent in support of its contention, on maintainability, is inapplicable in the present case. In the aforesaid case, the dispute was between the Central Government (licensor under the TRAI Act) and Tata Tele Services (to whom licenses were intended to be issued). In the said case, the question before the Supreme Court was as to whether a person would become a licensee under the Central Government only on the actual grant of a license and whether only a dispute arising after the grant of a license would come within the purview of the TRAI Act. The Supreme Court, in those circumstances, held that a dispute commencing with the acceptance of a tender leading to the possible issue of a license and disputes arising out of the grant of license even after the period has expired would all come within the purview of Section 14(a) of the TRAI Act. To put it differently, the Supreme Court has held that Section 14 takes within its sweep disputes following the issue of a Letter of Intent pre grant of actual license as also disputes arising out of a license granted between a quondam licensee and the licensor.

30. Another judgment of Andhra Pradesh High Court in **Indus Towers Limited v. The Commercial Tax Officer** cited by the respondent is also not applicable in the present facts as the issue in the said case was as to whether in the factual context of the Registration certificate issued and the nature of the petitioner's business (an infrastructure provider category-1), the goods purchased by the petitioners/dealers (for the purposes of building, operating and maintaining passive telecom infrastructure and where on the towers erected and maintained but nonetheless continued to be owned by the petitioner – the passive infrastructure provider; goods which are indisputably integrally associated with the building and maintenance of the cell towers), are goods falling within the ambit of Section 8(1) read with the provisions of Section 8(3)(b) of the CST Act, and thus eligible only at the concessional rate of tax provided in Section 8 (1). Similarly, the judgment of **State of Punjab v. Raghunath Dass**, AIR 1963 Punjab 76 cited by the respondent is also not applicable. In this case, the definition of licensee was examined in the context of the Punjab Excise Act. This decision is of no help to the respondent in support of its argument of non-maintainability of the present petition. The judgment of this Court in **Home Solutions Retails Ltd. v. UOI**, 182 (2011) DLT 548, is also not applicable in the present case as the issue before the High Court in that case was a challenge to Section 65(105)(zzzz) of the Finance Act, 1994 in as much as it purported to levy service tax on the renting of immovable property to be used for commercial/business purposes. The facts and circumstances are materially different.

31. The objection of the respondent about the maintainability of the present petition was also urged by the respondent/S-Tel in the aforesaid case, and which were duly examined and rejected by this Court in the said case. In this matter, this Court has considered the decision of TDSAT in **Reliance Infratel** (supra) in para 28. Therefore, the reliance of the respondent on the aforesaid judgment of TDSAT in **Reliance Infratel** (supra) is misplaced. Even otherwise, the judgment of the TDSAT is not binding upon this Court. As far as this Court is concerned, the judgment of this Court in Viom Networks matter will hold the field though I have been informed by the parties that an appeal against the said judgment is subjudice. Once after considering the similar objections, learned Single Judge has taken the view that this Court has jurisdiction, I am not inclined to different view although, I am informed that appeal is pending against the order passed by the Single Judge. Both the sides have confirmed that the operation of the order has not been stayed. Thus, at this stage, in my view the said order is also applicable in the facts of the present matter also.

COUNTER-CLAIM AS DAMAGES BY THE RESPONDENT

32. As far as the claim of damages to the tune of Rs.75 Crore which is claimed in its letter dated 9th March, 2016 are concerned, the respondent submits that the services rendered by the petitioner to the respondent under MSA was deficient and defective. The details of which are mentioned in the reply. The same are reproduced below:

- a) On 14th July, 2013 the respondent sent an email to the petitioner highlighting continuous outages from Mediyas site and seeking target date for its permanent resolution;

- b) On 11th September, 2013 the respondent sent an email to the petitioner attaching therewith major outage details for the month of August, 2013 for Punjab, Haryana, Madhya Pradesh and Gujarat circles and also sought petitioner's plan of action towards its resolution;
- c) On 29th August, 2013 the respondent sent an email to the petitioner specifically stating that the infra conditions at the petitioner's sites are in a very critical state and despite repeated escalations no improvement has been observed;
- d) On 24th July, 2013 the respondent sent an email to the petitioner highlighting several outages in June 2013;
- e) On 27th December, 2013 and 23rd January, 2014 the respondent sent email to the petitioner complaining about several outages in Gwalior and other places;
- f) On 18th May, 2014 and 20th May, 2014 the respondent sent email to the petitioner highlighting several outages in Haryana;
- g) On 23rd June, 2014 the respondent sent an email to the petitioner informing it about an intentional fire incident at petitioner's site in Bhind area and seeking its mediate resolution;
- h) On 19th November, 2014 the respondent sent an email to the petitioner recording the minutes of the meeting as well as raising several concerns of the respondent;
- i) On 9th September, 2015 the respondent sent an email to the petitioner stating that in spite of their commitments the situation is not under control and their deficiency is affecting respondent's network availability and brand value;

- j) On 26th August, 2015 the respondent sent an email to the petitioner and informed petitioner that due to their negligence, it is the respondent who is losing its hardware and customers;
- k) On 8th February, 2016 the respondent sent an email to the petitioner whereby pointing out the deficiency in service of the petitioner and continuing fire incidents on petitioner's site and their failure to meet the commitments;
- l) On 29th January, 2016 the respondent sent an email to the petitioner expressing the concern over the second intense fire incident at Gwalior Road site and loss to the all the equipments and damages suffered because of the negligence on part of the petitioner;
- m) On 22nd January, 2016 respondent sent an email to the petitioner highlighting the negligence on part of the field team of the petitioner because of which many sites were down;
- n) On 17th February, 2016 respondent sent an email to the petitioner pointing out the 4th fire incident in one month and material loss, loss of revenue and loss of customers faced by the respondent.

33. It is submitted on behalf of the respondent that a mere perusal of the aforesaid correspondences exchanged between the parties categorically establishes the fact that the petitioner has been providing deficient services to the respondent and thus, the respondent claimed damages from the petitioner to the tune of Rs.75 Crore vide its letter dated 9th March, 2016. The respondent's claims against the petitioner is wholly justified and substantiated as

the petitioner has failed to provide efficient and defect-free services to the respondent, for which the petitioner is liable to compensate the respondent under the MSA.

34. It is submitted that the petitioner has committed several breaches of the MSA while rendering services to the respondent as the petitioner has provided deficient and defective services to the respondent, for which the petitioner is liable to compensate the respondent under the MSA who are entitled to raise counter-claim against the petitioner.

35. The respondent's claim that the petitioner has suppressed communications regarding its supposed counter-claim of Rs.75 crore cannot be considered in the present petition. The respondent's letter dated 9th March, 2016, in which it raised its counter-claim, along with the petitioner's reply dated 15th March, 2016 has been specifically addressed in paragraph 46 of the petition. The same if valid has to be considered by the Arbitral Tribunal. The claim for damages (in its original 9th March, 2016 letter as well as its reply. It appears that prior to the letter, the respondent has not once raised any claims for any such damages. The respondent has made averments in its reply that it has paid Rs.338.24 crore under the MSA thus far, while making such payments the respondent had never hinted on making any adjustments from such payment against any claimed amount for damages of Rs.75 crore, or otherwise. Thus, in the present petition, the said amount cannot be adjusted. The respondent has a remedy. Thus, at this stage, the plea raised by the respondent in the petition filed by the petitioner is not sustainable and the same is rejected without expressing any opinion on merits.

36. Both the parties have made their rival submissions. They have also filed the written arguments.

37. The petitioner is seeking the relief to secure the following amount on the date of filing of written submissions. The details of the said claims are given under:

Claim	Amount
Overdue Invoices+ interest thereon	Rs.52.62 Crore
Settlement Waived Off Amounts	Rs.62.5 Crore
Lock-in liabilities	Rs.46.7 Crore
Total Claims	Rs.125.82 Crore

38. I shall take the claim amount of Rs.26.50 Crore with regard to settlement as waived off amount.

39. It is submitted by the petitioner that out of the total sum claimed by the petitioner, a sum of Rs.26.50 Crore has been claimed towards amounts which were earlier waived by the petitioner under the Settlement Agreement dated 6th May, 2013 and interest thereon.

40. The petitioner has referred Clause 1.3 of the Settlement Agreement and submits that the waiver of Rs.20.11 Crore therein was *"subject to prompt and complete payments by VTL... of the ongoing payments under the MSA"*. Thus, the waiver was a conditional waiver, subject to continued prompt and complete payments by the respondent. As the respondent's admitted position is that it has overdue amounts under the MSA till 30th November, 2015 (as evidenced by the reconciliation sheets signed by the respondents for overdue amounts (till 30th November, 2015)), the

petitioner is well within its rights to reclaim the waived amounts with interest.

41. It is stated by the respondent that the Settlement Agreement was entered into between the parties to resolve the differences and disputes between the parties.

42. It appears from the record that the respondent under the Settlement Agreement dated 6th May, 2013 has paid the petitioner by way of various cheques and the petitioner has accepted all such payments.

43. The following payments were made by the respondent to the petitioner under the Settlement Agreement dated 6th May, 2013:-

- a) The payment of Rs.5 crore was made to the petitioner vide Cheque No. 508868, dated 30th April, 2013, which was cleared on 15th May, 2013;
- b) The payment of Rs.10 crore was made to the petitioner vide Cheque Nos. 508927, 508928, 508929, 508930 and 508931 dated 20th May, 2013, 24th May, 2013, 26th May, 2013, 28th May, 2013 and 30th May, 2013 respectively, all of which were cleared by 4th June, 2013;
- c) The payment of Rs.39 crore was made to the petitioner in 14 monthly instalments vide various Cheques and the entire dues were cleared by the respondent by 30th July, 2014 in terms of the Settlement Agreement dated 6th May, 2013.

44. The details of payments made by the respondent to the petitioner under the Settlement Agreement dated 6th May, 2013 have been annexed as Annexure R-9.

45. It is stated that the respondent has fulfilled and discharged all of its obligations under the Settlement Agreement dated 6th May, 2013 and the petitioner had accepted the said discharge of obligations without any protest. Thus, the said amount in view of disputed facts cannot be protected in the petition. Counsel for the petitioner argued that since the payment was not made within time as per the Agreement, therefore, the petitioner has a right to recall the waived amount.

46. I do not wish to express any opinion in the present petition. In case the petitioner wishes to press its claim, it can only be adjudicated by the Arbitral Tribunal. I am not inclined to pass any order in favour of the petitioner to secure the amount as prayed to extent the petitioner if so desire may raise before the Arbitral Tribunal.

EXIT AMOUNT

47. Admittedly, the parties have a recorded commercial understanding under Clause 1.5 of the MSA that if the respondent wishes to terminate the site orders before the expiry of the lock-in period without cause, the respondent is liable to compensate the petitioner as a percentage of the monthly fees for the balance lock-in period with such percentage varying from 35% to 60% for different categories of sites. Counsel for the petitioner has submitted that in view of respondent's early exit of sites under the MSA, the respondent is liable to pay lock-in liabilities to the tune of Rs.46.7 crore. The site-wise details and calculations of the lock-in liabilities have been provided in the petition.

48. In its support, learned Senior counsel for the petitioner submits that passive infrastructure providers such as the petitioner incur massive expenditure in building up and operationalising telecom tower sites, often at the behest of telecom companies such as the respondent. If telecom companies exit such sites before the agreed upon period, it is impossible for infrastructure providers to recover their costs.

Further, the exact loss that is suffered in case of early termination is difficult to quantify and, therefore, lock-in amounts are commercially agreed upon upfront. In the context of the MSA, the lock-in amounts were arrived at after various negotiations, by keeping in mind the type of sites (i.e., whether a particular site is anchor or shared) and the number of tenants at the site on the date of exit. It is thus clear that the lock-in liabilities are a genuine pre-estimate of the damages to be incurred in case of early exit by the respondent and therefore, the petitioner is *prima facie* entitled to full payment of the lock-in liabilities under the MSA.

49. It is stated that the respondent has, on various occasions, implicitly acknowledged its obligation to pay lock-in fees under the MSA. In its 27th November, 2015 letter, about terminating services for the Gujarat circle as the respondent requested termination **"without imposition of any exit penalty"**. The communication is filed as annexure P-17 along with the petition.

50. Therefore, the petitioner has submitted that the respondent was fully aware of and has acknowledged its liabilities to pay the Exit Fees even at the time of termination. Even before, the respondent has sought waivers of lock-in fees for sites at the time of exit on various occasions: by virtue of execution of (i) Settlement

Agreement; ROFR Agreement and (iii) Addendum to Settlement Agreement, whereby the respondent had sought express waivers of lock-in fees, thereby implicitly acknowledging that such lock-in fees were due.

51. The respondent has opposed the prayer of exit charges on the basis that no "actual loss" has been demonstrated by the petitioner.

52. On behalf of the petitioner, it is submitted that the parties while entering into the Agreement had clearly made provisions for the payment of fee, in case of premature exit by the respondent from the sites. At the time when the parties had entered into MSAs as well as supplementary agreement, they were aware that if the respondent exits prematurely, the petitioner will suffer loss, and in view thereof, a method to calculate that loss was provided in the agreement itself. Therefore, to say that it is in the nature of penalty or not a genuine pre-estimate of damage is clearly untenable.

53. It is argued that merely using the word 'penalty' by the respondent in the communication will not make the exit fee in the nature of penalty. In support thereof, the judgments are referred by the respondent in its reply, to the extent that the exit fee is in the nature of penalty and it is inapplicable in the facts of the present case. In the present case, the exit-fee envisaged in the Agreements, is a genuine pre-estimate of damage suffered by the petitioner in case the respondent prematurely exits the petitioner's sites. The genuine nature of damage is apparent from the fact that the respondent had itself agreed in the Settlement Agreement to pay the same in case of prematurely exiting the sites.

54. In support of arguments, the petitioner has referred the decision of the Supreme Court in **ONGC v. Saw Pipes**, AIR 2003 SC 2629 where while interpreting Sections 73 and 74 of the Contract Act held that the party who is alleging that stipulated amount is not reasonable compensation, has to prove the same. The relevant excerpt of the judgment is as follows:

"46. From the aforesaid Sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same." (Emphasis supplied)

55. It is stated by the petitioner that the respondent's claim regarding the lock-in liabilities cannot be accepted as passive infrastructure providers such as the petitioner who incur massive expenditure in building up and operationalizing telecom tower sites, at a specific location, at the behest of telecom companies such as

the respondent. If telecom companies exit such sites before the agreed period, it is impossible for the infrastructure providers to generate revenues even for the recovery of their costs. Hence, the lock-in liabilities of the respondent are meant to justly compensate the petitioner for its huge investments in the sites infrastructure, upon an early termination by the respondent.

56. It is also the contention of the petitioner that where it is difficult to prove the exact loss suffered as a result of breach of the contract and the compensation named in the contract for such breach is a genuine pre-estimate of loss which the parties knew to be likely to result, there is no question of proving loss and the party is not required to lead evidence to prove actual loss.

57. It is true that in relation to the liquidated damages, it has been specifically held that in cases of complex commercial contracts, where contracts are negotiated and drafted by experts in the field, the intention of the parties are only to be gathered from the words used.

58. The said aspect of liquidated damages has been dismissed by me in the connected matter being O.M.P.(I)(Comm)No.186/2016 titled as **Indus Towers Limited v. Videocon Telecommunications Limited** in paras 54 to 62 on similar situation. My finding in this matter also remains the same. The said paras read as under:

"54. In terms of Section 74 of the Contract Act 1872, where the contract stipulates an amount that is payable by way of liquidated damages/penalty, only reasonable compensation upto the maximum of the amount stipulated in contract is recoverable. In other words, Section 74 is disabling inasmuch as notwithstanding any such amount

stipulated in the contract, the Claimant is only entitled to reasonable compensation for the loss it has suffered and for which compensation cannot exceed the amount prescribed in the contract

55. In this regard, the respondent has placed the reliance on the following judgments:-

(i) In ***Kailash Nath Associates v. Delhi Development Authority***, (2015) 4 SCC 136, the Supreme Court has observed the following:-

"43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a

sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application".

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages—namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall." (Emphasis supplied)

(ii) In **Tower Vision India Pvt. Limited v. Procall P. Ltd.**, (2014) 183 Comp. Cases 364 (Delhi), this Court has observed that:

"13.This provision makes it clear that such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle enshrined in this section that a mere breach of contract by a defaulting party would not entitle other side to claim damages unless the said party has in fact suffered damages because of such breach. Loss or damage which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered. When there is a breach of contract, the party who commits the breach does not eo instant, i.e. at the instant incur any pecuniary obligation nor does the party complaining of the breach becomes entitled to a debt due from the other party..."

"24.Even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him and what is stipulated in the contract is the outer limit beyond which he cannot claim. Unless this kind of determination is done by the Court, it does not result into "debt". (Emphasis supplied)

- (iii) In the recent judgment dated 8th July, 2016 passed in **Indus Tower Limited v. Sistema Shyam Teleservices Limited**, O.M.P. (I) (Comm.) No.103 of 2016, it was held as under:-

"81. From the entire gamut, prima facie it appears that the liability of Exit Charges cannot be treated as pre-estimated damages. The said charges are 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. After the trial, if the case is made out, then the petitioner might be entitled for compensation."

- (iv) **Vishal Engineering & Builders v. Indian Oil Corporation Limited**, 2012(1) Arb. LR 253 (Delhi) (DB) [Paras 19,20,22,23,24,37&39]

"12.Section 74 of the Contract Act stipulates that in case of such a broken contract if a sum is named in the contract as the amount to be paid in case of such breach, whether or not actual damage or loss is proved to have been caused thereby, the aggrieved party is entitled to receive from the opposite party who has broken the contract, a reasonable compensation not exceeding the amount so named.

37.Merely because there is a clause of liquidated damages that does not mean that the amount of liquidated damages has to be recovered even when no loss has been caused. The respondent had to establish that loss was caused."

56. Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of the petitioner has placed the reliance in this regard on **ONGC Ltd.** (supra), particularly paras 64 to 68 which read as under:-

"64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand case wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not

actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is — whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.....

..... 66. In *Maula Bux* case the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in

case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.

67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed..... In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty..... There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods......

68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation....."

57. In reply to the said citation of **Saw Pipes** (supra), it is submitted by the respondent that the aforesaid judgment would not help the case of the petitioner since it is entitled without any proof of damages/loss to the exit charges as stipulated in the contract, inasmuch as the relevant clause at issue in the aforesaid judgment expressly stipulated that the amount in question is a genuine pre-estimate of damages as understood by the parties. The present case is not a case where the issue of public utility is involved or it is also not a case where it is difficult to assess the compensation. Therefore, the petitioner is to prove the damages regarding the exit charges. Further, this Court in **Indus Tower Limited** (supra) has held that exit charges cannot be treated as damages as stipulated in Schedule 5 Part II with the clause of MSA.

58. It is correctly argued that no such stipulation is present in the instant contract between the parties. In **Kailash Nath** (supra) which considers various judgments on the point and also by a Division Bench of this Court in **Vishal Engineers** (supra), it is only where damages cannot be assessed and/or are impossible to prove, and the contract in question contains a stipulation to pay a specified amount by way of a genuine pre-estimate of damages, that such amount would be payable without proof of the extent of actual loss/damage. The Supreme Court in **Saw Pipes** (supra) has contemplated the onus shifting to the defendant to establish the absence of loss/damage and not otherwise. It is rightly observed in the said judgment that where the contract in question is one relating to a public utility and for instance the loss/damage to the public on account of delay in due execution, the loss on account of the breach is not amenable to precise quantification and assessment.

59. One instance of the application of the principle as articulated in ONGC's case, which in no manner deviates or indeed could have deviated from the settled position in law under Section 74 as enunciated by previous larger and co-ordinate Benches, is the decision of the Supreme Court in **Construction and Design Services v. Delhi Development Authority**, (2015) 14 SCC 263 which is related to a public utility and had contained an express finding to the effect that the contractor had failed to execute the work (construction of sewerage pumping station) (para 14). It is in this context that the Supreme Court held that if the entire amount stipulated is a genuine pre-estimate of damages, actual loss need not be proved (para 16). The Court further premised this conclusion on a finding that the evidence of precise amount of loss may not be possible (para 17).

60. The *dicta* of the Constitutional Bench of the Supreme Court rendered in **Fateh Chand v. Balkishan Das**, AIR 1963 SC 1405, is quoted often in judgments dealing with the issue of liquidated damages. In the said judgment, the Supreme Court held as under:

"The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who

*has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby, it merely dispenses with the proof of 'actual loss or damages'; **it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted.....***"

61. A party, who has suffered breach, is entitled to compensation. In **State of Kerala & Ors. v. United Shippers and Dredgers**, AIR 1982 Kerala 281, a Division Bench of Kerala High Court was confronted with the question "Whether even in the absence of legal injury resulting from the breach of contract, claim for compensation will lie in the light of Section 74 of the Contract Act." Considering the question, the Kerala High Court held:

"Compensation is something that constitutes an equivalent or recompense; making things equivalent; satisfying or making amends". This is how the word compensation has been explained in Biswas's Encyclopaedic Law Dictionary and in Jowitt's Dictionary of English Law. Black's Law Dictionary explains compensation as 'indemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value; that which is necessary to restore an injured party to his former position. 'Compensation' signifies restoration of position or making things equivalent or recompense. Necessarily, something must have happened as a result of the breach of contract which requires an act of recompense or restoration. **If the breach has not resulted in any harm, loss or damage to the other party, the question of recompensing him or restoring to him something which he has lost would not arise.** That is the reason why Section 73 of the Act states 'compensation for any loss or damage caused to him thereby'. **However grievous or serious an act of breach may be, if it does not lead to any loss or damage caused to the other party Section 73 will not give rise to a right of compensation."**

"14.The interpretation canvassed by the appellant would go against the legislative purpose in using the word **compensation** in all the three sections viz.; Ss. 73, 74 & 75 of Chapter VI of the Act. **One cannot compensate a person who has not suffered any loss or damage.** There may be cases where the actual loss or damage is incapable of proof. Facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damages. Section 74 of the Act exempts him from such responsibility and enables him to claim compensation in spite of his failure to prove the actual extent of the loss or damage, provided of course he establishes the basic requirement for award of compensation viz the fact that he had suffered some loss or damage. The proof of this basic requirement is not dispensed with by Section 74 of the Act."

"18. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from sections 73 & 75 of the Act. **Section 74 is only supplementary to section 73 of the act and it does not make any departure from the principle behind section 73** in regard to this matter. **Every case of compensation for breach of contract has to be dealt with on the basis of section 73 of the Act.** In a particular case where the contract itself stipulates for payment of sum of money on the breach of contract or contains any other stipulation for penalty, the principle additionally propounded by Section 74 also will have to be applied and that is why **irrespective of the amount stipulated in the contract, the party suffering from the breach is entitled only to reasonable compensation, which, shall not exceed the amount so stipulated in the contract.** Whether it be a contract which stipulate sum of money as being payable on breach of contract or whether it contains any other penal clause, or whether it is a contract which does not contain any such clause, **the party complaining of breach of contract cannot**

successfully claim compensation unless he makes out loss or damage referable to such breach. The best measure of reasonable compensation would of course be the extent of actual loss or damage sustained.If quantification of loss or damage is not possible, the party who has suffered on account of the breach is not without remedy. He can still request the Court to assess reasonable compensation on the materials available and award the same to him..... In a case where the party complaining of breach of contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy or make amends. Therefore he will not be entitled to compensation."

62. This position was accepted and reiterated by a learned Single Judge of this Court in **Indian Oil Corporation v. Lloyds Steel Industries Ltd.**, 2007 (4) Arb.L.R. 84 (Del) and a Division Bench of this Court in **Vishal Engineers** (supra). The judgments of **Lloyds Steel** and **Vishal Engineers** also considered the judgment of the Supreme Court in **Saw Pipes** (supra) and has explained its implication. In **Lloydys Steel** (supra), this Court has held as under:

"51. Notwithstanding the above, the petitioner still wants damages to be recovered from the respondent on the spacious plea that liquidated damages mentioned in the contract are pre-determined damages and, therefore, in view of provisions of Section 74 of the Indian Contract Act, the petitioner was entitled to these damages and it was necessary for the petitioner to prove these damages. **The legal position, as explained by the Supreme Court in ONGC v. Saw Pipes (supra), which has already explained above, is not in doubt. However, it is only when there is a loss suffered and once that is proved, it is not for the arbitrator or the Court to examine the actual extent of the loss suffered once there is a pre-estimation thereof. Moreover, the compensation, as stipulated in the contract, has**

to be reasonable. In a particular case where the defaulting party is able to demonstrate that delay/default has not resulted in any loss being suffered by the other party, then that party cannot claim the damages only because in the contract there is a stipulation regarding liquidated damages.

52. No doubt, the parties to a contract may agree at the time of contracting that, in the event of breach, the party in default shall pay a stipulated sum of money to the other. However, the stipulated sum has to be a genuine pre-estimate of damages likely to flow from the breach and is termed as 'liquidated damages'. **If it is not a genuine pre-estimate of the loss, but a amount intended to secure performance of the contract, it may be a penalty.....**

X X X X

55. It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow there from that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. **For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to award a compensation where no loss is suffered, as one**

cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation inspite of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. **In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation See *State of Kerala v. United Shippers and Dredgers Ltd.* . Even in *Fateh Chand (supra)* the Apex Court observed in no**

*uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. **If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed.**"*

59. In the present case also, there is no pleading by the petitioner that the purported loss in the instant case is not capable of quantification or the present case is the case of public utility. Thus, the principles laid down in **Saw Pipes** (supra) is not applicable in the facts of the present case, nor the said judgment would help the case of the petitioner.

60. But at the same time, the respondent cannot deny the fact that the parties had agreed between them in MSA that in the event when the respondent exists from any site to the terms of the Service Contract, it shall pay an amount as specified in the schedule. It is also correct that no case of public utility is pleaded and the present case is not that one that it is virtually not possible to assess the pre-estimated genuine damage.

Under such situation, it cannot be denied by the respondent that in case it is proved, the petitioner may be entitled to reasonable compensation. Therefore, I am of the view that at the best, if it is

proved before the Arbitral Tribunal, the petitioner may get the reasonable compensation.

61. The spectrum has been transferred and the service is closed. It is true and also admitted by the petitioner that the said fact can be ascertained by the Arbitral Tribunal, for which the steps are taken.

62. The question before this Court at present is as to whether till such time, the compensation is ascertained or the claim of the petitioner is rejected, whether in view of the peculiar facts and circumstances, any amount should be secured or not. The issue before this Court is also that in case, the Arbitral Tribunal awards compensation in favour of the petitioner, it is to be assessed as to under those circumstances, the respondent would be in a position to pay the said amount or the Award would be merely a paper decree.

63. The respondent's contention is that the petitioner has failed to satisfy the requirement of the Order XXXVIII Rule 5 CPC and that there is no averment in the present petition qua the respondent's intention to obstruct or delay the execution of arbitral award is without any merits.

64. In reply to this argument, Mr.P.Chidambram and Mr.Parag P. Tripathi, learned Senior counsels have referred many paragraphs of the petition wherein the petitioner has categorically stated about the *mala fide* and fraudulent intention of the respondent. In view of the respondent's admitted precarious financial position and its inability to pay its debts, it does not matter whether the respondent has the 'intent' to obstruct or delay the execution of the award, in case it is passed in the petitioner's favour. The record of the case, documents

filed and the overall conduct of the parties can be looked into by this Court to determine whether the guidelines of Order XXXVIII Rule 5 of CPC are satisfied or not.

65. In the present case, it is evident from the act on the part of the respondent, that its sole intention was to transfer the sale consideration to the Consortium of Banks in utter disregard to the directions issued by this Court, the fact which satisfies the test laid down under Order XXXVIII Rule 5 CPC.

66. In number of cases, the Courts have held that the strict provisions of Order XXXVIII Rule 5 of CPC cannot be bodily lifted and imported into Section 9(ii)(b) of the Act. The rigours of every procedural provision in CPC cannot be put into place to defeat the grant of relief, which would sub-serve the paramount interests of justice.

The following case laws can be relied upon:

- (i) ***Steel Authority of India Ltd. v. AMCI Pty Ltd. & Anr.***, passed by this Court on 1st September, 2011 in OMP No.417 of 2011;
- (ii) ***Gatx India Pvt. Ltd. Vs. Arshia Rail Infrastructure Ltd.***, passed by this Court on 20th August, 2014 in OMP No.1132/2013.

67. I reject the contention of the respondent that no remedy is available to the petitioner under Section 9 of the Act. Relief under Section 9 cannot be refused on the ground of existence of Secured Creditors. There is no embargo under the law for passing orders for securing of amounts and if such an extraneous issue is taken into consideration, it will sub-serve the purpose of the provisions of

Section 9. While deciding the petition under Section 9 of the Act, the Court must have due regard to the entire gamut of the matters in these types of cases where the party has no respect for Court order, reasonable amount is to be protected, otherwise, the respondent will act in the same manner if the award is passed in favour of the petitioner.

68. There is an implied promise of the respondent's contention that it would be able to honour the award which may eventually be passed against it through its non-spectrum based business is a feeble attempt on the part of the respondent to establish before this Court, its ability to discharge its liability in future. On one hand, the respondent had tried to show its financial condition to somehow justify the sale of spectrum. On the other hand, it pleads in its defence that it shall be able to honour its liabilities and as such, no order or direction is warranted against it under Section 9. The respondent's plea is totally baseless. Even going by the respondent's figures of profits generated through its non-spectrum based business for the last three years, it is clear that the same would not be sufficient to discharge the huge financial liabilities of the respondent running into Crore. Nothing cogent is there to assure that the respondent would be able to discharge all its financial liabilities in future. It is an admitted position that the respondent has been suffering from financial condition and is indebted to its secured creditors to the tune of Rs.4,485.06 Crore. Besides this, the respondent suppressed that it has availed finance of Rs.7,500 Crore from VIL, i.e. its parent company, which it is obliged to refund. The fact that the respondent is apparently running into heavy losses; its assets other than the spectrum are charged in favour of secured

creditors/lenders and that there are other higher priority obligations, such as, repayment of money to its parent company, *prima facie* indicates that it would not be possible for the respondent to honour its debts and financial obligations.

69. It is a matter of fact that in the present petition and connected petitions filed by some other petitioners against the respondent being OMP (I) (COMM) No.95/2016, OMP (I) (COMM) No.186/2016 and OMP (I) (COMM) No.107/2016, vide order dated 1st April, 2016, this Court directed the respondent that in case the Spectrum sold/transferred, the respondent would deposit the amount so claimed in the petitions with the Registrar General of this Court.

70. While the final arguments were being heard in the subject petition on 24th May, 2016, the respondent had sold/transferred the spectrum without depositing the claimed amounts in utter disregard to the direction issued by this vide Order dated 1st April, 2016.

71. Therefore, by order dated 26th May, 2016, this Court recorded the conduct of the respondent during the proceedings and in view thereof, directed the respondent to deposit the claimed amount with the Registrar General of this Court.

72. Despite full knowledge of the conditions imposed by the Court for sale/transfer of spectrum, the respondent in connivance with the State Bank of India had deliberately transferred the entire sale consideration directly into the designated account maintained by SBI in an attempt to take the same out of reach of this Court.

73. The said orders dated 1st April, 2016 and 26th May, 2016 were challenged before the Division Bench where with the

consent of the parties, it was agreed that without deposit let the judgment be pronounced in the matter subject to the certain conditions.

74. In view of the said conduct of the respondent, the balance has to strike between the parties, as this Court apprehends that if the Award is passed, the petitioner may not be able to recover the awarded amount in view of losing faith of the Court by the respondent as per past experience, as despite of conditional order, the spectrum was sold to Bharti Airtel Ltd. who was also aware about the interim directions. On the date of selling the spectrum, all were fully aware. The conduct of the respondent speaks for itself. The Court thus is satisfied with the requirement of the provisions under Order XXXVIII Rule 5 CPC necessitating grant of part relief in view of peculiar facts and circumstances.

75. I do not find any force in the submissions of the respondent that no amount can be secured, as there is a first charge of secured creditors on entire assets and even the petitioner cannot claim preference over secured creditors. There is no cogent and clear evidence placed on record to prove that there is first charge of secured creditors, i.e. consortium of banks. Even, it is a matter of surprise that the consortium of banks was fully aware of the pendency of various petitions from March, 2016 as well as the interim orders passed, however, the bank did not take any steps for the last many years in order to recover the amount due. They have woken up only when the petitions are filed and produced few documents of the year 2016.

76. As discussed earlier, if it is proved, the petitioner may be entitled to reasonable compensation. Without prejudice and without

going into the merits of the case, as the claim of the petitioner is for a sum of Rs.46.7 Crore, taking the face value of the said claim, the respondent is directed to deposit a sum of Rs.9.34 Crore (i.e. 20% of the amount claimed) within two weeks, with the Registrar General of this Court by way of Bank Guarantee subject to his satisfaction, for the period of two years at present, which shall be extended from time to time until the Award is published by the Arbitral Tribunal. The said deposit shall be treated as without prejudice. As far as other charges are concerned, the said claim can be raised before the Arbitral Tribunal which shall be decided by the Tribunal as per their own merits and without any influence of this order.

DETAILS OF PETITIONER'S CLAIMS ON OVERDUE INVOICES

77. Now, I shall deal with the claim of Overdue Invoices and Interest, the contention of the petitioner is that as on 15th March, 2015, the respondent owed Rs.40.50 Crore to the petitioner on account of unpaid invoices and interest thereon. In support, the petitioner has referred the Annexure P-4. It is contended that since the filing of the petition, the petitioner has continued to provide services to the respondent while the respondent has failed to make payment of a single rupee for such services. Accordingly, the following amounts which have been invoiced to the respondent, were also added to the amounts claimed: (i) Rs.8.09 Crore in respect of dues for the months of March and April-Annexures A-4 to A-6 of the First Supplementary Affidavit of the petitioner dated 19th April, 2016; and (ii) Rs.4.03 Crore in respect of pending dues for the month of May-Annexure A-1 of the Second Supplementary Affidavit of the petitioner dated 25th May, 2016 filed by the petitioner.

78. It is argued on behalf of the petitioner that the amounts claimed in respect of overdue invoices arise directly under the MSA and are indisputable matters of record. The respondent has made clear admissions with respect to its liabilities on two separate occasions in reconciliation exercises between the parties: On 14th October, 2015, liabilities up to Rs.29.96 Crore were admitted as on 30th September, 2015 and on 31st December, 2015, liabilities up to Rs.34.31 Crore were admitted as on 30th November, 2015- Annexure A-8 of the First Supplementary Affidavit dated 19th April, 2016. The respondent has not disputed these reconciliation exercises during the proceedings. But despite of the same, the respondent has failed to pay the same admitted liabilities except the respondent in rebuttals to the aforesaid except raising a counter-claim of Rs.75 Crore.

79. It is contented by the petitioner that the counter-claim is based on bald allegations without providing any evidence or break-up of such amounts and is a clear after-thought. The first instance of such a claim was the respondent's recent letter dated 9th March, 2016 (Annexure P-15) following the initiation by the petitioner of legal proceedings against the respondent. That apart, such claims contradict Clause 1.19 of the MSA, under which no indirect, or consequential losses can be claimed.

80. In earlier part of my order, I have already rejected the plea of the respondent to adjust the such claim by the respondent observing that the such claim cannot be raised in the present petition. In any event, the proper forum for the respondent to raise such a counter-claim is before the arbitral tribunal. The counter-claim cannot be used as a defence in the current proceedings. The current

proceedings are concerned with securing the amounts claimed by the petitioner pending arbitration, with such security being necessitated by the respondent's precarious financial position and exit from the mobile telecom business. Therefore, at the cost of repetition, I agree with the petitioner's argument that the plea cannot be raised here.

81. It is denied by the petitioner that the respondent has been making payments regularly under the MSA. From the reconciliation sheets signed by the respondent for overdue amounts (till 30th November, 2015) (annexed in Annexure A-8 of the Supplementary Affidavit), the respondent's admitted position is that amounts of Rs.34.31 Crore were outstanding as on 30th November, 2015. Even by its email dated 13th April, 2016 (annexed in Annexure A-7 of the Supplementary Affidavit), the respondent has refused to make any payments to the petitioner despite of outstanding amounts, and despite the fact that the petitioner has been providing services to the respondent continuously till date. In this regard, the petitioner has provided a detailed break-up of the overdue amounts for each invoice raised between 3rd January, 2013 and 4th March, 2016. All other contentions raised by the respondents are denied by the petitioner in its rejoinder.

82. The petitioner had claimed amounts overdue in respect of invoices raised under the MSA (as defined in the petition) and interest thereon aggregating to Rs.40.50 Crore. The aforesaid figure represented dues as on 15th March, 2016, it does include into account dues for the subsequent period. In addition the petitioner had raised invoices dated 4th March, 2016 on the respondent for an amount aggregating to Rs.2.62 Crore. The payment towards the

aforesaid invoices became due on 7th April, 2016. Copies of the aforesaid invoices are annexed to the Affidavit as Annexure A-1 filed along with affidavit dated 19th April, 2016. It is alleged in the affidavit that the representative of the respondent had verbally informed the petitioner that the petitioner's dues would not be paid due to the respondent's "lack of funds". The petitioner sent emails dated 4th April, 2016 and 6th April, 2016 to the respondent calling upon the respondent to pay the due amounts for the month of March, 2016. The aforesaid emails have been annexed hereto as Annexure A-2. In addition, the petitioner served a notice on the respondent dated 12th April, 2016 calling upon the respondent to pay the abovementioned dues of Rs.2.62 Crore. The petitioner sought payment of the aggregate of the following amounts in the aforementioned notice:

- a. Rs.2.62 Crore towards due amounts for the month of March, 2016, as mentioned above;
- b. Rs.1.48Crore towards reimbursement of power and fuel expenses for the month of March, 2016 (as per invoices dated 8th April, 2016 and 11th April, 2016);
- c. Rs.2.61 Crore towards services being rendered by the petitioner for the month of April, 2016 (as per invoice dated 5th April, 2016); and
- d. Rs.1.38 Crore representing the provisional amount that shall be payable as reimbursement charges for the period between 1st April, 2016 and 2nd May, 2016.

83. The above amounts aggregate to Rs.8.09 Crore. The abovementioned 12th April, 2016 notice of the petitioner is annexed hereto as Annexure A-3. Thus, the total amount due from the

respondent to the petitioner, against unpaid invoices upto 2nd May, 2016 with the break-up as:

Overdue Invoices+ interest thereon	Rs.48.59 Crore (Rs.40.50 Crore towards dues claimed in the petition + Rs.8.09 Crore towards due amount claimed in the affidavit)
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84. The petitioner filed the second supplementary affidavit wherein it was stated that the petitioner has raised invoices dated 3rd May, 2016 on the respondent for an amount aggregating to Rs.2.61 Crore representing IP fees for the month of May. However, the respondent has refused to take the delivery of the invoices in spite of the petitioner's attempts to deliver the same. Copies of the aforesaid invoices are annexed to the affidavit dated 25th May, 2016 as Annexure A-1. It is stated that in addition, the respondent is also liable to pay Rs.1.42 Crore representing provisional amounts for reimbursement charges for the month of May, 2016. Thus, the petitioner claims a total of Rs.4.03 Crore under the said affidavit. The total claims of the petitioner with regard to unpaid invoices till the date of selling of spectrum is Rs.52.92 Crore.

85. The respondent has merely made vague submissions about the unpaid invoices. Neither the respondent has admitted the amount as claimed, nor acknowledged the same. The respondent has failed to produce any cogent and clear evidence before the Court to show that it has paid the amount against the invoices. On the other hand, the petitioner is able to file e-mails and other evidence by way of affidavit that a sum of Rs.52.92 Crore amount is due towards unpaid invoices. There is no impediment to secure at least about 60%

amount for unpaid invoices and at the same time, the facility is enjoyed by the respondent who cannot stall the amount of unpaid invoices. Thus, in order to strike the balance between the parties, at this stage, I direct the respondent to deposit at least a sum of Rs.32 Crore also with the Registrar General of this Court, within two weeks, by way of Bank Guarantee subject to his satisfaction, for the period of two years at present, which shall be extended from time to time until the Award is published by the Arbitral Tribunal.

86. As regards the remaining amount of about 40% as claimed, it is directed that both parties within two weeks shall jointly appoint a Chartered Accountant who after the meeting of both parties' representatives and examining the invoices shall identify the figures about the unpaid invoice in terms of agreement so that in case any remaining amount is payable, the same shall be paid by the respondent to the petitioner directly within two weeks once the report is submitted, as counsel for the respondent does not dispute that in case actual payment on the basis of subject matter of sites is due, the petitioner would be entitled to receive the same.

87. In view of the directions issued by the Court vide order dated 1st April, 2016, it was the responsibility of all the Directors of the respondent-Company to ensure the compliance of the order as they are personally responsible. In this regard, reliance is placed on the judgment passed by the Supreme Court in the case of **DDA v. Skipper Construction Company (P) Ltd. and another**, (1996) 4 SCC 622. In this case, the issue was related to the adoption of the device of incorporation by certain individuals for committing illegalities and to defraud people. The Court reiterated the proposition that where the corporate character is employed for the

purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass the appropriate orders to do justice between the parties concerned. The Court held as under:

"The fact that Tejawant Singh and members of his family have created several corporate bodies does not prevent this court from treating all of them as one entity belonging to and controlled by Tejawant Singh and family if it is found that these corporate bodies are mere cloaks behind which lurks Tejawant Singh and/or members of his family....."

88. It is further clarified that if the respondent will not comply with the order for any reason as mentioned by it during the course of hearing, the petitioner under those circumstances is granted liberty to move an application to recover and deposit the said amount from the personal assets of the Directors, in view of the peculiar facts of the present case. In this regard, reference is also made to the judgment passed by the Supreme Court in the case of **State of UP v. Renusagar Power Company**, AIR 1988 SC 1737, wherein the Court has dealt with the nexus between the parent and the subsidiary companies. In this case, the Supreme Court had lifted the corporate veil to hold that Hindalco, the holding company and Renusagar Power Company, its subsidiary, should be treated as one concern and the Power Plant of Renusagar must be treated as the own source of generation of Hindalco and on that basis, Hindalco would be liable to pay the electricity duty.

89. As far as the application being I.A. No.4994/2016 filed by the applicant-State Bank of India is concerned, similar application was filed in O.M.P. (I) (COMM.) Nos.95/2016 & 107/2016 wherein I have

considered the said application and discussed the same. The relevant extracts of the order passed therein are reproduced here below:-

"Pertaining to I.A. No.4995/2016, the said application has been filed under Order 1 Rule 10 CPC for intervention on behalf of applicant-State Bank of India, as Facility Agent, for and on behalf of 18-Banks' Consortium, to become a party and to receive the spectrum amount. The prayer of this application is strongly opposed by the petitioner, by stating that the application itself is not maintainable. The basis of this application rests on the alleged fact that the spectrum of the respondent has been charged to the applicant-banks. No deed of mortgage has been annexed to the application to prove the existence of any such charge. On the contract, the clause cited from the alleged indenture of mortgage specifically states that the subject matter of the charge would exclude the UASL (the Unified Access Spectrum License, which at the relevant time included the spectrum currently sold by the respondent to Bharti).

It is settled law that airwaves constitute public property and must be utilized for advancing public good. No individual has a right to utilize them at his choice and for purposes of profit [*Secretary, Ministry of I&B v. Cricket Association of Bengal*, 1995(2) SCC 161, para 206(b)]. Therefore, any charge sought to be created over the spectrum by the respondent must be approved by the Government. In this regard, paragraph 8 of the minutes of the meeting dated 9th September, 2015 and page 4 of the minutes of the meeting dated 19th December, 2015 between the respondent and the applicant-Banks clearly states that the assignment of the spectrum license in favour of the applicant-banks was yet to be completed since permission of the Department of Telecommunications for the same was awaited. Therefore, the Banker's application grossly fails to establish that the spectrum is charged in favour of the applicant-banks.

Under illustration (g) to Section 114 of the Indian Evidence Act, 1872, if evidence which could be produced is withheld, the Court may presume that such evidence is unfavourable to the person withholding it. The applicant-bankers are withholding the indenture of mortgage, and their refusal to produce the same despite the same being pointed out during the hearings, the Court must presume that the mortgage does not extend to the spectrum. The applicant-bankers have not taken any steps for enforcement of the alleged security at the appropriate forum for the last many years. Even assuming that the spectrum has been charged in favour of the applicant banks, it must be noted that the priority of payments enjoyed by secured creditors is only relevant when paying off debts of a limited company in liquidation.

The application is otherwise not maintainable as the applicant-banks are not a party to the arbitration agreement in the MSA. The term 'party' as used in Section 9 of the Arbitration Act is defined as a 'party to the arbitration agreement'.

It has been held in many judgments that Section 9 of the Arbitration Act only contemplates issuance of interim measures by the Court at the instance of a party to an arbitration agreement with regard to the subject-matter of the arbitration agreement and a third party cannot be subjected to proceedings under Section 9 of the Arbitration Act (*Shoney Sanil v. Coastal Foundations* 2006 (1) KLJ 457, Paragraph 6; *Deutsche Postbank Home Fin. Ltd v. Taduri Sridhar*, 2011 (2) UJ SC 1237 Paragraph 12; and *S.N. Prasad v. Monnet Finance Ltd.*, 2010 (10) UJ SC 4888 Paragraph 19).

The spectrum has also been sold. I have been informed that the amount is deposited in an escrow account. In the light of the above, the application of the applicant-banks is dismissed, as the same is not maintainable."

90. In view of the same, the present application is also disposed of.

I.A. No.8038/2016 (u/s 151 CPC, by petitioner)

91. The abovementioned application has been filed by the petitioner after transferring of the spectrum by respondent No.1 to Bharti, seeking the following reliefs:-

"(a) Pass appropriate orders directing the Respondents to provide information about the Escrow Account and/or any Other Accounts in which the proceeds of the transfer of Respondent No.1's spectrum rights to Bharti Airtel Limited totaling INR 2,749.88 Crore are held, and specifically the identity of any escrow agents and the terms and conditions for operation of the Escrow Account or any Other Account(s); AND

(b) Pass appropriate orders requiring the Respondents to disclose all details and documents including instructions pursuant to which funds were transferred from Airtel to Respondent No.1 and from Respondent No.1 to the Escrow Account or any other account of Respondent No.2; AND

(c) Pass appropriate orders directing the Respondents and/or any agent for the Escrow Account and/or any Other Accounts and/or the party with the necessary powers, to withdraw an amount of INR 125.82 Crore from the funds in the Escrow Account and/or any Other Accounts and deposit the same with the Registrar General of the Hon'ble Court within three (3) days;

Or alternatively,

(d) Pass appropriate orders restraining Respondent No.1, its officers, employees or representatives from transferring, alienating, creating any third party interest or otherwise dealing with an amount of INR 125.82 Crore (being the Petitioner's claims) that are currently held in the Escrow Account and/or any Other Accounts; AND

(e) Pass appropriate orders restraining Respondent No.2, its officers, employees or representatives from transferring, alienating, creating any third party interest or otherwise dealing with an amount of INR 125.82 Crore

(being the Petitioner's claims) that are currently held in the Escrow Account and/or any Other Accounts; AND

(f) Pass ex-parte ad-interim order or orders in terms of the prayers above; AND

(g) Grant exemplary costs of these proceedings to be paid by the Respondents; AND

(h) Pass any other such other and further order(s) as may be deemed fit and proper in the facts and circumstances of the case.”

92. List this application and also the I.A. No.9016/2016 on 5th October, 2016 the date already fixed.

93. In the meanwhile, the respondent or its agent is directed not to withdraw at least a sum of Rs.41.34 crore from the funds lying in the Escrow account. This order is being passed because of the reason that after the transfer of spectrum by the respondent in favour of Bharti in clandestine manner within the knowledge of SBI, they have not disclosed the details of the Escrow account despite of query raised by the Court from time to time. They had not only failed to file the reply in time but also avoided to give the details required by the Court.

Once the direction issued in para 85 of my order is complied with by the respondent, the restraint order passed in this matter shall become non-operative.

94. The main petition is accordingly disposed of.

95. The findings arrived at are tentative and the same shall have no bearing in the arbitration proceedings which may be decided without any influence of this order.

96. *Dasti*, under the signatures of the Court Master.

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 14, 2016

