

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

% **Judgment reserved on : 19th May, 2016**
Judgment pronounced on: 8th July, 2016

+ **O.M.P. (I) (COMM.) No.103/2016**

INDUS TOWERS LIMITED Petitioner
Through Mr.Rajiv Nayar, Sr. Adv. with
Mr.L.K. Bhushan & Ms.Raashi Beri,
Advs.

Versus

SISTEMA SHYAM TELESERVICES LTD. Respondent
Through Mr.Akhil Sibal, Adv. with Mr.Shivek
Trehan, Ms.Fareha Ahmad Khan,
Mr.Utkarsh Saxena, Ms.Nidhima
Sareen, Mr.Nikhil Chawla &
Ms.Jhanavi Mitra, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 praying for, inter alia, directing Sistema Shyam Teleservices Limited, the respondent not to sell, transfer, alienate or otherwise dispose of its active infrastructure equipments, apparatus consisting of Base Transceiver Stations (BTSs), cables, antennas, microwave etc., all other assets, including movable or immovable properties of whatever nature, or whole or any part of its undertaking or any rights, title or interest therein and directing the respondent to keep the same in safe custody till the disputes between the petitioner and respondent regarding non-payment of dues and unpaid amounts to the petitioner have been settled through

Arbitration, in terms of the Master Services Agreement signed between the parties.

2. Few facts are that petitioner on 10th January, 2008 was registered for Infrastructure Provider-Category-1 (IP-I) with the Department of Telecommunication, Ministry of Communication and IT, Government of India vide Registration Certificate No.177/2008, to establish and maintain passive infrastructure and provide the same to the licensees of Telecom Services under Section 4 of the Indian Telegraph Act, 1885.

3. On 25th February, 2009, the petitioner and the respondent had entered into a Master Services Agreement (hereinafter referred to as "MSA"), whereby the respondent availed of the passive infrastructure services provided by the petitioner in various telecom circles throughout India, in consideration for fees to be paid to the petitioner as stipulated under the MSA.

4. The petitioner alleged that the petitioner regularly raised invoices on the respondent company for the same and the respondent never disputed the quality of services provided by the petitioner or the invoices raised. However, a number of invoices raised by the petitioner remained unpaid by the respondent company.

5. The MSA also stipulated that the respondent is liable to pay to the petitioner 'exit amount' as prescribed under Clause 19.2 and Schedule 5 of the MSA in the event that it terminates the MSA or exits from the telecom sites under the MSA prior to the expiry of its terms.

6. The Supreme Court of India on 2nd February, 2013 delivered judgment in the matter of **Centre for Public Interest Litigation v. Union of India**, W.P.(C) No.432/2010 (2G Judgment) by which it

cancelled the Unified Access Service Licenses granted to the respondent company in 21 Telecom Circles all over India.

7. The petitioner had received a letter from the respondent dated 21st February, 2013, whereby the respondent terminated its services in 10 service areas/telecom circles, out of which the petitioner was providing passive infrastructure services to the respondent at 133 sites in 3 telecom circles, namely Punjab, Haryana and Andhra Pradesh. In this letter dated 21st February, 2013, the respondent alluded to the judgment of the Supreme Court of India dated 2nd February, 2012 in the matter of 2G Judgment and stated that pursuant to the 2G Judgment, 21 of its licenses were cancelled and hence it was terminating its services with effect from 23rd March, 2013 in the said 3 circles. The respondent also stated that this circumstance was beyond its control, falling under the clause of Force Majeure and hence the respondent is not liable to pay the lock-in charges/exit amount consequent to the early termination of the services.

8. As per petitioner the exit amount is payable to the petitioner as per clause 19.2 of MSA due to the termination/exit by respondent from the telecom site(s) where it was availing the passive infrastructure services provided by the petitioner prior to the lock-in term mutually agreed in the MSA.

9. It appears that subsequent to this judgment of the Supreme Court the respondent Company took an internal commercial decision to not renew its Licenses in the fresh auction conducted by the Government of India for various telecom circles where the petitioner was providing services to the respondent under the MSA.

Thereafter, various communications were exchanged between the petitioner and the respondent, the petitioner at all the times

rejected the stand of the respondent that it is not liable to pay the exit amount as stipulated under the agreement. The petitioner called upon the respondent to make payment of the exit amount and other amounts for unpaid invoices for the services availed under the MSA.

10. Prior to the termination of the MSA, the respondent was availing the services of the petitioner in 14 telecom circles apart from Rajasthan in India. However, pursuant to the 2G Judgment, the respondent exited from 6 telecom circles where it was availing services under the MSA but continued to avail services of the petitioner in 8 telecom circles.

11. The petitioner submits that as no response or payment was forthcoming from the respondent which is due for the last about three years, the petitioner sent a demand letter dated 10th March, 2016, (pursuant to a letter dated 7th March, 2016 also sent by the petitioner to the respondent), setting out therein the details of the outstanding amounts due and payable by the respondent to the petitioner, which included, inter alia Rs.87,80,51,993/- on account of exit amount Rs.4,00,51,757/- on account of the outstanding amount for services rendered in the six telecom circles from which the respondent has exited and Rs.23,83,22,374/- for the outstanding amount for services rendered in the telecom circles which are operative and asking the respondent to make payment of the said amount forthwith.

12. It is stated by the petitioner that due to non-payment of amount due as per agreement the disputes had arisen between the parties, the petitioner invoked Clause 21 (Dispute Resolution Clause) of the MSA and tried to have the disputes resolved amicably through the internal escalation mechanism provided therein. But, the petitioner received no cooperation from the respondent and the disputes could not be settled

amicably. The petitioner thereafter had sent a Notice dated 19th March, 2016 invoking arbitration to the respondent to refer all disputes to arbitration, as required under the MSA, nominating Retired Judge of Supreme Court as its Nominee Arbitrator. The respondent sent a response dated 25th March, 2016 to the notice invoking arbitration dated 19th March, 2016 sent by the petitioner, whereby it has without any cogent reasons rejected the reference of the disputes to arbitration, with the *malafide* intention to evade payment of the outstanding amount due and payable by the respondent to the petitioner.

13. In 2016, it has come to the notice of the petitioner that a scheme under Sections 391 to 394 of the Companies Act, 1956 has been filed for the demerger and vesting of undertakings of the respondent herein to Reliance Communications Limited (the Transferee Company).

14. It is submitted that the said scheme is unenforceable and non-implementable, inasmuch as though various assets and liabilities of the respondent are proposed to be transferred to Reliance Communications Limited, the scheme clearly sets out that no pending litigation against the respondent is proposed to be transferred to Reliance Communications Limited, which would make any award/ decree passed against the respondent incapable of being executed against them, in the event that the said Scheme is sanctioned.

15. As petitioner, being an unsecured creditor of the respondent, which is the Transferor Company, has already filed its objections to the said Scheme in the court convened meeting of the unsecured creditors.

16. The petitioner apprehends that once the said scheme is sanctioned, the petitioner is unlikely to receive its legitimate and

outstanding dues from the respondent, inasmuch as if the said scheme is approved, the respondent would not be in a position to discharge its debts, inasmuch as its assets would have been transferred to Reliance Communications Limited in consideration for shares of Reliance, which are in the form of intangible assets and would be of no help to the petitioner to realize the amounts due and payable by the respondent to it.

17. Even the petitioner had also entered into a Master Services Agreement with Reliance Communications Limited for providing passive infrastructure services, pursuant to which Reliance Communications Limited has failed to pay the amounts due and payable to the Petitioner. The petitioner has written several communications to Reliance Communications Limited, including a Legal Demand Notice dated 9th February, 2016 calling upon them to make payment of outstanding amount of approximately Rs. 88 crores to the petitioner, but there is no positive response from the respondent. It is submitted that Reliance Communications Limited, itself being a defaulter and in dispute with the petitioner, the petitioner is unlikely to get any outstanding amount due which is payable by the respondent.

18. The petitioner submits in view of an amount of Rs.115,64,26,124/- having become due and payable to the petitioner by the respondent. The said amount should be secured while disposing of present petition as the petitioner has apprehension that the assets of the respondent are likely to be sold and/or transferred and/or alienated to the detriment of the petitioner.

19. The amount of Rs.87,80,51,993/- claimed by the petitioner on account of Exit Charges is payable by the respondent to the petitioner. Mr. Rajiv Nayar, learned Senior counsel appearing on behalf of the

petitioner has referred the MSA, he says under Schedule 5 provides that the respondent is liable to pay to the petitioner Exit Amount for the telecom circles from where the respondent exited the MSA prior to the expiry of its term.

20. It is alleged by him that the respondent, in the year 2013, exited from 6 telecom circles in which it was availing services of the petitioner, citing cancellation of its licenses by the Supreme Court of India in the matter of **CPIL vs. Union of India** (2G Judgment) and Force Majeure/Change in law as the reason for terminating the MSA vide its letter dated 21st March, 2013. The respondent went on to obtain new licenses for 8 telecom circles falling under the MSA in the fresh auction conducted by the Government of India, though did not bid for licenses in 6 other circles falling under the MSA due to its own commercial and financial reasons. The respondent continues to avail services of the petitioner under the MSA for the 8 circles in which it obtained fresh licenses.

21. It is submitted by Mr. Rajiv Nayar, learned Senior counsel for the petitioner that under Clause 5.3.3 of the MSA, an obligation was placed upon the respondent to obtain and maintain all requisite licenses, which the respondent failed to do who cannot take advantage of its own commercial decisions and on one hand, plead frustration of the MSA for some telecom circles and on the other hand, continue to avail the services of the petitioner under the same MSA for other circles. The respondent was not prevented from applying for and obtaining new licenses for all the telecom circles falling under the MSA. The decision of the respondent not to bid for licenses for certain circles amounts to voluntary termination of the service contracts under the MSA. In these circumstances, with the respondent voluntarily terminating various

service contracts under the MSA due to its own commercial and financial reasons, the respondent cannot plead force majeure or part frustration of the MSA and is liable to be secured as it has come to the knowledge of the petitioner that the respondent is demerging/vesting its entire telecommunications business, including its Telecom License, in Reliance Communications Limited in a Scheme under Sections 391-394 of the Companies Act, 1956.

22. It is argued by Mr. Nayar that in the said Scheme, the respondent itself has admitted and acknowledged the petitioner as a creditor as well as the liability of the respondent to make payment of the Exit Amount to the petitioner. Attention is drawn to where the identified liabilities of the respondent, which are being transferred to Reliance are listed, and at serial no. 6, the Exit Penalties specified in Annexure B are identified as liabilities clearly acknowledges the name of Indus Towers Limited (petitioner) in relation to the liability of payment of Exit Charges. By the respondent's own admission, the respondent recognizes the petitioner as a creditor and admits that it is liable to pay Exit Amount to the petitioner. In view of the above admission, the dues claimed are admitted dues.

23. It is alleged that the said Scheme is fraudulent and detrimental to the creditors of the respondent, including the petitioner, and has been devised to defeat the claims of the creditors. In this respect, attention is drawn to Clause 8 of the Scheme titled "Legal Proceedings", which states that no legal proceedings pending against the respondent are being transferred to Reliance, despite the entire business of the respondent, its assets as well as liabilities are being transferred.

24. It is also submitted that despite being a creditor of the respondent, as admitted by the respondent itself in the Scheme, no notice of the Scheme of Arrangement was given to the petitioner and for the meeting of creditors held on 18th March, 2016, which is a clear attempt to defraud the petitioner.

25. Under these circumstances the exit amount should be secured by the respondent.

26. With regard to the other amounts claimed by the petitioner for the services provided under the MSA, being Rs. 4 crores approx., remaining unpaid in the six telecom circles from which the respondent has exited; and Rs. 23,83,22,374/- for the services being provided in the eight telecom circles where the respondent continues to avail services under the MSA. The respondent should be directed to pay the said amount directly to the petitioner.

27. It is submitted that the amounts claimed by the petitioner for the services provided to the respondent under the MSA which have remained unpaid are not disputed by the respondent, which is evident from an e-mail dated 15th March, 2016 by the respondent to the petitioner who has asked the petitioner for reconciliation of accounts, and under the column "Total Exit Circle", has acknowledged the amount of Rs.4,00,51,758/- as payable to the petitioner. Once the respondent itself has acknowledged the said amount as due and payable to the petitioner and has asked the petitioner to reconcile the same, there is no dispute relating the same.

28. It is also submitted that the respondent is also liable to pay to the petitioner the current outstanding amount of Rs.23,83,22,374/- for the 8 circles where it continues to avail the services of the petitioner under the MSA.

29. It is stated by Mr. Nayar, learned Senior counsel that for the aforesaid two set of amounts claimed by the petitioner, invoices have been regularly raised by the petitioner on the respondent on a monthly basis as stipulated under the MSA, and the respondent already has in its possession all invoices pertaining to the aforesaid amounts.

30. The case of the respondent inter alia is that during the period of 2013, many communications were exchanged between the parties wherein each party reiterated its previous stand. However, after 21st January, 2014, not a single communication, oral or written, was exchanged between the parties herein with respect to the payment of Exit Charges for more than 2 [two] years i.e. until 7th March, 2016. No such document has been filed by the petitioner before this Court. It is submitted by the respondents that the said claim is time barred. Even otherwise, the petitioner is entitled for any relief after the expiry of such long period. The disputes between the parties in the present case should be left with the arbitral tribunal.

31. It is also stated by the respondent that the impending merger between the respondent and Reliance Communications Limited was extensively reported in the media- both print and electronic in June 2015. But the petitioner did not take any steps towards agitating its purported claims, by either invoking the Dispute Resolution Procedure or by invoking the jurisdiction of this Court. It is based on its knowledge of a Media Release dated 2nd November, 2015, Bharti Infratel Limited, a 42% shareholder in the petitioner, approached this Court, for the second time, under Section 9 of the Arbitration and Conciliation Act, 1996. Despite the fact that the aforesaid Media Release issued on 2nd November, 2015 was to the express knowledge

of its shareholder, the petitioner, once again, did not choose to take any steps to agitate its purported claims.

32. It is submitted by Mr.Akhil Sibal, learned counsel appearing on behalf of the respondent that after more than two years of unexplained delay between the period of January, 2014 to 7th March, 2016, acting in concert with Bharti Infartel Limited, the petitioner sought to re-agitate abandoned and stale claims with the intention to exert further pressure on the respondent into acceding to the illegal demands of the petitioner and Bharti Infratel Limited. By its communication dated 7th March, 2016, the petitioner called upon the respondent to pay, within a period of 2 days, a sum of Rs.87,80,51,993/- towards Exit Charges [Claim No. 1]. In addition, the petitioner claimed, for the first time ever, an amount of Rs.4,00,51,757/-[Claim No. 2] as amount purportedly outstanding towards services rendered in the 6 [six] circles exited by the respondent.

33. It is stated by the respondent that within the period of three days of the demand raised, in the communication dated 7th March, 2016, the petitioner, by its communication dated 10th March, 2016 called upon the respondent to additionally pay, forthwith, a third demand for Rs.23,83,22,374/- [Claim No. 3]. The demand for Rs.23,83,22,374/- was raised by the petitioner for the first time ever in its communication dated 10th March, 2016.

34. It is also stated that without giving any time to the respondent to revert on the purported demands raised by the petitioner; the petitioner, through a communication issued on the next day i.e. on 11th March, 2016, invoiced Clause 21.1.1 of MSA thereby, referring the purported disputes to the Relationship Managers of the parties. Immediately upon the issuance of the communication dated 11th

March, 2016, the petitioner, by an email dated 11th March, 2016 sent at 1:56 pm, unilaterally fixed a meeting for the same day at 3:00 pm to discuss the purported demands.

The respondent replied to the aforesaid email on 11th March, 2016 at 2.27 pm expressing its unavailability to meet the petitioner's representative on account of prior engagements. By the said email, the petitioner was assured that the respondent shall be responding to the communication shortly. Despite the respondent's email sent at 2:27 pm expressing its inability to meet the petitioner's representative at such short notice, the representative of the petitioner unilaterally arrived at the respondent's office.

35. It is alleged that the undue and excessive haste shown by the petitioner who has issued a communication dated 11th March, 2016 wherein the petitioner proceeded to invoke Clause 21.1.2 of the MSA thereby referring the purported disputes to the Chief Technical Officer of the parties. Clause 21.1.2 of the MSA was invoked by the petitioner on the same day as the invocation of Clause 21.1.1 of the MSA by the petitioner. The MSA provides 5 business days to the Relationship Managers of the Parties to resolve purported disputes.

The respondent by its communication dated 14th March, 2016, informed the petitioner that it was in the process of examining the validity of the purported claims raised by the petitioner. In view of the fact that the purported claims related to a period of 2013 coupled with the fact that the concerned person handling the account of the petitioner was unavailable, the respondent sought a reasonable period of 10 [ten] days to respond to the communications issued by the petitioner.

36. It is stated that without having any effective discussion the petitioner raised the alleged disputes on 19th March, 2016 as mandated under Clauses 21.1.1 and 21.1.2 of the MSA and the petitioner issued a notice invoking arbitration under Clause 21.2. of the MSA on 19th March, 2016. The petitioner thereafter, filed the captioned petition under Section 9 of the Arbitration and Conciliation Act, 1996 before this Court .On 30th March, 2016 this Court by its order dated 7th April, 2016 issued notice of the petition to the respondent.

37. The respondent by its communication dated 21st March, 2013, claimed frustration of MSA on account of the judgment passed by the Supreme Court. In addition, and by way of abundant caution, the respondent invoked Clause 11.2.3 and Clause 2 of Schedule 5 of the MSA reiterating its denial of any liability towards payment of Exit Charges. The respondent again on 29th April, 2013 replied to the petitioner's communication dated 19th March, 2013 and, once again, denied payment of Exit Charges but the petitioner, vide its communication dated 30th April, 2013, claimed Exit Charges towards premature termination of service contracts.

38. The Arbitral Tribunal comprising three former judges of the Supreme Court of India in the present case stood duly constituted as on 21st April, 2016. The petitioner's petition under Section 11 of the Act challenging the appointment on behalf of the respondent has been dismissed by this Court itself.

39. Admittedly, on 23rd May, 2016, preliminary meeting was convened by the Arbitral Tribunal wherein the procedure regarding the arbitration was determined by the Arbitral Tribunal.

40. Mr.Sibal has raised the preliminary objection to the extent that the relief sought by the petitioner is now to be decided by the Arbitral

Tribunal instead of this commercial court. Mr. Sibal has challenged the maintainability of the petition under Section 9 (3) of the Act, while arguing Mr. Sibal submits that the petition has been filed before this Court on 30th March, 2016 i.e. after the enactment of the Arbitration and Conciliation (Amendment) Act, 2015, which came into effect on 23rd October, 2015 ("Amendment Act of 2015"). Prior to the Amendment Act of 2015, there was no statutory restriction on the powers of the Court to entertain an application under Section 9 of the Act even if the arbitral tribunal stood constituted. However, Section 9(3) incorporated in the Act, by the Amendment Act of 2015 provides that once the Arbitral Tribunal has been constituted, the Court shall not entertain an application under Section 9(1) of the Act unless the Court finds that circumstances exist, which may not render the remedy provided under Section 17 of the Act efficacious. Furthermore, by virtue of the Amendment Act of 2015, the Arbitral Tribunal has the same powers to grant interim relief as the Courts.

41. It is submitted by Mr. Sibal on behalf of respondent that on 21st April, 2016, the Arbitral Tribunal stood duly constituted and a preliminary hearing was scheduled by the Arbitral Tribunal on 23rd May, 2016. In view of the fact that the Arbitral Tribunal stood constituted on 21st April, 2016, the respondent, by way of a preliminary objection under Section 9(3) of the Act, objected to the maintainability of the petition before this Court.

42. In response to the preliminary objection raised by the respondent, Mr. Rajiv Nayar, learned Senior counsel appearing on behalf of the petitioner has argued that there is an apprehension that scheme under Section 391 and 394 is likely to be approved at any time and its assets would be transferred, then the petitioner may not be

able to recover any amount. Even otherwise, the completion of pleading would take some reasonable time, thus due to the existence of such circumstances the remedy provided under Section 17 of the Act is inefficacious. Once it appears, the present petition would become infructuous.

43. On this Mr.Akhil Sibal submitted that a party who has almost abandoned its purported claims for the past almost 2 years, cannot now be permitted to take advantage of the exception contained in Section 9(3) of the Act. The remedy under Section 17 of the Act has not been rendered inefficacious. If approach of the petitioner is accepted, the objective of the legislature in amending under Section 9 of the Act, which is to ensure minimisation of the interference of the courts in arbitration process shall stand defeated. A party cannot be permitted to take advantage of its own wrong. He says that under these circumstances, the petitioner ought to have filed the petition earlier.

It is submitted by Mr.Akhil Sibal that the petitioner who has failed to make any attempt to file an application under Section 17 of the Act before a duly constituted Arbitral Tribunal cannot thereafter, be permitted to argue before this Court that a remedy which the petitioner did not even seek to avail of is inefficacious. It was incumbent upon the petitioner to make an attempt before the Arbitral Tribunal seeking ad-interim/interim relief, and only in the event that the Arbitral Tribunal is unable to decide the application, can a plea of inefficaciousness be taken by the petitioner.

44. It is stated by Mr. Sibal that the remedy available to the petitioner before the Arbitral Tribunal remains efficacious as it is evident from the fact that the proceedings under Sections 391 to 394

of the Companies Act, 1956 are pending before the High Court of Maharashtra at Bombay and the High Court of Rajasthan. The De-Merger Scheme cannot come into effect till such period, it receives the statutory approval of the respective High Courts. The next date of hearing before the High Court of Rajasthan is 8th July, 2016. Even thereafter, the respondent cannot give effect to the De-Merge Scheme till such period that the approval of the DoT is accorded. It cannot therefore, be argued that the remedy of the petitioner under Section 17 of the Act is inefficacious.

45. As far as the above referred preliminary objection is concerned, in normal cases, the contentions of the respondent have a force. However, the situation in the present case becomes peculiar as the respondent itself is not sure that the scheme would not be sanctioned until the pleadings of Section 17 are ripe for hearing. The respondent is also not prepared to make the statement that if any petition under Section 17 of the Act is filed before the Arbitral Tribunal and until the same is decided, the respondent would take an adjournment in the respective High Courts where the proceedings of de-merger scheme is pending. Both the counsels, however, did not deny the fact agreeing that in case any application under Section 17 is filed before the Arbitral Tribunal, it would take some time. Though this Court agrees with the arguments of the learned counsel for respondent that as per amended provisions of Section 9(3) of the Act, only the Arbitral Tribunal be constituted and it would be appropriate by the Court to refer the matter before Arbitral Tribunal, however, the present matter is of peculiar in nature. If the respondent would have agreed to get the scheme postponed till the application under Section 17 of the Act is decided, I would not have proceeded with the matter. But due to

circumstances at the present stage, thus, I have decided to hear the petition. It is also a matter of fact that the similar two matters are pending against the same very respondent in which the orders are reserved. Out of two OMPs, one OMP was filed in 2014 i.e. before amendment of Section 9(3) of the Act when all the aforesaid circumstances were explained to the learned counsel for the respondent, who without prejudice agreed to address his submissions on merits.

46. The respondent has also raised another preliminary objection with respect to the lack of jurisdiction of this Court in view of Clause 23.12.2 of the MSA. Clause 23.12.2 of the MSA reads as under:-

"23.12 Governing Law and Submissions to Jurisdiction

...23.12 Subject to Clause 21 above, the Parties irrevocably agree that the courts of New Delhi are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and that accordingly any proceedings arising out of or in connection with this Agreement shall be brought in such courts. Subject to completion of the Dispute Resolution Procedure, each of the parties irrevocably submits to the jurisdiction of such courts and waives any objection to proceedings in any such Court on the ground of venue or on the ground that proceedings have been brought in an inconvenient forum." (emphasis supplied)

47. On behalf of the respondent, Counsel has referred the list of dates and argued that the petitioner has failed to comply with the Dispute Resolution Procedure as prescribed under Clause 21 of the MSA. The Internal Resolution prescribed under the MSA mandates that parties must attempt to resolve disputes informally through discussions between them first through their Relationship Managers and thereafter, with the Chief Technical Officers. The petitioner, through a communication issued on 11th March, 2016, invoked Clause

21.1.1 of the MSA thereby, referring the purported disputes to the Relationship Managers of the parties. Clause 21.1.1 of the MSA, it is submitted, specifically grants a period of 5 [five] business days to the Relationship Managers to resolve the Disputes. However, without giving the Relationship Managers any time to attempt resolution of the disputes, the petitioner, on the same day itself i.e. 11th March, 2016 at 8:04 PM, invoked Clause 21.1.2 of the MSA thereby referring the disputes to the Chief Technical Officers.

48. It is submitted that the petitioner has proceeded in the matters in haste. No principle of any standard of reasonableness, be said and mentioned in the Dispute Resolution Procedure prescribed under the MSA has been completed by the parties. In the absence of completion of the Dispute Resolution Procedure as mandated by Clause 23.12 of the MSA, the present petition is premature and liable to be dismissed.

49. With regard to the second preliminary objection about the non compliance of Clause 23.12.2 on merits, I do not want to express any opinion as the said clause is meant for the purpose of constitution of Arbitral Tribunal. In the present petition, the same has already been constituted. The petition under Section 11 of the Act, filed by the petitioner subsequently has been dismissed by this Court. As far as the objection raised by the respondent is concerned, it is open to the respondent to challenge the said issue before the Arbitral Tribunal. While dealing with the petition under Section 9, it is not proper to decide the said issue at this stage since at present the Court is only dealing with Section 9 petition, which cannot be rejected on this ground.

50. Now, I shall discuss the petition on the basis of rival submissions of both the parties in the present petition. The petitioner is seeking

inter alia, a direction to the respondent to deposit with this Court the sum of Rs. 115,64,26,124/.

51. As per Demand Letter dated 10th March, 2016 and pertaining to which Arbitration has been invoked against the respondent the petitioner has claimed the amount in the following manner as per the details given are as under:

- i) Rs.87,80,51, 993/- on account of Exit Charges for six telecom circles from which the respondent exited the Master Services Agreement.
- ii) Rs.4,00,51,757/- on account of services availed and remaining unpaid by the respondent in the six telecom circles from which the respondent exited the Master Services Agreement;
- iii) Rs.23,83,22,374/- on account of the outstanding amount payable by the respondent in the eight telecom circles where the respondent continues to avail services under the Master Services Agreement.

52. The amounts claimed by the petitioner towards exit charges are disputed by the respondent on various reasons including the ground that the same are time barred.

53. The respondent had denied payments towards Exit Amount in the present case on the basis of early termination vide its communication dated 21st February, 2013 and the petitioner has even admitted the same in its pleadings. Certain correspondence was exchanged between the petitioner and the respondent thereafter in 2013 and the respondent reiterated that it was not liable to pay any Exit Amounts. The petitioner did not take steps until March, 2016 and invoked arbitration only on 19th March, 2016 i.e. after more than three years.

Even the petition under Section 9 was filed by the petitioner only on 30th March, 2016.

54. In a nut shell, it is the case of the respondent that the petitioner has failed to prima facie establish its entitlement to the payment of Exit Amount in view of the early termination of the Service Contracts under the MSA by the respondent for the following reasons:

- a) The termination of the Service Contracts under the MSA has been under Clause 11.2.3 of the MSA read with Clause 2 of the Schedule 5 of the MSA on the ground of "change of law", "Law" has been expressly defined at Clause 1.1 of the MSA to include an order, judgement or decree of a court. Invoking clause 11.2.3 of the MSA, the respondent terminated the Service Contracts under the MSA on the ground that the judgment and order dated 2nd February, 2012 passed by the Supreme Court of India constitutes a "change of law", which necessarily renders the existence or performance of the Service Contract void or invalid.
- b) The cancelling of the Unified Access Service licenses by the Supreme Court, vide order dated 2nd February, 2012, rendered the respondent incapable of performing the MSA and therefore, resulted in frustration of the MSA. After cancellation of licenses awarded to the petitioner in the year 2008, the respondent is not contractually again bound to bid for the same licenses. The auction of new licenses was conducted under a different policy. The policy of 2008 was based on first-come-first-serve and the respondent secured Unified Access Service Licenses along with spectrum for 21 circles for a total consideration of Rs. 1,658 Crores. Bearing in mind the consideration paid by the respondent towards obtaining licenses and spectrum, the respondent

accordingly, negotiated its terms and conditions for the performance of the MSA.

However, after the cancelling of the licenses by the Supreme Court of India on 2nd February, 2012, fresh auctions were conducted in 2013 under an entirely new policy. The policy for allocation of spectrum and grant of licenses in 2013 was wholly different and incomparable to the Policy of 2008, on the basis of which the MSA had been entered into. In fact, in the auction for spectrum in 2013 the respondent secured spectrum in 8 circles at a significantly higher cost of Rs.3,639 Crores. In view of the fact that the subsequent licenses having been secured by the respondent under vastly different terms and conditions and for a consideration much higher than what was paid by the respondent under the Policy of 2008; the respondent cannot be expected to perform its obligations under the MSA, the terms of which were agreed to by the respondent under entirely different circumstances.

- c) The liability to pay Exit Amount in case of early termination of the Service Contracts is not absolute. Exit Amount is payable only if termination of the Service Contract is under specific grounds as identified in Part 2 of Schedule 5 of the MSA. The grounds under which Exit Charges are payable by the respondent are a) voluntary termination of the Service Contract b) Insolvency and c) material default of its obligations. The respondent does not fall under any of the three grounds as stated by the respondent.

55. It is stated by the respondent is that none of the grounds specified in Part 2 of Schedule 5 of the MSA under which Exit Charges

are payable are applicable to the respondent. In rejoinder, the case of the petitioner is that the respondent is in "material default of its obligations" and is therefore, liable to pay the Exit Amount under Part II (ii) of Schedule 5 of the MSA. It has been pleaded, albeit incorrectly, that the respondent, under Clauses 2.6.2 and 5.3.3 of the MSA was under an obligation to obtain, maintain and comply with all applicable laws and applicable permits, including any Sharing Operator License, failing which the respondent is liable to pay Exit Charges.

56. The respondent has also denied and submits that the reliance on Part II (iii) of Schedule 5 of the MSA to claim Exit Amount by the petitioner is incorrect and the same is misread by the petitioner. The recital at Part II (iii) of Schedule 5 reads as under:

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

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

It is denied on behalf of the respondent that there is any material default of any of its obligation under the Agreement. As per the 2G judgment delivered by the Supreme Court, under unseen circumstances the respondent cannot be blamed nor on the basis of any default by the respondent is noticed in the said judgment.

57. It is also submitted that the clause 5.3.3 is not an "obligation" of the respondent under the MSA. The petitioner's reliance on Clause 5.3.3 is misplaced. The said clause is under the heading "Sharing Operator Warranties and Covenants". From a bare perusal, it is clear that Clause 5.3.3 of the MSA is a warranty by the respondent to comply with all applicable laws, including maintaining permits to the

extent that it does not cause or result in any breach of any law by the petitioner. The petitioner, however, has sought to misinterpret Clause 5.3.3 to mean that it casts an unreasonable and unconditional obligation on the petitioner to keep the licenses alive despite an order from the Supreme Court quashing the same. The said clause does not in any manner seek to cast such an onerous condition upon the respondent. It is also stated the obligation to maintain a license cannot continue even after the license has terminated due to unforeseeable circumstances beyond the control of the license holder.

58. In support of his argument Mr. Akhil Sibal has also referred the order and judgement dated 21st August, 2014 passed by the Telecom Disputes Settlement and Appellate Tribunal ["TDSAT"] in ***Unitech Wireless (T.N.) Pvt. Ltd. v. Bharat Sanchar Nigam Ltd. and Ors.***, as upheld by the Supreme Court, wherein TDSAT, in similar facts, observed that the quashing of the licenses by the Supreme Court, which the license holder had no control over, would necessarily amount to frustration. The law, it was further observed, does not expect a party to perform a contract that has become impossible or completely impractical from the point of view of the original intent of the contracting parties as a result of some supervening circumstance.

59. The submissions of Mr. Sibal is that even books of account of petitioner do not reflect purported claims/outstanding amounts as the petitioner itself by its communication dated nil received by the respondent on 25th March, 2016 i.e. 5 days prior to the filing of the petition sought confirmation from the respondent, for purposes of a statutory audit, of a sum of Rs.20,64,96,765/- being the balance due

to the petitioner by the respondent as on 29th February, 2016. Counsel for respondent submits that a sum of Rs.20,64,96,765/- is not due and payable by the respondent. Even as per the petitioner's own books of account, only a sum of Rs.20,64,96,765/- is taken as correct and not Rs.1,15,64,26,124/- as claimed by the petitioner payable by the respondent to the petitioner.

The respondent has also alleged that the balance, the confirmation of which was sought by the petitioner, was merely for services rendered to the respondent under the MSA and does not reflect the Exit Amounts purportedly payable by the respondent. The fact that the purported claim for Exit Charges is not reflected in the communication dated nil firmly establishes the fact that the said claim was abandoned by the petitioner.

60. The three grounds which are as follows:-

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

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

is the respondent's case that the judgment and order dated 2nd February, 2012 passed in WP(Civil) No.423/2010, whereby the licenses granted in 2008 stood cancelled, amounts to a "change of law" under Clause 11.2.3. of the MSA within the meaning of Schedule 5 Part 2 and termination of the service contracts upon such "change of law" does not attract levy of Exit Amounts.

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

*The Sharing Operator shall only pay to Infratel the Exit Amount upon termination of a Service Contract where:
... (iii) such termination is on account of the Sharing Operator being in material default of any of its obligations under the Service Contract.*

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

on account of material default of the respondents obligations.

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

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

The petitioner cannot even seek to rely on Part II (i) of Schedule 5 as the same contemplates payment of Exit Charges only account of voluntary termination of the service contracts. Admittedly, the termination of the service contracts and exit from 6 circles by the respondent arises out of the quashing of the licenses by the Supreme Court and the same has not been disputed by the petitioner.

65. *Prima facie*, there is a force in the submissions of learned counsel appearing on behalf of the respondent that pursuant to the cancellation of licenses awarded to the petitioner in the year 2008, the respondent is not, statutorily or contractually, bound to bid for the same licenses, the auction of which was conducted under a different policy. Under the policy in 2008 which was based on first-come first-serve, the

respondent secured Unified Access Service Licenses along with spectrum for 21 services areas for a total consideration of Rs.1,658 Crores. Based on this consideration paid by the respondent towards obtaining licenses and spectrum, and based on these licenses, the respondent entered into the MSA on certain terms and conditions. However, after the cancellation of the licenses by the Supreme Court on 2nd February, 2012, fresh auctions were conducted in 2013 under a new policy. It is pertinent to note that the policy for allocation of spectrum and grant of licenses in 2013 was wholly different and incomparable to the policy of 2008, on the basis of which the MSA had been entered into. In fact, in the auction for spectrum in 2013 the respondent secured spectrum in eight circles at a cost of Rs.3,639 Crores. The respondent cannot be expected to continue performance of the MSA under the same terms and conditions, whereas the foundation of MSA, which were the licenses, no longer remains the same.

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

completely impractical from the point of view of the original intent of the contracting parties as a result of some supervening circumstance.

67. The TDSAT has also held that the judgment and order dated 2nd February, 2012 passed by the Supreme Court was beyond the control of Unitech Wireless and had resulted in frustration of the agreement between the parties. In the said circumstances, Unitech Wireless was held not liable to pay Exit Charges on account of early termination. The Supreme Court maintained the judgment of TDSAT on appeals filed by BSNL impugning the judgment and order passed by TDSAT and was of the considered opinion that the appeals, being devoid of any merit, were liable to be dismissed. The said order of the Supreme Court was passed on 6th February, 2015 in Civil Appeal Na. 38102 of 2014. In view of the dismissal by the Supreme Court, the judgment and order of the TDSAT has attained finality.

68. Prima facie, I find force in the submission of Mr. Akhil Sibal that the MSA has in fact, been terminated by the respondent under Clause 11.2.3 of the MSA. Clause 5.3.3 is not solely an "obligation" of the respondent under the MSA. The said clause is under the heading "Sharing Operator Warranties and Covenants". From a bare perusal, it is clear that the same has been made as a warranty by the respondent to comply with all applicable laws, including maintaining permits to the extent that it does not cause or result in any breach of any law by the petitioner. The petitioner, however, has relied upon Clause 5.3.3 by giving meaning that it casts an unreasonable and unconditional obligation on the petitioner to have kept the licenses alive despite an order from the Supreme Court. The said clause does not in any manner seek to cast such an onerous condition upon the respondent. The

limited purpose of Clause 5.3.3 is to seek a warranty from the respondent that it shall comply with all applicable laws and ensure that no acts on its part result in breach of any law by the petitioner.

69. Clause 18.3.2 of the MSA expressly stipulates that if any of the approvals referred to in Clause 2.6.2, including permits from DoT are withdrawn or not granted, the Sharing Operator i.e, the respondent shall be entitled to terminate the Service Contract prior to its specified term without the payment of the Exit Amount.

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

71. With regard to two decisions referred by the petitioner passed by the Division Bench, it is submitted by the respondent's counsel that the said orders are distinguishable on facts. The orders which were passed by the Division Bench in FAO (OS) No.613-614 of 2012 and FAO (OS) No.97 of 2013 are on different facts. The Court, while passing orders in FAO [OS] No.613-614 of 2012 and FAO [OS] No. 97 of 2013, was largely concerned with the fate of the respondent No.1's subscribers and customers and therefore, endeavoured to find an efficacious solution which would ensure continuity of business between the petitioners therein (Viom Networks Ltd. and Indus Towers Ltd., respectively) and respondent No.2 (Telewings Communication Services), the entity acquiring the respondent No.1 therein (Unitech

Wireless (Tamil Nadu) Pvt. Ltd.). The orders in the said appeals were therefore, passed in peculiar facts and considerations, which are not same in the present case as the respondent in the present case has already exited from the concerned circles and has shut down its operations. Therefore, it is submitted that neither does the respondent have any customers in the said circles who will be adversely affected, nor does the respondent have any active equipment installed upon the passive infrastructure of the petitioner in the said circles. Continuity of business is therefore, not a consideration before this Court in the facts and circumstances on the present case. These orders passed by the Division Bench of this Court in the aforesaid appeals were ad-interim orders constituting a binding judicial precedent until the petition is finally decided. It is submitted that even otherwise these orders dated 21st December, 2012 and 21st February, 2013 were passed by the Division Bench in the aforesaid appeals prior to the order and judgment of the TDSAT, the judgment which was later on upheld by the Supreme Court. It has been held by the TDSAT that no lock-in charges are liable to be paid on account of early termination of the contract due to the quashing of licenses by the Supreme Court.

72. In view of the above said reasons, *prima facie* it appears that it may be possible that the cancellation of the UAS licenses by the Supreme Court rendered the respondent incapable of performing its obligations under the service contracts and therefore, may be resulted in frustration however, this issue also raised by the respondent would have to be considered by the Arbitral Tribunal.

73. Even pursuant to the merger, the respondent shall continue to retain certain movable and immovable assets, which are to the tune of Rs. 171 crores. The market value of the said immovable assets is

considerably higher than the book value. It is pleaded by the respondent in paragraph 9 of its reply.

74. It is further submitted that in consideration for the transfer of its business undertaking to Reliance Communications Limited, the respondent is acquiring Rs.27,65,53,305/- fully paid up equity shares in Reliance Communications Limited, aggregating to 10% of the total issued and fully paid up share capital of Reliance Communications Limited valued at Rs.2,115,60,00,000.00/- crores. It is also pleaded by the respondent in paragraph 9 of its reply on merits.

75. It is rightly argued by the learned counsel for the respondent that even on merit, the petitioner has failed to satisfy the dual test of Order XXXVIII Rule 5 CPC. He submits that no prima facie case has been made out as while discussing Order XXXVIII Rule 5 CPC it has been held by the Supreme Court in **Raman Tech. and Process Engg. Co. & Anr. v. Solanki Traders** reported at 2008 (2) SCC 302 that if the averments in the plaint and documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order XXXVIII Rule 5 of the Code. The Supreme Court has further held that merely having a prima facie case will not entitle the plaintiff to an order of attachment before judgement, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. This intention, which is a sine qua non for the petitioner to succeed in its claim for security, is wholly absent in the facts of the present case.

76. It is settled law that while disposing of property the Courts have consistently held that a respondent is not debarred from dealing with

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

It is submitted by the respondent that petitioner is not entitled to secure any amount in view of the provision of Order XXXVIII Rule 5 CPC only if the respondent intends to obstruct or delay the execution of the decree.

77. Prima facie, it appears that there may be a bonafide intentions of the respondent as appeared from the scheme of Clause 4.5 of the Scheme all identified liabilities as set out in Part 2 of Schedule 1 shall stand transferred and vested in the transferee company i.e. Reliance Communications Limited. The identified liabilities set out at Serial No. 6 in Part 2 of Schedule I along with Annexure B thereto specific provision and account for the purported exit penalties claimed by the petitioner.

78. In addition to the said provision in the De-Merger Scheme, the respondent has, in terms of Clause 8.1 of the De-Merger Scheme, agreed to continue to remain a party insofar as the pending disputes with the petitioner is concerned. Therefore, in addition to Clause 4.5 read with Serial No. 6 in Part 2 of Schedule 1; Clause 8.1 of the De-Merger Scheme is an additional security available to the petitioner insofar as its purported claims for Exit Charges are concerned.

It is submitted on behalf of respondent that the intention of the respondent in safeguarding the interests of the petitioner is bonafide.

On a plain reading of the aforesaid clauses, it cannot be said that the respondent has any intention to obstruct or delay the execution of any award that may be passed against the respondent.

79. It is submitted by Mr. Sibal that there is unnecessary apprehension in the mind of the petitioner that the condition of the respondent after demerger would become insolvent who may not be able to pay the amount if any award is passed. It is also denied by the respondent that the provisioning made by the respondent in the De-Merger Scheme with respect to Exit Charges tantamount to an admission of liability. The said argument is without any basis because as per Clause 4.5 of the De-Merger Scheme which stipulates that the identified liabilities shall be transferred to Reliance Communications Limited on the same terms and conditions as were applicable to the respondent. The liability with respect to Exit Charges is admittedly, being disputed by the respondent before this Court and the Arbitral Tribunal. As such, the liability stands transferred to Reliance Communications Limited subject to the outcome of the arbitral proceedings.

Even De-Merger Scheme minutely scrutinized by a statutory process under Section 391 to 394 of the Companies Act. The petitioner is trying to restraint on the respondent from transferring its business undertaking to any third party, including Reliance Communications Ltd. The scheme of arrangement between the respondent and Reliance Communications Limited and their respective shareholders and creditors is pending before the High Courts of Maharashtra and Rajasthan under Sections 391 to 394 of the Companies Act, 1956. The said scheme, before it is sanctioned by the respective High Courts, has

to be subjected to a statutory process, which process involves seeking approval of the creditors of the respondent.

It is submitted that the creditors' meeting held on 18th March, 2016 under the orders of the High Court of Rajasthan, the scheme has been approved by an overwhelming majority, despite the objection and dissent of the petitioner. Now, the respective High Courts shall sanction the scheme, upon scrutiny, only if it is found to be in the interest of the shareholders and the creditors and not otherwise. Upon the schemes being sanctioned by the High Courts of Rajasthan and Mumbai by a statutory process, the petitioner cannot be permitted to thereafter, contend that the intention of the respondent transferring its infrastructure business to RCOM is malafide.

80. From the reading of all relevant clauses and after having considered the rival submissions of the parties coupled with the peculiar circumstances of the matter where many spectrums were cancelled by the judgment of Supreme Court it appears prima facie that these were all unseen circumstances which were not in the knowledge of any party.

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.

82. It is also pertinent to mention that the respondent has specifically stated that the petitioner otherwise has adequate Security of Rs.14,33,95,882/- unlawfully withheld by the petitioner as under Clause 12.6 of Schedule 3 of the MSA, the respondent agreed to deposit with the petitioner with respect to each site, an amount equal to the total rate for three months towards interest free security deposit. Clause 12.6 further stipulated that upon expiry of 24 months from the date of Service Contract for each site, the petitioner is liable to refund to the respondent a sum equivalent to two months.

It is not categorically denied by the petitioner that as per terms of Clause 12.6, the respondent deposited a sum of Rs.21,55,05,567/- towards interest free security deposit in respect of 2,428 sites. Out of the said security, a sum of Rs.14,33,95,882/- has become refundable to the respondent, which refund has been demanded by the respondent vide its communication dated 19th April, 2016. Admittedly, on an earlier occasion, the petitioner has refunded a sum of Rs.4,00,00,000/- in accordance with Clause 12.6 of Schedule 3 of the MSA.

83. The petitioner, in its rejoinder in paragraph 9 has not disputed the fact that a payment of Rs.21,55,05,567/- has been made by the respondent towards interest free security deposit, out of which a sum of Rs.14,33,95,882/- has become refundable to the respondent. The respondent has however, stated that the sum of Rs.14,33,95,882/- is refundable provided that there are no outstanding or any other sum due and payable by the respondent to the petitioner on any account whatsoever. Counsel appearing on behalf of the respondent submits that the said amount of Rs.14,33,95,882/- is, as on date, available

with the petitioner as interest free security deposit, which the petitioner is refusing to release. The said amount has been retained by the petitioner as security towards its purported claim of Exit Charges as alleged by the respondent. Even otherwise in case of any dispute with regard to the said amount, the petitioner is always at liberty to move the application before the Arbitral Tribunal.

84. In OMP No.472/2014 and OMP (I) No.54/2016, the statement has been made on behalf of the same respondent No.1 that after the sanction of approval/assignment of assets, the respondent would get 171 crores from the assignee as well as share capital of Rs.21156000000/- the respondent No.1 in that matter is prepared to give an undertaking, which would be without prejudice, on behalf of respondent not to dispose of the share capital to the actual value of sixteen crores during the pendency of arbitration proceeding or if required the respondent shall not do anything pertaining without the permission of the Arbitral Tribunal. The statement was made in order to strike the balance in view of two decisions of the Division Bench wherein the Court by applying the formula of 20% amount claimed in the said petitions.

85. In view of rival submissions made by both the parties who have tried to give their own interpretation of various clauses of the contract, this Court felt that on the face of it they are many disputed question of facts. The clauses of the contract have to be interpreted. In case any final conclusion or opinion is given pertaining to relevant clauses on merit at this stage, it would affect the case of one of the parties. The controversy is to be determined by the Arbitral Tribunal, wherein it is to be decided as to whether Exit Chargers are payable by the respondent or not, if payable to what extent or it is only the

respondent who was in material default for which the respondent is responsible to fulfil its obligation. The respondent is also seriously contesting the matter on the issue of limitation. There is a specific plea that from January, 2014 upto March, 2016, there was a complete silence on behalf of the petitioner on the said clause. At this stage, this Court is taking prima facie view while passing the orders.

Therefore, I am of the view that the points raised by both the parties are kept open for determination by the Arbitral Tribunal by applying the similar formula of 20% in view of the two decisions of Division Bench in different manner. As the petitioner in hand security amount of Rs.14,33,95,882/- thus for the balance amount, the directions are issued on claim No.1 in order to secure approximate amount that the respondent shall keep share capital for the actual value of Rs. 2 crores and shall not dispose of the same during the pendency of arbitration proceedings unless the permission is granted by the Arbitral Tribunal, if so necessary. However, it is made clear that the said condition is imposed that the petitioner would not oppose de-merger scheme directly or indirectly and the condition would apply once the scheme is sanctioned by the respective High Courts

86. The next alleged claim of Rs.4,00,51,757/- as mentioned in the communication dated 7th March, 2016 issued by the petitioner has two components:

- a) Rs.1,05,54,544:-: The said demand, it is alleged in the aforesaid communication, is towards principal outstanding in respect of circles exited by the respondent pursuant to the judgement of the Supreme Court.

b) Rs.2,94,97,213/-: The said demand, it is alleged in the aforesaid communication, is towards interest billed for delayed payments purportedly made by the respondent to the petitioner.

87. It is stated by Mr. Sibal that admittedly, the respondent has paid the principle amount to the petitioner and the demand of Rs.2,94,97,213/- is merely towards interest for delayed payments. The said demand has been raised by the petitioner for the first time ever in its communication dated 7th March, 2016.

88. It appears that the respondent has disputed the fact that the purported claim of Rs.4,00,51,757/- is due and payable to the petitioner. The respondent submits that the aforesaid demand admittedly, pertains to a period prior to the termination of the Service Contracts under the MSA and therefore, stands time barred.

It is the specific case of the respondent that no supporting documentation i.e. invoices in support of the said demand has been filed by the petitioner in its petition. Despite a specific objection taken by the respondent with respect to the absence of any documentary evidence in support of the petitioner's claim, the petitioner has not filed a single document with its rejoinder to substantiate its purported claim. There is not a shred of evidence before this Court in support of the aforesaid purported demand.

89. It is also pertinent to mention that in response to the specific objection taken by the respondent with respect to the absence of any documentary evidence, the petitioner, in the corresponding paragraph of its rejoinder at page 28 has stated thus:

"Without prejudice to the contention that the Respondent is liable to pay to the Petitioner the said amount, it is submitted that in the present proceedings, the correctness or

otherwise of the claims of the petitioner cannot be gone into as the same are matters to be decided by the Arbitral Tribunal...".

In view of the averments made by the petitioner itself in the rejoinder, even this Court is also of the view that the demand raised by the petitioner is to be considered and to be determined by the Arbitral Tribunal. The said amount cannot be secured under these circumstances.

90. The next prayer made by the petitioner is to secure the amount of alleged claim for Rs.23,83,21,37/-. The petitioner claimed the same by its communication dated 10th March, 2016, is towards amounts purportedly due in existing telecom circle. The demand of Rs.23,83,22,374/- has been raised by the petitioner for the first time in its communication dated 10th March, 2016.

91. The said demand of Rs.23,83,22,374/- is denied by the respondent as being due and payable to the petitioner, however, without prejudice it is submitted by the respondent submits that the said demand is without any basis. Mr. Akhil Sibal submits that from the records maintained by the respondent, an amount of Rs.9,99,60,391/- became due and payable to the petitioner on 31st March, 2016 i.e. after the issuance of the petitioner's communication dated 10th March, 2016 and has been paid to the petitioner under acknowledgement with regard to remaining amount of Rs. 13,83,61,953/- is concerned, the respondent disputes the same as being payable. In response to the petitioner's communication dated 10th March, 2016, the respondent in its reply dated 25th March, 2016 called upon the petitioner to furnish details along with supporting documents in order for the respondent to examine the purported claim on the date of filing of the petition. However, the respondent is

agreeable to pay the amount to the petitioner directly if any demand is raised by way of bill. Mr. Sibal submits that his client is ready to sit with the authorized representative of the petitioner in order to reconcile the account. If any valid amount is due, the same would be paid without any delay and his client would keep on paying the amount on receipt of invoices.

92. It is stated by Mr. Sibal that some documents were handed over by the petitioner on 19th May, 2016 after argument addressed by both the parties. The said document would be examined by his client. Under these circumstances, it is directed to both the parties to sit together and reconcile the account. If any invoice(s) is missing from the record of the respondent, the copy(s) shall be handed over by the petitioner within two weeks from today. The respondent shall verify its record and in case the payment is already not made, the respondent shall make the payment within 15 days thereafter. In case the said payment is not made, liberty is granted to the petitioner to move an application so that the appropriate orders be passed for securing the said amount.

93. Under these circumstances, the present petition is disposed of. However, liberty is granted to move a fresh application before the Arbitral Tribunal for change of circumstances, which would be decided as per merit.

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

(MANMOHAN SINGH)
JUDGE

JULY 08, 2016