

* **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.) No.107/2016, I.A. Nos.4955/2016,**
4995/2016, 6253/2016 & 9017/2016

ATC TELECOM TOWER CORPORATION PVT. LTD. Petitioner
Through Mr.Sandeep Sethi, Sr.Adv. with
Mr.Amar Gupta, Mr.Manish Jha,
Mr.Divyam Agarwal & Ms.Vandana
Anand, Advs.

versus

VIDEOCON TELECOMMUNICATIONS LTD. Respondent
Through Mr.Sndeep S. Ladda, Adv. with
Mr.Soumik Ghosal, Ms.Shikha
Sarin, 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.Sahil
Mongia, Advs. for State Bank of
India.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act"), pending arbitration, for seeking interim protection by way of an *interim* order, directing the respondent to furnish reasonable security in the sum of Rs.1,33,40,350/-.

2. The petitioner is also seeking relief restraining the respondent from selling, transferring or otherwise alienating or creating any third party interest in its spectrum in the State of Bihar, Gujarat, Haryana, Madhya Pradesh, UP (East) and UP (West) Circle.

3. The petitioner, a "Telecom Infrastructure Service Provider", makes available passive telecom infrastructure in the shape of mobile towers to its customers for providing the communication services to the public at large throughout India. Respondent is a telecom operator providing telecom services pursuant to the Unified Access Services Licenses (UASL) issued by the Department of Telecommunications, Government of India, to establish, install operate and maintain Unified Access Services and other Value Added Services, in various telecom service areas/circles in India.

4. On 1st June 2009, a Passive Infrastructure Sharing Agreement ("ETIPL MSA") was entered into between Essar Telecom Infrastructure Pvt. Ltd. (now ATC Telecom Tower Corporation Pvt. Ltd., the petitioner herein) and Datacom Solutions Private Ltd. (now Videocon Telecommunication Limited, the respondent herein) for providing the passive telecom infrastructure facilities and services all over India. Subsequently, the petitioner and the respondent had entered into a Settlement Agreement on 15th December 2014 and a subsequent Addendum on 5th May 2015.

5. Relevant Terms in the Agreement:

i) The term "Anchor Site" has been defined as under:

"Anchor Site(s)" means Site(s) occupied by Datacom or Service Order released by Datacom or constructed for and on the instruction /requirement

of the Datacom after confirmation of the nominal/co-ordinates from the Datacom."

- ii) The term "Shared Telecom Site" has been defined as under:

"Shared Telecom Site(s)" means the existing Site (s) of the Infrastructure provider which are shared by other Telecom operators or made available simultaneously to one or more Telecom operators."

- iii) The term "Services" has been defined as under:

"Services" Means provisioning of services at Site along with Passive Telecom Infrastructure facilities built thereon and the related operations and maintenance services as more fully described in the Schedule 1."

- iv) Clause 1.5 states the 'Initial Term and Renewal' for the parties as per the agreement. The Clause 1.5.1 reads as under:

"This Agreement shall come into effect from the date first above written, and will remain valid for a period of 15 years for each of the Anchor Sites as well as Shared Sites with effect from the respective commencement dates ("Term"). Upon the expiry of the Term, in case any Site(s) are still under operation under this Agreement, each such Site shall be used by Datacom for a period not exceeding 15 years for both Anchor Sites as well as Shared Sites from its Commencement Date and each such Site shall continue to be governed by the term and conditions of this Agreement. For avoidance of doubts it is clarified that those sites, which have not completed 15 years of tenancy by Datacom as on the date of expiry of 15 years from the date of signing of this Agreement, shall be operative and bound by the terms of this agreement till the completion of 15 years of tenancy from their respective commencement dates."

v) For the Lock-in period between the parties, the Clause 1.5.3 states as under:

"Each Site shall have a lock-in period of 10 years for Anchor site and 7 years for Shared site from the Commencement Date of each Site ("Lock-in Period"). Under the following circumstances, any particular Site may be vacated by Datacom before expiry of Lock-in Period:

(a) the final order of any Government (Central/State) or any statutory body; subject to submission of the relevant documents;

(b) Rejection of SACFA approval subject to submission of the relevant documents;

(c) in the Event of Infrastructure Provider failing to remedy any breach of terms & conditions of this Agreement having a Material Adverse Effect on this Agreement within 30 days of a written Notice served by Datacom after the expiry of a cure period of 15 days from the date of breach.

(d) Force Majeure as explained in details under Clause 1.10 under "Force Majeure";

(e) The Infrastructure Provider ceases to be in operation/existence or becomes bankrupt or insolvent.

In the above cases (Clause 1.5.3), as long as such circumstances are not caused due to the fault of Datacom, the Lock-in-Period shall not be binding on Datacom and Datacom shall be free to terminate its Service Order with respect to a particular site without incurring any liability whatsoever."

vi) With respect to the 'Early Termination' between the parties, the clause 1.5.5 states as under:

"Subject to provisions of this Clause 1.5, if either of the parties wishes to exit from any of the Sites before completion of the lock-in period due to any reason other than those mentioned above ('Early Termination'), then the exiting party shall pay to the other party as per the schedule provided in the agreement."

6. The respondent in view of the agreement and terms thereof had agreed to pay the Fees and Actual Costs according to the terms and conditions of the Agreement as provided in Schedule 2 of the Agreement. The fee is the infrastructure provisioning fees payable by the respondent to the petitioner in consideration of the services provided with respect to the Anchor sites and Shared sites.

7. The agreement provided the clause that in case the respondent is to exit during the lock-in period, the respondent is liable to pay the fee for the residual period of the lock-in for the sites as provided in the said Agreement. The Agreement executed between the parties also provided for no waiver by both the parties and no provision of the agreement will be deemed to have been waived by either party unless the waiver is in writing and has been signed by the party against whom the enforcement is attempted.

8. The parties have agreed in Clause 9.2 of Schedule II of the Agreement dated 1st June 2009 about the Interest on Delayed Payment which is stated as under:

"9.2 For delay in payment beyond 15 days after the expiry of Payment timeline as detailed in Clause 9.3 below, the Infrastructure Provider shall be entitled for interest of 15% per annum. The cure period as defined under Clause 1.24(g) of the main Agreement shall not be applicable in such cases."

9. The petitioner further submits that despite of the agreements, the respondent has defaulted in its obligations and payments in terms of the agreements for providing the aforesaid services. Even reminders and follow-ups were issued, but the respondent had failed to clear its dues in the timeline provided under the Agreement.

10. It is mentioned in the petition that in December 2014, the respondent's outstanding payment accumulated to more than Rs.1 Crore which made it difficult for the petitioner to bear the day-to-day expenses for maintaining the sites. In view of the aforesaid outstanding, the respondent had approached the petitioner with a request to enter into a Settlement Agreement for the payment of outstanding contractual payments under the Principal Agreement. It is stated by the petitioner that in order to resolve the issue for the payment of outstanding contractual payments, the petitioner had entered into a Settlement Agreement dated 15th December 2014 ("SA"). Under the SA, the respondent agreed to pay Rs.1 crore as one time settlement amount. Since, the respondent had, under the SA, agreed to increase the lock in period for a period of additional 23 months, the petitioner, in consideration thereof, had agreed to waive off the claims for lock in charges for 150 telecom sites respondent had exited.

11. The respondent by its letter dated 27th November, 2015 had informed the petitioner that it will be shutting down its mobile operations in Gujarat Service Area with effect from the midnight of 26th December, 2015 and the sites will be remotely switched off by the Company. The respondent had further requested the petitioner to immediately stop billing for its sites and allow the Company to remove its telecommunication equipments without imposition of any

exit penalty. Subsequently, the respondent by its letters dated 11th December 2015, 23rd December 2015, 21st January 2016 and 15th March 2016 had revised their exit dates to 31st May, 2016 as a premature exit from the agreement. The said fact has not been denied by the respondent.

In reply, the petitioner by its letter dated 22nd December 2015 had rejected the request of the respondent for an Early Exit without imposition of the Exit cost. The petitioner had informed the respondent of its consistent default and demanded the outstanding amount of Rs.10 lakhs due to the petitioner as on December 2015. Further, the petitioner had demanded an amount of Rs.50,11,369/- towards the Exit fee under the terms of the MSA.

12. It is alleged by the petitioner that the respondent had discontinued its mobile services with effect from 24th May, 2016, after selling its entire spectrum in all six circles to Bharti Airtel. The communications between the parties show that the respondent is indebted to the petitioner and has never denied its liability towards the payment of the outstanding charges. Therefore, if the petitioner is not secured, pending arbitral process, there is every possibility that the Award which may be obtained would result in a paper decree or a decree which cannot be enforced on account of financial inability of the respondent to satisfy the decree.

13. It is stated that since the respondent has sold its spectrum to Bharti Airtel for an aggregate consideration of Rs.4,428 crores and now not in a financial position to clear the outstanding; and any decree/award passed pursuant to the arbitration between the parties, will remain a paper decree/award as the petitioner would not be able to enforce the same. In view of the respondent's imminent exit from

the telecom business and its weak financial condition, the petitioner has filed the present petition for securing the amount claimed in the arbitration.

14. The respondent has filed the reply to the petitioner's petition under Section 9 of the Act wherein the respondent *inter-alia* have raised the following pleas:

- a. Lack of jurisdiction under Section 9 of the Act.
- b. Petitioner is guilty of *suppressio veri, suggestio falsi* as the petitioner has concealed a fact that despite of the cancellation of 2G Licenses, the respondent has continued to make payments and till date has made substantial payments of about Rs.31.3 Crores and also did not disclose the fact that the respondent's assets are worth almost Rs.4.95 crore which is in petitioner's possession.
- c. There was a need of transfer of spectrum to reduce the loan/liabilities of around Rs.3717 crore and interest liabilities of Rs.450 Crore per year payable to the Secured Creditors (Consortium of Banks). The said transfer is only of the Spectrum and not of the entire company or entire assets of the respondent-Company. Spectrum transfer is subject to the payment of all statutory dues and subject to the fulfillment of various conditions precedent and subsequent obligations.
- d. The transfer of spectrum is in larger public interest enshrined in TRAI Report and DOT Guidelines. There is a first 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 the Secured Creditors.

- e. The claim of the petitioner is unexplained. The respondent has also made all payments under the agreement. No primacy ought to be given to the petitioner by granting any interim protection without examining the counter claim of the respondent.

15. 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, the 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.

16. Before dealing with the 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 the 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 the service providers/licensees as defined in Section 2(e) and (j) of the TRAI Act.

17. Section 14 of the said Act provides that TDSAT shall have the exclusive jurisdiction to adjudicate the disputes between the two service providers/licensees. The dispute raised by the petitioner pertains to MSAs entered into between the petitioner and the 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.

18. 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, the contention has been made by the respondent to reconsider the judgment passed by this Court in Viom Network's matter.

19. 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.

20. 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, has 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 the 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.

21. Another judgment of Andhra Pradesh High Court in **Indus Towers Limited v. The Commercial Tax Officer**, 2012(4) ALT 755 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 Delhi High 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 renting of the immovable property to

be used for commercial/business purposes. The facts and circumstances are materially different.

22. The objection of the respondent about the maintainability of the present petition was also urged by the respondent in **Viom Networks Ltd.** (supra) which was duly examined and rejected by this Court. In this matter also, this Court has considered the decision of TDSAT in **Reliance Infratel** (supra) matter in para 28. Therefore, the reliance of the respondent on the aforesaid judgment of TDSAT in **Reliance Infratel** (supra) matter 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** (supra) 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 take a different view although, I am informed that appeal is pending against the order passed by the learned Single Judge. Both 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.

23. The next submission of the respondent is that the respondent is transferring only the Spectrum and not its entire assets. Even otherwise, the respondent has sufficient asset base, is not a fly-by-night operate and is not in a position of bankruptcy and as such no cause for deposit of any security arises.

24. It is admitted in the reply by the respondent that through the transfer of sale of spectrum, net receivable amount is only Rs.2,066 Crores, whereas the amount payable to the Banks and the Financial

Institutions is Rs.4575.98 Crores. This clearly shows that the respondent is in a huge financial crisis. *Prima facie*, it appears to the Court that after having sold the Spectrum, the respondent may not be able to satisfy all the liabilities of the Banks and Financial Institutions as the respondent, in its reply, is not able to explain as to the source of revenue/income from where they will be able to bridge the huge gap of huge liabilities even after the sale of its spectrum. The liabilities of the Banks and the Financial Institutions would split thereby. Therefore, at this *Prima facie* stage, it cannot be assessed or concluded that despite of having sold the Spectrum, the respondent has sufficient funds to clear the liabilities in case the award is passed against the respondent, as the respondent may not have any other substantial business to generate resources and revenue for satisfying its various liabilities including the claim of the petitioner. Even the auditor's report of Videocon Industries does not clearly disclose that the respondent may turn around on the basis of other businesses. Thus, the submission of the respondent at present cannot be accepted that the respondent is in sound condition to pay the amount if the Award is published in favour of the petitioner in view of the other business activities of the respondent, as admittedly, the petitioner has provided the services under the Agreement and is liable to be paid. Securing the payment which the petitioner has claimed in its Section 9 petition has nothing to do with the claims of the Banks and the Financial Institutions. There is no force in the submission of the respondent in this regard because on one hand, the respondent submits that the first charge is with the Banks and the Financial Institutions and on the other hand, it is canvassed that the respondent-Company is in solvent position and is able to fully revive

in view of other businesses being carved out. At the same time, it is pleaded that the Spectrum is being sold as the condition of the respondent's financial position is critical. There is no averment made in the reply that the secured creditors are initiating or have initiated any proceedings for enforcement of their securities against the respondent. Therefore, the sale of spectrum by the respondent is a commercial decision and not due to any proceeding initiated by the lending banks, as had been argued by the respondent during the hearing on last date. Even, admittedly the leading banks so far have not taken any steps to recover the amount from the respondent. Instead, a mere statement is made on their behalf that since the parties were talking to each other with regard to selling of the Spectrum, therefore, no action was taken.

25. It is rightly argued on behalf of the petitioner that it has a right under Section 9 of the Act to seek injunctive as well as any other relief for securing the amount in dispute in the Arbitration proceedings if a valid case is made out. The Court has full power under Section 9 of the Act to pass any interim order if it is the case of admitted liabilities.

26. The respondent's reliance upon various judgments with regard to Order XXXVIII rule 5 is misplaced as none of them are passed in respect of Section 9 of the Act. The rigors of Order XXXVIII rule 5 CPC, as held by the Mumbai High Court, cannot be put into place to defeat the grant of relief under Section 9 of the Act. Every case depends upon its own circumstances. For admitted liabilities and malafide intention of the non-applicant, this Court can pass the order for securing the amount but in every case, the relief order under Order XXXVIII Rule 5 cannot be granted.

- i) In **Deccan Chronicle Holdings v. L & T Finance Limited**, Appeal (Lodging) Nos.130 and 131 of 2013 in Arbitration Petition Nos. 1095 and 1321 of 2012; decided on 8th August, 2013 the Bombay High Court has specifically rejected the contention that the grant of interim measures under Section 9 of the Act would be governed by the underlying principles for the grant of interim relief under Order XXXVIII Rule 5 CPC. While rejecting the aforesaid contention the Court held that:

"The principle is that when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice. The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that in deciding an application under Section 9, the Court would while bearing in mind the fundamental principles underlying the provisions of the CPC, at the same time, have the discretion to mould the relief in appropriate cases to secure the ends of justice and to preserve the sanctity of the arbitral process."

- ii) Petitioner also relies upon the decision of Bombay High Court in **Nimbus Communications Limited Vs. Board of Control for Cricket in India and another**, 2012(4) Arb.L.R. 113 for the aforesaid proposition of law.

27. Let me now deal with the merit of the case. The present petition is filed for the recovery of outstanding from the respondent accumulated to Rs.1,33,40,350/- for the loss of revenue including exit fee.

28. Out of the total sum of Rs.1.33 Crores claimed by the petitioner, a sum of Rs.50.11 Lakhs has been claimed towards lock-in liabilities. Further, the petitioner has claimed a sum of Rs.6,38,000 lakhs towards overdue invoices and Rs.50,11,369/- towards exit penalty in their letter dated 22nd December, 2015 addressed to the respondent. This sum was increased to a total claimed amount of Rs.1.33 crores at the time of filing of their section 9 petition before this Court.

UNPAID INVOICES

29. The actual claim of the petitioner on the date of filing of the petition is Rs.6,38,000/- payable by the respondent. The petitioner has not placed on record any document to prove the outstanding amount claimed in the petition. The submission of the petitioner is that the petitioner has clearly provided in the petition the heads under which the respondent is liable to pay and the exact amount outstanding under those heads. Annexure P-12 of petitioner's list of documents is referred and the petitioner submits that the respondent has failed to dispute the aforesaid calculations. It is stated that as far as IP fee is concerned, there is no denial even in the reply filed by the respondent that the same is not outstanding and payable by the respondent herein. As far as the calculation of exit fee is concerned the same is not disputed by the respondent. Only the applicability of the exit fee has been disputed.

30. It is correct that the respondent has for the first time, in their reply to the petition, disputed their liability. Prior to the filing of the reply, the respondent had never disputed their liability. Even in the reply, the respondent has taken a vague plea of non-reconciliation of outstanding invoices. The respondent has also failed to state in the reply as to how much amount is outstanding as per their records. The respondent, in the reply, has failed to place on record any of such correspondence, wherein they have specifically denied the aforesaid liabilities.

31. It is admitted by the petitioner that it has not only specifically pleaded about the outstanding but has also filed a statement of outstanding. It is stated that if the respondent was serious about disputing the liability, they should have filed their statement of accounts regarding the transaction. It is alleged that the communications between the parties on record show that the respondent never denied its liability. In this regard, the petitioner has referred the letter dated 13th April 2016 by the respondent.

32. The next plea raised by the respondent is that the petitioner cannot claim the exit fee as of today as the agreement is not terminated yet, and the clause for the exit fee will be triggered only when the agreement is terminated. It is submitted on behalf of the petitioner that the respondent has not disputed the amount of Exit fee claimed. It is mentioned in the MSA that "*Subject to provisions of this Clause 1.5, if either of the parties wishes to exit from any of the Sites before completion of the lock-in period due to any reason other than those mentioned above ('Early Termination'), then the exiting party shall pay to the other party as per the schedule provided in the agreement.*" Thus, the entire Agreement need not be terminated for

raising the exit claim. The exit fee claim was made by the petitioner during the currency of the Agreement in 2014 also, which was not disputed by the respondent, but was waived by the petitioner under Supplementary Agreement in view of the respondent extending the lock-in period.

33. As far as the claim of the petitioner of Rs.6,38,000 lakhs towards overdue invoices is concerned, it is pleaded by the respondent that the petitioner has retained the movable and immovable assets of the respondent to the tune of Rs.4.95 crores as on 29th February, 2016 for the repayment of dues. Learned counsel for the respondent submits that in case the petitioner is not agreeable to return the equipments etc., the amount due if any has to be adjusted. The petitioner has not denied the same except that the value of assets is denied. During the course of hearing, it was stated by the learned counsel for the petitioner that the said assets have no market value and these are just junks and his client has no objection if the same be removed. In the meanwhile, subject to the reconciliation of the account, the said claim of the petitioner is genuine as the same is liable to be secured. Subject to the other adjustments, in case the said amount is already paid by the respondent, both the parties are directed to verify the invoices within two weeks from today and in case there is any outstanding, the same shall be paid by the respondent within four weeks from the date of the settlement of account. Once the amount is crystallized and paid by the respondent, if due, the respondent is permitted to remove the assets within two weeks after making the said payment.

EXIT FEE

34. It is submitted on behalf of the respondent that the exit fee as provided in the MSAs are in the nature of liquidated Damages, and which cannot be claimed without proving loss or legal injury. In the present case, since the petitioner has not suffered any loss, as it has already recovered its investment in the first five years of the agreements itself, the exit fee cannot be claimed.

It is also submitted on behalf of the respondent that the exit fee does not reflect a genuine pre-estimate of damage but it is in the nature of penalty, which cannot be recovered under Section 74 of the Contract Act. Even the petitioner in its communication as well as pleadings has referred to the exit fee as 'exit penalty'.

35. It is further submitted by the petitioner that the justification for claiming the exit fee in the present case is not only the Capex Recovery but the respondents unequivocal agreement to increase in lock in period for further period of 23 months from the expiry of 10 years in case of anchor sites and 7 years in case of shared sites. Therefore, the petitioner will suffer loss on account of premature exit of the respondent from the petitioner's site. It is also submitted that the petitioner, under the supplementary agreement, had agreed to waive off the claims for Lock-in Charges in consideration of the respondent extending the lock-in period for further 23 months.

36. On behalf of the petitioner, it is also submitted that the parties while entering into the agreement had clearly made provision for 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 the 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.

37. 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 exists 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.

38. In support of arguments, the petitioner has referred the decision of the Supreme Court in **ONGC v. Saw Pipes**, AIR 2003 SC 2629 have 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 arise 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)

39. In terms of Section 74 of the Indian 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.

40. 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."

41. 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....."

42. 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.

43. 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.

44. 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).

45. 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....."

46. 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 inspite 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."**

47. 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 **Llodys 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.**"*

48. In the present case, 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, rather in the rejoinder, it was pleaded that it is the subject matter of the Arbitral Tribunal. Thus, the principles laid down in **Saw Pipes** (supra) are not applicable in the facts of the present case, nor the said judgment would help the case of the petitioner.

49. However, the respondent cannot deny the fact that the parties have agreed between them in MSA that in the event where the respondent exists from any site according to the terms of the Service

Contract, it shall pay the 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 wherein it is virtually not possible to assess the pre-estimated genuine damage.

Under such situation, it is also not 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.

50. The term 'stipulating payment of exit fee of Rs.50,11,369/-' claimed by the petitioner in case of respondent's prematurely exiting the respondent's site, is unambiguous and therefore must be given effect to while determining *prima facie* case of the petitioner. The total amount was increased on both the heads which on the date of filing of the petition was Rs.1,33,00,000/- as per the case of the petitioner.

51. The submission of the petitioner's counsel is that the respondent should deposit the entire outstanding amount in view of the reason that the Spectrum is sold. As the financial condition of the respondent is not solvent, in view of the settled law referred by me, the entire amount of exit charges cannot be secured, although I agree with the argument of the petitioner that the petitioner is entitled for reasonable compensation if the case is made out before the Arbitral Tribunal. I also agree with the learned counsel for the petitioner that the conduct of the respondent is not reasonable, as the respondent has, despite of interim order/direction, sold the Spectrum contrary to the order/direction passed by this Court. As far as the interest claimed in the matter is concerned, I am of the view that the said

aspect would also be considered by the Arbitral Tribunal. Counsel for the respondent submitted that the petitioner has retained its equipments as security for repayment of dues, in view of an apprehension of the petitioner that after transfer of spectrum by the respondent to any other entity, the respondent would have no significant assets against which the petitioner can enforce its claims. Copy of the Chartered Accountant's certificate showing list of Assets of the respondent lying with the petitioner in each of the states of Gujarat, Haryana, Madhya Pradesh-Chhattisgarh and Assam as on 29th February, 2016 is on record as Annexure R-1. All the said facts are not mentioned by the petitioner in its petition, except it is stated that the valuation of the equipment given by the respondent in Annexure R-1 is unilateral and unsubstantiated. It is also submitted on behalf of the petitioner that it has not retained the aforesaid equipment as security for repayment of dues, even otherwise, the said equipments have no commercial value for the petitioner, once the same is removed from the site. Once the amount is deposited, the respondent is at liberty to move the application for removal of equipment in view of the stand taken by the petitioner. As far as the exit fee is concerned, I agree with the submission of the petitioner that if it is proved, the petitioner may be entitled to a reasonable compensation. In the light of these facts and circumstances in the present case, the prayer to secure the exit fee claimed by the petitioner is allowed to the extent that without prejudice, the respondent shall deposit Rs.10 lacs, which comes to 20% of the actual amount claimed by the petitioner, with the Registrar General of this Court within two weeks from today. As far as the interest component and other miscellaneous charges are concerned, I am not

inclined to pass any order, as the issue of entire exit charges is disputed one. The said issue has to be considered by the Arbitral Tribunal on merit.

52. The present petition is accordingly disposed of. I.A. No.6253/2016 also stands disposed of. No costs.

53. 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.

54. As far as the pending applications are concerned, I.A. No.4955/2016 has been filed by the respondent for condonation of delay in filing the reply. No objection was raised by the petitioner. The delay is condoned. The said application is disposed of. As regards I.A. No.9017/2016, the same is already listed on 5th October, 2016.

55. 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 contrary, 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 Airtel.

56. 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 the purposes of profit (**Secretary, Ministry of I&B v. Cricket Association of Bengal**, 1995(2) SCC 161, para 201(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, as the 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.

57. 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-Banks 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 the secured creditors is only relevant when paying off the debts of a Limited Company in liquidation.

58. 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'.

59. It has been held in many judgments that Section 9 of the Arbitration Act only contemplates the 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***, AIR 2006 Ker. 206, para 6; ***Deutsche Postbank Home Fin. Ltd v. Taduri Sridhar***, (2011)11 SCC 375, para 12; and ***S.N. Prasad v. Monnet Finance Ltd.***, (2011) 1 SCC 320, para 19).

60. The Spectrum has also been sold. I have been informed that the amount is deposited in an escrow account. The respondent has failed to provide all the details despite of assurance given by them in the Court. In the light of the above, the application of the applicant-banks is dismissed, as the same is not maintainable.

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

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 14, 2016