

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

% *Judgment pronounced on: 29th January, 2016*

+ **O.M.P.(I) No.343/2015**

HUAWEI TECHNOLOGIES CO. LTD. Petitioner
Through Mr.Gopal Jain, Sr. Adv. with
Mr.Devashish Bharuka,
Ms.Jasmeet Chandokh,
Mr.Gaurav Chauhan, Mr.Vaibhav
Niti, Ms.Anu Tyagi, Mr.Sanjiv
Goel & Ms.Arpita Bishnoi, Advs.

versus

STERLITE TECHNOLOGIES LIMITED Respondent
Through Mr.A.S.Chandhiok, Sr. Adv. with
Mr.Punit Tyagi, Mr.Ankit Parihar
& Mr.Ambarish Pandey, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition for interim measures under Section 9 of the Arbitration and Conciliation Act, 1996.
2. The respondent-Company is engaged in the business of supply of telecommunication. Brief facts as per the petition are that the petitioner cooperated with the respondent to win the bid for Mahanagar Telephone Nigam Ltd. (MTNL) Tender No.MTNL/20-80(818)/2005-MM/BB dated 24th March, 2006, issued by MTNL for supply, installation, testing, commissioning of Broadband Access Network and associated accessories. The respondent acted as the

lead bidder and due to petitioner's cooperation, MTNL awarded the said project to the respondent.

3. In view thereof, the petitioner and the respondent entered into a Supply Contract for MTNL Broadband Project (hereinafter referred as "Supply Contract") being No.00F3560704100A on 9th April, 2007, for supply of equipment subject to terms and condition under the Supply Contract.

4. On 1st March, 2012, MTNL issued a letter to respondent for closure of M/s STL Broadband Project against T.E. No.MTNL/20-80(818)/2005-MM/BB dated 24th March, 2006 and as per the petitioner it makes clear that petitioner has supplied all the equipments as specified under the Supply Contract.

5. It is alleged by the petitioner that it had delivered equipment on time and also complied with all the terms and condition of the Supply Contract. However, respondent failed to make the complete payment of delivered equipments and violated the terms of the Supply Contract. In spite of the repeated reminders, the respondent failed to make the due payment for total USD 1,45,26,080.53 (Approx.). The petitioner thereafter sent a Legal Demand cum Arbitration Notice to the respondent invoking Article 22 of the Supply contract seeking payment of pending claim along with interest payable @ 18% p.a. and for settlement of the dispute through referring it to Arbitration as per Article 22.3 of the Supply Contract.

6. The same reads as under:

"22.3 All disputes, controversies or claims arising out of or in connection with or in relation to this Contract of its negotiation, performance, breach, existence or validity, whether contractual or tortures, shall be referred to

arbitration in accordance with the Indian Conciliation and Arbitration Act, 1996 and conducted by a single arbitrator to be appointed by the Parties by mutual consent. The cost of arbitration shall be shared by the Parties. The place of the arbitration shall be India and the applicable law in relation to the procedure of the arbitration shall be determined by reference to the law of the place of the arbitration is to be held. The arbitration proceedings shall be conducted in English language. The award of the arbitration shall be final and binding against the Parties hereto."

7. The aforesaid notice was duly served upon the respondent. However, no reply was received within the stipulated time against the demand raised by the petitioner for the pending claim. Even no objection was received from and on behalf of respondent to the proposed name of the sole Arbitrator.

8. Thereafter, the petitioner through its advocate wrote a letter dated 29th December, 2014, to the proposed sole Arbitrator requesting him to assume jurisdiction and proceed with the matter as per Article 22.3 of the Supply Contract. On 6th January, 2015 advocate for the petitioner received a letter dated 5th January, 2015 by hand, issued by the sole Arbitrator holding the first/preliminary meeting of the aforesaid matter on 21st January, 2015. On 7th January, 2015, after expiry of the stipulated time, the Advocate for the petitioner received a letter dated 6th January, 2015 along with enclosures, issued by the respondent through its Advocate in reply to the aforesaid Legal Demand cum Arbitration Notice dated 28th November, 2014, wherein the respondent raised objections to the appointment of sole Arbitrator.

9. On 20th January, 2015 advocate for the petitioner received copies of letters dated 13th January, 2015 and 19th January, 2015,

issued by the respondent to the sole Arbitrator raising its objection to the letter dated 5th January, 2015 for holding the preliminary meeting who inter alia objected to the appointment of sole Arbitrator. However, in the said letter dated 19th January, 2015, the respondent admitted the subsistence of an arbitral dispute between the parties by stating the fact that the respondent will be initiating the proceedings under Section 11 of the Arbitration and Conciliation Act, 1996.

10. By its order dated 21st January, 2015 the sole Arbitrator, in view of the objection raised by the respondent, recused himself from the proceedings of the aforesaid matter and closed the proceedings with directions that the parties may take recourse for redressal of their dispute in accordance with law.

11. On 24th February, 2015 petitioner has filed a petition before the Supreme Court of India, under Section 11(6) of the Arbitration and Conciliation Act, 1996 being Arbitration Petition No.27 of 2015 and same is pending adjudication. On the same day, the petitioner received a legal notice dated 23rd February, 2015 from the respondent, it is stated by the petitioner that respondent is pressurizing the petitioner not to recover the due amount and frustrate the arbitration proceedings. I have been informed that now the Arbitrator in the matter has been appointed by the Supreme Court.

12. In the present petition the petitioner has approached this Court seeking an interim relief for securing an amount of USD 1,45,26,080.53 (approx. Rs.97,04,93,250/- using the current exchange rate as on 11th January, 2016) due and payable by the respondent.

13. In reply, the respondent has stated that the respondent has filed the petition of demerger which is pending. The proposed demerger of the respondent is into two entities, that is, Sterlite Technologies Limited, where the telecom business of the respondent is proposed to remain, and Sterlite Power Transmission Limited, where the power and transmission business of the respondent is proposed to be demerged. The respondent has only approached the Bombay Stock Exchange for seeking preliminary the proposed restructuring and the respondent has sought various clarifications from the respondent on permission from the Stock Exchange (since the Respondent is a listed company). The consent is yet to be granted by the Stock Exchange, as at present, the Stock Exchange has the process of communicating with the Stock Exchange as well as the Securities and Exchange Board of India (SEBI) to provide such clarifications. The process of restructuring is in its preliminary stages. Once the permission by the Stock Exchange has been granted, the respondent would be required to submit a scheme for demerger under Section 391-394 of the Companies Act, 1956 to the High Court of Bombay for approval. At that stage, all the creditors will get an opportunity to file their objections, if any, to the proposed scheme of restructuring.

14. It is contended by the respondent that the available assets of the respondent-Company, post the demerger are before the Bombay Stock Exchange, both before and after the demerger, which would show the financial stability of the respondent. In addition, even at present, the non-current assets of the respondent are to the tune of Rs.2390 crores (approximately) and the current assets are to the tune of Rs.1830 (approximately) crores, together totaling to Rs.4200

crores approximately. Further, an affidavit of assets of the respondent in Form 16A Appendix-E, under Order XXI Rule 41 (2) of the CPC along with the assets as on 30th June, 2015 and a statement of the Fixed Assets Register has been filed. The respondent, at present, holds more than 50 bank accounts in different banks in the country. The respondent is allowed an overdraft facility of Rs.1040 crores in total. The respondent has availed overdraft facility only to an extent of Rs.544 crores (approx.) with the balance available fund limit of Rs.496 crores (approx.).

15. Under these circumstances there are sufficiency of assets of the respondent, both before and after the demerger would show the financial stability of the respondent, thereby filing of the present petition is premature. The claims of the petitioner are disputed by the respondent. Let the sole Arbitrator may decide the same on urgent basis as alleged by the respondent during the hearing of the petition. The liberty is granted to the petitioner to file an application under Section 17 of the Act before the Arbitral Tribunal, if necessary.

16. On merit, it is stated that more than 70 percent of the invoices filed by the petitioner in support of its alleged claim of USD 1,45,26,080 (approximately) pertain to the year 2008, 2009, 2010 and 2011. The claim of the petitioner is even barred by limitation. The petitioner has sought to mislead this Court by stating in its petition that MTNL wrote a letter dated 1st March, 2012 showing that the petitioner had successfully performed its obligations under the Supply Contract and supplied all the equipment as specified in the Supply Contract.

The pending points, totaling 29 in number, required the urgent attention of the petitioner, failing which, the pending payments due

to respondents would not be released. In addition to above, MTNL also took the following decisions, amongst others:

- a. To levy penalty for the pending points over and above the penalty envisaged under the tender i.e. LDs etc.
- b. Withhold an amount of Rs.16.18 crores (which were given as Bank Guarantees) against the due payments to be released to the Respondent.
- c. Withholding specific payments in respect of EAI (hardware, software and I&C charges) and with regards to BSAS (hardware, software, licenses, CD and I&C charges, if any), as also recovering payments already made.

17. Thus, the petitioner was required to perform as per the terms of the Supply Contract. As per the terms of the Supply Contract, the equipment supplied by the petitioner was required to pass various Acceptance and Validation tests which were to be conducted by MTNL. However, the petitioner failed to satisfy the requirements under the Contract, but the equipments supplied by the petitioner also failed to pass the abovementioned tests, resulting in non-payment by MTNL and resultantly short-closure.

Apart from payments being stopped by MTNL for the project, MTNL has also withheld (for default of the petitioner) the Bank Guarantee amount which was otherwise due to be released to the respondent.

Due to the non-performance of the obligations under the Contract by the petitioner, MTNL has slapped huge LDs, penalties and damages on the respondent, and consequently the milestone payments which were required to be released by MTNL, have yet not been released by MTNL. Had the obligations under the Supply Contract been performed as per the requirements and the schedule,

the project would have been completed by 2010 and the equipments and goods supplied would be under the Annual Maintenance Contracts ("AMCs") as on 2015. The fact that there is no AMC that is running as on date or has run its course establishes that the petitioner has failed to discharge its obligations of supplying equipments in terms of the Contract.

18. Even by emails and reminders the respondent brought to the notice of the petitioner that various issues are pending for months, as a result of which the project has suffered and MTNL is withholding payments. Amongst such reminders, the respondent highlighted issues relating to:

- Completion of compliance of security requirement at site;
- Resolution of tape, library, storage & firewall Issues;
- Licenses renewal and hardware support extension
- Debit note acceptance for 215 faulty battery at MTNL stores;
- Resolution of MTNL complaints and no support by the petitioner (leading to shut down of services);
- Replacement of faulty batteries supplied by the petitioner;
- Replacement of faulty HDD Warranties and AMC relating to the equipments supplied under the Contract; etc.

Copies of representative emails and reminder letters dated 21st January, 2015, 3rd December, 2014, 7th November, 2014, 14th October, 2014, 10th October, 2014, 8th October, 2014, 17th September, 2014, 8th September, 2014, 21st June, 2014, 5th March, 2014, etc., have been filed.

19. It is stated that due to pendency of works and the failure on the part of the petitioner, the respondent has suffered financial and reputational loss, including –

- Deduction of liquidated damages by MTNL;
- Deduction of amounts by MTNL on account of defective equipments by the petitioner;
- Non-clearance of milestone payments by MTNL due to the inactions of the Petitioner;
- Cost of arranging third parties to complete work which was to be completed by the petitioner, thereby raising various debit notes;
- Withholding of Bank Guarantees by MTNL;
- Other penalties levied and deductions made by MTNL on the respondent.

The payments, if any, are to be made to the petitioner, would be made provided the petitioner performs its obligations under the Contract and the respondent or MTNL has no legitimate ground or claim to refuse or withhold the said payments. The letter i.e email dated 16th April, 2015 as referred by the petitioner about the admission of amount due cannot be relied upon as the said letter is issued only for the purpose of dealings with the banker. It is reiterated that the amount, if any, payable to the petitioner becomes payable only after the petitioner fulfills its obligations under the Contract, MTNL issues the relevant certifications, and the payment to the respondent is released from MTNL.

Therefore, the petitioner is not entitled for any relief claimed as the same is liable to be dismissed and is not maintainable as the petitioner has failed to fulfill its obligations under the Supply Contract.

20. The petitioner has filed the rejoinder to the reply filed on behalf of the respondent, who has denied the averments made in the reply. It is stated that the petitioner is entitled to recover the amount due on the basis of admission. It is the admitted amount which is payable to the petitioner. Learned Senior counsel for petitioner has referred the letter dated 30th November, 2015 issued by MTNL and argued that the respondent has already received the amount from MTNL, however the respondent is not paying the same to the petitioner with malafide intention. The plea of demerger is irrelevant as the petitioner is only concerned with the amount due if the respondent is in sound condition. He submits that all the more reason, it has to pay the same to the petitioner who has denied that if the award passed in favour of the petitioner, they may not be able to recover the admitted amount due. The excuse made by the respondent is lame which is not relevant to decide the present petition.

21. On 13th January, 2016, the arguments were heard and the order was reserved. In the meanwhile, the petitioner filed an application being I.A. No.594/2016 for bringing on record certain additional documents. By order dated 14th January, 2016, the Joint Registrar dismissed the said application on the reason that the matter has already been reserved for final judgment. The petitioner thereafter filed Chamber Appeal being O.A. No.21/2016 challenging the order dated 14th January, 2016 which was listed before Court on 19th January, 2016. With the consent of the parties, the additional documents filed along with the application being I.A. No.594/2016 were taken on record and the chamber appeal was accordingly

disposed of. The details of the said additional documents are mentioned as under:

- a. Copies of Rollover letter issued by petitioner along with email of respondent, marked as Annexure P/17.
- b. Copy of Chairman Report dated 15th December, 2015, marked as Annexure P/18.
- c. Copy of letter dated 27th August, 2015 addressed by SEBI to NSE and marked to BSE and the demerged company providing its observations on the scheme, marked as Annexure P/19.
- d. Copies of letters sent by BSE and NSE dated 28th August, 2015 advising demerged company to comply with the observations of SEBI, marked as Annexure P/20.
- e. Copy of letter of MTNL dated 30th November, 2015, marked as Annexure P/21.

22. Mr. Chandhiok, learned Senior counsel appearing on behalf of respondent argued that this Court should not exercise its jurisdiction to pass an order for securing the amount in view of the stand taken in the reply and even otherwise, when the condition of the respondent is solvent who would be capable of and has capacity to pay the amount if the Award is passed against the respondent. The petitioner has failed to satisfy the conditions of Order XXXVIII Rule 5 CPC. The discretion of the Court to grant interim relief under Section 9 of the Act is to be exercised very rarely or sparingly and it should be extremely cautious in granting the relief. Mr.Chandhiok has referred the decision of Division Bench of this Court passed in the case of **C.V. Rao v. Strategic Port Investments KPC Ltd.,** (2015) 218 DLT 200 (DB), para 38 which reads as under:

“38. The law is well-settled that the discretion of the Court to grant interim relief under Section 9 of the Act has to be exercised sparingly and only in appropriate cases and

the Courts should be extremely cautious in granting the interim relief. As held in *Olex Focas Pvt. Ltd. & Anr. Vs. Skoda Export Company Ltd. & Anr.*; AIR 2000 Delhi 161 the power to pass orders with regard to interim measures should always be exercised by Court for the purpose of safeguarding the interest of the parties to the arbitration proceeding so that the award is not frustrated. The Court's discretion ought to be exercised in those exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties or funds either before or during the pendency of arbitration proceedings or even during the interregnum period from the date of award and its execution. It is also a well settled principle of law that unless and until the petitioner succeeds in bringing the nature of dispute and differences within the ambit of agreement no relief can be granted under the provisions of Section 9 of the Act (See *Smt. Baby Arya vs. Delhi Vidyut Board*:AIR 2002 Delhi 50)."

Mr. Chandhiok submits that financially, the condition of the respondent is quite sound and after demerger, it would become solvent. There is no risk. The amount due, if any, would be easily recoverable if the Award is passed in favour of the petitioner. As the petitioner has failed to produce any cogent evidence that there is any threat of alienation of property due to the proposed merger as respondent is a high net-worth company, the petitioner would not be entitled for relief as claimed. It is also alleged that the shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. Therefore, there is no need to pass an order to secure the amount.

23. Let me deal with the first submission of Mr.Chandhiok, who stated that the condition of the respondent-Company is solvent and

it is not necessary to pass any interim direction. On the other hand, learned Senior counsel appearing on behalf of the petitioner, on merit, has pointed out that the respondent stands indebted to petitioner alone for USD 1,54,04,190.07 (approx.) for supply of goods under two separate and independent contracts out of which USD 1,45,26,080.53 (approx.) forms part of the present petition. The respondent has failed to disclose vital information in its affidavit which was filed as per direction of the Court as its contingent liabilities and whether assets detailed are encumbered with the Banks for securing loans, which if taken into account would be contradictory to the stand portrayed in the reply. The petitioner has supplied the equipments under the said supply contract to the respondent who has further supplied the same to MTNL and the same are being used and enjoyed by the MTNL. The respondent has breached the terms of the supply contract by not making the payment to the petitioner. It is alleged that the restructuring/ demerger of the respondent-Company would be jeopardizing the claim of the petitioner who will be deprived of its legitimate claim on it being upheld in the arbitration on the following grounds:

- (a) Because the power segment is significant portion of respondent-Company's business in last 5 years (contributing to total turnover as high as 71.16% in FY12, gradually reducing to 49.760/0 in FY15). In terms of net assets holding on 31st March, 2015, it comprises a little more than 25% of the total net assets of the whole respondent-Company (so far as direct assets/liabilities are concerned). This means that the net assets of the demerged company would be reduced to extent of Rs.322.72 Crores by the hiving off of the power division. This would surely

have significant bearing on respondent's Telecom Division's ability to repay petitioner's debts after demerger, the demerged businesses are separately and independently liable for paying off its debts/ liabilities. It is pertinent to mention here that respondent has not disclosed its list of liabilities and creditors. Therefore, it raises a serious doubt on ability of respondent to pay dues of the petitioner. Even though the net cash flow during the year had always been positive in last 5 years, the cash flow from investing activities has always been negative. For e.g. it stood at (-) Rs.436.98 Crores in FY 2014-15 and (-) Rs.407.93 Crores in FY 2013-14.

24. It is submitted that such diversification/siphoning of funds to group companies of the respondent does not reflect bonafide of the respondent-Company when it is not paying dues of its creditors in time. It is also stated in the rejoinder that the respondent has several contingent liabilities but no provision for them has been recognized by the respondent in the financial statements. There is an outstanding demand of Rs.188 crores which is pending adjudication before the appropriate Court of Law.

25. It is alleged in the rejoinder that the respondent's Long Term Borrowings/Secured Loans stand at Rs.988.74 crores and Short-Term Borrowings at Rs.563.73 Crores. Details of Secured Loans & short term borrowings as on 31st March, 2015 reported in annual report for FY 2014-15 is reproduced as under:

LONG-TERM BORROWINGS:

	Non-current		Current maturities	
	31 March 2015 ('in Crores')	31 March 2014 ('in Crores')	31 March 2015 ('in Crores')	31 March 2014 ('in Crores')
Debentures				
2,000 (31 March 2014 : Nil) 10.60% Non convertible				
debentures of ` 10 lacs each (secured)	200.00	-	-	-
2,500 (31 March 2014 : 2,500) 11.45% Non convertible				
debentures of ` 10 lacs each (secured)	250.00	250.00	-	-
Term loans				
Indian rupee term loans from banks (secured)	538.74	433.44	139.82	68.89
Deferred payment liabilities				
Sales tax loan (interest free) (unsecured)	-	-	0.45	1.07
	988.74	683.44	140.27	69.96
The above amount includes				
Secured borrowings	988.74	683.44	139.82	68.89
Unsecured borrowings	-	-	0.45	1.07
Amount disclosed under the head				
"other current liabilities" (note 10)	-	-	140.27	69.96
Net amount	988.74	683.44	-	-

SHORT-TERM BORROWINGS (SECURED)

	31 ST March 2015 ('in crores')	31 ST March 2014 ('in crores')
Cash credit from banks	4.28	17.04
Working capital demand loans from banks	105.00	-
Other loan from banks	563.73	542.6

These long-term borrowings are secured by way of first pari passu charge on entire movable fixed assets (both present and future) and mortgage of certain immovable fixed assets of the Company. Whereas short-term loans are secured by hypothecation of raw materials, work in progress, finished goods and trade receivables. Further, the total liability of the Company towards trade payables as on 31st March, 2015 is Rs.884.16 Crores out of which USD 1,45,26,080.53 (approx.) are payable to the petitioner alone under the said supply contract.

The respondent has not produced the Index of Charges filed with the Registrar of Companies showing various charges which banks are holding against the respondent.

26. It is alleged that the plea of the respondent-Company to the Bombay Stock Exchange was that it has shown the company financials, post-restructuring, by way of a Proforma Financials on 31st March, 2015, but the figures stated in the said Proforma Financials are vague and misleading, as the same are not supported by any certified document. The audited financial statement of the respondent-Company, for the Financial Year 31st March, 2015 states a different state of affairs for the two segments of the respondent-Company, which is evident from the segment-reproduced herein under:

Particulars	Telecom Product and Solutions	Power Product and Solutions	Unallocable	Total
Segment Assets	1622.42	1074.12		2696.54
Common Assets			1530.77	1530.77

Total Assets	1622.42	1074.12	1530.77	4227.31
Segment Liabilities	443.03	751.40		1194.43
Common Liabilities			1790.23	1790.23
Total Liabilities	443.03	751.40	1790.23	2984.66
Net Assets	1179.39	322.72	-259.46	1242.65

The net current assets (Current Assets Minus Current Liabilities) of the respondent-Company is found to be always negative, i.e. less than 1, as against the standard of 1.33. It is submitted that the same is not treated as a healthy sign for the respondent-Company and raises serious doubts on the credibility of the company to payoff its current liabilities. The details are reproduced herein under:

Particulars	For the FY (As per Audited Financial Statements)				
	Fig In Rs. Crores				
	2010-11	2011-12	2012-13	2013-14	2014-15
Current Assets	1,363.19	1,269.71	1,321.56	1,398.82	1,834.31
Less : Current Liabilities	1,366.58	1,514.98	1,792.67	1,552.77	1,914.70
Net Current Assets (Working Capital)	(3.39)	(245.27)	(471.11)	(153.95)	(80.39)

27. It is also stated in the rejoinder that under the garb of demerger the respondent cannot frustrate the claims of the creditors including the petitioner. On a perusal of the Annual Report for FY 2014-2015 dated 31st March, 2015 and Balance Sheets of the respondent-Company, it can be seen as follows:

a. Loans: As per the Balance Sheet as at 31st June, 2015, it can be seen that:

- (i) Long terms borrowings is Rs.888.02 Crores, and
- (ii) Short terms borrowings is Rs.738.71 Crores.

It is submitted that as on 31st March, 2015, the long term borrowings of the respondent-Company was Rs.988.74 Crores whereas the short term borrowings was Rs.563.73 Crores. As per the annual report for FY 2014-15, the amounts shown against the Long term borrowings is secured by mortgaging movable fixed assets and also, immovable fixed assets (in present and future) of the company. Similarly, short term borrowings are also secured by hypothecation of raw materials, work in progress, finished goods and trade receivables. Thus, the entire borrowings of the respondent-Company is secured by mortgaging the assets of the company. Therefore, the claim of the respondent of having sufficient availability of funds to pay the petitioner is baseless as there exists charge on the assets of the respondent by the financial institutions pursuant to which it cannot be said that the respondent is financially viable.

b. Contingent Liabilities: The details of contingent liabilities as on 31st March, 2015 raise serious concerns on the respondent-Company's credibility on payment of dues. There are several contingent liabilities devolving upon the company for example the demand of Rs.188 Crores (including penalties and excluding interest) in a pending excise/ customs matter as old as 2001. The company was incorporated in year 2000 only and such outstanding liabilities appears to be serious enough to have

warranted the statutory auditors, M/s S R B C & CO LLP to form the basis for a qualified opinion in their Audit Report for FY 2015 as under:

"Pending disposal of the matter by the Honourable Supreme Court, we are unable to comment on the adequacy of the provisions made towards the amount of excise / customs duty payable. Our audit opinion on the standalone financial statements for the year ended March 31, 2014 was also qualified in respect of this matter."

28. Mr. Gopal Jain, learned Senior counsel appearing on behalf of petitioner has read the pleadings of the petitioner wherein it is submitted by him that on a bare perusal of the table showing liability (supra), it can be seen that respondent-Company has not provided details regarding disputed sales tax amount, excise duty, customs duty and service tax arising from disallowances made in assessments which are pending with appellate authorities for its decision. In respect of the claims made against the company, respondent has not acknowledged the claims as a debt may be for the reason that it does not expect these claims to succeed. Accordingly, no provision for the contingent liability has been recognized in the financial statements. It is submitted that the respondent has presumed that it is not liable to pay the said liabilities. The respondent has failed to disclose its Liabilities towards Bank with respect to Telecom and Power segment. The details of segment wise assets and liabilities given in the Annual reports dated 31st March, 2015 have been reproduced hereinabove. Thus, in terms of 'Net Assets' holding on 31st March, 2015, the net assets of the respondent would be reduced to extent of Rs.322.72 crores by the hiving off of the power division. The liabilities towards bank loans

with respect to each segment are not given. The petitioner is entitled to get its claim amount secured in Section 9 of the Act. In case the averments made in the rejoinder are considered carefully, *prima-facie*, conclusion can be drawn about the actual position of the respondent. It is also difficult to conclude that after demerger, its condition would have been more improved. Anyhow, the petition is pending in Bombay High Court which would be decided as per its own merit. But I am of the considered opinion that in view of the nature of the facts of the present case, the respondent can derive any benefit of such plea.

It is argued on behalf of the petitioner that the respondent has received the amount from the employer. Even otherwise, the respondent has admitted its liability in its various communications, as referred to above also, thus, there is no impediment to grant the relief in view of the admissions/admitted facts.

29. As far as finding arrived by the Division Bench in the case of **C.V. Rao** (supra) is concerned, this Court totally agrees that the said relief can only be granted in the exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceeding infructuous if the award is passed against them.

I agree that the discretion should be exercised in those exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous or there is an admitted liability.

30. In the present case, admittedly, the goods have been supplied by the petitioner to the respondent in terms of the supply contract and respondent has further supplied the same to MTNL. The said goods are being used and enjoyed by the MTNL. The respondent after supplying the goods to MTNL has collected substantial payment and has not paid to the petitioner for supply of the goods and the payment has been retained by the respondent.

No doubt, the claim(s) and counter-claim(s) of the parties would be adjudicated in arbitral proceedings. However, there is no reason why the petitioner's claim be not secured by requiring the respondent to furnish appropriate security, especially in the light of the contractual framework and particularly when the dues are admitted and the party has received the amount due from the employer.

31. It is admitted position that by letter dated 23rd February, 2015 the respondent approached the petitioner to settle the alleged pending issues who also issued its letter dated 16th April, 2015, admitted its liability towards the petitioner as the respondent in order to make remittance to the petitioner issued emails seeking issuance of letter from the petitioner for rollover of forex cover for MTNL-BB project. One of the many specimen of extract reads as under:

"To,

Dated: 16th Apr-15

M/s Sterlite Technologies Limited
India

**Sub- Outstanding amount against Contract No-
00F35607041100A**

Sir,

This is in reference to project reference to project - MTNL Broad Band contract No- OOF3560704100A which is under execution stage. For this project your outstanding payable to Huawei is around USD 40,00,000 which is expected to be due latest by Oct-15.

This letter is being issued on your request for the sole purpose of your dealings with your banker and cannot be construed to impact any obligation under the contract:

For
Huawei Technologies Co. Ltd.

Authorized Signatory
Name
Designation"

32. On 20th May, 2015, the petitioner came to know that the respondent with a view to alienate its assets submitted an application to the BSE, seeking demerger of its telecom business and power business. The petitioner through the present petition filed in July, 2015 approached this Court seeking a direction to restrain the respondent from carrying out any demerger of its assets, thereby frustrating the claim of the petitioner and/or to secure the amount due and payable to the petitioner. The respondent on 5th August, 2015 gave an undertaking to this Court to serve an advance copy of the company petition for demerger to the petitioner, to enable the petitioner to take appropriate action. The SEBI on 27th August, 2015 raised/made its objections/observations to the scheme of demerger of the respondent-Company. BSE and NSE forwarded the observations to the respondent for compliance by letter dated 28th August, 2015. The contents of the said letter are reproduced here as under:-

Annexure P/20
Exhibit "I-1"

64

BSE Limited Registered Office: Floor 25, P-1, Towers, DLF-Phase II, Market-100 Gurgaon
T-491 33 3379 (24x7x24) 94491 33379 BSE www.bseindia.com
Corporate Identity Number: U07130MH2002PLC033588



BSE
EXPERIENCE THE FLEX

August 28, 2015

DCS/AMAL/CS/24(1)/134/2015-18

The Company Secretary,
Sterlite Technologies Limited
E-1, MIDC, Survey No 88/1, Rakholi Village,
Madhuban Dam Road, Silvassa,
Dadra-395 230,
Dadra & Nagar Haveli.

Dear Sir/Madam,

Sub: Observation letter regarding Draft Scheme of Arrangement of Sterlite Technologies Limited and Sterlite Power Transmission Limited.

We refer to your submission of draft Scheme of Arrangement of Sterlite Technologies Limited (STL) and Sterlite Power Transmission Limited (SPTL), filed under clause 24(f) of Listing Agreement and in accordance with SEBI Circular No. CIR/CFD/DIL/5/2013 & No. CIR/CFD/DIL/8/2013 dated February 4, 2013 & May 21, 2013 respectively.

As required under SEBI Circular No. CIR/CFD/DIL/5/2013 & No. CIR/CFD/DIL/8/2013 dated February 4, 2013 & May 21, 2013 respectively, SEBI vide its letter dated August 27, 2015 has given its letter of comments on the draft scheme and a copy of the same is attached as Annexure I. In addition to the same, in para 2 of its observation letter, SEBI has interalia stated that:

- Stock Exchange(s) to ensure that "Fairness opinion" submitted by Sterlite Technologies Limited, as forwarded by NSE, vide letter received by SEBI on June 11, 2015, is displayed from the date of receipt of this letter on the website of the listed company and the Stock Exchange(s) along with various documents submitted pursuant to the Circulars.
- Considering that STL is promoter of SPTL and the shareholding of STL in SPTL is proposed to be cancelled as part of the proposed scheme, Stock Exchange(s) may advise the company to consider modifying the draft scheme to clearly state that the obligation of purchasing equity shares and redeemable preference shares pursuant to the scheme of arrangement will be on promoters of STL and not on STL, as informed by STL in earlier communications.
- The Company shall duly comply with provisions of Circulars.

Accordingly, you are advised to comply with the same.

For Sterlite Technologies Limited

Authorised Signatory

SENSEX India's Index the world tracks

33. The respondent on 12th October, 2015 approached the High Court of Judicature at Bombay seeking demerger without supplying an advance copy of the same to the petitioner (which was supplied late evening on 28th October, 2015) i.e. 2 days before listing of the said petition.

The Company Petition under Sections 391 to 394 read with Sections 100-103 of the Companies Act, 1956 and Section 52 of the Companies Act, 2013 came to be listed before the High Court of Judicature at Bombay on 30th October, 2015 and the respondent was directed to hold a meeting of its Equity Shareholders, Secured Creditors and Unsecured Creditors on 15th December, 2015, to record their consent/ objections.

34. In the meanwhile on 30th November, 2015 the MTNL confirmed that almost all the payment regarding broadband project has been released to the respondent. The extract of the same are reproduced below:

महानगर टेलीफोन निगम लिमिटेड
(भारत सरकार का उद्योग)
MAHANAGAR TELEPHONE NIGAM LIMITED
(A Govt. of India Enterprise)

Annexure P/21

No. MTNL/20-80(818)/2005-MM/BB (Vol-VI)
November 30, 2015.

To

M/s. Huzwel Telecommunications (India) Co. Pvt. Ltd.
7th Floor, Tower -A
Space 1, Tech Park, Sohna Road
Sector-29, Gurgaon
Haryana-122001.

Sub: Confirmation on payments made by MTNL to front end partner.

Ref: Your letter No.MTNL/Sterline/BB&MPLS/10112015.

This has reference to your letter referred above. Based on your request, it is confirmed that MTNL has released all due payments to M/s Sterline against MPLS project.

Regarding Broadband project, MTNL placed following two POs on M/s. Sterline Technologies Ltd:

- (i) MTNL/20-80(818)/2005-MM/BB/SOTL/1 dated 30.4.2007 for Rs. 169.8 Cr.
- (ii) MTNL/20-80(818)/2005-MM/BB(Add-on-Maint)/20 dated 1.3.2008 for Rs.48.4 Cr.

The status of release of payments is as follows:

- (i) An amount of Rs.16.8 Crore is withheld by MTNL, due to an ongoing Audit para.
- (ii) After withholding the payments related to EAI & BSAS (which is yet to be finalized), MTNL has released almost all other due payments to M/s Sterline Technologies Ltd.

(Kulwant Chand)
DGM (MM-T)

पंजीकृत व निगम कार्यालय: महानगर दूरतारार सदन, 9 सी जी ओ कॉम्प्लेक्स, नई दिल्ली-110003

REGU. & CORPORATE OFFICE: Mahanagar Dूरतारार Sदन, 9 CGO Complex, New Delhi-110003

35. The above said document was not available with the petitioner when the petition was filed. It has been filed as additional document and the same is taken on record. Even no objection was raised by

the respondent. It is submitted on behalf of the respondent that the said letter itself discloses that MTNL has withheld an amount of Rs.16.8 crore and payments related to EAI and BSAS (which are yet to be finalized). The letter dated 30th November, 2015 cannot be read in isolation and ought to be read along with letter dated 1st March, 2012 and the action taken or yet to be taken by MTNL as the liabilities of the respondent under the tender have not yet come to an end. There is no question that no further damages, penalties and recoveries would be raised by MTNL upon the respondent. The said letter dated 30th November, 2015 has not been sent by MTNL to the petitioner but to its Indian subsidiary. On one hand, the petitioner denies that the supply contract and services contract are back to back contracts with conjoint and coterminous rights and obligations and on the other hand, the petitioner relies upon correspondence exchanged between its Indian subsidiary and MTNL.

36. There is no force in the submission of the respondent that MTNL may initiate the proceedings for demerger, penalties and recoveries of amount against the respondent. The goods were supplied years ago. The same were used by MTNL. The amount has been collected by the respondent. It is merely an excuse for not securing the amount. In case any such proceedings are taken, the respondent is always at liberty to move before court for modification of orders for securing the amount. At this stage, this court is only inclined to secure the amount. The same is not ordered to be released to the petitioner at this stage. Thus, the contention of the respondent is without any logic.

37. It is alleged by the petitioner that it had attended the meeting of unsecured creditors on 15th December, 2015 and casted a

negative vote opposing the demerger. The respondent on 21st December, 2015, despite of objections raised by petitioner filed a company petition for final approval of scheme before the High Court of Judicature at Bombay, being CSPL/897 /2015 which is pending for consideration. In the said petition, the respondent in its chairman's report dated 15th December, 2015, admitted the liability of Rs.31.30 Crores is due and outstanding to be paid to the petitioner.

38. From all the relevant documents, it emerges that the petitioner after receipt of the purchase orders from the respondent, delivered the goods and raised corresponding invoices for the outstanding amount of USD 1,45,26,080.53. If the e-mails exchanged between the parties dated 24th September, 2012, 26th September, 2012, 27th September, 2012, 25th April, 2013, 26th April, 2013 and 16th April, 2015 are read, it appears that the respondent has denied its liability towards the petitioner.

39. The respondent in its own letters is admitting its outstanding, however, the same was not released on account of default of the petitioner as MTNL was withholding the same as alleged by the respondent. It appears to the Court that when reply was filed, they were not aware that the MTNL on 30th November, 2015 would inform the petitioner's associated company that almost all the amount has already been received. It is evident that on 30th November, 2015, MTNL has confirmed that almost all the payment regarding the broadcast project has been released to the respondent except an amount of Rs.16.8 crores is withheld due to ongoing audit. It is not aware that the said payment has now been released or not. Even on 15th December, 2015 respondent filed a company petition for final approval of scheme before the High Court Of Bombay, admitting in

its Chairman's report dated 15th December, 2015, the liability due and outstanding to be paid to the petitioner.

40. Despite the fact that the respondent has admitted that the payment will be made to the petitioner after the same is received from MTNL, which fact has been confirmed by MTNL vide letter dated 30th November, 2015 that almost all payment has been made by MTNL to the respondent for supply of goods but the said amount has not been disbursed to the petitioner.

41. The respondent is also trying to mix up the dispute of two different contracts entered into between two different entities for supply of goods and Service Contract, in fact Supply contract and Service contract are two individual, independent and different contracts signed between different parties. Service Contract signed between respondent and Huawei Telecommunications (India) Company Pvt. Ltd. is a separate contract and terms of the said contract are independent to the Supply Contract. The present petition has been filed by the petitioner only for securing an amount pertaining to the supply contract; the respondent is mixing a separate contract entered. Thereafter the respondent's submission on MOU to call Supply Contract and Service Contract as back to back agreements is without any force as Article 29.2 of the Supply Contract specifically states that the Supply Contract itself is the entire contract and it supersedes and replaces all prior communications or representations.

42. With regard to the plea that the claim of the petitioner is barred by limitation, the same is frivolous *prima facie* as petitioner is shown as a creditor in the books of accounts of the respondent. The letters seeking Forex Rollover Cover for the outstanding payments

are also towards the debt. Reliance is placed upon the following judgments:-

- (1) ***Shreeram Durga Prasad v. Sial Soap Stone Factory & Others***, 1982 Mh LJ 912,
- (2) ***Bhajan Singh Samra v. M/s Wimpy International Ltd.***, (2011) 185 DLT 428,
- (3) ***Bengal Silk Mills Co. v Ismail Golam Hussain Arif***, AIR 1962 Cal 115.

43. The respondent cannot defeat the claim of the petitioner merely by taking the shelter of process of demerger. The respondent has already approached the Bombay High Court for final approval of the scheme. The case of the respondent is to be decided as per its own merit.

44. The respondent itself has admitted that the condition of the respondent is financially sound so as the due amount. The respondent has not denied the letter issued by MTNL and its contents and receiving of amount. A mere reliance was made that the obligations under the contract have not been fulfilled by the petitioner and therefore, MTNL has not disbursed the payments. The said plea has now become infructuous after the receipt of payments by the respondent from MTNL. There is no denial on behalf of respondent who has also not challenged the validity of the said letter.

45. No doubt, in a normal case, the requirement of all conditions of Order XXXVIII Rule 5 CPC are to be satisfied before Court while considering the prayer of securing the amount and the Court should exercise its discretion very carefully in order to secure the amount. However, if the petitioner has been able to make out a strong case

against the respondent, particularly, when the respondent has received the amount from the employer and it is avoiding to clear the due amount and is raising flimsy reasons and when it appears to the Court to be just and convenient, then the Court has ample power to exercise its discretion to secure the amount even when the condition of the company is solvent, under Sections 9(1) (ii) (b) and (e) of the Arbitration and Conciliation Act, 1996. The amount, under these circumstances, should be secured, once the dispute is of commercial in nature. The present case of the petitioner falls within the range of exceptional one where the amount is liable to be protected.

46. The respondent in the present case has failed to disclose vital information such as, its contingent liabilities and whether assets are encumbered with the Banks for securing loans/overdrafts as detailed in its affidavit filed in view of the orders and in the absence of said information, the stand portrayed by the respondent has become doubtful.

47. The interim relief in the present case is sought on the respondent's admitted obligation under the contract. The interim relief claimed in the present case is nothing but an admitted obligation on the part of the respondent and such an obligation can be enforced under Section 9 of the Act by way of interim relief.

48. Under these circumstances, the petitioner has prima facie case in its favour and balance of convenience also lies in favour of the petitioner. If the relief is not granted, the petitioner will suffer injury and even award if passed in favour of the petitioner in the arbitration proceedings may become paper decree.

49. The prayer of the present petition is accordingly allowed by directing the respondent to secure the amount.

50. The said amount be secured in the following manner:

- i) The respondent shall furnish the bank guarantee of USD 1,45,26,080.53 by using the current exchange rate in Indian currency as of 29th January, 2016 with the satisfaction of Registrar General of this Court, within the period of four weeks from today, who would invest the said amount initially for a period of 12 months in FDR.
- ii) Liberty is granted to the respondent to reduce a sum of Rs.16.8 crores if the said amount still has not been received after audit of MTNL, however the respondent has to file the affidavit in this regard within ten days from today.
- iii) As and when the final order of award is passed, the fate of the amount would be accordingly decided by this Court.

51. The present petition is disposed of. It is clarified that the arbitration proceedings would be decided as per its own merits without the influence of this order.

52. No costs.

(MANMOHAN SINGH)
JUDGE

JANUARY 29, 2016