

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

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

+ **O.M.P.(I) No.496/2015**

HUAWEI TECHNOLOGIES CO. LTD. Petitioner
Through Mr.Sachin Dutta, 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, Advs.

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 petitioner-Company is, *inter alia*, engaged in the business of Supply of Telecommunication Equipment and Network Elements. The respondent-Company is engaged in the business of developing and delivering products, solutions and infrastructure for telecom and power transmission networks
3. Brief facts as per the petition are that Bharat Sanchar Nigam Ltd (hereinafter referred as "BSNL"), O/o Chief General Manager, Karnataka Telecom Circle, No.1 S.V. Road, Halasuru, Bangalore-560008, issued a Tender No.MM/10-85/2010-II/BB (hereinafter referred

to as "BSNL Tender"), on 2nd September, 2010 for DSLAM Equipment and its associated accessories.

4. The said tender was for supply, installation and commissioning of ADSL2PLUS DSLAMS for 3.22 Million Line along-with eMS. The petitioner-Company being a specialist in supply of telecommunication products and in setting up/integrating telecommunication networks, was approached by the respondent-Company seeking co-operation and support in winning the said BSNL Tender. Copy of the BSNL tender dated 2nd September, 2010 has been filed.

4.1 In view thereof, petitioner-Company decided to cooperate with respondent-Company for bidding successfully for the said tender and it was agreed that respondent-Company shall act as the lead bidder and shall submit the bid to BSNL. Accordingly the petitioner-Company and the respondent-Company entered into and executed a Bid Co-operation Agreement dated 29th October, 2010 for the procurement of DSLAM Equipment Tender No.MM/10-85/ 2010-11/BB. BSNL awarded the said project to the respondent-Company. It is alleged by the petitioner that it was due to the efforts, collaboration and international reputation of the petitioner-Company, the BSNL Tender was awarded to the respondent-Company.

4.2 Thereafter, the petitioner-Company and the respondent-Company, entered into and executed a supply contract namely "SUPPLY CONTRACT for BSNL Tender for the procurement of DSLAM Equipment Tender No.MM/10-85/2010-11/BB" (hereinafter referred to as "Supply Contract"). In pursuance to the terms and conditions of the Supply Contract and acting upon them, the petitioner-Company shipped/delivered all the equipment's within the time frame stipulated in the Supply Contract as alleged by the petitioner.

The respondent-Company issued first Purchase Order bearing No.STL/IMS/BSNL-DSLAM/PO/O10 dated 29th August, 2012 (hereinafter referred to as "1st PO"), total value whereof was USD 2,976,064. It is submitted that the petitioner-Company as per the terms and conditions of the 1st PO and Supply Contract and further, to the satisfaction of the respondent-Company supplied the equipments within the stipulated time limit.

4.3 In order to secure the payments against the supply of equipments, the petitioner-Company and the respondent-Company mutually agreed that the respondent-Company shall open irrevocable "Letter of Credit" (hereinafter shall be referred to as "LC") in favour of the petitioner-Company. Thus, for 1st PO dated 29th August, 2012, two LCs were executed. First, an irrevocable LC bearing No.0005MLC00066913 dated 7th September, 2012 for an amount of USD 7,25,004 open with the ICICI Bank Ltd, Global Trade services Unit, Mumbai and second, an irrevocable LC bearing No.007LCO1122690001 dated 25th September, 2012 for an amount of USD 724,970.31 was open with the HDFC Bank

After having supplied the equipments as per 1st PO dated 29th August, 2012, the petitioner-Company raised invoices dated 7th January, 2013 and invoices dated 9th January, 2013. The respondent-Company received the equipments without any demur.

4.4 The respondent-Company issued Second Purchase Order bearing No.STL/IMS/BSNL- 29 DSLAM/PO/004 dated 28th April, 2014 (hereinafter referred to as "2nd PO") having total value of said PO was USD 20,312.39. It is stated that as per the terms and conditions contained in the 2nd PO, the respondent-Company was responsible to make all payments to petitioner-Company through irrevocable usance

confirmed LC with 100% of Sterlite PO value according to Incoterms 2010. It was further stated therein that the LC shall be opened within 7 days from the date of release of 2nd PO on petitioner-Company by respondent-Company through a Bank acceptable to petitioner-Company, as per the payment terms mentioned herein below:

First: 40% of the invoice value shall be payable within 150 days from the invoice date of the respective shipment and upon submission documents as per the contract.

Second: 40% of the invoice value shall be payable on the 240th day from FOB shipment date of the respective shipment. Payment shall be made against each shipment and upon submission of documents as per the Contract.

Remaining 20% of the invoice value shall be payable within the FOB shipment date to the respective shipment +540 days and upon submission of documents as per the contract.

5. It is the case of the petitioner that the contrary to the aforesaid agreed schedule of payment, the complete payment has not yet been released in favour of the petitioner-Company as on date as such the respondent-Company has breached the terms and conditions of the 2nd PO.

In respect of the 2nd PO, the respondent-Company opened a separate irrevocable LC bearing No.0005MLC00006915 dated 3rd May, 2014 amounting USD 20,312.39 with the ICICI Bank Ltd, Global Trade services Unit, Mumbai.

After having supplied the equipment, the petitioner-Company raised invoice bearing No.TC 14032859 against the 2nd PO dated 27th June, 2014. Maintaining its impeccable track record, the petitioner-

Company supplied and the respondent-Company received the equipments, without any demur and/or protest let alone reported/pointed out any deficiency.

6. It is submitted that the cumulative amount due on the respondent-Company was USD 1,470,292.39 against both the purchase orders, out of which USD 5,79,989.72 has been duly paid to the petitioner-Company. Now, the remaining due amount as of date is USD 8,78,109.54. It is stated by the petitioner that the respondent-Company was/is under obligation to clear the outstanding dues amounting to USD 878,109.54 but the said due amount has not been released in the favour of the petitioner-Company.

It is submitted that there is acknowledgment and admission of liability by the respondent-Company by way of opening different LCs as mentioned in the preceding paragraphs. Also, the total amount due i.e. USD 878,109.54 was actually not paid to the petitioner-Company for the reason that under-mentioned LCs were expired.

The details of the three LCs are mentioned herein below:

Date	LC No.	Amount
07.09.2012	No.0005MLCOO066913	USD 725,004.00
25.09.2012	No.007LCO1122690001	USD 724,970.31
28.04.2014	No.0005MLCOOO06915	USD 20,312.39

7. It is submitted that the aforesaid LCs expired because of the non compliance of terms thereof by the respondent-Company. The respondent-Company did not show the requisite and relevant documents to the Bank as a consequence thereof abovementioned LCs expired. The petitioner-Company again and again reminded the respondent-Company to show/furnish the required documents to the

HDFC Bank so that the legitimate amount, which is due and payable to the petitioner-Company could be released in its favour, but LCs expired due to late presentation. The HDFC Bank Ltd, Pune Branch corresponded with the Bank of China, Shenzhen Branch, wherein HDFC Bank Ltd, Pune Branch stated that there are some discrepancies in the documents presented before the bank but the respondent-Company never took the initiative to remove the said discrepancies and finally, LCs expired. It was also mentioned in the correspondence that "original letter from the applicant (i.e. respondent-Company) designating freight forwarder to receive the goods on behalf of applicant not presented".

8. It is the case of the petitioner that the respondent-Company has acted in utter violation of the agreed terms of the Supply Contract and for ulterior motives, has not paid the outstanding amount to the petitioner-Company without any reason. The equipment supplied by the petitioner-Company has been successfully installed and are functional. Admittedly, BSNL is commercially exploiting those equipments and is drawing financial benefits by providing services by using the said equipments. But the respondent-Company by withholding the outstanding dues payable to the petitioner-Company without any valid reason.

9. It is alleged by the petitioner that the balance and the Profit and Loss Account of the respondent-Company depicts its negative Cash Flow for the Financial year 2013-2014 by Rs.65.54 Crores, giving raise to doubts and genuine apprehension qua the capacity of the respondent-Company to pay the dues of the petitioner-Company.

The aforesaid annual report of the respondent-Company shows an excess of liabilities over the assets as it is evident therefrom that

the current liabilities of the respondent-Company is to the tune of Rs.1552.77 Crores whereas cash Flow is extremely weak being negative by Rs.65.54 Crores during the Financial Year 2013-2014, which clearly corroborates that the financial health of the respondent-Company is debilitating. Deteriorating financial health of the respondent-Company is cause of concern for the petitioner-Company.

10. It is submitted that the respondent-Company has applied for demerger to the Bombay Securities Exchange for demerging its businesses on 20th May, 2015. The respondent-Company has approached the Bombay Securities Exchange seeking demerger of its Telecom and Power Businesses into two separate entities. Therefore, the petitioner-Company is under genuine and reasonable apprehension that such demerger will substantially cause prejudice to its rights and interests as the respondent-Company may under the garb of demerger will transfer its assets, moveable and/or immoveable, to new entity. The petitioner-Company has reasons to believe that the respondent-Company in order to ward off its liability to pay to the petitioner-Company may go to the extent of disposing, alienating, transferring, creating third party interest etc. its assets, moveable and/or immoveable.

Despite repeated requests, the respondent-Company failed to liquidate the outstanding amount. Being aggrieved by the apathetic conduct of the respondent-Company, the petitioner-Company narrating the factual backdrop, was constrained to send a Demand Notice dated 2nd July, 2015 calling upon the respondent-Company to pay the outstanding claims to the tune of USD 878,109.54 along with the interest @ 18% p.a till realization thereof. The respondent-Company was also put to notice that in the event of non-compliance of

the requisition contained in the said demand notice, the petitioner-Company shall be constrained to invoke Article 16.1 of the Supply Contract for settlement of claims by Arbitration. In reponse to the said demand notice, the respondent-Company sent a reply dated 16th July, 2015. However, the respondent-Company failed to make payment of the delivered equipments. Total outstanding amount payable by the respondent-Company to the petitioner-Company is USD 878,109.54. The claim sheet clearly depicts the details of concerned purchase orders and invoices, giving rise to the outstanding claim of USD 878,109.54.

11. It is alleged that the disputes raised by the petitioner-Company are arbitrable and required to be adjudicated by way of arbitration since the parties under the Supply Contract have agreed for the same. Further the disputes raised by the petitioner-Company are in relation to and arising out of the Supply Contract as such is covered by the arbitration Clause contained therein. The petitioner-Company is ready to invoke arbitration Clause contained in the Supply Contract. The relevant Clause 16.1 of the Supply Contract reads as under:

"16.1 Any dispute arising out of or in connection with the present agreement shall be finally settled by Arbitration in accordance with the provisions of Arbitration and conciliation Act, 1996. Place of arbitration shall be Delhi and Arbitrator should be retired Judge of High Court or supreme Court as to be appointed by High Court. The working language of the arbitration shall be English. Both parties shall also bear their own cost of arbitration."

12. Reply has been filed on behalf of the respondent. It is stated by the respondent on merit that the petitioner has failed to demonstrate how the alleged claim of USD 878,109.54 is due and payable to the petitioner by the respondent, especially in the light of the facts that

the petitioner has failed to discharge its obligations under the Supply Contract. It is submitted that the petitioner failed to honor its obligations under the Contract and the inaction of the petitioner resulted in non-functioning of the equipments supplied as well as non-provision of back-up support for the equipments in the form of warranty obligations. This has resulted in financial and reputational losses to the respondent as well as the fact that BSNL has withheld payments due to the respondent, including release of Bank Guarantees provided by the respondent to BSNL.

12.1 Under the Supply Contract, the supply of DSLAMs were critical components and the petitioner was responsible for the supply of the DSLAMs as well as the installation and commissioning of the same for BSNL. The components and the DSLAMs supplied by the petitioner failed to meet the standards and specifications under the Contract as a result of which many cards/components supplied by the petitioner did not work. It resulted in delay of the entire project resulting in BSNL withholding payments due to the respondent.

12.2 The petitioner has also failed to resolve the technical issues relating to the DSLAMs equipment, as well as issues relating to commissioning and integration of Metaslov component for Multiplay network. The integration of the Metaslov component was required to be done under the BSNL Tender and as per the agreement between the parties, the same was to be carried out by the petitioner. The petitioner failed to carry out such integration and failed to provide the support to complete the mandatory requirements under the BSNL Tender as well as the Supply Contract. As a result of this non-integration of the Metasolv component, BSNL wrote a letter dated 27th March, 2015 to the respondent (being the lead bidder), stating that:

- a) The Metasolv integration component has been pending for long but inspite of repeated persuasions, the integration work has not been completed.
- b) Earlier letters have been written by BSNL wherein it was proposed that this integration be completed within 15 days, otherwise the work may be executed by some other vendor at the risk and cost of the respondent;
- c) BSNL has already obtained quotation from another vendor for such Metaslov integration and the estimated price is about Rs.2 crores. Final opportunity is given to complete the work else BSNL would be constrained to engage the outside vendor at the cost of the respondent.

12.3 It is stated that under the Supply Contract, the respondent had issued a purchase Order on 27th September, 2011 with reference No.STL/IMS/BSNL-DSLAM/PO/001 to the petitioner (hereinafter referred to as the "First Purchase Order" or "FPO"). The FPO preceded the two POs which have been cited by the petitioner in its petition, and this fact has not been brought on record by the petitioner. Under the FPO, even though the petitioner supplied the equipments and the corresponding payment was made by the respondent, the petitioner failed to fulfill its obligations of repair, warranty and spares. The repeated technical problems with the equipments were not resolved by the petitioner. These unfulfilled obligations also affected the performance and completion of the next two Purchase Orders, namely PO No.STL/IMS/BSNL-DSLAM/PO/010 dated 29th August, 2012 (referred to as "POI") and PO No.STL/IMS/BSNL-29DSLAM/PO/004 dated 28th April, 2014 (referred to as "P02"). Under the Contract, warranty obligations were required to be fulfilled by the petitioner, as

also the fact that as per clause 4. 19 of the Contract, the petitioner was required to maintain 2% spares for supporting the terms of the BSNL Tender. The petitioner failed to maintain such spares which led to repeated problems with the equipments supplied. These pending obligations were repeatedly highlighted to the petitioner, yet the petitioner failed to resolve the same.

In addition to above, the petitioner is yet to resolve other issues under the Supply Contract relating to security compliance documentation in respect of the equipment supplied, leading to BSNL withholding the payment.

12.4 As a result of the above inactions and non-performance of the petitioner, the respondent had to face consequences in terms of financial and reputational losses. The inactions of the petitioner has led BSNL to withhold the Performance Bank Guarantees ("PBG") amounting to Rs.4.05 crores submitted by the respondent. Further, BSNL has also withheld an amount of approximately Rs.5 crores out of the tender consideration which is payable to the respondent, but the same is not being paid due to the omissions and non-performance by the petitioner. The respondent had issued reminder letters as well as emails to the petitioner to bring to the notice of the petitioner that due to the inaction of the petitioner, the entire project has suffered and the respondent is facing financial as well as reputational losses with the threat of BSNL blacklisting the respondent for any future projects.

12.5 The petitioner has sought to mislead the Court by stating that mere opening of Letters of Credit ("LC") by the respondent has led to an admission and an acknowledgement of the alleged outstanding payment to the petitioner. In a case where the party has failed to adhere to the terms of the contract and has supplied equipments not

meeting the specifications, as well as failed to honor its obligations under the Contract, mere opening of a LC would not amount to any acknowledgement of any payment. In the present case, the petitioner failed to supply equipment which met the standards and specifications under the Supply Contract as well as BSNL Tender, as a result of which the scope of work under the Supply Contract was never completed. This has led to BSNL withholding payments due and payable to the respondent. The question of payment to the petitioner of the outstanding amount does not arise till the time the petitioner does not perform its obligations under the Contract. The payment, if any, would become payable to the petitioner only if the petitioner remedies the pending points as well as performs its obligations under the Supply Contract and in terms of the BSNL Tender. The present petition is not maintainable and the same is liable to be dismissed.

13. The respondent has also placed the facts relating to the demerger in the present case. The same are mentioned as under:-

- a) As on date the respondent-Company is engaged into the business of inter alia providing manufacturing optical fiber and optical fiber cables, power conductors and high voltage power cables and providing turnkey transmission solutions for the telecom and power industries. A part of the business of the respondent-Company is also in the area of manufacturing of power transmission products and providing turnkey solutions for power industries and participating in transmission infrastructure across the country. This is the power and grid business of the respondent, and at present, both these businesses are merged together and carried on by the respondent-Company. The shares

of the respondent-Company are listed both on the Bombay Stock Exchange as well as the National Stock Exchange of India.

- b) As at the present the two businesses are merged, though having separate business implications and challenges, the respondent has decided to formulate a scheme for demerger whereby the power products and the transmission grid business of the respondent would be demerged from the respondent-Company, thereby leaving only the telecommunication business in Sterlite Technologies Limited, and creating a new entity known as Sterlite Power Transmission Limited for the resulting demerged business.
- c) The respondent having realized that the nature of risk and competition inherent in each of the telecom and power products and transmission grid business is distinct, since both are subject to distinct business cycles and operate under different regulations and market structures, has taken the decision of such a demerger going forward.
- d) The separation of the two entities together with its business, undertaking and investments as a going concern would lead to significant benefits for both the businesses including allowing each business to create a strong and distinct platform which enables greater flexibility to pursue long-term objectives. This step would also allow the accelerated growth of the telecommunication business, which is in a high growth stage on the backdrop of huge data consumption opportunity, and allow the power business to explore suitable strategies to fund its growth plans. This would offer the shareholders a clear focused investment opportunity in the telecom sector allowing them to unlock the value of their holdings, thereby creating higher value for the respondent-

Company and its telecom business. This demerger is to be made effective by way of a corporate restructuring plan whereby the existing businesses would be re-organized and segregated.

- e) However, for this plan of restructuring and demerger to be effective, there are various legal steps involved which have to be complied with. The first step in the process is to create an internal scheme of arrangement/restructuring/ demerger which has to be approved by the Board of Directors of the respondent-Company. As on date, such approval has been granted by the Board of Directors. The next step in the entire process is to submit the proposal to the Stock Exchanges and get the requisite approvals from them, since the shares of the respondent-Company are listed on the Stock Exchanges. As on date the respondent has made such an application to the Stock Exchanges and the same is pending.
- f) Once such approval is granted as per law, the respondent is required to make an application to the jurisdictional Company court, being the jurisdictional High Court under Section 391-394 of the Companies Act, 1956, where the scheme of restructuring/ demerger would be approved. However, at the time of making such an application, a notice would be sent to all the creditors of the respondent-Company, inviting any objections to the demerger. Only once the scheme has been approved by the Court, the respondent-Company would be in a position to make any transition and carry out the specifics of the demerger scheme. This is a long drawn process, one which is likely to be completed over a span of twelve months. Further, as noted

above, this scheme of demerger is only approved after taking into consideration the objections of all parties.

- g) Further, as also evident from the copy of the presentation made to the Bombay Stock Exchange by the respondent post the demerger, the value of the demerged company being Sterlite Technologies Limited would only increase. The debt intensive portion relating to the power and transmission business would be demerged into the new company which would be separate business altogether, resulting in lower debt and higher asset value and net worth for Sterlite Technologies Limited for carrying on the telecommunication business. This would also lead to higher earnings as well as value for the shareholders of the respondent-Company, as well as benefit for the creditors of the respondent-Company.

14. Rejoinder to the reply on behalf of the respondent has been filed by the petitioner wherein the petitioner has denied all the averments, submissions, statements and allegations made in the reply filed by the respondent, except those specifically admitted herein. It is not in dispute that the petitioner has duly supplied the products under the agreement to the respondent who has further supplied the same to BSNL and the same are being used and enjoyed by BSNL. Respondent has breached the terms of the Supply Contract by not making the payment to the petitioner. It is an apprehension of the petitioner that BSNL has already made substantial payment for such supply of goods to the respondent who is using the- same for its benefit by investing it in his own business which is actually to be disbursed to the petitioner.

By order dated 4th September, 2015 the Court had directed the respondent to file affidavit of Assets and Statements of Accounts as

well as balance sheets for last three years. The respondent by filing the affidavit under reply has only provided the information that suits its interest to allegedly show that it is financially well stable and has enough assets to satisfy the claim of the petitioner but has failed to disclose the liabilities and covenants which are attached to these assets. The respondent has omitted to disclose such vital information.

15. 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.644/2016 for bringing on record certain additional documents. By order dated 15th 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.20/2016 challenging the order dated 15th 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.644/2016 were taken on record and the chamber appeal was accordingly disposed of. The details of the said additional documents are mentioned as under:

- a. Copy of Chairman Report dated 15th December, 2015, marked as Annexure P/17.
- b. 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/18.
- c. 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/19.

16. It is alleged that the respondent has limited its affidavit only to assets but has failed to disclose the liabilities and covenants attached to the assets. The respondent stands indebted to petitioner alone for USD 1,54,04,190.07 for supply of goods under two separate and independent contracts out of which USD 8,78,109.50 forms part of 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/overdrafts. It is submitted that in the affidavit under reply, respondent-Company has painted a picture that it is cash surplus and is a very high profit making company without disclosing any details regarding its current or future liabilities. It is alleged that 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 49.76% 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.

- b) Because 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.436.9 Crores in FY 2014-15 and (-) Rs.407.93 Crores in FY 2013-14.

It is submitted that such diversification/siphoning of funds to group companies of the respondents does not reflect bonafide of the respondent-Company when it is not paying the 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.

The respondent has not further provided reserve for disputed sales tax, excise duty, customs duty and service tax arising from disallowances made in assessments which are pending adjudication before the relevant appellate authorities for its decision. No tax expense has accrued in the financial statements of the respondent for the tax demand raised. Even the Comments of the Auditors as given in their main audit report under "Basis for Qualified Opinion" show that they are unable to comment on the adequacy of the provisions made towards the amount of excise customs duty payable pendency such adjudication.

- c) It is pertinent to mention here that it's commonly understood that any new business start-up, especially the one like 'Power sector', requires formidable amount of monetary investments and a consistent cash liquidity infusion. The Petitioner wants to draw attention of this Court to the fact that, quite possibly, the unpaid outstanding of petitioner to the tune of USD 1,54,04,190.07 (since 2007 under two separate contracts) may have naturally increased the internal cash liquidity of respondent, which would have been, for the obvious reasons, infused in the 'cash demanding' operations of power sector. Fostering the power sector operations at the undue merit of unpaid outstanding on the telecom sector side is against the business principles and ethics in whatsoever way. It is submitted that this Court keeps the demerger proceedings in abeyance till the concerns expressed by respondent's creditors are heard and understood.
- d) It is alleged in the rejoinder that 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 are reproduced here 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:

	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

- e) 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.

- f) It is evident from the submissions made by the respondent-Company to the Bombay Stock Exchange that the respondent has shown the company financials, post restructuring, by way of a Proforma Financials on 31st March, 2015. However, the figures stated in the said Proforma Financials is vague and misleading as the same are not supported by any certified document. It is pertinent to mention here that the audited financial statement of the respondent-Company, for the FY 31st March, 2015, states a different state of affairs for the two segments of the respondent-Company, which is evident from the segment-wise details of assets and liabilities. The same is 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

- g) Because 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}

17. The goods have been supplied by the petitioner to the respondent in terms of supply contract and respondent has further supplied the same to BSNL. The said goods are being used and enjoyed by the BSNL without any protest. The commercial proceeds of the same are being retained by the respondent with a view to gain unjust enrichment.

18. It is submitted that as per the Supply Contract, the goods were supplied on the condition that the payments will be made to the petitioner by the respondent through unconditional, clear and irrevocable Letter of Credit which was to be kept alive for a period of 365 days which, was extendable for another 365 days and upon expiry of the Letter of Credit, payment was to be routed to the ESCROW

Account to be opened 45 days prior to the expiry of the Letter of Credit.

19. However, it is pertinent to mention that the respondent failed to perform its part of the obligation under the Supply Contract by not making payment to the petitioner and thereby, committed breach of the contract.

20. 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"

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BSE United Registered Office: Floor 25, P-1 Towers, Dabhi Street, Mumbai-400 001 India
T: +91 (22) 2373 1234/33 F: +91 (22) 2373 1003 www.bseindia.com
Corporate Identity Number: U01309G325PLC15538



BSE
EXPERIENCE THE VIEW

August 28, 2015

DCS/AMAL/CS/24/134/2015-16

The Company Secretary,
Sterlite Technologies Limited
E 1, MIDC, Survey No 68/1, 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

21. The respondent had filed an affidavit dated 18th September, 2015 in view of the order passed on 4th September, 2015 wherein the respondent has painted a picture that it has cash surplus and is a very high profit making company without disclosing any details regarding its current or future liabilities, however they did not disclose vital information such as, its contingent liabilities and whether assets are encumbered with the Banks for securing loans/ overdrafts, which if taken into account would be contradictory to the stand portrayed by the respondent.

22. The petitioner in its reply dated 28th October, 2015 to the said affidavit dated 18th September, 2015, at page 10 of the said reply, has given details of the Index of Charges filed by the respondent with the Registrar of Companies. From a perusal of the same, it can be seen that all the assets of the respondent-Company are encumbered. Further, it is also clear from the affidavit of the respondent that the cash surplus sought to be portrayed to pay the debt of the petitioner, has been taken as a loan after keeping its assets on mortgage. Therefore, in effect the respondent does not have any cash surplus, as claimed by it and there is imminent possibility of the respondent-Company being unable to discharge its debts in future as alleged by the petitioner. Even if the contention of the respondent regarding its financial wherewithal is accepted, even then no prejudice would be caused if the amount claimed the petitioner from the respondent is secured, especially when the contract between the parties envisaged securing of payment by way of an irrevocable LC and any unpaid moneys being put in an escrow account.

23. The respondent-Company has already approached the Bombay High Court for final approval of the Scheme of Arrangement. It is

alleged by the petitioner that the ill motives of the respondent is also clear from the fact that in the Scheme of demerger, as filed by the respondent in the Bombay High Court, the respondent has deliberately manipulated its books of accounts and has failed to show the correct financial health of the demerged Company and has also not reflected the true and correct outstanding of the petitioner. It is further submitted that the respondent is also not financially sound and is not in a condition to pay its debts and the respondent has filed an affidavit of assets dated 18th September 2015 wherein it has tried to depict best of health whereas the petitioner has filed its reply to the same on 28th October, 2015 which clearly shows that all assets of respondent are encumbered and are charged with and the respondent is highly indebted.

24. The respondent's only contention is that the petitioner has failed to fulfil its obligations under the Supply Contract as some of the equipments supplied were not working and it also failed to fulfil its obligations of repair, warranty and spares due to which, BSNL has withheld Bank Guarantees furnished by the respondent to BSNL.

25. There is no dispute with regard to the fact that equipments were indeed supplied by the petitioner to the respondent under the Supply Contract. Thus, since the time the Supply Contract was provided for supply of equipment, the same has been duly complied with by the petitioner. The clause 4.1 of Supply Contract stipulates that it is respondent who is responsible for installation and commissioning, integration, AMC, Warranty. The issue as regards the non-performance of the obligations under the Supply Contract, if any, are a matter to be decided by the Arbitral Tribunal. The present petition has been filed only for securing an amount.

26. 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:



To

M/s. Huawei Telecommunications (India) Co. Pvt. Ltd.
7th Floor, Tower-A
Sector-1-Tech Park, Sakinaka Road
Sector-49, Gurgaon
Haryana-122001.

Subj: Confirmation on payments made by MTNL to final end partner.

Ref: Your letter No.MTNL/Sterlite/B&B/MPL/S/10/12015.

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 Sterlite against MPL3 project.

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

- (i) MTNL/20-80(818)/2005-MM/BB/SQ/TL/1 dated 30.4.2007 for Rs. 69.8 Cr.
- (ii) MTNL/20-80(818)/2005-MM/BB(Add-on-Mum)/20 dated 1.3.2008 for Rs.44.4 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 Sterlite Technologies Ltd.

(Signature)
(Soulaiman Elvand)
DGM (MM-I)

पंजीकृत व निगम कार्यालय: महानगर दूरसंचार सदन, 9^{थी} बी जी ओ कॉम्प्लेक्स, नई दिल्ली-110003

REGD. & CORPORATE OFFICE: Mahanagar Dूरसंचार Sadan, 9 CGO Complex, New Delhi-110003

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

27. It is submitted 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.

28. 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.

29. The respondent itself has admitted that the condition of the respondent is financially sound regards 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. The said stand is not available as the payments have already been disbursed by MTNL.

30. It is submitted that the letter dated 30th November, 2015 was not placed on record and the petitioner cannot rely upon the same. Nonetheless, 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 of the petitioner. 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.

31. 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.

32. No doubt, the petitioner's claim will 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.

33. It is submitted that the Letters of Credit prematurely expired and the respondent intentionally did not deposit any amount in the ESCROW account due to which, the petitioner was declined of its right to full payment to be made by the respondent.

34. The terms of payment in Supply Contract and in all letters of credit clearly stipulated that Letter of credit had to be kept alive as first 40% of the invoice value was payable within 150 days from Invoice date of respective shipment, Second 40% of the Invoice value was payable on the 240th day from FOB shipment date of respective shipment and remaining 20% of the Invoice value was payable on 540th day from FOB shipment date of respective shipment. Therefore, it had to be kept alive according to said terms.

35. In paragraph 14 of the petition, petitioner has specifically stated as under:

"14. It is submitted that the aforesaid LCs expired because of noncompliance of terms thereof by the Respondent-Company...."

36. The respondent while replying to the aforesaid paragraph, in their reply at paragraph 3.13 has not denied the fact that the Letter of Credit had expired prematurely.

37. The, respondent by prematurely letting the Letters of Credit expire and also intentionally failed to open the Escrow account 45 days prior thereto, deprived the petitioner of its rightful claim. The said act of the respondent was in clear breach of the terms and conditions of the Supply Contract.

38. In view of the above, it emerges that the petitioner has supplied the contracted goods to the respondent. No complaint has been raised by the respondent with regard thereto although a vague plea of deficiency has been taken only in response to the demand notice sent by the petitioner.

39. The petitioner's payments were to be secured by an irrevocable LC. The contract goes to the extent of providing that the unpaid amount of LC shall be transferred to an escrow account. The LC "expired" prior to the contractually envisaged period. Even the escrow account as contemplated under the contract was not opened. Thus, the contractual mechanism to secure the petitioner's payment was frustrated as a result of the fraudulent conduct of the petitioner.

40. As regards the arguments of securing of the amount under Section 9 of the Act, similar arguments as addressed by Mr.Chandhiok in O.M.P. (I) No.343/2015 have been referred and the same are

discussed in paras 43 to 47 of the said petition. The same read as under:-

"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 is 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 the 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 detailed are encumbered with the

Banks for securing loans/overdrafts in its affidavit filed in view of orders in the absence of said information to the stand portrayed by the respondent is 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."

41. Even if it is assumed that the financial condition of the respondent is sound as claimed in the respondent's affidavit dated 18th September, 2015, no prejudice would be caused if the respondent is required to secure the claims of the petitioner amounting to USD 878,109.54 as it is the case of the respondent itself that the respondent is a solvent company. However, in view of the case produced by the petitioner, this Court cannot conclude or accept the statement of the respondent that it is in sound position. Without expressing any opinion in this regard, the Court is of the view that in view of admitted fact in the matter, the amount is liable to be secured.

42. Under these circumstances, the petitioner has a *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 would become only a paper decree. The petitioner may not be able to recover any decretal amount. Therefore, in view of the facts of the present case and as per the scheme of Section 9 of the Act, this Court has the power to secure the admitted amount/ debt.

43. The prayer of the present petition is accordingly allowed by directing the respondent to submit the bank guarantee or cash worth USD 878, 109.54 (approx.) by using the current exchange rate in

Indian currency 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. As and when the final order of award is passed, the fate of the amount will be accordingly decided by this Court. The petitioner is at liberty to move interim application before the Arbitral Tribunal for recovering the same amount however, the same would be determined as per its own merit.

44. 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.

45. No costs.

(MANMOHAN SINGH)
JUDGE

JANUARY 29, 2016