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

\+ EFA(OS) (COMM) 17/2018

RELIANCE TELECOM LIMITED .....Appellant

Through: Mr. Kapil Sibal and Mr. Amit Sibal, Sr. Advs. with Ms. Chaitanya Safaya, Mr. Vaibhav Niti, Ms. Madhuri Agrawal & Ms. Surabhi, Advs.

versus

ATC TELECOM INFRASTRUCTURE PRIVATE LTD ..... Respondent

Through: Mr. Sanjay Jain, Sr. Adv. with Ms. Sneh Suman, Mr. AjitWarrier, Mr. Angad Kochhar and Ms. Rhea Verma, Advs.

\+ EFA(OS) (COMM) 18/2018

RELIANCE COMMUNICATIONS LTD ….Appellant

Through: Mr. Kapil Sibal and Mr. Amit Sibal, Sr. Advs. with Ms. Chaitanya Safaya, Mr. Vaibhav Niti, Ms. Madhuri Agrawal & Ms. Surabhi, Advs.

ATC TELECOM INFRASTRUCTURE PVT LTD ..…Respondent

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. AjitWarrier, Mr. Angad Kochhar and Mr. Varun, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

O R D E R

% 07.12.2018

SANJIV KHANNA, J. (ORAL):

Counsel for the parties have been informed that spouse of one of us (Sanjiv Khanna, J.) has some shares in the Reliance Communications Limited. Learned Senior Advocates on instructions state that the parties have no objection to this Bench hearing the present appeals.

Caveat No. 1163/2018 in EFA (OS) (COMM) 17/2018
Caveat No. 1164/2018 in EFA (OS) (COMM) 18/2018

Since counsel for the caveator enters appearance and would be heard, the caveats stand disposed of.

CM Nos.51493-51494/2018 in EFA (OS) (COMM) 17/2018
CM Nos.51500-51501/2018 in EFA (OS) (COMM) 18/2018

Allowed subject to all just exceptions.

EFA (OS) (COMM) 17/2018 &CM No.51492/2018 (stay)
EFA (OS) (COMM) 18/2018 &CM No.51499/2018 (stay)

1. This common order would dispose of the afore-captioned appeals under Section 10 of the Delhi High Court Act, 1966 read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Divisions of High Courts Act, 2015.

2. Subject matter of challenge is the order dated 29.10.2018 passed by the learned Single Judge in OMP (Comm) (Enf.) No. 202/2018 and OMP (Comm) (Enf.) No. 203/2018, which petitions seek enforcement of the order dated 31.3.2018 passed by the Arbitration Tribunal under Section 17 of the Arbitration and Conciliation Act, 1996 (A & C Act, for short).

3. In view of the limited controversy involved before us, we are not referring to the factual background in detail. Suffice it is to note that

Arbitration proceedings are pending between the respondent and the appellants, and the Arbitration Tribunal while passing the order dated 31.03.2018 under Section 17 of the A and C Act had, inter alia, observed that claims of the respondent were approximately Rs.118 crores excluding interest and costs and that the financial position of the appellants was precarious having quarterly loss of Rs.2709 crores and revenue had fallen by 50%. The total debt was Rs.44,300 crores as on October, 2017 and that the appellants were in the process of negotiating on arrangement for sale of its assets, towers etc. On merits the appellants had admitted user of the sites belonging to the respondent and therefore, it was necessary to secure the claim of approximately Rs.47.50 crores in the first case; Rs.13.67 crores approximately should be secured in the second case. Arbitration Tribunal had duly noted that the appellants were relying upon Strategic Debt Restructuring undertaken by the lead bankers under the Reserve Bank of India directions and other aspects including asset monetization process being carried out under the high-powered Bidding Evaluation Committee. The operative portion of the order dated 31.03.2018 of the Arbitration Tribunal reads as under:

> "27. *We are of the view that in these circumstances, it would be appropriate to protect the interest of the Claimant with regard to the principal amounts of case no. 1 and 2 exclusive of damages and costs as discussed above. Applying the principles enunciated in the judicial pronouncements noticed hereinbefore and the relevant facts as discussed, we are of the view that it would be appropriate to take the figures of Rs. 40 crores for case no. 1 and Rs. 13 crores in respect of case no. 2, which excludes the exit sites charges, costs and interest amounts. The relief deserves to be moulded in such a fashion that the Respondents processing of the case under the SDR scheme is not prejudiced,*

while simultaneously protecting the interest of the Claimant. In these circumstances, we direct that in the event of the Respondents in case no. 1 and 2, receiving any amount by way of consideration for the sale of the assets or under any other arrangement scheme or otherwise, the said amounts coming under their control, a sum of Rs. 40 crores and Rs. 13 crores, respectively for case no. 1 and case no. 2 shall be kept apart and not disbursed or utilized without the leave of the Tribunal.

The applications Order U/s 17 of the Claimant are decided accordingly in the above terms"

4. We are not required to examine the merits of the said order. It is stated that appellants have filed belated appeals challenging the said order in which notice has been issued on the application for condonation of delay. Operation of the order dated 31.3.2018 passed by the Arbitral Tribunal has not been stayed.

5. Impugned order dated 29.10.2018, passed by the learned single judge in the enforcement applications, i.e. the OMPs quoted above, reads:-

> "1. Pursuant to the last order, the decree holder i.e. ATC Telecom Infrastructure Private Limited (in short 'ATIPL') has filed an affidavit dated 26.10.2018. This affidavit adverts to the regulatory filing dated 03.10.2018 made by the judgment debtor (i.e. Reliance Communications Limited) with the Bombay Stock Exchange and the National Stock Exchange. A copy of the filing made is appended with the affidavit. The same is indicative of the fact that the judgment debtor i.e. Reliance Communications Limited is expected to receive a sum of Rs.975 crore via sale of spectrum and out of the said amount, it would proceed to pay Ericson India Private Limited, a sum of Rs.550 crore and furthermore pay a sum of Rs.230 crore to minority investors of RITL.

2. I am informed by the learned counsel for the judgment debtor (i.e. Reliance Communications Limited) that RITL is a subsidiary of the judgment debtor (i.e. ReHance Communications Limited).

3. In these circumstances, it is made clear that as and when the spectrum is sold, the information pertaining to the same (and prior to the amount received being utilized) will be placed forthwith, before the Court. Intimation in that behalf would also be given to the decree holder i.e. ATIPL.

4. This apart, learned counsel for the judgment debtors in the captioned matters concerning Reliance Communications Limited [i.e. OMP (ENF) (COMM.) NO. 202/2018] and Reliance Telecom Limited (in short 'RTEL') [i.e. OMP (ENF) (COMM.) NO. 203/2018] have also brought to the Court two affidavits, once again, pursuant to the directions contained in the order dated 03.10.2018.

4.1 These affidavits are of even date i.e. 29.10.2018. The affidavits have been filed by Mr. Sanjeev K. Mishra, who was directed to remain present in Court.

4.2 To be noted, Mr. Sanjeev K. Mishra is present in Court.

4.3 In the affidavit filed by Mr. Mishra on behalf of the judgment debtor (i.e. RTEL) it is averred that the said judgment debtor maintains 25 bank accounts and as on 20.10.2018, a cumulative balance available in those accounts is a sum of Rs. 1,48,12,484/-. The details of the banks and the account numbers with the amount credited to each account has been given in the form of a tabular chart, appended to the affidavits.

4.4 Likewise, in the case of other judgment debtor/Rehance Communications Limited, Mr. Mishra, in his affidavit has indicated that the said judgment debtor/Reliance Communications Limited maintains 119 banlc accounts

> and that these bank accounts, as on 20.10.2018, have a cumulative balance of Rs. 17,86,06,318/-. The details of the banks, the account numbers and the credit balance available in each of the accounts is also provided by way of a tabular chart appended to the affidavits.
>
> 5. In these circumstances, the judgment debtors (i.e. Reliance Communications Limited and RTEL) are directed to have the moneys in those accounts transmitted to this Court. Needful will be done within 10 days from today. Upon receipt of the monies, the Registry will invest the same in an interest bearing fixed deposit, maintained with a nationalized bank.
>
> 6. Renotify the matter on 13.12.2018.
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> 7 Mr. Sanjeev K. Mishra will remain present in Court on the next date.
>
> 8. The Registry is directed to scan and upload the affidavits of Mr. Sanjeev K. Mishra which were handed over in Court today.
>
> 9. Dasti under the signatures of the Court Master."

6. The appellants had thereupon preferred a Special Leave Petitions before the Supreme Court, wherein vide order dated 01.11.2018 direction for transfer of money from the bank accounts to the Court was stayed. By order dated 16.11.2018, the Special Leave Petitions were dismissed as withdrawn observing that the appeal lies to the Division Bench of Delhi High Court. The status quo order passed earlier would continue till listing of the appeal for hearing before the High Court. Thereupon the present appeals have been preferred.

7. **The Appellants contend that:**

- The respondents are unsecured creditors.

- Secured Creditor have preference and first charge.
- Secured Creditors are in complete control and deposits and payments are monitored and checked and verified by the Chartered Accountant appointed by the State Bank of India.
- Order of attachment under Order XXXVIII Rule 5 of the Code of Civil Procedure does not create a charge. Reliance is placed on Rules 7 and 9 of Order XXXVIII of the Code.
- Appellants are not entitled to make payment from the asset monetization escrow account to unsecured creditors without approval of the secured creditors.
- Supreme Court has permitted transactions relating to sale of spectrum.
- Sale is required and necessary to meet the obligations in terms of the orders passed by the Supreme Court in other proceedings.
- The Appellants are in process of transferring spectrum rights for Rs. 975 crores.
- Payments of Rs. 550 Crores would be made to creditors and Rs. 230 Crores to minority investors. This would be in terms of the orders passed by the Supreme Court. Interest is also to be paid. Entire proceeds would be appropriated.
- Appellants are entitled to challenge an order dated 31.3.2018 of the Arbitration Tribunal in enforcement proceedings as the direction given are contrary to law and a nullity.
- Impugned Order does not decide the issues raised that arise for consideration on merits.

- The respondents have misconstrued and misunderstood order of the Arbitration Tribunal dated 31.3.2018.
- Arbitration Tribunal has not directed payment or deposit of any amount. Impugned Order directing money to be deposited in Court is beyond the scope and ambit of the execution proceedings.
- Day to day and running payments have to be made. Transfer of money from 119 bank accounts to the court would stall and stop the entire operations and day to day working.

8. **The respondents contesting the said submissions have submitted that:**

- Executing Court cannot go behind Order of the Arbitral Tribunal dated 31.3.2018.
- In execution proceedings, the executing court would not examine the merits but only enforce the order.
- Appellants have belatedly filed appeals challenging the order of the Arbitral Tribunal dated 31.03.2018, in which appeals notice on the application of condonation of delay has been issued. The Order of the Arbitral Tribunal dated 31.3.2018 has not been stayed.
- False and wrong affidavits were filed; Bank Account details were concealed; the Executing Court was therefore entitled to direct transfer of money from the 119 bank accounts to the court which accounts are not in control of the secured creditors.
- Directions in paragraph 3 were also justified in the facts of the case, since only prior intimation is to be given before the amounts received on sale of spectrum are utilised.

- Conduct of the appellants was mala fide.
- Rights of the respondent must be protected, even if the respondent is not a secured creditor
- Any payment to unsecured creditors would confer the rights on the respondent to secure and seek payment, even if such payments are made with approval of secured creditors.
- Payment to investors/ shareholders cannot be made ignoring the rights of the respondent. Investors rank below all creditors, including unsecured creditors.

9. We have noted the contentions which would arise and which may have to be decided in the execution/enforcement proceedings. Issue would arise as to the rights of the respondent as an unsecured creditor on payments being authorised by the secured creditors to other unsecured creditors. Question relating to doctrine of *pari-passu* rights of unsecured creditors would also arise. We would refrain and not go into any of these issues and contentions on merits as these are pending before the Single Judge. Impugned order does not decide and adjudicate any issue and dispute.

10. The impugned order was passed in view of the non-compliance of the orders passed by the Single Judge in the enforcement applications vide the above OMPs. On the enforcement petitions coming up for hearing the appellants had made a statement that their assets were mortgaged to the financial institutions and banks. Sale proceeds on monetization of the assets would be directly paid to the banks and financial lenders. In these circumstances, Learned Single Judge vide order dated 21.8.2018 had directed the appellants to file affidavits disclosing details of their bank

accounts and file statement of accounts with account balances pertaining to previous eight months ending on 31.08.2018. Execution OMPs were next listed on 12.9.2018.

11. The appellants did not file the affidavit and documents and on request were granted time for compliance on 12.09.2018 and the enforcement OMPs were adjourned to 3.10.2018.

12. On 3.10.2018, the appellants had tendered affidavits of compliance stating that Reliance Communication Limited had on 28.12.2017 opened an Asset Monetization Escrow Account bearing no. 37441314988 with the State Bank of India the lead bank of the lenders and deemed trustee. Entire proceeds on Asset Monetization are deposited in the said account and are under the control of the secured creditors. The sale proceeds are entirely for the benefit of secured creditors. Payments from the account have been solely made towards re-instating the bank guarantees and related costs payable to the Department of Telecommunications, Union Of India (DoT for short). As on 29.9.2018, Rs 4.20 crores was available in the Escrow Account. All lenders have a charge on the Escrow Account.

13. Reliance Telecom Limited in their affidavit had solemnly affirmed having opened Asset Monetisation Escrow Account No. 37441313780 with the State Bank of India deemed trustee and the lead banker of the lenders. Further, the amount in the said account had been used solely towards the re-instating the bank guarantees and related costs of the DoT. There was 'NIL' amount in the said account on 29.09.2018.

14. On 3.10.2018, Learned Single Judge passed a detailed order raising queries with reference to transactions recorded in the two accounts which could not be explained by the Counsel appearing for the appellants. Statement of accounts had entries for transfer of money, details and particulars of which were not available and it was stated that the name of the secured lender to whom money was remitted would be furnished.

15. The respondents had contested affirmation in the affidavits relating to bank accounts, stating that full and complete disclosure of the bank account had not been made. Appellants had then stated that they had given details of only those accounts where money had been credited. This, Learned Single Judge observed, was not satisfactory nor an accurate statement. Mr. Sanjeev Kumar Mishra who had sworn the affidavits was directed to remain present in person on the next date of hearing and place on record the exact details with regards to all bank accounts maintained by the appellants including credit balance, if any, available in the accounts. Details were required to be furnished to the counsel of respondents at least 5 days before the next date of hearing.

16. Thereupon, the appellants had filed affidavits sworn by Mr. Sanjeev Kumar Mishra dated 29.10.2018 stating that transfers of Rs. 19.46 Crores in Asset Monetisation Escrow Account ending with digits 4988 relating to Reliance Communications Limited, was made to Trust and Retention account maintained with State Bank of India for utilisation and payment of DoT fees, etc. Further, Reliance Communications Limited had 119 bank accounts with credit balance of more than Rs. 17.86 crores as on 20.10.2018. Details of these accounts which had credit balance with closing balance as

on 20.09.2018 and 20.10.2018 were furnished. However, the statements of accounts, were not enclosed. It was stated that this would run into 6 box files/paper books.

17. In the affidavit filed on behalf of Reliance Telecom Limited, it was stated that payment of Rs. 73.07 lakhs on 9.4.2018 was to Trust and Retention Account maintained with State Bank of India which was utilised for payment of DOT fees. Reliance Telecommunications Limited had 25 bank accounts having consolidated balance of Rs. 1.48 Crores as on 20.10.2018. Statement of Accounts would run into 1 box file/paper book. Details of the said account with closing balance as on 30.09.2018 and 20.10.2018 was furnished, but statements of accounts were again not furnished.

18. By impugned order dated 29.10.2018, Learned Single Judge noted the presence of Mr. Sanjiv Kumar Mishra in Court and has referred to the affidavits and statements made therein. It records that Reliance Communications Limited was to receive sum of Rs. 975 crores for sale of spectrum out of which Rs 550 Crores would be paid to Ericson India Pvt Ltd and Rs. 230 crores paid to minority Investors of Reliance Telecommunications Limited, a subsidiary of Reliance Communications Limited.

19. It is clear to us that the impugned order dated 29.10.2018 was passed by the Single Judge in view of the non-compliance of the directions given in the earlier order dated 21.08.2018 and subsequent orders and evasive stand taken by the appellants in the affidavit filed on 03.10.2018. Appellants had concealed facts and were not transparent and forthright.

20. During the course of hearing before us, learned senior counsel appearing for the appellants has stated that they would furnish soft copy of the statements of accounts all the 119 accounts for last eight months to the learned Single Judge under sealed cover. The said soft copy will be filed along with a certificate under Section 65B of the Evidence Act certifying that the statement of accounts are true copies of the accounts at the said banks. Details of bank accounts in which there have been transactions for Rs. 5 crores or more will be separately indicated in the soft copy, Statements would be filed within a period of ten days.

21. Learned counsel for the respondent has drawn our attention to the statement of bank accounts enclosed with affidavit dated 03.10.2018 which refers to account number ending with the digits 4300 and 6844. It is submitted that details of these bank accounts are not included in the 119 bank accounts mentioned in the Annexure to the affidavit dated 29.10.2018. Learned Senior Advocate appearing for the appellants submits that they would examine the said aspect and would ensure that details of all bank accounts alongwith the bank statements are included in the soft copy.

22. We record the aforesaid statement made on behalf of the appellants without prejudice to the rights and contentions and defences raised by the appellants in the execution proceedings. This statement would obviously not prejudice the respondent.

23. Other issues which requires examination is as regards the direction for transfer of money from 119 bank accounts to the court and directions given in paragraph 3 of the impugned order dated 29.10.2018 which for the sake of convenience is again reproduced:

"3. In these circumstances, it is made clear that as and when the spectrum is sold, the information pertaining to the same (and prior to the amount received being utilized) will be placed forthwith, before the Court. Intimation in that behalf would also be given to the decreeholder i.e. ATIPL."

24. The Senior Advocate appearing for the appellants submits that the Supreme Court has permitted transaction of spectrum, pursuant to which the appellants have entered into transaction for sale and the appellants are in the process of transferring spectrum rights for consideration of Rs. 975 crores. Out of the sale proceeds, Rs. 550 crores have to be paid to a third party creditor and Rs. 230 crores have to be paid to another creditor (minority shareholder).It is also stated that interest and tax also has to be paid. As per the appellants, no surplus would be available.

25. Learned counsel for the respondent on the other hand has referred to the order of the Arbitral Tribunal dated 31.03.2018 and submit that the appellant must comply with the directions contained in the said order. Respondent as unsecured creditor has equal right as any other unsecured creditor, and superior right to that of an investor-shareholder.

26. We would only observe that this is the core issue raised and would be decided in the execution proceedings. We would clarify and observe that the directions given in paragraph 3 of the order dated 23.10.2018 would mean that appellants would furnish details of entire amount received on transfer of spectrum and other assets before any payments are disbursed. The said details will be initially furnished to the court and need not be furnished to the respondent. In view of the order passed by us, the

directions given in paragraph 5 of the impugned order for transfer of money from the bank accounts to the Court are not required or necessary.

27. At the same time, we would leave it to the respondent to move an appropriate application before the learned Single Judge in the enforcement OMPs for protection of their rights and for enforcement of the order of the Arbitration Tribunal dated 31st March, 2018. Appellant would be heard. Thereupon it will be open to the learned Single Judge to pass an appropriate orders and direction, including interim order as may be required and necessary in accordance with law, after examining the contentions and issues raised by the respective sides, which we have briefly noticed above. We also clarify that the present order on statement of account, furnishing of particular of payment/disbursement and deposit of money would not in any way bar the Single Judge from passing appropriate order in accordance with law.

28. The impugned order dated 29th October, 2018 passed by the Learned Single Judge as noticed above does not examine and deal with the issue of merits, as the situation had not arisen. The order as noticed above is predicated on non-compliance of the directions and also the wrong affidavits filed by the appellant at the first instance. To this extent the adverse orders against the appellants were justified, yet at the same time the orders would have very wide repercussions and consequences for not only the appellants in the present case but several creditors including secured creditors, who have stakes and claims. Orders passed in other proceedings and their impact have to be considered.

29. We would refrain and not go into these aspects as these issues and contentions are pending before the Single Judge. As noticed, impugned

order does not decide and adjudicate any issue and dispute, therefore it would not be appropriate for us as an appellate forum to examine the contentious issues on merits for the first time as a Court of first instance.

30. We clarify that this order has been passed only to decide and dispose of the appeal pursuant to the impugned order dated 29.10.2018. This appeal does not opine and decide any issue on merits in the enforcement proceedings pending before the learned Single Judge.

31. Appeals are disposed of without any order as to costs.

32. *Dasti* under signature of the Court Master.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 7, 2018
uj