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

% **Reserved on: 5th January, 2018**
Pronounced on: 15th January, 2018

\+ **ARB. A. (COMM.) 47/2017 & IA Nos.13161, 13571/2017**

RELIANCE COMMUNICATION LIMITED & ANR.
..... Petitioners

versus

BHARTI INFRATEL LIMITED ..... Respondent

\+ **OMP (ENF.) (COMM.) 143/2017 & IA Nos.13958/2017, 13960/2017, 13981/2017**

BHARTI INFRATEL LIMITED ..... Petitioner

versus

RELIANCE COMMUNICATIONS LIMITED & ANR.
..... Respondents

Presence : Mr.Ravindra Shrivasava, Sr. Adv. with Mr.Vaibhav Niti, Ms.Shally Bhasin, Ms.Surabhi Limaye, Ms.Garima Tiwari and Ms.Ruchi Sahay, Advs. for Reliance
Mr.Gopal Jain, Sr. Adv. with Mr.Vikram Sobti, Ms.Kriti Awasthi and Mr.Mehul Parti, Advs. for Bharti Infratel

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

ARB. A. (COMM.) 47/2017

1. The petitioner/appellant has filed this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter

referred as 'the Act') against the impugned majority award dated 12.10.2017 passed under Section 17 of the Act wherein the appellant was directed to furnish bank guarantee of ₹ 10.00 Crores of a nationalized bank within two weeks and to auction its equipments, removed from the disputed sites of the respondent within 60 days.

2. Before proceeding further, let me state in brief the facts alleged by the petitioner:-

a) On 13.04.2010 the Master Service Agreement was entered into between the parties;

b) in December, 2015 the appellants surrendered / exited from the sites of the respondents for which its 2G licenses have expired;

c) the respondent demanded the exit amount to the tune of ₹ 39,22,48,384/- vide letter dated 10.01.2016 from the appellants which was also followed by a legal notice dated 10.02.2016;

d) the appellants vide its reply dated 03.05.2016 contended the surrender / termination of sites was for reasons beyond its control;

e) on 14.09.2016 the appellants issued a Media Reliance about the merger of its wireless business with Aircel Limited;

f) the respondent approached this Court on 21.12.2016 by filing an application under Section 9 of the Act being OMP (I) (COMM) No.497/2016;

g) this Court vide order dated 01.10.2017 directed that the Section 9 application of the respondent be treated as an application under Section 17 of the Act before the arbitral tribunal comprising

of Ms. Justice (Retd.) Rekha Sharma (Presiding Arbitrator), Ms.Justice (Retd.) Usha Mehra (Co-Arbitrator) and Mr Justice (Retd) S N Aggarwal (Co-Arbitrator);

h) the appellants issued a press release on 01.10.2017 about the lapsing of their merger scheme with Aircel Limited;

i) the arbitral tribunal passed the impugned order dated 12.10.2017 under Section 17 of the Act; hence this appeal.

3. The learned senior counsel for the petitioner argued it is an admitted position the petitioner was holding 2G licensee under the Telegraphs Act, so it needed infrastructure for the use of such license, hence entered into agreement with the respondent. However the Supreme Court delinked the spectrum and license leading petitioner to terminate Master Service Agreement on account of "*change of law*" and by "*efflux of time*" as the licenses granted to the petitioner even otherwise were to expire in December, 2015. Though the respondent requested the Government to extend such licenses but it could not be extended and rather the Supreme Court directed fresh auction of such licenses. The petitioner participated in such auction, but was not successful and it resulted into frustration of the Master Service Agreement of dated 13.04.2010 (hereinafter referred as to 'MSA'), hence the petitioner was forced to give up its services.

4. The petitioner referred to various provision of MSA concerning termination, Exit amount etc and argued the amount

claimed by the respondent in fact is the damages of ₹39 crores approx. which are yet to be established, proved or quantified, since is for an unexpired lock in period and for this reason could not have been protected by the learned arbitral tribunal and thus the impugned order needs to be set aside.

5. Clause No.19.2 of the Master Service Agreement dated 13.04.2010 read as under:-

> *"19.2 Exit Amount*
> *The Sharing Operator shall only pay to lnfratel the Exit Amount specified in paragraph 1 of Schedule 5 (Standard Site Access Terms) upon termination of a Service Contract where:*
> *(i) the Sharing Operator has voluntarily terminated such Service Contract; or*
> *(ii) such termination is on account of an Insolvency Event in respect of the Sharing Operator; or*
> *(iii) such termination is on account of the Sharing Operator being in material default of its obligations under the relevant Service Contract."*

6. Clause 2 of Schedule 5 refer to termination of the service contract and it notes:-

> *"Schedule 5*
> *Standard Site Access Terms*
> *2.* ***Termination of Service Contract***
> *Either Party may terminate a Service Contract by written notice to the other Party at any time following:*
> *(i) a material default (including but not limited to non-payment on the part of the*

Sharing Operator from the due date of invoice raised by infratel or failure solely on the part of infratel to meet the Uptime Levels for a continuous period of 4 months (excluding downtime due to Force Majeure Event or non fulfillment of any obligations on the part of the Sharing Operator) or series of defaults the combination of which is material, by the other Party of any of its obligations failing to remedy such default(s) within thirty (30) days after receipt of written notice giving particulars of the default(s) and requiring them to be remedied; or

(ii) a change of law or decision of any Government Authority which necessarily renders the existence or performance of the Service Contract void or invalid; or

(iii) a Force Majeure Event occurring in respect of the relevant Site.

In addition, lnfratel shall be entitled to terminate a Service Contract in accordance with the Provisions of Clause 6.3 of the Agreement.

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

(i) the Sharing Operator has voluntarily terminated such Service Contract/withdraws the Service Order; or

(ii) such termination is on account of an Insolvency Event in respect of the Sharing Operator; or

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

7. The registration certificate No.145/2007 dated 25.01.2007 issued by the Government of India to the respondent empowers the respondent to provide for the infrastructure to any licensee of the spectrum service under Section 4 of the Indian Telegraph Act, 1885. It says the company shall in no case provide the infrastructure to the licensee, whose license is terminated or suspended or is not in operation at given point of time. Hence, it is argued that though the petitioners' licenses were not extended but per condition of the license granted to the respondent, the respondent was also debarred from providing/ infrastructure to the petitioner after the expiry of petitioner's licenses and hence the contract was frustrated as its continuation was coextensive with currency of 2G licenses.

8. The learned senior counsel for the petitioner referred to an order dated 01.07.2017 passed by this Court in petition under Section 9 filed by the respondent against the petitioner asking for a deposit of an amount of ₹ 43.96 Crores or to give a bank guarantee thereof being in apprehension as petitioner was going to be merged with Aircel Limited, but now since the merger is given up, there should not be any apprehension in the mind of the respondent qua its debt, if any. Even otherwise, the impugned order notes the petitioner undertook to remove its equipment from infrastructure sites provided by the respondent within a period of four weeks and not to transfer, sell, encumber or alienate them in any manner the said assets without seeking appropriate orders from

the arbitral tribunal in this regard and only in these circumstances, such application under Section 9 of the Act was converted into an application under Section 17 of the Act and was sent to the arbitral tribunal which passed the impugned order.

9. The learned senior counsel for the petitioner referred to para 24 viz., the operative part of the impugned order to say such order was passed without complying with the provisions of Order 38 and Order 39 of the Civil Procedure Code. Para 24 read as under:-

> *"24. After having noticed the facts in brief, the salient features of the MSA, the submissions and the counter submissions and having regard to the financial position of the respondents as brought out by the claimant the tribunal is of the view that the balance of convenience demands that some protection vis-a-vis the claimed amount needs to be accorded to the claimant pending disposal of the arbitral proceedings. Accordingly, the respondents arc directed to furnish a Bank Guarantee for a sum of Rs.10,00,00,000/- of a Nationalized Bank valid for a period of one year within two weeks subject to further orders, if any, from the Tribunal."*

10. Thus petitioner is aggrieved of the fact the tribunal ignored the principles laid down in *Ramantech & Process Engg. Comp. & Anr. V. Solanki Traders (2008) 2 SCC 302* which says the power under Order 38 Rule 5 CPC is drastic and be not used mechanically. It cannot be used to convert an unsecured debt into a secured debt and an attempt by the plaintiff to utilize such

provisions as a leverage for coercing the defendant to settle the suit claim be discouraged. Ramantech (supra) notes the 14 guiding principles laid down in *Premraj Mundra V. Ms.Maneck Gazi & Ors., AIR 1951 Cal 156* wherein the court held that though the acute financial embarrassment of defendant may be a relevant fact, but not by itself sufficient for attachment. The learned counsel for petitioner also relied upon *BKP Enterprise & Anr. V. Spiceject Ltd. 2017 SCC Online Delhi 8208; Lanco Infratech Ltd. V. Hindustan Construction Company Ltd. (2016) 234 DLT 175 and Intertoll ICS CECONS O & M Comp. Pvt.Ltd. V. NHAI, ILR (2013) II Delhi 1018* to press his argument that no order for securing *speculative* losses or *speculative* claim for damages can be made, not till the debt is crystallized.

11. The learned senior counsel for the petitioner also referred to paras 19 to 21 of the dissenting opinion rendered by Mr.Justice S.N.Aggarwal (Retd.) to further his argument.

12. Heard.

13. Before proceeding further let me say the conduct of the petitioner was not above board. Despite being not granted any stay against the impugned order the petitioner failed to comply with the directions passed by the impugned order and failed to furnish bank guarantee of ₹10.00 Crores of a nationalised bank for a period of one year within two weeks from the date of the order. Such period had since lapsed on 26.10.2017. The petitioner then filed this

appeal on 09.11.2017. It was listed on 10.11.2017 but petitioner took a date for 20.11.2017 and in the meanwhile on 17.11.2017 the respondent filed an execution petition [OMP (ENF) (COMM) No.143/2017] wherein the petitioner was directed on 17.11.2017 to file an affidavit of assets and bank accounts, but the respondent did not file the same either on 20.11.2017, 27.11.2017, 04.12.2017 or 18.12.2017 and rather filed an IA No.13981/2017 for modification of order dated 17.11.2017. It was only on 20.12.2017 when the respondent found its appeal may not be heard for non-compliance, the petitioner filed the compliance affidavit.

14. In *Nimbus Communications Ltd. vs. BCCI*, 2016 SCC online Bombay 6781, the Court held:

> *"14. Even otherwise, during the pendency of Arbitration proceedings, there was no interim stay/order obtained against the impugned order. When inquired with the Appellant about the non-compliance, the submission is made that the Contempt Petition is pending and they will make their submission and defence in the Contempt Petition by an appropriate reply. Another statement is made that the Appellant is not in position to deposit the amount so directed. These are also important elements to grant the protective reliefs of security/injunction."*

15. Now let me also proceed to find the legality of the impugned order, if based upon the terms of the contract or is devoid of any merit.

16. Clause 6.2 of the MSA relate to payment:

> *"**6.2 Payment Terms***
>
> *6.2.1 Subject to clause 6.4, all invoices submitted by Infratel in accordance with this Schedule 3 (Charges) shall be paid by the Sharing Operator within 15 days of receipt.*
>
> ***6.4 Disputed Items***
> *If the Sharing Operator or Infratel reasonably and in good faith disputes:*
>
> *xxx xxx*
>
> ***6.4.1** the Party disputing the invoice or Site Access Service Credit or Operation and Maintenance Service Credit, as the case may be, must notify the other Party in writing of the amount of the invoice or Site Access Service Credit or Operation and Maintenance Service Credit which it disputes (the "Disputed Amount") together with detailed reasons why it considers it is not obligated to pay the Disputed Amount within seven (7) days of receipt of the concerned invoice or notification of Site Access Service Credit or Operation and Maintenance Service Credit, as the case may be falling which such invoice(s) shall be deemed to have been accepted and shall be paid for by the Sharing Operator or infratel, as the case may be, as per the terms of this Agreement;"*

17. Admittedly the invoices were raised by the respondent on 15.01.2016 for an amount of ₹39.00 Crores and per clause No.6.4.1 (supra) such invoices were to be paid within 15 days and in case of any dispute – such dispute ought to have been raised within 7 days – *failing which such invoices were deemed to have*

been admitted and were to be paid for by the petitioner as per terms of the agreement. Admittedly petitioner failed to raise dispute qua such invoices for reasons best known to it and hence per contractual terms such invoices are *deemed to have been admitted*. To this extent the petitioner can't alleged the claims by respondent are wholly *speculative*. It also cannot be urged by the petitioner the contract stood determined on account of *change of law* and thus exit amount is not payable.

18. In definition part of MSA, clause *18* which define *change of law* was intentionally kept blank to mean the contract could not be terminated on account of *change of law*.

19. Considering the terms of the contract, the tribunal observed the relationship between the parties being purely of lessor and lessee - independent of the licenses of the respondents since the period of MSA was definitely more than the period of such licenses. The learned tribunal while refraining from commenting upon the merits and where certain questions needs to be answered during further course of the arbitral proceedings as set out in para No.23 of the order, directed the petitioner to furnish the bank guarantee.

20. It was only after noting brief facts/salient features of the MSA, submissions, counter-submissions, financial position of the respondent, the arbitral tribunal on applying the principles of Order 39 Rule 1 & 2 of the Code of Civil Procedure took a view the

balance of convenience demand some protection need to be accorded to the respondent pending disposal of the arbitral proceedings, and hence passed the impugned order.

21. Here I may here refer to *M/s. Banker Hughes Singapore Pte vs. Shiv-Vani Oil and Gas Exploration Services Ltd*; MANU/MH/2030/2014 where it was held:-

> *"62. The respondent themselves have admitted in their affidavit dated 21st April 2014 and disclosing that all the assets of the respondent company are already encumbered with the banks and there are no assets which are not encumbered. It is stated in the affidavit that there are* ***no deposits with the bank and the loan is taken from around 26 banks whose names are disclosed in paragraph 2 of the said affidavit. There is no investment made in floating securities*** *except in assets that are plant and equipments and the figures of all the assets mentioned in the balance sheets are owned by the respondent.* ***It is thus clear beyond reasonable doubt that if the petitioner succeeds in the arbitration proceedings against the respondent, petitioner would not be able to recover any amount from the respondent****. In the prima facie view, the petitioner good chances of succeeding in the arbitration proceedings. The respondent are obstructing the legitimate claims of the petitioner, in my prima facie view. In my view if the respondent in this situation is not directed to provide security by way of furnishing a bank guarantee of a nationalized bank in favour of the petitioner so as to secure the claim of*

the petitioner, petitioner would not be able to obtain the fruits of the arbitration while executing the award. 64. In ***my view interest of justice would be met with if the respondent is directed to furnish a bank guarantee of a nationalized bank in favour of the Prothonotary and Senior Master of this court in the sum of USD 20,00,000 initially for a period of two years and shall be kept alive till the arbitral award is rendered*** *and for a period of three months from the date of the award."*

22. Moreover in *Steel Authority of India Ltd. V. AMCI PTY Ltd. & Anr.* 2011 VII AD (Delhi) 644, wherein it was held as under :

"44. There are two decisions of Bombay High Court in Delta Construction Systems Limited, Hyderabad (supra) (Single Bench) and National Shipping Company of Saudi Arabia Vs. Sentrans Industries Limited, (2004) 1 ArbLR 409 (DB), wherein it has been held that the power of the Court to secure the amount in dispute under arbitration is not hedged by the predicates as set out in Order 38. All that the Court must be satisfied is that an interim measure is required. The party coming to the Court must show that if it is not secured, the award which it may obtain would result in a paper decree or a decree which cannot be enforced on account of acts of a party pending arbitration process. The Division Bench in National Shipping Company of Saudi Arabia (supra), inter alia, held:

"..... .... In a special provision of the nature like Section 9(ii)(b), we are afraid, exercise of power cannot

be restricted by importing the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is. The legislature while enacting Section 9(ii)(b) does not seem to us to have intended to read into it the provisions of Order 38, Rule 5 of the Civil Procedure Code as it is. ....

xxx

We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) outside the provisions of Order 38, Rule 5 of the Code of Civil Procedure. Each case under Section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience. The power of the Court under Section 9(ii)(b) cannot restricted to the power conferred on the Court under Civil Procedure Code though analogous principles may be kept in mind."'

23. Thus where the amount claimed by the respondent is not *speculative* and rather is based upon the terms of the contract and also where the respondent has violated the orders time and again and also where this Court in OMP(I)(Comm.) No.504/2017 had noticed the respondent's financial crisis, would be all the more a reason for the arbitral tribunal to pass an order seeking bank guarantees for at least 20% of the dues. Hence the impugned order needs no interference.

24. Even otherwise, the scope to intervene in the award under Section 37 of the Act is very narrow, as held in *Bakshi Speedways vs. Hindustan Petroleum Corporation* (2009) 162 DLT 638 as under: -

> *"4. The principles applicable to an appeal under Section 37(2)(b) in my view ought to be the same as the principles in an appeal against an order under Order 39 Rules 1 and 2 CPC i.e., unless the discretion exercised by the court against whose order the appeal is preferred is found to have been exercised perversely and contrary to law, the appellate court ought not to interfere with the order merely because the appellate court in the exercise of its discretion would have exercised so otherwise. I had at the beginning of the hearing itself inquired from the senior counsel for the appellant as to what could be said to be perverse in the exercise of discretion by the arbitral tribunal in the exercise of powers under Section 17 of the Act and as to how the said interim measures granted by the arbitral tribunal could be said to be contrary to law; it was further pointed out that in the opinion of this court, on the perusal of the memorandum of appeal, the only ground which appeared to have some force was the ground taken in the memorandum of appeal of the arbitrator as on the date of making of the order having become functus officio."*

25. Same proposition was laid in *Emaar Mgf Land Limited v. Kakade British Realities Private Ltd. & Anr. 2013 (138) DRJ 507*.

26. There is plethora of decisions of this Court including *Unitech Wireless (Tamil Nadu) Private Limited vs. Viom Networks Limited FAO (OS) No.613/2012* decided on 21.12.2012 wherein directions to secure 20% of the amount due was found justified. Further the direction to auction the existing assets lying at the spot is given by the arbitral tribunal but both the respondents says such a direction is not feasible to comply with since there is no buyer in the country of such equipment as alleged. Even otherwise, such direction is to save the assets from depreciating and losing its substantial value, hence need no intervention. Thus there is no ground to interfere in the impugned order merely on a plea some other view could have been taken by the tribunal.

27. The appeal is dismissed for reasons aforesaid. Pending applications, if any, are also disposed of.

28. No order as to costs.

OMP (ENF.) (COMM.) 143/2017

1. In view of above, Reliance Communication Ltd. to comply with the order of the learned tribunal and furnish the bank guarantee within three days from today lest to file an affidavit in term of Form 16A Appendix-E within two weeks from today giving details of its assets, moveable or immoveable, which can be sold readily, and OMP (ENF.) (COMM.) 143/2017 be listed for further direction on 09.05.2018.

YOGESH KHANNA, J

JANUARY 15, 2018/*DU*