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

Judgment reserved on March 03, 2015
Judgment delivered on March 10, 2015

\+ O.M.P. 280/2012
RELIANCE BROADCAST NETWORK LIMITED
..... Petitioner

Through: Mr.K. Datta, Advocate with Mr.Ashish Verma and Mr.Rahul Malhotra, Advocates

Versus

BROADCAST ENGINEERING AND CONSULTANTS INDIA LTD AND ANOTHER ..... Respondent

Through: Mr.Rajeev Sharma, Adv. & Mr.R.Gogna, CGSC along with Mr.Vipul, Ms.L.Gangmei, Ms.Tanisha, Advs. for Ministry of Information & Broadcasting (UOI)

\+ O.M.P. 273/2012
RADIO ONE LIMITED ..... Petitioner

Through: Mr.Rajiv Nayar, Sr. Advocate with Mr.Kirat Singh Nagra and Mr.Kartik Yadav, Advocates

Versus

BROADCAST ENGINEERING CONSULTANTS INDIA LTD ..... Respondent

Through: Mr.Rajeev Sharma, Adv. with Ms.Radha Lakhmi R.,

Adv. for R-1
Mr.R.Gogna, CGSC along with Mr.Vipul, Ms.L.Gangmei, Ms.Tanisha, Advs. for Ministry of Broadcasting (UOI)

\+ O.M.P. 287/2012
MALAR PUBLICATIONS LTD ..... Petitioner

Through: Mr.Abhishek Malhotra, Mr.Debashis Mukherjee, Adv.

Versus

BROADCAST ENGINEERING AND CONSULTANTS INDIA LIMITED & ANR ..... Respondent

Through: Mr.Rajeev Sharma, Adv. & Mr.Vivek Goyal, CGSC with Mr.M.Tapan Sharma, Adv. for UOI/R2

\+ O.M.P. 295/2012
PURAN MULTIMEDIA LTD ..... Petitioner

Through: Mr.K. Datta, Advocate with Mr.Ashish Verma and Mr.Rahul Malhotra, Advocates

Versus

BROADCAST ENGINEERING AND CONSULTANTS & ANR ..... Respondent

Through: Mr.Rajeev Sharma, Adv. with Ms.Radha Lakshmi R., Adv. for respondent No.1
Mr.R.Gogna, CGSC along with Mr.Vipul,

Ms.L.Gangmei, Ms.Tanisha,
Advs. for Ministry of
Information & Broadcasting
(UOI)

Judgment reserved on March 05, 2015
Judgment delivered on March 10, 2015

\+ O.M.P. 291/2012
DHAMAAL 24 RADIO NETWORK LTD. ..... Petitioner

Through: Mr.Abhishek Malhotra, Adv. with
Mr.Nitin Bhatia, Adv.

Versus

PRASAR BHARTI ..... Respondent

Through: Mr.Rajeev Sharma, Adv.

\+ O.M.P. 294/2012
DHAMAAL 24 RADIO NETWORK LTD. ..... Petitioner

Through: Mr.Abhishek Malhotra, Adv. with
Mr.Nitin Bhatia, Adv.

Versus

BROADCAST ENGINEERING AND CONSULTANTS INDIA LTD. AND ANR ..... Respondent

Through: Mr.Rajeev Sharma, Adv.

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. This batch of petitions have been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (Act, in short), inter alia,

claiming a common interim measure in the nature of direction to the Broadcasting Engineering and Consultants India Ltd. (BECIL, in short)/Prasar Bharti to issue No-Objection Certificate to them, or a direction for giving permission, to enable them to apply for migration to Phase III in terms of FM Radio Policy dated July 25, 2011. Since the issue(s) which arise(s) for consideration in this batch of petitions is identical, they are being disposed of by this common order.

FACTS:

2. All the petitioners herein operate FM Radio Stations in different cities of the country under FM Radio (Phase II) policy of Ministry of Information and Broadcasting (MIB, in short) dated July 13, 2005. Before Phase II policy was framed, there was a Phase I policy. Under the Phase II policy, the case of a new entrant was also considered. The policy stipulated a process of granting permission by issuance of a Letter of Intent to enable the company to obtain frequency allocation, SACFA clearance, achieve financial closure, and appoint all key executives, enter into an agreement with DD/AIR/BECIL and deposit the requisite amount towards land/tower lease rent, Common Transmission Infrastructure (CTI, in short) etc. and comply with the requisite conditions of eligibility for signing the "Grant of Permission

Agreement" (GOPA). The "grant of permission agreement" was executed between the MIB and the petitioners herein on different dates. The policy also contemplated mandatory for all Phase II operators to co-locate transmission facilities in all the 91 cities on terms and conditions to be prescribed separately. Out of 91 cities, in 84 cities, the facilities had to be co-located on existing AIR/DD towers, while in remaining 7, the policy contemplated new towers to be got constructed by the MIB through BECIL. The new towers were to be constructed at Chennai, Delhi, Kolkata, Mumbai, Bangalore, Hyderabad and Jaipur.

3. Pending creation of co-location, facility by BECIL, the successful bidders in the 7 cities were permitted to operationalize their channels on individual basis for a period of two years or till the co-location facility is commissioned, whichever is later, at the end of which, they were to shift their operations to new facilities. Permission to run individual channel were to be granted to each successful bidder only after it had entered into an agreement with BECIL and made full payment towards its share in the common infrastructure. The BECIL acted as a system integrator for providing a common transmission infrastructure to enable the petitioners herein to obtain SACFA clearance and frequency allocation etc. The petitioners herein entered into 'project management

agreements' (PMA) with the BECIL on different dates, the details of which shall be given in the judgment later.

4. The PMA was primarily to provide project management services, to build, install, commission and completion of the common transmission infrastructure. The PMA contemplated payment of fee to BECIL for providing project management services. The common transmission infrastructure in terms of Annexure I included the following:

Antenna system; RF Feeder cable and accessories; combiners; Antenna switch frame; power supply system for the total set up; building works to house CTI as also the building for LOI holder; individual transmitters, rigid lines and accessories, Air conditioning arrangements, earthing system for CTI, fire fighting equipment for CTI, technical furniture at CTI.

5. Suffice to state, the common transmission infrastructure did not include the tower to be constructed by BECIL on behalf of MIB. Clause 17.1 stipulated a dispute resolution mechanism through the process of arbitration by a Sole Arbitrator to be nominated by the Secretary, MIB.

6. None of the petitioners have signed agreements for tower rental. On July 25, 2011, the MIB had issued an order in the nature of policy

guidelines in pursuance to a decision of Union Cabinet with a purpose to expand the FM Radio Broadcasting Services through private agencies called the FM Radio Phase III. The guidelines stipulates migration of the existing permission holders i.e. the petitioners herein, to Phase III, subject to the provisions contained therein, which includes payment of all outstanding dues pertaining to the government, Prasar Bharti and BECIL in relation to existing FM radio permission/operations; signing of fresh 'grant of permission agreement' (GOPA). In any case, if the existing permission holder does not execute the fresh agreement within the given time, it shall be construed to mean that he does not want to migrate to the FM Phase III regime and therefore shall continue to be governed by Phase II policy provisions. The counsels for the parties state that the last date for getting NOC is March 9, 2015 and the deadline to sign the GOPA has been extended till March 23, 2015. I may only point here that this Court in the order dated July 3, 2014, has recorded that the deadline to migrate has been extended till March 31, 2015.

PLEADINGS OF THE PARTIES:
OMP 280/2012

7. It is the case of the petitioner that, it operates FM radio stations at

45 cities in the country. For the said purpose, it had paid to the MIB a fee of Rs. 160 Crores as a one time entry fee and an amount of Rs. 30 Crores towards licence fee till March 2011. It had on March 23, 2006 entered into a PMA for common transmission infrastructure for the FM radio Phase II at Delhi and similar agreements were entered for all 45 cities, in which, it operates. It is the case of the petitioner that the respondent No. 1 is falsely claiming from it monitoring charges, which were payable as per clause 13.1 of the GOPA. According to the petitioner, the respondent No. 1 has failed to provide monitoring as contemplated in GOPA. It has charged arbitrary interest @ 19.5 percent on the outstanding amount. The petitioner has also raised an issue of failure on the part of the respondent No. 1 to set up a CTI structure at Kolkata and the advance paid to the respondent No. 1, was Rs. 1,08,00,000/-. The petitioner also raised an issue with regard to CTI tower at Chennai, stating that, the same is inadequate as its height is 130 meters instead of 175 meters, prescribed in clause 12.2 of GOPA. In other words, it is the petitioner's case that there exist genuine commercial disputes between the parties. It is noted, that the petitioner has invoked clause 17.1 of the PMA, seeking settlement of disputes through arbitration.

8. The respondent No. 1 has filed its reply. It may not be necessary for this Court to go into the details of the averments made in the reply by the said respondents in view of an additional affidavit filed by the respondent No. 1 on February 23, 2015. In para 4 and 5 of the additional affidavit, the respondent No. 1 has stated as under:

> *"4. I state that there have been other dealing between the parties in terms whereof tower rental, monitoring charges in respect of monitoring of technical compliances and content and Studio Transmission Links (STL) charges are payable by the petitioner to respondent No. 1. The said dealings are not under the Project Management Agreements.*
>
> *5. I state that upto 31st December, 2014 an amount of Rs. 1,30,44,538/- was payable by the petitioner towards tower rental for the Tower at Chennai for the period 01.04.2008 to 31.03.2015 along with interest on delayed payments of Tower Rentals amounting to Rs. 1,32,81,909/-. In addition, an amount of Rs.2,62,901/- was due from the petitioner towards interest on STL outstandings. The total amount due from the petitioner upto 31.12.2014 was Rs. 2,65,89,348/-".*

The petitioner, in response to the affidavit has denied the amount claimed by the respondent No. 1.

OMP 273/2012:

9. The case of the petitioner in this petition is that it is a private FM radio broadcaster in India and operates under the brand name "Radio One" operating in 7 Indian cities namely Mumbai, Delhi, Kolkata, Chennai, Bangalore, Pune and Ahmedabad. Under the Phase II scheme, it entered into a separate PMA for the 7 cities on March 20, 2006 and April 15, 2006 with the respondent for setting up of CTI. It is also averred that the petitioner was also required to enter into agreements for use of Tower Aperture on payment of rent as per the said policy. Pursuant to the PMA, the petitioner has paid approximately Rs. 7.3 Crores to the respondent for setting up of Common Transmission Infrastructure (CTI). It is the petitioner's case that the respondent delayed the setting up of Common Transmission Infrastructure, and in the case of Kolkata, had not even built the same, thus, breaching the time frame specifically provided under the project agreements. Such delay caused grave prejudice and loss to the petitioner. The petitioner's case is that it has been taking up the issue of delay in handing over the site by the respondent and thus, insofar as Kolkata is concerned, an amount of Rs. 1,08,00,000/- need to be refunded back, which has not been done till date. Insofar as the refusal to enter into rental agreements

for the use of tower aperture at the cities of Chennai and Delhi, it is the case of the petitioner that they had not executed solely on account of the respondent having illegally and wrongfully levied rentals on the CTI sites, which are not contractually payable to the respondent. Suffice to state, the petitioner has been disputing the invoices raised by the respondent. It is their case, that even the consortium of broadcasters including the petitioner made several representations in respect of claims made by the respondent, which have not been addressed to. The petitioner states that in view of the new policy, enunciated by the MIB, the migration from Phase II to Phase III is possible if a No-Objection certificate is granted by the Prasar Bharti/BECIL, which presupposes the payment of all dues by the petitioner. In other words, the respondent is insisting upon the dues by the petitioner otherwise the petitioner would not be eligible for seeking migration to Phase III, and as such, compelled it to file the present petition, seeking an order, directing the respondent to issue the petitioner a No due certificate, without prejudice to its rights and contentions, pending the outcome of the arbitration proceedings. I note, that, the petitioner has filed an application under Section 11(6) of the Act i.e. Arb. P. 88/2015, which stands adjourned.

10. The respondent–BECIL has filed its reply to the petition.

11. On February 23, 2015, the respondent filed an affidavit wherein, it has taken the following stand:

> *"4. I state that there have been other dealings between the parties in terms whereof tower rental for the tower erected at Delhi and Chennai and monitoring charges in respect of monitoring of technical compliances and content are payable by the petitioner to respondent No. 1. The said dealings are not under the Project Management Agreements.*
>
> *5. I state that upto 31st December, 2014 an amount of Rs.2,45,98,008/- was payable by the petitioner towards tower rental for the Towers at Delhi and Chennai for the period 01.04.2008 to 31.03.2015 along with interest thereon amounting to Rs. 1,25, 84,741/-. In addition, an amount of Rs. 4,35,882/- was due from the petitioner towards monitoring charges for 7 cities. The total amount due from the petitioner upto 31.12.2014 was Rs. 3,76,18,631/-"*

12. A perusal of the affidavit now filed by the respondent would show as on December 31, 2014, the total amount due is Rs.2,45,98,008/- against tower rentals for the towers at Delhi and Chennai for the period April 1, 2008 to March 31, 2015 and interest thereon of Rs.1,25,84,741/- and an amount of Rs. 4,35,882/- towards monitoring charges for 7 cities, the total

of which, comes to Rs.3,76,18,631/-. No reply to the additional affidavit has been filed.

OMP 287/2012:

13. It is the case of the petitioner in the petition that it had participated in the auction of licences in respect of FM broadcasting stations by the respondent No. 2, Ministry of Broadcasting (MIB) in Phase II of the licensing policy and has been granted Letter of Intent and subsequently, executed GOPA dated September 13, 2006, inter alia to set up and operate 7 Radio stations in Tamil Nadu and Puducherry. In terms of the FM Radio policy, Phase II, the petitioner was required to co-locate transmission facilities with the existing infrastructure of Prasar Bharti and the common facilities had to be integrated by the respondent. In these circumstances, the petitioner entered into a PMA dated April 16, 2006 for CTI at Avadi, Chennai with the respondent No. 1. During oral discussions with the officials of the BECIL, it raised concern with regard to the strength of signals that would originate at Avadi since it is located at least 20 kilometers from Chennai. According to the petitioner, it had paid to the MIB (GOI) an amount of Rs. 24.3 Crores as one time entry fee for the operation of the FM broadcasting stations. It has also incurred capital expenditure of approximately Rs.60 Crores besides having paid a sum of Rs. 5.18 Crores to the respondent No. 1. It is also the case of the petitioner

being a successful bidder, the petitioner was also required to enter into an agreement paying rent for the use of the tower as per the said policy. It has also made an advance payment of Rs.1,08,00,000/- as 100% advance towards the estimated share of capital cost on cost sharing basis towards the building, installation, commissioning and completion of CTI to the respondent. Besides that, the petitioner was required to pay land and tower rentals. According to the petitioner, as per the FM Phase II policy at places where a suitable tower for Prasar Bharti was not available, the broadcasters were permitted to operationalise their transmission facilities out of interim set up till permanent set up was completed. The petitioner, for the city of Chennai created an interim set up at Doordarshan Centre, Chennai, and started operations of its Radio station under the name Hello FM on October 02, 2006 and the petitioner continues to use the said facility till date in view of the problems with the CTI set up/created by the respondent No. 1 at Avadi. The petitioner's case insofar as the facility at Avadi is concerned; the signals are poor, noisy with very low clarity. According to the petitioner, it is in receipt of letter dated March 31, 2009, wherein, the respondent No. 1 has alleged that the petitioner, while operating from the interim set up at Chennai is in violation of GOPA as well as the PMA. The petitioner's stand is that it responded vide letter dated April 13, 2009, providing a detailed account of the disadvantages for phase II, due to

technological deficiencies in services as well as signal interference at CTI complex at Avadi. The petitioner also contested the demand made by the respondent No. 1 vide its letter dated October 12, 2009 of an amount of Rs.31,37,780/- along with security deposit of Rs. 13,93,776/-, by stating that, the demand is unjustified as the petitioner had not commenced use of the same in view of several deficiencies highlighted by it. The petitioner has also stated that the grievance of the petitioner has not been addressed. The petitioner also referred to the issuance of policy guidelines in the year 2011 by MIB for migration to FM Radio Phase III. The petitioner has also stated that the respondent has agreed to adjust the monitoring charges from the balance advanced capital with them and further agreed to provide, interest on the balance capital, advance available with them, and with the said understanding, and in acknowledgement/admission of the same, the respondent has even provided the petitioner with TDS certificates, however, the respondent is yet to make a refund of Rs.3,226,875/- and in view of the fact that the respondent No. 1 has miserably failed and neglected to comply with its obligations under the agreement, it is constrained to invoke the arbitration clause to refer the disputes before the Sole Arbitrator. It has also referred to the writ petition filed by it being WP(C) No. 1257 of 2012 being Radio One Ltd. Vs. Union of India and Anr., wherein, the Court has observed that the appropriate remedy in view

of the arbitration clause between the parties, is initiation of arbitration and seeking interim directions therein.

14. As noted in the other petitions, the respondent No. 1 had also filed its reply so also the respondent No. 2. That apart, the respondent No. 1 has filed an additional affidavit on February 23, 2013, wherein, the respondent No. 1 has taken the following stand:

> *"4. I state that there have been other dealings between the parties in terms whereof tower rentals for the tower erected at Chennai and monitoring charges in respect of monitoring of technical compliances and content are payable by the petitioner to respondent No. 1. The said dealings are not under the Project Management Agreements.*
>
> *5. I state that upto 31st December, 2014, an amount of Rs.1,30,44,538/- was payable by the petitioner towards tower rental for the Tower at Chennai for the period 01.04.2008 to 31.03.2005 along with interest thereon amounting to Rs.63,54,980/-. In addition, an amount of Rs.38,91,906/- was due from the petitioner towards monitoring charges for the 7 cities. The total amount due from the petitioner upto 31.12.2014 was Rs.2,32,91,424".*

15. Suffice to state, it is the case of the respondent No. 1 that the total amount due from the petitioner as on December 31, 2014 was

Rs.2,32,91,424/- towards tower rental for the tower at Chennai along with interest thereon and monitoring charges for the 7 cities under GOPA. No reply to the additional affidavit has been filed.

OMP 295/2012:

16. The case of the petitioner in this petition is that pursuant to an auction of the licenses in respect of private FM broadcasting stations by the MIB in Phase II of the licensing policy, Letters of Intent were granted to the petitioner to set up and operate radio stations in Category B cities of Agra and Varanasi, Category C cities of Bareily, Jalandhar, Gorakhpur and Ranchi, and Category D cities of Hisar and Karnal. It had executed GOPA on November 23, 2006. It had paid to the Govt. of India an amount of Rs. 7.88 Crores as one time entry fee and an amount of Rs. 25,10,505/- towards fee for the first year in respect of the aforesaid 8 stations. It had also incurred capital expenditure for an approximately sum of Rs.24 Crores besides having paid a sum of Rs.5 Crores to the respondent No. 1 and a sum of Rs. 1.20 Crores to Prasar Bharti. In terms of the Phase II policy, successful bidder was required to co-locate the transmission facilities with the existing infrastructure of Prasar Bharti and the common facilities had to be integrated by the respondent No. 1. In entered into agreements in the year 2006 with the Prasar Bharti for its existing infrastructure on payment of licence fee for each of its 8 radio stations. It had also entered into a

Project Management Agreement for CTI on April 22, 2006 with respect to FM radio station at Karnal. Similar agreements were executed in all the 8 cities. The petitioner, in consideration of the respondent No. 1, building, installing, commissioning and completing the CTI agreed to pay to BECIL its share of actual cost as also fee for providing project management services equivalent to 10% of its share of actual net cost. An advance payment of Rs. 5,02,00,000/- was paid to the respondent No. 2 on 22.04.2006 for all 8 stations. Further, as per GOPA, the petitioner was required to pay its share of monitoring charges arrived at by equally apportioning Rs. 25,000/- per month amongst all permission holders for the city. It is the case of the petitioner, that, the BECIL vide letter dated March 19, 2009 demanded the outstanding monitoring charges for the year 2007-08 and 2008-09 from the petitioner. It is the case of the petitioner, pursuant to certain discussions, it was agreed that the monitoring charges be adjusted from the balance capital advance already with BECIL on account of common infrastructure set up. It is the case of the petitioner that approximately, Rs.60 lakhs are available with the BECIL and called upon the BECIL to square up the monitoring charges and for final reconciliation duly audited at their end so that the payments, if any, may be made by the petitioner. Surprisingly, it received a show-cause notice dated May 5, 2011 from the MIB for non payment of monitoring charges and stating that

the petitioner was in violation of the GOPA. The petitioner brought to the notice of the MIB the understanding arrived at between the parties. It is also its case that inspite of such unreasonable and arbitrary conduct of the respondent, it had sent a cheque of Rs. 7,86,535/- to the BECIL, being outstanding amount as per the petitioner's calculations. The petitioner referred to the policy enunciated on July 25, 2011 for expansion of FM radio broadcasting services to private agencies Phase III, wherein, migration was permissible from Phase II to Phase III, subject to payment of all dues and securing an NOC from the concerned authorities. The petitioner also referred to a letter dated September 8, 2011 issued by MIB to the petitioner, asking it to clear the dues of the respondent before migration could take place. According to it, as per the respondent, vide its letter dated October 7, 2011, it had sent a final statement of accounts with regard to 8 Radio stations, whereby, it raised a demand of Rs. 84,07,047/-. The respondent demanded Rs.58,24,172/- towards monitoring charges, which according to the petitioner, is not payable. The petitioner's case is that the statement also included an amount of Rs.5,77,628/- paid as TDS by BECIL.

17. Suffice to state, the petitioner contested the statement of accounts sent to it. The petitioner referred to a writ petition being WP (C) 8782/2011 wherein, it had prayed for a direction to permit it to migrate

without necessity of obtaining a certificate from the respondent. The Court gave direction for invoking the arbitration. The writ petition was withdrawn by the petitioner with liberty to initiate arbitration proceedings. It is necessary to state here that the petitioner has invoked clause 17.1 of the Project Management Agreements.

18. The respondent Nos. 1 and 2 have filed their replies to the petition. I would not dilate much on the replies filed by the respondent Nos. 1 and 2 in view of the additional affidavit filed by the respondent No. 1 on February 23, 2015, wherein, the following stand has been taken:

> *"4. I state that there have been other dealings between the parties in terms whereof monitoring charges in respect of monitoring of technical compliances and content are payable by the petitioner to respondent No. 1. The said dealings are not under the Project Management Agreements.*
>
> *5. I state that upto 31st December, 2014 an amount of Rs.49,87,204/- was payable by the petitioner towards monitoring charges in respect of the 8 cities for the period starting from 2007 to 31.03.2011 and 01.04.2012 to 31.03.2013. In addition, an amount of Rs.25,82,875/- was due from the petitioner towards CTI outstandings under the Project Management Agreements. The total amount due from the petitioner upto 31.12.2014 was Rs.75,70,079".*

In response to the aforesaid affidavit, the petitioner has denied, that the amount of Rs.75,70,079/- is due and payable.

19. During the hearing, Mr. Rajeev Sharma, learned counsel for the BECIL, the respondent No. 1, submitted a due payment summary of the petitioner, wherein, it is reflected that, the petitioner has to pay an amount of Rs. 54,87,586/- in total, the break up of which is Rs. 44,35,360/-, against monitoring charges and Rs.10,52,226/- against CTI charges.

OMP 291/2012:

20. The petitioner has filed the present petition with a stand that it had participated in the auction of licences in respect of private FM broadcasting stations by the MIB in Phase II of the licensing policy and granted Letters of Intent to set up and operate 10 radio stations in the cities of Shimla, Ahmednagar, Dhule, Jabalpur, Hisar, Jalgaon, Karnal, Patiala, Mujjafarpur and Ranchi. In terms of the Phase II policy, the petitioner was required to co-locate transmission facilities with the existing infrastructure of the respondent Prasar Bharti and common facilities had to be integrated by the Broadcasting Engineering and Consultants India Ltd. (BECIL). It had entered into 10 agreements for availing the respondent's infrastructural facilities i.e. tower aperture, open space, land, covered space, building and other facilities. It had also entered into PMA for 10 cities for CTI with BECIL. In terms of the agreement, the petitioner was required to pay to

the respondent the annual licence fee in advance for use of the respondent's infrastructure. Apart from this, the petitioner was to pay to the respondent in the first year an amount equal to one year's licence fee by way of security deposit which was refundable to the petitioner on termination of the agreement(s). Furthermore, as per the agreement(s), the petitioner was to pay to the respondent 10% after every two years for the open/covered space and the common facilities; 2.5% after every year for the tower. According to the petitioner, it had paid an amount of Rs.4,76,72,382/- towards licence fee in respect of all the 10 radio stations till date. Furthermore, an amount of Rs. 68,94,331/- as security deposit was paid to the respondent at the time of execution of the licence agreements. The petitioner also referred to the new policy formulated by the MIB on July, 2011, which stipulates migration to Phase III subject to clearing the dues and obtaining NOC from the concerned authorities. It is the case of the petitioner that a meeting was held with the Joint Secretary, Broadcasting of MIB on the issue of higher interest being charged by the respondent for use of its infrastructure. It was decided that the issue of high rentals will be discussed with the respondent in a separate meeting. Despite such an assurance, no meeting had been called for by the respondent. It is the petitioner's case that the respondent has failed miserably and neglected to comply with its obligation under the agreement(s) and is further making

unreasonable demand from the petitioner and had no other alternative, but, to invoke clause 12 of the agreement(s), invoking arbitration for reference of the disputes so arisen between the parties before the Sole Arbitrator.

21. The respondent Prasar Bharti filed its reply wherein, it has taken a plea that the petitioner has not invoked any arbitration clause even though the petition was filed as far back as on March 26, 2012.

22. It is the case of the respondent that the petitioner has defaulted in making the payments and in such circumstances, it is not entitled to any interim measure or protection. It would state that the agreements for the 10 locations were executed as far back as on March/April, 2006. The agreements were arrived at voluntarily and the petitioner never objected to the licence fees specified therein. The respondent has also stated that the petitioner had paid licence fee without demur upto 2010-11. The respondent would submit that the petitioner has no prima facie case nor any balance of convenience in its favour. Admittedly, the petitioner, utilizing the land of the respondent, despite using the land, the petitioner is refusing to pay the rent which is not justified.

23. On March 03, 2015, when the matter was heard by this Court, the learned counsel for the petitioner has stated that the petitioner has paid all the dues to Prasar Bharti. According to him, the Prasar Bharti in advance had raised an invoice for the year 2015-16 which has to be paid to the

petitioner and the same should not come in the way of for grant of NOC. Despite opportunity, no affidavit was filed and at the request of the counsel for the petitioner, the matter was adjourned to March 5, 2015. On March 5, 2015, the learned counsel for the petitioner has clarified that invoice raised by the Prasar Bharti was for the year 2014-15 for the usage of infrastructure like tower, open space and common facilities. He would concede to the fact, the petitioner has not invoked the arbitration clause.

24. Mr.Rajeev Sharma, learned counsel for the respondent would state that an amount of Rs.1,02,82,583/- is due from the petitioner as on October 2014 with interest. He would state that till such time, the amount is paid by the petitioner, NOC cannot be granted. The learned counsel for the petitioner would submit that the petitioner would pay 50% of the amount to the respondent.

OMP 294/2012:

25. In this petition, the petitioner has inter alia sought an order of injunction restraining the respondent No. 1 from raising a demand of Rs. 81,11,040/- apart from seeking an order of issuance of No due certificate so as to enable the petitioner to sign GOPA for phase III. It is the case of the petitioner that pursuant to the participation in the auction of licences, an LOI was issued by Ministry of Information and Broadcasting to operate Phase II FM broadcasting stations in 10 cities of Shimla, Ahmednagar,

Duley, Jabalpur, Hisar, Jalgaon, Karnal, Patiala, Muzafarpur and Ranchi. It had entered into PMA with the respondent No. 1 with regard to the 10 cities. It had paid the respondent No. 1 an amount of Rs.6,03,00,000/- in respect of all 10 radio stations. It had made a security deposit of Rs. 68,94,331/- to the respondent No. 2 in respect of each radio stations in terms of GOPA and Rs.4,76,72,382/- towards licence fee for all 10 stations. It is the case of the petitioner that there was an issue of breach of contractual obligation by the respondent No. 1 in respect of petitioner's radio station at Shimla as the CTI facility which was to be handed over on 20.04.2007 could be handed over only on 08.10.2009. It is its case that it had incurred huge costs on account of the delay. It had also denied its liability to pay escalated costs as well as for delay in construction of CTI in Shimla. It had asked the respondent No. 1 to refund an amount of Rs.40,25,000/-. However, the respondent No. 1 has not refunded it till date. Even a request for No-Objection Certificate has not been acceded to.

26. The respondent No. 1 demanded from the petitioner a payment of Rs.35,51,536/- towards CTI and Rs.45,59,504/- towards monitoring charges and interest on account of late payment of monitoring charges. The respondent No. 1 had also demanded an amount of Rs.14,57,671 towards electricity consumption for the month of November 2011 to January 2012 for the 10 radio stations of the petitioner. The petitioner

would refer to the policy regarding Phase III issued by MIB and would refer to the clauses with regard to the issuance of NOC, subject to clearance of all dues by the radio operators. The petitioner also referred to the understanding arrived at between the petitioner and the respondent No. 1, adjusting the monitoring charges from the balance advance capital available with the respondent No. 1. The petitioner would submit that the refusal to give No-Objection Certificate is illegal.

27. The respondent has filed its reply, taking various objections.

28. During hearing, Mr.Rajeev Sharma, has said that the total amount due from the petitioner is Rs. 77,86,632/- against monitoring charges under clause 13.2 of GOPA, which payment has to be made to BECIL. Similarly, he would state that a further amount of Rs.35,51,536 as on December 31, 2014 is due for the Common Transmission Infrastruture provided by the BECIL. He would state, a total sum of Rs.1,13,38,168 is due.

29. Learned counsel for the petitioner would submit, an amount of Rs. 77 lakhs would be secured by way of a bank guarantee. He would dispute the payment of Rs. 35,51,536/- as there was a delay on the part of the BECIL to construct the CTI at Shimla. He would also state, the said amount would also be secured by way of a bank guarantee. It is his case that the petitioner is hard pressed for money in view of various investments made by it.

SUBMISSIONS:

30. Mr.Sandeep Sethi, learned counsel appearing for the petitioner in OMP No.280/2012 would submit that the petitioner operates, FM stations in 45 cities in the country and in that regard paid to the MIB fees of Rs.160 crores as one time entry fee and an amount of Rs.33 crores to BECIL and that apart making huge investments. The petitioner is not a fly by night operator, who would not honour, any award even if comes against it. He has drawn my attention to the e-mail dated February 4, 2015, received from BECIL along with an attachment, a statement showing outstanding payment of Rs.28,33,175/-, which has been paid by it. He would state, unfortunately, in the affidavit filed by the Respondent No.1, it had for the first time taken a plea that, the Tower rental, monitoring charges and Studio Transmission Links charges are payable by the petitioners are not under the PMA. Such an objection has been taken after 3 years, of the filing of the petition. He refers to letter dated November 21, 2011, written by the petitioner to BECIL to contend, that the, petitioner has genuine issues for which immediate attention of BECIL was sought like reconciliation of advances, interest, monitoring charges, CTI Chennai etc. With regard to Chennai, he would state the Tower in the city of Chennai was erected at Avadi, a small town in North West of Chennai, is inadequate technically as the height of the Tower constructed is 130

meters, instead of 175, and thus, it is legitimate and prudent for the Respondent No.1 to refund the entire advance amount paid to BECIL under the agreement. It was his endeavour, to argue that, the Respondent No.1 does not dispute the genuine issues raised by the petitioner and the Court which considers an application under Section 9 of the Act, would have a prima facie view to decide whether a direction to the petitioner to pay is necessary. The amount now being claimed by BECIL is with regard to tower rental for the Tower in Chennai, and interest on delayed payment of tower rentals for the cities of Delhi , Chennai and Hyderabad, in addition to interest on STL outstanding, cannot be said to be dues unless adjudicated. He would refer to the agreement executed with Prasar Bharti on June 20, 2006 to contend, that it was for usage of infrastructure of Prasar Bharti to be collected by BECIL on behalf of Prasar Bharti with an Arbitration clause. He would also refer to PMA between the petitioner and BECIL and its various provisions. According to him, there is no dispute with regard to Monitoring charges under GOPA. In the end, it is his submission that the petitioner could not be called upon to discharge, a claim where there is no dispute.

31. On the other hand, Mr.Rajeev Sharma, learned counsel for the Respondent No.1 would state that the FM II Policy was framed in the year 2005, under which, out of 91 cities, in 84 cities, the operators could co-

locate with the infrastructure of Prasar Bharti and for 7 cities, referred to above, new Towers were erected by the BECIL on behalf of MIB. The BECIL was only a collecting agency. Till such time the towers did not come up in these 7 cities, the operators were at liberty to have an arrangement either independently or at AIR/DD (PB) station. According to him, the agreement referred to by Mr.Sethi with Prasar Bharti was one such arrangement which the petitioner had for Delhi. He would state that, the Tower rental is payable and this aspect has been conceded by the petitioner in its letter dated December 29, 2011, wherein in Para 7(a) the petitioner had stated *"it is submitted that out of the total amounts specified towards rentals only Rs.1,00,42,640/- is due and payable".* According to him, in fact, BECIL has constructed the Tower at Chennai, in terms of the policy, the petitioner is bound to pay the rentals. Unfortunately, despite construction they have not co-located. He would also state that Mr.Sethi has not answered the objection taken by the Respondent No.1, with regard to the arbitrability of the issues regarding Tower Rentals, and interest on Tower Rentals for the cities of Delhi, Hyderabad and Chennai, as there is no Arbitration agreement between the parties. According to him, the petitioner has invoked the arbitration clause under PMA. The petition under Section 9 is itself not maintainable. He has taken me through the provisions of the PMA, to highlight, the scope of the agreement to submit

construction of tower and payment of tower rent does not find place in PMA. He would state that towers does not fall under Common Transmission Infrastructure. The petitioners were to execute an agreement with regard to tower rental. Unfortunately, they have not come forward to execute the same. He would refer to page 34 of the reply of respondent No.1, which is a statement showing tower rental status. According to him, vide letter dated April 08, 2009, the petitioner was called upon to pay the tower rental charges. Unfortunately, the same has not been paid. The claim of rent is not a recent development. NOC can be given only if the dues are paid, which are to the tune of Rs.2,65,89,346/-.

32. Mr.K.Datta in rejoinder to the submissions made by Mr.Rajeev Sharma would submit that the respondent No.1 had never taken the objection regarding arbitrability of the disputes. He would state, rather a statement was made on behalf of the respondent No.2 that MIB is willing to appoint an Arbitrator. In that regard, he draws my attention to the order dated June 01, 2012 and May 28, 2012 passed in the petition. In view of such a statement, it is not correct on the part of respondent No.1 to contend that the issues/disputes are not arbitrable in the absence of an agreement/arbitration clause. He would reiterate the submission made by Mr.Sethi regarding inadequacy of the tower in Chennai, being of a lower height. So, the issue of inadequacy of infrastructure is an issue which falls

under the PMA and as such arbitrable. He referred to Annexure 1 of the PMA. He would also state that as per Section 7(4)(c) of the Act, an Arbitration Agreement is in writing, an exchange of statements of claim and defence, in which the existence of the agreement is alleged by one party and not denied by the other party. He refer to para 48-49 of the petition and corresponding para in reply in this regard. He also refers to the order of the Division Bench dated March 02, 2012 passed in W.P.(C) 1257/2012 filed by one of the petitioner in this batch of petitions i.e. 'Radio One Ltd'. to contend that the Division Bench has said that remedy for the petitioner is to initiate arbitration proceedings and seek interim direction therein. He has referred to Clause 5.3 of the GOPA filed in OMP No.295/2012 to contend that GOPA recognizes the construction of tower through BECIL. In the last it is his submission that without prejudice, the petitioner shall deposit the principal amount, excluding interest in this Court, pending decision by the Arbitrator, the NOC must be given to enable the petitioner to migrate; otherwise great hardship shall be caused to the petitioner. Out of the 45 stations, the dispute is with regard to only one. According to him, as the petitioner is operating at other places, there cannot be an apprehension that the petitioner would not be able to discharge the liability if established against the petitioner. He has filed written submissions in OMP 273/2012.

33. Mr.Rajiv Nayyar, learned Senior Counsel who appeared for the petitioner in OMP 273/2012 adopted the arguments advanced in OMP 280/2012 by Mr.Sandeep Sethi/Mr.K.Datta. That apart he would point out the letter dated December 19, 2014 written by BECIL and January 19, 2015 written by the petitioner No.1, which provide justification for non payment of the dues by the petitioner. He would state, insofar as monitoring charges are concerned, the same shall be paid by the petitioner. He would also state, for the last so many years, the respondent has assured the petitioner during the hearings that the issue would be resolved or in the alternatively the matter would be referred to arbitration, but at this point of time to say that the issue with regard to tower rentals is not arbitrable is unjustified. He says as per Section 7(4)(b) & (c), read with the statements made and averments not denied by the respondent No.1, in its reply, the existence of an arbitration clause is admitted and in that regard he has drawn my attention to para Nos.48 & 49 of the reply. According to him, without prejudice, the petitioner is ready to deposit the amount in the Court. He would rely on the judgment of the Supreme Court in ***BSNL & Ors. Vs. M/s. Subhas Chandra Kanchan and Anr., AIR 2006 SC 3335***

34. Mr.Rajeev Sharma, learned counsel for the respondent No. 1 would submit that the petitioner claim to have invoked clause 17.1 of the PMA executed with BECIL. According to him, tower rental interest therein and

monitoring charges do not fall within the ambit of the PMA and therefore, disputes are not covered under PMA. He would also state that, the reliance placed on Section 7(4)(b) and (c) of the Act is not tenable. For applicability of Section 7(4)(c), there has to be a specific averment which has not been denied. A bare reading of paragraph 48 shows that there is no specific averment regarding tower rental and monitoring charges . He relied upon the judgment of the Supreme Court in ***S.N.Prasad Vs.Monnet Finance Ltd. and Ors., AIR 2011 SC 442.*** On Section 7(4)(b) of the Act, he would state, the letters must record the existence of an agreement. According to him, no such letters have been pointed out. He would also state that the tower/tower rentals are not part of PMA as is clear from Annexure I and III, which lists out the CTI. According to him, any jurisdictional issue needs to be pleaded by the petitioner and the Court also needs to consider such an issue while exercising jurisdiction. On the statement of the ASG, regarding willingness of the Govt. of India to appoint an Arbitrator as a proof of existence of an Arbitration clause, it is the submission, such submission needs to be rejected for the following reasons;

(i) MIB only nominates the Arbitrator;

(ii) The Secretary does not even have to see whether Arbitration Agreement exists and whether the disputes are within the ambit of

arbitration agreement;

(iii) The statement of ASG is not indicative of any consent by BECIL.

He would, on the judgment of the Division Bench, states that, the DB did not go into the question as to what disputes are arbitrable and contains no adjudication on the said issue. In the last, he states, once policy has been upheld, it is not a case of an interim measure.

35. Mr. R.Gogna, learned CGSC for MIB states that even after the order dated 28.05.2012 was passed, when statement of learned Additional Solicitor General was recorded, the MIB has filed its reply in some of the petitions wherein, it has been averred that since MIB is not a party to the PMA, and since there is no arbitration agreement between the petitioner and the answering respondent, the petition against MIB is not maintainable.

36. Mr.K.Datta in OMP No. 295/2012, apart from relying on the submissions made in other petitions would state that the petitioner would deposit in Court the amount claimed by the respondent No. 1.

37. Mr.Rajeev Sharma has referred to para No.4 & 5 of the affidavit which is already reproduced above to state , the petitioner is liable to pay the dues, and till such time, NOC cannot be issued.

38. The learned counsel for the petitioner in OMP No.291/2012, which

is filed primarily against Prasar Bharti would submit that an invoice for the year 2014-15 has been raised by the Prasar Bharti for the usage of infrastructure i.e. tower, open space, common facilities. The petitioner is ready to pay 50% of the amount to the Prasar Bharti.

39. Mr.Sharma on the other hand would submit that the petitioner is in arrears of Rs.1,02,82,583/- and hardship is not a ground to not pay the dues. Mr.Sharma also justifies, claim of Rs.1,13,38,168/- towards monitoring charges and CTI charges against the petitioner in OMP No. 294/2012.

40. Having considered the submission made by the learned counsel for the parties, the foremost question which arises for consideration at least in OMP Nos. 280, 273 and 287 of 2012, is whether the petitions under Section 9 of the Act per se are maintainable in view of the objection taken by the learned counsel for respondent No.1 that the disputes regarding tower rental and interest thereon, is not covered by the PMA, the agreement which they invoked for the purpose of filing the petitions. From the pleadings, it is clear that the petitioners in the aforesaid OMPs did rely on the arbitration clause in PMA. It is to be seen whether PMA encompass in itself the issue related to tower rental to attract the arbitration clause. The clause 3.1 of the PMA stipulates, BECIL providing project management services to build, install, commission and complete the

Common Transmission Infrastructure and clause 5.1 stipulates in consideration the operator shall pay to BECIL its share of actual net costs and fee @ 10% of its share of actual net costs. Suffice to state, as stated above, the CTI does not include tower construction or the rental to be paid for its usage. Rather I find, the petitioner in OMP No. 273/2012 in para 13 of the petition has admitted that the parties i.e. the operators and the BECIL were also required to enter into agreement for use of tower aperture and payment of rent. It has also come on record in OMP No. 273/2012, in the reply of the respondent No.1, as per Annexure R3, which is a copy of the minutes of meeting held between the officials of BECIL, AIR, Private FM Broadcasting Companies under the Chairmanship of JS(B) MIB wherein, in para 2.5 of the minutes, the following is recorded on operational date for tower rent fixation:-

> *"2.5. Operational date for tower rent fixation*
>
> *FM operators stated that they had signed agreements for tower rental at certain price in 2006. As per agreements, the tower rental is to escalate at certain rate per annum. The FM operators started using the tower in 2008 even though they signed the agreements in 2006. BECIL is charging them the tower rental from 2006. However, the FM operators requested that the tower rental should be charged from 2008, from the date of actual use instead of 2006, the date of signing the agreement".*

41. From the above, it is clear that without any doubt that the parties were required to execute a separate tower agreement, which would have governed the tower rentals. Mr.Rajeev Sharma may be right in his submission that despite being called upon to execute the agreements, the petitioners have not come forward. In any case, it is suffice to state that the issue/dispute of tower rentals is not governed by PMA and the invocation of PMA seeking relief under Section 9 is not tenable. To seek relief under Section 9, an existence of an arbitration agreement is necessary and in that regard Section 7 of the Act defines Arbitration Agreement to mean as under:-

> *7. Arbitration agreement. —*
> *(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
> *(3) An arbitration agreement shall be in writing.*
> *(4) An arbitration agreement is in writing if it is contained in—*
> *(a) a document signed by the parties;*

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

42. Section 7 of the Act had come up for interpretation before the Supreme Court in ***Travancore Devaswom Board Vs. Panchamy Pack (P) Ltd., (2004) 13 SCC 510*** wherein the Supreme Court has in paras 6,7 and 8 held as under:-

"6. We are unable to accede to any of the three submissions made by the respondent. The Arbitration Conciliation Act, 1996, clearly provides that the arbitration agreement must be an agreement which should be in writing (see Section 7(4)). In this case, there was no agreement at all, quite apart from the fact that there was no writing to this effect. The High Court has not in the impugned order recorded any consent as has been contended by the

respondent. We are not prepared to act on any basis other than that expressed by the High Court itself.

7. The impugned order, therefore, cannot be sustained. In the absence of any agreement the Arbitrator could not have any jurisdiction. The participation of the appellant in the preliminary sittings before the Arbitrator would not make any difference. It is to be noted that under Section 7 Sub-section (2), the ground challenging jurisdiction of the Arbitrator is required to be taken at the earliest and not later than the filing of the defence but a party shall not be precluded from raising such a plea merely because it has appointed or participated in the appointment of an Arbitrator. The language of the Section, therefore, leaves no room for doubt that mere participation in the proceedings would not tantamount to an acceptance of the jurisdiction of the Arbitrator to arbitrate disputes between the parties.

8. The decision reported in Tamil Nadu Electricity Board case (supra) is on all fours with the facts of the present case. This Court has clearly said in paragraph 2 of the decision:

"12. Since disputed questions of facts arose in the present appeals the High Court should not have entertained Writ Petitions under Article 226 of

Constitution and then referred the matter to arbitration in violation of the provisions of the new Act. There was no arbitration agreement within the meaning of Section 7 of the new Act. Under the new Act, award can be enforced as if it is a decree of a Court and yet the High Court passed a decree in terms of the award which is not warranted by the provisions of the new Act. The appellant had also raised the plea of bar of limitation as in many cases if suits had been filed those would have been dismissed as having been filed beyond the period of limitation. In our opinion exercise of jurisdiction by the High Court in entertaining the petitions was not proper and the High Court in any case could not have proceeded to have the matter adjudicated by an arbitrator in violation of the provisions of the new Act."

43. Similarly, in ***S.N.Prasad (supra),*** the Supreme Court held that there can be a reference to arbitration only when there is an agreement between the parties. If there is a dispute between a party, to an arbitration agreement with other parties as also non parties, the reference can be only with respect to the parties to the Arbitration agreement and not the non parties.

44. On the maintainability of Section 9 petition in the absence of an arbitration agreement, this Court in ***Ashok Kumar and Anr. Vs. SBI Officers Association and Anr. 2013 X AD (Delhi) 512*** has held as under:-

"15. It is well settled principle of law that the court seized of an application under Section 9 of the Act can form a prima facie opinion on the preliminary aspects relating to arbitrability of the dispute prior to granting or refusing the interim measures under the said section. This is due to the reason that the court would proceed to consider the grant or non grant of the interim measures only upon the satisfaction that there exists a valid arbitration clause covering the dispute raised before the court. The said preliminary enquiry relating to arbitrability of the dispute is the jurisdictional fact which enables the court to assume jurisdiction on the application and proceed to consider the same on merit. If on the other hand, the dispute itself does not fall within realm of the arbitration, then the court may straightaway proceed to reject the application as the court may not be able exercise its powers under Section 9 of the Act.

16. The position in law has been aptly described by the Supreme Court in the case of SBP & Co. v. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618] wherein the Apex Court has considered the powers of the court or judicial authority at great length when faced with a question as to whether the power to appoint the arbitrator is a judicial power or administrative function. While answering the said question, the Supreme Court also proceeded to observe that the court seized of the application under Section 9 has the power to examine the

validity of the arbitration agreement and also to arrive at the finding whether the dispute is covered by the arbitration clause or not. Upon satisfaction of the preliminary jurisdictional facts, the court can proceed to assume jurisdiction over the subject matter. In the words of the Supreme Court speaking through Hon'ble Balasubramaniyam for Majority (as his lordship then was), it was observed thus:

> *"Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the*

Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication."

(Emphasis Supplied)

45. Now it is to be seen, what is the effect of the pleadings of the parties, more specifically, in para 48 and 49 of OMP 273/2012 and also the statement made by the learned ASG regarding appointment of an Arbitrator, on the dispute regarding tower rental. Whether the dispute regarding tower rental can at all be referred to arbitration.

46. I note, the petitioner in OMP 273/2012 in para 48 has stated *"that due to the inaction and/or failure and/or refusal by the respondent to act in accordance with the agreements in releasing the payments to the petitioner illegally withheld by it, releasing outstanding dues payable under the PMAs; delaying any issuance of any clarifications on rentals and security charges for sights at Delhi and Chennai.....XXXX"*, to which, the reply of the respondent BECIL is *"it is denied that there is any inaction and/or failure and/or refusal by respondent to act in accordance with the agreements. It is denied that the respondent is liable to pay any amount to the petitioner or there is any outstanding dues payable by it under the*

project management agreement to the petitioner. It is denied that there is any delay in issuance of clarifications on rentals and the security charges for sites at Delhi and Chennai".

47. To construe an averment made is an acceptance of a particular fact, it is necessary, that such averment must be specific and unambiguous and not by drawing an inference. To construe that the averments made above relates to tower rentals, the petitioners should have pleaded; the agreement in question (PMA) is in writing and deals with tower rentals and the said agreement contains arbitration clause for settlement of disputes with regard to tower rentals. In the absence of a specific and unambiguous stand in the petition, it cannot be construed that the respondent has accepted the existence of an arbitration agreement with regard to tower rentals. Moreover, any claim by the petitioner with regard to existence of an arbitration agreement qua tower rentals cannot be read in isolation overlooking a specific stand of the petitioner in para 13 of the petition, wherein, the petitioner has conceded that the parties were required to enter into agreements towards the use of CTI tower aperture at the cities of Chennai and Delhi and payment of rent. It cannot now, plead and contend that the averments in para 48-49 must be read to mean that it had taken a stand that the tower rentals are covered by PMA.

48. With regard to the statement made by the learned ASG during the

hearing on May 28, 2012, it is noted, the same has to be read in the context that Union of India is willing to appoint an Arbitrator in terms of the Arbitration clause (emphasis supplied). Suffice to state, with regard to tower rentals, neither there was an agreement nor any arbitration clause. The statement, can be read with regard to the disputes related to the agreements executed between the parties i.e. PMA. It is also the case of MIB during the submissions that after the hearing, dated May 28, 2012, it has pleaded in its reply that in the absence of MIB being a party to the arbitration agreement, the same is not binding on it.

49. Insofar as the judgment on which reliance was placed by Mr.Rajiv Nayar, in the case of *BSNL and Ors. (supra)* is concerned, the Supreme Court was considering a case wherein, existence of an arbitration agreement is not disputed. Rather, clause 25 was an arbitration clause, in terms of which, the Arbitrator was to be appointed by the Managing Director of the appellant company. While hearing an application under Section 11(6) of the Act, no objection was given by the counsel for the appointment of Mr.B.C.Bhattarcharya as an Arbitrator. The said statement was sought to be resiled from by the learned counsel for the appellant, which was not agreed to by the High Court and in the said background, the Supreme Court held, such a statement, cannot be resiled

from in view of the provisions of Order III Rule 1 of the Code of Civil Procedure. The facts of the present case are different inasmuch as there is no arbitration agreement in this case on tower rentals, the judgment would not help the petitioner's case. Further, the order of the Division Bench in W.P.(C) 1257/2012 dated March 2, 2012 would also not help the case of the petitioners.

50. From the above, I note the disputes/differences between the parties primarily are as below:

Petition No.	**Nature of dues**	**Payable under**
OMP 280/2012	(1) Tower rental; Chennai (2) Interest on tower rental for the city of Delhi, Hyderabad And Chennai (3) Interest on STL outstandings	No agreement for (1) and (2) (3) GOPA
OMP 273/2012	(1) Tower rental for the towers at Chennai and Delhi with interest (2) Monitoring charges for 7 cities	(1)No agreement (2) GOPA
OMP 287/2012	(1) Tower rental at Chennai with Interest (2) Monitoring charges for 7 Cities	(1) No agreement (2) GOPA
OMP 295/2012	(1) Monitoring charges in Respect of 8 cities (2) CTI outstandings	(1) GOPA (2) PMA
OMP 291/2012	Tower, open space, common Facilities	Agreement with Prasar Bharti
OMP 294/2012	(1) Monitoring charges (2) CTI charges	(1) GOPA (2) PMA

51. The petitioners in the present petitions have primarily invoked PMA. The disputes under PMA are primarily CTI charges. In OMP 280/2012, OMP 273/2012 and OMP 287/2012, tower rentals have also been claimed, for which, there is no agreement. In the absence of an agreement for referring the disputes relating to tower rentals, a petition

under Section 9 of the Act would not be maintainable nor a direction as sought for by the petitioners for issuance of NOC can be granted. These petitions are accordingly dismissed.

52. Insofar as OMP Nos. 295/2012, 291/2012 and 294/2012, are concerned, they primarily relate to monitoring charges, CTI charges, charges for common facilities etc. under GOPA/PMA/agreement with Prasar Bharti. In OMP 295/2012, the petitioner has only invoked clause 17.1 of the PMA and not the corresponding clause in GOPA. Insofar as OMP Nos. 291/2012 and 294/2012 are concerned, the petitioner has not invoked the relevant arbitration clause till date even though three years have elapsed since the filing of the petitions. This itself can be a ground to dismiss these petitions under Section 9 in view of the pronouncement of the judgment of the Supreme Court in ***Sundaram Finance Ltd. Vs. NEPC India Ltd., (1999) 2 SC 479*** wherein, the Supreme Court has stated, that, when an application under Section 9 of the Act is filed before the commencement of the arbitral proceedings, there has to be a manifest intention on the part of the applicant to take recourse to the arbitral proceedings. Absence of invocation does not reveal the manifest intention on the part of the petitioner to take recourse to the arbitral proceedings. A possible argument of the petitioners on this

could be, it was under the bona fide belief of the matters getting settled.

53. It is true, as seen from the order sheets, the petitions also got adjourned on the ground of settlement. It is also noted, that the last date of migration to Phase III also got extended. Possibility of the petitioners being under the bona fide belief that matters would be settled, and as such, no steps were taken to invoke arbitration clauses, cannot be ruled out, but, the larger question would be whether they have made out a prima facie case, for grant of interim measure. The answer is in the negative, for more than one reason; the amount sought to be recovered by BECIL/Prasar Bharti has a contractual basis, in GOPA/PMA/Agreement in the case of Prasar Bharti; the agreements have been executed as per the policy enunciated by the MIB; the demand made is not speculative. I note from the respective stand of the parties, they are justifying/contesting the demand. The differences need to be decided, through the process of arbitration contemplated under the agreements, that cannot be a reason, not to pay the dues as demanded for the purpose of NOC, in terms of the policy dated July 25, 2011, which provision has been upheld by the Division Bench of this Court in W.P.(C) 1257/2012. Even though, the petitioners have offered to give bank guarantees as security/pay some of the amount, this Court is of the

view, the only order that can be passed, keeping in view the facts is that, insofar as OMP No. 295/2012 is concerned, the petitioner shall deposit the entire amount as claimed from it with BECIL within 10 days from today. On deposit of the said amount, the BECIL, shall issue NOC to the petitioner within two days. Simultaneously, the petitioner shall also invoke the arbitration clause under GOPA. The BECIL shall keep the amount so deposited by the petitioner in an interest bearing FDR(s) till the culmination of the arbitration proceedings by the Arbitrator, to be appointed by this Court in the petition filed by the petitioner under Section 11(6) of the Act and pursuant to invocation of GOPA in terms of this order, so that the interest amount is enured to the successful party. Suffice to state, the deposit of the amount is subject to the orders to be passed in Arbitral proceedings.

54. Similarly, insofar as OMP Nos. 291/2012 and 294/2012 are concerned, the petitioner shall deposit the entire amount claimed from it with BECIL/Prasar Bharti within 10 days. On deposit of the said amount, the BECIL/Prasar Bharti shall issue NOC to the petitioner within two days. Simultaneously, the petitioner shall also invoke the arbitration clause for appointment of an Arbitrator within 10 days from today. The BECIL/Prasar Bharti shall keep the amount so deposited by

the petitioner in an interest bearing FDR(s) till the culmination of the arbitration proceedings by the Arbitrator(s), so that the interest is enured to the successful party. Suffice to state, the deposit of the amount is subject to the orders to be passed in arbitral proceedings.

55. The conclusion is, OMP Nos. 273/2012, 280/2012 and 287/2012 are dismissed.

56. OMP Nos. 291/2012, 294/2012 and 295/2012 are disposed of in terms of the directions in para 53 & 54 of this judgment.

(V.KAMESWAR RAO)
JUDGE

MARCH 10, 2015
akb