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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : December 21, 2012

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FAO(OS) 613/2012

UNITECH WIRELESS (TAMIL NADU) PVT. LTD. Appellant
Represented by: Mr.Sandeep Sethi, Sr.Advocate
instructed by Mr.Ashish Dholakia, Mr.Anand Prasad,
Mr.Sitesh Mukherjee, Mr.Ashish Bhan, Ms.Padma Kaul,
Advocates.

versus

VIOM NETWORKS LTD. & ANR. Respondents
Represented by: Mr.N.K.Kaul, Sr.Advocate and
Mr.Arvind Nigam, Sr.Advocate instructed by
Ms.Ruchi Agnihotri Mahajan, Ms.Shreya Sircar and
Mr.Jai Mohan, Advocates.

AND

FAO(OS) 614/2012

TELEWINGS COMMUNICATION SERVICES Appellant
Represented by: Mr.Sandeep Sethi, Sr.Advocate
instructed by Mr.Ashish Dholakia, Mr.Anand Prasad,
Mr.Sitesh Mukherjee, Mr.Ashish Bhan, Ms.Padma Kaul,
Advocates.

versus

VIOM NETWORKS LTD. & ANR. Respondent
Represented by: Mr.N.K.Kaul, Sr.Advocate and
Mr.Arvind Nigam, Sr.Advocate instructed by
Ms.Ruchi Agnihotri Mahajan, Ms.Shreya Sircar and
Mr.Jai Mohan, Advocates.

**CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH**

PRADEEP NANDRAJOG, J.

1. Respondent Viom Networks Ltd. filed an application under Section 9 of the Arbitration and Conciliation Act 1996 impleading appellants Unitech Wireless (Tamil Nadu) Pvt. Ltd. (hereinafter referred to as 'Unitech') and Telewings Communication Services Pvt. Ltd. (hereinafter referred to as 'Telewings') as respondents No.1 and 2 respectively, pleading that Unitech had obtained a license from the Government of India for Unified Access Services and as per guidelines issued by DoT, Unitech, Tata Teleservices Ltd. and Viom had entered into an umbrella agreement under which Viom had to provide passive infrastructure and Tata Teleservices had to provide infrastructure for transmission. Viom and Unitech executed an Infrastructure Agreement pertaining to passive telecom facilities and services, which agreement was amended from time to time. Unitech entered into a separate Transmission Agreement with Tata Teleservices Ltd. Services were statedly provided by Viom to Unitech for 13 circles. Terms of payment were agreed. There was a lock-in period of 7 years for Anchor Sites and 5 years for Shared Sites. Pleading further that in view of the decision dated February 02, 2012 passed by the Supreme Court, cancelling the 2G licenses issued on 'First Come First Serve' basis and spectrum to be re-auctioned, the license granted by the Government of India to Unitech was cancelled and this resulted in an inter-se dispute between the Unitech Group and the Telenor Group, the shareholders of 'Unitech'. Alleging that about ₹2,000 crores were due to it, Viom pleaded that Unitech was threatening to transfer all its assets to Telewings for around ₹4,000 crores and in respect of

equipment, software and other equipment provided by it prayed for an interim injunction prohibiting Unitech from transferring its business operations to Telewings.

2. When the petition came up for hearing, the learned Single Judge simply adjourned the matter recording that the maintainability of the petition had to be decided on account of the legal issue : Whether the subject matter of the dispute was arbitrable or TDSAT had the exclusive jurisdiction to decide the same. The refusal to grant an ad-interim injunction led Viom to file an appeal which was disposed of with the observation that the learned Single Judge, on an application being filed, would decide whether some interim protection was warranted immediately keeping in view the legal position that pending determination of a Court having jurisdiction the Court was not denuded the power to pass interim directions.

3. On an application filed, the learned Single Judge took up for hearing OMP No.1127/2012 i.e. Viom's application under Section 9 of the Arbitration and Conciliation Act, 1996. Hearing arguments spread over three days on the subject of maintainability of the petition and the date December 17, 2012 arriving; leaving only four working days before the ensuing winter vacations, the learned Single Judge has directed the matter to be listed for further consideration on January 08, 2013 and by way of an ad-interim order dated December 17, 2012, has restrained Unitech from selling, alienating or creating third party rights over its Active Infrastructure including, but not limited to Microwave/GSM antennae and Base Transceiver Station (BTS).

4. Now, up in appeal are Unitech and Telewings.

5. Unfortunately for us, the learned Single Judge has not indicated anything in the order in question as to what was in the mind of the learned

Single Judge which propelled the learned Single Judge to issue the ad-interim direction? What was the pressing and necessitating urgency to pass the ad-interim order and why the directions could not await till January 08, 2013? Nothing has been stated in the order.

6. The urgency to pass an ad-interim order, as we were informed by learned Senior counsel, is that six out of the thirteen circles in respect whereof Unitech had a license from the Government of India have been put up for auction. Unitech did not participate at the auction of the spectrum. On January 19, 2013, Unitech would not be able to provide any telecommunication services under the license it had obtained from the Government. Telewings had been issued the necessary licenses for these circles being the highest bidder and between Telewings and Unitech there is an agreement that the infrastructure created by Unitech would be purchased by Telewings at an approximate price of ₹4,000/- crores. The fear of Viom is that if the active infrastructure provided by it to Unitech was sold, a valuable security available to it would be lost pending arbitration and hence the need to pass an ad-interim direction.

7. With respect to ad-interim orders, we would like to point out that when matters are complex and arguments pertaining to either jurisdiction or grant of interim injunction, as in the instant case, last for three to four days and with so much work pressure upon Judges requiring some time to be taken out for other matters as well, there is bound to be a gap between the date when petitions come up for preliminary hearing and when decision is pronounced. It cannot be that a Judge leaves all judicial work and devotes his/her energy to a singular case. We are finding corporates litigating in Courts as if the Courts are exclusively meant for them. At the drop of the hat appeals are filed and valuable Court time consumed, when

the matter can be resolved from a simple business efficacy point of view.

8. We shall highlight in the instant case, a simple business efficacy solution to the problem, but would note that briefest possible reasons are to be recorded while granting or declining ad-interim injunctions because unless a Judge hears the parties adequately, it may be difficult to give impromptu opinions, for if they are given, they would not be opinions but would be guesswork; and surely judicial opinions are not to be guesswork.

9. Now, we prima-facie do not find any infirmity in the impugned order inasmuch as surely Unitech cannot transfer any asset belonging to Viom which it is using under an agreement with Viom.

10. But in the complex world of telecommunications where many parties pool in their resources and services are made available to consumers through an integrated system, the systems as a whole is required to be sold for the reason stripping any part of the system would reduce everything to a scrap.

11. Our questions to learned senior counsel for the respondent : What if Unitech transfers to Telewings its assets other than what belongs to Viom? And what would Viom do with its infrastructure if it does not have a customer? Were met with the response that Viom would cross the bridge when it is reached.

12. In other words, Viom was willing to run the risk of its assets being reduced to scrap, but was satisfied that even those of Unitech and others could be reduced to scrap.

13. In the OMP filed by Viom there is a very relevant pleading. In para 80 it is pleaded as under:-

“80. In fact, if the respondent No.1 is acquired as a ‘going concern’ by respondent No.2/Telenor, the

respondent No.1 ought to recognize the existing rights of the petitioner under the existing contracts and further clarify that these contracts will be honored by the acquiring entity. However, as of now, there is no clarity with respect to these contracts. The monetary claims against the respondent No.1 by the petitioner for all 19771 sites require to be secured, as if it is a pure asset sale, since Unitech Wireless, i.e. respondent No.1 would be stripped off its assets.”

14. This is the correct approach to solve a problem. If Viom’s infrastructure, which is an integral part of the large infrastructure of Unitech and in which even Tata Teleservices has contributed by making available some infrastructure, is transferred i.e. the entire business of Unitech is transferred to a third party which takes over all the liabilities as well, we see a positive approach in Viom seeking said commitment.

15. What has happened in the instant case is that at a re-auction of the spectrum, Telewings has purchased the spectrum in 6 out of the 13 circles, and we are informed that as and when 7 more circles would be auctioned, Telewings would participate in the auction. The subscriber base of Unitech is four crore connections, as we were informed. Thus, four crore consumers would be affected. Well yes! It could be argued that these consumers of mobile services could shift to an existing service provider. But why force them to do so if a meaningful solution can be found?

16. There is then, the fear of the unknown. It was urged by learned senior counsel for Unitech and Telewings that the Unitech Group and the Telenor Group, the promoters of Unitech, are in serious litigation and they do not know what possible orders Telenor can obtain against Unitech Group with respect to Unitech. But, the fear of the unknown should not prevent us from taking practical decisions by following a course of conduct which best possibly serves the interest of all.

17. If it can be ordered that transfer of assets by Unitech to Telewings would be upon the express condition that Telewings assumes all liabilities and responsibilities under the contract between Viom and Unitech and agrees that under orders of the Court it would be treated that the dues of Viom would be a charge on the infrastructure provided by Viom, in our opinion that would more than safeguard the interest of Viom if additionally we secure Viom by directing that of the approximately ₹4,000 crores to be paid by Telewings to Unitech, ₹500 crores would be kept aside in an escrow account and for which an affidavit would be filed in the OMP before the learned Single Judge.

18. We dispose of the appeals directing setting aside of the impugned ad-interim order and directing that till the learned Single Judge decides OMP No.1127/2012, if in the interregnum Unitech were to transfer its assets to Telewings, the same would be subject to Telewings filing an affidavit before the learned Single Judge affirming that it assumes all liabilities and responsibilities under the contract between Viom and Unitech and agrees that under orders of the Court it would be treated that the dues of Viom would be a charge on the infrastructure provided by Viom. Unitech would file an affidavit that as and when it receives approximately ₹4,000 crores from Telewings it would keep aside ₹500 crores in an escrow account and would do so as and when it receives the money. Telewings shall not physically remove any equipment provided under its agreement with Viom.

19. We make it clear that our order would also be treated as an ad-interim order and we expressly make it clear that we have not expressed any opinion on the merits of the controversy. Whatever facts we have noted and reflected upon are the minimum to speak the minimum.

20. The appeal stands disposed of, but with an advice. Viom and

Telewings should seriously consider what has been pleaded by Viom in para 80 of OMP No.1127/2012.

21. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

DECEMBER 21, 2012
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