

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
NEW DELHI**

**Dated 21<sup>st</sup> August, 2014**

**Petition No.436 of 2013  
(With M.A. No. 334 of 2013)**

Unitech Wireless (T.N.) Pvt. Ltd. ...Petitioner  
Vs.  
Bharat Sanchar Nigam Ltd. & Ors. ...Respondents

**Petition No.437 of 2013  
(With M.A. No. 335 of 2013)**

Unitech Wireless (T.N.) Pvt. Ltd. ...Petitioner  
Vs.  
Bharat Sanchar Nigam Ltd. & Ors. ...Respondents

**BEFORE:**

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON  
HON'BLE MR. KULDIP SINGH, MEMBER**

For Petitioner : Mr. Meet Malhotra, Sr. Advocate  
Mr. Ravi S.S. Chauhan, Advocate  
Ms. Padmaja Kaul, Advocate  
Ms. Shagun Jain, Advocate  
Mr. Prateek Dahiya, Advocate  
Ms. Pallak Singh, Advocate  
Mr. Anant Ramadhyani, Advocate

For Respondent No. 1 : Ms. Maneesha Dhir, Advocate  
Mr. K.P.S. Kohi, Advocate  
Mr. Prashant Jain, Advocate  
Ms. Neha Singh, Advocate

For Respondent No. 2 : Ms. Anamika Tomar, Advocate  
Mr. P.K. Chaudhary, Advocate

For Respondent No. 3 : Mr. Rajiv Kapur, Advocate

## **ORDER**

**By Aftab Alam, Chairperson** – In terms of the Inter-connect agreement entered into between Bharat Sanchar Nigam Limited (BSNL) and the different private mobile phone operators, if an operator asks for removal and cessation of a port<sup>1</sup> installed, at its instance at any Point of Inter-connect (POI) at BSNL's exchange, it is required to pay one year's port charges as the cost of removal of the capacity. The question that arises for consideration before us is whether the cost of removal, as stipulated in the agreement, would still be payable even if the cessation and removal of the port be occasioned due to reasons over which the operator has no control.

The facts of the case are quite simple and brief. The petitioner, M/s Unitech Wireless Private Limited is a mobile phone operator. At the material time it was in inter-connect agreements with BSNL in several circles where it was operating on the basis of the Unified Access Services Licences granted by the Central Government. As provided under chapter 3 of the agreement it had a numbers of ports installed by BSNL in the latter's exchanges to allow for inter-connectivity between the two net-works in each of the circles where it was operating. It was

---

<sup>1</sup>In the Telecommunication Interconnection (Port Charges) Regulation 2001 (Regulation 6 of 2001) framed by the Telecom Regulatory Authority of India 'Port' is defined as under:

“In this Regulation, a “port” means a place of termination on a Switch/distribution frame to provide a point access or interconnection for ingress and egress of traffic between the two Interconnecting networks. The bandwidth of the Port shall be 2.048 Megabits per second.”

duly making payments for all the ports in the different circles as specified by clause 6.3.2, in terms of Regulations framed by the Telecom Regulatory authority of India (TRAI) from time to time. It had also furnished to BSNL, in every circle the requisite bank guarantees as required under clause 7.4 in chapter 6 of the agreement.

All the UAS licences held by Unitech came to be quashed by the Supreme Court by judgment and order dated 12 February 2011 passed in *Centre for Public Interest Litigation Vs. Union of India*<sup>2</sup>. By that judgment the Supreme Court found and held that a large number of UAS licences to different operators (122 in all, including all the licences held by Unitech) were granted by the central government in an illegal way. It, accordingly, quashed all those licences and directed the government to grant fresh licences and allocate the spectrum, released as a result of quashing of the licences, through auction after taking into consideration the recommendations of the Telecom Regulatory Authority of India (TRAI) as was done for allocation of spectrum in 3G band. The operative order is contained in paragraph 81 of the judgment which, in so far as relevant for the present, is reproduced below:

"81. In the result, the writ petitions are allowed in the following terms:

- (i) **The licences granted to the private respondents on or after 10.1.2008 pursuant to two press releases issued**

---

<sup>2</sup>(2012) 3 SCC 1

**on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.**

**(ii) The above direction shall become operative after four months.**

(iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.

(iv) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.

(v) xxxxxxxx

(vi) xxxxxxxx

(vii) xxxxxxxx

(emphasis added)

There was some delay in holding the auction and a number of interlocutory applications (IAs) came to be filed before the court by the Union of India and some private operators seeking some clarification or further directions on different issues. On 24 April 2012, disposing of IA no.5 in Writ Petition 423/2010 filed by the Union of India the Supreme Court passed the following order:

“This is an application by the Union of India for clarification of judgment dated 2.2.2012 and for grant of permission to conduct the auction as per the time schedule set out in Annexure P1 enclosed with the application.

We have heard the learned Attorney General and carefully perused the averments contained in the application.

In our view, it will be just and proper to partially accept the prayer made in the application and extend the time fixed by the Court up to the end of August, 2012.

Accordingly, the application is disposed of in the following terms:

1. The time specified in judgment dated 2.2.2012 in Writ Petition No.423 of 2010 and Writ Petition No. 10 of 2011 for conducting the auction for grant of fresh licenses and allocation of spectrum is extended up to 31.08.2012. This would necessarily mean that the applicant shall have to finalise the auction on or before 31.08.2012.

**2. The existing licenses shall be entitled to continue to operate till 07.09.2012."**

(emphasis added)

On 27 August 2012 while disposing of IA no. 8/2012 filed on behalf of the Union of India for extension of time to complete the auction process, the Supreme Court further extended the time allowed to the licence-holders whose licences were quashed to continue to operate by directing that "the existing licensees shall be entitled to continue to operate till 18 January 2013". Thereafter the matter was taken up on a few dates<sup>3</sup> and finally by the order passed on 15 February 2013 the Supreme Court brought to end the operations by the licence-holders whose licences were quashed. The operative part of the order dated 15 February 2013 is as under:

We have considered the respective submissions. In our view, once the licences granted to the private respondents on or after 10.1.2008 and subsequent allocation of spectrum were quashed by this Court, the Government is duty bound to auction the entire spectrum, which became available as a result of such quashing and it cannot avoid compliance of the Court's order in the guise of acting on the recommendations made by TRAI.

---

<sup>3</sup>18 January 2013, 4 February 2013.

In view of the above, we issue the following directions:

- (i) The entire spectrum released as a result of quashing of the licences on 2.2.2012 should be auctioned without further delay.
- (ii) Since, the issue relating to allotment of spectrum in 900 MHz. band was not subject matter of consideration in Writ Petition Nos.423/2010 and 10/2011, we deem it proper to make it clear that judgment dated 2.2.2012 will have no bearing on the litigation, if any, filed in the matter of allotment/re-allotment of spectrum in 900 MHz. band and the competent judicial/quasi-judicial Forum shall be free to adjudicate upon the pending matters or which may be filed hereinafter in relation to the allotment of spectrum in 900 MHz.band and connected issues.
- (iii) Such of the licensees, who continued operation after 2.2.2012, whether or not they gave bid in the auction conducted on 12.11.2012 and 14.11.2012, shall pay the reserve price fixed by the Government for the purpose of conducting auction in November, 2012.
- (iv) **The licensees, who did not give bid in the auction conducted on 12.11.2012 and 14.11.2012 or who remained unsuccessful shall forthwith discontinue their operations in the concerned circles/areas** and the successful applicants should be allowed to operate in those circles/areas.
- (v) The issue relating to liability of the licensees, who discontinued their operations between 2.2.2012 and this date shall be decided separately.

In terms of the order passed by the Supreme Court, Unitech ceased all its operations in all the circles.

In the meanwhile, however, as directed by the Supreme Court, on 12 & 14 November 2012 the central government held auction for allocation of spectrum and

granted licences to the successful bidders. In the auction one M/s Telewings Communications Private Limited was successful in getting spectrum followed by the grant of UAS licences in six (6) circles, namely (i) Andhra Pradesh, (ii) Bihar, (iii) Gujarat, (iv) Maharashtra, (v) Uttar Pradesh (east) and (vi) Uttar Pradesh (west). Unitech entered into a Business Transfer Agreement with Telewings and transferred its business in those six (6) circles to Telewings. Having thus stepped into the shoes of Unitech, Telewings was successful in getting assigned to it all the ports installed in the exchanges of BSNL in those circles at the instance of Unitech and consequently *the parties (Unitech and BSNL) are not in dispute in the aforesaid six circles. Their dispute relates to the remaining circles where Unitech had to shut down operations on the direction of the Supreme Court.*

In the two petitions filed by Unitech there is express challenge to the demand notices issued by BSNL and the steps taken by it to encash the bank guarantees furnished by Unitech for realization of the demands in six (6) circles, namely (i) Kerala, (ii) Rajasthan, (iii) Madhya Pradesh, (iv) Kolkata, (v) Punjab and (vi) Himachal Pradesh. Apart from the above, in the pleadings there are references to five (5) more circles, namely (i) West Bengal, (ii) Haryana, (iii) Jammu Kashmir, (iv) North East and (v) Karnataka. As there is no reference to any other circle, a faint objection is raised in the reply filed by BSNL that Unitech is not entitled to any relief beyond the eleven (11) circles as mentioned above. We

wish to make it clear that we intend to decide the legal question whether in the facts and circumstances of the case as applied to the terms of the inter-connect agreement between the parties, BSNL is entitled to charge one year's port charges as the cost of removal of the capacity. In case the question is answered in the affirmative, BSNL would be surely free to raise and realise, in accordance with law, similar demands in circles where it has so far not made the demands. But conversely, if the question is answered in the negative, it would be highly anomalous for BSNL to raise demands against Unitech and try to realize the demand amounts in a few circles simply on the ground that those did not form part of the pleadings.

There are a few letters on record that were exchanged between BSNL and Unitech and to which we may now advert. Our attention was drawn first to the letter dated 7 August 2012 from the Asst. General Manager (Coord-1), BSNL to Unitech. The letter is on the subject of "Cancellation of 2G licences by Hon'ble Supreme Court of India- Termination of Interconnect Agreement And Closure of POIs". It refers to the order of the Supreme Court passed on 24 April 2012 (by which the time allowed to the operatives under the quashed licences was extended till 7 September 2012) and states that under clauses 8.2.1 (a) and (b) of the inter-connect agreement, the agreement could be terminated on 7 September 2012 without any further notice. It further says that no request was received from

Unitech for surrendering its POIs and goes on to say that (even) in the absence of any such request from Unitech its POIs could be disconnected “as per Hon’ble Court order and Interconnect agreement”. What reply was given by Unitech to this letter is not known to us.

The second letter that was brought to our notice is dated 17 August 2012. It is from Unitech and pertains to Odisha circle only. The letter states that in view of cancellation of its licences by the Supreme Court the corporate management of the company had decided to gradually scale down its operations in Odisha circle by 31 August 2012 and asks BSNL to immediately take back the space and ports in the E1 and L-II Tax locations as indicated in the letter. The letter then gives the list of 123 ports (out of a total of 127) at different places that Unitech wished to surrender.

The third and the final letter is once again from Unitech. It is dated 18 January 2013 and was written apparently in response to the impugned demand raised by BSNLL in six (6) circles. The letter refers to an earlier request for surrender of E1 ports, the orders of the Supreme Court dated 2 February 2012 and 14 January 2013 and clauses 8.2.1 (a) and (b) of the agreement and goes on to say as under:

“In view of the above said order and in accordance of the terms and conditions of the Interconnect Agreement M/s Unitech Wireless (Tamilnadu) Private Limited will discontinue its Pols in Kerala service areas. It may also be noted that the interconnect agreements envisages that

the interconnection between BSNL and M/s Unitech Wireless (Tamilnadu) Private Limited will remain valid only during the currency of the respective Licences.

We would like to bring following additional information to your knowledge:

1. We have already paid the advance rental for Ports charges till 31<sup>st</sup> Mar 2013 and this date is well beyond the said date.
2. We have already made an excess payment made from our side and we have all the legal right to claim the refund.
3. We have already paid the advance rental for Infrastructure till 31<sup>st</sup> Mar 2013 and this date is well beyond the said date.”

The letter finally disputes the Unitech’s liability to pay the demands of cost of surrender raised by BSNL or any claims arising from the termination of the inter-connect agreement. The same letter was given by Unitech to the BSNL authorities in eleven (11) circles as mentioned above.

We have referred to the three letters only because those are part of the record but those letters are clearly of not much help in deciding the case. From the letters it simply appears that, though accepting that the bilateral inter-connect agreement had come to end as the result of the licences of Unitech being quashed by the Supreme Court, BSNL maintained that it was nevertheless entitled to charge one year’s port charges as the cost of removal of the capacity. Unitech on the other hand took the position that in terms of the agreement it was not liable to pay any charges for the surrender of the capacity. Further, we are clear that this case has to be decided on the basis of the construction of the relevant clauses of the Inter-connect agreement between the two sides, regardless of the later conduct of the

parties as it is well settled that unless there is any ambiguity, the clear terms of the contract cannot be read to mean differently in light of the later conduct of the parties. A term of the contract must be held to mean what the contracting parties intended it to mean at the time of execution of contract and that meaning will not vary simply because one or both parties later acted differently<sup>4</sup>. The conduct of the parties may be an aid to construction only in case the terms of the contract are ambiguous and capable of being understood in more ways than one.

Before proceeding further, however, we may note two other facts. One is that Unitech had paid, in advance, the annual rental for all its ports with BSNL in all the circles where it was operating till March 31, 2013, that is, a fortnight beyond the date when it ceased its operations in terms of the Supreme Court order dated 15 March 2013. The second is that in raising the impugned demands BSNL has discounted the period up-to March 31 2013 (till when the rent was already paid) and has taken into account only the period from 1 April 2013 till the expiry of one year from the date of request for surrendering the ports.

Now we turn to the relevant clauses of the inter-connect agreement. Chapter 3 of the agreement deals with Inter-connect Capacity and clause 3.5 lays down the terms relating to “Removal and Cessation of Interconnect Capacity”. Sub-clauses 3.5.1, 3.5.2 and 3.5.4 are relevant for the present and are reproduced below:

---

<sup>4</sup>See Bank of India Vs. K. Mohandas: (2009) 5 SCC 313 paragraph 28.

### “3.5 REMOVAL AND CESSATION OF INTERCONNECTCAPACITY

- 3.5.1 Either party may place a written order on the other for the removal and cessation of interconnect capacity with full justification.
- 3.5.2 If UASL required the removal of, in part or in full, interconnect capacity already provided under this agreement then an order (in short “removal order”) shall be placed on the BSNL to that effect. BSNL will in turn verify the requirement and remove the capacity within 30 days (or mutually agreed time frame) from the date of receipt of the removal order.  
If BSNL after receiving the request disagrees with the proposed removal, then the capacity will not be removed until joint agreement is reached in accordance with the dispute resolution procedure as laid down in Chapter 9.
- 3.5.3 A removal certificate will be issued by BSNL to the UASL for the removed capacity within one month of the completion of the removal work.**
- 3.5.4 The cost of removal of such capacity thus agreed upon, as payable by the CMTS PROVIDER to BSNL shall be the one-year’s port charges as prescribed in Clause 6.3.2 in respect of such capacity. In the case of links provided on Rent & Guarantee basis, the prevalent terms and conditions of BSNL for Rent & Guarantee cases, will apply.”**

(emphasis added)

Chapter 6 of the agreement deals with the Inter-connection charges and clause 6.3.2 specifies the port charges.

The other important set of provisions is the one dealing with the term and termination of the agreement which is contained in chapter 8 of the agreement. Clauses 8.1, 8.2.1, 8.2.2 and 8.2.3 which are especially important for the present and reproduced below:

“8.1 TERM: This Agreement unless terminated earlier, shall be in force for a period of 10 years from the date of signing of the Agreement. The

same shall be renewable for a further period of 10 years in writing by consent of parties, on terms, which may be mutually agreed.

## 8.2 TERMINATION:

8.2.1 This Agreement shall continue for the period indicated in Clause 8.1 above **unless any of the following events occur:**

(a) **Either Party ceases to hold a licence under Section 4 of the Indian Telegraph Act.**

(b) An order is entered by a court of competent jurisdiction mandating the winding-up or dissolution of a Party, or appointing a receiver or liquidator for such Party or having a comparable effect;

(c) If in the interest of national security or otherwise, it is ordered by a Competent Authority such as Licensor/TRAI, that the agreement may be terminated,

(d) If there is a breach of any of the technical and financial obligations as covered in clauses 2.1.3, 2.1.5.1, 2.1.8, 2.1.9.1, 2.1.9.2, 2.5 and 6.4.6

**in which case this Agreement shall immediately be terminated, without any further notice.**

8.2.2 **This Agreement also may be terminated by either Party giving 30 days' notice to the other in the event that either Party:**

(a) breaches any provision of this Agreement; provided, however, that the breaching Party has been notified in writing of its failure by the non-breaching Party and the breaching Party has not remedied its failure within twenty (20) Working Days; and the approval of Licensor or TRAI as the case may be, has been obtained for such termination. In the event, the approval is accorded with conditions, regard being had to the general interest of the customers, the same will be fully complied with before the final act of disconnection of interconnection arrangements becomes effective. Provided, however, in the event no intervention is made by the Regulator/Licensor during the notice period, the approval shall be deemed to have been accorded.

(b) ceases to carry on business,

(c) **Either Party is unable to discharge its obligation under this agreement.** However, in case of Force Majeure procedure as indicated below shall be followed:

#### FORCE MAJEURE

Neither party shall be liable for any breach of this Agreement (other than a breach for non payment) caused by an act of God, insurrection or civil disorder, war or military operations, national emergency, fire, flood, lightning, explosion, subsidence, industrial dispute of any kind. The Party affected by such force majeure shall promptly notify the other Party of the conditions and the details thereof. If as a result of force majeure, the performance by affected Party of its obligation under this agreement is only partially affected, such Party shall nevertheless remain liable for the performance of those obligations not affected by such force majeure. If the force majeure lasts for more than the continuous period of 90 calendar days from the date of the notification, and continues to prevent the affected Party from performing its obligations in a whole or in material part, the either party shall be entitled to, terminate this agreement by giving not less than 30 calendar days written notice to the other Party.

**8.2.3 Termination of this Agreement shall be without prejudice to a Party's rights, liabilities or obligations that may have accrued prior to such termination."**

(emphasis added)

Clause 3.5.4 of the inter-connect agreement, as may be seen above, plainly stipulates payment of port charges for one year as the cost for removal of the capacity. The stipulation is unqualified. In other words, the payment of cost is regardless of the reason for the request for cessation and removal of capacity. On a plain reading of the clause, the cost would be payable irrespective of whether the inter-connect agreement remains subsisting or it comes to end. Ms. Maneesha Dhir, counsel for BSNL, accordingly argued that the reason for cessation and removal of capacity might have been the termination of the inter-connect

agreement, which, in turn, was due to the quashing of the UAS licences of Unitech by the Supreme Court but that would not relieve Unitech from the liability to pay the cost of removal. And the liability thus accrued would be enforceable by virtue of clause 8.2.3 of the agreement.

The contention appears unexceptionable if the scrutiny is confined to clauses 3.5.4 and 8.2.3. But it is basic that the terms of an agreement cannot be seen in isolation. The agreement must be read as a whole and the true meaning and scope of each of the terms must be construed in juxtaposition with the other terms in the agreement. Keeping this in mind we now turn to the termination clause in the agreement. Clause 8.2 expressly deals with termination of the agreement. Clause 8.2.1 provides for automatic termination of the agreement in case of certain external events or certain specified breaches of its terms. One of the external events [under sub-clause 8.2.1 (a)] is that either party to the bipartite agreement ceases to hold a licence under section 4 of the Indian Telegraph Act. As opposed to clause 8.2.2 that requires a thirty days' notice, the termination under clause 8.2.1 is self-effectuating and warrants no notice. Under sub-clause 8.2.1 (a) the termination of the agreement takes place simply as a consequence of one of the parties ceasing to hold the licence and in that event it is no longer possible for the two sides to keep the agreement alive even in case they so wish.

A contract may be discharged in a variety of ways. It can be discharged by performance, it can be discharged by breach, it can be discharged in terms of the contract itself, and it can be discharged by frustration. Frustration of contract is the term commonly used to describe the situation where the performance of the contract is rendered impossible or impractical due to some supervening circumstances. The statutory provision to deal with such cases, in the absence of any dissolution clause in the agreement itself, is contained in section 56 of the Indian Contract Act. Having been accorded statutory recognition, the law relating to frustration of contract in India is quite different from the law in England and one of the earliest authoritative exposition of the difference in the law is to be found in the Supreme Court decision in *Satyabrata Ghose Vs. Mugneeram Bangur & Co*<sup>5</sup>. In that decision Mukhrejee J, speaking for the court, examined all the different principles evolved by the English courts for rationalizing the discharge of the contract as a result of its performance becoming impossible due to some supervening circumstances. After discussing some English decisions the judgment referred with approval to a decision of the Nagpur High Court and an earlier decision of the Supreme Court itself:

The question was considered and discussed by a Division Bench of the Nagpur High Court in *Kesari Chand v. Governor-General-in-Council* [ILR 1949 Nag 718] and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. The doctrine

---

<sup>5</sup> 1954 SCR 310

is a special case of impossibility and as such comes under Section 56 of the Indian Contract Act. We are in entire agreement with this view which is fortified by a recent pronouncement of this Court in *Ganga Saran v. Ram Charan* [1952 SCR 36 at 52] , where Fazl Ali, J., in speaking about frustration observed in his judgment as follows:

“It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look primarily to the law as embodied in Sections 32 and 56 of the Indian Contract Act, 1872.”

We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *dehors* these statutory provisions.

The judgment further said:

..... In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word “impossible” in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

..... According to the Indian Contract Act, a promise may be express or implied [Vide Section 9]. **In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself** and such cases would be outside the purview of Section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under Section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act.

The classic exposition of the law in *Satyabrata Ghose* was later reiterated by the Supreme Court in *The Naihati Jute Mills Vs. Khyaliram Jagannath*<sup>6</sup>.

More recently, a learned Single judge of the Delhi High Court in a case (*Continental Enterprises Ltd. Vs. State Trading Corporation of India*<sup>7</sup>), dealing with the overlapping *force majeure* clause in the agreement referred to the several Supreme Court decisions, including the ones in *Satyabrata Ghose* and *The Naihati Jute Mills* and made the following observations:

20. As far as the concept of force majeure is concerned, I find that Supreme Court in *Dhanrajamal Gobindram v. Shamji Kalidas and Co.* reported in AIR 1961 SC 1285 has held that the intent of such a clause is to save the performing party from the consequences of anything over which he has no control.

21. The Apex Court in *Satyabrata Ghose v. Mugneeram Bangur & Co. and Anr.* reported in AIR 1954 SC 44, para 9, has further held that the word "impossible" in Section 56 of Contract Act has not been used in the sense of physical or literal impossibility. The Supreme Court held that performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the party finds it impossible to do the act which he promised to do.

22. The Supreme Court in *Smt. Sushila Devi and Anr. v. Hari Singh and Ors.* reported in AIR 1971 SC 1756 has held as under:

11. ...Section 56 of the Indian Contract Act. The view that Section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. Section 56 of the Indian Contract Act lays down a rule of

---

<sup>6</sup> AIR 1968 SC 522, paragraph 7.

<sup>7</sup> MANU/DE/3425/2009

positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract.

12....That object became impossible because of the supervening events. Further the terms of the agreement between the parties relating to taking possession of the properties also became impossible of performance. Therefore we agree with the trial court as well as the appellate court that the contract had become impossible of performance.”

The upshot is that the law does not expect anyone to do something that has become impossible or completely impractical from the point of view of the original intent of the contracting parties as a result of some supervening circumstance. Such an eventuality leads to the frustration of the contract as provided under section 56 of the Contract Act. But in the present case there is no need for any recourse to section 56 of the Contract case because the inter-connect agreement itself provides for the dissolution of the contact in such an event.

Let us briefly recapitulate the basic facts of the case. Unitech lost its licences as those were quashed by the Supreme Court. The loss of the licences denuded Unitech of the competence to be in any agreement with BSNL. In other words the Supreme Court decision knocked off the very basis of the agreement and it triggered of the termination of the licence as stipulated in clause 8.2.1 of the

agreement. As result of the termination of the licence it became legally impossible for Unitech to continue to maintain and operate the ports it had got installed at BSNL's exchanges. It needs also to be kept in mind that over this entire chain of events Unitech had completely no control.

In light of the discussions made above we fail to see any application of clause 3.5.4 of the inter-connect agreement and find it difficult to sustain the impugned demand by BSNL for payment of cost of removal of the ports.

We are also unable to appreciate the reliance placed by Ms. Dhir on clause 8.2.3 of the agreement. That clause deals with liabilities or obligations that might have accrued *prior to termination* of the agreement. In the present case no liability has accrued prior to the termination of the licence but the cessation of capacity and removal of ports are *the result of* the termination of licence.

In support of her submissions Ms. Dhir placed reliance on the decisions of the Supreme Court in (i) *Ganga Retreat & Towers Ltd. Vs. State of Rajasthan*<sup>8</sup> (paragraph 28) and (ii) *Dhanrajamal Gobindram Vs. Shamji Kalidas & Co.*<sup>9</sup> (paragraph 17). The passage relied upon by Ms. Dhir in the first decision is on section 19 of the Contract Act and we are unable to see its application to the facts of this case. The second decision deals with the vagueness of the *force majeure* clause and it is in fact against the case of BSNL.

---

<sup>8</sup> (2003) 12 SCC 91

<sup>9</sup> (1961) 3 SCR 1285

In light of the discussion made above we are of the considered view that in the facts and circumstances of the case it is not open to BSNL to demand port charges for one year as the cost for cessation of capacity and removal of the ports.

We order accordingly.

But before closing the record of the case it is important to say that the decision in this case is primarily based on the finding that the reason that caused the termination of the inter-connect agreement, namely the quashing of Unitech's licences by the Supreme Court was a circumstance over which the licence-holder had no control. But a party to the inter-connect agreement may lose its licence under section 4 of the Indian Telegraph Act for several reasons. Some of the reasons may be directly attributable to the licence-holder, for instance non-payment of the annual licence fee or committing breach of the terms of the licence and thereby forcing the licensor (the central government) to cancel the licence. Such a case would be a case of self induced frustration and in such cases the plea of frustration would not be sustainable. In *Ganga Saran Vs. Ram Charan Ram Gopal*<sup>10</sup> Justice Fazal Ali speaking for the Supreme Court observed: "Clearly, the doctrine of frustration cannot avail a defendant when the non-performance of the contract is attributable to his own default". Again in *Bhoothalinga Agencies Vs.*

---

<sup>10</sup> [1952 SCR 36]

*VTC Poriaswami Nadar*<sup>11</sup> the Supreme Court recognized the concept of self induced frustration, and held that: “the doctrine of frustration cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party”. The loss of licence for any reason attributable to the licence-holder would equally terminate the inter-connect agreement as provided under clause 8.2.1 but that would impact the provisions of the inter-connect agreement between the licence-holder and BSNL quite differently and in such a case the present decision shall have no application.

In the result the petitions are allowed subject to the observations made above.

.....  
**(Aftab Alam)**  
**Chairperson**

.....  
**(Kuldip Singh)**  
**Member**

---

<sup>11</sup> [1952 SCR 65]