IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION APPLICATION (L) NO.34646 OF 2022

World Phone Internet Services Pvt. Ltd.] .. Applicant

Versus

One OTT Intertainment Ltd. In Centre] .. Respondent

Mr.Manoj Harit a/w Aditya Vaibhav Singh, Pooja Harit, Hamza Lakdawala, Niket Harit for the Applicant.

Mr.Cyrus Ardeshir a/w Komal Khushalani, Shadab Jan, Prangana Barua and Mufaddal Paperwalla i/b M/s. Crawford Bayley & Co. for the Respondent.

CORAM : BHARATI DANGRE, J
RESERVED ON : 24th NOVEMBER, 2022
PRONOUNCED ON: 2nd DECEMBER, 2022

JUDGEMENT

1 The Petition/Application filed under Section 9 of the Arbitration & Conciliation Act, 1996, by World Phone Internet Services Pvt Ltd. (for short referred "WPISPL"), a Delhi based Class "A" Unified License ISP, seek restrain order against the Respondent One OTT Intertainment Ltd. In Centre (for short referred as "OIL"), from suspending internet services of the customers/subscribers (nearly 22,000 plus) of the Applicant and of the joint venture established under Memorandum of

Understanding (MOU) dated 19.06.2021 entered between the two.

2 The Agreement refer to a strategic licensed partnership between the Applicant and Respondent to leverage each others strength to scale up the business in Pan India and for exploring the possibilities for providing state of art Internet Services to the subscribers, at a charge not exceeding the maximum retail price. The MOU record the broad understanding of the initial working arrangement with a desired outcome of leading to a long term commercial relationship.

It is this Agreement captioned as "Memorandum of Understanding" which, apart from providing the terms and conditions of the business deal struck between the two parties before me, contain clause for its tenure and succinctly cull out obligations of the parties. The relationship between the parties is specifically set out in form of clause 4 of the MOU in the following words :

> "**4 Relationship between the parties**
>
> Nothing contained in this MOU precludes either Party from its normal business affairs and efforts in connection with its products and services in the territories other than the selected cities in Proposed Region. The relationship between the Parties will at all times be that of independent contractors. Subject to the terms of Arrangement mentioned under this MoU, neither Party will have the authority to contract for or bind the other in any manner whatsoever. This MoU confers no rights upon either party except those expressly granted herein, and does not confer any right

upon either party to make any representation or commitment on behalf of the other."

The legal character of the MOU is set out in Clause 7, as under :

> **Legal Character :**
> It is understood that this MOU constitutes a broad summary of understanding between the Parties with respect to the Arrangement and is subject to their respective corporate approvals and final legal documentation.

There is a stipulation for the event of default, which enlist the situations which would amount to "Default" and it is contemplated that in case of any such occurrence, the non-defaulting party shall have right to terminate the MOU under Clause 9.

3 This MOU also provide for Dispute Resolution Mechanism in Clause 13, which has adopted Arbitration as a mode for resolution of dispute and in Clause 13.1, it is spelled out as under :

> **13.1 Arbitration Procedure** :
> Any dispute, controversy, claim or disagreement of any kind whatsoever between the Parties in connection with or arising out of this MOU or the breach, termination or invalidity thereof (hereinafter referred to as a Dispute) shall be resolved by arbitration irrespective of the amount in Dispute or whether such Dispute would otherwise be considered justifiable or

> ripe for resolution by any court. This MOU and the rights and obligations of the Parties shall remain in full force and effect pending the award on such arbitration proceedings.

Apart from this MOU, the parties also entered into an addendum on 15.07.2021 where they permitted inclusion of one clause which made a provision for the interregnum, pending the novation of links availed by WPISPL to OIL and also for changing its name in the customers record to that of "OIL"

4 The dispute arose between the two, and though I am not expected to delve deep into it, I will be briefly referring to it a little while later, the result of the dispute was suspension of internet services, including that of various organizations, and as per the Applicant, around 22,000 customers were put to serious prejudice, which resulted in frantic calls being received by the applicant, demanding resumption of internet services. It aggravated further on 28.10.2022, when the applicant was served with an email communication from the respondent in which the respondent raised a demand of Rs.9.34 Crores and alleged violation of terms and conditions of the MOU. It was indicated that this notice may be considered as issued under clause 9.3 of the MOU, which amounting to termination of the MOU.

The applicant allege that under duress, the amount claimed by the respondent was handed over through post-dated

cheques, and only the internet services were resumed and even thereafter huge whopping sum of Rs.1.2 Crores was cleared by the applicant, but respondent refused to withdraw the notice of termination.

The applicant makes a grievance that though the services were resumed, it received several threats of termination and it also resulted in actual termination of the contract entered between the respective customers which forced it to grant immediate amount worth lakhs of rupees to some of the customers in LCO segment, and this caused loss of Rs.15.32 crores.

5 In para 30 of the Application, following statement is made.

> "30. It is manifest from the facts and circumstances of described hereinabove that the Applicant will has no other option but to invoke clause 13 of the MOU dated 19/06/2021 and refer the dispute to arbitration . More so, when the actual loss suffered by the Applicant due to the unlawful act of disruption of internet services is nearly twice the alleged claim made by the Respondent. Moreover, the claim made by the respondent relates to the Advance Dilution Plan which envisages reduction of advance to bring it to the tune of Rs.2.67 Crores by end of March 2023 . The applicant has always been ready and willing and continues to be so to adhere to the Advance Dilution Plan subject to emergent exigencies. On the other hand , in case the internet services are suspended for the second time it would certainly result in the total closure of the Applicant as well as the joint venture. The loss and damages would be unquantifiable and

immense. Considering the fact that the Applicant has built a customer base of more than 22,000 over a period of 22 years. It was this customer base and a pan India grip over the market that attracted the respondent to enter into the MOU in the first place."

6 It is, in this, background, when applicant apprehends prejudice, hardship, total destruction of it's business and goodwill and huge monetary loss and damages, the Application is filed seeking grant of injunctive orders against the Respondent, restraining it from disruption of internet services, which will help save and salvage the business in which the respondent itself has 50% partnership.

7 Heard the learned counsel Mr.Manoj Harit for the applicant and Mr.Cyrus Ardeshir for the respondent who would raise preliminary objection about maintainability of the Application under Section 9 of the Arbitration Act, on the ground that since the special forum is created by the statute for determination of disputes arising between two or more service providers in the Telecom Regulatory Authority of India Act, 1997 (TRAI) in the from of Telecom Dispute Settlement and Appellate Tribunal (TDSAT) with the jurisdiction of the Civil Court specifically ousted, he would submit that the arbitration proceedings would not lie despite the parties, concurring to refer their dispute for arbitration.

By referring to the statutory enactment in the form of TRAI Act, 1997, the learned counsel would submit that admittedly the Applicant is a unified licensee, and hence, is a "service provider" as defined in Section 2(e) of the Act. By laying emphasis on Section 14, Mr.Ardeshir would submit that the statute provides for establishment of Appellate Tribunal, which is permitted to adjudicate "any dispute" between two or more service providers, the submission advanced is that the remedy available is to file appropriate proceedings before the TDSAT.

He would place reliance upon the decision of the Hon'ble Apex Court in the case of *Vidya Drolia and others vs. Durga Trading Corporation, (2021) 2 SCC 1*, which has construed in detail the non arbitrability of a particular dispute by laying the fourfold test, when the subject matter of a dispute is not arbitrable, one of the condition being, when subject matter of the dispute is expressly or by necessary implication non-arbitrable as per mandate of a statute.

The learned counsel would submit that it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability, and further lays down that all questions about the said right and liability shall be determined by the Tribunal so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

8 Per contra, the learned counsel for the applicant Mr.Harit would contest the submission so advanced, by requesting me to carefully peruse the MOU executed between the parties, and he would submit that the MOU is indicative of a contract being entered into between two parties with no involvement of the TRAI, and ultimately under this document, both the parties are conferred with obligations and since the issue arises out of failure to honour them, the dispute is *inter se,* without any involvement of the TRAI. According to him, there is no exclusion of the proceedings under the Arbitration Act.

He would place reliance upon the decision in the case of *Viom Network Limited & Anr vs. S Tel. Pvt. Ltd. & Anr., 2013 (139) DRJ 641* and the specific observation in the said decision, in Para 13, to the following effect :

> "13. Thus the only controversy for adjudication is whether the petitioners as Infrastructure Providers Category-I are a 'service provider' under the TRAI Act. If the petitioners are to be so held to be a service providers, then the disputes which have arisen between the petitioners and the respondent S Tel Pvt Ltd. would be between two service propviders as envisaged under Section 14(a)(ii) of TRAI Act. However if the petitioners were to be held to be not a 'service provider' within the meaning of Section 14(a)(ii), then the adjudication of the said dispute would be as per the arbitration agreement between the parties."

Another decision of the Delhi High Court in the case of ***Vicom Networks Limited Vs. Videocon Telecommunications Limited 2016 SCC OnLine Del 5219*** is also pressed into service.

Further, he also draw my attention to out two orders passed by the TDSAT in the case of *C.H. Entertainment Pvt. Ltd. Vs. Connect Broadband Services Limited 2007 SCC OnLine 2777 TDSAT 277* and *Aircel Digilink India Ltd. Vs. Union Of India 2005 SCC OnLine TDSAT 105*.

9 The contention of learned counsel for the applicant precisely is, since the dispute do not involve TRAI, but arises out of interest arrangement between the parties, worked out through the MOU, which specifically contain an arbitration clause, which provide for resolution of dispute through arbitration procedure, the intention of the parties must be honoured.

This contention is, raised in view of clause 13 of the MOU when the parties have agreed that the Award passed by the Arbitrator would be final and binding .

10 In view of the position of law that is placed before me in support of the rival contentions about maintainability of arbitration proceedings, I must now turn to the MOU drawn between the parties, to ascertain the true nature of relationship between them parties and to find out whether it is only restricted and involve the two of them.

The MOU dated 19.06.2021 entered between WPISPL and OIL highlight the background, being OIL is in the business of providing broadband internet and other related services pursuant to unified license dated 27.05.2014 and the MOU is premised on possibility of leveraging each others strength to scale up business in Pan India, for the purpose of providing state of art internet services to the subscribers and WPISPL represented to OIL that they can identify approximately 20000 retail customers to begin with, and which would fetch huge revenue.

11 In this background, the parties agreed to a frame work of collaboration amongst themselves, for extension of internet services in the proposed region/area through combination of each others and work out terms and conditions, of the arrangement, for the period specified in the MOU. This contemplated booking of the suppliers directly on prepaid basis and OIL paying whopping commission of Rs.35 lakhs per month provided actual monthly collections, including GST calculated after deduction of partner commission to Local Cable Operator (LCO) from subscribers identified by WPISPL is equal to, or above Rs.3.26 crores, in such month or OIL to maintain monthly profit and loss statement and provide the same to WPISPL and shall incur the expenses mentioned in Annexure I. When the heads which form part of Profit and Loss account are concerned, it would cover the bandwidth cost and LCO commission; Fiber

Lease expenses etc., apart from certain other Indirect Expenses for keeping the business running. The obligations cast on the parties are reciprocal in nature; each party having undertaken to indemnify and keep indemnified other party against demands, penalties etc.

From the perusal of the MOU, it is evident that both the parties are the Unified licensee and are in the business of broad band internet brand width and have agreed to amalgamate their ventures by arriving at an understanding of sharing the profits.

12 Section 7 of the Arbitration Act, defines 'Arbitration Agreement' to mean an agreement through which the parties agree to submit to arbitration, or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.

The essence of making reference to Arbitration, is existence of an Arbitration clause and 'Arbitrability of the Dispute'. An Arbitral Tribunal may lack jurisdiction if the dispute is non- arbitrable and in such a case, the jurisdiction of the Arbitral Tribunal itself gets impacted.

13 In *Booz-Allen and Hamilton INC Vs. SBI Home Finance Limited, (2011) 5 SCC, 532,* three facets of non-arbitrability were highlighted;

> (i) Whether the dispute is capable of adjudication and settlement by arbitration ie, whether the disputes having regard to their nature could be resolved by a

private forum chosen by the parties or whether it would exclusively fall within the domain of public fora.

(ii) Whether the disputes are covered by arbitration agreement or whether they are excluded from it's purview
(iii) Whether the parties have referred the disputes for arbitration contemplating that even if the dispute is arbitrable, if the parties have not chosen the said forum, then the Tribunal will not get jurisdiction to decide the dispute

Booz-Allen Vs. Hamilton (supra) drew a distinction between actions in personem, i.e. actions which determine the rights and interest of the parties themselves in the subject matter of the case and actions in rem which refer to actions determining the title of property and rights of the parties not merely amongst themselves, but also against all the persons at any time claiming an interest in the property. Rights, in personam, were considered to be amenable to arbitration, whereas disputes involving rights in *rem* were left for adjudication by the Courts and Public Tribunals as they are unsuitable for private arbitration.

14 Some of the well recognized examples of non-arbitrable disputes, which by now are clearly spelt out are; (i) disputes relating to rights and liabilities which give rise to, or arise out of criminal offence (ii) matrimonial disputes (iii) Guardianship matters (iv) Insolvency and Winding up matters (v) Testamentary matters (vi) Eviction or tenancy matters governed

by special statutes, where tenant enjoys statutory protection against eviction, in which case, the specified Courts which are confered jurisdiction to grant eviction, shall exclusively decide the issues. Further, the dispute relating to terms and conditions, of a Private Trust under the Trust Act, are also non-arbitrable. Another category of disputes which are held to be non-arbitrable, are the ones which arise out of an enactment, which has constituted forum with extensive and wide powers to determine them and the statutes which have excluded the normal civil remedy available in the Civil Court. The Consumer Protection Act,1986 the Industrial Disputes Act, 1947, are some of the Special statutes where the legislature has ousted the jurisdiction of the Civil Court and intended that the interest of the workman and consumers in larger public interest in the form of special rights would be adjudicated by constituting a judicial forum with the powers that a Civil Court. Neither the workman nor the consumer can waive their right to approach the specially created forum by opting for arbitration.

15 The three categories which would make the dispute non-arbitrable was evolved in case of *The Wolverhampton new Waterworks Company v/s Hawkesford ,* 141 ER 486, and the test laid down read as under:-

> "There are classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is

> affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there unless the statute contains words, which expressly or by necessary implications exclude the common law remedy and the parties swing has its election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action of common law, but there is a third class, i.e. where the liability not existing at common law is created by a statute which at the same time, gives a special and particular remedy for enforcing it"

Implicit non-arbitrability is established, when by a mandatory law, the parties quintessentially part way from contracting out and waiving the adjudication by the designated Court or the specified public forum, leaving no choice. In such circumstances, a person who insist on the remedy must seek his remedy before the forum stipulated in the statute and in no other way.

16 In case of *M/s.Transcore Vs.Union of India, 2008(1) SCC 125*, the Hon'ble Apex Court examined the doctrine of election in the context whether an order under the proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, (1993) (The "DRT Act") is a condition precedent to taking recourse to the Secularization and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002 (the "NPA Act"). For analysing the scope and remedies under the two Acts, it was held that the NPA act is an additional remedy which is not inconsistent with the DRT Act and reference was made to the doctrine of election in the following terms :-

> "64 In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies: inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Judisprudence, 2d. Vol.25 p.652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to *Snell's Principles of Equity,* the doctrine of electoin of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application"

17 In case of *Vidya Drolia Vs. Trading Corporation, 2021(2) SCC page 1,* the importance and significance of a 'statute' is found to worded thus :-

> "68. Statutes unfailingly have a public purpose or policy which is the basis and purpose behind the legislation. Application of mandatory law to the merits of the case do not imply that the right to arbitrate is taken away. Mandatory law may require a particular

> substantive rule to be applied, but this would not preclude arbitration. Implied non-arbitrability requires prohibition against waiver of jurisdiction, which happens when a statute gives special rights or obligations and creates or stipulates an exclusive forum for adjudication and enforcement. An arbitrator, like the court, is equally bound by the public policy behind the statute while examining the claim on merits. The public policy in case of non-arbitrability would relate to conferment of exclusive jurisdiction on the court or the special forum set up by law for decision making. Non-arbitrability question cannot be answered by examining whether the statute has a public policy objective which invariably every statue would have. There is a general presumption in favour of arbitrability, which is not excluded simply because the dispute is permeated by applicability of mandatory law. Violation of public policy by the arbitrator could well result in setting aside the award on the ground of failure to follow the fundamental policy of law in India, but not on the ground that the subject matter of the dispute was non-arbitrable"

18 On a detail analysis of the earlier precedents about the statutes containing a clause ousting the jurisdiction of the Civil Courts, in order to engage arbitration in commercial/other matters, the fourfold test for determining whether the subject matter of a dispute in an agreement is not arbitrable, came to be laid down as under :-

> 76.1 (1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

76.2 (2) When cause of action and subject matter of the dispute affects third party rights: have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

76.3 (3) When cause of action and subject matter of the dispute related to alienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

76.4 (4) When the subject matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5 (5) These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-artbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable"

19 On laying down the fourfold test to determine the non-arbitrability, the Insolvency or Intra company disputes to be addressed by a centralized forum, was considered to be the efficient and efficacious remedy for the actions in rem, similarly, the grant and issue of Patent and registration of trade marks have been held to be exclusive matters falling within the sovereign or government functions and having no *erga omnes* effect as such grants confer monopoly rights and therefore, held to be non-arbitrable.

Decision of Delhi High Court in *HDFC Bank Ltd vs. Satpal Singh Bakshi, 2021 SCC Online Del 4815*, which had pronounced that the disputes which are to be adjudicated by DRT under the DRT Act are arbitrable, is overruled by the Three Judges Bench in Vidya Drolia Vs. Durga Trading Corporation (supra) by categorically holding that such disputes are non-arbitrable.

20 The position of law having been crystallized to the above effect, I must appreciate the contention advanced by Mr.Ardeshir, the learned counsel for the respondent raising a preliminary objection about arbitrability of the disputes that have arisen between the parties out of the Memorandum of Understanding, and an addendum executed between the parties *inter se*.

The objection succintly, set out is, the Telecom Regulatory Authority of India, Act 1997 is a Special statute to resolve the disputes that arise under the Act, with an ouster of the jurisdiction of the Civil Court, and the scope of the statute would make the disputes non-arbitrable.

21 Turning my attention to the TRAI Act, I must take note of its the Preamble of the Act which would highlight it's nature and scope.

> "An act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes

> Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of services providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto"

22 The statement of objects and reasons accompanying the said enactment highlight the National Telecom Policy, 1994 which lay it's emphasis on achieving the universal service and bringing the quality of telecom services to world standards as well as to meet the customers' demand at reasonable price with participation of companies registered in India, offering such services. Contemplating multiple operationed situation, arising out of opening of basic as well as value added services in which private operator will be competing with the Government operators, a need was felt for an independent Telecom Regulatory Body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure, apart from protection of consumer interest.

It was therefore, proposed to set up an independent Telecom Regulatory Authority as a non-statutory body with the powers and functions inter alia, for

(i) ensuring technical compatibility and effective inter-relationship between different service providers;

(ii) regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(iii) ensuring compliance of licence conditions by all service providers;
(iv) protection of the interest of the consumers of telecommunication service;
(v) settlement of disputes between service providers;
(vi) fixation of rates for providing telecommunication service within India and outside India;
vii) ensuring effective compliance of universal service obligations, 5. The Authority shall have an inbuilt dispute settlement mechanism including procedure to be followed in this regard as well as a scheme of punishment in the event of non-compliance of its order.

23 The Act of 1997 in Chapter IV provide for Establishment of Appellate Tribunal to be known as 'Telecom Disputes Settlement and Appellate Tribunal (TDSAT)' under Section 14.

Section 14 reads as under :-

> 14. Establishment of Appellate Tribunal.-The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to-
>
> (a) adjudicate any dispute –
>
> (i) between a licensor and a licensee;
> (ii) between two or more service providers
> (iii) between a service provider and a group of consumers: Provided that nothing in this clause shall apply in respect of matters relating to-
>
> (A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the

jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under Section 9 of the Consumer Protection Act, 1986 (68 of 1986);
(C) the dispute between telegraph authority and any other person referred to in sub-section (1) of Section 7-B of the Indian Telegraph Act, 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

(c) exercise jurisdiction, powers and authority conferred on-
(i) the Appellate Tribunal under the Information Technology Act, 2000 (21 of 2000); and

(ii) the Appellate Tribunal under the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008)

24 The procedure for making a reference to the TDSAT is set out in Section 14-A of the Act. Section 15 is an ouster clause which reads thus :-

15. Civil Court not to have jurisdiction – No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

25 The cumulative reading of the entire statute with special emphasis an provision like Sections 14 and 15, is indicative of it to be a self contained Code, intended to deal with all disputes arising out of Telecommunication Services provided in the country, which is clearly reflected through it's statement of objects and reasons.

Normally, when such a special statute prescribe a special forum for resolving the disputes touching its provisions, the Courts are expected to construe the jurisdiction conferred on it in such a manner so that it shall not frustrate the object for creation of the statute.

26 The Apex Court in case of *Union of India vs. Tata Teleservices (Maharashtra) Limited, 2007 (7) SCC 517*, has observed as under :-

> "15 The conspectus of the provisions of the Act clearly indicates that disputes between the licensee or licensor, between two or more service providers which takes in the Government and includes a licensee and between a service provider and a group of consumers are within the purview of TDSAT. A plain reading of the relevant provisions of the Act in the light of the Preamble to the Act and the Objects and Reasons for enacting the Act, indicates that disputes between the parties concerned, which would involve significant technical aspects, are to be determined by a specialised tribunal constituted for that purpose. There is also an ouster of jurisdiction of the civil court to entertain any suit or proceeding in respect of any matter which TDSAT is empowered by or under the Act to determine. The civil court also has no jurisdiction to grant an injunction in respect of any action taken or to be

taken in pursuance of any power conferred by or under the Act. The constitution of TDSAT itself indicates that it is chaired by a sitting or retired Judge of the Supreme Court or sitting or a retired Chief Justice of the High Court, one of the highest judicial officers in the hierarchy and the members thereof have to be of the cadre of Secretaries to the Government, obviously well experienced in administration and administrative matters.

16 The Act is seen to be a self-contained code intended to deal with all disputes arising out of telecommunication services provided in this country in the light of the National Telecom Policy, 1994. This is emphasized by the Objects and Reasons also.

17 Normally, when a specialised tribunal is constituted for dealing with disputes coming under it of a particular nature taking in serious technical aspects, the attempt must be to construe the jurisdiction conferred on it in a manner as not to frustrate the object sought to be achieved by the Act. In this context, the ousting of the jurisdiction of the civil court contained in Section 15 and Section 27 of the Act has also to be kept in mind. The subject to be dealt with under the Act has considerable technical overtones which normally a civil court, at least as of now, is ill equipped to handle and this aspect cannot be ignored while defining the jurisdiction of TDSAT"

While dealing with an aspect whether before a licence is conferred, whether a claim can be entertained by making an application u/s.14 of the Act, and the issue has been answered in the affirmative by recording that the expressions "licensor' or 'licensee' occurred in Section 14(a)(i) of the Act, definitely shall not exclude a person like the respondent, who had been given a

Letter of Intent and some negotiations were going on, but no formal contract was executed. Holding that, the argument of the dispute not permitted to be raised under the authority prescribed under the Act, it was specifically held as under :-

> "23 To exclude disputes arising between the parties thereafter on the failure of the contract to go through, does not appear to be warranted or justified considering the purpose for which TDSAT has been established and the object sought to be achieved by the creation of a specialised tribunal"

27 In the present case, Advocate Harit has submitted strenuously that the MOU between the parties, is a purely private arrangement entered between themselves, and in any case, the dispute do not involve the TRAI so as to warrant it's reference to TDSAT. He would submit that the business arrangement worked out between the parties amongst themselves, with OIL in the business of providing broadband, internet, bandwidth. True it is. That the parties decided to explore the possibility of coming on a joint platform, to scale up the business in Pan-India by providing State of Art Services to the subscribers by keeping the charges at the best minimum, but they also agreed for, if certain obligations which are to be discharged under the MOU or it's addendum and contemplated 'event of default'. In such case, the clause having been invoked, they should be left to themselves to resolve their dispute through the mechanism prescribed under the MOU itself

is the argument of Mr.Harit. He would submit that when the parties have amicably decided to resolve their disputes through arbitration and have decided to give binding effect and finality to the award of the arbitrator, there is no gain-say in submitting that the dispute is non-arbitrable and must be referred to TDSAT.

I do not find force in the submission, for the reason that reading of the Application filed by the applicant would clearly disclose that the two entities, who had entered into an agreement are the License holders under the Act and the coordination is established between them, for providing internet services to the subscribers and this contemplated novation of links availed by the applicant to the respondent and for changing it's name in customers records to OIL. The applicant was expected to take over the customers of OIL and the arrangement worked out between the parties contemplated, as under in the application itself :-

> "6 The aforesaid Addendum was necessitated in view of the fact that the novation of links availed by WPISPL to OIL's name and also for changing WPISPL's name in customer's records to OIL would take certain time. The time would be considerable in some cases due to factors like 'lock-in' period provided in agreements of WPISPL with its customers and non-availability of GST registration with OIL in certain States etc. Consequently, the Parties agreed that till the time novation of links availed by WPISPL is completed to OIL and OIL's name is registered in enterprise customer's records, WPISPL shall keep availing bandwidth and connectivity from telecom companies (hereinafter referred to as 'telcos') like

> Bharati Airtel, Tata Communications Ltd, and shall bill to OIL for such amount as reimbursement of costs at actual plus applicable GST thereon. In turn, OIL shall pay such amounts to WPISPL to enable it to make payment to telcos. As a contra-entry or back-to-back billing system – OIL shall raise invoice for same value on WPISPL as it had raised on customers. WPISPL shall deposit all collections done by it from these customers into OIL's bank account on a back-to-back basis".

28 The respondent was liable to pay a commission of Rs.35 lakhs per month to the applicant, in case the subscription from the subscribers was above Rs.3.26 crores in a month. In case where the actual collection from the subscribers identified by the applicant fell short of 3.26 crores, the respondent was liable to pay 10.70% of the actual collection. The dispute that arose between the parties out of the Memorandum of Understanding ultimately affected the customers, as the applicant has clearly stated in the application that on 28/10/2022, on account of the alleged discord, the internet services of the subscriber came to be interrupted and as per the version of the applicant, 22,000 plus customers were put to serious prejudice and harm, who demanded restoration of their connections. When the prayer clause in the application is perused, the relief sought is to restrain the respondent form suspending the internet services of the subscribers, nearly 22,000 plus belonging to the applicant and of the joint venture under the MOU dated 19/6/2021.

In short, the dispute which has arisen between the parties is ultimately likely to affect the customers/subscribers of the internet services, and it is incomprehensible to assume that the dispute is only between two parties.

29 TRAI Act has defined the term "Licencor' and 'Licensee'. It also prescribe a definition of service provider in Section 2(j) which would mean the Government and includes a licensee. 'Licensee' is defined as a person licensed under sub-section (1) of Section 4 of the Indian Telegraph Act for providing specified public telecommunication services. The applicant and the respondents, both being licensee, if they have arrived at an arrangement amongst themselves, they have obtained a lience for providing specified public telecommunication service, and in any case, if the disputes/differences which have arisen between them is likely to affect the customers and in fact, in the present case, this is what has precisely happened, I have no hesitancy to record that such type of dispute between two or more service providers would squarely fall within the ambit of section 14, considering an important aspect being the Appellate Tribunal would determine such disputes between two or more service providers, and TDSAT competent to adjudicate the disputes. It is clearly noticed that ulimately, the dispute that has arisen has impacted the services to be provided to the customers/subscribers and since the Act of 1997 aim to regulate the telecommunication services and for

ensuring technical compatibility and effective inter-relationship between the service provider, and for protection of the interest of the consumer of telecommunication services, the dispute must receive adjudication at the hands of TDSAT.

30 The decision relied upon by Mr.Harit in case of *Viom Network Ltd vs. M/s.Videocon Telecommunication Ltd, 2016 SCC Online 5219,* which in turn, make reference to another decision of the Delhi High Court in case of *Viom Network Limited Vs. S. Tel Pvt.Ltd and Anr, 2013(139) DRJ 641*, decided on 11/11/2013.

When the earlier decision of the learned Single Judge of the Delhi High Court is perused, it can be seen that the petitioners before the High Court are the Telecom Infrastructure Service Providers, registered as Infrastructure Provider Category-I, (IP) 1, with the Department of telecommunications and operating as passive infrastructure sites, providing passive telecom infrastructure services to various telecom operators. The respondent, before the Court was one such telecom operator having acquired unified access service licences to establish, install, operate and maintain unified access service in defined areas. A Master Service Agreement was entered into between them which comprise an arbitration clause.

The controversy that arose for adjudication before the Delhi High Court was whether the petitioner as infrastructure

providers Category-I are service provider under the TRAI Act and if they are held to be service providers, then the disputes that have arisen between them between two service providers as envisaged u/s.14(a)(ii) of the TRAI Act and if they were not to be held as service provider, then the adjudication would be as per the arbitration agreement.

31 This specific issue was examined and it was held that the petitioners are not the service providers within the meaning of TRAI Act and resultantly, TDSAT would not have jurisdiction to decide the disputes between the petitioner and the respondent, necessarily, leading to a conclusion that the remedy of Arbitration Act is not ousted. However, in the case before me, the applicant as well as the respondent, both are licensee and since service provider includes a licensee, the dispute between two or more service providers is covered by 14(a)(ii).

32 In a subsequent decision by the Delhi High Court in case of *Gaur Distributors Vs. Hathway Cable and Datacom Limited, 2016 SCC Online Del 4605,* where the dispute arose between two service providers, the following observations, has enunciated the clear position of law which has emerged after the decision of the Apex Court in case of *Cellular Operators Association of India vs. Union of India, 2003(3) SCC 186* and *Union of India vs. Tata Teleservices (Maharashtra) Limited, 2007(7) SCC 517*, to the effect that the disputes between two service providers should be adjudicated in the first instance only

by TDSAT. The learned Single Judge of the Delhi High Court relied upon the observations of the Appellate Tribunal in *Aircel Digilink India Ltd. Vs Union of India in Petition No.6/2003*, and the relevant observations are reproduced as under :-

> "18 It is a matter of public policy laid in the public interest that telecom, broadcasting and cable services dispute which affect a large body of consumers all over the country should be amenable to one expert body. What will happen if in a dispute between two service providers in telecom sector arising out of an interconnection agreement, a service provider revokes the interconnection agreement. For these two, it may be dispute of recovery of money or damages or of technical nature but disconnection deprives consumers of access of one network to the other network. Consequences are not limited to the two service providers only but are of far reaching-nature not difficult to imagine. Similarly, if in cable industry, a broadcaster and a multi-service operator sever their relations under alloyed breach of agreement, it affects again a large body of consumers who would not be able to avail the signals for various channels and yet having made payment. An arbitrator will find himself lacking-jurisdiction to give relief to hapless customers".
>
> 20. The Arbitration Act, 1996, is a general Act and it will apply to all the arbitration agreements but the Act, i.e., TRAI Act is Special Act and applies to telecom sector and by notification issued on 9 January, 2004, also applies to broadcasting and cable services. The intention of the Legislature in ousting the jurisdiction of all other courts and all other authorities is quite apparent and it is to ensure and enable one single authority, i.e., TDSAT, to uniformly regulate this vital telecom sector which includes broadcasting and cable TV sector. Proper functioning of various stakeholders in this telecom sector is vital to the development and to safeguard interest of the consumers at

large who are the beneficiaries of these services. It may also be noticed that telecom sector is subject to various regulations issued by TRAI which even monitors the interconnection between various service providers. In the Cellular Operators Association of India v. Union of India (2003) 1 Comp U1 (SC): (2003) 3 SCC 186, the Supreme Court has held that jurisdiction of TDSAT under Section 14 cannot be held merely to be supervisory jurisdiction and that it is the only forum for addressing the grievances of aggrieved party inasmuch as the appellate jurisdiction to the Supreme Court is only on the substantial question of law and jurisdiction of Civil Courts for filing a suit is ousted. TDSAT has power to adjudicate any dispute. The Supreme Court in the case of West Bengal [Telecom] Regulatory Commission v. CESE Ltd.: (2002) 8 SCC 715 has even recommended the establishment of a similar expert Tribunal like TDSAT in telecom sector in other similar regulatory bodies. The question of exclusive jurisdiction of an expert body like TDSAT has recently been discussed in a decision of Supreme Court in the case of Clariant International Ltd. v. Securities and Exchange Board of India (2004) 4 Comp LJ 52 (SC): (2004) 8 SCC 524 (paras 64 to 82)."

33 By gainfully referring to the observations of the Appellate Tribunal, the Delhi High Court concluded that the petition filed by the petitioner under the Arbitration and Conciliation Act, is not maintainable and the parties cannot exclude the statutory jurisdiction provided thereunder.

34 In light of the aforesaid discussion, since the dispute has arisen between the applicant and the respondent, who are the service providers, I hold that and the dispute necessarily fall under the umbrella of TDSAT in view of Section 14A(ii), it must

be adjudicated by special forum created under the statute and parties by a clause like arbitration clause, cannot chose to be referred for arbitration, when a specific remedy is provided in form of statutory Appeal.

Holding that the objections raised by Mr.Cyrus Ardeshir to sustain, the application is dismissed.

The applicant do not deserve any interim measures under Section 9 of the Arbitration and Conciliation Act.

(SMT.BHARATI DANGRE, J)

Tilak