

THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

I.A. 1909 OF 2020

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

Indus Towers Limited

...Applicant

In the matter of

C.P.(IB) No. 1386/MB/2017

Ericsson India Pvt Ltd

Financial Creditor

Vs.

Reliance Telecom Ltd.

Corporate Debtor

Order delivered on: 01.11.2023

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Appearances

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)

For the Applicant : Mr. Santosh Mishra, Advocate

For the Respondent : None

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application IA 1909/2020 is filed on 20.10.2020 by M/s Indus Towers Limited seeking direction against the Anish Niranjana Nanavaty, the Resolution Professional in the Corporate Resolution Insolvency Process in the case of Reliance Telecom Ltd. (Corporate Debtor). The Application has sought following reliefs-
 - a. Admission of entire claim of Rs. 462,35,32,818/- (Four Hundred Sixty-Two Crores, Thirty Five Lakhs, Thirty Two Thousands, Eight Hundred & Eighteen Only);
 - b. Rejection of the Plan and direction to the Resolution Professional to present the Plan after incorporation of the claim of the Applicant;
 - c. Direction to Resolution Professional to immediately take over the custody of the equipment lying at the sites owned by the Applicant and make arrangement of their removal therefrom.

2. The Applicant is engaged, inter alia in providing Passive Infrastructure, which included tower and shelter, and related operations and maintenance services on a non-exclusive basis to various telecommunication operators in India. The telecommunication operators utilise the passive infrastructure of the Applicant, by installing its active infrastructure, which included terminal station equipment and antennae. The entire contractual arrangement between the parties, were typically recorded in a Master Service Agreement, pursuant to which the parties would execute Service Contract for each site (passive infrastructure).
 - 2.1. On 31.05.2010 the Applicant executed a Master Service Agreement with Reliance Communications Ltd. ("RCOM") jointly with its subsidiary Reliance Telecom Ltd. ("RTL") pursuant to which, the Applicant provided passive infrastructure, sites access availability as well as operation and management ("Services") to the Corporate Debtor and RCOM in sixteen (16) telecommunication circles/service areas

("RCOM MSA"). RCOM MSA was a single/common contract between the Applicant as first party and the Corporate Debtor and RCOM jointly as second party. In terms of MSA, several service contracts were executed by the Applicant with the Corporate Debtor and RTL. RCOM MSA was amended vide the First Supplementary Agreement dated 01.12.2016 (effective from 01.07.2016) ("Supplementary Agreement").

- 2.2. As per the Contracts, "Passive Infrastructure" means at any Site, any infrastructure located at such site which is permitted by Law to be shared by the Parties, including but not limited to the tower, shelter, diesel generator sets, air conditioners and electrical and civil works, DC power system, battery bank, etc.
- 2.3. As stated above, the Applicant had been rendering Services to the Corporate Debtor at 729 sites in West Bengal telecommunication circles/service areas. The Applicant raised invoices upon the Corporate Debtor from time to time in respect of each sites towards the energy cost, monthly charges, Security Deposit as per Clause 12 & 13 of Schedule of 3 of the MSA. However, the Corporate Debtor chose not to make payments to the Applicant within the stipulated time. On account of persistent defaults in payment of the invoices raised by the Applicant, huge outstanding accrued in the accounts of the Corporate Debtor. In the meantime, the Corporate Debtor also voluntarily exited from 335 Sites without paying the Exit Amounts.
- 2.4. Pertinently, there were various Sites where the Corporate Debtor was operating on dual technology i.e. GSM and CDMA. For the Sites which were shared by the Corporate Debtor for operating either GSM or CDMA equipment, it was paying monthly charges in terms of Schedule 3 of the MSA. In the event, the Corporate Debtor chose to remove any sharing operator equipment (CDMA BTS or GSM BTS), it was liable to pay 35% of the loading amount in respect of such removed equipment over the remaining term of service contract to the Applicant as one time payment as per clause 14.1 of schedule 3 of the MSA.

- 2.5. On account of non-payment of the outstanding dues by the Corporate Debtor towards unpaid invoices, Exit Amounts and Reduction in Loading Charges, the Applicant was constrained to invoke arbitration to recover its outstanding dues from the Corporate Debtor for recovery of the same. Accordingly, Arbitral Tribunal comprising of Hon'ble Mr. Justice T. S. Thakur, Former Chief Justice of India, Presiding Arbitrator, Hon'ble Mr. Justice Mukul Mudgal, Former Chief Justice of Punjab & Haryana High Court and Hon'ble Mr. Kailash Gambhir, Former Judge, Delhi High Court as Co- Arbitrators (Arbitral Tribunal No.1), was constituted wherein the Applicant has raised total monetary claim of Rs. 101,54,76,573/- as computed on 31.05.2017 against the Corporate Debtor and RCOM. The said arbitration is currently suspended on account of CIRP proceedings against the corporate debtor.
- 2.6. In view of the aforesaid, and the initiation of the CIRP against the Corporate Debtor, the Applicant filed its proof of claims for total amount of Rs. 75,79,68,494/- (Rupees Seventy Five Crores Seventy Nine Lacs Sixty Eight Thousand, Four Hundred and Ninety Four Only), as the Operational Creditor before the IRP vide its communication dated 24.05.2019 ("Proof of Claims") under the following heads:

Proof of claims under RCOM's MSA filed vide email dated 24.05.2019			
Head of claim	Amount (INR)	Relevant clauses MSA dated 31.05.2010 (Annex-2 at Pg. 105 to 178	Relevant Para of Proof of claims
Outstanding invoices against the services availed and energy costs till 31.12.2017	11,17,39,881.00	Clause 7.1, 7.2, r/w Schedule 3	Para 15 of Annex A @ Pg. 160
Exit amounts (inclusive of taxes)	51,02,07,232.00	Clause 12,13 r/w Paragraph 1.1 to 1.3 of Schedule	Para 16 of Annex A at Pg. 161I
Interest @15.80 pa. on the exit amount of Rs. 51,02,07,232.00 as at date of insolvency commencement	10,99,20,911.00	Clause 7.3.1	Para 17 of Annex-A @ Pg. 163

Reduction of Loading charges for 11 sites alongwith applicable taxes	26,61,266.00	Para 14.1 of Schedule 3	Para 18 of Annex A @ Pg. 164
Interest @15.80 p.a. on the amount of reduction in loading charges of Rs. 26,61,266/- as at date of insolvency commencement	5,23,029.00	Clause 7.3.1	Para 19 of Annex-A @ Pg. 164
(A) Total	75,79,68,494.00		

2.7. The counsel for the Applicant, vide its detailed email dated 13.12.2019, provided (a) All the communications issued by the Corporate Debtor informing about exiting the sites; (b) Copy of 5 missing invoices of worth Rs. 7,72,574.51; (c) the interest on the Exit Amount is claimed in terms of under Clause 7.3.1 of MSA, to the RP. The Resolution Professional was informed that the 158 invoices are not available with the Applicant.

3. The Resolution Professional filed his Reply stating that after filing of present application, the claim of the applicants was revisited in the backdrop of legal advice obtained by the RP, and thereupon, a claim of Rs. 62,09,59,261/- was admitted. As of now, only the interest claimed on Exit & Loading Charges amounting to Rs. 13,70,09,232/- has been rejected. In other words, a claim of Rs. Rs. 62,09,59,261/- stands admitted and updated in the list of Creditors of the Corporate Debtor, accordingly, this Tribunal is not required to pass any Order in relation to such admitted claims.

3.1. Since, the Resolution Professional was not provided access to 72 Sites, it could not remove the equipment thereat, and vacate the Sites. The Applicant has clarified in the Rejoinder that the equipments are lying at 15 Sites only. The Respondents have clarified that they are willing to remove their equipment within 3 months after provision of complete access to sites wherever equipments are lying.

4. We heard the Counsel and perused the material available on records.
- 4.1. We find that the only issue of interest on Exit Charges remains in the Present Application. While, the Resolution Professional contends that there is no provision for payment of interest on Exit Charges under both the MSAs, the Applicant relied upon Clause 7 for claim of interest. For sake of understanding, we quote the relevant clauses hereunder in this relation -

- 4.2. Clause 7 of the Agreement provides that –

“7.1 Payment of Charges

Indus shall charge and invoice the Sharing Operator for the Charges in accordance with Schedule 3 (Charges). However, the Charges set out in Schedule 3 (Charges) can be mutually reviewed annually or otherwise for future new Sites and new Upgrades request on the Existing Sites. Any such review and revision shall not affect any other provision of a Service Contract existing at the time of such revision and shall be applicable on all Service Orders received on or after the effective date of such revision.

7.2 Payment Terms

Subject to Clause 7.4, all invoices submitted by Indus in accordance with this Schedule 3 (Charges) shall be paid by the Sharing Operator within 15 days of receipt.

Late Payment

7.3.1 If either Party has not paid any invoices by their due date, all such unpaid sums (which are undisputed) will accrue interest at a rate equal to 2 (two) % above the then prevailing State Bank of India Prime Lending Rate. If the Sharing Operator fails to pay any undisputed amount in an invoice, for a period of 90 days subsequent to receipt of the invoice from Indus, the Operation and Maintenance Service Levels in respect of the

Circle to which such invoice relates shall cease to apply until such time as the relevant invoice is paid in full. In addition, upon the expiry of this 90 day period, Indus may, at any time, choose to terminate the relevant Service Contracts and the relevant Exit Amounts shall be payable by the Sharing Operator in accordance with the relevant Service Contracts.

7.3.2 In addition to the above and notwithstanding all other rights that Indus may have, it will be entitled to adjust from the Security Deposit all such sums of money as may be due and payable by the Sharing Operator.”

4.3. Clause 19 provides ‘Term of Each Service Contract’ and reads as under

–

“19.1 Term

Each Service Contract shall have a term that is mutually agreed by the Parties. provided that no Service Contract shall have a term of less than five (5) years.

19.2 Exit Amounts

The Sharing Operator shall pay to Indus the Exit Amount specified in paragraph 1 of Schedule 5 (Standard Site Access Terms).”

4.4. Paragraph 1 of Schedule 5 reads as under -

“Schedule 5 Standard Site Access Terms

Sharing Operator Exit

1.1 In relation to Service Contracts with a term of seven (7) years or more, the Sharing Operator may terminate a Service Contract prior to expiration of its term, provided that upon such termination, the Sharing Operator shall pay to Indus the higher of the following amounts, subject to the Sharing Operator having already made all applicable payments for a period of five (5) years:

(i) 35% of the unpaid amount as per the term of the Service Contract, or
(ii) the Total Rate, as applicable at the time of termination, for a period of 12 months.

1.2 In relation to a Service Contract with a term of less than seven (7) years, the Sharing Operator may terminate the Service Contract prior to expiration of its term, provided that upon such termination, the Sharing Operator shall pay to Indus the entire unpaid amount for the remainder of the term.

1.3 The amount payable to Indus by the Sharing Operator upon such termination under paragraphs 1.1 or 1.2 above shall be referred to herein as the "Exit Amount".

1.4 For the avoidance of doubt, while calculating the Exit Amount under paragraph 1.1 or 1.2 above, the annual escalation under paragraph 2.4.1 of Schedule 3 (Charges) for the remainder of the term shall not be taken into account and the Exit Amount shall be calculated at the rate prevailing at the time of termination.

1.5 The consolidation of two or more operators at a Site into a single operator through any merger, acquisition, scheme of arrangement etc., shall amount to a termination of the Service Contract in respect of any operator that ceases to exist and decides to exit the Site, and the Sharing Operator that so ceases to exist (or its successor- in-interest) shall be liable to pay to Indus the Exit Amount. Where the surviving operator continues to use any equipment of the operator who has ceased to exist at the Site, such equipment shall be subject to charges, as applicable, in accordance with Schedule 3 (Charges) and in such a case where existing operator uses the equipment of ceasing operator then no Exit Amount shall be payable by the ceasing operator (or its successor-in-interest)".

4.5. We find that Para 1 to Schedule 5, dealing with the Exit Charges does not contemplate payment of any interest, however, clause 7.3.1 of the MSA stipulate payment of interest on delayed payment of charges. The

question for consideration is whether the word “Charges” stated in the Clause 7.3.1 also include “Exit Charges”?

- 4.6. On careful reading of clause 7.3.1, we find that the said clause mandates payment of interest on any invoices, which remains unpaid, however, the said clause provides for right to the Applicant for termination of the MSA in case of non-payment beyond specified period. It provides that in the event of termination, the sharing operator shall be liable to pay the Exit Amounts in addition of the outstanding charges alongwith interest on such outstanding charges. The language used in clause 7.3.1 is emphatically clear, and the stipulation of interest does not extend to Exit Charges therein. Since, Para 1 of the Schedule 5 providing for determination of Exit Charges as well as Clause 19 are silent on the applicability of interest on the payment of Exit Charges, we are not inclined to hold that the amount of interest claimed on Exit charges is admissible. Accordingly, we reject the contention of the applicant on this count.
- 4.7. As regards inadmissibility of the claim qua 20 invoices, we find that the applicant has failed to submit the proof, the same can not be admitted. However, the applicant shall be at liberty to submit the proof thereof within 15 days from the date of communication of this Order, whereupon the Resolution Professional shall admit the claims under the invoices submitted pursuant to this opportunity.
- 4.8. Since, the claim of the Applicant has already been admitted to the extent discussed in this Order, the prayer for Rejection of the Plan, which is otherwise not maintainable on this ground, is rendered meaningless, hence dismissed.
- 4.9. The Applicant is directed to provide access to the Resolution Professional to take over the custody of the equipment lying at the sites owned by the Applicant and make arrangement of their removal therefrom. The Resolution Professional shall conclude such exercise within 3 months from the date of communication of this Order.

5. In view of the foregoing, this Application no. IA 1909 of 2020 is disposed of with aforesaid directions.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)