

**(2012) 12 MAD CK 0057**

**In the Madras High Court**

**Case No :** O.S.A. No's. 393 and 394 of 2012 and M.P. No's. 1 and 2 of 2012 (2 Nos.)

M/s. Gemini Communications Ltd.

APPELLANT

Vs

The Chief General Manager Southern Telecom Projects Bharat  
Sanchar Nigam Ltd., 25, Greenways Lane Raja  
Annamalaipuram Chennai-600028

RESPONDENT

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**Date of Decision :** 19-12-2012

**Acts Referred:**

Arbitration Act, 1940 — Section 34  
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1  
Contract Act, 1872 — Section 14, 37, 38, 41, 41(e)  
Specific Relief Act, 1963 — Section 14, 14(1), 16

**Citation :** (2013) 1 CTC 550 : (2013) 1 MLJ 569

**Hon'ble Judges :** R. Banumathi, J; K.K. Sasidharan, J

**Bench :** Division Bench

**Advocate :** Sriram Panchu, for Mr. J. Saravanakumar in O.S.A. No. 393 of 2012 and Mr. R. Shanmugam in O.S.A. No. 394 of 2012, for the Appellant; T.R. Rajagopalan, Assisted by Mr. M. Govindaraj and Mr. M.S. Velusamy, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

R. Banumathi, J. and K.K. Sasidharan, J.—These two intra-court appeals are directed against the order and decretal order dated 21 September 2012 in O.A. Nos. 238 and 239 of 2012 in C.S. No. 207 of 2012, whereby and whereunder, the learned Single Judge was pleased to dismiss the interlocutory applications filed by the appellant for the purpose of restraining the respondent from terminating the Purchase Order dated 28 June 2010 and invoking the Performance Bank Guarantee.

Factual Background:

The case of the appellant:

The appellant is engaged in the business of providing and implementing networking solutions and services. The appellant has successfully completed various Government projects. The appellant has forged strong alliances with leading international companies and commands commendable respect in the industry. The Government of India under the administrative control of the Department of Information and Technology had intended to provide connectivity to Common Services Centres under the National e-governance project. The Government decided to implement the project under WiMAX technology and named it as "Rural WiMAX Project II". The Government of India had entrusted the implementation of Rural WiMAX Project II to the respondent/Bharat Sanchar Nigam Limited under the supervision of Department of Information and Technology.

2. The respondent issued a notification dated 5 June 2009 calling for tenders for Supply, Installation, Commissioning and Maintenance Support of Wave 2 certified WiMAX equipment in BSNL, in various circles across the Country on Turnkey basis. The total estimated cost of the tender was Rs. 1167 Crores. Since it was a prestigious project, the appellant submitted its commercial tender. The bid submitted by the appellant was accepted resulting in issuance of Advance Purchase Order dated 16 December 2009 for a sum of Rs. 434,34,21,603/-. The appellant was required to furnish security for an amount equal to 5% of the value of purchase order within fourteen days from the date of issuance of Advance Purchase Order by the respondent. The appellant furnished Performance Bank Guarantee for a sum of Rs. 21,23,01,730/-. Though the appellant submitted the Bank Guarantee immediately, the respondent was very reluctant in issuing the Purchase Order. Finally, the respondent placed Purchase Order on 28 June 2010 for supply, installation, commissioning and maintenance support of WiMAX equipment in BSNL network on Turnkey basis for Project II. The value of the Purchase Order Project II was unilaterally reduced to Rs. 378,28,07,007/-. The respondent after negotiation agreed to reduce the value of Bank Guarantee and a revised Bank Guarantee for a sum of Rs. 19,26,63,217/- was submitted.

3. The respondent had placed Purchase Order on 28 June 2010 after a lapse of six months from the date of Advance Purchase Order and submission of Performance Bank Guarantee. The delay between the Advance Purchase Order and the Purchase Order was not because of any act or omission on the part of the appellant. Based on the tender awarded and the Advance Purchase Order issued by the respondent, the appellant invested huge sums of money for identification of sub-contractors, issued sub-contracts, started production of equipments and invested in increasing the man-power, etc., The appellant has also placed huge orders with its suppliers for supply of specific equipments as per the requirements of the Purchase Order and with a view to comply with the same. Similarly, the appellant invested huge sums of money for purchasing and installing the required infrastructural facilities.

4. Clause 6 of the Purchase Order provides for the details of the equipment's to

be supplied and the time limit for supply, installation and commissioning. As per clause 13.1.1 of the Purchase Order, the respondent should pay the appellant 40% of the equipment cost (including CPE's) on the supply of all the equipments/materials at site against the Purchase Order in satisfactory condition. Such a clause was inserted for the smooth cash flow for executing the project.

5. Since in the Purchase Order dated 28 June 2010 vast difference was found when compared to the Advance Purchase Order, the appellant sought certain clarification from the respondent by writing various letters. The appellant informed the respondent that those details were necessary for the due execution of project and supply of equipments. Though clarifications were raised in July 2010 itself so as to enable the appellant to start implementing the project by delivering the equipments, the respondent was very reluctant in clarifying the doubts. The respondent issued certain clarifications during October, 2010 and some of the other doubts were not clarified.

6. Though the appellant placed orders with the equipment manufacturers for manufacturing and supply of Core equipments, BTSs and CPEs, the same could not be delivered on time due to the delay in procuring the import licence by the respondent. The import licence was received only in October, 2010. The Core Equipments which does not require import licence were supplied within the time indicated in the Purchase Order. The remaining equipments were delivered after obtaining import licence by the respondent.

7. Since the Purchase Order issued by the respondent does not disclose lot-wise quantities of equipments to be supplied in each circle, by the appellant, it created confusion both for the appellant as well as for the Circles, in identifying the quantity of equipments to be supplied in each circle. Therefore, the last mile deliveries were put on hold. The appellant was able to receive the circle-wise delivery only on 13 January 2011 that too, after pursuing rigourously with the respondent.

8. Though a request was made to the respondent to load the CA Root Certificate in the CPEs before despatch, the respondent failed to issue the Root Certificate, as a consequence of which the appellant was compelled to hold the finished goods in overseas warehouse.

9. Since there was a long gap between the time of bidding and issue of final Purchase Order, the specifications, make and models quoted for non-WiMAX equipments were changed due to fast changes and developments in electronics market. It was difficult to supply the original quoted third party items and as such the appellant requested the respondent to accept the higher version of the specifications. Though a request to that effect was made as early as on 31 August 2010, it was approved by the respondent only in April, 2011.

10. The respondent was bound to pay 40% of the equipment cost on delivery of all equipments/materials, site-wise. The respondent has to pay a sum of Rs. 54,42,00,490/- towards 40% of the equipment cost supplied. Even after

deduction of custom charges from the invoice raised, the respondent has to pay a sum of Rs. 37,32,56,782/- towards 40% of the total equipment cost supplied. However, the appellant has received only a sum of Rs. 6,43,92,540/- The appellant sent several letters to the respondent to release 40% of the total dues. Though the officers of the respondent had indicated and assured that the amount payable would be released at the earliest, no fruitful action was taken by the respondent to pay the agreed amount.

11. Because of the non payment of 40% of the equipment cost, the appellant was put to great difficulty in mobilising the funds for delivering the remaining equipments. The abrupt and unexpected obstruction in the cash flow of the appellant caused by the inaction of the respondent in timely release of payments has severely hampered the otherwise smooth and efficient functioning of the operations.

12. Since the delay was only on the side of the respondent, the time prescribed for delivery was extended from time to time. The respondent finally extended the delivery time up to 30 April 2012. The appellant produced Additional Bank Guarantee for a sum of Rs. 1,98,00,000/- and Rs. 1,82,00,000/- on 22 October 2011 and 25 October 2011 respectively as a condition precedent for granting extension. While so, a show cause notice dated 22 February 2012 was received calling upon the appellant to show cause as to why action should not be taken for non fulfillment of the Purchase Order. The appellant, on receipt of the said letter submitted its reply on 1 March 2012 indicating that the respondent alone was at fault for the delay in implementing the project. According to the appellant, since the respondent had granted extension of time till 30 April 2012, it was improper to issue a show cause notice on 22 February 2012 even before the expiry of the extended period.

13. The appellant has reliably learnt that the respondent was taking coercive steps to encash the Bank Guarantee. Since the letter dated 22 February 2012 indicated the decision of the respondent to terminate the contract and to invoke the Bank Guarantee, the appellant was constrained to file the suit for permanent injunction restraining the respondent from terminating the Purchase Order dated 28 June 2010.

14. The appellant, along with the Civil Suit filed two applications in O.A. Nos. 238 and 239 of 2012 for interlocutory injunctions.

15. The appellant in the affidavit filed in support of the interlocutory applications reiterated the contentions taken in the plaint in C.S. No. 207 of 2012. The appellant submitted that the period for supply has already been extended till 30 April 2012 and as such, it was not open to the respondent to take steps for terminating the contract. The appellant, therefore, prayed for orders of interim injunction restraining the respondent from terminating the Purchase Order dated 28 June 2010 or deducting/levying late delivery charges or taking any action or proceedings as mentioned in the letter dated 22 February 2012 pending disposal

of the suit and to restrain the respondent from invoking the Performance Bank Guarantee dated 20 June 2010 issued by the Axis Bank for a sum of Rs. 19,26,63,217/- and Additional Bank Guarantees for a sum of Rs. 1,98,00,000/- and Rs. 1,82,00,000/- issued by Axis Bank and Bank of India respectively, pending disposal of the suit.

Defence:

16. The respondent, on appearance, filed a common counter affidavit disputing the claim made by the appellant. The counter affidavit reads thus:

(i) The appellant and three other Companies were given Purchase Orders for supply, installation and commissioning of WiMAX equipments. The appellant was given Purchase Order to install 2707 Base Station (BTS) and to provide connectivity to around 14271 CSCs in the States of Punjab, Haryana, Rajasthan, Madhya Pradesh, Chattisgarh, Gujarat and Maharashtra. The other Companies have supplied the ordered quantity as per the Purchase Order even before the cut off date. Though the appellant was expected to accept the contract without any condition, the appellant had raised so many queries and sought for several clarifications and had furnished a conditional acceptance letter. Thereafter, unconditional acceptance letter was given on 9 February 2010. Therefore, it was only the appellant, who had delayed the project at the threshold itself for reasons best known to them. The Purchase Order was given on 28 June 2010 after furnishing Performance Bank Guarantee by the appellant on 20 June 2010.

(ii) The appellant was asked to submit a self certification which is mandatory for obtaining clearance from the Government of India. The appellant submitted the mandatory self certificate only on 12 May 2010 and it was approved on 14 June 2010. The Performance Bank Guarantee was furnished on 20 June 2010. The respondent placed Purchase Order on 28 June 2010. Therefore, it cannot be said that the respondent delayed the issuance of Purchase Order.

(iii) The BTS supplied by the appellant were incomplete in nature. The BTS were without Indoor Units and as such, it cannot be said that complete units were supplied by the appellant. It is true that the respondent had agreed to pay 40% of the amount in case the equipments were supplied in satisfactory condition against the Purchase Order. Since the appellant has not supplied the equipments as a complete unit, payments were not released.

(iv) The Advance Purchase Order was only an intention to place Purchase Order on the bidder. It was issued for the purpose of acceptance. The appellant originally accepted it with a condition and it was long thereafter unconditional acceptance was given. The respondent immediately issued the Purchase Order and as such, there was no delay on the part of the respondent.

(v) The appellant had delivered only 21 Base Stations (BTS) against the total ordered quantity of 2707 BTS during the extended period. The appellant had submitted documents and amended list of items for applying import licence on

16 September 2010. The application for import licence was submitted to the Wireless Planning Co-ordination Wing on 22 September 2010 and the Import Licence was issued on 18 October 2010 and it was made over to the appellant on 19 October 2010. Therefore, it cannot be said that the respondent was at fault, by delaying the matter.

(vi) Though the appellant had supplied 955 BTS, the fact remains that none of the BTS have indoor units. Out of 955 incomplete BTS, 267 units were diverted to Madhya Pradesh. Even in Madhya Pradesh those units were not delivered. Therefore, in total, the appellant supplied only 688 BTS and that too, in an incomplete condition on account of the failure to provide the required Indoor Units.

(vii) The Customer Premises Equipment (CPE) can be utilised only after installation of BTS and roll out of network. The appellant could not complete the BTS and thereby could not roll out of the network. Therefore, there was no purpose in supplying the CPEs. In fact, CPEs supplied by the appellant were delivered without feeder cables. Thus, the hardware of CPE was incomplete in all respects. The CPEs supplied by the appellant cannot be used without the supply of other related items.

(viii) The appellant has failed to supply the brand for which the contract was awarded, but sought for change of model. The respondent had agreed to the revised model and the benefit of the intervening period of eight weeks was given to the appellant and no penalty was levied for the said period. Despite such relaxation, the CA Root Certificate was not loaded in the CPE.

(ix) The respondent had given firm commitment to the department of Information and Technology to execute the project without any delay and before the cut off date. The other bidders in the very same contract had completed the work on time. Even though several extensions were given, the appellant was not in a position to complete the work. It was only under such circumstances, show cause notice was issued on 22 February 2012.

(x) The appellant had committed similar defaults in respect of other contracts. The appellant became a successful bidder in WiMAX Project, Phase-I and failed to complete the project even after three years. The other bidders like M/s. HCL have completed the project and have entered into warranty. The appellant alone caused delay. Therefore, it cannot be said that the appellant was always ready and willing to perform its part of the contract.

(xi) The appellant appeared to have set up the business by taking this contract without any basic infrastructure. The contract period was over long back and several extensions were given in public interest. Still the appellant was not confident of completing the project and resorted to dilatory tactics.

(xii) The appellant had breached the terms of contract and wanted to restrain the respondent from taking further proceedings in accordance with the provisions of

contract. The respondent is entitled to invoke the Performance Bank Guarantee on account of the failure on the part of the appellant to fulfil the terms of contract. Accordingly, the respondent prayed for dismissal of the interlocutory applications.

The Judge's finding:

17. The learned Single Judge originally granted ex parte interim order on 29 March 2012 and issued notice to the respondent. It was only thereafter the respondent filed a counter affidavit with a specific prayer to vacate the interim order. The learned Single Judge considered the case of the respective parties and opined that there was a breach committed by the appellant in executing the contract. According to the learned Judge, the question of payment of 40% would arise only in case the appellant had satisfactorily supplied the equipments. Even in the reply to the show cause notice, the appellant wanted six months more time to supply the equipments. The learned Single Judge was of the view that the prayer for injunction would amount to re-writing the terms of the agreement between the parties. The learned Single Judge was also of the considered view that no prima facie case was made out by the appellant. The balance of convenience was also not in their favour. The learned Single Judge was of the further opinion that it was only after finding prima facie case and balance of convenience, the factor of relative hardship could be gone into. The learned Judge in the light of the arguments and the judgments cited, ultimately arrived at a finding that the appellant has not made out a case for interlocutory injunction. Accordingly, the applications were dismissed. Feeling aggrieved, the appellant is before this Court by way of these two intra-court Appeals.

Submissions:

18. Thiru Sriram Panchu, learned Senior Counsel for the appellant in O.S.A. No. 393 of 2012 made the following submissions:

(i) The appellant has supplied 955 BTS within the time granted. The appellant raised invoice for a sum of Rs. 828,223,089/-. The respondent was bound to pay 40% of the amount viz., Rs. 223,451,525/-. Similarly the appellant made total supplies for a sum of Rs. 1,789,584,734.23. However, the respondent has paid only a sum of Rs. 100,734,845.57. The delay in paying the amount as agreed stood in the way of further supplies.

(ii) The appellant, taking into account certain security reasons, decided to supply indoor units (IDU) during the time of installation. Therefore, IDUs were not supplied. In fact, IDUs have to come from Taiwan. The non payment of 40% of the amount also contributed for the delay in supplying the indoor units.

(iii) Though the appellant asked for certain clarifications for the purpose of accepting the contract, the respondent delayed the matter. Immediately after getting partial clarification, the appellant accepted the contract. This resulted in delaying the matter by six months.

(iv) The appellant was not in a position to import equipments in the absence of import licence issued by the respondent. This also contributed for the delay.

(v) The respondent conducted meetings on multiple occasions and has agreed to release 40% of the amount. Even then the respondent has not taken any follow up action to pay the amount.

(vi) The respondent has extended the time till 30 April 2012. However, even before the expiry of the said period, the respondent issued the show cause notice on 22 February 2012. Even though reply was given to the said notice, the same was not considered by the respondent and this resulted in filing the Civil Suit.

(vii) The Purchase Order contains a penalty clause. This would make the position very clear that the time limit can be extended from time to time subject to payment of penalty.

(viii) Before issuing the order of termination, the respondent has not issued any notice as provided under clause 18 of the agreement.

(ix) The suit was filed on 22 March 2012. The respondent filed the vacate stay petition only on 3 August 2012. This would show that there was no urgency in the matter.

(x) The appellant, time and again expressed their willingness to supply the equipments, provided payment is made. The respondent dragged the matter under one pretext or the other and as such it cannot be said that the appellant was at fault.

(xi) The factual matrix would show that only 5% of the Common Service Centre is connected till now. Therefore, even now extension could be granted to complete the project.

(xii) The learned Single Judge failed to consider the prima facie case, balance of convenience and irreparable injury.

(xiii) Since the show cause notice was issued during the currency of the period of extension, the appellant had proved prima facie case. The supply of 955 BTS would also prove that the appellant has substantially complied with the contractual terms. This also gives an indication that the appellant has made out a prima facie case. The balance of convenience is also in favour of the appellant. In case the contract is terminated and the Bank Guarantee is encashed, it would cause difficulties to the appellant. Similar is the case of irreparable injury. The appellant has already supplied the equipments to the respondent. The respondent is yet to make payment. In the meantime, if the Bank Guarantee is also invoked, it would cause substantial hardship to the appellant. These aspects were not considered by the learned Single Judge. Therefore, the impugned order is liable to be set aside.

19. The learned counsel Mr. R. Shanmugham, appearing on behalf of the appellant in O.S.A. No. 394 of 2012 took us minutely through the contractual



provisions and the respective pleadings. He would contend:

(i) The definition of "Purchaser" covers only Chennai Circle. The Purchase Order was also given by the Chennai Circle. The Purchase Order was subsequently amended by the Head Office at BSNL. Such act of amendment has to be treated as illegal.

(ii) The appellant has supplied BTS along with the required IDUs. Therefore, it cannot be said that the equipments were in an incomplete shape.

(iii) The appellant has been corresponding with the respondent time and again. In almost all those correspondences, the appellant has indicated the supply of equipments as per the Purchase Order and well before the cut off date. Though the appellant was entitled to collect 40% of the amount, the respondent adopted delaying tactics and denied payment. The unreasonable delay in making payment by the respondent alone attributed for the delay in supplying the remaining equipments.

(iv) The appellant has submitted invoice indicating supply of 955 BTS in a complete shape. In case the BTS were without IDUs, the respondent should have pointed out the deficiency then and there. However, there is nothing on record to show that the respondent at any point of time pointed out the incomplete nature of the supplies made by the appellant.

(v) The Purchase Order proceeds as if the appellant has to supply region wise. By way of subsequent amendment, the respondent wanted the appellant to supply site-wise. It was not practically possible for the appellant to obtain acknowledgement from different sites spread over multiple regions.

(vi) The contract contains a provision for arbitration. The respondent should, therefore, be directed to nominate the arbitrator other than the officials of BSNL, to resolve the dispute.

(vii) The appellant invested substantial amount by way of giving Performance Bank Guarantee, to purchase raw materials, to undertake manufacturing process and for supply of equipments. Though the appellant invested several crores, the respondent has paid only a paltry sum of Rs. 10.23 crores.

(viii) The respondent has taken a contradictory stand in the counter affidavit. The respondent originally claimed that 21 BTS alone were supplied. However, in paragraph 13 of the counter, it was stated that 955 BTS were supplied. The facts and figures found in the counter affidavit itself would show that the respondent wanted an excuse to repudiate the contract.

(ix) The respondent right from the time of Advance Purchase Order dragged the matter under one pretext or the other and even for obtaining Import Licence and root certificate, considerable time was taken. The appellant was never at fault and the entire delay had occurred only on account of the delaying tactics resorted to by the respondent.

20. Mr. T.R. Rajagopalan, learned Senior Counsel appearing on behalf of the respondent, made the following submissions:

(i) The tender issued by the respondent was for the purpose of supply, installation, commissioning and maintenance support of Wave-2 certified WiMAX equipment in BSNL across various circles and across the Country on Turnkey Basis. The appellant was fully aware that it was a composite tender and payments would be made only in case the equipments were installed satisfactorily and in a complete shape.

(ii) The Advance Purchase Order cannot be treated as a contract. The Advance Purchase Order indicated the intention of the Purchaser to place the Purchase Order on the bidder. Therefore, it cannot be said that there was a difference in terms between the Advance Purchase Order and the Purchase Order as well as delay.

(iii) The Purchase Order which contains the contractual terms shall be deemed to be the contract and as such the appellant is bound by the terms of the Purchase Order.

(iv) The delay had occurred on account of the clarification sought for by the appellant. Clause 5(1) of the Advance Purchase Order mandates that the prospective bidder has to obtain the required clarification in writing before submitting the tender documents. The appellant sought for clarification after the Advance Purchase Order and the same caused delay. The said delay cannot be attributed to the respondent.

(v) The respondent reserved the right to vary the quantity.

(vi) The issue of Advance Purchase Order was only an intention to purchase and it culminated in a contract on acceptance of Advance Purchase Order by the contractor.

(vii) The appellant initially accepted the Contract with reservations. Since it was not an unconditional acceptance, the matter was delayed. Immediately after submitting the unconditional acceptance, the respondent issued the Purchase Order. Therefore, it cannot be said that the delay had occurred only on account of the respondent.

(viii) The appellant was given extension time and again. Even during the extended period, the appellant was not in a position to supply the equipments. Therefore, the respondent rightly issued the show cause notice.

(ix) Though the appellant submitted a reply to the show cause notice dated 22 February, 2012, the said show cause notice was taken as the basis for filing the suit.

(x) The appellant has very cleverly moulded the prayer by challenging the Purchase Order without indicating that the Purchase Order itself was the contract.

(xi) The appellant is now arguing that they have already supplied 955 equipments. However, the appellant conveniently omitted to mention the fact that the contract was given for supply of 2707 equipments.

(xii) The appellant obtained an ex parte interim order on 29 March 2012. The interim order was vacated only on 1 September 2012. Even though in the reply to the show cause notice the appellant wanted only six months to supply the equipments, the fact remains that even after enjoying the interim order for a period of five months the appellant was not in a position to supply the equipments. This would show that the appellant has been giving empty promises to supply the equipments without any concrete steps taken for regular supply.

(xiii) The appellant was expected to supply equipments in a full-shape. The contract was not for supply of BTS alone. The BTS along with IDU should be supplied and then only the appellant would be entitled for payment of 40% of the amount. Admittedly, the appellant has supplied only BTS and that too not the required quantity. Since the required number of IDUs were not supplied, the respondent was not in a position to use the equipments supplied by the appellant. Therefore, there was no question of payment of the balance amount.

(xiv) The contract was nothing but a composite contract for supply, installation and commissioning. The learned counsel for the appellant has admitted that the required number of IDUs were not supplied. Unless and until the IDUs are supplied, the respondent would not be in a position to use the BTS. Therefore, the respondent rightly rejected the claim for payment of 40% of the amount,

(xv) The appellant has executed the Performance Bank Guarantee in accordance with the terms of contract. Since the appellant failed to perform its part of the contract, the respondent was entitled to terminate the contract. The termination of contract would give a right to the respondent to invoke the Bank Guarantee. Therefore, it cannot be said that the appellant has made out a prima facie case.

(xvi) Even though the contract contains a provision for arbitration, the appellant has chosen to file a Civil Suit. Therefore, it is not open to the appellant to contend that the respondent should have referred the matter for arbitration.

#### Factual Analysis:

21. The Government of India took a decision to provide connectivity to Common Services Centres under the National e-Governance Project. The Government have also taken a decision to implement the project under WiMAX technology. The project was called as "Rural WiMAX Project-II. The policy was adopted in larger public interest. The Government wanted last mile connections to end rural villages to run various e-governance applications. The rural population would be the ultimate beneficiary. The project was primarily intended to the public to have access critical and essential e-governance like Tele-Medicine, e-learning, etc. The Government of India through the department of Information and Technology entrusted the work with Bharat Sanchar Nigam Limited (hereinafter referred to

as "BSNL"). The Government has also agreed to finance the project. The Ministry of Information and Technology wanted BSNL to complete the WiMAX -II Project in a time bound manner. The respondent, pursuant to the policy decision taken by the Government, issued a notification calling for tenders from companies providing network services. The appellant and three other service providers were selected for the project. The appellant was declared as the successful bidder to install Base Station with respect to 2707 project centres for a total value of Rs. 434,34,21,603/-. The respondent issued an Advance Purchase Order dated 16 December 2009 to the appellant. The Advance Purchase Order was considered as the intention to place orders with the appellant.

22. This contract appears to be a distinctive one taking into account the time bound manner and nature of equipments to be supplied. The respondent in the tender notification, Advance Purchase Order and the Purchase Order very clearly indicted that the Advance Purchase Order would mean the intention of the purchaser to place the purchase order on the bidder. The terms and conditions of the Advance Purchase Order were re-produced in the Purchase Order.

23. Since some of the terms are crucial in nature for the purpose of deciding these Original Side Appeals, we are extracting a set of those important provisions.

#### The Essential Terms

(i) The Advance Purchase Order" was indicated as the intention of the Purchaser to place Purchase Order on the bidder as per clause 1(e) of Section - II.

(ii) Clause 1(f) of Section II defines "The Purchase Order" thus:

The Purchase Order" means the order placed by the Purchaser on the Supplier signed by the Purchaser including all attachments and appendices thereto and all documents incorporated by reference therein. The purchase order shall be deemed as "Contract" appearing in the document.

(iii) Clause 5 of Section II deals with Clarification of bid documents:

5.1 A prospective Bidder, requiring any clarification on the Bid documents shall notify the Purchaser in Writing at the Purchaser's mailing address indicated in the invitation of Bid. The Purchaser shall respond in writing to any request for clarification of the Bid Documents, which it receives not later than the date fixed for receipt of queries from bidders vide NIT of this tender document. Copies of the query (without identifying the source) and clarifications by the Purchaser shall be sent to all the prospective Bidders who have received the bid documents.

5.2 Any clarification issued by BSNL in response to query raised by prospective Bidders shall form an integral part of the bid document and it may amount to an amendment of relevant clauses of the bid documents.

(iv) The purchaser was given the right to vary the quantity as per clause 25 of Section- II.

(a) BSNL will have the right to increase or decrease up to 50% of the quantity of goods and services specified in the schedule of requirements without any change in the unit price or other terms and conditions at the time of award of Contract.

(v) The time limit for acceptance of the terms and conditions of the Advance Purchase Order was stipulated in clause 27 of Section-II.

27.1 The issue of an Advance Purchase Order shall constitute the intention of the Purchaser to enter into Contract with the Bidder. The Advance Purchase Order shall be issued as per package for tender inclusive of all the items as in schedule of requirements.

27.2 The Bidder shall within 14 days of issue of the Advance Purchase Order, give his acceptance along with performance security in conformity with Section IX provided with the bid document.

(vi) The Purchase Order was intended to be a Contract by virtue of clause 28.1 of Section II of the Advance Purchase Order.

28.1 The issue of Purchase Order shall constitute the award of Contract on the Bidder.

(vii) The responsibility of the Supplier for delivery, installation and Commissioning was indicated in clause 6 of Section-III General (Commercial) conditions of Contract.

#### Delivery and Documents:

6.1 Delivery of the goods and documents, its installation and commissioning shall be made by the Supplier in accordance with the terms specified by the Purchaser in its schedule of requirements and special conditions of contracts, and the goods shall remain at the risk of the Supplier until delivery, installation, commissioning and making over to the node in charge, has been completed. The delivery of the equipment shall be to the ultimate consignee as given in the purchase order.

6.2 The supply, installation and commissioning of the system shall commence immediately on placement of purchase order on Bidders and be completed as stipulated in Section IV. The actual commissioning Schedule will be as per the stipulation in the special conditions in Section IV.

(viii) The purchaser reserved its right to change the Purchase Order by clause 13 of Section-III General (Commercial) conditions of Contract.

13.1 The Purchaser may, at any time, by a written order given to a Supplier, make changes within the general scope of the Contract in any one or more of the following:

(a) drawings, designs and specifications, where Goods to be supplied under the Contract are to be specifically manufactured for the Purchaser;

(b) the method of transportation or packing;

(c) the place of delivery; or

(d) the services to be provided by the Supplier.

(ix) Time was intended to be the essence of the Contract, which is evident from clause 15 of Section-III General (Commercial) conditions of Contract.

15.1 Delivery of the Goods and performance of the services including installation and Commissioning shall be made by the Supplier in accordance with the time schedule specified by the purchaser in its purchase order. In case the supply is not completed in the stipulated delivery period, as indicated in the Purchase Order, Purchaser reserves the right either to short close/cancel this purchase order and/or recover liquidated damage charges. The cancellation/short closing of the order shall be at the risk and responsibility of the Supplier and Purchaser reserves the right to purchase balance unsupplied item at the risk and cost of the defaulting vendors.

15.2 Delay by the Supplier in the performance of his delivery obligations shall render the Supplier liable to any or all the following sanctions; forfeiture of his performance security, imposition of liquidated damages and/or termination of the contract for default.

15.3 (iv) If the vendor fails to deliver the full ordered quantity even during extended delivery period then the PO shall be short closed and the Performance Bank Guarantee as well as additional BG shall be forfeited.

Format of (i) letter conveying conditions of DP Extension and (ii) DP Extension letter are given in the Appendix.

15.4 If the supplies are not completed in the extended delivery period, the Purchase Order shall be short closed and both the Performance Securities shall be forfeited.

(x) Clause 16.1 of Section-III General (Commercial) conditions of Contract deals with Penalty/Liquidated damages.

16.1 The date of delivery of the stores, including installation & Commissioning, Validation/Acceptance Testing, stipulated in the acceptance of the tender should be deemed to be the essence of the contract and commissioning of the project must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be made after expiry of the contracted delivery period, without prior concurrence of the purchaser and be accepted by the consignee, such delivery will not deprive the purchaser of his right to recover liquidated damage under clause 16.2 below. However, when supply is made within 21 days of the contracted original delivery period, the consignee may accept the stores and in such cases the provision of clause 16.2 will not apply.

(xi) The purchaser was given the right to terminate the contract without prejudice to the remedy for breach of contract vide clause 18 of Section-III

General (Commercial) conditions of Contract.

18. Termination for Default:

18.1 The Purchaser, may, without prejudice to any other remedy for breach of Contract, by written notice of default, sent to the Supplier, terminate this contract in whole or in part

(a) If the Supplier fails to deliver any or all of the goods within the time period(s) specified in the Contract, or any extension thereof granted by the Purchaser pursuant to clause 15;

(b) If the Supplier fails to perform any other obligation(s) under the Contract; and

(c) if the Supplier, in either of the above circumstances, does not remedy his failure within a period of 15 days (or such longer period as the Purchaser may authorize in writing) after receipt of the default notice from the Purchaser.

(d) The equipment supplied failed to pass the validation test.

18.2 In the event the Purchaser terminates the Contract in whole or in part pursuant to para 18.1 the Purchaser, may procure, upon such terms and in such manner, as it deems appropriate, goods similar to those undelivered and the Supplier shall be liable to the Purchaser for any excess cost for such similar goods. However the Supplier shall continue the performance of the Contract to the extent not terminated.

(xii) The agreement contains a specific provision for arbitration vide clause 20 of Section-III General (Commercial) conditions of Contract.

Arbitration:

20.1. In the event of any question, dispute or difference arising under this agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement, the same shall be referred to the sole arbitration, of the Chief General Manager, Southern Telecom Projects, Chennai, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the Chief General Manager, Southern Telecom Projects, Chennai BSNL or by whatever designation such an officer maybe called (hereinafter referred to as the said officer) and if the Chief General Manager, Southern Telecom Projects, Chennai or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the Chief General Manager, Southern Telecom Projects, Chennai or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996. There will be no objection to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant he has expressed his views on all or nay of the matters in dispute. The

award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the Chief General Manager, Southern Telecom Projects, Chennai, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.

20.2 The arbitrator may from time to time with the consent of both the parties enlarge the time frame for making and publishing the award. Subject to the aforesaid, Arbitration and Conciliation Act, 1996 and the rules made there under, any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.

20.3 The venue of the arbitration proceeding shall be the office of the Chief General Manager, Southern Telecom Projects, Chennai BSNL, Chennai or such other places as the arbitrator may decide.

(xiii) The agreement also contains a provision with respect to payment vide clause 6 of Section-IV of Special Conditions of Contract- Part-A of the Advance Purchase Order.

Payment terms:

6.1 Payment shall be made in Indian Rupees only. The mode of payment shall be as follows:

6.1.1 40% of Equipment cost (including CPE"s) on the supply of all the equipment/materials at site against the purchase order in satisfactory condition site-wise.

6.1.2 15% of Equipment cost (including CPE"s) on successful validation as per provisions in this document. Regarding integration with existing systems, the validation tests includes integration with existing OSS/BSS of BSNL.

(xiv) Clause 3.2.1.7 of Section-IV of Special Conditions of Contract Part-B contains a clause regarding the materials to be supplied and also the implementation schedule. Clause 3.2.1.7 reads thus:

3.2.1.7 The supply shall include complete equipment including cabling, antennae systems, accessories, tools, hardware and software, Operations & Management System, etc.

(xv) Clause 4 of Section-IV of Special Conditions of Contract Part-B contains the details regarding the cut off period before which the supply should be commenced and completed.

#### 4. Implementation Schedule

4.1 Time to Supply and Installation : The Bidder shall ensure that the equipment



is supplied within the time schedule as given below:

Schedule of supply/installation & validation/Acceptance Testing & Commissioning for phase-I from the date of issue of Purchase Order.

Sl. No.

Items

Supply from PO date on or before

Installation /from PO date on or before

Commissioning from PO date on or before

1

First 25% (including 25 sites as in 1 above) of total sites

90 days

120 days (with validation)

135 days

2

Second 25% of total sites

120 days

175 days

190 days

3

Balance 50% of total sites

150 days

225 days

240 days

(xvi) The Purchase Order issued to the appellant indicates that it was an order for supply, installation and commissioning and Maintenance support of WiMAX equipment in BSNL network on Turnkey basis for Project II. The Purchase Order was issued on 28 June 2010.

(xvii) Clauses 5 and 6 indicates the scope of the Purchase Order and delivery Schedule.

Scope of the Purchase order Placement of Purchase Order for Supply, Installation, Commissioning and Maintenance Support of WiMAX equipment in BSNL NETWORK on Turnkey basis for Project - 2 Delivery & Commissioning

## Schedule

Sl. No.

Equipments Pertaining to

Supply on or before

Installation on or before

Commissioning on or before

1

First 677 Sites

26/09/2010

26/10/2010 (with Validation)

10/11/2010

2

Second 677 Sites

26/10/2010

20/12/2010

4/1/11

3

Balance 1353 sites

25/11/2010

8/2/11

23/02/2011

(xviii) Clause 13 of the Purchase Order deals with payment terms. Since we are now concerned only with the initial payment of 40%, the clause regarding such payment is extracted below:

### Payment Terms

Payment shall be made in Indian Rupees only. The mode of payment shall be as follows:

13.1 Payment shall be made in Indian Rupees only. The mode of Payment shall be as follows:

13.1.1 40% of Equipment cost (including CPE's) on the supply of all the equipment/materials at site against the purchase order in satisfactory condition site-wise.

(xix) Clause 15 deals with delay in supplier's performance and the consequences of such delay.

#### Delays in Supplier's Performance

15.1 Delivery of Goods and Performance of the services including installation and Commissioning shall be made by the Supplier in accordance with the time schedule specified by the Purchaser in its purchase order. In case the supply is not completed in the stipulated delivery periods, as indicated in the Purchase Order, Purchaser reserves the right either to short close/cancel this purchase order and/or recover liquidated damage charges. The cancellation/short closing of the order shall be at the risk and responsibility of the Supplier and Purchaser reserves the right to purchase balance unsupplied item at the risk and cost of the defaulting vendors.

15.2 Delay by the Supplier in the performance of his delivery obligations including installation and commissioning shall render the Supplier liable to any or all of the following sanctions, forfeiture of his performance security, imposition of liquidated damages and/or termination of the contract for default.

(xx) The provision regarding termination for default reads thus:

#### 18. Termination for Default

18.1 The Purchaser may, without prejudice to any other remedy for breach of Contract, by written notice of default, sent to the Supplier, terminate this Contract in whole or in part

(a) If the Supplier fails to deliver any or all of the goods within the time period(s) specified in the Contract, or any extension thereof granted by the Purchaser pursuant to clause 15:

(b) If the Supplier fails to perform any other obligation(s) under the Contract, and

(c) If the Supplier, in either of the above circumstances, does not remedy his failure within a period of 15 days (or such longer period as the Purchaser may authorize in writing) after receipt of the default notice from the Purchaser.

(d) The equipment supplied failed to pass the validation test.

18.2 In the event the purchaser terminates the Contract in whole or in part pursuant to para 18.1 the Purchaser may procure, upon such terms and in such manner, as it deems appropriate, goods similar to those undelivered and the Supplier shall be liable to the Purchaser for any excess cost for such similar goods. However, the Supplier shall continue the performance of the Contract to the extent not terminated.

(xxi) The details regarding time to supply and installation was further indicated in clause 4.1 of the Special Conditions of Contract (Annexure 1).

24. The issue raised by the appellant requires to be considered in the light of the

contractual provisions extracted above.

25. The respondent issued a notification on 5 June 2009 calling for tenders for giving the contract of Supply, Installation, Commissioning and Maintenance Support of Wave-2 certified WiMAX equipments to various circles of BSNL across the Country on Turnkey Basis. The bid submitted by the appellant after evaluation was accepted. The respondent issued an Advance Purchase Order on 16 December 2009 for a sum of Rs. 434,34,21,603/-. The Advance Purchase Order contains the essential terms of contract. The appellant belatedly confirmed the terms and resultantly, the respondent issued the Purchase Order on 28 June 2010. The contention taken by the appellant with regard to the delay between the Advance Purchase Order and the Purchase Order does not merit acceptance in view of the clear recital in the Advance Purchase Order that the same was only an intention to purchase and shall not be construed as a Purchase Order or a contract.

26. The Purchase Order contains the detailed terms and conditions governing the subject contract. The appellant was expected to submit its unconditional acceptance of the terms and conditions of the contract. The appellant without accepting the contract in its entirety, furnished a conditional acceptance letter to the respondent. The appellant wanted certain clarifications to be given by the respondent before accepting the contract unconditionally. Though, the notification calling for bids contain a specific clause that clarification with regard to the contract should be notified before submission of bids, the fact remains that the appellant has not sought for any clarification either before submitting the bids or atleast immediately after the acceptance of bid and before issuance of Purchase Order. The delay in giving clarification by the respondent was also taken as a ground to justify the delay caused in the matter of supply of equipments by the appellant.

27. The appellant accepted the terms and conditions and produced the Performance Bank Guarantee and immediately thereafter, the Purchase Order was issued on 28 June 2010. The contract in question was for the purpose of supply and installation of 2707 Base Stations (BTS) to provide connectivity to around 14271 CSCs in the States of Punjab, Haryana, Rajasthan, Madhya Pradesh, Chattisgarh, Gujarat and Maharashtra. Since WiMAX II Project was a turnkey project, the appellant was solely responsible for the supply, installation and commissioning of equipments. The time table appended to the Purchase Order shows that the appellant has to supply equipments pertaining to first 677 sites on or before 26 September 2010. There was a further requirement to commission those 677 sites on or before 10 November 2010. The supply of equipments in full in respect of second 677 sites should be completed on or before 26 October 2010. The appellant was expected to complete the installation and commissioning on or before 20 December 2010 and 4 November 2011 respectively. Similarly with respect to the remaining 1353 sites, the appellant was bound to supply the equipments on or before 25 November 2010 and install

and commission on or before 8 February 2011 and 23 February 2011 respectively.

28. Even as per the version given by the appellant in the plaint in C.S. No. 207 of 2012, equipments were supplied only in respect of 955 BTS. Though the appellant claimed that supplies were made in respect of those 955 sites in all material aspects, the respondent disputed the said version by giving the details of the equipments supplied in full as well as the total number of incomplete equipments. In fact, during the course of initial hearing, the learned Senior Counsel for the appellant in O.S.A. No. 393 of 2012 fairly submitted that the appellant was advised to supply the IDUs only during the time of installation, given the nature of the product. However, the learned Senior Counsel maintained that the appellant at all point of time agreed to supply the required number of IDUs for the purpose of installation and integration. Though the appellant was expected to adhere to the specified time table for the purpose of supply, installation and integration, the fact remains that the appellant failed to perform its part of the contract as agreed originally.

29. The appellant has alleged several reasons for the delay in the supply of equipments. According to the appellant, though as many as 955 out of 2707 BTS were supplied and a bill for a sum of Rs. 233,451,525/- being 40% of the cost was raised, the respondent has paid only a sum of Rs. 9,071,434.97. The appellant has also placed reliance on the Minutes of the meetings with the officials of the respondent and the alleged assurance given to pay 40% of the invoice amount with respect to BTS.

30. We now propose to deal with the contentions raised by the appellant one after another under specified heads and to record our finding in respect of those issues.

Substantial contentions and our findings:

I. Delay between the issue of Advance Purchase Order and the Purchase Order:

Contention of the appellant:

According to the appellant, the Advance Purchase Order was given on 16 December 2009. The appellant furnished a Performance Bank Guarantee for a sum of Rs. 21,23,01,730/- on 29 December 2009. However the respondent issued the Purchase Order only on 28 June 2010 nearly after six months from the date of Advance Purchase Order. This delay caused substantial prejudice to the appellant.

Finding:

The date of Advance Purchase Order cannot be taken as the relevant date for computing the period of performance of contract. The Advance Purchase Order was nothing but an intention of the purchaser to place the Purchase Order on the bidder. The Advance Purchase Order itself contains a definition clause. It is true that the appellant furnished a Bank Guarantee on 29 December 2009. It is a

matter of record that immediately after the issuance of Advance Purchase Order, the appellant has raised so many queries and made a request for clarifications and had furnished only a conditional acceptance of contract. The respondent was not bound to entertain request for clarification after the issuance of Advance Purchase Order on account of the specific condition incorporated in the tender notification indicating that the prospective bidders have to obtain the clarification on bid documents by making a request in writing and the clarification issued by the respondent shall form an integral part of the bid document and it would amount to amendment of relevant clauses of the bid documents. Even though the respondent was not answerable to the appellant after the issuance of Advance Purchase Order, the fact remains that BSNL made every attempt to give the clarification. According to the appellant, some of the questions remain unanswered. The materials on record shows that the appellant submitted their unconditional acceptance only on 9 February 2010. Thereafter, the respondent reduced the value of the Purchase Order from Rs. 434,34,21,603/- to Rs. 378,28,07,007/-. The appellant accepted the reduction and consequently an amended Bank Guarantee for a sum of Rs. 19,26,63,217/- was submitted to the respondent instead of Rs. 21,23,01,730/-. The revised Performance Bank Guarantee was given on 20 June 2010 and immediately thereafter Purchase Order was issued on 28 June 2010. Since the delay between the Advance Purchase Order and the Purchase Order dated 28 June 2010 was primarily on account of so many clarifications raised by the appellant, for the purpose of accepting the contract, the appellant cannot bank upon their own fault to justify the delay in supplying the equipments. In any case, even according to the appellant, time was extended subsequently on multiple occasions. In fact, as per clause 27.2 of the Purchase Order, the appellant was expected to give the unconditional acceptance in writing within fourteen days from the date of issuance of the Advance Purchase Order. Therefore, we are of the view that there was no undue delay between the issuance of Advance Purchase Order and the Purchase Order dated 28 June 2010.

## II. Reduction of the value of Purchase Order:

### Contention of the appellant:

The respondent originally issued a Purchase Order for a sum of Rs. 434,34,21,603/-. The appellant, pursuant to the said Purchase Order furnished Performance Bank Guarantee for a sum of Rs. 21,23,01,730/- taken from Axis Bank, Chennai. However, without notice to the appellant, the respondent reduced the value of the Purchase Order drastically from Rs. 434,34,21,603/- to Rs. 378,28,07,007/- without any basis. This materially effected the contract.

### Finding:

Clause 25(a) of the Advance Purchase Order gives authority to the Purchaser to make changes in the Purchase Order. When there is a specific authority given to the respondent to make changes in the Purchase Order, the appellant was not

justified in contending that the unilateral reduction caused them prejudice. The appellant accepted the so called unilateral reduction and agreed to supply the equipments. The appellant only wanted reduction of the value of the Bank Guarantee. Therefore, we do not find any merit in the contention with respect to the unilateral decision to reduce the value of Purchase Order.

### III. Delay in procuring Import Licence: Contention of the appellant:

It is the case of the appellant that immediately after the receipt of Purchase Order, they have placed Purchase Orders with the original equipment manufacturer for the purpose of manufacturing core equipments, BTS and CPEs. However, the same could not be delivered on time due to the delay in obtaining Import Licence by the respondent. The Import Licence was issued only during October, 2010. The delay in procuring Import Licence was taken as a substantial ground to justify the delay in supplying the core equipments.

#### Finding:

Even though the Purchase Order was given as early as on 28 June 2010, the appellant submitted the documents for grant of Import Licence only on 16 September 2010. The respondent submitted the documents before the Wireless Planning Co-ordination Wing (WPC) on 22 September 2010 itself and ultimately Import Licence was issued on 18 October 2010. The Import Licence was given to the appellant on the very next day. Therefore, it cannot be said that there was undue delay on the part of the respondent in procuring Import Licence. It is a matter of record that considering the procedural delay on account of Import Licence, extension was given to the appellant up to 13 January 2011. According to BSNL, in spite of giving such extension, the appellant was able to deliver only 21 Base Stations (BTS) as against the total ordered quantity of 2707 BTS during the extended period. Therefore, the so called delay in obtaining Import Licence would not come to the rescue of the appellant. In any event, whether there was any such delay in procuring Import Licence could be gone into only when parties adduce evidence.

### IV. Though 955 BTS were supplied, 40% of the agreed payment was not made:

#### Contention of the appellant:

The Purchase Order gave an assurance that 40% of the invoice amount would be paid, taking into account the quantity delivered. It was only on the said undertaking, the appellant accepted the contract and made supplies thereafter. The appellant has already delivered the equipments to the respondent site wise for a total sum of Rs. 136,05,01,227/- and the appellant has also raised invoices for the same to the respondent from time to time. As per clause 13.1 of the Purchase Order, the respondent has to pay 40% of the equipment cost on delivery of all equipments supplied and even after the deduction of custom charges from the invoice raised, the respondent has to pay a sum of Rs. 37,32,56,782/- and while so, the appellant had received only a sum of Rs.

6,43,92,540/- . In spite of numerous letters sent by the appellant to release 40% of the total dues which was payable on delivery of equipments, no fruitful action was forthcoming from the respondent.

#### Finding:

The contract in question was termed as a "Turnkey Project". The purchase agreement itself was considered as a contract. Since the contract contains a dead line with regard to the supply of equipments, installation and commissioning, it could very well be said that time was considered as the essence of contract. The contract was to supply 2707 BTS in complete shape. It was not a contract for supply of certain equipments without any commitment to make it a complete one. The value of the equipment was estimated in units. The unit price was taken into account for the purpose of determining the total value of Purchase Order. Clause No. 14 of the Purchase Order clearly gives an indication as to how the total amount of the Purchase Order was arrived at. The appellant very specifically agreed to supply equipments pertaining to 677 sites on or before 26 September 2010. The appellant has further agreed to install the equipments and commission the project on or before 26 October 2010 and 10 November 2010 respectively. The counter affidavit filed by the respondent indicates that the dead line of 10 November 2010 was extended up to 13 January 2011. Even though the appellant was expected to complete the supply of equipments in its full shape relating to 677 sites, the fact remains that the appellant was able to supply only 21 Base Stations during the said period, against the total quantity of 2707 BTS. The appellant has taken up a contention that altogether 955 BTS were supplied.

Whether the equipments were supplied in complete shape, whether there was actual supply of the stated quantity of BTS as alleged by the appellant could be determined only when the parties adduce oral and documentary evidence. In the absence of indication as to the actual date when supplies were made, it cannot be said that appellant has made out a prima facie case that BSNL has delayed the payment.

It is not the case of the appellant that even as on date indoor units were supplied in respect of the so called 955 Base Stations (BTS). As observed above, the learned Senior Counsel during his opening remarks very clearly admitted that, the appellant, taking into account the sensitive nature of IDU, decided to supply the indoor units during the time of installation. The contract was not one for supply of equipments alone as contended by the appellant. It was a comprehensive contract for supply, installation and commissioning. It was for a specific purpose and for a time bound programme. The appellant was bound to supply the BTS with all accessories and ancillaries including indoor units. In fact, the learned counsel for the respondent on instructions from BSNL submitted that indoor unit is the heart of the equipment, without which, it is not possible to make the system functioning. There is no point in saying that the appellant has supplied 955 BTS without any reference to the indoor units supplied in respect of those equipments. The counter affidavit originally filed by the respondent



indicates that even against the incompleting BTS supplied, 267 units were diverted to Madhya Pradesh. However, it is stated that the BSNL Unit at Madhya Pradesh has not received those BTS. The respondent has agreed to pay 40% of the invoice amount only in case the BTS were supplied in a complete shape, meaning thereby, with indoor units and other ancillary items. The appellant appears to have procured only such of those items which would be available in market or which could be procured without any difficulty. The appellant has not produced any documents before us to substantiate the contention that even in respect of those 955 BTS, indoor units were provided so as to enable them to claim 40% of the total value. Unless and until the appellant has produced records evidencing supply of BTS in its complete form with all the integral parts it cannot be said that the respondent failed to honour the commitment with regard to payment of 40% of the invoice amount. Therefore, on this point also, the appellant cannot be said to have established a prima facie case justifying grant of interim injunction.

V. Even the cost of CPE's supplied were not paid by the respondent:

Contention of the appellant:

The appellant has taken up a contention that even the proportionate cost of Customer Premises Equipments (CPEs) supplied were not paid. According to the appellant, site independent items were supplied as per order and as such the respondent was bound to pay 40% of the invoice amount.

Finding:

The Customer Premises Equipments (CPE) can be utilised only after installation of BTS and roll out of network. The respondent in the counter affidavit very clearly contended that without the network availability, there is no use of supply of CPE. Since the appellant was not in a position to complete BTS, they could not roll out of the network. The contention of the respondent that CPEs supplied by the appellant were without feeder cables and as such the CPE's were in incomplete shape, also assumes significance. When it is made out that without the supply of BTS, CPEs cannot be made use of, whether the appellant is entitled to claim 40% of the amount towards CPEs is to be seen only when parties adduce oral and documentary evidence.

VI. Delay in issuing CA Root certificate:

Contention of the appellant:

The appellant contended that there was considerable delay in loading the CA Root certificate in the CPEs. The appellant also contended that CPEs were made to store in the warehouse for want of Root Certificate. Therefore, the delay in issuing the Root Certificate by the respondent compelled them to keep the finished goods in overseas warehouse. The respondent has issued the details of the Root Certificate only on 13 April 2011 and the same resulted in the delayed supply of CPE's. The appellant, after receipt of Purchase Order submitted a

request before the respondent to accept superior version of the specification stating that it was difficult to supply the originally quoted third party items i.e. Client work stations, etc., due to specification change. Even though the request was made as early as on 31 August 2010, approval was given only during April, 2011. This delay of about seven months also contributed towards the total delay in supplying the equipments.

Finding:

It is not in dispute that the appellant has agreed to supply the non-WiMAX equipments in accordance with the specifications given in the Purchase Order. It was only after the receipt of Purchase Order, the appellant made a request to change the model. The respondent agreed to change the model and the time taken for grant of approval was excluded from the total period prescribed for completing the supply. It is also a matter of record that in spite of giving such relaxation, the CA Root certificate has not been loaded in the CPE.

VII. Delay in payment of Customs Duty:

Contention of the appellant:

The appellant in paragraph 21 of the plaint contended that there was a substantial delay in payment of customs duty by the respondent and as such, there was imposition of warehouse charges and extra customs duty as interest. Because of the non-payment of customs duty by the respondent, the appellant was compelled to pay interest on customs duty, demurrage, retention and ground rent charges and this has created additional financial burden and delayed the final delivery.

Finding:

Though the appellant contended that it was the duty of the respondent to pay Customs Duty, there is nothing on record to show that the Purchaser has taken up the task of paying the customs duty. The respondent in the counter affidavit very specifically stated that it was the responsibility of the appellant to pay customs duty and customs clearance and they have only agreed to help the appellant to complete the formalities. This again is a matter which could be looked into only during the time of trial.

VIII. Even before the extended period, show cause notice was issued:

Contention of the appellant:

The appellant was given extension upto January 2011. It was further extended upto 31 December 2011. The delivery period was extended on 7 February 2012 by giving time up to 30 April 2012 and such being the case, the respondent was not justified in issuing the show cause notice on 22 February 2012.

Finding:

The contract in question was for the purpose of commissioning the project. The

Government wanted the rural people to enjoy the benefits of WiMAX technology. The Government entrusted the work with BSNL and even agreed to give subsidy for executing the project. Since the Government wanted to complete the project in a time bound manner, BSNL in the very tender notification as well as in the Advance Purchase Order and finally in the Purchase Order imposed a specific condition that supply, installation and commissioning should also be made within the prescribed period. Therefore, there is no difficulty in arriving at a conclusion that time was the essence of contract. It is true that final extension was given up to 30 April 2012. We should remember here that contract was given to supply total equipments pertaining to 2707 BTS. Given the nature of equipments to be supplied, it can very well be said that it would not be possible to supply all the 2707 equipments before a particular date. The appellant would be justified in taking up a contention that the respondent should have waited till 30 April 2012, in case the agreement was for the purpose of execution of a document. Here, the contract was for the purpose of supply of equipments, installation and commissioning and the period was extended only to complete the entire process. The extension was given on 7 February 2012. According to BSNL, the appellant has not supplied even one BTS, complete in all respects or indoor units for all BTS already supplied after the extension given on 7 February 2012. Such being the case, the appellant cannot be heard to say that respondent should wait till 30 April 2012 to oversee the progress and only thereafter, show cause notice could be issued. The appellant was bound to show progress in supplies. The appellant has not produced any records to show that subsequent to 7 February 2012 even equipments relating to atleast one site was supplied. The appellant had already delayed the project. The respondent was monitoring the project. The respondent found that the other contractors have all supplied the agreed quantity and accepted payments. Even then, the appellant was not in a position to supply the required equipments. The respondent having found that in spite of the extension given on 7 February 2012, the appellant was not in a position to supply the equipments, issued a show cause notice on 22 February 2012. The respondent in the said show cause notice very clearly stated that the appellant has not made progress in installation and commissioning of BTS despite the commitment given by them in this regard. The respondent further indicated that it has become the habit of the appellant to simply seek delivery extensions without showing any result. It was only under such circumstances, the appellant was directed to show cause as to why action should not be taken in accordance with the provisions of the Purchase Order. The appellant submitted a reply to the said show cause notice on 1 March 2012. Except stating that the respondent has not paid 40% of the amount, the appellant nowhere stated that subsequent to 22 February 2012, equipments were supplied and it is not correct to state that there was no progress. Even in the reply dated 1 March 2012 the appellant wanted six months' time for manufacturing and supplying equipments to the Circles. From the reply, it is very clear that the appellant has not manufactured the equipments. The appellant has no case that BSNL failed to consider the reply and took a hasty action in the matter. It is a matter of record that even before

considering the reply dated 1 March 2012 the appellant filed the Civil Suit in C.S. No. 207 of 2012 and obtained an interim order on 29 March 2012. When it is made out that no progress was shown by the appellant in spite of granting extension on multiple occasions, it cannot be said that the respondent was at fault in issuing the show cause notice even before the expiry of the extended period. Therefore, we reject the contention with regard to the issuance of notice during the currency of extension.

#### IX. Arbitration:

##### Contention of the appellant:

The learned counsel for the appellant in O.S.A. No. 394 of 2012, during the course of his submissions contended that in spite of a specific provisions for arbitration, the respondent filed a counter in the matter and contested the interlocutory applications in the Civil Suit. According to the learned counsel, in view of the arbitration clause, the matter should be referred to an independent arbitrator. It was his further contention that there is no point in conducting the arbitration by the Chief General Manager as he was a party to the transaction. In short, the learned counsel wanted the matter to be referred to an independent arbitrator, notwithstanding the specific provision contained in the agreement to refer the dispute to an arbitrator nominated by BSNL. Finding:

The appellant was well aware of the contractual terms including the provision regarding arbitration. In spite of such an express provision, the appellant took no efforts to call upon the respondent to appoint an arbitrator. The appellant straightaway filed the Civil Suit for injunction and obtained an interim order and is now accusing the respondent for not referring the matter for arbitration. The learned Senior Counsel for the respondent submitted that the very fact that it was only after obtaining interim order in the present appeal, the appellant has come up with a request to refer the matter to arbitration shows their modus operandi to delay the matter. The learned Senior Counsel, on instructions submitted that BSNL is not agreeable for arbitration on account of the background facts especially due to passage of time and in view of the nature of litigation and with a view to complete the project early. Therefore we are of the view there is no merit in the contention taken by the appellant on the basis of the provision regarding arbitration.

#### X. No urgency to complete the project in view of the delay in filing the application by BSNL to vacate the interim order:

##### Contention of the appellant:

It is the contention of the learned Senior counsel for the appellant in O.S.A. No. 393 of 2012 that the Civil Suit was filed in C.S. No. 207 of 2012 along with two interlocutory applications. The learned Single Judge was pleased to grant interim ex parte order on 29 March 2012. The respondent filed a counter affidavit only on 3 August 2012 with a request to vacate the interim order. The respondent

took nearly four months time to file the counter affidavit and to get the stay vacated. This shows that there was no real urgency and the project was not a time bound one.

Finding:

It is true that the appellant obtained an ex parte interim order on 29 March 2012. The respondent filed counter affidavit in the interlocutory applications on 3 August 2012. The fact that the respondent took four months" time to file counter affidavit and ultimately the interim application was disposed of only on 21 September 2012, would not go to show that there was no real urgency in the matter.

We are dealing with a written contract. The terms of the agreement are very clear. The contract contains a specific clause regarding completion. In fact, the period before which supplies should be made, installation to be completed and project should be commissioned were all very clearly indicated in the contract. The administrative delay in filing counter in the matter and to bring up the application for final disposal would not be a factor to decide the urgency of the matter in view of the time indicated for completion of contract.

The appellant obtained ex parte interim order on 29 March 2012. Nothing prevented the appellant from making supplies thereafter. The interim order was vacated only on 21 September 2012. Therefore, the appellant was having nearly five months time, at its disposal. The appellant could have completed the supplies during the said period. In fact, the appellant in their reply to the show cause notice has indicated that only six months time was required to complete all the supplies and to commission the project. Even though the appellant was having five months clear time before the interim order was vacated, the appellant miserably failed to make supplies. The appellant cannot take advantage of their own wrong. In view of clause 15.1 of the contract, we reject the contention that time was not the essence of contract.

XI. No notice before termination:

Contention of the appellant:

It was contended that the injunction was vacated on 21 September 2012. Thereafter, the contract was terminated on 22 September 2012. According to the appellant, the contract contains a specific provision for giving fifteen days notice before taking action for termination. No such notice was issued before terminating the contract on 22 September 2012. Therefore, the order of termination is bad in law.

Finding:

The order of termination dated 22 September 2012 is not an issue in this appeal. In fact, the suit itself was only one for injunction.

Prima facie, the appellant has no case on the basis of clause 18 of the Purchase

Order regarding issuance of notice before termination. The respondent has already issued a show cause notice on 22 February 2012. The appellant was given fifteen days time to submit the reply. It is a matter of record that the appellant has given a reply on 1 March 2012. The appellant immediately filed a Civil Suit on 22 March 2012 and obtained an interim order. This prevented the respondent from taking any action pursuant to the show cause notice. The respondent waited till the disposal of the interlocutory applications. The interim orders were vacated on 21 September 2009. The appellant thereafter terminated the contract on 22 September 2012. When it is made out that before terminating the contract, the respondent has issued notice on 22 February 2012 to the appellant, resulting in submitting a reply by the appellant, it cannot be said that the subsequent termination on 22 September 2012 was without notice and was in violation of clause 18 of the Purchase Order. We, therefore, reject the contention regarding invalidity of the order of termination.

XII. Bank Guarantee Being conditional, no right to invoke the guarantee in view of the pending dispute: Contention of the appellant:

According to the appellant, pursuant to the Advance Purchase Order, conditional performance guarantee was given. The terms of the deed indicates that only in case there was no dispute, the respondent can invoke the bank guarantee. According to the learned Senior Counsel, since there was a valid dispute between the parties, it was not open to the respondent to invoke the bank guarantee.

Finding:

The notification issued by the respondent contains a reference to the agreements to be executed by the supplier.

The annexure to the bid document contains the details of the documents to be annexed along with the bid and the documents to be produced in case the bid is accepted. Page 93 of the bid document contains the format of Performance Security Guarantee Bond. The bank agreed to pay the amount due without any demur on demand from BSNL by reason of breach by the contractor of any of the terms and conditions contained in the said agreement or by reason of the contractor's failure to perform the agreement. The respondent has produced a copy of the Performance Security Guarantee Bond. Since the copies were not legible, we directed the learned counsel for the appellant to produce the original of the bank guarantee or atleast a legible photocopy. However, the document was not produced before us. Therefore, we are not in a position to verify the terms and conditions incorporated in the guarantee agreement executed by the appellant and to arrive at a conclusion as to whether the bank was bound to pay the amount to BSNL notwithstanding the dispute between the parties. In case, the bank guarantee was given in the format appended to the bid document, the respondent would be justified in its contention that they can invoke the bank guarantee, notwithstanding the dispute.

As held by the Supreme Court in BSES Ltd. (Now Reliance Energy Ltd.) Vs.

Fenner India Ltd. and Another, the beneficiary is the best judge to decide as to when and for what reason the bank guarantee should be encashed.

### XIII. Assurance to complete the Project by the end of May, 2013

Contention of the appellant:

The learned Senior Counsel for the appellant in O.S.A. No. 393 of 2012 submitted that in case the appellant is given time till 31 May 2013, the entire equipments would be supplied and the project would be completed. According to the learned Senior Counsel, the appellant has spent considerable amount for the purpose of supplying equipments and as such no prejudice would be caused in case time is extended by six more months.

Finding

The learned Senior Counsel for the respondent, on instructions, submitted that the respondent is not prepared for any such extension. According to the learned Senior Counsel, the contract in question was the second contract given to the appellant. Even the first contract was not completed by the appellant within the time stipulated. Even now, it remains incomplete. It was his further contention that there is no guarantee that the appellant would complete the project even after giving extension. The learned Senior Counsel submitted that the respondent extended time now and then with the fond hope that the appellant would complete the project. It is not possible for the respondent to wait any more in view of the fact that the project has already been delayed.

The appellant was expected to complete the project originally by 30 September 2010. Time was extended upto 13 January 2011. Even then the appellant was not in a position to make supplies as agreed. Taking in to account the request made by the appellant, time was extended up to 31 December 2011. Thereafter, time was once again extended up to 30 April 2012. The final extension was given on 7 February 2012. The respondent having found that still there was no progress made by the appellant, issued a show cause notice on 22 February 2012. As stated earlier, the appellant obtained an interim order on 29 March 2012 and enjoyed the benefits of the said order till 21 September 2012. Even during the currency of injunction, efforts were not taken by the appellant to supply the equipments and to commission the project. It is not as if it would be impossible to complete the contract before the cut off period. In fact, the other three contractors have supplied the agreed quantity within the time granted by BSNL. The details furnished by the respondent in the counter affidavit contains the following table and the same would prove the comparative performance of the contractors.

Name of the vendor

P O Date

Ordered Quantity

Supplied Quantity

GEMINI (L 1) (Appellant)

28/06/2010

2707

955 (Incomplete)

ZTE

28/09/2010

1718

1718

ICOMM

8/7/10

1357

1357

VMCL

31/03/2011

949

949

The appellant wanted only payment and that too, by supplying incomplete equipments. The appellant was expected to supply the equipments in its full shape. The appellant has agreed to Commission 2707 BTS in a phased manner, but, miserably failed to commission even a part of BTS within the extended period. The appellant very casually contended that they have supplied 955 BTS and as such, the respondent was bound to pay 40% of the invoice amount. The respondent very specifically contended that the BTS were supplied without indoor units and therefore, it was impossible to commission the project. The figures given by the respondent shows that only 21 BTS were supplied in its complete form. Without the indoor units, it is not possible to commission the project.

In the plaint in C.S. No. 207 of 2011, it was claimed that the appellant has forged strong alliances with international companies and commands commendable respect in the industry and has got their status as one of the fastest growing business houses in India and the group is firmly rooted in India and is expanding their footprint to the other parts of the world. However, the representation submitted by the appellant on 30 June 2011 and available at page No. 219 of the typed set of papers (Additional typed Set II) in O.S.A. No. 394 of 2012 described the appellant as a small Indian Company floated and operated by



a small group of young entrepreneurs with big dreams, to be part of great Indian growth story. The appellant in the said representation stated that their financial strength may not match and in fact, does not match with the other competitors. The financial condition of the appellant is revealed from the said representation dated 30 June 2011.

As regards financial condition of the appellant, there is material differences between the plaint averments and the representation dated 30 June 2011. The learned counsel for the appellant in O.S.A. No. 394 of 2012 submitted that the appellant is in a financial crisis and in case injunction is not granted, the appellant and the employees would be put to difficulties. The appellant has no case that their financial condition has improved and they would be in a position to procure equipments from abroad and would complete the supplies within a period of six months. The learned counsel for the appellant in O.S.A. No. 394 of 2012 contended that the appellant would be in a position to supply, provided a direction is issued to the respondent to pay 40% of the invoice amount relating to the supplies already made. Therefore, the promise itself is a conditional one. The appellant has no case that 2707 equipments would be supplied in its full form, in case six months time is given. The documents available on record prima facie gives an indication that the appellant has no financial capacity and infrastructural facilities to supply the equipments in its entirety.

The contract is a time bound one. It was a turnkey project. The appellant wanted the contract to be kept alive and to supply the equipments according to their choice and that too, after making part payment by BSNL. As already stated the appellant could have supplied the equipments at least during the currency of the interim order. The fact that inspite of an undertaking given on 1 March 2012 that the entire 2707 equipments would be supplied and the project would be commissioned in case six months time is given, the appellant had not taken any efforts even after getting the interim order on 29 March 2012, clearly indicates that the intention is only to purchase time. Given the nature of project and the agreement to execute it in a time bound manner, we cannot direct the BSNL to extend the time by another six months. In fact, prima facie we are in agreement with the contention of the learned Senior Counsel for the respondent that the appellant never adhered to the time schedule.

The learned Senior counsel for the respondent during the course of his arguments submitted that this is the second case of default, in so far as the appellant is concerned. According to the learned Senior counsel, another project was also given to the appellant. In spite of giving sufficient time, the appellant was not in a position to complete WiMAX I Project. In fact, part of WiMAX I Project was given to M/s. HCL and the said contractor has completed the project within the stipulated time. It was further submitted that the appellant had completed only 50% of the work in about three years with respect of WiMAX I Project and it is still in an incomplete stage.

WiMAX I Project is not an issue in the present appeals. The respondent in spite of

having complete knowledge about the delay caused to complete another project appears to have, given the subject contract to the appellant. The officials of the respondent were in the know of things. The fact that the respondent issued the second contract to the appellant with respect to WiMAX Project II in spite of failure to complete the first project, shows the way in which multi crore contracts are handled by BSNL.

The applicable legal principles:

31. While considering the question of interlocutory injunction in a matter involving a contract, necessarily, it has to be seen as to whether the Court would be in a position to enforce specific performance of contract entered into between the parties.

32. The appellant has entered into an agreement with the respondent to supply and install equipments and ultimately to commission the project. The agreement contains a specific provision for termination, in case the Purchaser is of the view that the performance is not up to the mark.

33. The Specific Relief Act, 1963 (hereinafter referred to as "the Act") contains provisions as to the contracts which could be specifically enforced and which cannot be specifically enforced. Chapter VII of the Act deals with injunctions generally. Similarly, Chapter VIII provides for grant of perpetual injunctions.

34. Section 38 of the Contract Act gives jurisdiction to the Court to grant perpetual injunction to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication. The provisions of Section 38 have to be read in association with Sections 14 and 41 of the Act. Section 14 deals with contracts which cannot be specifically enforced. Sub-section (c) and (d) of Section 14 provides that a contract which is in its very nature determinable or the performance of which involves the performance of a continuous duty which the court cannot supervise, specific performance cannot be enforced. Section 41 of the Act contains a statutory bar for grant of injunction under certain specified circumstances. Sub-section (e) of Section 41 provides that injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. Similarly, sub-section (h) of Section 41 also contains a bar in case equally efficacious relief could be obtained by any other usual mode of proceeding, except in case of breach of trust.

35. The case pleaded by the appellant has to be considered in the light of sub-sections (c) and (d) of Section 14 and sub-sections (e) and (h) of Section 41 of the Act.

36. The appellant has admittedly entered into a contract with the respondent. The contract involves supply, installation, commissioning and maintenance support of WiMAX equipments in various circles of BSNL on turnkey basis. The contract provides for supply of various equipments both "Site Dependent items"

and "Site Independent items". The appellant has to supply equipments and install it in the concerned station. The appellant has also undertaken to commission the project and to undertake the subsequent maintenance. The contract by its very nature cannot be specifically enforced by Court. The appellant filed a Civil Suit for perpetual injunction restraining the respondent from terminating the Purchase Order or to invoke the Bank Guarantee. The application for injunction against termination would amount to a prayer for specific performance of contract. Since the contract was determinable at the instance of the purchaser, a show cause notice was issued to the appellant. The appellant has submitted a reply to the show cause notice. The appellant was determined to see that no further action is taken by the respondent pursuant to the show cause notice. Though the appellant made a request for granting six months' time to complete the project, even before considering the said request by the respondent, a Civil Suit was filed. The appellant wanted the respondent to continue the contract notwithstanding the right to terminate the contract on account of the failure to supply equipments within the cut off period. The agreement was not one for sale of immovable property. It was a composite contract of highly technical nature, which cannot be specifically enforced by Court. Section 41(e) prohibits grant of injunction to prevent the breach of a contract, the performance of which would not be specifically enforced.

37. Temporary injunctions are regulated by the Code of Civil Procedure. Section 37 of the Act gives liberty to the aggrieved petitioner to file an application for temporary injunction by invoking the provisions of the Civil Procedure Code. The liberty granted to invoke the provisions of the CPC for temporary injunction does not mean that the Court is bound to grant injunction notwithstanding the statutory bar against grant of perpetual injunction in a contractual matter.

38. It is trite that temporary injunctions are granted to preserve status quo during the currency of proceedings. It is open to the Court to dismiss the suit ultimately notwithstanding the interim protection given earlier. The fact that temporary injunctions are regulated by the provisions of the CPC does not mean that the Court would be deprived of its jurisdiction to look into the plaint and supporting documents to arrive at a prima facie satisfaction as to whether the main relief could be ultimately given in the Civil Suit. The plaint in the subject case was cleverly worded. At the first blush, it would appear as if the injunction was sought only against terminating the Purchase Order. However the fact remains that the Purchase Order itself is a contract. Therefore, injunction not to terminate the Purchase Order would amount to a prayer for specific performance of contract. According to the respondent, in case permanent injunction is granted, it would deprive the purchaser of its right to terminate the contract notwithstanding the availability of sufficient grounds.

39. The learned Senior Counsel for the appellant in O.S.A. No. 323 of 2012 and the learned counsel for the appellant in O.S.A. No. 324 of 2012 contended that the learned Single Judge failed to consider the prima facie case, balance of

convenience and irreparable injury. According to the learned counsel, the learned Judge only extracted the arguments and judgments and failed to consider the factual matrix in the light of Order XXXIX Rule 1 of the Code of Civil Procedure.

40. The petitioner in an application for injunction is required to prove the prima facie case, balance of convenience and irreparable injury. The Court has to consider the totality of circumstances and to decide as to whether the petitioner in a given case has made out a case for interlocutory injunction. The Court has also to see whether the balance of convenience is in his favour. In case, these two conditions are satisfied, the third condition should also be looked into. The petitioner should prove that in case injunction is not granted, it would cause him irreparable injury.

Binding legal precedent:

41. The Supreme Court in *Dalpat Kumar and Another Vs. Prahlad Singh and Others*, re-iterated the legal principles regarding interim injunction and burden of proof on the side of the plaintiff to prove the prima facie case, balance of convenience and comparative hardship. The Supreme Court said:

5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infringement of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

42. The Supreme Court in *Seema Arshad Zaheer and Others Vs. Municipal Corpn.*

of Greater Mumbai and Others, indicated the salient features of prima facie case thus:

The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a prima facie case as pleaded, necessitating protection of plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of plaintiff's right is compared with or weighed against the need for protection of defendant's right or likely infringement of defendant's rights, the balance of convenience tilting in favour of plaintiff; and (iii) clear possibility of irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands.

43. Most recently, the Supreme Court in Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and Others, reiterated the legal position regarding injunction:

29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on Account of refusal of temporary injunction if the injury suffered by the plaintiff on Account of refusal of temporary injunction was not irreparable.

44. In Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, M/s. Indian Oil Corporation Limited cancelled the Indane distributorship of M/s. Amritsar Gas Service and the order of termination was challenged in a Civil Suit before the Subordinate Judge, Amritsar. The Corporation in the said suit filed an application u/s 34 of the Arbitration Act to stay the suit. Though the application was dismissed by the trial court and affirmed by the High Court, the Supreme Court set aside the said order and appointed a retired Judge of the High Court as Arbitrator. The arbitrator passed an award and directed the Corporation to remedy the breach by restoring the distributorship. The said award was ultimately taken up before the Supreme Court. The Supreme Court accepted the contention of the Corporation that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition under Sections 14 and 16 of the Specific Relief Act. The Supreme Court opined that granting the relief of restoration of distributorship even on the finding that the breach was committed by the Corporation is contrary to the mandate provided in Section 14(1) of Specific Relief Act. Accordingly, the award was set aside.

Prima facie case:

45. The appellant has taken the subject contract on turnkey basis. The appellant was in the know of things with respect to WiMAX project. The appellant was given a contract earlier also and as such the nature of the project was well known to them. The contract in question was a second contract for WiMAX II

Project. The appellant has agreed to supply the equipments, install the same and commission the project before the cut off period indicated in the Purchase Order. Taking into account the nature of contract, time limit was fixed. By the very nature of contract, it could be said that the Commissioning should be done at the earliest point of time. BSNL was competing with other private service providers even to survive. The appellant has agreed to supply the equipments in its full shape within the cut off date, but miserably failed to supply the equipments in its full shape within the extended period. The appellant was given extensions atleast on three occasions. Even then the appellant was not able to supply the required number of equipments. Though the appellant has undertaken to commission 2707 BTS within the contract period, only 21 BTS were supplied. The respondent having found that there was no progress in the matter, issued a show case notice to the appellant on 22 February 2012. Even thereafter, there was no progress made out by the appellant. The respondent was well within its authority to terminate the contract. Such being the position, it cannot be said that prima facie case is in favour of the appellant.

#### Balance of convenience

46. The appellant having failed to supply the products in spite of the indication given in the contract that time was the essence of contract, cannot be heard to say that balance of convenience is in their favour. Because of the delay caused by the appellant, the respondent was put to difficulties. Therefore, it cannot be said that balance of convenience is in favour of the appellant.

#### Irreparable injury:

47. The appellant in the plaint in C.S. No. 207 of 2012 claimed to be a multinational company engaged in the business of providing and implementing networking solutions and services. The appellant contended that they have forged strong alliances with leading international companies and commands commendable respect in the industry. Even though such a claim was made in the plaint, in view of the documents available on record, it appears at least prima facie that the appellant has no financial capacity to purchase the equipments and to supply the same to BSNL.

The other contractors, who have taken contract along with the appellant supplied the equipments within the cut off period. They were given payment as per schedule by the respondent. In case injunction is granted, the respondent would be put to irreparable loss. The respondent would not be in a position to float fresh tenders and to complete the project. The appellant has got an alternative remedy to claim damages. The contract in question is a public project undertaken by the Government in larger public interest. In case the respondent is restrained from terminating the contract, BSNL has to wait till the disposal of the suit to select another supplier and to commission the project. Public interest would suffer materially in case injunction is granted. The respondent is a Government organisation and in case it is held that the appellant is entitled to

damages, the decree can be enforced without any difficulty.

Therefore, we are of the view that the appellant has not made out a case for interlocutory injunction.

48. Since the learned counsels for the appellant and the learned Senior Counsel for the respondent argued the appeals at length on merits, we have no other option except to consider the merits of the matter for the purpose of deciding the prima facie case, balance of convenience and irreparable injury. We make it clear that our observation and findings above, would not stand in the way of the learned Single Judge deciding the Civil Suit on merits and as per law. uninfluenced by any such observation.

Conclusion:

In the result the intra-court appeals are dismissed. Consequently, the connected Mps are closed. No costs.