Iridium India Telecom Limited vs Motorola Inc. A Corporation And Anr. on 8 August, 2003

Equivalent citations: 2003(6)BOMCR511

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Bench: S.A Bobde

JUDGMENT

Bobde S.A., J.

1. These are the plaintiff's motions for orders in the nature of attachment before judgment and injunction for obtaining security for a decree that might be passed in the plaintiff's favour.

2. Iridium India Telecom Ltd., hereinafter referred to as the "plaintiffs", has filed this suit against the defendant No. 1 i.e. Motorola Inc., inter alia, for a declaration that the agreement dated 19-7-1993 with the defendant No. 2 and a supplementary agreement dated 15-9-1994 for purchase of stocks and shares of the defendant No. 2 are void and for a further declaration that another agreement dated 30-11-1995 called "gateway equipment purchase agreement and a restated agreement dated 10-7-1997 for the same equipment are void. As a consequence thereof, the plaintiff has sought a decree of U.S. $ 120,490,000 with further interest on the principal sum of U.S. $ 90,330,000 relatable to the amount paid by it for purchase of shares and another sum of Rs. 377,21,54,857. The particulars of claim at Exh. 'C' are in respect of to (i) Equity Investment in Iridium Lic.; (ii) expenses incurred for setting up gateway at Pune; (iii) other expenses incurred relating to Iridium system of which include several facilities like building, office equipments, etc; (iv) payment made to the Department of Telecommunication; and (v) cumulative operational losses incurred by the plaintiff till 31-3-2002. No part of the claim is based on a debt due to the plaintiff i.e. an ascertained sum of money. It is a claim for unliquidated damages based on an adjudication of the defendants' liability if the Court finds that the plaintiff was induced to purchase the equity and the equipment and to make other expenditure on the basis of fraudulent mis-statement of misrepresentation by the defendants.

3. A notable feature of the suit is that the plaintiff has sought the above sums of money by way of restitution or a declaration that the agreements under which these amounts were paid are void, having been obtained by the defendants on the ground of mis-statement, misrepresentation, etc. The suit is based on what is described as actionable mis-statement and non-disclosure by the defendants prior to the agreements and not on obligations flowing from the contract.

4. The thrust of the plaintiff's case is that it has been induced by the defendant No. 1 to invest huge sums of money in the Iridium system even though the defendants knew that the system was never capable of working. It is not the plaintiff's case that they have not received the stocks, shares and equipments they have paid for, but they have been induced upon false representation to; firstly, invest and subscribe to the equity of Iridium Inc. worth U.S. $ 70 million and then incur expenses for setting up of the gateway at Pune to the extent of 20.34 million U.S. $, even though the defendants knew well that the Iridium system of telecommunication proposed by the defendant No. 2, which is a wholly owned subsidiary of the defendant No. 1 Motorola, was not capable of functioning right from the beginning.

5. The plaintiff i.e. Iridium India Telecom Ltd. is a company incorporated under the Companies Act on 24-10-1994. Eighty per cent of its equity is directly or indirectly held by public financial institutions, Nationalised Banks and public insurance companies, viz. the Industrial Development Bank of India, I.C.I.C.I. Ltd., State Bank of India, Export Import Bank of India, Unit Trust of India, General Insurance Corporation of India and its subsidiaries, Life Insurance Corporation of India, Housing Development Finance Corporation Ltd., Infrastructure Leasing and Financial Services Ltd.

6. Twenty per cent of the plaintiff's equity is held by Motorola, the 1st defendant.

7. The defendant No. 1 Motorola Inc. is a body corporate in the U.S.A. It was incorporated in the year 1928 and is described in the plaint as one of the world's largest Corporations. It carries on the business, inter alia of design and manufacture of radio products and systems, including telephone services. The defendant No. 2 Iridium Lic. is the successor of Iridium Inc. The defendant No. 2 is a wholly owned subsidiary of the defendant No. 1 Motorola. The defendant No. 2 i.e. Iridium Lic. is a wholly owned subsidiary of the defendant No. 1 Motorola. It is facing bankruptcy proceedings. Its predecessor Iridium Inc. was also a wholly owned subsidiary of Motorola, the 1st defendant.

8. The Iridium system has been described as the first commercial wireless communications system that was designed to provide global digital service to hand-held telephones similar to today's cellular phones. It comprises a constellation of about 66 low orbit satellites which are designed to communicate directly with hand-held equipments with one another and with terrestrial interconnection points (gateways) as well as earth based system control facilities. This infrastructure was designed to act as a digital satellite network between telecommunication facilities on the ground, or through gateway and public telephone networks.

9. It appears that the defendant No. 2 Iridium Lic. and its predecessor was incorporated as a wholly owned subsidiary of the defendant No. 1 Motorola Inc. essentially for the Iridium system. According to the plaintiff, therefore, the defendant No. 1, who was the originator of the Iridium system is responsible and liable for damages since the fraudulent and wilful representation is liable to be attributed to the defendant No. 1, though actually made in a Private Placement Memorandum (PPM) i.e. a prospectus for inviting-equity issue by the defendant No. 2.

10. By Notice of Motion No. 2557 of 2002, the plaintiff seeks: (i) attachment before judgement of all the defendants' assets and properties in India, including all amounts payable to or receivable by the

defendants; and (ii) restrain the defendants from removing from India or encumbering all assets and properties, including any amounts payable to or receivable by the defendants. It is common ground that the assets of the defendant in respect of which interim reliefs are sought in India constitute the amount receivable in the ordinary course of business such as amounts receivable for goods supplied to various parties.

11. Since the existence of a strong prima facie case or a good or arguable case is important for granting any of the interim orders sought for by the plaintiff, it is necessary to examine this aspect of the case. As observed earlier, the plaintiff claims to have been induced by fraudulent mis-representation to invest in the equity of the defendant No. 2 by both the defendants. The equity is purchased under two stock purchase agreements of 19-7-1993 and 15-9-1994. According to the plaintiff, this investment was preceded by a Private Placement Memorandum (PPM) dated 10-8-1992 which contains the false representations which induced the plaintiff to invest.

12.Likewise, the plaintiff claims that it has been further induced to invest in the purchase of gateway equipments under two agreements dated 10-7-1997 and 9-4-1997 for which they made payments during the years from 1996 to 1999 and which they would not have, had they been apprised of the real state of affairs regarding the Iridium system.

13.The plaintiff specifically claims that they never received the 1995 PPM which expressly points out the shortcomings in the system. It is not disputed that the system was commissioned in the year 1998 and has also worked. It is also indisputable that the system has proved commercially unviable or unsuccessful.

14.Now the investment of 70 million U.S. $ by the plaintiff prior to its incorporation on 24-10-1994 was made in Iridium Inc. by certain public financial institutions, viz., I.D.B.I., I.C.I.C.I., Exim Bank, etc. After incorporation of the plaintiff on 24-10-1994 the investments made by the I.D.B.I., I.C.I.C.I., S.B.I. and Exim Bank were transferred in favour of the plaintiff and was transferred. The equity of the plaintiff in Iridium Lic. were allotted to the plaintiff. The shares in the plaintiff were allotted to these financial institutions as consideration for transfer of their shares in the Iridium Lic to the plaintiff. This is incorporated in the stock purchase agreement of 16-1-1995. Thus, for all practical purposes, the agreements in question in this suit are agreements between the plaintiff on the one hand and the defendants on the other. For the sake of convenience, the investment by the institutions is referred to as investment by the plaintiff, even though some of it was made when the plaintiff had not been incorporated.

15.According to the plaintiff, the defendant No. 1 promoted the Iridium system and made representation to various investors, including the Chairman, I.D.B.I., Chairman, V.S.N.L., Managing Director, I.C.I.C.I., Chairman of H.D.F.C., Vice-Chairman and Managing Director of IL & FS and made several misrepresentations about the Iridium system.

16.The first contention of the plaintiff is that the defendant No. 1 in particular had full knowledge of the unviability of the Iridium system. According to the plaintiff, there is proof of this in the fact that the Board of Directors of the defendant No. 1 in the early 1990s rejected a proposal to itself fund one

billion U.S. $ needed to develop the Iridium system. In other words, the contention is that because the defendant No. 1 itself did not fund the entire project and decided to invite investment, it had knowledge that the system would not work. It is not possible to infer from the mere fact that the company decided to invite investment from the public, it must be taken to note that the product it proposes to launch would not work.

17.On 10-8-1992 the defendant No. 1 issued a Private Placement Memorandum, not meant for the public, but for select strategic investors world-wide. This included a number of telecommunication services and equipment manufacturers around the world. According to the plaintiff, this Memorandum, which is in the nature of a prospectus, did not give the investors a clear and correct picture of the Iridium project and its viability. It contained, amongst others, the following representations:-

> (a) That the system was eminently viable and it was expected to have 1.7 million total voice and paging subscribers by 2002 and nearly 3.5 million subscribers by the year 2007.
>
> (b) That global link with reception comparable to cellular phones and receivable almost everywhere.
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> (c) That Iridium phones to be of compact size and comparable to cellular phones.
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> (d) There would be high quality and strong signal link for data, fax, pager and phone.

The Memorandum stated that the technology used was proven and that there were several benefits for installing a gateway which were critical and essential interconnection points without which the system could not operate. Telephone calls made on the Iridium system would pass through these gateways and the gateway operators would receive payment for the use of their gateways. It would provide global coverage. The PPM projected that the Iridium project was an adventure of the defendant No. 1 Motorola, who had created the system. Motorola had enormous technological ability and capability and had a proven track record in wireless telephony and space. The PPM projected that the total cost of the Iridium system would be U.S. $ 4 billion (Rs. 12,000 crores approx.). The defendant No. 1 was scheduled to invest about U.S. $ 300 million (Rs. 945 crores approx.) and the balance amount of U.S. $ 3.68 billion (Rs. 11,055 crores approx.) was, therefore, required to be sourced from outside.

18.According to the plaintiffs, eventually after the system was launched, all these representations turned out to be false. The problems were as follows. The signal could not be picked up inside the building or cars and the user had to go to open window and use the telephone outside the window or at the window in the electronic sight of the satellite. If a user wanted to use the telephone inside the car, it was necessary for him to install an additional antenna which was required to be open to the sky in line with the satellite. The size and weight of the said telephone and its antenna were extremely unwieldy and bulky and put off a lot of prospective customers. Moreover, the initial lot of handsets were required to be recalled and even where the Iridium signals could be picked, the

quality of the same was extremely poor even for voice communication and the said signal would get frequently disconnected. This, according to the plaintiff, constitutes a complete failure of the system.

19.It is, therefore, necessary to scrutinise some of the statements in the PPM and whether it constitutes fraudulent misrepresentation. The statements are as follows:-

> GLOBAL COVERAGE. The Iridium system is being designed to provide a subscriber link (e.g. 'dial tone' for voice service) on a global basis, with certain limitations such as under severe or usual conditions (e.g. in natural or 'concrete' canyons such as Manhattan). These conditions typically prove troublesome for other forms of wireless communications, including cellular.
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> HAND HELD SERVICE. The Iridium system is designed to serve hand-held equipment, similar in size and weight to today's hand-held cellular telephones. The company believes that the Iridium system is the only commercial global satellite system currently proposed that will have the capability (link margin averaging 16 DB) for hand-held digital voice service. The Iridium system is also being designed to provide data, facsimile, paging and geolocation services.
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> DUAL MODE PHONES EXPECTED TO IMPROVE MARKET ACCESS AND PENETRATION. Motorola has agreed to manufacture dual-mode Iridium/cellular telephones. These units are expected to operate both with a subscriber's regional standard cellular service as well as with the Iridium system. This capacity would allow Iridium service to be marketed as a premium global roaming service by cellular service providers around the world. This should position Iridium to increase market access and penetration by permitting the company to benefit from existing cellular distribution channels.
>
> SYSTEM DESIGN INCORPORATES PROVEN TECHNOLOGY. Most of the technologies of the Iridium system have already been successfully applied in a number of other operational systems, including systems used by NASA and the U.S. Department of Defence. However, the Iridium system would be the first commercial system to integrate these existing technologies to form a global personal communications network.

20.There are several representations in the PPM dealing with capabilities of the system which claim that the Iridium system is being designed to have global coverage and is capable of providing a subscriber link virtually anywhere on the earth surface at any time. It was expected to provide service with 16 db. link path i.e. the volume at which the voice can be heard over the system. This according to the plaintiff did not prove true. There is a serious dispute between the parties as to the intent and meaning of the representation. I have dealt with them only to the extent necessary for considering a prima facie case.

21.For instance, as regards the global coverage, the defendants submitted that a plain reading of the statements show that right from the beginning, they had pointed out certain limitations under severe or usual conditions, for example in natural or 'concrete' canyons such as Manhattan. There was a clear statement that these conditions typically prove troublesome for other forms of wireless communication, including cellular and these exist in the Iridium system also. They submit that the equipment is hand-held and the statement that "it is similar in size and weight to today's hand-held cellular telephones" has obvious reference to the cellular telephone of the period 1990 to 1992 which in some cases was as large as a domestic cordless phone. They admit that by today's standards, the size of the Iridium phone may be considered to be larger than hand-held, but that is more due to the fact that the cellular phones have made great advances in technology and have diminished in size. So also they submit that the cellular technology has improved and those signals have now greater penetration into steel and concrete buildings than the signal of the Iridium system. According to the defendants, when the 1992 PPM was issued, the penetration of the Iridium system was the same as that of the existing cellular system. They strongly assert the statement that the system incorporates proven technology is correct because the reference is to technology which has been successfully applied in a number of other operational systems, including systems used by NASA and the U.S. Department of Defence. It was projected that the Iridium system would be the first commercial system to integrate the existing technology. The defendants point out that they had clearly stated the limits of service and have stated that there will be times when the communication link cannot be maintained. The system, according to them, was not expected to compete directly with traditional landline and cellular communications systems since it will cost more to use and will be subject to certain capacity limitations. They point to the following statements:-

> Rather, it is intended primarily for use by individuals whose travel, takes them to places where either their cellular standard is not available or traditional communications systems are inconvenient or unavailable.
>
> They intended to appeal to cellular users who travel to areas where their regional cellular standard does not operate, because of either incompatibility or lack of coverage.

22.As regards the market surveys, the defendants point out that it was clearly stated in the P.P.M. that the market surveys are based on certain assumptions with respect to the amount of Iridium services the company will sell in each of the years and:

> such assumptions are based in part on market surveys and analysis of analogous systems, e.g., terrestrial cellular systems, and are also based in part on judgements concerning company proposals. However, because no existing system has all of the features and functions of the IRIDIUM system, investors must evaluate these assumptions without the benefit of directly comparable systems. These assumptions are critical because the company expects that almost all of its costs will be fixed. Thus, while the company believes its projections are reasonable, the company is unlikely to achieve its projected financial results if these assumptions prove to be optimistic.

> It is thus obvious that whether the representations in the P.P.M. referred to above were wilful and deceitful or whether they were made honestly, having regard to the existing technology which eventually turned out to be wrong is a matter that can be properly gone into only at the trial of the suit.

23.As regards the role of the gateways which, according to the plaintiff, was not necessary to establish at all, it was pointed on behalf of the defendants in the P.P.M. itself the role of the gateway as follows:-

> Multiple gateways were contemplated as the Iridium System is being designed to route communications over the network through a gateway interconnection with the terrestrial P.S.T.N. that is closest to the origination or destination of the particular call. This feature is expected to minimize terrestrial toll charges incurred by Iridium users and is expected to result in least cost routing.
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> 1992 P.P.M.

24.The learned Counsel for the defendants, however, strongly relied on what may be described as disclaimer clauses in the P.P.M. The P.P.M. expressly states:-

> AN INVESTMENT IN IRIDIUM INVOLVES CERTAIN RISKS and that PROSPECTIVE INVESTORS SHOULD CAREFULLY CONSIDER THE DISCLOSURES SET FORTH ELSEWHERE IN THIS MEMORANDUM, INCLUDING THOSE UNDER THE CAPTION RISK FACTORS.
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> It stated that the P.P.M. was not intended to explain completely the complexities of the technologies. It further expressly states:
>
> "Neither this Memorandum nor any other document provided to prospective investors makes any representations or warranties with respect to the economic returns which may accrue to investors in shares or to Iridium gateway operators or service providers. This Memorandum and other documents that may be provided to prospective investors contain projections with respect to the future development and performance of the company, gateway operators and service providers. Such projections reflect a variety of assumptions. These assumptions (and the others indicated in this Memorandum) may or may not prove to be correct and small changes or inaccuracies in some assumptions may dramatically affect results. No representation is made as to the accuracy or the achievability of such assumptions or the projections based thereon. Goldman, Sach & Co., acting as placement agent of this offering, has not independently verified any of such information and assumes no responsibility for its accuracy or completeness. Only those particular representations and warranties which may be made to investors in definitive, executed written agreements shall have any legal effect. Furthermore, nothing contained in this Memorandum or in such definite written arguments shall serve to limit or eliminate,

in any way, any of the disclaimers made therein.

> The company has prepared the projected financial information presented in this Memorandum based on its estimates of the purchase and maintenance costs of the IRIDIUM system, the market demand for IRIDIUM services, acceptable market prices for such services and future operating expenses. The projections assume that IRIDIUM voice and paging service become available in 1998 and that all approvals necessary to operate in the projected markets have been received as of that date. The company believes that the assumptions used in developing these projections are reasonable, although no representation is made as to their accuracy or attainability. See "RISK FACTORS".

Based on the above statements, the learned Counsel appearing for the defendants submitted that the investment includes certain risks and that the prospective investor should carefully consider the disclosure clauses in the Memorandum, including those under the caption RISK FACTORS. In fact, the P.P.M. requires the investors to consult their Counsel and Advisors before investing in shares. It is a fact that such statements have been made in the P.P.M. and, in fact, if the projected financial information as stated has the basis of the assumptions. Prima facie, without further evidence, it must be observed that the representations made in the P.P.M. were conditional and clearly called upon the investors to make their own evaluation.

THE STOCK PURCHASE AGREEMENT:

25.Moreover, the stock purchase agreement dated 19-7-1993 under which the plaintiff acquired their equity contains clauses as follows:-

> The investor/IL & FS is capable of evaluating the merits & risks of the purchase of the shares.
>
> "In purchasing shares, such investor has relied only on the advice of such investor's own advisors, the representations and warranties of the company contained herein and the information contained in the Private Placement Memorandum.
>
> (ii) Such Investor (1) has received and read a copy of the Space System Contract and the O & M Contract, (2) has had full access to such other information concerning the space System Contract and O & M Contract as such investor has requested, (3) understands that the Company is bound by the provisions of the Space System Contract and the O & M Contract and hereby ratifies the company's execution of the Space System Contract and the O & M Contract and (4) agrees to the terms of the Space System Contract and the O & M Contract and will not take any action in contravention of the enforcement of and the company's full compliance with the terms thereof.

26.Such clauses are also contained in the Supplemental Stock Purchase agreement dated 15-9-1994. Prima facie, it appears that the transactions were entered into by mature investors who were capable of evaluating the merit and reason for the purchase of the shares and they had an opportunity to ask questions and receive answers concerning the Iridium system generally and the risk inherent in an investment in shares. They have specifically stated that they had full access to the information consisting of the iridium system as the investors had requested. These are the clauses which contained in the stock purchase agreement. These clauses were read with other clauses in the P.P.M. referred to above, in my view, negate prima face a case of fraud, misrepresentation as regards the 1992 P.P.M. which led to the stock purchase agreement under which the plaintiff invested.

1995 P.P.M.:

27.It was next pointed out by the learned Counsel for the plaintiff that the fact that the Iridium system could not work as promised and was a failure became apparent to the defendants who have virtually recorded the failure in the P.P.M. issued on 28-11-1995. This P.P.M., according to the plaintiff, was meant for existing equity investors of the company such as the plaintiff, but was withheld from the plaintiff by the defendant No. 2 who nevertheless continued to accept investments despite knowledge that the system would not work. In short, the plaintiff's contention is that the defendants have recorded in the 1995 P.P.M. all the features of the system which show that it is a failure. They withheld that P.P.M. from the plaintiff, although it was meant to the existing investors and while withholding it continued to accept investment which the plaintiff would not have made, had it known the contents of the 1995 P.P.M.

28.It appears that the plaintiff has made investments in the defendants No. 2 right from 1994 to 1999 which includes the investment in gateways. On the other hand, the learned Counsel for the defendants submits that the 1995 P.P.M. did not record a failure of the system but plainly stated the limitations on the systems. According to the defendants, this P.P.M. was not withheld from the plaintiff. In fact, according to the defendants, this was handed over to one of the shareholders of the plaintiff i.e. the I.D.B.I. and there is correspondence to that effect. Whether the contents of the 1995 P.P.M. were known is discussed later.

THE GATEWAY EQUIPMENT PURCHASE AGREEMENT:

29.Moreover, as regards the Gateway Equipment Purchase Agreement, it must be noted that Article 31 of that agreement specifically declares that the said agreements:-

> Constitutes the entire understanding between the parties concerning the subject-matter hereof and supersedes all prior discussions, agreements and representations whether oral or written and whether or not executed by Motorola, including but not limited to the Iridium L.I.C. P.P.M. of August 10, 1992 and supplements thereof.....
>
> Limiting the issues to the purchase of gateway equipments, it is clear that at least this agreement cannot be said to be prima facie vitiated by alleged misrepresentations in

prior discussions, agreements, representations, including those made in P.P.M. of 10-8-1992 or P.P.M. of 20-11-1995.

30.Moreover, according to the plaintiff, prior to the issue of the 1995 P.P.M., the defendant No. 1 had filed with the Securities and Exchange Commission, Washington DC, U.S.A. forms S-1 which is a registration statement under the U.S. Securities Act, 1933 for the issue of Senior Sub-ordinated Discount Notes of the aggregate amount of U.S. $ 300 million. These Notes are long term debt instruments. According to the defendants, form S-1 was issued by the defendant No. 2 after its approval by its Board of Directors which included one S.H. Khan, who was the plaintiff's representative on the Board of Directors of Iridium Inc. This form S-1 contains some statements regarding the system as those made for the subsequent P.P.M. of November 1995 issued about five months later. Therefore, it cannot be said that the plaintiff had no knowledge of the statements in the 1995 P.P.M. which accepted the limitation of the Iridium system. According to the defendants, therefore, the investments during the aforesaid period from 1994 to 1999 which are substantial as is apparent from Exh. 'C', have been made consciously knowing the limitations of the system. Now it is a fact that form S-1 contains virtually the same statements as those in the 1995 P.P.M. The statements clearly acknowledge several limitations as follows:---

(a)That the Iridium subscribers will constitute a narrow portion of the overall wireless communications market. The Iridium system is not intended to provide communications services that compete with terrestrial cellular and passing services because of the advantages such cellular and paging systems generally have in terms of voice quality, signal strength, ability to penetrate various environments (such as buildings) and cost. Rather Iridium services are expected to compete with other mobile satellite services primarily for users who require communications services in areas where landline or terrestrial wireless service is unavailable, inconvenient, of poor quality or unreliable.

(b)The ISU and pager for the Iridium system are still under development. Motorola has informed the company that the portable hand held ISU Motorola will develop is expected to be significantly larger and heavier than todays smallest and lightest pocket sized, hand held cellular telephones and is expected to have a significantly longer and thicker antenna than hand held cellular telephones.

(c)As with any wireless communications system and particularly any satellite-based wireless service, there will be certain service limitations or degradation due to the interference or attenuation imposed by natural or man-made obstructions between the satellites and subscriber equipment. Such limitations will vary, sometimes significantly, as actual situations and conditions vary and as the satellites in the Iridium system move across the sky. Based upon current testing and stimulations, it is expected that such limitations will also vary according to the particular subscriber equipment being employed, with smaller units using integral antennas, such as portable, hand held ISU's being generally more susceptible to limitations than units having accessory antennas such as automobile antennas.

(d)The degradation that may be experienced on a satellite based communications system like the Iridium system includes; inability to initiate or receive calls; interruptions of service ranging from brief (no major disruption of communications) to moderate (possibly requiring repetition of words, phrase and sentences by the speaker) to complete (an ongoing transmission is terminated involuntarily); and spurious noises. Generally these limitations will be more severe than the limitations that would be experienced in comparable environments in mature cellular systems due in part to the generally lower link margins in the Iridium system than those prevailing in mature cellular systems. Some limitations can be reduced or eliminated by the subscriber moving to an area in which a sufficiently clear view of the satellites can be obtained.

(e)Iridium subscribers using portable, hand held ISUs should expect almost no limitations in service in areas where an unobstructed view from the ISU to the satellite is maintained. Minor degradation in service quality and availability can be anticipated to occur as widely spaced obstructions, such as trees, buildings and other natural and man-made obstacles are positioned between the satellite and the user. Larger and more densely spaced obstacles should be anticipated to introduce more significant limitations. Severe degradation of service quality and availability would be expected from time to time in densely-packed urban environments. Service availability inside buildings is expected to be limited and will vary with building contraction and other relevant factors. Only extremely limited service is expected to be available inside buildings with steel contraction and metal coated glass typical of urban high rise buildings.

(f)The quality of service to portable, hand-held ISUs inside automobiles is expected to be important to many of the Iridium system subscribers. Because the structure of the automobile will tend to obstruct the signal, service to portable, hand-held ISUs inside an automobile will have limitations which will vary with the type of vehicle. The significant reduction in signal strength associated with the use inside a moving automobile makes the effect of other environmental obstructions temporary but more pronounced. However, the company believes that it will be possible to largely eliminate this loss of signal strength through the use of an optional portable antenna that could be quickly affixed to, and removed from, the exterior of the automobile. Motorla has indicated that it is working on the developments of such an antenna.

(g)Market: The potential market for Iridium services is the world-wide market for global personal voice, paging and date communications. However, because Iridium services will generally be priced higher than terrestrial land line and wireless services where they are available, and will offer more limited service quality and signal penetration than mature cellular and paging systems, the company's strategy is not based upon direct competition with such terrestrial systems. Rather, Iridium services are targeted at meeting the communications needs of users who (i) are travelling outside their none territory in an area served only by incompatible local wireless

standards (ii) are otherwise located where terrestrial landline or wireless services are not available or do not offer an attractive and convenient option, or (iii) find it important to be able to make or receive a call, or receive a page, at any time, where the service is authorised, by means of a single handset with a single telephone number or pager.

(h)In addition, as subscribers travel more often, roaming capabilities, which allow individuals to utilise their units in the locations to which they travel, are in greater demand. Accordingly, the company believes that the availability of Iridium services through portable hand held ISUs will be an important element in determining the size of the market for its service.

(i)The company believes that the global roaming available through the Iridium system will exceed the reach of any single terrestrial wireless service. Additionally, the company anticipates that at the time the company enters the market place, the Iridium portable, hand held ISUs will be significantly smaller than commercially available satellite terminals capable of providing comparable services. The company anticipates that many international travellers, particularly those who travel exclusively between densely populated urban areas, will expect or require more in building coverage, higher voice quality, and service to smaller subscriber units more typical of terrestrial cellular services than will characterise the services provided over the Iridium system; however, the company believes that the Iridium systems combination of coverage, portability and other service features will nonetheless appeal to many professional travellers who regularly leave the coverage areas of their terrestrial wireless systems and for which the ability to communicate and be reached with greater reliability, while on he move outside their terrestrial wireless system coverage areas will be valuable.

(j)Land Based Telecommunications Systems: The company does not expect to complete to any significant extent with landline telephone service. If landline telephone service of acceptable quality is available, the company expects that subscribers will use it because of its significantly lower cost. Similarly the company does not intend to compete with terrestrial cellular telephone systems, for the vast majority of personal communications services, because Iridium services will be priced significantly higher than most cellular telephone services, the Iridium system will lack the operational capacity to provide local services to larger numbers of subscribers in concentrated areas and the company's system is not expected to afford the same voice quality, signal strength, or ability to penetrate various environments (such as buildings) as terrestrial cellular systems. Rather the company expects its subscribers to use Iridium services in areas or situations where local cellular system use a standard incompatible with that of the users home market or where terrestrial service is unavailable, inconvenient, of poor quality or unreliable. The extension of land based telecommunications systems to areas that are currently not serviced by landline or cellular telephone systems will reduce demand for the company's service.

(k)RISK FACTORS: The ultimate success of the Iridium system will depend upon subscriber acceptance which in turn will depend upon a number of factors, including price, technical capabilities of the Iridium system and the extent of availability of alternative telecommunications systems. If the level of actual subscriber demand and usage for Iridium service is significantly below that, or develops significantly more slowly than expected by the company, the company's cash flow and ability to pay interest on and the principal of the notes will be materially and adversely affected.

(l)Based upon certain testing and stimulations, Iridium subscribers using portable hand held ISUs should expect minor degradation in service quality and availability to occur in environments in which widely spaced obstructions, such as trees, buildings, and other natural and man made obstacles are positioned between the satellite and the user. These severe limitations will be exacerbated if the subscriber uses a portable hand held ISU in an automobile without attachment to an external antenna. In addition, only extremely limited voice service, or no voice service, is expected to be available inside buildings with steel contraction and metal coated glass typical of urban high rise buildings (including in particular, in most hotels and professional buildings).

(m)The company's business plan assumes that existing users of terrestrial cellular and paging services will be willing to accept higher prices, more limited service quality and larger and heavier hand held telephones and pagers than such users may be accustomed to in order to have the ability to make and receive calls and to receive pages on a world-wide basis with a single telephone or pager and telephone number, particularly when travelling in areas where terrestrial services are incompatible, unavailable, inconvenient of poor quality or unreliable. There can be no assurance that the company's assumption will be correct or that the price, service limitations or subscriber equipment size and weight will not create more significant limitations on customer acceptance than the company anticipates.

(o)The Iridium system is not intended to provide communications services that compete with most landline and terrestrial wireless services, but instead is designed to complement existing services. Iridium services will be priced significantly higher than most cellular and paging services and Iridium customers are not expected to discontinue their use of terrestrial wireless services. Also the Iridium system will lack the operational capacity to prove local services to large number of subscribers in concentrated areas and the company's system will not afford the same voice quality, signal strength and degree of penetration in areas that are served by mature cellular systems. The extension of land-based telecommunications systems to areas that are not currently serviced by landline or cellular telephone or paging systems could reduce demand that might otherwise exist in such areas for the company's services. The company may also compete for business travel customers with businesses that provide short term rentals of cellular telephones capable of operating in specific countries or regions. These businesses often have rental locations at airports, hotels

and other locations.

According to the plaintiff, had they known that the defendants had accepted the advantages of the landline system over the Iridium system as is apparent from Clause (a) above and that the hand-held unit would remain larger than today's smallest and lightest pocket sized hand-held cellular telephones or that there would be certain service limitations or degradation due to interference imposed by natural or man-made obstructions between the satellites and subscriber equipment; that there would be degradation which would include the inability to initiate or receive calls; interruptions of service ranging from brief to moderate, requiring repetition of words, etc., as contemplated by Clause (d) above, and several other limitations referred to in the P.P.M., they would not have further subscribed or continue to subscribe to the equity of Iridium. Neither would they have entered into the Gateway Equipment Purchase Agreement. According to the plaintiff, the 1995 P.P.M. demonstrates that the Iridium system is a complete failure. It posits severe degradation of service quality in densely-packed urban environments and even the service availability inside buildings is expected to be limited and such as would vary with building construction and other relevant factors. Besides, only extremely limited service is expected to be available inside buildings with steel construction and metal coated glass which is common these days. Moreover, the P.P.M. states that the system would have severe limitation inside an automobile and that this limitation could be removed only through the use of portable antenna which would have to be fixed to the exterior of the automobile. Therefore, it would virtually be of no use inside of most buildings or automobiles which is where the people would want to use the most. The advantages stated by the company, viz., the defendants, in respect of the configuration, portability and other service features are extremely insignificant and that the plaintiff invested in the equity only because this P.P.M. was withheld from them.

31.Now it appears to be a fact that severe limitation on the working of the Iridium system has been stated in the P.P.M. and that it is possible to agree with the plaintiff that the system is virtually of no use in the usual habitat of a working man or the commercial channel. This, however, by itself does not mean that the plaintiff would not have invested in equity as, in fact, they have. Prima facie, it appears that the plaintiff cannot plead ignorance of the 1995 P.P.M. at least because of the presence of S.H. Khan on the Board of Directors of the defendant No. 2 as a representative of the plaintiff. There is no merit in the plaintiff's contention that the defendants have not pleaded that S.H. Khan was on the Board of Directors when Form S-1 was approved by it. Admittedly, S.H. Khan's signature does not appear against the name of power of attorney to form S-1. It contains the name of other members of the Board of Directors who have appointed certain officers to act as their powers of attorney for the purpose of S-1. As is apparent, the issue is whether knowledge of this form S-1 could be attributed to S.H. Khan. The defendants have squarely alleged the plaintiff's knowledge of the action of the defendants' Board through their representative. For instance, in regard to the meeting of the Related Party Contracts Committee held on 17-4-1996 which specially authorised the delayed implementation of facts and data details, they have alleged that though not S.H. Khan, one M. Raza, Managing Director of the plaintiff, was present. Further, in relation to the 1995 P.P.M. of S-1 document, the defendants have alleged that both the documents are issued with the approval of the Board of Directors of the defendant No. 1 which included S.H. Khan. Further in para 79 of the affidavit, the defendants have clearly alleged as follows:---

Even otherwise, the 1995 S-1 was issued by Iridium Inc. after approval of the Board of Directors in 1995 which contained representations similar to those contained in the 1995 P.P.M. and was available with the plaintiff through its representatives on the Board of Directors of Iridium Inc. There is thus a clear averments that form S-1 was available with the plaintiff through its representative on the Board of Directors. There is no specific denial of the averment that S-1 was available to the plaintiff through its representatives on the Board of Directors of Iridium Inc. It is also plain that the plaintiff has not filed any affidavit of its representative S.H. Khan on such an important issue. On the other hand, they have taken a plea that Khan's whereabouts are not known. Prima facie, the plaintiff's version does not appear to be probable. Moreover, it is important to note the cover sheet of the 1995 P.P.M. as follows:---

The Officer is being made only to existing equity investors of the company.

There is no doubt that the plaintiff was an existing equity investor of the company and it is highly improbable that the P.P.M. which was meant for the existing equity investors of the company was not brought to the notice of one of them, particularly when the representative of the plaintiff was on the Board of Directors. This entire version of the plaintiff that they had no knowledge of S-1 or the 1995 P.P.M. does not inspire confidence. Prima facie, therefore, it is not possible to accept this contention that there is a fraud and concealment on the part of the defendants is getting the plaintiff to invest further sum of 45 million US $ for the period 1-12-1994 to 7-3-1996 by withholding the 1995 P.P.M. In the circumstances, I am of prima facie, view that the plaintiff has not made out a strong prima facie case for taking the view at this stage that the prayer that the defendants made fraudulent misrepresentation to the plaintiff which induced them to invest in the equity of the defendant No. 2 and to purchase gateway equipments. I do not hold that such a view may not be possible upon trial; only that it is difficult to adjudge at a prima facie liability of the defendants to the plaintiffs based on the ground of fraudulent misrepresentation, in spite of several disclosures made in the two P.P.M.s of 1992 and 1995 and the statement of the plaintiff that they have had access to all the information before the agreement.

32.Several decisions were cited on behalf of the plaintiff in support of the proposition that where there has been a fraudulent misrepresentation or a wilful concealment of relevant fact in a Prospectus inviting investment, it is no answer to show that the investor ought to have made inquiries. Cases were also cited for the proposition that the intention to deceive is not relevant. With respect, there is no doubt about the proposition that where fraudulent misrepresentation or wilful concealment is established, it would be extremely inequitable and unjust to uphold the plea that those deceived ought to have made proper inquiry or have had constructive notice of some of the facts on which they were induced to invest. However, I am not inclined to go into those cases relied upon by the plaintiff in detail because it is not well-established that there has been a fraudulent misrepresentation or wilful concealment of facts by the defendants in this case. It must be noted that each of those cases relied upon by the plaintiff, though very instructive, are cases where fraudulent misrepresentation, etc. was established at the trial. The cases relied upon by the plaintiff are the Directors & C. of the Central Railway Company of Venezuela v. Joseph Kisch, reported in 1867(II) English and Iris Appeals 99; Aaron's Reefs Limited v. Twiss, reported in 1896 A.C. 273 and Arnison v. Smith, reported in 1888(XLL) C.A. 348.

33.But there is one feature of the case which disentitles the plaintiff to any relief i.e. as disclosed hereinafter. In para 24(1) of the plaint, the plaintiff has averred as follows:---

> "It is extremely significant to note that although this memorandum (1995 P.P.M.) was available as early as 20th November, 1995, a copy of the same was not made available to the plaintiff."

In the said para 24(1) of the plaint, the plaintiff has further averred as follows:-

> So also, a copy of the said memorandum was never furnished to the plaintiff by the 1st defendants and the 1st defendant, in particular.

> At the close of the arguments, the defendant No. 1 furnished two letters which are at Exhibits 1 & 2 to the affidavit dated 25-7-2003. The first letter dated 21-11-1995 was addressed by the predecessor of the defendant No. 2 to Mr. S.H. Khan, Chairman and Managing Director, Industrial Development Bank of India. This is the same person who was nominated as a Director on the Board of the defendant No. 2 by the plaintiff. That letter contains the following sentence:---

> In my letter to you of October 31, 1995, we summarized the terms of the $ 300 million financing offer to Iridium investors that the Board of Directors approved at its last meeting. We also advised you that Motorola, to help ensure the success of the offering, had agreed to commit to purchase $ 100 million of the financing. The purpose of this letter is to transmit to you the formal offering of this financing, as set forth in the attached Confidential Private Memorandum (P.P.M.), and to provide you with a brief summary of the offering. A more complete discussion of this offering, inclining a current description of the Iridium program, is included in the attached P.P.M. A copy of this letter is endorsed to Mr. Ravi Parthasarathy and Mr. Moosa Raza. Normally, some caution would have been necessary to infer from the mere sending of this letter that such a letter was, in fact, sent and received by the addressee. However, there is a response by the IDBI to the defendant No. 2. It accepts receipt of the letter of 21-11-1995:---

> FORWARDING THE PRIVATE PLACEMENT MEMORANDUM FOR THE PROPOSED FINANCING OFFER OF USD 300 MILLION TO THE EXISTING INVESTORS(.) WE ADVISE THAT THE INDIAN INVESTORS FEEL THAT BEFORE A FINAL VIEW REGARDING PARTICIPATION IN THE PROPOSED OFFER IS TAKEN, THEY WOULD NEED TO BE SATISFIED ABOUT THE PROSPECTS AND PROGRESS SO FAR ACHIEVED TOWARDS IMPLEMENTATION OF THE PROJECT AND THE EFFECTIVENESS OF THE MEASURES TAKEN/PROPOSED TO BE TAKEN TO MITIGATE VARIOUS RISKS ASSOCIATED WITH THE PROJECT(.) It is important to note that by this letter, the IDBI has communicated the feeling of the INDIAN INVESTORS. Obviously, this includes the plaintiff who is undoubtedly an Indian investor. It is obvious from this reply that the letter along

with the 1995 P.P.M. inviting investment of 300 million US $ from the existing shareholders was received by S.H. Khan, who was a nominated Director on the Board of the defendant No. 2. It is, to my mind, no answer, as contended on behalf of the plaintiff, that the letter forwarding 1995 P.P.M. was not addressed to the plaintiff and, therefore, the plaintiff was entitled to make the statement in the plaint that a copy of the 1995 P.P.M. "was not made available to the plaintiff". It must be seen that the statement in the plaint is not only to the effect that the 1995 P.P.M. was not furnished to the plaintiff, but it is also to the effect that it was not made available to the plaintiff. The correspondence referred to the above clearly belies this version of the plaintiff. In fact, in the affidavit-in-reply dated 4-8-2003 after making some grievance of the shortage of time, Ravi Parthassarathy, who has sworn the plaint has made the following statements in para 16(iv) regarding the plaintiff's record:---

"The contemporaneous Record sighted does not indicate that the 1995 P.P.M. was available with the plaintiff. The plaintiff's record, sighted however, indicate that the plaintiff was aware of a third round offering for 300 million dollars being made by Iridium to existing investors."

The second sentence casts a serious doubt on the credibility of this deponent. Obviously, this deponent came across the record which shows that the plaintiff was aware of the third round offering 300 million US $ made by Iridium. There is no dispute about the third round offering 300 million US $ was made only by the 1995 P.P.M. The record which admittedly indicates the offering of 300 million US $ of equity shares to the existing investors must indeed be containing a reference to the 1995 P.P.M. of which the plaintiff appears to be feigning ignorance. It was nevertheless submitted on behalf of the plaintiff that the inducement to invest was based on the 1992 P.P.M. and, therefore, the defendants have acted fradulently thereunder. As indicated earlier, I find prima facie that the 1995 P.P.M. which invited investment cannot be said at this stage to contain fraudulent and wilful representation. It has, however, been a very important part of the plaintiff's case that the plaintiff would not have invested any amount had they known that the contents of the 1995 P.P.M. which clearly acknowledges the limitations of the Iridium system; according to the plaintiff, its failure. In fact, before the plaintiff's knowledge of the 1995 P.P.M. was brought to the notice of the Court, the plaintiff's argument was that had they known the contents of the 1995 P.P.M., they would have withheld investment of about 37 million US $ which they invested after 10-5-1995 in the equity of the defendant No. 2. In fact, it is obvious that the plaintiff has invested huge sums of money including about Rs. 148 crores for purchase of gateway equipment in the year 1996-97. It appears clear that they did so even after reading the 1995 PPM which contains a clear statement of the limitation of the Iridium system. Apart from the fact that goes against the plaintiff's case that they continued to make investments because the 1995 PPM was withheld from them and, therefore, the investments are induced by misrepresentation and fraud; the plaintiff's case seems to be vitiated by what prima facie appears to be a palpable false statement made in the plaint to the effect that a copy of the 1995 PPM was not available to the plaintiff. In my view, therefore, relying on the judgment of the Supreme Court in S.P. Chengalvaraya Naidu v. Jagannath, , this conduct of the plaintiff by itself is sufficient to deny it any relief. In that case, their Lordships have observed as follows:-

> If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party.
>
> In the present case, I am of view that the plaintiff has come to this Court with a case that they were not made aware of the 1995 PPM. In fact, this statement is made in para 24 of the plaint which is said to contain "Fraudulent, dishonest and deceitful intent of the 1st defendant and knowledge that the mis-statements were fraudulent, dishonest and deceitful and/or negligent. In para 24(1), the plaintiff has stated that the revised representations were contained in a memorandum dated 20th November, 1995 which for the first time made references to the fact that the system may not successfully operate were deliberately concealed from the plaintiff and, on the contrary, false and misleading representations and mis-statements were made to the plaintiff. It is clear that these statements were made in order to gain advantage over the defendants.

34.Even otherwise, there seems to have been some delay in alleging fraud. It is not disputed that the Iridium was commissioned in 1998. Thereafter, in August, 1999 Iridium Inc. initiated bankruptcy proceedings. The plaintiff has alleged that it discovered the fraud and misrepresentation in December 1999 or January, 2000 after the system had functioned for over a year and the suit is filed 18 months thereafter in September 2002. Even having regard to the fact that there was a tolling agreement between the parties, as a result of which no suit could have been filed from November 2000 till June 2001. Apparently, there is no satisfactory explanation why the suit was not filed soon after June 2001 but was filed almost 14 months later in September 2002. It cannot be said that the plaintiff did not contemplate any action on the ground of fraud since they initiated penal proceedings in October 2001. Those proceedings have been stayed by this Court at the instance of the defendants in Criminal Writ Petition No. 465 of 2002.

35.An important factor which, to my mind, prima facie negates the view of fraud by the defendants at this stage is the fact that the defendant No. 1 has invested over 500 million U.S. $ in the plaintiff itself. The defendant has stated in its affidavit-in-reply that the defendant No. 1 has lost well over U.S. $ 2 billion in the Iridium venture. There is a categorical denial that the defendant has earned 3.68 billion U.S. $ for supply of equipments as alleged by the plaintiff. It is prima facie difficult to foresee at this stage why the defendant would scuttle its own venture in this fashion. This is in my view no prima facie case to warrant the grant of the interim relief prayed for.

36.In view of my observations earlier, I am of view that the plaintiff has not made out any prima facie case for an interim order of attachment before judgment or of an injunction. In fact, the plaintiff is disentitled for any relief from this Hon'ble Court in view of the false and misleading statements in the plaint. Nevertheless, I have dealt with other points raised on behalf of the parties, in view of the fact that the matter has been argued at length and the points were canvassed at the Bar at length.

ORDER XXXVIII, Rule 5:

37.In the present notice of motion, the plaintiff has prayed, inter alia, for an interim order of an attachment before judgment under Order XXXVIII, Rule 5 or Order XXXIX, Rule 1(b) of the C.P.C. Order XXXVIII, Rule 5 reads as follows:---

> "5(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,---
>
> (a) .....
>
> (b) .....

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security."

The language of Order XXXVIII, Rule 5 expressly requires the existence of intent to obstruct or delay the execution of any decree that may be passed against the defendants. This has been the consistent view of this Court. See Sardar Nowroji Pudamji v. Deccan Bank Limited, reported in Vol. XLV I.L.R. Bom. 1256 and Senaji Kapurchand & others v. Pannaji Devichand, reported in A.I.R. 1922 Bombay 276.

38.Similarly, an injunction can be granted under Order XXXIX, Rule 1(b) where the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors. It must, therefore, be seen whether the property of the defendant is liable for attachment before judgment or an injunction is liable to be granted.

39.It must be recorded, at the outset, that the learned Counsel for the plaintiff made a statement that the plaintiff is not in a position to show that the defendant is about to dispose of his property with an intent to obstruct or delay execution of any decree that may be passed against the defendant No. 1 or with a view to defraud its creditors. Yet the application, both for attachment before judgment and an injunction was pursued under section 151 of the C.P.C. While invoking section 151, it was argued that this power is available to this Court, firstly, and for which there is no provision in Order XXXVIII, Rule 1 of the C.P.C., in a case such as this where the defendant is about to remove its property not from the jurisdiction of this Court but the property which is already situate outside the jurisdiction of this Court to outside India. Secondly, simply because the defendant is a company incorporated abroad and in such a case, it is not necessary to establish that the defendant is dealing with its property to obstruct or delay the execution of any decree that may be passed against it with a view to defrauding its creditors. Apart from the statement of the learned Counsel for the plaintiff conceding that the plaintiff is not in a position to establish that the defendant is dealing with its property with an intent to obstruct or delay the execution of any decree that may be passed against it, it is necessary to see whether there is any material produced by the plaintiff to show that the defendant is about to deal with its property in the manner aforesaid since, in my view, even if the

power is available under section 151 of the C.P.C., it does not appear that while exercising that power, the Court can or ought to abandon condition on which the power is conferred on a Court to grant an order or attachment before judgment or injunction under Order XXXIV, Rule 1(b).

40. Now admittedly in the present case, the defendant is a foreign Corporation. In the affidavit-in-reply, it is stated that the defendant No. 1 is a reputed company which has been doing business in India for the past 20 years and has a turnover in the past four years ranging from 37 million US $ to 43 million US $. The defendant No. 1 is a reputed foreign Corporation in existence for over 70 years and is amongst the top 50 fortune 500 companies in the world. It operates in over 100 countries and has large assets in the U.S.A., U.K., Singapore, China and other countries. For the purpose of this case, the assets in the U.S.A. and U.K. have some importance as is mentioned later.

41. In India, the defendant No. 1 carries on the sale of equipment and undertakes projects for the Government of India, including the Army and security agencies. It also deals with Public Sector and most of the Private Sector telecom companies. In six months after the suit was filed in September 2002, purchase orders were placed on the defendant No. 1 and its wholly owned subsidiary company in India aggregating to 12 million US $ and 94 million US $ i.e. Rs. 60 crores and Rs. 70 crores, respectively. From 1989 to-date, the defendant No. 1 has also invested Rs. 230 crores in the equity of two wholly owned subsidiaries in India. Hence, this is not a usual case of a defendant having immovable or other movable assets in India and about to remove them. On the contrary, its business in India seems to be increasing.

42. In Notice of Motion 2557 of 2002, the plaintiff claims attachment, inter alia, of the amount payable to the defendant No. 1 under a company petition, being Company Petition No. 185 of 2001 filed under sections 433 and 434 of the Companies Act against the respondent, B.P.L. Mobile Cellular Ltd. It has been compromised by the defendant No. 1 and the respondent by executing consent terms. Under the consent terms, the respondents have agreed to pay to the defendant No. 1 a sum of US $ 19,788,685 (about Rs. 100 crores) in six installments payable as under:---

On or before April 30, 2002	USD 1,000,000.00
On or before June 30, 2002	USD 1,000,000.00
On or before September 30, 2002	USD 3,864,671.32
On or before December 31, 2002	USD 3,864,671.32
On or before March 31, 2003	USD 3,864,671.32
On or before June 30, 2003	USD 3,864,671.32."

The plaintiff, therefore, has prayed that this Court should restrain the defendants by an appropriate order and injunction from recalling or removing the said moneys which otherwise would be available for the satisfaction of the decree. The plaintiff has prayed for attachment of all amounts payable to or receivable by the defendants, from any person or entity in India, including the amounts payable under the consent terms filed by and between the defendant No. 1 and the respondents in Company Petition No. 185 of 2001 in the Madras High Court. This Court initially granted an ad interim order on 16-9-2002 in terms of prayer Clause (c) to the Notice of Motion. Thereafter, on 3-10-2002 when the defendants moved vacation of the ex parte order, this Court

restricted the order of attachment of moneys receivable by the defendant No. 1 in accordance with the consent terms filed before the Madras High Court on a statement being made that the defendant No. 2 has no other property, except the amount receivable under the aforesaid consent terms. Thus, what the plaintiffs really seek in this case is an order in the nature of a garnishee order for attaching the money receivable by the defendant No. 2 by way of attachment before judgment. Now there is no doubt that though a garnishee order is normally passed after the Court passes the decree, there is power in this Court to grant such an order before judgment vide judgment dated 15-10-1992 of a Division Bench of this Court in Appeal No. 704 of 1992 in Notice of Motion No. 2042 of 1992 in Suit No. 2678 of 1992, Triangle Drilling Limited & another v. Jagson International Limited & another.

43.It appears from the affidavit in support of the notice of motion that no material from which any intent of the defendants to remove monies receivable by them can be inferred. Admittedly, the property in question i.e. the money receivable under the consent terms are already outside the jurisdiction of this Court and there is no specific provision under Order XXXVIII, Rule 5 to enable this Court to attach the property which is already outside the jurisdiction of this Court. The plaintiff, therefore, seeks an injunction under Order XXXIX, Rule 1(b) against the defendants and under section 151 of the Code. In my view, in the absence of any material to show that the defendants intend to remove or dispose of its property with a view to defrauding its creditors, such an injunction cannot be granted because Order XXXIX, Rule 1(b) reads as follows:--

> "1. Where in any suit it is proved by affidavit or otherwise-
>
> (a) .....
>
> (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,
>
> (c) .....

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit, as the Court thinks fit, until the disposal of the suit or until further orders."

It is further contended on behalf of the plaintiff that even in the absence of any material to show that the defendants intend to remove or dispose of their property with a view to defeat or defrauding its creditors either under Order XXXVIII, Rule 5 or Order XXXIX, Rule 1(b), this Court has power under section 151 to grant such an order. The learned Counsel for the plaintiff relied on a decision of the Supreme Court in Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, , for the statement of law that in the face of section 151, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise effecting it. Therefore, even though the defendant No. 2 may not have any intention to remove its property with intent to defeat or delay the execution of the decree that may be passed against him, this Court ought to exercise its inherent powers under

section 151 to grant such a relief by way of attachment before judgment or an injunction.

44.This is also the view of the Division Bench of the Calcutta High Court in Boeing Company v. R.N. Investment & Trading Co. (P.) Ltd., reported in 99 CWN 1.

45.The learned Counsel for the defendants, however, relied on the decision of the Supreme Court reported in Padam Sen v. State of U.P., , wherein the Supreme Court has observed as follows:---

> "The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the legislature. It is also well recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.
>
> The learned Counsel submitted that if an injunction was granted under section 151 or an order of attachment before judgment is made thereunder, it ought not to be granted de hors the principle underlying the grant of injunction or attachment before judgment, viz., even without the intention of the defendant threatening to remove or dispose of its property with a view to defeating its creditors, in case of an injunction or with an intent to obstruct or delay the execution of a decree that may be passed against him in case of an attachment before judgment. In my view, this submission deserves acceptance. Parliament has clearly expressed its intention as to the circumstances in which a defendant's property may be attached before judgment and in so doing, has stated that it may be done where the Court is satisfied that the defendant with intent to obstruct or delay the execution of a decree that may be passed against him is about to dispose of the whole or any part of his property. In the case of an injunction, it has, inter alia, expressed its intention that the Court may grant a temporary injunction where the defendants threaten or intent to remove or dispose of his property with a view to defrauding his creditors. In doing so, it has also prescribed the manner in which these powers are to be exercised. In such a case, therefore, I am of view that the powers under section 151 of the C.P.C. ought not to be exercised by the Court to grant an attachment before judgment or an injunction for the asking so that even if there is no intention on the part of the defendant to remove his property with a view to obstruct or delay the execution of a decree that may be passed against him or even if it cannot be established that the defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors, in a case such as the present one.

46. Moreover, as observed by the Supreme Court in Padam Sen's case, these inherent powers are not powers over substantive rights which any litigant possesses. In para 9, the Supreme Court has observed as follows:---

> "The inherent powers saved by section 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the courts for passing such orders which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in the matters of procedure, which powers have their source in the courts possessing all the essential powers to regulate its practice and procedure. A party has full rights over its books of account. The Court has no inherent power forcibly to seize its property. If it does so, it invades the private rights of the party."

Clearly, what the plaintiff seeks from this Court is an order regarding substantive rights of the defendants to receive its moneys under the consent terms. In fact, that right directly affects its right to carry on business. Such a right, in my view, cannot be affected or interfered with by this Court in exercise of its inherent powers under section 151. The law laid down by the Supreme Court in Padam Sen's case was affirmed by their Lordships in Manohar Lal's case, , after quoting the aforesaid passage from Padam Sen's case, their Lordships observed as follows:---

> "These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the legislature for orders in certain circumstances is dictated by the interests of justice."

Thus, even though it might be possible, as a matter of power to grant an injunction or an order of attachment before judgment in circumstances was not covered by the express provisions of the Code. The power to do so ought not to be exercised contrary to the intention of the legislature and the procedure specifically provided by the legislature. The restriction imposed exist because as stated by their Lordships, it should be presumed that the procedure specifically provided by the legislature for orders in certain circumstances is dictated by the interest of justice. Therefore, though there is nothing in the Code of Civil Procedure which controls the power of this Court to grant an injunction or an order of attachment in cases not covered by Order XXXVIII, Rule 5 or Order XXXIX, Rules 1 & 2, I am of view that it would not be a proper exercise of the powers under section 151 in this case to direct an attachment before judgment, even though there is no material to infer that the defendants intend to remove their property with a view to obstruct or delay the execution of a decree or even though the defendants have no intention to remove or dispose of their property with a view to defraud their creditors as contemplated by Order XXXIX, Rule 1(b). In any case, the power under section 151 can, since the attachment or injunction as sought for is granted, it would clearly affect the substantive right of the defendant No. 2 and would not be merely a matter of procedural right.

47.The learned Counsel for the plaintiff also submitted that this Court should in the exercise of its inherent powers to do justice grant a Mareva injunction or a freezing order. The main reason on which this injunction was sought is the fact that the defendant No. 1 Corporation may be said to be a resident outside the jurisdiction of this Court but has assets within jurisdiction. Apart from the Mareva injunction case itself i.e. Mareva Compania Naviera SA v. International Bulk Carriers Ltd., reported in 1980(I) All.Eng.L.R. 213, the learned Counsel relied on the decision in Rasu Maritima v. Pertambangan, 1977(3) All.E.R. 324, hereinafter referred to as the Pertamina case, wherein the Court of Appeal in England took note of the statement of law that you cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property and I am not aware of any statutory or other power in the Court to restrain a person from dealing with his property at a time when no order against him has been made. Thereupon, the Court observed that none of the above statement was made in relation to a defendant who was out of the jurisdiction but has assets in the country. The Court relied on a statute of 1873 and 1925 and held that the Court gave a wide discretion to grant an interlocutory injunction whenever it appears to the Court to be just or convenient. The Court referred to the Mareva case itself and observed that unless an interlocutory injunction were granted ex parte, the debtor could and probably would, by a single telex or telegraphic message, deprive the shipowner of the money to which he was plainly entitled and described the procedure of a Mareva injunction by which the defendants' property within the jurisdiction of the Court can be frozen by an order of the Court as just and convenient. The Court referred to an earlier case decided by Kerr, J., where such an injunction was granted:---

A plaintiff has what appears to be an indisputable claim against a defendant resident outside the jurisdiction, but with assets within the jurisdiction which he could easily remove, and which the Court is satisfied are liable to be removed unless an injunction is granted.

This was found necessary because otherwise it would enable the defendants to ignore the plaintiff's claim in the courts of a country and snap his fingers at any judgment which may be given against him. Therefore, the Court justified the grant of such an order on an ex parte basis. The Court eventually held that such an injunction ought to be granted where the plaintiff has a good arguable case and to induce the defendants to give security. However, in the Pertamina's case, the Court found that a Mareva injunction was not necessary in spite of a prima facie liability of Pertamina. It is clear from a reading of this decision that the decision which affirmed the practice of granting a Mareva injunction arose in a situation where there was no statutory or other power in the Court to restrain a person from forfeiting his property when no order against him has been made. In other words, there was no power to grant an attachment before judgment. Nevertheless, I do not read this decision as taking the view that a Mareva injunction ought be granted whenever the plaintiff makes out a case of a liability against the defendant. Most of the cases referred to in Pertamina case show that there was a clear liability and a debt due from the defendants to the plaintiff. I am of view that such a clear liability or a debt owing to the plaintiff is absolutely necessary before the Court grants a Mareva injunction which really seems to be an order for freezing the assets in exercise of the powers conferred on the Indian courts under Order XXXVIII, Rule 5.

48.The learned Counsel for the plaintiff next relied on a decision of the Court of Appeal in Chartered Bank v. Daklouche & another, reported in 1980(1) All.E.R. 205. That was a case where the suit was

brought against a husband and wife claiming damages for fraud and conspiracy. The plaintiff applied for a Mareva injunction restraining the husband and wife from disposing of 70,000 pounds standing in the wife's name in the London Bank. The trial Court discharged the injunction. However, the Court of Appeal found it appropriate to continue the injunction. The facts of the case are very different from the present case because it was found that the presence of the defendant-husband in England was fleeting and he was likely to leave at short notice and the wife, who was not based in England was likely to leave the country at short notice also. Finding that the husband was a person outside the jurisdiction of the Court, a Mareva injunction was granted. In the present case, as will be apparent, there does not seem to be any material for inferring that the defendant No. 1 is likely to leave India at a short notice. In fact, the learned Counsel for the defendant No. 1 stated that the defendant No. 1 undertakes to give a notice to this Court in case it intends to cease its business.

49.Apart from the fact that it is not necessary to consider the question of attachment before judgment from the point of view of a Mareva injunction, a practice which appears to have been adopted by the English Court initially because there was no statutory power to make an order for attachment before judgment, it appears that such an injunction ought not to be granted in the present case even if looked at from the point of view of the law relevant to this injunction as developed by the courts in India. Before dealing with the case in point, it is necessary to note the true fact that in the present case, the plaintiff seeks the attachment in the nature of a garnishee order of money receivable by the defendants for goods and services provided by them to purchasers in India which include a wide range of customers, including the Indian Army and security agencies. In other words, the plaintiff seeks an order which could have the effect of disabling the defendants from receiving any moneys for goods and services provided by them. Effectively, this could stop the defendants from doing business completely in India. It is, of course permissible for the Court to grant an injunction despite this consequence. But something more than the mere possibility of a decree in the plaintiff's favour is necessary. Certainly, such an injunction ought not to be granted merely because the defendant is a foreign company. The reputation and the financial capacity of the company are certainly relevant factors.

50.It appears that even the courts in England have been wary of granting a Mareva injunction in certain circumstances. In the first place, it must be noted that in the Mareva case itself i.e. 1980(I) All.E.R. 213, the injunction was granted in respect of a debt owing to the plaintiff. The Court said that if it appears that the debt is due and owing and there is a danger that the debtor may dispose of its assets so as to defeat it before judgment, the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of his assets. The essential factor there was the existence of a debt due and owing and a danger that the debtor may dispose of the assets so as to defeat it before judgment. No case has been brought to my notice where a Mareva injunction or, in fact, even an attachment before judgment under Order XXXVIII, Rule 5 of the C.P.C. has been granted in a suit for unliquidated damages in torts before the defendant is found liable. This is not to say that the Court would have no power to grant an injunction or an attachment before judgment in such a suit there being no legal impediment in doing so, but it would have to be the clearest case where the defendants appear to have no tenable defence whatsoever. Even in such a case, the extent of security required by the Court would be doubtful.

51.In Third Chandris Shipping v. Unimarine, reported in 1979(2) All.E.R. 972, the English Court of Appeal first expressed its caution that must be exercised while considering the grant of a Mareva injunction. Lord Denying said the following:---

> "Much as I am in favour of the Mareva injunction, it must not be stretched too far lest it be endangered. In endeavouring to set out some guidelines, I have had recourse to the practice of many other countries which have been put before us. They have been most helpful. These are the points which those who apply for it should bear in mind. (i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the Judge to know; see The Assios. (ii) The plaintiff should give the particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant. (iii) The plaintiff should give some grounds for believing that the defendants have assets here. I think that this requirement was put too high in the unreported case of MBPXL Corporation v. Intercontinental Banking Corporation. In most cases the plaintiff will not know the extent of the assets. He will only have indications of them. The existence of a bank account in England is enough, whether it is in overdraft or not. (iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or Award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a Mareva injunction simply because it has agreed to London arbitration. But there are some foreign companies whose structure invites comment. We often see in this Court a Corporation which is registered in a country where the company law is so loose that nothing is known about it, where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an Award is obtained, it may go unsatisfied. Such registration of such companies may carry many advantages to the individuals who control them, but they may suffer the disadvantage of having a Mareva injunction granted against them. The giving of security for a debt is a small price to pay for the convenience of such a registration. Security would certainly be required in New York. So also it may be in London. Other grounds may be shown or believing there is a risk. But some such should be shown. (v) The plaintiffs must, of course, give an undertaking in damages, in case they fall in their claim or the injunction turns out to be unjustified. In a suitable case this should be supported by a bond or security; and the injunction only granted on it being given, or undertaken to be given."

It is obvious from the above that the mere fact that the defendant is a foreign company is not by itself sufficient. Such an injunction would be attracted where the company is one which is registered in a country where nothing can be found about the membership or its control or its assets and

judgment cannot be enforced against it and more over where there is no reciprocal enforcement of a judgment. Even there the fact that the plaintiff must give an undertaking is treated as a matter of course. Applying the aforesaid principle to the present case, I find that there is evidence of a lack of a full disclosure of all matters within the plaintiff's knowledge. For example, the plaintiff has failed to make a disclosure of the fact of a winding up petition having been admitted against it. The plaintiff has given no material for inferring that there is a risk of assets being removed in order to defeat the decree that may be passed against it. On the other hand, it appears that the defendants' business is growing as observed earlier. More important, it seems that the plaintiff undertaking in damages is essential, particularly since they are seeking an order which has the potential of stopping the defendants from doing business. In such a situation, the undertaking in damages should be good. Having regard to the pendency of the winding up proceedings, it is difficult to see that the value of the plaintiff's undertaking in damages, in case their claim turns out to be unjustified.

52.The observations of Kerr.L.J. in Z Ltd. v. A, reported in 1982(1) All.E.R. 556, are pertinent. These observations in particular show that the injunction ought not to be granted where the removal of the assets is in the ordinary course of the defendants business, but only where the intention to make himself judgment proof. Kerr.L.J., observed as follows:---

> "However, the danger of assets being removed from the jurisdiction is only one facet of the ploy of a defendant to make himself judgment-proof by taking steps to ensure that there are no available or traceable assets on the day of judgment; but as the result of using his assets in the ordinary course of his business or for living expenses, but to avoid execution by spirting his assets away in the interim."

Kerr.L.J., further observed:---

> "It follows that in my view Mareva injunctions should be granted, but granted only, when it appears to the Court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. Second, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him."

I am of view that in this case it is not clear that the plaintiff will recover judgment against the defendants for a certain or approximate sum. Secondly, the defendant has no assets as is commonly understood within the jurisdiction of this Court which it is likely to remove. These assets, none of them within the jurisdiction of this Court, are monies receivable by it for goods supplied or services provided and it cannot be said that those moneys are sought to be removed by the defendants in order to defeat the decree that may be passed against it. Every businessman and trader who sells goods to Indian buyers on a mere filing of a suit for unliquidated damages in torts might become vulnerable and become incapable of removing, receiving and appropriating the amount received as price of their goods, if the plaintiff's argument is to be accepted.

53.In Iraqi Ministry of Defence v. Arcepey, reported in 1980(1) All.E.R. 480, an English Court was called upon to consider the question whether a defendant should be restrained by a Mareva injunction from dealing with their assets, in particular from repaying their debts. That Court observed as follows:---

> "I find it difficult to see why, if a plaintiff has not yet proceeded to judgment against a defendant but is simply a claimant for an unliquidated sum, the defendant should not be free to use his assets to pay his debts. Of course, if the plaintiff should obtain a judgment against a defendant company, and the defendant company should be wound up, its previous payments may thereafter be attacked on the ground of fraudulent preference, but this is an entirely different matter which should be dealt with at the stage of the winding up. It is not to be forgotten that the plaintiff's claim may fall, or the damages which he claims may prove to be inflated. Is he in the meanwhile, merely by establishing a prima facie case, to preclude the bona fide payment of the defendant's debts? When taxed with this point Counsel for the plaintiffs suggested that in such circumstances the appropriate course of a defendant's creditors was to proceed to judgment because the enforcement of judgments by execution would not constitute breaches of the Mareva injunction against the defendant. This I consider to be an unsatisfactory answer. It does not make commercial sense that a party claiming unliquidated damages should, without himself proceeding to judgment, prevent the defendant from using his assets to satisfy his debts as they fail due and be put in the position of having to allow his creditors to proceed to judgment with consequent loss of credit and of commercial standing. On the approach of Counsel for the plaintiffs a jurisdiction which found its origin in the prevention of an abuse would be transmuted into a rewriting of our established law of insolvency."

Though the facts of the case were different in the sense that the defendants claim that it was the duty to repay the loan, it does appear that the injunction was refused on the ground that such an injunction should not prevent a defendants from making payment of, or if I may add, receiving the amounts in the ordinary course of business. The following observations bears this out:---

> "He is not in such circumstances seeking to avoid his responsibilities to the plaintiff if the latter should ultimately obtain a judgment; on the contrary, he is seeking in good faith to make payments which he considers he should make in the ordinary course of business. I cannot see that the Mareva jurisdiction should be allowed to prevent such a payment. To allow it to do so would be to stretch it beyond its original purpose so that instead of preventing abuse it would rather prevent businessmen conducting their businesses as they are entitled to do."

54.From the observations of the Court in Derby & Co. Ltd. v. Weldon, reported in 1990(1) Ch. 65, it appears that the principles of grant of a Mareva injunction are the same as those for grant of attachment before judgment under Order XXXVIII, Rule 5. That Court has observed as follows:---

> "The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no Court should permit a defendant to take action designed to ensure that subsequent orders of the Court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is it its purpose to place the plaintiff in the position of a secured creditor. In a word, whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment, it may not be possible for him to obtain satisfaction of that judgment fully or at all, as the Court should not permit the defendant artificially to create such a situation."

Therefore, unless the Court discerns an injunction on the part of the defendants to take action to frustrate the subsequent orders of the Court as under Order XXXVIII, Rule 5, the attachment before judgment or such an injunction would not follow.

55.In fact, in Polly Peck International Plc. v. Nadir, reported in 1992(4) All.E.R. 769, an English Court very firmly established the principle that a Mareva injunction ought not to interfere with the ordinary course of business of the defendants. The Court observed as follows:---

> "As a general principle, a Mareva injunction ought not to interfere with the ordinary course of business of the defendant. It is not intended to give the plaintiff security in advance of judgment but merely to prevent the defendant from defeating the plaintiff's chances of recovery by dissipating or secreting away assets. This principle makes the grant of a Mareva injunction against a bank, at any rate a bank carrying on a normal banking business, very difficult.

56.In fact, in a subsequent decision in Customs & Excise v. Anchor Foods, reported in 1999(3) All.E.R. 268, another English Court reiterated the importance of not allowing the injunction to interfere with the bona fide business transaction of the defendant. It observed as follows:---

> "The purpose of a Mareva injunction is to afford protection to a person with a claim which can be described at least as good and arguable. However, the Mareva injunction jurisdiction is not to be used so as to impede or interfere with a defendant ordinary bona fide business transaction. The grant of such an injunction represents a very serious interference with the defendant's freedom. The Court should certainly not be too ready to grant such relief in the context of any bona fide transaction, particularly when it is in the ordinary course of business."

It is clear that in the present case, the intention of the defendants in receiving the monies for supply of goods made by them cannot be said to be removal of those monies so as to defeat the execution and delay of any decree that may be passed against it, but constitutes the removing from the assets in the usual course of business which must not be lightly to be interfered with.

57.The learned Counsel for the plaintiff next relied on a decision of the Calcutta High Court in Stephen Commerce Pvt. Ltd. v. O. & P. Vessel M.T. Zaima Navard, , for the proposition that an injunction must be granted merely because the defendant No. 1 Corporation is a foreign Corporation. In that case, while dealing with the question of arrest and release of a ship in the admiralty jurisdiction, that Court observed in para 61 as follows:---

> "Under sub-rule (b) of Order 38 a foreigner, simply because he is a foreigner, and a decree might be passed against him, might face arrest and the necess (sic) of furnishing security, because he does not reside in India. If it appears to the Court that the claim of plaintiff is reasonably arguable to a certain extent, that the defendant is a foreigner who is about to leave India, and that the decree is passed, might be delayed in execution because of the residence abroad of the plaintiff, the Court would have jurisdiction to issue a warrant of arrest and maintain it until security is furnished. It is noteworthy, that this jurisdiction to issue warrant and call for security, is vested with the Court in regard to foreigners, just as it is vested with the Court in regard to dishonest and fraudulent Indian defendants, although the foreigner might be a man of blemishless finance and character, yet, because he is a foreigner, and because the decree against him will have to be transmitted abroad for execution, the Court is vested with the jurisdiction to call for security. This jurisdiction has to be appropriately exercised in all cases which come before the Court."

This decision has obviously no application to the present case since it is a decision under Order XXXVIII, Rule 1(b) of the C.P.C. which deals exclusively with a natural defendant or as accepted by the Calcutta High Court to apply to a ship, is about to leave the country. Order XXXVIII, Rule 1(b) obviously has no application to a natural Corporation. The principle underlying has no application to the present case since there is no material on record to show that the defendant is about to leave the country.

58.From the discussions above, I find that there is no merit in the plaintiff's argument that the balance of convenience lies in their favour merely because the defendant No. 1 is a Corporation having large assets all over the world and it could do with the defendants no harm. Indeed, the balance of convenience cannot be said to be against the defendants, particularly when their very right to receive payment for goods and services provided by them is sought to be restrained. On the other hand, the plaintiff is admittedly under winding up and there would be no active interference in their business if the injunction is withheld.

59.This takes us to the next important question as to irreparable injury. According to the plaintiff, the defendants are allowed to remove their monies from India, the decree, as and when obtained by the plaintiff, would be practically inexecutable since the defendant-Corporation is incorporated in the U.S.A. and its assets there are beyond the reach of the Court. The U.S.A. is admittedly a country which is not a reciprocating territory recognised by the Foreign Judgment (Reciprocal Enforcement) Act, 1923. It is under this Act that decrees of Indian Courts become executable in such countries which are considered to be reciprocating territories. There is no dispute about the position that a decree of an Indian Court can be executed in accordance with the summary procedure in such a

territory. According to the defendants, and there is no dispute about this fact, the 1st defendant has a wholly owned subsidiary in the United Kingdom which is a reciprocating territory. The value of the equities is approx. US $ 365.94 million and net assets are approx. US $ 594 million. It is, therefore, clear that if this Court decrees the suit, the decree can be executed under the reciprocal arrangement in the U.K. The only argument advanced against this position on behalf of the plaintiff is that the defendant No. 1's share remains in the wholly owned subsidiary in the U.K. are worthless. It is difficult to see the merit of this argument since obviously the shares if attached in execution of the decree would give access to the fixed assets of the wholly owned subsidiary which are considerable.

60. As regards the U.S.A., it appears that the decree when passed would be capable of execution under the Uniform Foreign Money-Judgments Recognition Act, 1962. Section 3 of the said Act reads as follows:---

> "3. Recognition and Enforcement.-Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."

Section 4 of the said Act reads as follows:---

> "4. Grounds for non-recognition.-(a) A foreign judgment is not conclusive if (1) the judgment was rendered under a system which does not provide impartial Tribunals or procedures compatible with the requirements of due process of law, (2) the foreign Court did not have personal jurisdiction over the defendant; or (3) the foreign Court did not have a jurisdiction over the subject-matter.
>
> (b) A foreign judgment need not be recognised if (1) the defendant in the proceedings in the foreign Court did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> (2) the judgment was obtained by fraud;
>
> (3) the cause of action claim for relief on which the judgment is based is repugnant to the public policy of this state;
>
> (4) the judgment conflicts with another final and conclusive judgment;
>
> (5) the proceeding in the foreign Court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that Court, or (6) in the case of jurisdiction based only on personal service, the foreign Court was a seriously inconvenient forum for the trial of the action."

On behalf of the defendants, it was asserted that the judgment and decree of this Court would be fully conclusive if it was passed. There is no doubt that the defendants have raised a question of jurisdiction on the ground that the plaintiff has agreed to arbitration in the State of Delawane. However, the question of the execution of the decree passed by this Court would arise only after this Court has overruled any question of jurisdiction raised by the defendants. In case, the Court upholds the contention of jurisdiction or lack of jurisdiction raised by the defendant, the plaintiff would in any case have to take recourse to courts elsewhere. In any case, the learned Counsel for the defendants submitted that the judgment of this Court if entered in favour of the plaintiff cannot be refused recognition for lack of personal jurisdiction under section 5(a)(2) of the Act which reads as follows:---

> "5. Personal Jurisdiction.-(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if (1) .....
>
> (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the Court over him; "

The learned Counsel for the defendants fairly stated that the defendants may be taken to have voluntarily appeared in the proceedings within the meaning of section 5(a)(2). It is obvious that the defendants appearance in these proceedings is voluntary and not only for the purpose of protecting any seized property or to deal with threat of seizure. The defendants have sought time to file written statement and, therefore, it cannot be said that the appearance is for contesting the jurisdiction of the Court over the defendants. Thus, having regard to the provisions of the Foreign Money-Judgments Recognition Act, 1962, I find that the decree, if and when granted by this Court, appears prima facie to be capable of enforcement in an appropriate Court in the U.S.A. In any case, there is no dispute about the proposition that the plaintiff can always sue upon a decree granted by this Court for its enforcement in the U.S.A. I, therefore, find that this is not a case where it could be said that irreparable injury would be caused to the plaintiff if an injunction is withheld. Apart from this, the plaintiff's business has obviously come to a standstill. The defendants business is increasing. In fact, figures show that it is increasing in India. I am, therefore, of view that even on this ground, it cannot be said that irreparable injury would be caused to the plaintiff if the injunction is withheld. On the other hand, if an injunction is granted, there is no doubt that the defendants would become incapable of receiving any moneys by way of price of goods supplied and this would seriously prejudice the contracts entered into by the defendants and the interest of parties with which it is doing business. In fact, one of the respondents Bharati Cellular appeared before this Court and expressed such an apprehension.

61. Though, several suppression are alleged by the defendant, one suppression of fact appears to be of consequence. The plaintiff has suppressed the fact that it had been subjected to the process of winding up at the time of the institution of the suit. The suit was instituted on 16-9-2002. The winding up petition had been admitted against them in March 2000, more than a year before they filed the suit. Now Rule 148 of the High Court (O.S.) Rules reads as follows:-

> "148. A party to whom interim relief has been granted shall, before the order is issued, unless the Court otherwise directs, give an undertaking in writing, or through his Advocate to pay such sum by way of damages as the Court may Award as compensation in the event of a party affected sustaining prejudice by such order."

I am of view that the fact that a winding up petition against the plaintiff which is as important as an insolvency petition pending against a natural person has a vital bearing on the plaintiff's undertaking or capacity to reimburse the defendants. I see no merit whatsoever in the submission of the learned Counsel for the plaintiff that relief cannot be denied to the plaintiff since this Court would not have denied relied to a poor person approaching it. Firstly, the plaintiff is not such a person. Secondly, in an appropriate case, the Court has the power to relieve the plaintiff from the rigour of an undertaking. In any case, the plaintiff who sought an injunction of this magnitude was bound to bring to the notice of the Court the fact that a winding up petition had been admitted against it so that the Court could have applied its mind to the kind of undertaking to be given by the plaintiff. I am of view that this constitute a suppression of material facts disentitling the plaintiff to an equitable relief. Even otherwise, if the plaintiff has become liable for winding up, I do not see why the Court should grant an injunction in its favour since it would obviously have no capacity to reimburse the defendants in damages in case the suit is dismissed.

62. The learned Counsel for the defendant No. 1 has also urged that it is not possible at all to pass any decree against the defendant No. 1 Motorola Inc. for the alleged misrepresentations made by the defendant No. 2. Therefore, no order of attachment can be passed either. According to the learned Counsel, the reliefs sought by the plaintiff are possible against the defendant No. 1 only if the corporate veil of the defendant No. 2 Iridium LIC. is pierced so as to reach the holding company i.e. the defendant No. 1. In the submission of the defendant No. 1 assuming, without admitting, that there are misrepresentations by the defendant No. 2, unless a clear case of fraud perpetrated by the defendant No. 1 Motorola Inc., through the defendant No. 2 Iridium Lic is made out, there is no occasion to lift the corporate veil and reach Motorola. In view of my findings above, I do not decide this question since I have decided the matter on the basis that the representations by the defendant No. 2 were fully backed and supported by the defendant No. 1.

63. Therefore, I am of view that the plaintiff is not entitled to any interim relief and Notice of Motion No. 2557 of 2002 is dismissed.

64. In Notice of Motion No. 2793 of 2002, the plaintiff has sought similar reliefs in respect of the amount payable by the defendant No. 1, viz., Motorola Inc. In view of the dismissal of Notice of Motion No. 2557 of 2002, I find no merit in the present motion which is hereby dismissed.

65.In accordance with the undertaking given by the defendant No. 1, the defendant No. 1 is directed to give immediate notice if it intends to cease its business activities in India and shall in no case commence its winding up operations in India without six months' notice in advance to the plaintiff.

66. Copy of this judgment duly authenticated by the Associate of this Court be supplied to the parties.

67. Mr. Tulzapurkar, learned Counsel for the plaintiff, seeks continuation of the ad interim order dated 16-9-2002 as varied by order dated 3-10-2002. Having regard to the duration for which these orders are continued, they shall continue for a period of four weeks from today.

68. P.S. to give ordinary copy of this judgment to the parties concerned.