Bharti Televentures Ltd. vs Bell South International Asia/Pacific ... on 28 August, 2000

Equivalent citations: 2000(55)DRJ216

Author: Vikramajit Sen

Bench: Vikramajit Sen

ORDER

Vikramajit Sen, J.

1. The Plaintiff, Bharti Televentures Ltd. (BHARTI) has filed this suit for permanently injuncting Bell South International Asia/Pacific Inc. USA (BELL) from selling or entering into any arrangement/agreement for the sale of its shareholding in Sky cell Communications Limited (SKYCELL), to any third party. SKYCELL is the joint venture constituted by Crompton Greaves Ltd. (CROMPTON), which holds 40.5 per cent of its equity; BELL, which holds 24.5 per cent of its equity; Milliohm International Cellular SA (MILLICOM) (which holds 24.5 per cent of its equity); and DSS Enterprises (DSS) (which holds 10.5 per cent of its equity).

2. It is not in controversy that the joint venture SKYCELL has been sustaining substantial losses. The Plaintiff thereupon entered the fray by negotiating for the purchase of the shareholding, inter alia, of BELL for a sum of US $ 115 million. The contract between the original four constituents of SKYCELL included a covenant that none of them would agree to trans fer their shareholding to a third party without their unanimous consent. BHARTI's contention is that a binding contract had come into effect between BELL and itself, pursuant to a consensus between these four parties, and the execution of a written contract was a mere formality BELL contends to the contrary, the submission being that they were only in the negotiating process with BHARTI. If consensus ad idem or the meeting of the minds of the two adversaries had actually transpired, the injunction prayed for must be granted, subject to compliance of certain legalities. If not so reached, there being no enforceable agreement, the injunction must be declined.

3. Mr. Kapil Sibal, the learned Senior Counsel for the Plaintiff, con tended that the Defendant has developed dishonest intentions because it appears to have received an offer of US $145 million for its shareholding in SKYCELL, from Hutchinson and/or AT&T. This offer is conditional on these parties acquiring a majority equity holding in SKYCELL. Since BHARTI has already purchased and actually acquired the 41 per cent holding of Cromp ton, it necessarily means that the other three partners, namely, BELL and MILLICOM and DSS would have to agree to jointly transfer their stake in SKYCELL to Hutchinson and/or AT&T. Mr. Sibal argued that this is the only reason for MILLICOM and DSS backtracking, reneging and withdrawing their earlier consent to the purchase

of BELL's shareholding by BHARTI and that this conspiracy has been instigated and initiated by BELL.

4. The agreement between the constituent members of the joint venture SKYCELL, is dated August 12, 1992. It incorporates that no shareholders shall sell or otherwise transfer or dispose off any of its shares unless mutually agreed upon by all the shareholders. Article 36 stipulates that no person or entity shall be invited to participate or shall participate in SKYCELL without the prior written consent of all the shareholders. Thereaf ter, Article 7 is of significance as it contains the details that require to be complied with before the intended transfer could take effect. Article 21 contains the arbitration clause. The Plaintiff's contention is that the provisions of the agreement had been complied with and fulfillled. The controversy in this regard had resulted in a Suit being filed by BELL against CROMPTON, MILLICOM, DSS and SKYCELL in the High Court of Judicature at Madras. This litigation was between the shareholders of the joint ven ture namely SKYCELL. BHARTI was not a party in those proceedings. In the order of the Learned Single Judge of the Madras High Court it was observed that if the parties failed to resolve the controversy before May 10th, 2000, the aggrieved party may seek arbitration in accordance with Article 21 of their Agreement. The Order further mentioned that if the parties arrived at an understanding even before 3rd May, 2000, it was open to them to carry out and implement the common decision taken by them unanimously. The Court clarified that its Orders would not be a bar to the enforcement of such a decision. It is the Plaintiff's contention that all the parties met in Chennai on May 3, 2000; and that the decision to sell the shares to BHARTI was unanimously agreed upon. This decision was thereupon conveyed to BHARTI later in the evening of that very day. Although this fact is not disputed. Mr. Sibal stressed that this is independently evident from the fact that no arbitration proceedings have been initiated by any of the four parties, and infact no litigation between them is subsisting.

5. BHARTI has already purchased the 40.5 per cent shareholding of CROMP TON in SKYCELL. It is alleged that an agreement had also been arrived at for the purchase of BELL's shareholding of 24.5 per cent by BHARTI on that day itself i.e. 3.5.2000. It is argued that there was consensus on all relevant and material points and therefore even though the formal contract has not been executed, this would not undermine the legslity, efficacy and enforceability of the agreement. Mr. Sibal also drew attention to BHARTI's letter dated May 8, 2000, that is five days after consensus was reached, forwarding to BELL a copy of the Share Purchase Agreement entered into between CROMPTON and BHARTI. This letter was followed by BHARTI's letter dated May 11, 2000, highlighting the fact that certain guarantees issued by ABN Amro and ICICI needed to be sorted out. On 25th May, 2000 the Advocates of BELL conveyed to BHARTI the former's approval to proceed for obtaining approval/clearances from the Department of Communications (D.O.T.). This was in the form of a letter by SKYCELL addressed to the D.O.T., wherein it specifically requested that the transfer of the 24.5 per cent shareholding in the joint venture by BELL to BHARTI, be approved. Similar letters were also addressed by SKYCELL for the transfer of the 10.5 per cent sharehold ing of DSS to BHARTI. In these correspondence it was also recorded that the Department of Telecommunications had already accorded approval for the transfer of the entire 40.5 percent shareholding held by CROMPTON to BHARTI. SKYCELL had also written letters to ABN Amro and ICICI informing it of the agreement for this transfer of shareholding. It was adumbrated by Mr. Sibal that the only point

of difference which had subsequently cropped up between the parties hereto pertained to whether the figure of US $115 million was a derivative of the enterprise value as on the date of the Purchase Agreement on the then prevailing exchange rate, as expressed in parties letter dated June 9, 2000. It is alleged that even this controversy was immediately put to rest, by BHARTI acceding to the view of BELL. The draft of the Share Purchase Agreement was thereafter exchanged, but was admittedly not executed. However, as late as June 17, 2000 the Defendant had issued draft certificates to the effect that the representation and warranties made in Sections 71 and 72 of the Share Purchase Agreement between the parties, were valid.

6. Mr. Sibal then emphasised that the Plaintiff, not being privy to joint venture agreement, was not imp leaded in the litigation that was pending in the High Court of Madras. However, since that litigation had satisfactorily ended with the present agreement for purchase of shares, neither BHARTI nor BELL was further aggrieved with to the Order of the Learned Single Judge. Learned Counsel further drew attention to the affidavits filed on behalf of CROMPTON, that subject to the approval of statutory authorities there was no dispute as the three partners had agreed for transfer of the respective shareholding in favour of BHARTI. By letter dated June 30, 2000, the Plain tiff recorded the talk with Mr. Hillman of the Defendant, who had confirmed that the draft agreement had been cleared and that he was awaiting certain formal internal clearances, which were necessary for signing the agreement. Attention was further drawn to a letter dated August 4, 2000 from SKYCELL to the Department of Telecommunications forwarding the Resolution to the effect that subject to the receipt of consensus from other shareholders under the joint venture agreement and approvals from the Department and Institutional lenders, the sale of entire 24.5 per cent shareholding held by BELL and 10.5 per cent shareholding held by DSS had been approved in principle. He had argued that till date no writing had been received from the Defendant stating that the agreement had been cancelled. Instead the Defendant had instigated the other constituents of the joint venture SKY CELL to address letters to the effect that the agreement had been put to an end.

7. The Defendant has placed on record a letter dated August 5, 2000, from BELL to CROMPTON recording that the former has not, either prior to or after the shareholders meeting of May 3, 2000, at Chennai, consented to any transfer of shares by CROMPTON to BHARTI. There is a similar letter dated 11th July, 2000, from DSS to BELL in which it was recorded that the former does not consent to any sale by the latter of its shares to the Plaintiff. Significantly, a copy was not endorsed either to CROMPTON or BHARTI. There is also a letter dated August 7, 2000 from the Defendant to the Plaintiff expressing that the former was no longer negotiating with the latter. The circular letter dated August 8, 2000 has also been placed on record by the Defendant, in which the latter has mentioned that the existence/offer of a higher purchase price had been discussed on May 3, 2000: thereafter, it is refuted that Millicom had ever conveyed its approval to the transfer. It is Mr. Sibal's contention that these letters have only now been exchanged with a view to creating a defense to the present suit. He closed his arguments with reliance on Kollipara Sriramulu Vs. T. Aswathanarayana & Ors., , and by reiterating that the BHARTI was ready and willing to pay the agreed price of US $115 million to BELL.

8. Mr. N. Ganapati, learned counsel for BELL, had submitted that no binding and enforceable contract had been concluded between the parties. BELL had agreed to sell its holding in SKYCELL only in principle, to culminate only on the execution of a written contract. He drew attention to the affidavit dated 21st July, 2000 (page 105) of the Executive Director of BHARTI in which it was stated that purchase of the 24.5 per cent holding of BELL had been agreed at US $115 million whereas the 10.5 per cent holding of DSS had been agreed at US $ 113 million; he argued that the in congruency in the price is palpably evident. He further submitted that it has been incorrectly pleaded in paragraph 13 of the plaint and in para 4 of the affidavit dated June, 2000 (page 103) of Mr. S. Jayaram of CROMPTON that all the partners, including MILLICOM, had agreed to this transfer/purchase. Clause 3.6 mandated that prior written consent of all shareholders was essential and no document evidencing this consent was forthcoming on the record. This requirement finds reiteration in Clause 7.4 of their Agree ment. Prior written consent was essential even for inviting a third party to participate in SKYCELL. Mr. Ganapati also relied on the documents filed on 8th August, 2000, some of which have already been adverted to above. A reading of SKYCELL's letter dated 29th May, 2000 to ABN AMRO discloses that on that date only an agreement in principle had been reached and further negotiations were to be conducted on the release of the undertakings and guarantees that may have been furnished by BELL. He contended that this had not taken place till date. Similar statements were made to ICICI by SKYCELL on the same date. His submission was that on 5th August, 2000 he had him self, as the Advocate for BELL, authored a letter to CROMPTON informing it that BELL had "not, either prior to or after the shareholders meeting on 3rd may, 2000, at Chennai, consented to any transfer of shares by Crompton Greaves Ltd. in favour of Bharti Televentures Ltd." Mr. Ganapati also relied on BELL's letter dated 7th August, 2000 to BHARTI informing the latter that the negotiations had ended. He drew attention to the letter dated 11th July, 2000 written by DSS to BELL recording the lack of consent to any sale by BELL of its shares to BHARTI. He further emphasised that a similar statement had also been expressed by the MILLICOM to all the part ners in terms of its letter dated 8th August, 2000. Learned counsel further argued that the averments contained in paragraph 26 of the plaint were contradicted by the document filed by the Plaintiff, i.e. version 11 of the Draft Agreement dated 17th June, 2000, in Clause 4.1 (iv) to the effect No Objection Certificates would have to be issued. Attention was also drawn to the subsequent Clauses 6.2 and 7.1. Learned counsel submitted that all these factors lead to the unescapable conclusion that no binding and con cluded agreement could have, or did, come about. As the sequence of trans actions envisaged in the agreement did not happen, Section 50 etc. of the Contract Act would come into play. It was further argued that the relief of injunction ought not to be granted because of the prohibitions contained in the Specific Relief Act. It was contended that the appropriate relief, if any was available in the facts of the case, was for the Specific Perform ance of the so called agreement.

9. The first and foremost question to be answered is whether a binding contract between the parties had come into effect or were they only in the negotiating process. Even if the terms were agreed upon 'in principle' was the contract still at an inchoate stage. Should the factum of the parties not having executed a written contract lead the Court inexorably to the conclusion that no consensus had been arrived at. The Supreme Court had observed in Kollipara's case (supra) as follows:

> "We proceed to consider the next question raised in these ap peals, namely, whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actual ly agreed upon. It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and no such agreement was exe cuted. We do not accept this argument as correct. It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in Ridgway V. Wharton the fact of a subsequent agree ment being prepared may be evidence that the previous negotia tions did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In Von HatzfeldtWildenburg V. Alexander it was stated by Parker, J. as follows:
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> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contem plate the execution of a further contract between the parties, it is a question of construction whether the execution of the fur ther contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. In Rossier Vs. Miller Lord Cairns said:

> "If you find not an unqualified acceptance subject to the condi tion that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfillled no contract is to arise then you cannot find a concluded contract."

In Currimbhoy and Company Ltd. Vs. Creet, 60 I.A. 297, the Judi cial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker, J. in Von HatzfeldtWildenburg Vs. Alexander, (1912) 1 Ch. 284, was be applicable in India. The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agree ment which can be ignored. The evidence adduced on behalf of respondent No.1 does

not show that the drawing up of a written agreement was a prerequisite to the coming into effect of the oral agreement. It is therefore not possible to accept the con tention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written docu ment. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the com platens of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr. Gokhale is unable to make good his argument on this aspect of the case."

10. Applying the ratio to the present case I am not persuaded that it was understood, explicitly or implicitly, that the parties would be bound to their respective commitments only on the execution of a written contract. Learned counsel for the Defendant did not disclose the existence of any document or the happening of any event which would substantiate this argu ment. Oral agreements are as common and as legally efficacious as written contracts. If this were not so there would have scarcely been any need to introduce a statutory requirement that in the case of the transfer of immovable property over a certain value, or for a lease tenure exceeding eleven months, a written agreement is mandatory and must be registered. Even though there is nothing in writing to show that the parties intended themselves to be contractually bound only upon the execution of a formal contract I have also been unsuccessful in locating any incident which would demonstrate this resolve of the parties. The sequence of events points in the opposite direction, i.e. that the so called agreement in principle was given effect to by the parties from time to time and in diverse manner. In the first place the litigation initiated by BELL in the High Court of Madras has come to an end, post 3rd May, 2000. Secondly, no arbitral pro ceedings have commenced, even though the Order of the Learned Single Judge contemplated this possibility. Thirdly, and in my thinking most signifi cantly, the shareholding of CROMPTON has in substance already been acquired by BHARTI without any demur from BELL or the other two former jointventur ers, millon and DSS. Letters were exchanged after the filing of the suit, but their timing do not inspire confidence as to the truthfulness of their contents. There is an abundance of correspondence emanating from SKYCELL to various parties informing them of the agreement reached between BHARTI and BELL. No objection or reservation has been expressed by any of these par ties, even to SKYCELL. Instead a Resolution dated 13.7.2000 was adopted by circulation recording the consent of all parties to the purchase/transfer of all their holdings by/to BHARTI. Since the transfer was subject to the obtainment of clearances and approvals of Authorities or third parties, these were quite palpably the only reservations mentioned. The parties acted upon and implemented their agreement since permissions and clearances were infact solicited by SKYCELL. Fourthly, I cannot ignore the specious ness of the stance of the BELL that since Clause 3.6 and 7.4 of the Agree ment between the four constituents of SKYCELL required written consent, it is essential to find it in this form, and if absent, then it must be con cluded that no consent was given. The parties actions, subsequent to 3.5.2000 manifested this consent, and equitable relief cannot be denied only because formality is wanting, although substance is in abundance. In any event the circular Resolution dated 13.7.2000, prima facie, represents written consent. I cannot conceive of a greater and more compelling writing than a Resolution of all the erstwhile shareholders acting in unison. The speciousness and unreasonableness of the stance of the Defendant propels me towards granting equitable relief. Fifthly, I cannot ignore the timing of the letters recording that the parties had not consented to the transfer. This suit was filed on 5.8.2000

and the first hearing, at which the Defend ant BELL was present, took place on 7.8.2000. The contemporariness of the letters relied upon is indicative of the strong possibility that they were written with a view to provide a defense to the suit. For these manifold reasons, it cannot possibly be maintained that the Plaintiff, BHARTI, has been unsuccessful in disclosing a prima facie case on the controversy centering around the evolution of an enforceable contract between the parties. A definite answer can be given only pursuant to evidence being led by the adversaries.

11. It will be apposite to reproduce the following extract from Chitty on Contracts, 28th Edition:

> 1. PROOF OF TERMS:
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> Proof of terms. Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect. But it by no means follows that the document will contain all the terms of the contract: it may be partly oral, and partly in writing. Further, many contracts are made solely by word of mouth or are contained in or evidenced by documents which have not been signed by the party affected. In such cases, it will be necessary to prove which statements, or stipulations, were intended to be incorpo rated as terms of the contract or to have contractual effect.
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> (a) Contractual Undertakings and Representations:
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> Terms and representations. During the course of negotiations leading to the conclusion of a valid and binding contract, a number of statements may be made, some of which may, and others may not, be intended to have contractual force. Some statements may be considered to be mere representations, intended to induce the other party to enter into the contract, but not imposing liability for breach of contract. Others may be considered to be terms of the contract, for the breach of which an action for damages will lie. The question whether any particular statement is a mere representation or a terms of the contract is frequently a difficult one for the court. In reaching a conclusion it will take into account the following considerations: the importance of the truth of the statement; the time which elapsed between the making of the statement and the final manifestation of consensus; whether the party making the statement was, visavis the other party, in a better position to ascertain the truth of the state ment; and whether the statement was subsequently omitted when the agreement was embodied in a more formal contract in writing. But none of these criteria is conclusive and the true test would seem to be whether there is evidence of an intention by one or both parties that there should be contractual liability in respect of the accuracy of the statement."

12. Mr. Ganapati, learned counsel for the Defendant BELL relied on the decision of an Hon'ble Division Bench of this Court in the case of Baron International Airways Vs. Haj Committee and

another, . The Court came to the conclusion, in the facts and circumstances disclosed before them that the letter of intent exchanged between the parties could not be construed as an agreement. The following extract from this decision is high authority for the proposition that the Court must investigate and consider all factors before concluding that an agreement had not been reached, even though a formal contract had not been executed. Had the Hon'ble Division Bench been of the opinion that the existence of a formal contract was essential to the enforceability of the agreement/consensus ad idem arrived at by the parties, it would have been unnecessary to consider all the numerous points that have been mentioned in the Judgment :

> "7. We have given our indepth consideration to the relevant clauses of the aforesaid Letter of Intent and in view of the language used in the said Letter of Intent and also in view of the entire contents of the said letter read as a whole, it is apparent to us that the respondent No.1, through the aforesaid Letter of Intent, did not intend to agree or do anything to give rise to a binding and concluded contract between the parties. It was, however, at an offer stage and could not be construed as a firm and concluded contract executed by the respondent with the appellant. The said letter reveals that only on complying with certain conditions mentioned therein, a Charter Agreement would be executed. In other words, the conditions precedent for the coming into force of a binding contract, had yet to be fulfillled.

13. The next submission of the learned counsel for the Defendant which calls for consideration is whether any of the provisions of the Specific Relief Act, 1963, prohibit the grant of the injunction prayed for, Section 41 thereof prescribes that an injunction cannot be granted to prevent the breach of a contract the performance of which could not be specifically enforced [41(e)] and/or when equally efficacious relief can certainly be obtained by any other usual mode or proceedings except of breach of trust [41(e)]. Referring back to Section 14(a) of the said Act, it is perhaps the only clause that may be an impediment in granting Specific Performance, since it could be predicated that the nonperformance of the alleged con tract may be compensated in money. In the factual matrix prevailing, the fact that the stake of CROMPTON has already been acquired in contemplation and anticipation of the further acquisition of BELL's shareholding, even independent of the principles of Promissory Estoppel being attracted in full vigour, the breach by BELL of its contractual obligations would not be adequately compensatable in money. This is definitely a question which the Court cannot decide at this preliminary stage, and failure to grant injunc tory relief may well leave the Plaintiff without any efficacious remedy. The present suit would fall in the genre of a 'quia timet' action, in which Courts have not been hesitant in granting equitable relief.

14. I am also of the view that the principles of promissory estoppel would come to the assistance of the Plaintiff. This doctrine has succinctly been defined in Black's Law Dictionary to be that which arises when there is a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, and such prom ise is binding if injustice can be avoided only by enforcement of the promise. In the Concise Dictionary of Law published by the Oxford Universi ty Press, this principle is stated to apply when one party to a contract promises the other that he will not enforce his rights under the contract in whole or in part. Provided that the other has acted in

reliance on that promise, it will, though unsupported by consideration, bind the person making it; he will not be allowed subsequently to sue on the contract. Prima facie, an understanding at the very least and an enforceable contract had been reached on May 3, 2000, as is clearly evidenced by the Circular Resolution dated 13.7.2000. Acting thereon, BHARTI has acquired the stock of CROMPTON and taken other requisite step in implementation of the under standing/agreement.

15. The argument that the present action is not maintainable for the reason that the BHARTI ought to have filed a suit for Specific Performance is also without merit. I have already remarked on the timing of the letters of the constituents of SKYCELL pertaining to their consent, or withdrawal of it, to the sale/purchase of BELL shares. Learned counsel for the BELL had submitted that it had withdrawn/cancelled its offer after the filing of the present suit. Obviously BHARTI could not be expected to file an action of the nature of Specific Performance, even prior to such the cause of action having arisen.

16. I can foresee a situation where the Plaintiff, BHARTI, may reasonably complain that there is a bargain between all the partners for the sale/purchase of all their shareholdings. BHARTI has acted on that bargain and has acquired the stake of CROMPTON, legitimately, expecting to purchase the other holdings also. It has not been controverted that a sum of over Rupees Forty Crores has been paid for this acquisition. It does appear to me to be, unfair and inequitable at this threshold stage, to permit the BELL from resiling from their commitments to BHARTI, which pursuant to having made this large investment, would be relegated to and be left with a minority holding. Mr. Ganapati, learned counsel for the BELL had painstak ingly explained and emphasised this very situation, albeit in the context of BELL having obtained higher consideration for its stock, provided it could bring along with it the remaining constituents, so that HUTCHINSON and/or AT&T could thereby attain a majority holding in SKYCELL.

17. Finally, I am unable to appreciate which reciprocal promise BHARTI has transgressed or failed to perform. None has been brought to my notice by learned counsel for the BELL. Therefore, the provisions of the contract Act would not be attracted in a manner as would be an embargo for the grant of the interdiction prayed for.

18. In these circumstances I am satisfied that a prima facie case has been made out by the Plaintiff. The application is allowed and Defendant, BELL, is temporarily restrained from selling or entering into any arrangement/agreement for the sale of its shareholding in SKYCELL with any party other than the Plaintiff BHARTI.