

(2019) 09 DEL CK 0335

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 364 Of 2019

Bharat Sanchar Nigam Limited (Bsnl)

APPELLANT

Vs

Maharashtra Knowledge Corporation Ltd (MKCL)

RESPONDENT

Date of Decision : 25-09-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 28(1)(a), 28(3), 31(3), 34, 34(2)

Citation : (2020) 1 R.A.J. 491 : (2019) 10 AD(Delhi) 417 : (2019) 6 ArbLR 455

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Ajit Kumar Singh, Abhinav Mukerji, Bihu Sharma

Final Decision : Dismissed

Judgement

Jyoti Singh, J

I.A. No. 12475/2019 (Delay 14 days in re-filing)

1. This is an application seeking condonation of 14 days delay in re-filing the petition.

2. For the reasons stated in the application, the same is allowed and the delay of 14 days in re-filing the petition is condoned.

3. The application stands disposed of.

O.M.P. (COMM) 364/2019

4. Present petition has been filed by the petitioner/BSNL under Section 34(2) of the Arbitration & Conciliation Act, 1996 ("Act") for setting aside the award dated 09.10.2017 and the revised award dated 20.06.2019, passed by the learned Arbitrator. However, arguments have been addressed by the parties only with respect to Award dated 20.06.2019.

5. The facts relevant for adjudication of this petition are that the respondent which is a Company incorporated under the Companies Act, 1956, commenced

its business in April 2002, whereby it provides design, development and delivery of innovative e-learning, e-governance and e-empowerment technologies solutions and services to the Government and various Universities, etc.

6. The petitioner in the year 2005 entered into the market relating to IPTV, video-on-demand, interactive gaming etc. A tender was floated by the petitioner and respondent emerged as the successful bidder. A Franchise Agreement dated 17.03.2006 was executed between the parties for Pune and another Franchise Agreement dated 07.07.2008 was executed for 20 other cities including Gwalior, Mehsana, Rajkot, Nellore and Warangal. The present dispute concerns the Agreement dated 07.07.2008.

7. Disputes and differences having arisen between the parties with regard to the respondent allegedly not fulfilling its obligations under the Agreement, there being an Arbitration Clause in the Franchise Agreement, the petitioner appointed a Sole Arbitrator. Respondent preferred the following claims:

Sr. No.

Description

Amount (Rs.)

a)

The amount of Performance Bank Guarantee

5,90,00,000/-

b)

Cost

1. Stamp Duty for filing suit against BSNL

3,00,000/-

2. Legal and incidental expenses

2,00,000/-

c)

Total (Rs.)

5,95,00,000/-

d)

Plus interest @ 7.50% p.a. on Rs. 5,90,00,000/- from June 27, 2011 till the date the amount of Rs. 5,90,00,000/- is deposited in MKCL's Bank Account by BSNL

a) Liquidated compensation of Rs. 50,00,000/- on account of financial damages

and loss of opportunities

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The petitioner submitted its counter claims, which are as under:

"1) Claim -I: 25% of the Performance Bank Guarantee for the city of Pune amounting to Rs. 5,00,000/-.

2) Claim-II: Rs. 5,10,200/- on account of intra-city connectivity and bandwidth charges for the city of Pune under FA dated 17.03.2006.

3) Claim-III: Rs. 2.5 Crores for failure to launch the services under the FA dated 07.07.2008.

4) Claim-IV: Rs. 325.32 lacs for Intra-City connectivity and bandwidth charges payable by the Respondent under FA dated 07.07.2008.

5) Claim-V: Rs. 15,26,422/- on account of collocation charges for the city of Ahmedabad.

6) Claim-VI: Rs. 21,57,000/- in respect of security deposit of Set Top Boxes (STB) for the city of Vadodra, Nasik, Pune & Indore.

7) Claim-VII: Rs. 1,75,290/- on account of revenue share for the city of Ahmedabad, Vadodra, Surat & Rajkot.

8) Claim-VIII: on account of interest @ 12% Compounded annually.

9) Claim-IX: Rs. 2,00,000/- on account of litigation charges."

The learned Arbitrator rejected all the claims of the respondent and allowed some counter claims of the petitioner.

8. The net monetary effect of the award is as under:

"A) The Respondent (BSNL) is allowed Rs. 3,25,33,627/-out of their seven claims (Claim-1 to Claim-VII) of Rs. 6,23,11,017/-.

B) The Respondent (BSNL) has encashed total Bank Guarantees of Rs. 5,90,00,000/- of the Claimant (MKCL). Therefore, Respondent (BSNL) to return Rs. 2,64,66,373/- to the Claimant (MKCL) within three months from the date of Award."

9. Petitioner impugned the said award before this Court in OMP (Comm) 83/2018 to a limited extent that it directed refund of the amount recovered by way of encashment of Performance Bank Guarantees submitted by the respondent for 12 cities. When the petition was filed, the petitioner was aggrieved by the rejection of its claim of Rs. 2.7 Crores on account of the alleged failure of the respondent to launch services in 12 cities. The findings of the Arbitrator were mainly assailed on the ground that the respondent had itself admitted that they

did not launched services in 5 cities viz. Gwalior, Mehsana, Rajkot, Nellore & Warangal, and thus, the direction to refund was illegal.

10. What needs to be highlighted here is that when the petition was filed originally, the grievance was with respect to 12 cities, but at the stage of the notice, it was scaled down to 5 cities. The order passed by this Court while issuing notice on 21.02.2018 is as under:

"4. The petitioner has filed the present petition impugning an arbitral award dated 09.10.2017 to a limited extent that it directs refund of the amount recovered by encashment of performance bank guarantees submitted by the respondent in respect of the twelve cities. The Arbitral Tribunal had come to the conclusion that the respondent had launched the services in the twelve cities and, therefore, the petitioner would not be entitled to encash the bank guarantee. The learned counsel appearing for the petitioner has drawn the attention of this Court to the counter affidavit filed on behalf of the respondent, wherein it is admitted that the respondent was unable to launch the services in five cities on account of failure on the part of the petitioner to perform its reciprocal promise. Thus, there was no dispute that the respondent had failed to launch the services in five of the cities in question and the Arbitral Tribunal fell in error holding otherwise.

5. Issue notice limited to the above issue. The respondent may file its written statement/counter affidavit within a period of four weeks from of receipt of notice. Rejoinder, if any, be filed within a period of four weeks, thereafter.

6. List on 19.07.2018."

11. This is also recorded by the Court in its final order dated 04.04.2019, in para 12.4.

12. Contention of the respondent was that the conclusion of the Arbitrator that the respondent had not placed any conclusive material on record to demonstrate that it could not launch the services in the 5 cities, on account of the failure of the petitioner to provide infrastructure facilities, was erroneous. After hearing the parties, the Court rendered a finding that the Arbitrator had overlooked letter dated 10.12.2008 which was placed on record by the respondent and which was a vital piece of evidence in support of the respondent's contention. Thus, the Court partially set aside the impugned award with a direction to the Arbitrator to revisit the award on this aspect with respect to the 5 cities in question, after taking into account, the documents placed on record by the respondent.

13. On being queried by the Court during the hearing, the petitioner had submitted that out of a sum of Rs. 2,64,66,373/-, the amount that had been encashed by way of Bank Guarantee qua the 5 cities was only a sum of Rs. 1 Crore. Court, therefore, directed BSNL to pay to the respondent the undisputed sum of Rs. 1,64,66,373/- (i.e. Rs.2,64,66,373/- minus Rs. 1 Crore). Learned

Arbitrator was requested to render the award in a period of 8 weeks and the petition was accordingly disposed of. Relevant paragraphs of the order dated 04.04.2019 are as under:

"14.2 A perusal of the letter dated 10.12.2008 cited before me by counsel for MKCL would show that, for whatever it was worth, there is a reference in the letters that BSNL had failed to upgrade the link qua the five cities in issue to STM 16 or 1 Gig.

14.3 MKCL did try and convey to BSNL in December 2008 and thereafter in March 2010 that it was unable to provide the necessary service on account of failure on the part of BSNL to put in place the requisite infrastructure facilities and address the stated inadequacies.

15. The learned Arbitrator, in particular, appears to have overlooked the letter dated 10.12.2008, which, to my mind, was a vital piece of evidence.

16. On being queried, learned counsel for BSNL say that out of a sum of Rs. 2,64,66,373/-, the amount encashed by way of bank guarantee qua the five cities would be a sum of Rs. 1 Crore, which, in fact, conveys to the Court that the remaining amount, even according to BSNL, would have to be paid in view of the finding returned by the learned Arbitrator based on the record placed before me.

17. Thus, in fact, this would lead to a situation where the award can be sustained only partially at this moment.

18. I am, thus, inclined to dispose of the petition with the following directions:

(i) The impugned award is sustained partially which, in effect, would mean that the aspect which concerns the five cities referred to above in respect of which BSNL says that services were not provided will have to be re-visited by the learned Arbitrator. In other words, BSNL should pay, for the moment, a sum of Rs. 1,64,66,373/- (i.e. Rs. 2,64,66,373 minus Rs. 1,00,00,000/-) to MKCL.

(ii) As regards the issue as to whether the failure on the part of MKCL to provide services with regard to the aforementioned five cities occurred on account of the alleged breach of reciprocal promise on the part of BSNL to provide the necessary infrastructure, is an aspect which the learned Arbitrator will have to re-visit in view of the vital evidence having been completely overlooked by him.

18.1 Learned counsel for the parties are agreed qua this aspect that the matter could be remanded to the learned Arbitrator in order to enable him to render a finding on the issue as to whether, if the material sought to be placed before me by MKCL, in particular, the two letters, which I have referred to hereinabove, are taken in account the stand taken by MKCL before me that BSNL did not provide the necessary infrastructure facility could be sustained.

19. Thus, as indicated above, the petition is allowed in part.

20. The finding in the award that there was no conclusive material on record

which pointed in the direction that BSNL had failed to provide the necessary infrastructure facilities is set aside to enable the learned Arbitrator to re-visit the issue bearing in mind the material placed before this Court qua that aspect of the matter only.

21. Therefore, BSNL will pay the remaining amount as per the impugned award within four (4) weeks from today."

14. The learned Arbitrator thereafter passed a revised award dated 20.06.2019. The relevant part of the award is as under:

"4. In view of above, I am on the considered opinion that it was obligatory on the part of BSNL to intimate MKCL in writing if they were not in a position to provide required media/bandwidth for these cities, as BSNL has to be given First Right of Refusal by the bidder for providing intercity bandwidth requirement of franchisee. Therefore, in the absence of such a letter from BSNL MKCL was not free to obtain bandwidth from any other source. As such it can be safely assumed that BSNL would provide the necessary bandwidth to the franchisee (MKCL) for these cities.

5. In respect of Rajkot, it has been intimated by DE (Broad band) o/o CGMT Gujrat Circle, Ahmedabad vide their letter dated 09.06.2009 addressed to MKCL (Exh. RW-1/13) that IPTV service was launched in Ahmedabad on 01.10.2008 and in Rajkot on 18.05.2009. Further in table of Para-5 (page-5) of Evidence by way of Affidavit filed by BSNL (Exh.RW-1), it has been mentioned that as on 06.01.2010, 34 IPTV connections were working in Rajkot while IPTV Service was commercially not launched in Gwalior, Nellore, Mehsana, Warangal; where as in Amended Counter Claim on behalf of BSNL of dated 23.09.2014, in table of para-5 it is mentioned that IPTV connections as on 06.01.2010 in Rajkot were 37, in Gwalior 12 and zero (0) connection each in Nellore, Warangal, Mehsana."

The Arbitrator has held that the respondent had launched IPTV services in 2 cities out of 5 i.e. Rajkot and Gwalior. With respect to the remaining 3 cities, the learned Arbitrator has held that the services were not launched by the respondent, but this was on account of the failure of the petitioner to provide infrastructure facilities. However, the monetary part of the award dated 09.10.2017 was not modified by the Arbitrator.

15. Learned counsel for the petitioner has assailed the award, firstly, on the ground that the re-examined award is silent on the issue raised by the petitioner that once the respondent had itself admitted that it did not launch services in 5 cities, it was not open for the learned Arbitrator to give a finding that the services were launched in Gwalior and Rajkot.

16. He next contends that the learned Arbitrator has overlooked RW-1/7 i.e. a letter dated 24.01.2012 written by the BSNL providing details of upgradation from STM -1 to STM-16 in the said 5 cities. He further contends that the finding of the Arbitrator condoning the non-provision of services in the remaining 3 cities on the basis of a letter dated 10.12.2008 from the respondent is completely

perverse, especially in view of the fact that there was no follow-up action on the part of the respondent nor did the respondent at any point of time had put the petitioner to a notice that it was awaiting BSNL's instructions for seeking Band Width/Network from open market.

17. Learned counsel contends that from the letter dated 24.01.2012 of the BSNL, it is evident that the upgradation was carried out by the BSNL in the said 5 cities as early as October 2008 and January 2009. He contends that once the Arbitrator has held that the respondent did launch services in the cities of Rajkot and Gwalior, it would imply that the infrastructure had been provided and therefore, the finding that no infrastructure was provided is patently illegal.

18. Learned counsel for the petitioner further contends that while disallowing counter claim No. 3 of the petitioner, the learned Arbitrator has held that the petitioner should have given notice of termination of the agreement to the respondent, if the services were not launched within 9 months of signing the agreement. He submits that this finding is patently illegal as in the first place, there was no occasion for the petitioner to send any such notice since it was the respondent who had abandoned the work and walked out of the agreement. As a matter of record, neither of the parties has terminated the contract in writing, till date. Secondly, there is no such obligation under the covenants of the Agreement which requires giving of a termination notice. The terms of the Agreement are clear and unambiguous and the petitioner became entitled to forfeit the Performance Bank Guarantee (PBG) under clause 2.2.5 of Schedule I of the Agreement. The said clause is extracted hereinunder for ready reference:

"The services in other cities shall be launched after AT with in 9 months of signing the FA. Failure to comply with this may lead to forfeiture of BG for that city."

19. Learned counsel for the petitioner next contends that the Arbitrator cannot add or delete terms of an Agreement between the parties and in this case, the learned Arbitrator has virtually re-scripted the Agreement by placing obligations on the petitioner, which did not exist in the Agreement. Reliance is placed on the judgment of the Apex Court in Oil & Natural Gas Corporation Ltd. vs. SAW Pipes Ltd. 2003 AIR SC 2629 to contend that the intention of the parties is manifested in the terms of the language used in the Agreement and a contrary interpretation would be unsustainable. Reliance is also placed on the judgment in the case of Hindustan Zinc Ltd. vs. M/s. Friends Coal Carbonisation 2006 (4) SCC 445 for the same proposition.

20. Learned counsel contends that the finding of the Arbitrator that non-termination of the Agreement by the petitioner for alleged failures of the respondent amounts to condonation of default of the respondent is also perverse. He submits that the respondent failed in its obligation to launch the services within 9 months of signing the Agreement and thus clause 5.3.2 entitled the petitioner to terminate the contract. He submits that the discretion to terminate

the contract was with the petitioner. If the respondent had missed the deadline for performance, it was not as if there was an obligation or a mandate to terminate as this was only an enabling clause giving liberty to terminate. The submission is that the termination is usually resorted to if there is consistent non-performance over a period of time, which is envisaged by clause 5.3.2 itself.

21. Lastly it is contended that the Apex Court in *Arson Enterprise Ltd. vs. Union of India* 1999 (9) SCC 449 has held that where the error of finding of fact has a bearing on the award and is easily demonstrable, interference in the award is permissible. He submits that with regard to one of the cities viz. Rajkot, the Arbitrator has overlooked Exhibit RW-1/4 which was a letter dated 23.03.2010 from BSNL to MKCL regarding penalty for not launching services in the city of Rajkot.

22. Learned counsel for the respondent per contra argues that this Court in its earlier order dated 04.04.2019, passed in OMP (COMM) 83/2013 had clearly observed that the Arbitrator had ignored certain vital letters written by the respondent to the petitioner, more particularly, letters dated 10.12.2008 and 12.03.2010, which were evidence of the fact that the petitioner was aware that infrastructural facilities were not provided by them. He submits that it is for this reason that the earlier finding of the Arbitrator that the respondent had defaulted, was set aside. The Arbitrator has now in the impugned award held that the breach was on the part of the petitioner with respect to 3 cities based on these crucial letters and there is no error in the finding of the Arbitrator. Learned counsel, in fact, points out that the petitioner has not even placed the letter dated 10.12.2008 on the record of this Court.

23. Learned counsel contends that the reply filed by the respondent in the earlier petition has also not been placed on record. He has annexed a copy of the reply with the written submissions, since this matter has been reserved for orders, at the stage of admission itself. He submits that in the reply, the respondent had categorically stated that the respondent could not launch the services as requisite infrastructure was not provided by the petitioner and in fact, the petitioner by invoking clause 5.7.2 had even prohibited the respondent from approaching any other service provider in the concerned cities. The counsel submits that it was denied that there was no dispute between the parties as far as launching of services in the 5 cities was concerned and it was reiterated that in these 5 cities, failure was on the part of the petitioner. Reference in the reply was also made to several letters written by the respondent pointing out the failure of the petitioner to discharge its obligations.

24. Learned counsel next contends that the respondent had consistently written to the petitioner about its failure to provide necessary infrastructure and none of these letters were responded to by the petitioner. The covenants of the Agreement more particularly, clause 3.6.3 made it obligatory for the petitioner to intimate to the respondent in writing if the petitioner was not in a position to provide infrastructure, since the petitioner was to be given First Right of Refusal

by the respondent, for providing intercity bandwidth requirement of the respondent. Learned counsel has drawn the attention of this Court to various clauses of the agreement casting obligations on the petitioner:

(i) Clause 1.3.6 - BSNL shall market & promote the Content based services as part of its overall service portfolio.

(ii) Clauses 3.1 - The inter-city and intra-city bandwidth as required for provisions of content based services shall be provided to Franchisee by BSNL, subject to technical feasibility & availability. Franchisee shall provide detailed calculations in support of bandwidth requirement to BSNL. The decision of BSNL with respect to the amount of bandwidth allocated shall be final.

(iii) Clause 3.5 - Delay by BSNL in provisioning or making available its infrastructure/facilities as specified under this FA and as requested for by Franchisee to provision content based services to BSNL's customers shall result in consequent readjusting of Franchisee's roll out obligations as specified under this FA.

(iv) Clause 3.6.1 - The bandwidth for providing the services shall be provisioned as given below. B bandwidth shall be provided by BSNL subject to availability.

(v) Clause 3.6.2 - Intra-city connectivity and bandwidth shall be provided and shall not be charged extra by BSNL within city limits. Beyond city limits, it shall be provided on chargeable basis.

(vi) Clause 3.6.3 - Inter-city bandwidth shall be provided to the Franchisee on competitive rates of BSNL as the Franchisee is expected to locate a separate VoD server for the additional city. BSNL shall be given first right of refusal by the bidder for providing the intercity bandwidth requirement of the franchisee.

(vii) Clause 5.10 - Customer Care obligations that were to be handled by BSNL.

25. He submits that perusal of the clauses would show that the obligations such as marketing, customer care, infrastructure provision, providing bandwidth etc. were of the petitioner. In case of failure to provide bandwidth in a timely fashion, the petitioner was obliged to adjust the rollout obligation and once the respondent was intimated about the inability of the petitioner to do so, the respondent was obligated to offer First Right of Refusal to the petitioner. However, despite a host of these issues being pointed out by the respondent, in writing, the petitioner never responded and unilaterally encashed the PBG. He thus submits that the Arbitrator has rightly held that the petitioner had failed in its contractual obligations and since the infrastructure was not provided, the services could not be launched by the respondent.

26. Learned counsel for the respondent also submits that there is no illegality or contradiction in the award as sought to be argued by the petitioner. The first finding of the Arbitrator that services were available in the cities of Rajkot and Gwalior is based on the letter of the petitioner dated 09.06.2009, addressed to

the respondent, that IPTV service was launched on 18.05.2009 in Rajkot. Further, in para 5 of the Evidence by way of Affidavit, filed by BSNL (Exh. RW-1), it has been mentioned that 34 IPTV connections were working in Rajkot. He thus submits that the award deserves to be upheld and the petition deserves to be dismissed.

27. Learned counsel for the respondent has relied upon the judgment of the Apex Court in the case of *Sutlej Construction Ltd.* (2018) 1 SCC 718, wherein the Apex Court has held that once the Arbitrator appreciates the evidence and takes a view, courts should not interfere unless the award is such which shocks the conscious of the Court. Court cannot substitute the view of the Arbitrator in the award, if the view is one which is possible even though not plausible.

28. Learned counsel has also relied on the judgment of the Apex Court in *MMTC Limited vs. Vedanta Limited* (2019) 4 SCC 163, where it was held that in exercise of jurisdiction under Section 34, Court does not sit in appeal over the award. Further, while interpreting the terms of the Contract, the conduct of the parties and correspondences exchanged would be relevant factors, but this is within the Arbitrator's jurisdiction to consider.

29. I have heard the learned counsels for the parties and examined their contentions.

30. There is no dispute that the Franchise Agreement entered into between the parties on 07.07.2008 was with respect to 20 cities. The services in the trial city of Ahmedabad were launched on 01.10.2008. As per clause 2.2.5, the services in other cities were to be launched within 9 months of signing the agreement and on failure to comply, the petitioner was entitled to forfeit the Bank Guarantee for that city. The PBG amount for most cities was Rs. 20 Lacs and for Nagpur, it was Rs. 50 Lacs.

31. As per clause 3.6, the bandwidth provisioning and intracity connectivity was to be provided by the BSNL, subject of course to availability. Upon the BSNL providing the infrastructure facility, the respondent had to provide services such as IPTV etc. in terms of clause 2.1 of the Franchise Agreement ("FA"). Clause 2.2 of the Franchise Agreement (FA) provided for trial of the services of the Franchisee. After the launching of the services, the obligation of the Franchisee with regard to quality of service and maintenance etc. was mentioned in clause 2.6 of the FA.

32. What is undisputed is that the Arbitrator in the first Award had ignored some vital letters written by the respondent to the petitioner and this Court had in the earlier order observed that if they had been looked into, the decision would have been otherwise. Thus, this part of the award with respect to the 5 cities was remanded to the Arbitrator, to revisit his findings by looking into the evidence led by the respondent, more particularly, letter dated 10.12.2008.

33. Perusal of the impugned award shows that the learned Arbitrator while re-

visiting the award has considered the various letters issued by both sides in connection with the inter se dispute. The Arbitrator placed reliance on the letters dated 10.12.2008 (Exh. CW-5) and 12.03.2010 (Exh. CW-6) and came to a conclusion that the respondent through its letter dated 10.12.2008 had clearly mentioned that it was unable to undertake configuration in the various cities due to want of Media upgradation by the BSNL. The Arbitrator found as a matter of record that the petitioner had neither replied to this letter nor issued any letter that they were unable to arrange the same. Taking this evidence into account, the Arbitrator came to a finding that the contention of the respondent was justified and it was the BSNL who had not provided the infrastructure resulting into a situation where the respondent could not launch its services in the 3 cities of Mehsana, Nellore and Warangal. The letter dated 10.12.2008 is extracted hereinunder:

"Maharashtra Knowledge Corporation Ltd.

Creating a Knowledge Lit World

Date: December 10, 2008

Ref.: P:MKCL:Edutain & Infotain: BSNL(CDN)2/2008-09

The Dy. General Manager (NIB),

Bharat Sanchar Nigam Limited (BSNL)

O/o CGMT, Karnataka Telecom Circle,

3rd Floor, New Annex. Building,

No.1, Swamy Vivekananda Road,

Halasuru, Bangalore-560008.INDIA

Kind Attn.: Mr. Anup Kumar (DGM)

Sub: Compliance of performance clauses as specified in the Franchisee Agreement dated 7th July, 2008 between BSNL and

MKCL

Respected Sir,

This is regarding the Franchisee Agreement (FA), signed on 7th July, 2008 by and between BSNL and Maharashtra Knowledge Corporation Limited (MKCL) as leader of the Consortium (on behalf of other Consortium partners i.e. DiviNet Access Technologies Limited and WICENet Limited) for providing services to 20 cities spread in 5 States of India.

The Consortium had selected Ahmedabad as the trial city and completed the trials within the period specified in clause 2.2.1 of the FA. The service was commercially launched by BSNL's Shri Satyapal, CGM, Gujarat Telecom Circle on

October 1, 2008 in the city of Ahmedabad.

Further, the Consortium is ready to undertake configuration in the cities of Gwalior, Mehsana, Rajkot, Nellore and Warangal, however has been unable to do so for the following reason:

? The said cities are connected on STM 1 connectivity and BSNL has to upgrade the link to these cities to STM 16 or 1 Gig.

Kindly take on record the aforesaid submissions.

With Regards,

Sincerely yours,

Sd/-

Vivek Sawant

Managing Director"

34. Perusal of the letter shows that the respondent had clearly indicated its readiness to undertake the configuration in the 5 cities. Vide the second half of the letter, it was categorically brought to the notice of the Deputy General Manager (NIB), BSNL that the said cities were connected on STM-1 connectivity and the BSNL had to upgrade the link to these cities to STM-16 or 1 Gig. Since the upgradation had not taken place, the respondent was unable to perform its part of the Agreement. It is also a matter of record, as observed by the Arbitrator that the BSNL never responded to this letter and this position is un rebutted. Therefore, in my view, the Arbitrator was right in concluding that the breach and the failure was on the part of the petitioner.

35. Learned counsel for the petitioner, even today, has been unable to point out any response sent by the BSNL to this letter of the respondent. The counsel for the petitioner has sought to argue that a letter dated 24.01.2012 (Exh. RW-1/7) was sent to the respondent providing the details of upgradation in the 5 cities. However, no cognizance of this letter can be taken by this Court, inasmuch as this letter by its very date indicates that the letter was generated after the arbitration proceedings had started. The respondent had brought to the notice of the petitioner in 2008 itself that there was lack of infrastructure facilities. Respondent should have at that time, responded by rebutting the contents of the letter or should have taken steps to show that they had upgraded the links and the stand of the respondent was incorrect. Having failed to rebut and controvert the stand of the respondent, in my view, there is no infirmity in this finding of the Arbitrator that the breach was on part of the petitioner.

36. Insofar as the second finding of the Arbitrator is concerned that IPTV services were launched in the cities of Rajkot and Gwalior, I may only notice that this finding is based on the letter of the petitioner itself, dated 09.06.2009 addressed to the respondent (Exh. RW-1/13) whereby it had written that IPTV services was

launched in Rajkot on 18.05.2009. The Arbitrator in para 5 of the revised award, has taken note of this letter. The Arbitrator has also relied upon para 5 of the Evidence by way of Affidavit, filed by BSNL (Exh. RW-1) where it has mentioned that as on 06.01.2010, 34 IPTV connections were working in Rajkot. Most significantly, in the amended counter claim filed on behalf of BSNL dated 23.09.2014, where it was mentioned that as on 06.01.2010, there were 37 connections in Rajkot, 12 in Gwalior and (Zero) each in Nellore, Warangal and Mehsana. Based on these documents the learned Arbitrator has arrived at the finding that the services were available in these 2 cities. Having perused the documents, I find no infirmity in this finding of the learned Arbitrator.

37. The Arbitrator has in its findings differentiated between the two cities of Rajkot and Gwalior from the other three cities on the basis of the letter of the petitioner as well as their affidavits wherein the petitioner had admitted the launch of services in the cities of Rajkot and Gwalior. Thus there is no merit in the contention of the learned counsel for the petitioner that the re-examined award is silent on the issue that once the respondent had admitted that it did not launch services in the 5 cities, it was not open for the Arbitrator to give a finding that the services were launched in Gwalior and Rajkot. Whilst it is true that the respondent had taken a stand that it was unable to launch services in the 5 cities, which included Rajkot and Gwalior but the evidence led by the petitioner showed to the contrary. In view of the evidence, the Arbitrator has disagreed with the respondent on this account but this does not render the finding of the Arbitrator that services were launched in the two cities erroneous. Significantly this does not alter the monetary part of Award also. If the services were provided in the 2 cities, then the petitioner was not entitled to encash the Performance Bank Guarantees.

38. Insofar as the contention of the petitioner regarding the notice of termination is concerned, in fact, this contention is of no relevance, since the Arbitrator has not based his findings on the failure of the petitioner to send a termination notice.

39. The judgments cited by the learned counsel for the petitioner on the proposition that the Arbitrator cannot rewrite or delete or add to the terms of the contract between the parties certainly cannot be questioned. It is a settled proposition of law that the terms of the contract between the parties are sacrosanct. The Arbitrator or the Court cannot add to or delete the terms nor can they script a contract for the parties. However, the said judgments would have no application to the facts of the present case. The Arbitrator has neither scripted the contract nor added to or deleted anything in the terms of the contract. The Arbitrator has only relied upon the evidence given by the respondent in support of its contention, that there was breach on the part of the petitioner in providing infrastructure which as per the terms of the contract was an obligation on the petitioner before the respondent could launch its services in the concerned cities. Further, under the Contract itself the petitioner was obliged to inform the respondent if it was unable to provide the infrastructure, as it had the First Right

of Refusal. The petitioner failed in responding to the letter of the respondent and did not even inform the respondent that they were unable to provide the bandwidth facility etc. enabling the respondent to avail of the infrastructure from other providers in those cities. Thus, in my view, the Arbitrator has in fact acted in accordance with the terms of the contract and not contrary thereto.

40. Learned counsel for the respondent is right in his contention that if the award is based on proper appreciation of the evidence and facts then even if this Court was to come to a conclusion, howsoever plausible, which is different from the one arrived at by the Arbitrator, it cannot substitute its views for that of the Arbitrator. Section 34 of the Arbitration & Conciliation Act lays down the parameters which have to be followed by the Court in deciding a challenge to an award. The Apex Court and this Court in several judgments have laid down the scope of judicial review while interfering in an award under the Act.

41. Learned counsel for the respondent has rightly relied upon the judgments in the case of *Sutlej (supra)* and *MMTC Ltd. (supra)* to contend that the finding by the Arbitrator in the impugned award is neither perverse nor patently illegal nor against any fundamental policy of the land or morality or justice. The finding is in accordance with the terms of the contract and is not such which would shock the conscience of this Court. The Apex Court in the case of *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, relying upon *McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors.* (2006) 11 SCC 181 has held as under:

"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: "General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong". It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by

reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

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36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

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42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India-

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality - for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28.Rules applicable to substance of dispute.- (1)-(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission* [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan* [(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held: (SCC pp. 581-82, para 17)

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined

outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689] , Thawardas Pherumal v. Union of India [AIR 1955 SC 468] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] , Alopi Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588] , Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156])"

45. In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

"43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.""

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56. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the

court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be "justice". With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.

42. Examining the award impugned before me, in the light of the above judgments and the evidence before the Arbitrator, I am of the view that the Award has been rendered by the Arbitrator in accordance with the terms of the contract and based on the evidence led before him. The view taken is not only a possible but a plausible view.

43. I find no infirmity in the award requiring an interference by this Court. There is no merit in the petition and the same is dismissed.