

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Judgment reserved on: 19.07.2011**

% **Judgment delivered on: 02.08.2011**

+ **O.M.P. 571/2009**

BHARTI TELE-VENTURES LTD

(NOW KNOWN AS BHARTI AIRTEL LTD.)

..... Petitioner

Through: Mr. Maninder Singh, Sr. Advocate,  
with Ms. Pratibha M. Singh and  
Mr.Yoginder Handoo, Advocates.

versus

CRYSTAL TECHNOLOGY PVT. LTD.

..... Respondent

Through: Mr. Vibhu Bhakru and Mr. Vineet  
Jhanji, Advocates

**CORAM:**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

- |    |                                                                           |   |    |
|----|---------------------------------------------------------------------------|---|----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | : | No |
| 2. | To be referred to the Reporters or not?                                   | : | No |
| 3. | Whether the judgment should be reported in the Digest?                    | : | No |

## **J U D G M E N T**

**VIPIN SANGHI, J.**

1. By this petition under Section 34 of the Arbitration & Conciliation Act, 1996, the petitioner assails the award dated 28.05.2009 passed by the learned Sole Arbitrator Dr. R.K.P. Shankardass, Senior Advocate, whereby he has allowed the claim of the respondent-claimant against the petitioner herein.

2. The petitioner- Bharti Tele-Ventures Limited (hereinafter referred to as Bharti) was interested in acquiring shares in Skycell Communications Limited (hereinafter referred to as Skycell). The share in Skycell were held by primarily four entities, namely, Crompton Greaves Limited (hereinafter referred to as CGL); a US Corporation known as Bellsouth International (Asia/Pacific) Inc. (hereinafter referred to as Bellsouth); a Corporation incorporated in Luxemburg known as Millicom International Cellular SA (hereinafter referred to as Millicom); and DSS Enterprises Private Limited (hereinafter referred to as DSS). DSS held 10.5% shareholding in Skycell, whereas Millicom, Bellsouth and CGL held 24.5%, 24.5% & 40.5% shares respectively in Skycell. On 07.08.2000, the petitioner succeeded in acquiring the 40.50% shareholding of CGL in Skycell. This did not give controlling stake in Skycell to the petitioner, as it required above 50% shareholding to take control of Skycell.

3. Sometime in May 2001, the respondent approached the petitioner and held out that it had the resources to advise and negotiate, between DSS and the petitioner, the deal for sale of shares held by DSS in Skycell, in favour of the petitioner. Pursuant to negotiations held between the parties, they entered into an agreement on 16.05.2001, whereunder the respondent undertook, while acting as a consultant, to advise and assist the petitioner in negotiating the purchase of 10.5% shareholding of the DSS in Skycell. The objective of the agreement expressed in Clause A.1 reads as follows:

**“A. OBJECTIVE**

1. The Consultant shall advise and assist BTVL in negotiating with DSS, the purchase of the Share Capital by BTVL from DSS. The advise shall be inclusive of finalizing all the details of the deal including the sale consideration for the Share Capital and shall be deemed to be completed only with the completion of the transfer of the Share Capital in the name of BTVL for the consideration as stated in paragraph B.3 below and of the delivery of the share certificate(s) in original of the Share Capital along with duly and validly executed Share Transfer Deed(s) of the said Share Capital in favour of BTVL without any lien, encumbrance or charge and confer good title to BTVL.”

4. The scope of the respondent’s specific obligation under the agreement is described as follows:

**“B. PERFORMANCE**

**2. The Consultant is hereby authorized to negotiate in good faith with DSS for the purchase of the share capital by BTVL. In this regard, the Consultant shall undertake all steps to procure and obtain from DSS an irrevocable offer in writing or an acceptance for the sale to BTVL of the Share Capital.**

**3. BTVL does hereby agree to accept an offer received from DSS through the Consultant or otherwise, and agrees and confirms to the Consultant and authorizes it to commit to pay to DSS for the Share Capital a max. sale consideration of US\$ 13.60 Million worked out as follows:**

|                                                                                   |                    |
|-----------------------------------------------------------------------------------|--------------------|
| Gross Enterprise Value of SkyCell                                                 |                    |
| Equity Capital                                                                    | US\$ 162.5 Million |
| Less: Agreed debt/liabilities in the accounts of SkyCell, subject to a maximum of | US\$ 33.0 Million  |
| Net Enterprise Value of SkyCell                                                   |                    |
| Equity Capital (i.e. the value of 62,220,000 Equity Shares)                       | US\$ 129.5 Million |

The maximum Sale Consideration agreeable to be paid to DSS by BTVL for the Share Capital accordingly works out to 13.6 Million US Dollars.

*BTVL agrees to pay to DSS the said amount in Indian Rupees equivalent to the said US Dollars converted at the RBI Reference Rate on the date immediately preceding the date of the transfer the said Share Capital.*

*4. The receipt of an irrevocable offer for the sale of the Share Capital from DSS for a consideration not exceeding 13.6 Million US Dollars shall be binding on BTVL, and BTVL shall be obliged to proceed to conclude the purchase of the share capital at the earliest."*

**(emphasis supplied)**

5. Clauses 5 & 6 of the said agreement, which deals with the aspect of payment of the respondents fee, reads as follows:

**"C. FEES AND EXPENSES:**

*5. On receipt of an irrevocable offer / acceptance from DSS for the sale of the Share Capital within the price aforesaid, BTVL shall pay to the Consultant the fee as stated in para 6 below on the happening of any one of the following events:*

*(i) BTVL acquiring directly or indirectly any shares in Skycell from any one of the other shareholders of that Company, namely M/s Bellsouth International (Asia/Pacific) Inc., and M/s Millicom International Cellular S.A., or*

*(ii) Acquiring the share capital from DSS.*

*The fee payable to the Consultant shall be paid by an attested bank-to-bank transfer to the credit of the bank account of the Consultant or by bank drafts, as may be notified by it.*

*6. (1) In the event of the Consultant and/or BTVL securing an offer / acceptance from DSS for the sale of the share capital to BTVL at a sale consideration of 13.6 Million US Dollars, then in that event BTVL subject to it making the said payments to DSS shall not be liable to pay any fee to the Consultant as in such event the Consultant shall secure payment on account of its fee from DSS only, subject to a contract between them.*

*6. (2) In the event of the Consultant and/or BTVL securing an offer/acceptance from DSS for the sale of the share capital to BTVL at a consideration lower than 13.6 Million*

*US Dollars, then and in that event BTVL shall be liable to pay and shall pay to the Consultant a Fee equal to the differential between the above amount of 13.6 Million US Dollars and the consideration amount at which DSS agrees to sell the Share Capital. (For example, in case DSS agrees to sell the Share Capital at a consideration of US\$ 10 Million, then the fee payable by BTVL to the Consultant will be the differential as mentioned aforesaid, i.e. USD 3.6 Million.*

*6. (3) BTVL hereby authorizes the Consultant to secure the consent of DSS to sell the Share Capital at a sale consideration ranging between USD 9.45 Million and USD 13.6 Million for sale of the Share Capital. In the event that BTVL for any reason attributable to it, fails to conclude the sale transaction after the Consultant has secured an offer / acceptance from DSS for the sale of the share capital then and in that event BTVL shall compensate and pay to the Consultant the fees and the amount of liability that the Consultant may have assumed towards DSS such liability in any case shall not be more than 13.6 Million US Dollars provided that upon payment of such sums to Consultant, the share capital shall be caused to be transferred to BTVL. BTVL shall acquire the Share Capital on the condition that the same are free of any encumbrances, lien or charge and confer good title to BTVL."*

6. According to the respondent-claimant, the respondent rendered its services under the agreement as a consultant which fructified into an irrevocable consent and acceptance by DSS of the petitioner's offer to sell its shares to the petitioner. DSS agreed to give an irrevocable offer for sale of shares held by DSS in Skycell to the petitioner, upon the petitioner giving its assurance, commitment, guarantee and indemnity to DSS that the sale consideration of US\$ 1,35,97,500/- would be duly paid to DSS without any delay or default on the part of the petitioner and against delivery of shares.

7. The Arbitrator notes in the impugned award and it is not disputed by the petitioner that Mr. V.N. Koura, Advocate, and Mr. Rajive

Sawhney, Senior Advocate agreed to complete all the formalities of sale and purchase of shares.

8. The petitioner and DSS finalized an agreement, whereby the petitioner agreed to lodge the entire consideration with Mr. Rajive Sawhney and Mr. V.N. Koura, and DSS agreed to simultaneously lodge its shares along with Share Transfer Deeds with Mr. Rajive Sawhney and Mr. V.N. Koura, who were to exchange the same at the agreed time.

9. On or about 23.05.2001, the petitioner lodge two cheques dated 18.05.2001, i.e. one for Rs.42,95,92,500/- in favour of DSS and another for Rs.19,48,42,500/- in favour of the respondent aggregating to Rs.62,44,35,000/- (equivalent to US\$ 13.6 million at Rs.45.90 per dollar) with Mr. Kaura, Advocate. These cheques were subsequently substituted by the petitioner due to some discrepancy. A banker's letter for payment of the entire consideration was agreed to be deposited by the petitioner with Mr. Rajive Sawhney, Senior Advocate and Mr. V.N. Kaura, Advocate. The petitioner and DSS agreed to an arrangement in the nature of escrow agreement, whereby the two advocates Mr. Rajive Sawhney, Senior Advocate, and Mr. V.N. Koura, Advocate, were to hold some essential documents required for completing the sale, including cheques representing the consideration for the sale, original Share Certificates and executed Transfer Deeds covering the shareholding of DSS in Skycell, etc., but to exchange the relevant documents and to arrange the completion of the sale only upon the receipt of the necessary approval from the CLB and the other

consents required for the completion. Certain “irrevocable instructions”, jointly issued by the petitioner and DSS to enable two escrow agents to complete the sale, were as follows:

**“STRICTLY CONFIDENTIAL  
NOT TO BE DISCLOSED**

**Sd/-**

**Rajinder Sharma**

**A. Documents to be handed over to Mr. Rajive Sawhney to finalise the transaction**

1. *An irrevocable letter of acceptance given by DSS Enterprises Pvt. Ltd. to Crystal Technology Private Ltd as per draft approved.*
2. *Share transfer Deeds covering 65,33,100 Equity Shares held by DSS Enterprises Pvt. Ltd. in Skycell Communications Limited in favour of Bharti Tele-Ventures Limited.*
3. *Original Share Certificates for 65,33,100 Equity Shares of Skycell Communications Limited representing 10.5% shares of the issued share capital of SkyCell Communications Limited.*
4. *Copy of a resolution passed by the Board of Directors of DSS Enterprises Pvt. Ltd. authorizing the sale and transfer of the said shares to Bharti Tele-Ventures Ltd., certified under the hand of Mr. Satwant Singh, its Chairman and Managing Director.*
5. **No-Objection by BellSouth, Millicom, ICICI Bank and ABN Amro Bank for transfer of shares by DSS Enterprises Pvt. Ltd. to Bharti Tele-Ventures Limited.**
6. **Acceptable authority of agreement of Credit Agricole Indo Suez to Mr. Satwant Singh to consummate the sale transaction of the aforesaid shares to Bharti Tele-Ventures Ltd.**
7. **Consent of the Company Law Board for the sale of shares held in SkyCell Communications to Bharti Tele-Ventures Limited.**
8. *Any other consent or authority, no-objection or document as may be required to remove any impediment as may be caused in the transfer of shares.*
9. *Circular Resolution signed by Mr. Satwant Singh of the Board of Directors of SkyCell authorizing registration of the transfer of the aforesaid shares in favour of Bharti Tele-Ventures Ltd.*

**Sd/  
(Rajinder Sharma**

**Sd/  
(Satwant Singh)**

**STRICTLY CONFIDENTIAL  
NOT TO BE DISCLOSED**

**Sd/-  
SATWANT SINGH**

**(emphasis supplied)**

**STRICTLY CONFIDENTIAL  
NOT TO BE CIRCULATED**

**Sd/-  
Rajinder Sharma**

**B. Documents to be handed over to Mr. V.N. Koura to finalise the transaction**

1. Banker's letter for payment of Rupee equivalent of US\$13.6 Million as per draft approved.
2. Cheque No. \_\_\_\_\_ dated 18/5/2001 or Rs. \_\_\_\_\_ drawn on Deutsche Bank, New Delhi in favour of DSS Enterprises Private Ltd and Cheque No. \_\_\_\_\_ dated 18/5/2001 for Rs. \_\_\_\_\_ for Rs. \_\_\_\_\_ drawn on Deutsche Bank, New Delhi in favour of Crystal Technology Pvt. Ltd as collateral security

**C. Documents to be exchanged on completion of the transaction**

1. Mr. Rajive Sawhney will hand over to Mr. V.N. Koura the documents listed in 'A' above, handed over to him.
2. Mr. V.N. Koura will hand over to Mr. Rajive Sawhney the payment of Rupee equivalent of US\$ 13.6 Million.
3. The parties will sign two Agreements between Bharti Tele-Ventures Ltd. and Crystal Technology Pvt. Limited which will be held one each by Mr. V.N. Koura and Mr. Rajive Sawhney.
4. If matters are not concluded to the joint satisfaction of Mr. V.N. Koura and Mr. Rajive Sawhney by August 31, 2001, the two (2) original Agreements shall be destroyed by Mr. V.N. Koura and Mr. Rajive Sawhney and they shall return to the parties the documents given to them in cancellation of the transaction. The Parties shall be bound by the joint decision of Mr. V.N. Koura and Mr. Rajive Sawhney.

The above shall constitute irrevocable instructions and authorities to Mr. Rajive Sawhney and Mr. V.N. Koura

**Sd/  
(Rajinder Sharma)**

**Sd/  
(Satwant Singh)**

**STRICTLY CONFIDENTIAL  
NOT TO BE CIRCULATED/DISCLOSED  
Sd/-  
SATWANT SINGH"**

10. The petitioner and DSS agreed to the terms of the joint "irrevocable instructions" so as to implement the sale of DSS shareholding in Skycell to the petitioner, being fully aware of and taking into account the orders of the Company Law Board passed since 1998-99 and, in particular, its order of 07.04.1999 which enabled only the holding of negotiations for the said sale. But the making of the final sale was contingent upon the approval of the Company Law Board. The "irrevocable instructions" were made in the expectation that this approval would be forthcoming before 31.08.2001, upto which date the "irrevocable instructions" were to remain in force. The substantive final hearing in the matter had already taken place before the Company Law Board on 09.05.2001 (i.e., even prior to the date on which the parties entered into the agreement dated 16.05.2011), and the matter reserved for judgment.

11. The parties, in pursuance of the "irrevocable instructions" deposited with the escrow agents various documents. The two escrow agents in their communication dated 24.07.2001 addressed to the petitioner, DSS and the respondent, inter alia, recorded that the

following documents were placed on behalf of the petitioner, DSS and the respondent:

*"On 22 May 2001:*

- (i) "Undated joint irrevocable instructions marked "Confidential" signed by Mr Satwant Singh (on behalf of DSS) and Mr Rajinder Sharma (on behalf of Bharti) (hereinafter referred to as "Joint Instructions"). One original of the Joint Instructions was deposited with Mr Rajive Sawhney and one original of the Joint Instructions was deposited with Mr. V.N. Koura."*
- (ii) "Agreement dated 16<sup>th</sup> May 2001 between Bharti and Crystal. One signed original of the Agreement was deposited with Mr Rajive Sawhney and one signed original of the Agreement was deposited with Mr. V.N. Koura".*

*Between 22 and 27 May 2001:*

- 1. An undated letter (one on plain paper and one on the letter head of DSS) "of offer and acceptance signed by Mr Satwant Singh as Chairman and Managing Director of DSS and addressed to Crystal", [i.e. the Claimant]. This letter is stated to be "the one approved and finalized by Mr Rajinder Sharma of Bharti and Mr Satwant Singh in Mr Sawhney's office on the 22 May 2011". Enclosed with it were three original and two duplicate certificates covering 65,33,100 Equity Shares held by DSS in Skycell together with five transfer deeds in respect of the said shares duly completed and executed on behalf of DSS; and a certified copy of a resolution passed by the Board of Directors of DSS authorising sale and transfer of the shares. These are the documents specified at A.1 to 4 of the "Irrevocable Instructions".*
- 2. A circular resolution (one on plain paper and one on Skycell letterhead) for the sale and transfer of the shares to BTVL signed by Mr. Satwant Singh as Director of Skycell. This is Item A.9 of the Joint Instructions.*
- 3. A number of other documents including a copy of the "Supplementary Agreement" dated 27.5.2001 between the Claimant and Respondent, and a post-dated letter dated 16 August 2001 on DSS letterhead*

*from Mr. Satwant Singh nominating a person to represent the Respondent to replace him on the Board of Skycell, etc., were also filed by 27 May 2001 and are specified in the said letter of 24 July 2001.*

4. *The agreed draft of the Banker's letter referred to at item B.1 of the "Irrevocable Instructions" and Cheque No.945949 dated 31.8.2001 for Rs.42,95,92,500/- drawn in favour of DSS and Cheque No.946011 dated 31.8.2001 for Rs.19,48,42,500/- drawn in favour of Crystal, both on Deutsch Bank AG, in place of the earlier cheques drawn for similar amounts dated 18.5.2001 in relation to which there were some discrepancies. These cheques were deposited in terms of item B.2 of the Joint Instructions with Mr V N Koura "as collateral security".*
5. *The document as item A-6 of the "Irrevocable Instructions" (i.e. the consent from Credit Agricole Indo-Suez) is stated to have been deposited later i.e. on 3 July 2001".*

12. At this stage itself, I may note that the tribunal observes that the consent from Credit Agricole Indo Suez was deposited on 03.07.2001.

13. On 27.05.2001, the parties entered into a supplementary agreement confirming the earlier agreement of 16.05.2001 between the parties. This supplementary agreement was entered into to appoint the respondent as the consultant and also to assist in acquiring the shareholding of Bellsouth and Millicom in Skycell.

14. It is not in dispute that the petitioner, apart from engaging the respondent as a consultant to acquire the shares of Bellsouth and Millicom, continued direct negotiations with them for purchase of their shares in Skycell. Bellsouth and Millicom agreed, in principal, to the sale of their shares to the petitioner/Bharti at a price much lower than that was agreed between the petitioner and DSS. According to the

respondent, these negotiations were held in secrecy and without informing the respondent about the same, and the respondent became aware of these independent negotiations from DSS on or about 04.06.2001. The petitioner concluded agreements for acquiring the shares of Bellsouth and Millicom for purchase of their combined share of 49% on or about 02.07.2001. Therefore, the petitioner achieved a total shareholding of almost 90% in Skycell. The respondent and the DSS, at this stage, sent a communication on 05.07.2001 confirming the arrangements already entered into in terms of the agreements dated 16.05.2001 and 27.05.2001.

15. The petitioner terminated both the agreements dated 16.05.2001 and 27.05.2001 with the respondent, which the petitioner claims to have issued on 30.05.2001, inter alia, stating:

***“As agreed, we have till date not received any confirmation from you as to whether you have been able to receive an irrevocable offer from M/s. DSS Enterprises Private Limited for the sale of the 10.5% equity of SkyCell Communications Limited held by them in our favour.*”**

*You are fully aware that for the urgency to consummate the deal we had agreed to appoint you as our Consultants but till date since no information has been received from your end. We are, therefore, compelled to terminate both the agreements with immediate effect.*

*..... [Emphasis supplied]”*

16. This action of the petitioner gave rise to disputes between the parties which were referred to arbitration before the learned arbitrator.

17. One of the issues of fact considered by the arbitral tribunal was whether the letter of termination dated 30.05.2001 was an ante dated letter and an afterthought to resile from the concluded contracts and commitments. The learned arbitrator returned a finding of fact in favour of the respondent that the letter of termination dated 31.05.2001 was ante-dated. This finding of fact is based upon appreciation of evidence by the learned arbitrator, and the reasoning recorded by him in paragraph 53 of the award, which reads as follows:

*"53. In all the circumstances, it seems entirely likely that the Claimant's contention that the letter of termination of 30 May 2001 was ante-dated is correct. The Respondent had approved and placed the DSS letter of offer/acceptance as well as its cheques for the price amounting to US\$13.6 million in escrow on or before 27 May 2001. Nothing is shown to have or had in fact transpired for it to terminate the Agreement three days later on 30 May 2001. The stated reason for the termination in the letter (emphasized above, i.e. that no irrevocable offer had been received from DSS) was also obviously false as not only had the irrevocable offer letter been received but was even approved and made the basis of the Respondent's agreement with DSS incorporated in the Escrow arrangement."*

It cannot be said that the said finding is not based on evidence or is wholly irrational or patently illegal.

18. The learned arbitrator also considered the petitioners submission that the irrevocable letter of offer/consent from DSS and irrevocable instructions to the escrow agents, did not incorporate a binding agreement between DSS and the petitioner for the sale and purchase of shares, contingent upon approval of the Company Law Board and certain other bankers consents, and rejected the same.

19. The learned arbitrator has dealt with this submission of the petitioner in paragraph 34 in the following manner:

*"34. In its submissions, one of the contentions raised by the Respondent, which it seems appropriate to consider at this stage, was that no concluded contract could come into existence because of the approval required from the Company Law Board; and that any offer by DSS had first to be placed before the Company Law Board. This is contrary to the Board's Order of 7 April 1999 which expressly permitted steps may be taken for the sale of the shares but its finalizing required the Board's approval. Furthermore, it is on this basis that the Respondent itself entered into the Agreement of 16 May 2001 with the Claimant "to obtain from DSS an irrevocable offer". The record of the negotiations between the Respondent and DSS since 1999 clearly shows the intention always was to negotiate a firm enforceable agreement to be implemented contingent upon approval by the Company Law Board. The negotiations in 1999 and 2000 in fact led to what the Respondent itself considered were firm agreements for the purchase of the shares (i) under an MoU of October 5, 1999 between the Respondent, CGL and DSS; again (ii) in the negotiations on 3 May 2000, pursuant to the directions of the Madras High Court, and (iii) eventually in May 2001. In fact, Suit Nos.1957 of 2000 and 2202 of 2000 and subsequent proceedings were filed on that basis, i.e., the Respondent regarded that firm commitments had been made by DSS (subject to approval of the Company Law Board) which the Respondent apprehended would be violated and therefore obtained restraint orders from the Delhi High Court in the said suits. In May 2001, the parties finally and admittedly entered into a binding agreement that if the approval from the Company Law Board and the other consents became available on or before 31 August 2001, the Escrow Agents were bound to process the implementation of transfer of the shares to the Respondent and make the payment to DSS. The said agreement also bound DSS, pending the approvals, not to offer to sell the shares to anyone else".*

20. Once again, it cannot be said that the aforesaid finding is unreasonable or not founded upon evidence. The learned arbitrator has appreciated the facts and circumstances and the evidence placed

before him. It is not for this Court, in exercise of jurisdiction under Section 34 of the Act, to re-appreciate the evidence or to sit in appeal over the findings arrived at by the arbitral tribunal, and it also cannot be said that the findings are perverse or wholly unsustainable on the basis of evidence considered by the arbitral tribunal.

21. The submission of Mr. Maninder Singh, learned senior counsel for the petitioner, is that the impugned award has been made contrary to the agreement between the parties, and therefore the learned arbitrator as acted beyond jurisdiction. In support of his submission that the arbitral tribunal cannot travel beyond the agreement of the parties, he has placed reliance on the judgment of the Supreme Court in ***Delhi Development Authority v. R.S. Sharma & Co., New Delhi***, (2008) 13 SCC 80.

22. There can be no quarrel with the legal proposition that the arbitral tribunal is bound to implement the contractual terms and cannot travel beyond them. The issue that arises for consideration is whether the arbitral tribunal has, in fact, travelled beyond the contractual terms as contended by the petitioner, or has implemented the contractual terms in a reasonable manner, as contended by the respondent.

23. The submission of Mr. Singh is that the objective of the agreement dated 16.05.2001 was that the respondent shall advise and assist the petitioner in negotiating with DSS for the purchase of its share capital in Skycell. The advice was to be deemed to be completed

only upon the completion of transfer of the share capital in the name of the petitioner, and upon validly executed share transfer deeds being delivered to the petitioner without any lien, encumbrance or charge, and which confer good title on the petitioner.

24. Mr. Singh submits that the respondent failed to achieve the said objective. He submits that the respondent failed to ensure the consent of Credit Agricole Indo Suez. He submits that the consent of Credit Agricole Indo Suez was never placed before the arbitral tribunal. Even the permission from the Company Law Board was obtained on 31.08.2001, and the order of the Company Law Board was stayed by this Court on 05.10.2001. Mr. Singh submits that the learned arbitrator has ignored the objective stated in the agreement completely, while concluding that the respondent was entitled to receive fee, as the said objective had not been achieved by 31.08.2001.

25. Mr. Singh further submits that the respondent did not accept the termination of the agreement by the petitioner vide letter dated 30.05.2001, which is stated to have been received on 11.06.2001. This is evident from the fact that the respondent continued to pursue the matter to obtain the permission from the Company Law Board for transfer of the shareholding of DSS in Skycell. He further submits that the consultancy fees was not payable until and unless the shareholding of DSS was transferred in favour of the petitioner.

26. Mr. Singh submits that even when the Company Law Board passed its final order in C.P. No.43/1998 under Section 397/398 on

31.08.2001, the said order was not unconditional, as various conditions were imposed, without the compliance where of the shareholding of DSS in Skycell could not have been transferred to the petitioner. This aspect has been overlooked by the learned arbitrator. It was also submitted that the learned arbitrator erred in awarding the entire fee payable under the agreement between the parties even though the respondent had only sued for damages for breach of contract.

27. Mr. Singh also submits that there was no compliance by the respondent of the agreement inasmuch, as, the respondent had failed to obtain the documents mentioned at Sl. Nos. 5 to 7 of the "irrevocable instructions" agreed to be submitted with the escrow agents by DSS/respondent. These have been highlighted in the extract contained in para 9 above.

28. On the other hand, Mr. Vibhu Bhakru, learned counsel for the respondent has supported the award. He submits that the award is well reasoned and the learned arbitrator has analysed all the facts and evidence placed before him. The learned arbitrator has interpreted the agreement between the parties, which squarely fell within his exclusive domain. He submits that the petitioner has failed to point out any perversity or patent illegality in the award. He submits that the petitioner cannot argue the present petition as if it is an appeal from the award of the learned arbitrator.

29. Mr. Bhakru submits that the petitioner acted dishonestly in seeking to terminate the agreement between the parties, after the

respondent had already secured the irrevocable offer from DSS in the format approved by the petitioner, which had been deposited with the escrow agents. The reason for termination of the agreement between the parties was that the petitioner had reached an agreement with Bellsouth and Millicom on or about 02.06.2001 to acquire their shareholding in Skycell at a much lower price than the value at which the petitioner had irrevocably agreed to purchase the shareholding of DSS. The petitioner sought to wriggle out of its agreement with DSS, as well as its agreement with the respondent. He submits that there was no occasion for the petitioner to claim that the petitioner had, till the date of issuance of the said letter, received no information from the respondent. He submits that the arbitral tribunal has found the letter of termination to be ante-dated and the said finding, being a finding of fact, cannot be interfered in these proceedings, as no ground has been made out therefor.

30. He submits that on 05.06.2001, the respondent as well as DSS had reaffirmed to the petitioner their irrevocable agreement for the transfer of the shareholding of DSS in Skycell to the petitioner. Mr. Bhakru submits that the basis of the respondents defence was the illegal termination of the contract by the petitioner. He submits that after the termination of the respondent's authority to act as the petitioners consultant, the respondent could possibly not have taken any further steps in the matter. He submits that a perusal of the statement of claim would show that, according to the respondent, the respondent had already achieved all that the respondent could have

achieved in relation to the transaction, and there was no other outstanding obligation of the respondent.

31. Mr. Bhakru submits that the award of damages made by the learned arbitrator is perfectly legal and justified. In terms of the agreement between the parties, the petitioner had agreed to pay a total consideration of US\$ 13.6 million for the acquisition of 10.5% shareholding of DSS in Skycell. If the negotiated amount between the petitioner and DSS were to be less than US\$ 13.6 million, even then the petitioner agreed to shell out US\$ 13.6 million, i.e. the respondent was to receive the amount saved from the sale price payable to DSS to the respondent as the respondents fee. It was also understood that the respondent would be entitled to negotiate and receive its fee from DSS. He submits that DSS had informed the escrow agents that DSS had agreed to pay 5% as respondents fee out of the total consideration of US\$ 13.6 million. Due to the illegal termination of the contract by the petitioner, the respondent had been deprived of the payment of the said fee, i.e. 5% of US\$ 13.6 million, which is what has been awarded by the learned arbitrator.

32. Having heard learned counsels for the parties, I am of the view that there is absolutely no merit in any of the submissions of Mr. Singh. The learned arbitrator has not only taken note of the objective of the agreement between the parties, but also the other clauses of the agreement and, in particular, clause 6 of the agreement. He also takes into account the documents placed by the petitioner as well as DSS

with the escrow agents, and the effect of the same being so placed with them. The learned arbitrator has also evaluated the effect of the termination of the agreement between the parties by the petitioner vide letter dated 30.05.2001, which was served on the respondent only on 11.06.2001. The learned arbitrator has extensively dealt with, and marshaled the testimonies of the witnesses in arriving at his conclusions.

33. After evaluating the evidence placed before him, the learned arbitrator has returned a finding that the irrevocable letter of offer/consent from DSS and the “irrevocable instructions” to the escrow agents came to incorporate a binding agreement between DSS and the petitioner for the sale and purchase of shares contingent upon approval of the Company Law Board and certain other bankers consents. The petitioner has not been able to successfully assail the said finding returned by the learned arbitrator.

34. It is not in dispute that the respondent obtained the irrevocable letter of acceptance from DSS as per the draft approved by the petitioner (listed at item A.1 of the signed “irrevocable instructions”), which was deposited, by the agreement of the petitioner and DSS, with the escrow agents on 27.05.2001 together with the share certificates, executed transfer deeds, cheques for the agreed price made available by the petitioner and related documents towards implementation of the transaction in terms of the “irrevocable instructions”.

35. The learned arbitrator has observed that the letter of offer/acceptance of DSS, as approved by the petitioner, as well as the petitioners cheques for the price amounting to US\$ 13.6 million had been put in escrow on or before 27.05.2001. Nothing is shown to have transpired for the petitioner to terminate the agreement three days later on 30.05.2001. The reason for termination of the agreement, i.e. that no irrevocable offer had been received from DSS, was obviously false, as not only had the irrevocable offer letter been received, but was even approved and made the basis of the petitioners agreement with DSS, incorporated in the escrow arrangement.

36. The learned arbitrator also notes that on account of the agreement reached between the petitioner with Bellsouth & Millicom, the value of 10.5% shareholding in DSS in Skycell was no longer regarded as high as US\$ 13.6 million by the petitioner. The petitioner was, therefore, no longer willing to acquire the shareholding of DSS in Skycell at the same price of US\$ 13.6 million, and was willing to acquire the same at a lower agreed price, which had been paid to Bellsouth & Millicom. It is for this reason that the petitioner sought to walk out of the agreement with the respondent, as well as with DSS, and therefore terminated the agreements dated 16<sup>th</sup> and 27<sup>th</sup> May, 2001 by an ante dated letter. The learned arbitrator has returned a finding that the petitioner in refusing to pay the price as agreed in the agreements of May 2001, committed a breach, in particular, of the agreement of 16.05.2001. The relevant extract of the award reads as follows:

*"Having received the irrevocable letter of offer/acceptance procured by the Claimant in terms of Clause B.2 (reproduced in para 15 above) of the said Agreement and having approved and accepted the terms of the said letter in terms of Clause B.3 and thereafter having used it to enter into a binding agreement with DSS in terms of the "Irrevocable Instructions" contingent only upon approval by the Company Law Board, the Respondent was bound to pay the price of US\$ 13.6 million. Furthermore, Clause B.4 of the said Agreement expressly provided –*

*"The receipt of an irrevocable offer for the sale of the Share Capital from DSS for a consideration not exceeding 13.6 Million US Dollars shall be binding on BTVL, and BTVL shall be obliged to conclude the purchase of the share capital at the earliest".*

*The Respondent was thus in breach of each of these provisions of the Agreement of 16 May 2001. Furthermore, the Respondent's action of repudiation of the Agreements on the ground stated in the letter dated 30 May 2001 was clearly false and the termination wrongful."*

37. The aforesaid finding of breach of the agreement dated 16.05.2001 by the petitioner is a finding of fact reached by the learned arbitrator upon appreciation of the evidence before him. The petitioner has failed to disclose any sustainable ground to successfully assail the said finding. On a perusal of the award, to me it appears to be a perfectly reasonable and plausible finding. In fact, a finding to the contrary appears to be most implausible.

38. The learned arbitrator, while considering the issue whether the respondent/claimant had duly discharged its obligations under the agreement dated 16.05.2001 has returned the following findings:

*"80. From the detailed description of events set out above, it cannot be disputed that in terms of Clause B.2 (PERFORMANCE) of the Agreement, the Claimant, pursuant*

*to its authorization, did procure and obtain from DSS “an irrevocable offer in writing or an acceptance for the sale of Share Capital” for which it was also authorized “to commit to pay to DSS ..... max. sale consideration of US\$ 13.60 Million ....”. It cannot also be disputed that this letter became the subject matter of discussions/negotiations at a number of meetings between 16 and 27 May 2001 amongst the Claimant, DSS and the Respondent during which period the proposal to place the irrevocable offer/acceptance (“as per draft approved”) became the centre piece of the escrow arrangement and is mentioned at item A.1 of the “irrevocable instructions”. It was by reliance upon this letter that the Respondent immediately agreed to place payment for the shares by cheques amounting to US\$ 13.6 million with the escrow agents so that the transfer of the shares could be effectuated and payment automatically made for them contingent only upon obtaining the specified approvals. Furthermore, it cannot be denied that the preparation of the documents which contain specific references to the Claimant (e.g. the irrevocable letter itself is addressed by DSS to the Claimant as the Respondent’s authorized representative) was made in joint consultation of the three parties. The actual deposit of the agreed documents with the Escrow Agents by 27 May 2001 was also made either by the three parties together or in any event by the Respondent and the Claimant together. Accordingly, I have no difficulty in holding that the Claimant did complete performance of its obligation in terms of Clause B.2 (PERFORMANCE) of the Agreement of 16 May 2001”.*

39. The petitioners submission founded upon the ‘objective’ stated in the agreement has been also considered and expressly dealt with in para 83 of the award, which reads as follows:

*“83. Even assuming Clause A.1 of the Agreement also sets out obligations which the Claimant had to perform, the fact is that apart from the irrevocable letter of offer/acceptance, the delivery of the original share certificates and duly executed transfer deeds to the escrow agents was already complete by 27 May 2001 as were the cheques towards payment for the shares; but once the Respondent “terminated” the Agreements of 16 and 27 May 2001, by its letter of 30 May 2001, there was obviously nothing more the Claimant could do by way of rendering further advice and assistance. It would then have been for the Respondent, after securing executed*

*transfer deeds and original share certificates from the Escrow Agents, to have the transfer completed by applying to Skycell. The Claimant was also disabled from rendering services specifically set out in Clause 2(ii) of Agreement of 27 May 2001 in securing affirmative votes for the Respondent at Members' and Board meetings of Skycell. There is therefore no force in the Respondent's contention based on Clause A.1".*

The learned arbitrator on this basis concluded that the respondent/claimant had duly discharged its obligations under the agreement dated 16.05.2001.

40. In view of the aforesaid finding, the submission of Mr. Singh that the respondent failed to secure the documents mentioned at sl. Nos.5, 6 and 7 of the irrevocable instructions quoted in para 9 above loses its significance completely. After disabling the respondent to act in the matter, the petitioner could not have been heard to say that the respondent had not fulfilled his obligations under the contract.

41. Mr. Singh has not been able to advance any convincing argument to satisfy me that the aforesaid findings are not rational, reasonable or not founded upon the evidence led before the tribunal. It certainly cannot be said that the view taken by the tribunal is not a plausible view at all.

42. So far as the quantification of the damages awarded in favour of the respondent is concerned, there again the impugned award appears to be most reasonable and rational. The learned arbitrator has relied upon clause 6(3) of the agreement dated 16.05.2001, which in express term provided that:

*“In the event the BTVL for any reason attributable to it fails to conclude the sale transaction after the Consultant has secured an offer .....” it would be liable to “compensate and pay to the Consultant the fees .....”.*

43. He also takes note of the fact that the agreement specifically bound the petitioner to accept the irrevocable offer or upto US\$ 13.6 million, which the petitioner had accepted in the escrow agreement, but then refused to abide by the commitment to pay the agreed price as the petitioner had breached its agreement with the respondent. The said breach prevented the respondent from securing its agreed fees. The respondents right to be compensated also arose from the petitioners wrongful termination, and thus repudiation of the agreement with the respondent.

44. He also holds that the right of the respondent to receive the fee arose under clause 5(i) of the agreement dated 16.05.2001, as the petitioner had acquired the shares of Bellsouth & Millicom between June and August 2001. He takes note of the fact that admittedly a cheque for Rs.19,48,42,500/- was admittedly given in the name of the respondent with the escrow agents, which was admittedly the fee of the respondent.

45. I may note that the respondent had made a claim in its statement of claim for the entire amount of US\$ 13.6 million. While dealing with the said claim, the petitioner in its written submissions had, inter alia, stated as follows:

***“.... in light of the aforesaid conspectus of the facts set out by the Claimant itself, assuming without admitting the correctness of the of the same, assuming all the facts set out by the Claimant stand established, since the alleged failure of the Respondent to consummate the transaction has led to the claimant being deprived of a transaction fee to the tune of 5% of US\$ 13.6 Million, which is Rs.3,12,21,750/- only, that is the only amount that the Claimant is entitled to as damages under this proceeding[s].***

*Accordingly, the Claim raised in Prayer (b) for a sum of Rs.19,48,42,500/-, is arbitrary and whimsical and is not borne out from the facts of the case set out before this Hon'ble Tribunal. In respect of the said claim the Claimant has made an isolated submission at paragraph 18, page 15 of the claim petition, which reads as follows:*

*“The Claimant has fulfilled its obligations under the contract and was therefore entitled to receive a payment of Rs.19,48,42,500/-“*

*As set out above the said figure of Rs.19,48,42,500.00 (=US\$4.15 million) as per the submissions of the Claimant itself is reflective of the part of the sale consideration allegedly payable by Respondent to DSS. Since, admittedly the sale and purchase of the 10.5% shares is not the subject matter of controversy before this tribunal no payment on that account is due.*

*No amount of Rs.19,48,42,500.00 was ever receivable by Claimant towards commission or fee either under the contract or under the facts of the case”.*

46. The learned arbitrator takes note of the aforesaid submission of the petitioner. He also takes note of the documents deposited with the escrow agents which showed that the entire amount of US\$ 13.6 million was payable to DSS alone and the respondent/claimant was only entitled to 5% from the said amount as transaction fees. In the undated letter addressed by the DSS to Mr. Rajive Sawhney, it was stated by DSS as follows:

*".... it has been agreed that DSS will sell its entire 10.5% shareholding in SkyCell Communications Ltd. (SkyCell) to BTVL against a total consideration of US\$ 13.6 Million to be received in Indian Rupees. The said payment will be received as follows:*

- i. US\$ 10 Million directly BTVL (minimum US\$ 9.45 Million)*
- ii. Balance is to be paid by BTVL through Crystal.*

*...*

*DSS has agreed to pay to Crystal a fee equal to 5%, as agreed, of the total consideration amount. We undertake to deposit a cheque for the said amount as and when directed by you".*

47. The respondent/claimant had also sent a letter to DSS, in which it was, inter alia, stated:

*"We also confirm that it has been agreed that you will pay to us a fee equal to 5% of the total consideration of US\$ 13.6 Million ....".*

48. The learned arbitrator takes note of other circumstances as well and accepts the submission of the petitioner that the respondent was not entitled to claim Rs.19,48,42,500/- being the equivalent of US\$ 13.6 million. The respondent was held entitled to only 5% of the said amount as its fee, and accordingly the learned arbitrator has awarded the same alongwith interest @ 9% p.a. from 03.10.2001 to the date of the award, and he has also awarded interest @ 18% from the date of the award to the date of payment.

49. From the aforesaid, it is clear that the award on damages has been made by taking into account the germane facts and evidence. It cannot be said that the same is unreasonable or implausible. I,

therefore, reject the challenge of the impugned award, as made by the petitioner, in its totality.

50. However, I find that the award of interest @ 18% from the date of the award till payment is on the higher side. Considering the prevalent rate of interest at the relevant time, I reduce the rate of interest from the date of the award till payment to 12% p.a. In case, the payment is made by the petitioner within two months from today, interest shall not run from today till payment. However, in case the payment is not made within two months from today, the respondent shall become entitled to interest at the aforesaid rate from the date hereof till realization.

51. The respondent shall also be entitled to costs quantified at Rs.2 lacs.

**(VIPIN SANGHI)**  
**JUDGE**

**AUGUST 02, 2011**

**'BSR'/SR**