

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
F-138

+ **OMP No. 127 of 2008**

UNION OF INDIA

..... Petitioner

Through: Mr. Rajeeve Mehra, Additional
Solicitor General with Ms. Swati Sinha, Mr.
Ashish Virmani, Mr. Mohit Garg, Mr. B.V.
Niren and Mr. Prasouk Jain, Advocates.

versus

**HIMACHAL FUTURISTIC COMMUNICATIONS
LIMITED**

..... Respondent

Through: Mr. Bishwajit Bhattacharyya,
Senior Advocate with Mr. C. Bhattacharyya,
Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
05.12.2012

1. The Petitioner, Union of India ('UOI'), through the Secretary, Department of Telecommunications ('DOT'), has, in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), challenged an Award dated 12th October 2007 passed by the arbitral Tribunal ('Tribunal') in the dispute between the UOI and the Respondent, Himachal Futuristic Communications Limited ('HFCL'), arising out of a Share Purchase Agreement ('SPA') dated 16th

October 2001 whereby 11,10,000 equity shares (74%) of Hindustan Teleprinters Limited ('HTL') was sold by the UOI to HFCL.

2. The background facts are that HTL, a company wholly owned by the Government of India ('GOI') was incorporated in 1960 under the Companies Act, 1956 ('CA') primarily for the purpose of manufacture of electromechanical teleprinters, to cater to the needs of erstwhile Post and Telegraph Department. The main manufacturing facility of HTL was located in Chennai and a supplementary facility was located at the Hosur Industrial Estate near Bangalore City.

3. The case of the UOI was that the profitability of HTL declined on account of severe price competition among both Indian and multinational telecom equipment companies in the switching equipment segment. The Disinvestment Commission ('DC'), in its second report of April 1997, had classified HTL in the non-core category and *inter alia* recommended for strategic sale of either 100% or 50% of shares of HTL through competitive bidding.

4. On 16th December 1998 the GOI decided to disinvest 50% of the equity in HTL to a strategic partner. On 26th May 2000, the GOI decided to disinvest 74% of the equity in HTL as the response from the bidders to the earlier proposed 50% disinvestment was not encouraging. The GOI selected KPMG India Private Limited

(‘KPMG’) as a Global Advisor for the disinvestment process on 13th September 1999. KPMG submitted a valuation report to the UOI on 27th September 2001. The indicative price range for the 100% equity stake in HTL as on 31st March 2001, adopting the discounted cash flow (‘DCF’) methodology, was estimated at Rs. 524.36 millions, i.e., Rs. 52.436 crores. According to the UOI, the DCF methodology was considered as the most appropriate indicator of the value. On that basis it recommended that the reserve price for the 74% equity value of HTL should be Rs. 38.802 crores. HFCL, one of the successful bidders, offered Rs. 55 crores for the 74% equity shares in HTL.

5. An SPA was entered into between the UOI, HFCL and HTL on 16th October 2001. The relevant articles of the SPA read as under:

“2.1 On the closing date, the Government shall sell, and the Purchaser, relying on the several representations, warranties, covenants and undertakings contained in this Agreement, and the Schedules hereto shall purchase all the purchase shares at a price of Rs. 495.50 (Rupees four hundred ninety five and fifty paise only) per share, which price shall be subject to Post-Closing Adjustment as provided in Clause 2.4 hereinbelow, free and clear of all liens and from all other rights exercisable by or claims by Third Parties and together with all rights and advantages now and hereafter attaching thereto.

2.2 The consideration for the purchase of the purchase shares shall be the aggregate sum of Rs. 550,000,000

(Rupees five hundred fifty million only) (the “Sale Consideration”) (which price shall be subject to Post-Closing Adjustment as provided in Clause 2.4 hereinbelow). All transfer taxes, duties and charges payable in respect of the sale of the purchase shares shall be the responsibility of, and paid by, the Purchaser.

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2.4 Post-Closing Adjustment

(a) The Purchaser acknowledges and agrees that it has reviewed the balance sheet of the Company included in the Audited Financial Statements (the “Last Balance Sheet”) and that the value of the Net Assets reflected on the Last Balance Sheet rounded off to nearest thousand) is Rs. 574,736,000 (Rupees five hundred and seventy four million seven hundred and thirty six thousand only) (the “2001 Net Assets Amount”) as computed in Schedule 2.4 (a). The Purchaser further acknowledges and agrees that it has had the opportunity to review and is familiar with the accounting principles and specific calculations used to prepare the Last Balance Sheet and the 2001 Net Assets Amount and accepts as true and correct both the Last Balance Sheet and the 2001 Net Assets Amount. As used in this Agreement, the term “Net Assets” means those assets of the Company reflected on the Last Balance Sheet that constitute the aggregate of current and non-current assets of the Company under the accounting principles used to prepare the Last Balance Sheet, less those liabilities of

the Company reflected on the Last Balance Sheet that constitute current and non-current liabilities of the Company under the accounting principles used to prepare the Last Balance Sheet.

(b) Within 90 (ninety) calendar days following the Closing Date, the Government, the Purchaser and the Company shall cause an accounting firm jointly selected by the Government and the Purchaser (the “Auditors”) to prepare and deliver to each of the Purchaser, the Government and the Company a statement showing in reasonable detail the computation of the current and non-current assets of the company and the current and non-current liabilities of the company in each case as of the close of business of the company on the closing date and computed in a manner consistent with the computation of the current and non-current assets of the company and the current and non-current liabilities of the company reflected on the last balance sheet and in accordance with the accounting principles used to complete the 2001 Net Assets Amount (the “Closing Date Statement”). The sum of the current and non-current assets of the company reflected on the Closing Date Statement less the sum of the current and non-current liabilities of the company reflected on the Closing Date Statement is referred to in this Agreement as the Closing Date Net Assets Amount.

(c) The Government, the Purchaser and the Company shall cause the Auditors to prepare the Closing Date Statement in good faith. The Closing Date Statement delivered by the Auditors to each of the Purchaser, the

Government and the Company shall be final and binding on the parties to this Agreement. To enable the Auditors to prepare the Closing Date Statement, the Company shall, and the Purchaser shall cause the Company to, permit the Auditors and the Auditor's authorized representatives and employees to review, during normal business hours, the books, records, internal management accounts and work papers of the Company. Without limiting the generality or effect of any other provision of this Agreement, the Company shall, and the Purchaser shall cause the company to : (i) provide the Auditors and its authorized representatives and employees, access, during normal business hours, to the facilities, personnel and accounting and other records of the Company necessary to permit the Auditors to prepare the Closing Date Statement as provided in this Agreement; (ii) cooperate with the Auditors and its authorized representatives and employees in the preparation of the Closing Date Statement; and (iii) take such actions as may reasonably be requested by the Government to close, or to assist the Government in closing, as of the close of business of the Company on the Closing Date, the books and accounting records of the Company.

(d) If the Closing Date Net Assets Amount is greater than the 2001 Net Assets Amount, the Purchaser shall pay the Government an amount in Rupees by bank draft, equal to the difference between the Closing Date net Assets Amount and the 2001 Net Assets Amount, multiplied by 0.74. If the 2001 Net Assets Amount is greater than the Closing Date Net Assets Amount, the Government shall pay the Purchaser an amount in

Rupees, by bank draft, equal to the difference between the 2001 Net Assets Amount and the Closing Date Net Assets Amount, multiplied by 0.74.

(e) All payments to be made pursuant to Sub-Clause 2.4 (d) shall be made within 45 calendar days following the delivery of the Closing Date Statement by the Auditors to each of the Purchaser, the Government and the Company. The Purchaser shall bear the fees and expenses of the preparation by the Auditors of the Closing Date Statement and shall make such payment to the Auditors within 45 calendar days following the delivery by the Auditors to each of the Purchaser, the Government and the Company of the Closing Date Statement.

(f) On the Closing Date, and for a period of 4 (four) years from the Closing Date, the Purchaser shall pledge the Purchase Shares (as the "Pledged Shares") to the benefit of the Government as a continuing security to secure the payment of amounts, if any, as determined under Sub-Clause 2.4 (d), by the Purchaser to the Government in accordance with this Clause 2.4, by execution of the Pledge Agreement.

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6.9 The Balance Sheet and related Profit and Loss Statement of the Company for the year ended March 31, 2001 as audited by M/s. Sankaran & Krishnan Chartered

Accountants is to the knowledge of the Government, a true and correct statement of the financial position of the Company as at March 31, 2001 and there are no undisclosed liabilities.

.....

6.12 The Government has made available to the Purchaser all information, which would be material to the Purchaser for the purposes of the sale of the Purchase Shares. All information which has been provided to the Purchase with respect to such sale is, to the knowledge of the Government, true and correct in all material respects and no material fact or facts have been omitted therefrom which would make such information misleading.

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8.8 (a) Purchaser Review: The Purchaser has reviewed the documents and information with respect to the company and its business and operation which were made available for review in the Data Room and subsequently by the Government and identified on Schedule 8.8 hereto and the documents attached hereto as Schedule 8.8 (collectively the "Data Room Documents") in addition to such review, the Purchaser has had discussions with the senior management and operational personnel of the Company and has conducted an on-site review of all the facilities of the Company. The Purchaser is not aware of any facts,

conditions or circumstances that reasonably could indicate that any of the representations and warranties of the Government or the Company contained herein are false, incorrect or inaccurate in any material respect.”

6. It is not in dispute that HFCL paid UOI a sum of Rs. 55 crores pursuant to the SPA. This payment was subject to post-closure adjustment in terms of Article 2.4 of the SPA. In terms of Article 2.4 (b) of the SPA M/s. S.R. Batliboi & Co. (‘M/s. SRB’) was appointed as Auditor for preparing the closing date statement. M/s. SRB submitted their report on 12th January 2002 in terms of which HFCL submitted a claim of Rs. 3803.36 lakhs from the UOI on the basis that the net assets of HTL had become Rs. 607.68 lakhs as on 16th October 2001 as against Rs. 5747.36 lakhs as on 31st March 2001. However, according to UOI, later on it transpired that M/s. SRB had rendered some advisory service to HFCL in the past and therefore had a conflict of interest. Subsequently, a meeting was held on 10th June 2002 between the UOI, HTL and HFCL, and M/s. Ray & Ray, Kolkata was appointed for preparing the closing date statement. M/s. Ray & Ray submitted a final report on 7th August 2002 in terms of which the closing date Net Asset Amount (‘NAA’) of HTL was (-) Rs. 1886.57 lakhs on 16th October 2001 instead of Rs. 5747.36 lakhs as on 31st March 2001. As per the balance sheet of HTL the reduction in NAA was, therefore, (-) Rs. 7633.93 lakhs.

7. On the basis of the report of M/s. Ray & Ray, HFCL submitted a

claim to the UOI for payment of Rs. 56.49 crores within 45 days of the delivery of the closing date statement. It was contended by UOI that in a meeting held on 7th August 2002 between UOI, HFCL and HTL, it had been agreed that M/s. Ray & Ray would discuss their draft report with UOI and HFCL. Instead M/s. Ray & Ray submitted a final report with the letter dated 7th August 2002. It is stated that in the meeting held on 19th September 2002 between the Chairman (TC), the Secretary, Ministry of Disinvestment and the DOT it was decided that HFCL should be informed that “no claim shall be put across on the basis of the draft report of M/s. Ray & Ray”. In addition to this DOT appointed an independent Auditor M/s. R. Subramanian & Co. (‘M/s. RSC’) to make a detailed study and advise the government having regard to normal practices adopted in such post closure report. The stand of the UOI was that M/s. Ray & Ray had travelled beyond the scope of their assignment and had virtually reopened the correctness and validity of the NAA as on 31st March 2001, which had not been disputed by the parties. The UOI was of the view that there was no justification for M/s. Ray & Ray to reopen the accounts for the period prior to 31st March 2001.

8. HFCL raised a claim for refund of Rs. 56.49 crores which was more than the sale consideration of Rs. 55 crores. Consequently, the UOI refused to entertain HFCL’s claim. The disputes were then referred to the arbitration by the three-Member Tribunal comprising of Mr.

Justice R.S. Pathak, Mr. Justice S.P. Bharucha and Mr. Justice A.M. Ahmadi, all three former Chief Justices of India.

9. In its statement of claim, HFCL sought an Award against the UOI in the sum of Rs. 56.4910 crores, along with interest @ 18% per annum from 22nd October 2002 compounded at quarterly rests, with *pendente lite* and future interest till the date of actual payment with costs.

10. A statement of defence was filed by the UOI before the Tribunal in which it was contended as under:

(i) Having accepted the accounts and NAA as on 31st March 2001 in the sum of Rs. 5747.36 lakhs as “True and Fair” based on the detailed “due diligence” carried out by the Consultants appointed, it was not open to M/s. Ray & Ray to have gone into the question of “omissions and errors” in the period prior to 31st March 2001.

(ii) The scope of work of M/s. Ray & Ray with reference to Clause 2.4 of the SPA was restricted to the preparation of NAA as on 16th October 2001 taking into account the movements that had happened in the values of current assets, current liabilities, non-current assets and non-current liabilities arising out of transactions between 1st April 2001 to 16th October 2001. There

was no scope for M/s. Ray & Ray to reopen the earlier year transactions.

(iii) The interpretation by the Auditors and HFCL could not be accepted “by any imagination” as HFCL was claiming more money from the UOI as refund under Article 2.4 (a) of the SPA than the financial bid quoted after detailed evaluation. If the interpretation of HFCL was accepted, the net sale value would be in minus. The criterion adopted after reopening the financial bid was to sell 74% equity shares to the highest bidder. This criterion would become invalid if more than the entire sale proceeds were refunded to HFCL.

(iv) Even after HFCL got refund of the entire sale consideration, it would retain its rights in HTL. Resultantly it would have paid nothing in consideration for the transfer to it of the management of HTL. This gave rise to the question “whether this will involve reopening of the entire disinvestment process or starting the process afresh.”

(v) There were serious infirmities in the preparation of closing date statement by M/s. Ray & Ray as regards the inventories, prior period items, deferred tax assets and provision for income

tax (prior years). The report of M/s. Ray & Ray was therefore not valid and binding on the UOI.

(vi) There were subsequent developments with HTL incurring a huge loss during the financial year 2001-02 as reflected in its annual accounts. The case was referred to the Board for Industrial and Financial Reconstruction ('BIFR') which by order dated 3rd December 2004 directed a special investigating audit. It was, accordingly, prayed that HFCL's claim should be rejected.

11. A rejoinder was filed on behalf of HFCL in which it was stated that the Auditors appointed by both the parties were to prepare the closing date statement as of 16th October 2001 in terms of Article 2.4 (b) of the SPA read with definition of 'closing date statement' in Article 1.1 of the SPA. Consequently, M/s. Ray & Ray had no option but to prepare the closing date statement showing assets and liabilities as of 16th October 2001. It was further pointed out that under Article 2.4 (c) of the SPA, the closing date statement was final and binding on both UOI and HFCL. Under Article 2.4 (e) all payments in terms of Article 2.4 (d) were to be made within 45 calendar days following the delivery of the closing date statement by the Auditors to HFCL and UOI. The Auditors' assignment was not mere that of 'compilation' but adhering to the accounting systems and the "Framework of Statements on Standard Auditing Practices and Guidance Notes on Related

Services” issued by the Institute of Chartered Accountants of India (‘ICAI’). It was pointed out that the balance sheet of HTL as of 31st March 2001 was prepared as per Section 211 of the CA by following the generally accepted accounting principles including the mandatory accounting standards as required by the said provision. Accordingly, for preparation of closing date statement first a balance sheet as of 16th October 2001 was to be prepared in the same manner in which the last balance sheet was prepared by using the same accounting principles. It was then to be placed in the format as given in Article 2.4 (a) of the SPA. To prepare such balance sheet, the Auditors had to audit the accounts using the same accounting principles so as to reflect a “true and fair” assessment of the affairs of HTL as on 16th October 2001. A detailed explanation was given as to the justification for accounting for the prior period items since the Auditors’ assignment was not merely one of ‘compilation’. It was pointed out that the UOI could not rely on the closing date statement prepared by M/s. SRB since UOI had earlier rejected it.

12. Interestingly, in the annexure to the present petition the UOI has enclosed as Annexure II copy of a letter dated 14th November 2003 of M/s. RSC enclosing an “adjusted closing date statement as on 16th October 2001”. This shows the total liability as on the closing date statement to be 364.6687 crores and the NAA as (-) Rs. 18.8657 crores. This is not different from the NAA prepared by M/s. Ray &

Ray. This indicates why perhaps UOI did not rely on the report of M/s. RSC before the Tribunal.

13. In the impugned Award the Tribunal has, after setting out the reply of the UOI at some length, come to the conclusion that the application of Accounting Standard 5 ('AS5') had certain limitations since the ICAI maintained that it should be followed only for preparing "general purpose financial statements" including balance sheet, statement of profit and loss account, a cash flow statement (wherever applicable) and statement and explanatory notes which form part thereof. It was held that when a specific direction was given to the Auditors that the NAA should be prepared as on a particular date by following a similar set of accounting policies which were followed in an earlier year, the Auditors had to prepare the NAA only by following the specific mandate given in the letter of appointment. The Tribunal interpreted Article 2.4(b) as requiring the Auditors to prepare the NAA as on the closing date and computing "in a manner consistent with the computation of the current and non-current assets of the company and the current and non-current liabilities of the company reflected on the last balance sheet and in accordance with the accounting principles used to complete the 2001 Net Assets Amount ("the closing date statement")". Accordingly, it was found that the closing date statement prepared by M/s. Ray & Ray was consistent with the provisions of Article 2.4 of the SPA.

14. As regards the criticism of the manner in which M/s. Ray & Ray prepared the closing date statement, the Tribunal observed that these were “highly technical matters” and that UOI “ought to have called to the box a witness whose testimony could have been tested in cross-examination.” The Tribunal held that there was no concluded agreement between the HFCL and UOI that the Auditors were first required to produce a draft report. What was produced was indeed a final report which was binding on the parties. As a result UOI was obliged to pay HFCL the difference between the 2001 NAA and the closing date statement amount multiplied by 0.74, but limited to the sum of Rs. 55 crores being the sale consideration. Counsel for HFCL informed the Tribunal that it was restricting its claim to the said amount. Resultantly the Tribunal ordered that UOI should pay HFCL a sum of Rs. 55 crores together with simple interest @ 9% per annum till realization together with costs of Rs. 5 lakhs with simple interest thereon @ 9% per annum till realization.

15. Mr. Rajeev Mehra, learned Additional Solicitor General (‘ASG’), for UOI first submitted that the Award was not in accordance with the SPA between the parties and was against the public policy of India. He submitted that the direction to refund HFCL the entire sale consideration amounted to the transfer of 74% shares of HTL without any consideration. HFCL was thus unjustly enriched. The learned ASG further submitted that a contract without consideration was void as per Section 10 read with Section 25 of the Indian Contract Act,

1872 ('ICA'). Consequently, the SPA itself was void in the absence of consideration. It was specifically urged that the SPA was against the public policy of India since "disinvestment without any return cannot be in public interest and any transaction which is against the economic interest of the country, cannot be in line with the public policy of India." It was urged that the SPA was void under Section 23 of the ICA, as being opposed to the public policy of India. As regards the expression 'public policy of India', reliance is placed on the decision of the Supreme Court in *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited (2003) 5 SCC 705*. The learned ASG repeatedly urged that the specific plea raised by the UOI as set out in para 3 of its written submissions was that the Tribunal failed to deal with its contention that the consequence of upholding the plea of HFCL would be to render the SPA without consideration. He urged that the matter be remanded to the Tribunal under Section 34(4) of the Act to render a further Award on this aspect.

16. In reply it is pointed out by Mr. Bishwajit Bhattacharyya, Senior counsel for HFCL, that it was a misconception that the SPA was without consideration merely because as a result of the exercise undertaken by the Auditors under Article 2.4 (d), UOI would be required to pay HFCL a sum of Rs. 55 crores together with interest. He pointed out that HFCL took over the entire liabilities of HTL as reflected in the closing date statement prepared by M/s. Ray & Ray. Therefore, this was not a contract without consideration. He submitted

that the plea that the SPA was opposed to the public policy of India and hit by Section 23 of the ICA was not even urged before the Tribunal. He further submitted that the Tribunal did account for the submission of UOI on the aspect and in any event even if it was not specifically dealt with it would not make much difference since the contract was not one without consideration.

17. Having perused the impugned Award, the Court finds that the learned ASG is right in his contention that the specific plea raised by the UOI in the statement of defence that in the event of plea of HFCL being upheld the SPA itself would be rendered as one without consideration does not appear to have been specifically dealt with by the Tribunal. However the question whether the matter requires to be remanded to the Tribunal for that purpose will hinge on whether the submission is, on the face of it, tenable.

18. The above submission of the UOI proceeds on the basis that once the basic reserve price was fixed by it before inviting the bids, the NAA as on the closing date could not be any less. The plea is also based on UOI's understanding that since the sale consideration mentioned in the SPA was Rs. 55 crores, if that amount is asked to be returned to HFCL with interest the SPA is rendered as a contract without consideration.

19. Section 25 of the ICA unambiguously states that a contract without consideration is void. It read with Section 10 of the ICA implies that for a valid contract there has to be consideration. Under Section 2 (d) ICA the expression 'consideration' connotes an "act or abstinence or promise" by a 'promisee' to do or refrain from doing. This could in a broad sense include any liability that may pass on to a party which is a beneficiary under a contract. In order to examine the plea that the SPA is rendered without consideration if the sale consideration paid for the shares is returned to HFCL its clauses will have to be examined.

20. The reading of the clauses of the SPA makes it clear that with the purchase of 74% shares of HTL, and thereby being in management and control of it, HFCL also took over HTL with all its liabilities as reflected in its balance sheet and books of account. One of the obligations of HTL under Article 5.3 (b) (v) was "to comply with all loan agreements, leases and other contracts or instruments to which it is a party or to which any of its assets are bound." Article 8 sets out the representations and warranties of HFCL. Clause 9.0 of the 'Guidance Note on Terms used in Financial Statement' issued by the ICAI defines 'liability' as "the financial obligation of an enterprise other than owners' funds". Therefore it would not be correct to view the purchase of the 74% shares by HFCL as resulting in it taking over only the assets of HTL and not its liabilities. The price for the 74% shares at the time of execution of the SPA was obviously an estimate based on the NAA of HTL as on 31st March 2001 using the DCF

method. Both parties were conscious of this fact. This explains why Article 2.4 was inserted making it obligatory for a valuation report to be prepared by Auditors jointly appointed by UOI and HFCL and further mandating under Article 2.4 (c) that the said report “shall be final and binding” on both of them. Article 2.4 (d) acknowledged that the said report could produce a result that might require UOI to pay HFCL the differential amount if the NAA as on 16th October 2001 was less than the reserve price. Article 2.4 (b) made it clear that the same accounting principles used in preparing the last balance sheet on the basis of which the 2001 NAA amount [set out in Article 2.4 (a)] was arrived at had to be used for determining the NAA as on the Closing Date i.e. 16th October 2001. If as a result of the said exercise it was found that the NAA as on the Closing Date was in fact less than the reserve price then it was obligatory for UOI to pay HFCL the differential amount. It is not as if by making such payment the SPA was without consideration. HFCL was taking over a company saddled with the liabilities outstanding as on the Closing Date. The total liabilities of HTL as on the Closing Date, as determined by M/s. Ray & Ray, were Rs. 364.6687 crores. The total current and non-current assets as on that date were Rs. 345.8030 crores. The difference led to a negative NAA value of Rs. 18.8657 crores. The value of the shareholding of HTL had to be based on the NAA of HTL as on the Closing Date.

21. For the aforementioned reasons, this Court finds no merit in the contention of the learned ASG that as a result of the impugned Award whereby the UOI has been asked to pay Rs. 55 crores together with interest @ 9% per annum the SPA itself has been rendered as a contract without consideration and is, therefore, hit by Section 25 of the ICA. In that view of the matter, this Court is not inclined to refer the matter to the Tribunal for determination of this issue notwithstanding the fact that the Tribunal may not have specifically dealt with it.

22. The learned ASG then submitted that the Tribunal erred in not accepting the challenge of the UOI to the correctness of the report submitted by M/s. Ray & Ray. He took the Court through the entire statement of defence in this regard. He further submitted that even if the UOI may not have examined any witnesses to prove its case, the Tribunal was obliged to do so under Section 26 of the Act. In this regard he placed reliance on the decision in *Biju Xavier v. Christy Fernandez 2010 (4) KLT 904*.

23. As far as the above submission is concerned, this Court finds that a conscious decision was taken by the UOI not to produce witnesses before the Tribunal. This decision is contained in a letter dated 13th December 2006 written by the DOT to its counsel which reads as under:

“Shri V.G. Pragasam,
Advocate,
Supreme Court of India,
New Delhi.

Sub.: Arbitration between HFCL and DoT on Posting
Closing Adjustments of M/s. HTL Ltd.

Sir,

Kindly refer to the discussion held with you in the matter on 7th December 2006 in the Chamber of the learned ASG. It has been decided not to produce any witness before the Arbitral Tribunal on behalf of Department of Telecommunications. You are requested to kindly take further necessary action in the matter.

Sd/-”

24. On the above basis counsel for the UOI filed a Memo dated 15th December 2006 before the Tribunal as under:

“That on receipt of the issues framed in the above arbitration and after considering the issues, the Respondent Department of Telecommunications has conveyed its decision not to produce any witness before the Arbitral Tribunal on its behalf. Consequently, no affidavit of its witness by way of Examination Chief will be filed and no oral evidence would be adduced on behalf of the aforesaid Respondent. This stand of the Respondent

is being submitted to the Hon'ble Arbitral Tribunal for further proceeding in the matter. Copy of the letter dated 13th December 2006 from the Department of Telecommunications is enclosed.”

25. The Tribunal also recorded the above submission in its proceeding on 19th December 2006, as under:

“On November 27, 2006 the Arbitral Tribunal framed the issues arising in this arbitration and inter-alia noted that while the Claimant did not propose to lead oral evidence, the Respondent stated that one witness would be produced on its behalf. Accordingly, time was allowed to the Respondent for filing the Affidavit of Evidence of its witness by way of examination-in-chief. A letter dated December 15, 2006 has been received now from the Respondent stating that the Respondent does not propose to produce any witness, and therefore, no oral evidence would be adduced on its behalf.

In the circumstances, as already directed, the case will be taken up on February 22 and 23, 2007 at Hotel Taj Mansingh, Mansingh Road, New Delhi at 11.30 am on each day for the purposes of enabling counsel for the parties to present their oral submissions.”

26. The UOI was clear that it did not want to lead evidence in the matter. It cannot now be heard to say that the Tribunal should have nevertheless examined experts to enable the UOI to prove its case

concerning the alleged errors in the report submitted by M/s. Ray & Ray. Significantly, as already noted, the UOI sought to place reliance on the report of M/s. SRB which it had in fact rejected. It chose not to examine any expert from even M/s. RSC, the Auditors whose report it has annexed to the present petition. In the circumstances, the Tribunal committed no illegality in not examining an expert under Section 26 of the Act.

27. The learned ASG next contended that the events subsequent to the SPA ought to be taken 'judicial notice' of by this Court and on that basis hold that the impugned Award is opposed to the public policy of India. Reliance is placed on the decisions of the Supreme Court in *Pasupuleti Venkateswarlu v. Motor & General Traders* (1975) 1 SCC 770, *Ramesh Kumar v. Kesho Ram* (1992) Supp. (2) SCC 623, *Ram Kumar Barnwal v. Ram Lakhan (dead)* (2007) 5 SCC 660, and the decision of the Kerala High Court in *Union of India v. P.M. Paul* AIR 1985 Kerala 206. The submission is that after taking over the reins of HTL, HFCL "only took steps to ensure that the company runs into losses and the vacant land of HTL Limited at Guindy, Chennai which is at a prime location in Chennai is alienated and the consequent benefits are reaped by the Respondent". A compilation of documents was handed over to the Court during the final hearing enclosing the balance sheet of HTL for 2009-10, e-Auction sale notice issued by the State Bank of India ('SBI') calling for bids for a public auction of land admeasuring 10.162 acres belonging to HTL for a reserve price of Rs.

250 crores in which it was mentioned that the dues of the borrower as on 30th June 2012 were approximately Rs. 167.46 crores. It was submitted that after liquidating the dues of SBI, HTL would be left with a surplus and therefore, if the impugned Award is upheld it would unjustly enrich HFCL. The learned ASG drew attention to the judgment of the Division Bench of High Court of Madras dated 25th April 2007 in *Hindustan Teleprinters Employees Union v. Union of India MANU/TN/8400/2007* by which the challenge by the Employees' Union of HTL to the sale of 74% of equity shares of HTL in favour of HFCL was negated.

28. The above submissions were opposed by Mr. Bhattacharyya. He pointed out that it was not open to the UOI at the stage of the present petition under Section 34 of the Act to seek to place on record documents that did not form part of the arbitral record. According to him, the subsequent events are not relevant to the question whether the impugned Award was opposed to the public policy of India. Referring to the decisions in *Bhagawati Oxygen Limited v. Hindustan Copper Limited (2005) 6 SCC 462*, *Continental Construction Limited v. State of U.P. (2003) 8 SCC 4*, *Food Corporation of India v. Joginderpal Mohinderpal AIR 1989 SC 1263* and *T.P. George v. State of Kerala AIR 2001 SC 816* he submitted that the scope of interference with the impugned Award is narrow and the Court is not expected to re-appreciate the evidence.

29. It requires to be first noted that the documents sought to be relied upon for the first time during the final hearing of this petition by the learned ASG did not form part of the arbitral record. For instance, the decision of the Division Bench of the Madras High Court was rendered on 25th April 2007 whereas the impugned Award was passed on 12th October 2007. No application was filed before the Tribunal to place on record the said judgment. In any event, this Court fails to appreciate how the decision of the Division Bench of Madras High Court helps the plea of UOI in this case. Interestingly, the said decision recorded the submission of the learned ASG who appeared for the UOI in those proceedings praying for dismissal of the writ petition filed by the Employees' Union challenging the SPA. UOI defended the SPA and sought dismissal of the writ petition. In fact in the said writ petition it was pointed out by the Employees' Union that "the balance sheet discloses the availability of the surplus funds to an extent of more than Rs. 125 crores, while the disinvestment was ordered for a meagre (*sic*. meager) sum of Rs. 55 crores and that, that would amount to virtually gifting away the fourth Respondent to the third Respondent." By this time the report of M/s. Ray & Ray was already available to the UOI. If it was serious about its plea about the SPA being opposed to the public policy of India or the report of M/s. Ray & Ray being erroneous, it could not have opposed the above pleas of the Employees' Union and invited dismissal of the writ petition. The Madras High Court negated the plea of the Employees' Union by observing as under:

“While making the said averment in paragraph 11 of the affidavit filed in support of the Writ Petition, the Petitioner seems to have completely lost sight of the fact that the disinvestment ordered in favour of the third Respondent was based on the DCF method, while whatever allegations found in paragraph 11, may have some application and relevance on the balance sheet method.”

30. The Madras High Court approved the procedure followed and observed as under:

“23. It is also relevant to note that having regard to the fact that the first respondent continues to retain 26% of its equity holding in the fourth respondent, the third respondent cannot have 'free-for-all', in the matter of the handling of the assets of the fourth respondent-Company. Sufficient checks and balances appear to have been provided in order to ensure that the public interest in respect of the public sector undertaking, namely the fourth respondent, is fully protected. In fact, the workmen represented by the petitioner-Union seem to have got no grievance at all as regards their service conditions existing in the fourth respondent-Company as on date. Though it is stated that the proceedings are pending before the B.I.F.R., having regard to the finalisation of the sale of certain lands belonging to the fourth respondent, it is stated that whatever the financial deficiencies that exist as on date, are likely to be fully wiped out by resorting to such sale and that the fourth respondent would turn out to be a viable proposition immediately after the sale of the said property.

24. In fact, the process resorting to the disinvestment, has been succinctly set out in the abovesaid paragraphs 65 to 67 of the decision and therefore, when we apply the principles set out therein to the case on hand, we find from the common counter affidavit of the first and second respondents, in particular, paragraphs 16 to 19 of the counter affidavit, we find that the whole process of disinvestment was meticulously carried out strictly adhering to the various stages involved in the said process.”

31. The UOI not surprisingly did not challenge the above decision. It now seeks to urge a plea contrary to what it urged before the Madras High Court. Although it is arguable whether it could have urged a contrary plea before the Tribunal, the fact is that it did not. The Court sees no justifiable reason to permit it to do so for the first time in the present petition.

32. This Court, under Section 34 of the Act, is expected to examine if the impugned Award of the Tribunal is sustainable in law on the basis of the arbitral record that was before it. It would neither be fair nor proper for the Court to take ‘judicial notice’ of subsequent events to hold the impugned Award to be opposed to the public policy of India. Viewed from another angle, if on account of the sale of the property of HTL in the BIFR proceedings, surplus monies are available and HTL is made a viable enterprise as a result thereof, it cannot be said that it would be opposed to the public policy of India. The SPA was entered

into in 2001 whereas the sale of HTL's land is taking place in 2012. The intervening decade has witnessed an unprecedented increase of real estate values. Merely because the land is likely to fetch a higher sum in 2012 in a public auction than would have been anticipated in 2001 cannot by itself render the SPA opposed to public policy.

33. The Tribunal was called upon to determine whether Article 2.4 of the SPA had been properly worked out and whether it should be given effect to. As long as both the UOI and HFCL stood by the SPA and its clauses, the Tribunal had to proceed on the basis that the SPA and its clauses were binding on both parties. The Tribunal was bound to act in accordance with the SPA and it has done precisely that.

34. For the aforesaid reasons, this Court finds no merit in the present petition and it is dismissed as such, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J.

DECEMBER 05, 2012

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