

IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP No. 77 of 2003 & IA Nos. 3377, 3384, 5441 of 2010

Reserved on: August 3, 2012
Decision on: September 14, 2012

BHARTI CELLULAR LIMITED Petitioner
Through: Dr. A.M. Singhvi, Senior Advocate
with Mr. Gopal Jain with
Mr. Harsh Kaushik, Advocates.

versus

DEPARTMENT OF TELECOMMUNICATIONS Respondent
Through: Mr. Rajeev Mehra, ASG with
Mr. Sumeet Pushkarna and
Mr. Ashish Virmani, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
14.09.2012

1. The Petitioner, Bharti Cellular limited ('BCL') [earlier known as Bharti Mobile Limited ('BML')], has in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('the 1996 Act') challenged an Award dated 20th December 2002 passed by the learned sole Arbitrator in the disputes between the Petitioner and the Respondent Department of Telecommunications ('DOT') arising out of a licence agreement dated 26th December 1995 for provision of Cellular Mobile Telephone Service ('CMTS') in various telecom circles including Punjab. By the impugned Award the learned Arbitrator rejected the claim of BML for refund of the amount of licence fee together with interest paid by it to the DOT subject to the finding that if the Telecom Disputes Settlement and Appellate Tribunal ('TDSAT') or in any further appeal/further proceedings, it was finally held that BML was not liable to pay interest for the period of 52

days, i.e., from 18th April 1996 to 11th June 1997 then the DOT would refund the said amount to BML.

Background facts

2. Prior to 29th March 2000 BML was known as M/s. JT Mobiles Limited ('JTM'). The name of JTM was changed to BML by a certificate dated 29th March 2000 issued by the Registrar of Companies ('ROC'), Karnataka.

3. On 16th January 1995, the Government of India through Ministry of Communications, DOT issued tender documents for CMTS in various telecom circles including Punjab. JTM was provisionally selected for providing CMTS in the telecom Circles of Punjab, Andhra Pradesh and Karnataka. Since the telecom service areas of Andhra Pradesh and Karnataka were proximate while that of the Punjab Circle was not, it was decided to implement the licence agreement for the Punjab Circle by a separate legal entity. Accordingly, on 5th December 1995, a resolution was passed by the Board of Directors of JTM for implementation of the cellular licence for the Punjab Circle through its wholly owned subsidiary M/s. Evergrowth Telecom Limited ('EGTL').

4. A Licence Agreement was entered into between the DOT and JTM on 26th December 1995 for provision of CMTS in the Punjab Circle. The effective date was stipulated as 12th December 1995. A Board Resolution was passed by JTM on 10th January 1996 to the effect that CMTS licence for the Punjab Circle be implemented through EGTL and JTM would maintain in EGTL not less than 20% equity or as agreed by the DOT. On 23rd January 1996 JTM requested the DOT to permit the implementation of CMTS in the Punjab Circle through EGTL along with a request to

execute a fresh licence with EGTL. On 26th March 1996 DOT asked JTM *inter alia* for details of the exact equity structure of EGTL including copies of the Memorandum of Association ('MOA') and Articles of Association ('AOA'), certificate of incorporation etc. of EGTL. On 29th March 1996 EGTL wrote to the DOT confirming that EGTL was a wholly owned subsidiary of JTM and its entire share capital was held by JTM. Copies of the MOA as well as AOA were enclosed. On 15th April 1996 JTM while confirming the DOT that EGTL was a 100% subsidiary of JTM sought permission to enable EGTL to raise further equity by private placements to third parties in future to meet project implementation costs. On the same date, i.e., 15th April 1996 JTM informed the DOT that it would hold not less than 24% equity in EGTL for the initial three years of the licence. On 16th April 1996 JTM confirmed to the DOT that all foreign promoters of JTM were in agreement with the proposal of implementing Punjab CMTS licence through EGTL.

5. On 18th April 1996 the DOT wrote to JTM permitting operation of CMTS in Punjab Circle. The said letter reads as under:

“This has reference to your letters dated 23rd January 1996, 20th March 1996, 2nd April 1996, 15th April 1996 and 16th April 1996 regarding operation of Cellular Mobile Telephone Service (CMTS) through your 100% owned subsidiary, M/s. Evergrowth Telecom Ltd. The Department of Telecommunications has no objection to this proposal of the operation of CMTS through M/s. Evergrowth Telecom Ltd., subject to the conditions outlined below:

- (1) M/s. Evergrowth Telecom Ltd remains a 100% owned subsidiary of M/s. J.T. Mobiles Telecom Ltd;
- (2) Any variation in equity pattern and/or expansion in equity base of M/s. J.T. Mobiles Ltd. and M/s. Evergrowth Telecom Ltd will not be undertaken without obtaining permission of the Telecom Authority;

(3) Foreign equity in M/s. Evergrowth Telecom Ltd. including the holding through M/s. J.T. Mobiles Ltd. will not exceed 49%;

(4) The proportionate shareholdings of the individual foreign promoters/partners of M/s. J.T. Mobiles Ltd., whose network and/or experience have been taken into consideration for determining the eligibility and grant of the licence, in the subsidiary company viz., M/s. Evergrowth Telecom Ltd must not go below 10% for at least during the initial three years period as stipulated in the Tender conditions;

(5) As in item (4) above, the shareholding of Indian promoters of M/s. J.T. Mobiles Ltd. in the subsidiary company shall not go below 10% during the first three years.

(6) Resolution of the company viz., M/s. J.T. Mobiles Ltd passed as per the relevant laws/acts on the subject or any guidelines issued by any statutory authority, confirming the proposal of the operation of CMTS in Punjab through the subsidiary, i.e., M/s. Evergrowth Telecom Ltd. has been passed (copy of the said resolution to be made available to the Telecom Authority); and

(7) Various actions taken by M/s. J.T. Mobiles Ltd. are in accordance with the orders of Hon'ble Court where the matters relating to shareholdings and/or partnership in M/s. J.T. Mobiles Ltd are being heard."

6. On the same date JTM wrote to the DOT, as under:

"We thankfully acknowledge receipt of your letter No. 862-65(A)/95-VAS dated 18th April 1996 according your approval for operation of the CMTS licence in Punjab Circle through Evergrowth Telecom Limited.

As already advised in our letter dated 15th April 1996, we confirm that Evergrowth Telecom Limited is a 100% subsidiary of JT Mobiles Limited. However, the implementation of the licence will require the capital to be expanded and as mentioned under Item 2 of our referred letter, we will maintain a minimum of 24% equity in Evergrowth Telecom Limited which will satisfy condition No. 4 and 5 of your letter. Accordingly, you are requested to

amend/modify condition No. 1 and 2 of your letter. You will agree that condition No. 1 cannot be maintained concurrently with condition 4 and 5.

We confirm our acceptance to condition No. 3, 4, 5, 6 & 7.”

7. EGTL on its part wrote to the Chairman, Telecom Commission (‘TC’) on 24th April 1996, as under:

“Dear Sir,

With reference to the proposal from JT Mobiles Limited for implementation of the Punjab CMTS Licence in our company, we wish to confirm the following:

1. We will assume complete and total responsibility in respect of all the rights, obligations and liabilities arising out of the licence including but not restricted to compliance of all the terms and conditions of licence.
2. We undertake to provide such documentation as may be considered necessary by DOT including but not restricted to providing financial and performance bank guarantees.
3. We will not dilute the equity held by JT Mobiles Limited in our company below 24% at any time during the initial three years period of the licence.
4. The Foreign Equity in our company shall not exceed 49% of the total issued capital including foreign equity held through JT Mobiles Limited.

We are prepared to execute the Tripartite Agreement amongst JT Mobiles, DoT and ourselves as may be required in this regard.”

8. On 26th April 1996 JTM wrote to the DOT informing it of a proposal whereby it intended to invite Essar Telecom Limited (‘Essar’) and an associate company of Essar Commvision Limited to contribute 52% in the share capital of EGTL and JTM continued to hold 24% of the share capital in the company. The balance 24% was proposed to be offered to other non-residents. As a result the total share holding of EGTL would be

64.25% Indian and 35.75% Foreign. JTM requested the DOT for its formal approval to finalize the structure and also requested the DOT to assign the Punjab cellular licence to EGTL.

9. On 1st May 1996 the DOT wrote to JTM, as under:

“Dear Sir,

Kindly refer your letter dated 26th April 1996 regarding share holding structure of M/s. Evergrowth Telecom Ltd. In this regard, your kind attention is drawn to letter No. 842-65(A)/95-VAS dated 18th April 1996. I have been directed to ask you to kindly confirm that you have fulfilled the conditions listed in that letter. You are also requested to submit the necessary documents in support of the same.”

10. In response, on 1st/2nd May 1996 JTM wrote to the DOT, as under:

“Sub: Operation of Cellular Mobile Telephone Services in Punjab Circle.

We refer to your letter 842-65(A)/95-VAS dated 1st May 1996 and your letter dated 18th April 1996. We would like to confirm the following:

(1) M/s. Evergrowth Telecom Ltd. remains a 100% owned subsidiary of M/s. JT Mobiles Ltd as on 1st May 1996. In this respect please find enclosed (i) a copy of Form-2 filed with Registrar of Companies confirming the same (Annexure -1), (ii) Certified true copy of the Board resolution passed on 4th October 1995 giving consent to the company to invest in M/s. Evergrowth Telecom Ltd (Annexure-II).

(2) We have already notified the Department of Telecommunications (DoT) vide our letter dated 26th April 1996, the proposed structure of share capital of Evergrowth Telecom Limited and confirm that there is no variation in the equity pattern of JT Mobiles Ltd to the one already submitted to DoT.

(3) The foreign equity in M/s. Evergrowth Telecom Ltd. including holding through JT Mobiles Ltd will not exceed

49%. As per the present structure, the total foreign equity is 35.75% made up as follows:

Foreign equity holding through JT Mobiles Ltd – 11.76%

Direct foreign equity through NRI/OCBs on repatriable basis 24.00%

(4) The proportionate shareholding of the individual foreign promoters of JT Mobiles Ltd whose net worth and experience has been taken into consideration for determining the eligibility and grant of licence in the subsidiary company M/s. Evergrowth Telecom Ltd will remain at 11.76%.

(5) The shareholding of Indian promoters of JT Mobiles Ltd in M/s. Evergrowth Telecom Ltd will remain at 12.24%.

(6) We attach the certified true copy of the Board resolution of JT Mobiles Ltd dated 10th January 1996 passed as per provisions of the Companies Act, confirming the proposal of the operation of CMTS in Punjab through the subsidiary M/s. Evergrowth Telecom Ltd. (Annexure III).

(7) We would like to confirm that there are no court orders issued against JT Mobiles Ltd as of date restricting the operations of the company in any manner.

Kindly accord us your permission so that we can finalise the above structure to enable us to implement the Punjab licence at the earliest.”

11. On 25th June 1996 a letter of intent (‘LOI’) was issued by EGTL to Motorola for supply of radio equipment and related services. On 19th July 1996 EGTL wrote to the DOT and sought to lease 2 MB link for cellular network. On 16th August 1996 in response to the telephonic conversation with the Deputy Director General (VAS), DOT, JTM wrote to the DOT confirming that JTM would be injecting up to Rs. 35 crores of equity in EGTL and that EGTL will remain 100% subsidiary of JTM after this equity infusion. It was added that “we understand that it is in accordance with your approval letter dated 18th April 1996.”

12. On 22nd August 1996 DOT forwarded to all cellular licencees, including JTM, the proforma draft of the interconnection agreement. On 27th August 1996 EGTL executed a GSM Cellular System Equipment Purchase agreement with Motorola Inc. On 5th September 1996 Deutsche Bank wrote to EGTL regarding credit facilities for financial performance guarantee of Rs. 35 crores to be submitted to the DOT. A subscription agreement was executed by EGTL and Essar on 5th September 1996 for issuance of 98 lakhs convertible debentures of Rs. 100 each at par aggregating to Rs. 98 crores. On 2nd October 1996 a 'civil works and site services agreement' was executed between EGTL and Motorola India Ltd. for the CMTS Punjab Circle. On 17th October 1996 a Supply Contract was executed between EGTL and Nokia for supply of equipment for GSM Switching System in Punjab.

13. On 23rd October 1996, the DOT Punjab Office wrote to the Delhi Office with copy to EGTL regarding EGTL's request for inter connection of Cellular Mobiles Telephone Network ('CMTN'). On 30th October 1996 DOT raised a demand note on EGTL for payment of Rs. 40 lakhs towards interconnection of CMTN. The date for payment was extended from 15th November 1996 to 25th November 1996. On 22nd November 1996 EGTL informed the DOT that it had made the payment of Rs. 40 lakhs against the demand note raised by DOT. On 28th November 1996 DOT by way of an endorsement on a copy of EGTL's letter dated 22nd November 1996 informed that the work order had been made and was expected to be completed by 12th December 1996. On 29th November 1996 EGTL wrote to the DOT about the delay of DOT in providing points to interconnect at Ludhiana, Jalandhar and Amritsar for operating CMTS in Punjab Circle.

14. On 5th December 1996 JTM wrote the DOT about status of CMTS Punjab Circle and highlighted the delays in providing the facilities necessary for commissioning CMTS in Punjab Circle. JTM sought an extension of the effective date for commissioning the service up to 27th March 1997. On 7th December 1996 JTM wrote to the DOT regarding issue of guidelines and governing terms and conditions and installation of hardware inside the premises of DOT.

15. On 10th December 1996 DOT informed EGTL that DOT was not in a position to provide local lead and terminal equipment at Ludhiana, Jalandhar and Amritsar. On 11th December 1996 the TC wrote to the Deputy General Manager (SEP), CGMT, Punjab Circle, Ambala stating that “Further, since the No objection given to M/s. Evergrowth has not become effective and it is not being acted upon, accordingly all requests for operation of CMTS in Punjab should come from M/s. JT Mobiles Ltd, who is the Licensee company and no correspondence whatsoever should be accepted from M/s. Evergrowth Telecom Ltd. on behalf of JT Mobiles.” A copy of that letter was also marked to JTM. On 12th December 1996 JTM wrote the Chairman, TC requesting for change of the effective date of commissioning services and further that the date of payment of second instalment of licence fee should also be extended to coincide with the new effective date. On 31st December 1996 the Deputy General Manager (Planning) of the Ambala Circle of DOT wrote to EGTL referring to the letter dated 11th December 1996 from DOT of Delhi and stated that no objection given to EGTL has not become effective and “no correspondence can be accepted from your firm on behalf of J.T. Mobiles.”

16. On 3rd January 1997 JTM wrote to the DOT expressing its surprise

upon receiving the DOT's letter dated 11th December 1996 and once again confirmed its compliance with the various conditions stipulated in the letter dated 18th April 1996. On 4th January 1997 by two letters, JTM informed the DOT that it had complied with the various conditions stipulated in the letter dated 18th April 1996 and that DOT should recognise EGTL as the "legitimate entity to operate the Punjab CMTS and to conduct all the necessary communications and work with the concerned authorities for the Punjab Cellular Licence". JTM also pointed out that EGTL had already undertaken a number of actions for implementation of the Punjab licence and that Punjab project was far too advanced. Various financial agreements had already been in place between EGTL and the financial institutions to commence the implementation of the Punjab CMTS and it was not possible to withdraw these. JTM wrote to the DOT on 7th January 1997 stating that the banks were not willing to respond unless EGTL was accepted for operation of the Punjab CMTS.

17. On 10th January 1997 JTM wrote to the DOT referring to the earlier letter highlighting the hardships faced by it on account of withdrawal of the no objection letter. On 14th January 1997 JTM wrote to the Deputy General Manager, DOT, Ambala stating that it had already furnished and complied with the various conditions stipulated in the letter dated 18th April 1996. On 27th January 1997 EGTL was issued certification and permission by way of two licences permitting it to import equipment for the CMTS Punjab Circle. On 7th February 1997 JTM wrote to the Director, TC pointing out that various approvals were pending and consequent delays were being faced in the CMTS Punjab Circle. On 25th February 1997 JTM wrote to the Chairman, TC pointing out that by its letters dated 18th and 26th April 1996, copies of which were enclosed, it had confirmed compliance with the conditions required by it in the

approval letter dated 18th April 1996 and reconfirmed the letter dated 4th January 1997. Since JTM was facing difficulties and delays in obtaining necessary approvals to effectively implement the project within the time-schedule, DOT was requested to withdraw the said letter dated 11th December 1996 to avoid further delays.

18. A purchase contract was executed on 13th March 1997 between EGTL and Himachal Futuristic Communications Limited ['HFCL'] (International Division) for microwave equipment for CMTS Punjab Circle. On 7th April 1997 JTM reiterated to the DOT its compliance with all the conditions stipulated in the no objection letter dated 18th April 1996 and sought resolution of the disputes at an early date. On 28th April 1997 JTM wrote to the DOT enclosing a copy of an application submitted by JTM to the Secretary for Industrial Approval, Ministry of Industry, Government of India for payment of Technical fee to the Foreign Collaborator.

19. On 12th June 1997 the TC wrote to JTM as under:

“Dear Sir(s)

Kindly refer your letter dated 28th April 1997 on the above subject wherefrom following has been collected and observed from the application enclosed with the letter.

(i) The company has changed equity structure of joint venture company by increasing equity to 31% held by M/s. United Telecom Group and simultaneously removed M/s. PCIL from amongst the promoters.

(ii) As per Clause 17 of the Licence Agreement the equity holding of M/s. PCIL an Indian promoter cannot be reduced below 10 of total aggregate for a period of 3 years from effective date.

(iii) The statement that the company has decided to assign/transfer Punjab Licence to Essar Group is against the

prohibition of assignment or transfer of licence as prescribed per Clause 10 of the Licence Agreement.

(iv) The above is in violation of the express terms and conditions of the licence agreement.

In view of the above, within ten days from the receipt of this letter, kindly explain that why action for termination of licence, under Clause 5, may not be taken due to the abovenoted breaches committed by you. In case reply is not received within aforesaid 10 days, then it will be presumed and taken that you have nothing to say on the matter.”

20. In reply dated 1st July 1997 to the above show-cause notice dated 12th June 1997, JTM stated that the notice was based on incorrect facts, surmises and conjectures and there was no breach of licence. On 11th August 1997 JTM informed DOT that EGTL had incurred expenditure of the amount of Rs. 200 crores for implementation of the licence of CMTS services in the Punjab Circle. It was stated that the licence fee for the first two quarters for which the DOT had issued notice to JTM and also the fees for third and fourth quarters shall be paid under protest till the issue of effective date of licence was resolved. It also requested the DOT to postpone the effective date from 12th December 1995 to the actual date of the commencement of services.

21. Meanwhile, Parasrampur Credit & Investment Ltd (‘PCIL’) filed Civil Writ Petition No. 1345 of 1996 in this Court challenging the letter dated 3rd April 1996 of the DOT approving replacement of PCIL with M/s. RK Associates (‘RKA’). The said petition was dismissed by an order dated 11th July 1997. Thereafter, PCIL filed LPA No. 184 of 1997 wherein an order was passed by the Division Bench on 22nd August 1997 staying the operation of the letter dated 18th April 1996 issued by the DOT to JTM.

22. On 28th August 1997 JTM wrote to DOT seeking permission to EGTL to implement the Punjab CMTS licence. On 4th September, 5th December and 19th December 1997 the DOT issued certification and permission to EGTL for import of equipment for implementation of CMTS for Punjab Circle. On 31st December 1997 the DOT wrote to JTM as under:

“Dear Sir,

Kindly refer our letter of even no. dated 12th June 1997 vide which the company was asked to explain the violation of express terms and conditions of licence agreement and the reply to the same furnished by the company vide letter dated 1st July 1997.

2. The reply furnished by the company has been examined and not found satisfactory. The stand of the company that M/s. PCIL never acquired or held any shares is in contradiction to the licence agreement duly executed by the company wherein the equity of M/s. PCIL is clearly shown as 20%.

3. You are, therefore, required to rectify the default within 30 days of receipt of this letter failing which your licence may be terminated in accordance with the clause 6 and condition 15.1 Schedule ‘B’ of the licence agreement for breach of clause 17 of the licence agreement. This is without prejudice to any other remedy with the Telecom Authority may resort to under the licence agreement.

This may be treated as notice of default under clause 6 and condition 15.1 Schedule ‘B’ of the licence agreement.”

23. On 6th January 1998 JTM wrote to the TC stating that PCIL was only a nominee of RKA and the said arrangement was later terminated by RKA pursuant to which there was litigation pending in the Bangalore Civil Court and Delhi High Court between RKA and PCIL. It was on this score that permission was sought by JTM to replace PCIL and RKA and this was accepted by the DOT by its letter dated 3rd April 1996. Since the licence did not prohibit increase in equity of any shareholder, the equity of United Telecom Limited (‘UTL’) was increased from 11% to 31%.

Since the shareholding of PCIL in JTM was nil there was no breach of licence on account of PCIL being replaced with RKA.

24. On 8th January 1998 LPA filed by PCIL was dismissed by the Division Bench of this Court observing that the issues raised in the letter dated 18th April 1996 by the DOT and in the letter dated 12th June 1997 would be decided by the DOT. The interim order dated 22nd August 1997 was vacated.

25. On 12th January 1998 JTM wrote to the DOT reiterating the compliance of the various conditions as stipulated in the letter dated 18th April 1996 and sought to move forward in rolling out services in the State of Punjab. On 16th January 1998 JTM reiterated the above proposal and enclosed a copy of the Board Resolution of JTM dated 12th June 1996 expressly accepting the terms and conditions indicated in the DOT's letter dated 18th April 1996. On 17th January 1998 JTM wrote to DOT enclosing copy of the order dated 8th January 1998 of the High Court and conveyed its "unequivocal acceptance of conditions 1 to 7" of the DOT's letter dated 18th April 1996. It enclosed extracts of the minutes of the meeting of the Board of Directors held on 12th June 1996. On 19th January 1998 various clarifications were issued by JTM to the DOT on various issues relating to its CMTS licence in the Punjab Circle.

26. On 23rd January 1998 JTM passed the requisite resolution accepting the conditions in DOT's letter dated 18th April 1996. On the same day it wrote to the DOT enclosing a copy of the said resolution and requested the DOT to validate the permission to operationalize the implementation of the CMTS Punjab circle through EGTL. JTM had agreed to deposit Rs. 5 crores as part payment and pay the balance licence fee due up to the

date on which permission was granted to EGTL. It requested for deferment of payment of licence fee, waiver of interest and outstanding licence agreement fee. It also informed the DOT that EGTL issued 98 lakhs privately placed optionally fully convertible debentures at a par value of Rs. 100 each aggregating to Rs. 98 crores to Essar. The said debentures were convertible into equity subject to grant of approval from the DOT. It was pointed out by JTM that there was no infringement of licence conditions and there was no change in equity pattern of EGTL.

27. On 10th March 1998 DOT wrote to JTM conveying the decisions of Telecom Authority granting *ex-post facto* approval for increase in equity of UTL in JTM from 11% to 31% subject to the outcome of the various court cases filed by PCIL. It was stated that in view of the compliance with the conditions in the letter dated 18th April 1996 the operation of CMTS in Punjab by EGTL was agreed in principal. Relevant to the issue of outstanding licence fee JTM was asked to deposit a sum of Rs. 5 crores immediately, all outstanding up to the second quarter of second year by 20th March 1998, the outstanding dues of third and fourth quarter of second year by 30th June 1998 and the outstanding including those accrued up to 11th September 1998 for third year by 12th September 1998. The request for waiver of interest would be considered only after payment of the principal amount by the company. JTM was directed not to ask for any change in the effective date or take legal recourse for waiver of the licence fee and was asked to withdraw the suit filed by it and EGTL in the Delhi High Court unconditionally.

28. On 2nd April 1998 JTM wrote to the Chairman, TC enclosing a demand draft of Rs. 5 crore dated 2nd April 1998 towards part payment of the second year Punjab Circle licence fee but requested for deferment of

the payment of the outstanding dues for the second year as well as for the dues accrued for the first and second quarters of the third year up to 31st March 1999. The third quarter of licence fee for the third year would be paid as per schedule, and that it would approach the DOT separately for waiver of interest after payment of licence fee. On 24th September 1998 a further request was made by JTM for change of the effective date to 4th November 1997 and commercial clearance for their network in Chandigarh and grant of three to four months to reach financial closure and raise financial bank guarantee. On 13th November 1998 JTM *inter alia* requested the DOT to treat the period from 18th April 1998 till the date of commercial clearance was actually granted as a 'black out period' of which no licence fee would be paid.

29. On 22nd March 1999 DOT wrote to JTM stating that the company had not covered the mandatory 10% DHQs by 12th December 1996. It was required to pay liquidated damages ('LD') as per Condition 14.2 of the licence agreement which worked out to Rs. 100 lakhs. The said amount was asked to be deposited within 15 days. This was followed by a letter dated 26th March 1999 by TC stating that since JTM had failed to make payment of licence fee for the period from 12th December 1996 to 11th March 1999, it should furnish the requisite bank guarantee. JTM was asked to immediately make payment of the above amounts within 20 days and furnish the bank guarantee failing which "termination of the licence shall be initiated without any further correspondence."

30. JTM filed OMP No. 49 of 1999 under Section 9 of the 1996 Act in which an order was passed on 28th May 1999, the operative portion of which reads as under:

"I direct the respondent not to terminate the license of the petitioner and further restrain them from encashing the

existing bank guarantee subject, however, to the condition that the petitioner deposits with the respondent 20% of the amount due inclusive of interest as mentioned in the letter dated 25th January, 1999, by means of a banker's cheque / bank draft within two weeks from today. The petitioner will also keep the existing bank guarantee alive till further orders."

Thereafter, the above petition was dismissed as withdrawn on 8th October 2001.

31. On 15th July 1999, the DOT sent JTM a notice terminating the licence agreement for CMTS Punjab Circle forthwith on the ground that JTM had failed to set right the default pointed out in the notice dated 26th March 1999 within thirty days and further it had failed to comply with the directions in the order dated 28th May 1999 of the High Court. On 29th July 1999 EGTL wrote to the DOT seeking migration to New Telecom Policy 1999 ('NTP 1999'), withdrawal of termination letters and restoration of interconnection. It also referred to its earlier request for treatment of the period of 693 days as 'blackout' period. Prior thereto on 8th July 1999 JTM requested that the disputes be referred to arbitration.

32. As noted earlier the name of JTM was changed to BML by a certificate dated 29th March 2000 issued by the ROC, Karnataka.

33. On 19th September 2001 the DOT wrote to BML offering a modified package whereby the issue concerning payment of licence fee for the period between 18th April 1996 and 10th March 1998 was proposed to be referred to an Arbitrator. By a letter of the same date BML accepted the above offer and also paid part payment of Rs. 220 crores. On 21st September 2001 it had paid a further payment of balance of Rs. 58,48,094 by which time it had also paid a sum of Rs. 485 crores. Thus all outstanding amounts had been paid by it by that date. On 22nd September

2001 BML wrote to the Director (VAS-I), DOT confirming compliance with all the conditions stipulated in the order dated 18th April 1996.

34. On 25th September 2001 the DOT wrote to BML informing that in terms of the unconditional acceptance of the terms and conditions of the package and meeting of the milestones of the package, the DOT was withdrawing the termination order dated 15th July 1999. On 27th September 2001 the DOT appointed a retired judge of the Supreme Court as sole Arbitrator for determining the following dispute:

“Whether the licence fee for the period 18th April 1996 to 10th March 1998 including interest on that sum is payable by the company on the basis of the facts and circumstances pleaded by both the parties.”

Proceedings before the Arbitrator

35. Before the learned Arbitrator BML filed its claim on 12th November 2001 to which the DOT filed its reply on 22nd December 2001 and BML filed a rejoinder thereto on 12th January 2002. BML also sought amendment in the claim during the course of arguments on 6th August 2002 seeking that grounds L-1 and L-2 be inserted between ground L and M. Ground L-1 in substance was that the licence duty already paid for the period after 30th April 1997 was liable to be refunded and ground L-2 to the effect that DOT was bound to mitigate the loss suffered by terminating the licence on the ground of alleged non-performance of the contract by BML and when it did not provide services from 12th December 1996 onwards. BML also contended that the Attorney General for India (‘AG’) had given two separate opinions in which he had found that BML had substantially complied with the conditions stipulated in the NOC. BML prayed that the DOT should disclose the said opinions of the AG to the learned Arbitrator.

36. Based on the pleadings of the parties, the learned Arbitrator framed the following issues:

“(1) Whether the Claimant had, at all material times, intimated the Respondent that the Licence Agreement dated 26th December 1995 will be implemented by Evergrowth and not by the Claimant and whether the proposal was accepted by the Respondent on 18th April 1996 or any other date?

(2) Whether the Respondent’s letter dated 18th April 1996 is in the nature of a counter proposal for implementation of the Licence Agreement by Evergrowth?

(3) Whether the conditions mentioned in the letter of the Respondent dated 18th April 1996 were accepted expressly or by conduct, by the Claimant?

(4) Whether there was a novation of the Licence Agreement dated 26th December 1995 in view of the letter of the Respondent dated 18th April 1996, whether Evergrowth was to implement and operate the Licence Agreement and the Claimant thereby rendered itself incapable of implementing the Licence Agreement?

4(a) If not, whether there was no impediment to the operation of the Licence Agreement due to the letter dated 18th April 1996 or due to any subsequent event related thereto?

(5) Alternatively, whether the Respondent had, by its letter dated 18th April 1996 and by its conduct clearly represented that the Agreement dated 26th December 1995 could be implemented by Evergrowth only and the same was acted upon by the Claimant and Evergrowth to their detriment and whether consequently, the Respondent was estopped from contending that the Licence Agreement could not be implemented by Evergrowth?

(6) Whether the Respondent is estopped from contending that the letter dated 18th April 1996 did not come into effect as alleged or at all?

(7) Whether the Claimant had a legitimate expectation that the Licence Agreement dated 26th December 1995 could be implemented by or through Evergrowth?

(8) Whether the letter of the Respondent dated 11th December 1996, that stated that the letter dated 18th April 1996 was

ineffective and Evergrowth could not be allowed to implement the Licence Agreement dated 26th December 1995, is arbitrary, capricious, invalid and violative of principles of natural justice?

(8A) Whether, in view of Clause 14.2, Schedule B, Part III of the Licence Agreement, if the Claimant did not provide services or provide infrastructure at the District Headquarters so as to meet 10% of the demand for a period of 20 weeks, making itself liable for damages upto Rs. 100 lakhs, the Respondent (a) had mandatory duty under Clause 14.2 to terminate the licence had no discretion under Clause 15.1 to terminate the licence or not; or (b) had a mandatory duty to terminate the licence under Clause 14.2 as a measure of mitigating damages under Section 73 of the Contract Act and take over the work or hand it over to another Indian company as per Clause 15.3?

(9) Whether the licence fee and interest for the entire period of 693 days from 18th April 1996 to 10th March 1998 or any part thereof was not payable because the Licence Agreement dated 26th December 1995 had become incapable of performance by Evergrowth during that period and the amounts were liable to be refunded?

(10) Whether, after the letter of the Respondent dated 19th September 2001, the acceptance of the package by the Claimant by letters dated 19th September 2001, 20th September 2001 and the Respondent's letter dated 25th September 2001, the Respondent is entitled to raise a plea that the Claimant is estopped from claiming refund in view of the Claimant's letters dated 5th December 1996, 7th November 1996 and 12th December 1996?

(11) Whether the Claimant is not liable for the licence fee for the entire period commencing from 18th April 1996 to 10th March 1998 and is entitled to refund thereof?

(12) Whether the Claimant is not liable to pay interest on the entire Licence Fee for the period from 18th April 1996 to 10th March 1998?

(13) Whether, in any event, the Claimant is not liable to pay

—

(i) Licence fee and interest for the period 12th June 1996 to 10th March 1998 and is entitled to refund thereof? or

(ii) Licence fee and interest for the period 22nd August 1997 to 8th January 1998 and from 8th January 1998 to 10th March 1998 or any part thereof and is entitled to refund thereof?

(14) What is effect of non-filing of opinion of learned Attorney General?

(15) To What Relief?”

Impugned Award of the Arbitrator

37. Dealing with Issues 1 to 3 together, the learned Arbitrator concluded that since DOT never agreed for assignment of the licence in favour of EGTL, it did not permit JTM to implement the contract through EGTL, nor did it permit EGTL to implement the contract in its own right. There was no justification whatsoever for JTM to proceed on that assumption. It was held that the original contract of the licence between JTM and DOT dated 26th December 1995 remained. The learned Arbitrator held that the request by JTM to the DOT seeking amendment of the licence was its ‘offer’, the DOT’s letter dated 18th April 1996 was a ‘counter offer’ and JTM’s letters dated 18th April 1996 and 26th April 1996 were ‘further counter offers’. DOT by its letter dated 1st May 1996 had not accepted these ‘further counter offers’ but stuck to its original ‘counter offers’ dated 18th April 1996. Section 7(2) of the Indian Contract Act, 1872 (‘CA’) had no application since the dispute did not concern the ‘form’ of the Board Resolution of JTM but its ‘substance’. It was only on 23rd January 1998 that all 7 conditions laid down by the DOT on 18th April 1996 were accepted by the Board of Directors of JTM. Consequently, Issues 1 to 3 were decided against BML and in favour of the DOT.

38. On Issues 4 and 4(a), the learned Arbitrator held that “it is impossible to conclude that by letter dated 18th April 1996 of the Department, there was a ‘novation’ of the Licence Agreement, to the effect that EGTL was to implement the Licence Agreement dated 26th December 1995 in the place of JTM.” Further, there was no impediment to the operation of the licence agreement due to the letter dated 18th April 1996 of the DOT, and JTM alone was responsible for having allowed EGTL to enter into such contracts or commitments with third parties. On Issue No. 5 it was held that no plea of estoppel or promissory estoppel could be raised by BML or proved against the DOT. It was held that the DOT had not by its letter dated 18th April 1996 or by subsequent conduct represented ‘clearly’ or otherwise (neither expressly nor impliedly) that the agreement dated 26th December 1995 could be implemented only by EGTL. Further EGTL and JTM did not act upon such a representation and suffer detriment. On Issue No. 6 it was held that the DOT was not precluded from informing JTM and EGTL that the NOC dated 18th April 1996 was not effective and that the DOT’s letter dated 11th December 1996 was merely a clarification since the NOC in any case had not become effective.

39. Issue No. 7 was decided by holding that no legitimate expectation in regard to an ‘offer’ or ‘counter offer’ was possible. On Issue Nos. 8 and 8A, the learned Arbitrator held that there was no mandatory duty on the DOT to terminate the licence upon the failure of JTM to commission the service by 12th December 1996 by way of mitigating the damages under Section 73 of the CA. Issue No. 9 was decided against BML and in favour of DOT and it was held that there was no question of refunding the licence fee for the blackout period. Issue No. 10 was decided in favour of BML by holding that the pleas raised in the claim for refund were permissible. On Issue Nos. 11 to 13 it was held that BML was liable to

pay interest on the licence fee for the blackout period in terms of Condition 19.8 and that there was no question of their being equities in favour of BML in that regard.

Present proceedings

40. Aggrieved by the above Award, the present petition was filed by BML on 17th February 2003. On 19th February 2003 the following order was passed by the Court:

“This is a petition under Section 34 of the Arbitration & Conciliation Act, 1996. The main grievance of the petitioner is that the learned Arbitrator for the period 18th April 1996 to 10th March 1998 has declined the refund of interest charged by the respondent at penal rate of 17.5% compounded monthly. Learned senior counsel submitted that the Arbitrator has erred in proceeding on the basis that once there was a contractual stipulation even in equity such penal rate could be permitted. Counsel places reliance on case of ***Central Bank of India v. Ravindra & Ors. (2002) 1 SCC 367***. Counsel also raises the contention that the interpretation given by the learned Arbitrator to the correspondence between the parties regarding the undertaking required from the Petitioner that EGTL shall remain 100% owned subsidiary was unwarranted in as much as the Petitioners had clearly specified that EGTL remains its own 100% subsidiary.

Notice to the Respondent for 2nd April, 2003.

Notice be also issued to the learned Arbitrator for filing of the award alongwith its record.”

41. It appears that during the pendency of this petition, BML obtained photocopies of three opinions of the AG, dated 30th March 2000, 14th April 2001 and 29th August 2001 pursuant to the order dated 7th October 2009 of the Central Information Commission (‘CIC’) under the Right to Information Act, 2005 (‘RTI Act’). Accordingly, BML filed an application being IA No. 3377 of 2010 on 15th March 2010 seeking to

place on record such legal opinions and to direct the DOT to place on record the file notings pertaining to the case. IA No. 3384 of 2010 was filed by the Petitioner seeking to place on record the voluminous documents which formed part of the arbitral record. On 17th March 2010 this Court observed that the said application would be taken up with the main petition for disposal.

The amendment application

42. On 27th April 2010 BML filed an application IA No. 5441 of 2010 under Order VI Rule 17 of the Code of Civil Procedure, 1908 ('CPC') seeking leave to amend the main petition (OMP No. 77 of 2003) by adding the legal preliminary grounds of challenge to the impugned Award as listed in para 14 of the application. The background to BML seeking to incorporate the said amendments was that the Telecom Regulatory Authority of India (Amendment) Act, 2000 ('TRAI Amendment Act') came into force with retrospective effect from 24th January 2000. The TRAI Amendment Act inserted Chapter IV in the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act'). Under Section 14 of the TRAI Act, as amended, the Central Government established the Telecom Disputes Settlement and Appellate Tribunal ('TDSAT') to adjudicate any dispute between a licensor and a licensee, between two or more service providers and between a service provider and a group of consumers. Section 14M of the TRAI Act as amended provided that all applications pending for adjudication of disputes before the TRAI immediately before the date of establishment of the TDSAT shall stand transferred to the TDSAT immediately on its establishment under Section 14. Under Section 14N (1) of the TRAI Act as amended all appeals pending before the High Court immediately before the commencement of the TRAI Amendment Act, i.e., 24th January 2000, shall stand transferred to the

TDSAT on its establishment under Section 14. Section 15 of the TRAI Act as amended excluded the jurisdiction of a civil court in respect of any matter which the TDSAT was empowered to determine.

43. At the hearing on 28th April 2010 learned Senior counsel for BML informed the Court that he was not pressing prayer (iii) of the said application for deciding the preliminary legal objections as a preliminary issue. Nevertheless he was pressing for the other reliefs including remand of the present dispute forming subject matter of the impugned Award to the TDSAT for adjudication. In the event, the preliminary objection of the Petitioner was upheld. Notice was issued on the said application by the Court.

Submissions on the lack of jurisdiction of the Arbitrator

44. The first submission by Dr. A.M. Singhvi, learned Senior counsel and Mr. Harsh Kaushik, learned counsel appearing for BML pertained to the jurisdiction of the learned Arbitrator. It was submitted that TRAI Act being a special legislation would prevail over the 1996 Act and therefore, it was only the TDSAT which could adjudicate the subject matter of the arbitral proceedings. Reliance was placed on the decisions in ***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd. (2008) 4 SCC 755*** (hereinafter referred to as the ‘***GUVNL case***’), ***India Trade Promotion Organization v. International Amusement Limited 142 (2007) DLT 342 (DB)*** and ***Vinayak Balkrishna Samant v. The Mahanagar Telephone Nigam Limited 1996 (3) BomCR 179***. It was submitted that the learned Arbitrator lacked inherent jurisdiction and the TDSAT has the exclusive jurisdiction over the dispute between the parties. Reference was made to the decision of the Supreme Court in ***Union of India v. Tata Teleservices (Maharashtra) Ltd. (2007) 7 SCC 517***, the decision of the TDSAT in

Aircel Digilink India Ltd. v. Union of India (2005) 3 Comp LJ 461 (TDSAT), the decision dated 22nd January 2010 of the TDSAT in M.A. No. 108 of 2009 in Petition No. 172 of 2009 [***Star (India) Pvt. Ltd. v. Bharat Sanchar Nigam Ltd.***], the decision dated 11th February 2010 of the TDSAT in ***Hathway Space Vision v. Vivekanand Rao*** and the decision dated 10th April 2012 of the TDSAT in Petition No. 75 of 2012 (***Reliance Infratel Ltd. v. Etisalat DB Telecom Pvt. Ltd., Mumbai***).

45. Secondly, it was submitted that under Section 34 (2) (b) (ii) of the 1996 Act, an Award can be challenged if it is against the ‘public policy of India’. Relying on the decision in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705*** it is submitted that inasmuch as the impugned Award was contrary to the provisions of Section 14 (a) (i) of the TRAI Act, it was in violation of a substantive law in force in India. It was also in violation of Section 28 (1) (a) of the 1996 Act. Thirdly, it was submitted that under Section 34 (2) (b) (i) of the 1996 Act, the subject matter of the dispute was incapable of settlement by arbitration. The TRAI Amendment Act having come into force with retrospective effect from 24th January 2000, and the exclusive jurisdiction of the dispute being with the TDSAT, the reference of the dispute to arbitration after the said date was itself null and void. It was submitted that provisions of Sections 4, 8 and 16 (2) of the 1996 Act would not be applicable since the objections as to the subject matter jurisdiction went to the root of the matter and was different from an objection as to territorial and pecuniary jurisdiction. Reference was made to the decisions of the Supreme Court in ***Harshad Chiman Lal Modi v. DLF Universal Ltd. (2005) 7 SCC 791***, ***Chief Engineer, Hydel Project v. Ravinder Nath (2008) 2 SCC 350*** and ***Hira Lal Patni v. Sri Kali Nath AIR 1962 SC 199***.

46. Fourthly, it was submitted by Dr. Singhvi and Mr. Kaushik that an objection that a judicial forum or Tribunal lacks inherent jurisdiction to adjudicate a dispute, can be raised at any stage. A party will not be estopped from raising such a plea because it had invoked the arbitration clause and participated in the arbitration proceedings. Reference is made to the decision in ***Chiranjilal Shrilal Goenka (Deceased) through LRs v. Jasjit Singh 1993 (2) SCC 507*** and the decision of the TDSAT in ***Star (India) Pvt. Ltd. v. Bharat Sanchar Nigam Ltd.*** It is submitted that Section 2 (3) of the 1996 Act also acknowledges that a dispute that can be decided by a properly designated Tribunal would not be referred to arbitration. It is submitted that although the grounds urged in the petition as originally filed covered the objection to the impugned Award on the ground of lack of jurisdiction of the learned Arbitrator, the amendment application was filed out of abundant caution. In any event since the objection as to lack of subject matter jurisdiction went to the root of the matter it could be raised at any stage, even seven years after the filing of the main petition.

47. On the issue of jurisdiction, it is submitted by Mr. Rajeeve Mehra, learned Additional Solicitor General ('ASG') appearing for the DOT, that in terms of Section 21 of the 1996 Act the arbitral proceedings were deemed to have commenced on 8th July 1999 when BML sought reference of the disputes to arbitration. Chapter IV of the TRAI Act, containing Sections 14, 14M and 14N, was inserted by the TRAI Amendment Act with effect from 24th January 2000. Prior thereto there was no provision for transfer of pending disputes to the TDSAT. It is submitted that under Sections 14M and 14N of the TRAI Act only applications pending adjudication before the TRAI, and all pending appeals before the High Court, would stand transferred to the TDSAT. There was no provision for

transferring suits and petitions pending in civil courts or disputes pending before arbitral Tribunals to be transferred to the TDSAT. In respect of such pending disputes the arbitral Tribunal would continue to exercise jurisdiction. He referred to Section 31 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ('DRT Act') to point out the contrast and submitted that in the absence of express provisions to that effect no legislative intent to transfer pending arbitral proceedings to the TDSAT could be inferred. He submitted that even the bar of the jurisdiction of civil courts under Section 15 of the TRAI Act did not cover arbitral proceedings.

48. Mr. Mehra further submitted that the word 'jurisdiction' in Section 16 (2) of the 1996 Act was comprehensive enough to cover all challenges to jurisdiction including subject matter jurisdiction. Such objection could be raised, if at all, by either party to the arbitral proceedings, before the arbitral Tribunal prior to or at the time of a statement of defence being filed in the matter and not later. In the present case, much after the TRAI Amendment Act had come into force, BML participated in the arbitration proceedings without raising any objection as to jurisdiction under Section 16 (1) read with Section 16 (2) of the 1996 Act. No such objection was raised in the present petition when it was filed in 2003. After waiting for or a period of seven years, an amendment was sought to be made to incorporate such a ground by an application filed in March 2010.

49. The decisions in ***Kiran Singh v. Chaman Paswan*** and ***Harshad Chimanlal Modi v. DLF Universal Ltd.*** were sought to be distinguished by Mr. Mehra on the ground that they pertained to the provisions of the CPC and that the challenge to jurisdiction in terms of Section 16 of the 1996 Act was on a higher pedestal than Section 21 of the CPC. Section 16

of the 1996 Act permitted the learned Arbitrator to decide on his own jurisdiction. If such plea was permitted to be raised at a stage long after the passing of the Award, it would defeat the very object of expeditious adjudication of disputes under the 1996 Act. Mr. Mehra further submitted that a challenge to the Award by seeking amendment to the petition under Order VI Rule 17 CPC could not be permitted long after filing of the expiry of the maximum permissible statutory period of limitation under the proviso to Section 34 (3) of the 1996 Act. It was further submitted that unlike Section 174 of the Electricity Act, 2003 which was a *non-obstante* clause, Section 14 of the TRAI Act was not and therefore, the decision in the **GUVNL case** was distinguishable.

Tenability of the application for amendment

50. The above submissions have been considered. There are two issues concerning jurisdiction that arise for consideration in the present case. One is whether the plea as to the learned Arbitrator not having the inherent or subject matter jurisdiction to deal with the dispute ought not to have been raised by BML before the learned Arbitrator under Section 16 of the 1996 Act during the pendency of the arbitral proceedings or even thereafter in the present petition under Section 34 of the 1996 Act and whether the belated challenge to the jurisdiction can be permitted to be raised seven years after the filing of the petition. The second issue is that even if the amendment as sought were to be permitted, whether in fact in the present case, and in the context of the provisions of the TRAI Act, it could be said that the learned Arbitrator lacked inherent or subject matter jurisdiction to decide the dispute.

51. There is no dispute that at no stage of the proceedings before the learned Arbitrator, did BML raise any objection to his jurisdiction by

filing an application under Section 16 of the 1996 Act. Section 14 was inserted in TRAI Act with effect from 24th January 2000. BML itself being a licensed telecom operator was aware of the legal position concerning the jurisdiction of the TDSAT. It consciously did not raise any such objection and participated in the arbitral proceedings without demur. The scheme of the 1996 Act is to facilitate and promote expeditious resolution of the disputes between the parties. With this object in view, the legislature has minimised judicial intervention in arbitral proceedings. A party to arbitral proceedings is expected to be vigilant and raise all preliminary objections as to jurisdiction at the first available opportunity before the arbitral Tribunal not later than the completion of pleadings. Section 4 of the 1996 Act envisages that waiver is attracted where a party knowing that a certain provision of the 1996 Act has not been complied with, proceeds with the arbitration without stating its objection. If indeed, as has been urged by BML, Section 2 (3) of the 1996 Act anticipates the arbitral Tribunal lacking jurisdiction to deal with an issue that is within the exclusive jurisdiction of the TDSAT, then the failure by BML to raise an objection as to jurisdiction before the learned Arbitrator and participating in the arbitral proceedings throughout should be taken to be waiver by BML of its right to object under Section 4 of the 1996 Act.

52. Under Section 16 (2) of the 1996 Act, the objection as to the jurisdiction of the arbitral Tribunal has to be raised not later than the submission of statement of claims, by either party. Such objection can be raised even by a party which invokes the arbitration clause and files a statement of claims. The word 'jurisdiction' under Section 16 is wide enough to include objections as to the subject matter jurisdiction. Indeed it is not confined to pecuniary or territorial jurisdiction. The failure to raise such objection and permit the arbitral proceedings to reach its logical

stand would clearly preclude a party from raising such objection at a later stage. Under Section 16 if such an objection is raised and rejected by the arbitral Tribunal the party raising such objection would have to wait till the Award is passed, and raise such plea under Section 34 of the 1996 Act. In arbitral proceedings under the 1996 Act objections as to jurisdiction have to be raised in the manner provided in the 1996 Act. In other words it can be done only by way of an application under Section 16 and again not later than the filing of the statement of defence. If the said requirement is not viewed as being mandatory, and if a party is permitted to raise such objection at any time of its choice, it would defeat the object of the 1996 Act which is to ensure expeditious adjudication of disputes. In the present case BML participated in the arbitral proceedings without raising any such objection.

53. The Court next examines if BML did raise such an objection in the present petition under Section 34 of the 1996 Act when it was first filed. It was argued on behalf of BML that in ground 'A' of the petition it is contended that the impugned Award "itself is contrary to and in conflict with the public policy of India". In ground 'E (vii)' it has been pleaded that "the impugned Award *inter alia* ignores the substantive law of India and is violative of, contrary to and in breach of Section 28 of the Act." In ground 'F' again it has been pleaded that the Award is erroneous in law and opposed to the public policy of India and in ground 'R' it has been pleaded that the impugned Award "contains errors of law apparent on the face of the award" and has been rendered in breach of the contract. It is submitted that the above pleadings would include a plea that the learned Arbitrator lacked inherent jurisdiction to adjudicate the subject matter of the dispute and therefore, the amendment sought by way of an application was only out of abundant caution. Reference in this regard was made to

the decisions in ***Raptakos Brett & Co. Ltd. v. Ganesh Property (1998) 7 SCC 184*** and ***Municipal Corporation v. A.P.S. Kushwaha 2010 (1) JLLJ 331***.

54. This Court is unable to accept the submission that the grounds ‘A’, ‘E (vii)’, ‘F’ and ‘R’ of the petition include an objection by BML to the impugned Award on the ground of lack of inherent jurisdiction of the learned Arbitrator to adjudicate the dispute. The grounds of challenge to the impugned Award are to be specifically pleaded with reference to Section 34 of the 1996 Act. There is nothing in the abovementioned grounds that even vaguely suggests the ground of lack of inherent jurisdiction of the learned Arbitrator rendering the Award liable to be set aside under Section 34 (2) (b) (i) of the 1996 Act. The broad sweeping plea that the Award is contrary to the public policy of India and therefore liable to be set aside under Section 34 (2) (b) (ii) of the 1996 Act cannot also be said to cover a plea as to lack of inherent jurisdiction. In ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.***, the Supreme Court has delineated the scope of that expression. The lack of inherent jurisdiction of the Arbitrator to adjudicate the dispute has to necessarily be pleaded specifically. It has to be shown to lead to a patent illegality vitiating the impugned Award.

55. There is another reason why the strict view must be taken of scope of challenge to the Award under the 1996 Act. If all grounds of challenge are not taken to the impugned Award at the time of filing of the petition under Section 34 of the 1996 Act, and are permitted to be raised at any time, then the legislative intent behind prescribing a maximum time limit under the proviso to Section 34 (3) of the 1996 Act would be defeated. In ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy (2007) 2***

SCC 720 the Supreme Court did not permit an objection as to the jurisdiction of the learned Arbitrator to be raised at the stage of an appeal when no such objection was raised during the pendency of the arbitral proceedings. In ***Gas Authority of India Ltd. v. Ketī Construction (I) Ltd. (2007) 5 SCC 38*** it was held that where a party has received notice and it does not raise a plea of lack of jurisdiction before the Tribunal “he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34 (2) (a) (v) of the Act.”

56. In ***State of Maharashtra v. Hindustan Construction Company Limited (2010) 4 SCC 518*** the Court did not permit the new grounds by way of amendment since “such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award.” Further, in the present case, an amendment has been sought to the petition to include an additional ground of challenge by an application filed more than seven years after the filing of the main petition. Except stating that amendment is by way of abundant caution, there is no convincing explanation for the delay in filing the application. This Court is, therefore, not inclined to entertain the plea for amendment of the petition to urge the additional grounds on the ground of lack of jurisdiction. Accordingly, IA No. 5441 of 2010 is dismissed.

Plea as to lack of inherent jurisdiction of the Arbitrator

57. Notwithstanding the rejection of BML’s prayer for amending the petition, since extensive arguments have been advanced on the inherent lack of jurisdiction of the learned Arbitrator to decide the subject matter

of the dispute, the Court proceeds to consider the said plea. The sequence of events shows that BML invoked the arbitration clause on 8th July 1999. In terms of Section 21 of the 1996 Act the arbitration proceedings commenced on that date itself. By then Section 14 had not been inserted in the TRAI Act. Chapter IV which includes Sections 14 to 20 was introduced by the TRAI Amendment Act 2000 with effect from 24th January 2000. If the legislature intended that pending arbitration proceedings as of 24th January 2000, which would include the arbitral proceedings in the instant case, should be transferred to TDSAT, then it ought to have made a specific provision to that effect.

58. Sections 14, 14M and 14N of the TRAI Act are silent as to the transfer of pending arbitral proceedings to the TDSAT. The said provisions read as under:

“14. Establishment of Appellate Tribunal – The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to –

(a) adjudicate any dispute -

(i) between a licensor and a licensee;

(ii) between two or more service providers;

(iii) between a service provider and a group of consumers;

Provided that nothing in this clause shall apply in respect of matters relating to –

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

14M. Transfer of pending cases – All applications, pending for adjudication of disputes before the Authority immediately before the date of establishment of the Appellate Tribunal under this Act, shall stand transferred on that date to such Tribunal:

Provided that all disputes being adjudicated under the provisions of Chapter IV as it stood immediately before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, shall continue to be adjudicated by the Authority in accordance with the provisions, contained in that Chapter, till the establishment of the Appellate Tribunal under the said Act;

Provided further that all cases referred to in the first proviso shall be transferred by the Authority to the Appellate Tribunal immediately on its establishment under Section 14.

14N. Transfer of appeals – (1) All appeals pending before the High Court immediately before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, shall stand transferred to the Appellate Tribunal on its establishment under section 14.

(2) Where any appeal stands transferred from the High Court to the Appellate Tribunal under sub-section (1), –

(a) The High Court shall, as soon as may be after such transfer, forward the records of such appeal to the Appellate Tribunal; and

(b) The Appellate Tribunal may, on receipt of such records, proceed to deal with such appeal, so far as may be from the

stage which was reached before such transfer or from any earlier stage or *de novo* as the Appellate Tribunal may deem fit.

15. Civil court not to have jurisdiction – No civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other Authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.”

59. Section 14 of the TRAI Act states ‘any dispute’ between a licensor and a licensee; two or more service providers; and a service provider and a group of consumers will be adjudicated exclusively by the TDSAT. The expression ‘any dispute’ has to be read along with Sections 14M and 14N to determine which of such disputes that are pending as on 24th January 2000 would get transferred to the TDSAT. Section 14M refers to the ‘authority’ which under Section 2 (b) is the TRAI. Under Section 14M, cases pending before the TRAI immediately before 24th January 2000 shall stand transferred to the TDSAT upon its establishment. The proviso to Section 14M states that the disputes which were already being adjudicated prior to 24th January 2000 would continue to be adjudicated by the TRAI till the TDSAT is actually established, and would be transferred to it immediately upon its establishment. Section 14M does not talk of all pending arbitral proceedings. Section 14N deals with cases pending before the High Court. Arbitral proceedings are not covered under Section 14N of the TRAI Act either. Section 15 states that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the TDSAT is empowered to determine. The words ‘entertain any suit or proceeding’ indicate the prospective nature of that provision. None of the above provisions support the contention of BML that pending arbitral proceedings could not go on after the establishment

of the TDSAT and that in the present case, the learned Arbitrator lacked inherent jurisdiction to adjudicate the disputes.

60. Therefore, if the plea of lack of inherent jurisdiction had been raised by BML before the learned Arbitrator under Section 16 of the 1996 Act, he would have been justified in rejecting it. Equally, the plea of lack of inherent jurisdiction, even if permitted to be raised by BML at this belated stage on the strength of the decisions in ***Harshad Chiman Lal Modi v. DLF Universal Ltd., Chief Engineer, Hydel Project v. Ravinder Nath*** and ***Hira Lal Patni v. Sri Kali Nath***, cannot succeed for the reason that the present arbitral proceedings commenced prior to 24th January 2000. The continuance of the arbitral proceedings thereafter remained unaffected under Sections 14, 14M or 14N of the TRAI Act. Unlike Section 174 of the Electricity Act, 2003 which opens with a *non-obstante* clause, and which was interpreted in the ***GUVNL case***, Section 14 of the TRAI Act does not contain such a clause. The decisions of the TDSAT cited by BML are distinguishable on facts. None of the cases involved a situation where arbitral proceedings had already commenced prior to the establishment of the TDSAT.

61. The Court therefore rejects the contention of BML that in the present case the learned Arbitrator lacked inherent subject matter jurisdiction to deal with the dispute and that the impugned Award should be set aside on that ground.

Challenge to the Award on merits

62. The next contention concerns the challenge to the impugned Award on merits. It was submitted by Dr. Singhvi on behalf of BML that since the learned Arbitrator has reached the conclusion that could never have been

arrived at on the pleadings and evidence on record, the impugned Award is perverse and deserves to be set aside. It was further submitted that the finding of the learned Arbitrator that the NOC dated 18th April 1996 required the Petitioner to confirm that EGTL would “always” remain a 100% subsidiary of BML was erroneous as there was no such requirement in the NOC. The learned Arbitrator had read into the letter dated 18th April 1996 a stipulation that was non-existent. Further, EGTL remained a 100% owned subsidiary of JTM throughout. There was enough evidence on record to show that BML had unequivocally accepted the conditions of the NOC dated 18th April 1996. The terming by the learned Arbitrator of the NOC dated 18th April 1996 as an ‘offer’ and the response thereto by BML as its ‘counter offer’ was erroneous and contrary to the pleadings as well as the wording of those very documents. BML and EGTL sought approvals in their subsequent letters only pursuant to the Condition No. 2 of the NOC. It is submitted that JTM never stated that it would maintain only 12.24% equity. The learned Arbitrator ignored the proportionate foreign equity of BML of 11.76% and therefore, came to a wrong finding. In its letter dated 1st/2nd May 1996 BML had conveyed to DOT its acceptance of each of the conditions of the letter dated 18th April 1996. The letter dated 23rd January 1998 was only a reiteration of that acceptance. The wording of BML’s letter dated 1st/2nd May 1996 and the subsequent letters dated 3rd and 4th January 1997 was identical to the resolution letter dated 23rd January 1998.

63. The learned ASG appearing for the DOT responded by submitting that unequivocal acceptance of the seven conditions in the letter dated 18th April 1996 was never conveyed by BML earlier to 23rd January 1998. The letter dated 18th April 1996 of the DOT was a conditional NOC that was not complied with by BML during the so-called ‘black out’ period. DOT’s

letter dated 11th December 1996 clearly stated that the letter dated 18th April 1996 had not become effective. It was not the case of either party that during the blackout period, the licence granted to BML was suspended or that BML was incapable of implementing the contract. Without compliance with the conditions in the NOC, the licence could not have been assigned to EGTL. None of the agreements entered into with third parties mentioned EGTL as licensee. It is submitted that since the licence agreement was 'always in existence', BML could not avoid paying the licence fee as well as the agreed interest thereon apart from other amounts agreed to be paid under the agreement.

64. The Court would like to preface the discussion on merits by recapitulating the law concerning the scope of interference by the Court under Section 34 of the 1996 Act. The legal principles have been settled in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*** The Court explained in the said decision what the expression "opposed to the public policy of India" in Section 34 (2) (b) (ii) of the 1996 Act meant. It held that an Award "could be set aside if it is patently illegal" and further that "award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void." The said principles were reiterated in ***McDermott International Inc. v. Burn Standard Co. Ltd.*** (2006) 11 SCC 181 and a number of subsequent decisions.

65. The Arbitrator is mandated by Section 28 (3) of the 1996 Act to decide "in accordance with the terms of the contract" and in terms of Section 28 (1) to "decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India." A breach of the above statutory requirement would also invite invalidation

of the Award. To the extent that the requirement of the law even under the 1996 Act is that the Arbitrator cannot travel beyond the contract, or read something into it which does not exist, it is no different from the legal position that emanates under the Arbitration Act 1940.

66. In ***Continental Construction Co. Ltd. v. State of Madhya Pradesh (1988) 3 SCC 82***, the Supreme Court observed that an Arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. In ***Bharat Coking Coal Ltd. v. M/s. Annapurna Construction AIR 2003 SC 3660*** the Court explained that “the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.” In ***Associated Engineering Co. v. Government of Andhra Pradesh AIR 1992 SC 232*** the Supreme Court set aside an Award after finding that the Arbitrator in that case committed an error “not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority.”

67. The decision of the learned Arbitrator on Issues 1 to 4 was central to the entire Award. A perusal of the impugned Award shows that the finding on those issues has influenced the decision on the remaining issues. To briefly recapitulate, while deciding Issues 1 to 3 together, the learned Arbitrator held that DOT had never agreed for assignment of the licence in favour of EGTL and neither permitted JTM to implement the

contract through EGTL or permitted EGTL to implement the contract in its own right. It was further held that the licence agreement dated 26th December 1995 between JTM and the DOT remained; the request by JTM to the DOT seeking amendment of the licence was its 'offer; the DOT's letter dated 18th April 1996 was a 'counter offer'; JTM's letters dated 18th April 1996 and 26th April 1996 were 'further counter offers'; since DOT by its letter dated 1st May 1996 had not accepted these 'further counter offers' the NOC dated 18th April 1996 did not become effective till 23rd January 1998 when all 7 conditions therein were accepted by JTM. On Issues 4 and 4 (a), the learned Arbitrator held that the NOC did not bring about a novation of the licence agreement dated 26th December 1995 permitting EGTL to implement it in place of JTM. JTM was responsible for having allowed EGTL to enter into contracts or commitments with third parties.

68. There is merit in the submission of the learned counsel for BML that in arriving at the above conclusions the learned Arbitrator appears to have travelled beyond the express wording of the agreement reached between the parties and read into the NOC a term that was non-existent. It is apparent on a reading of the NOC letter dated 18th April 1996 that Conditions 1 and 2 therein were mutually inconsistent. While Condition No. 1 required JTM to ensure that EGTL remained a 100% subsidiary, Condition No. 2 stated that no variation in the equity pattern of EGTL and JTM could be undertaken without permission of the Telecom Authority. If permission was sought under Condition No. 2 and given by the Telecom Authority, it would obviously result in a variation in the equity pattern and/or expansion in the equity base of JTM. If Condition No. 1 were to be rigidly interpreted, then Condition No.2 was plainly inconsistent and unworkable. On the other hand, Condition No.2 itself envisaged that there

was no requirement under Condition No.1 that EGTL would remain a 100% subsidiary of JTM “throughout’ or “always.”

69. While the letter dated 18th April 1996 of JTM did confirm the acceptance of Condition Nos. 3 to 7 its request for amendment of Conditions 1 and 2 to clarify the possible anomaly cannot be viewed as a refusal, repudiation or non-acceptance by JTM of Conditions 1 and 2. In any event, with JTM confirming by letter dated 1st/2nd May 1996 that EGTL “is a 100% subsidiary of JTM”, Condition No. 1 stood satisfied. The letter dated 24th April 1996 from EGTL also assured that the equity held by JTM in EGTL would not be diluted below 24% at any time and foreign equity would not exceed 49% of the total issued capital including foreign equity held by JTM. In the letter dated 26th April 1996 JTM sought approval of the proposal to have Essar contributing 52% in the share capital of EGTL. The letter dated 1st/2nd May 1996 unequivocally states that “EGTL remains 100% owned subsidiary of JTM as of 1st May 1996”. The words “always” or “throughout” do not occur in Condition No. 1 of the NOC dated 18th April 1996. As rightly pointed out by BML the learned Arbitrator appears to have read such words into the NOC dated 18th April 1996 when there was no such condition. In fact if permission was granted under Condition No. 2, then clearly Condition No. 1 would not be fulfilled. Till such time permission was not granted under Condition No. 2, then Condition No. 1 stood fulfilled.

70. The findings of the learned Arbitrator as regards Issues 1 to 3 are not supported by the evidence on record. The correspondence between the parties, some of which have been referred to in the impugned Award, including the letters dated 26th April 1996, 1st/2nd May 1996, 16th August 1996 showed that JTM kept assuring the DOT that EGTL remained a

100% subsidiary in JTM. It also showed that JTM was, consistent with Condition No. 2, seeking permission of the Telecom Authority for variation in the equity pattern as proposed. The learned Arbitrator appears to have overlooked two letters dated 3rd January 1997 and 4th January 1997 written by JTM to DOT. In both letters the seven conditions were set out. Under the column 'present status' against DOT Condition No. 1 in both letters, JTM confirmed that "EGTL remains a 100% subsidiary of JTM". Against Condition No. 2 it stated that "there has been no variation and or expansion in equity base of JTM. JTM injected Rs. 30 crore as equity capital in EGTL to part finance implementation of the CMTS operations by EGTL." The finding that the precise wording of the Resolution dated 23rd January 1998 did not find mention in the letters dated 18th April 1996 and the letter dated 1st/2nd May 1996 ignored the fact that JTM was, pursuant to Condition No.2, seeking approval of DOT for the proposed change in pattern of equity holding in EGTL.

71. While ordinarily in exercise of its power under Section 34 of the 1996 Act the Court is not expected to re-appreciate the evidence, the instant case is one where the learned Arbitrator has overlooked material evidence. The fact that JTM unequivocally accepted the seven conditions set out in the NOC dated 18th April 1996 is evident from the letter of that date read with letters dated 1st/2nd May 1996 and 3rd and 4th January 1997 as well as by its subsequent conduct in seeking permission of the DOT in terms of the Condition No. 2. Neither of the parties proceeded on the basis or even contended that the request by JTM to the DOT seeking amendment of the licence was its 'offer'; that the DOT's NOC letter dated 18th April 1996 was a 'counter offer' and that JTM's letters dated 18th April 1996 and 26th April 1996 were 'further counter offers'. There is force in the contention of BML that this approach to the evidence has led

to the impugned Award erroneously deciding Issues 1 to 3. Consequently, it is not possible to accept the submission of the learned ASG that the view expressed by the learned Arbitrator on Issues 1 to 3 was a plausible one.

72. Issue No. 4 concerned the novation of the agreement dated 26th December 1995. The NOC letter dated 18th April 1996 conveyed DOT's conditional acceptance of the request of JTM to permit EGTL to operate the licence agreement. The finding of the learned Arbitrator that there was no novation of the licence agreement was as a direct consequence of his findings on Issues 1 to 3. Consequently, the Award in respect of Issue 4 is also required to be set aside.

73. The central issue referred to the learned Arbitrator was: "Whether the licence fee for the period 18th April 1996 to 10th March 1998 including interest on that sum is payable by the company on the basis of the facts and circumstances pleaded by both the parties." The answer to the said question depended on the answer to Issues 1 to 4. The answer by the learned Arbitrator to the above question in the affirmative has largely determined his answers to the remaining issues. The inevitable consequence of the decision of this Court that the Award in respect of Issues 1 to 4 is unsustainable in law, is that the Award in respect of the remaining issues is also required to be set aside. Consequently, the entire Award is liable to be set aside on the ground that it is opposed to the public policy of India under Section 34 (2) (b) (ii) of the 1996 Act.

Summary of Conclusions

74. To summarise the conclusions of the Court in this judgment:

(a) The plea for amendment of the petition to urge the additional grounds on the ground of lack of jurisdiction is rejected and IA No. 5441 of 2010 is dismissed.

(b) In any event, there is no merit in the contention of BML that the learned Arbitrator lacked inherent subject matter jurisdiction to deal with the dispute.

(c) The impugned Award is liable to be set aside on merits on the ground that it is opposed to the public policy of India under Section 34 (2) (b) (ii) of the 1996 Act.

Consequential directions

75. Although this Court finds that the impugned Award cannot be sustained in law on merits and is opposed to the public policy of India under Section 34 (2) (b) (ii) of the 1996 Act, it cannot possibly grant BCL the consequential reliefs of allowing its claims as that is beyond the scope of the powers of the Court under Section 34 of the 1996 Act. In this regard it is useful to recall the following observations of the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd.*** (at p. 208):

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

76. Accordingly, the impugned Award dated 20th December 2002 is set aside leaving it open to BCL to resort to appropriate legal remedies as may be available to it in accordance with law. The petition is allowed in the above terms with costs of Rs. 30,000 which will be paid by the DOT to BCL within a period of four weeks from today.

S. MURALIDHAR, J.

SEPTEMBER 14, 2012

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