

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

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Date of decision: 11th May, 2016

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W.P.(C) No.6773/2013 & CM No.14692/2013 (for stay)

BHARTI AIRTEL LIMITED & ORS

..... Petitioners

Through: Mr. Gopal Jain, Sr. Adv. with Mr.
Harsh Kaushik, Mr. Abhay
Chattopadhyay and Ms. Chinmayee
Chandra, Advs.

Versus

UNION OF INDIA

.... Respondent

Through: Mr. Gaurav Sarin, Sr. Panel Counsel
with Mr. Vidur Mohan, Ms. Charul
Sarin and Mr. Ajitesh K. Kir, Advs.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition (i) impugns the decision dated 26th December, 2012 of the respondent Department of Telecommunications (DoT) of the Union of India (UOI) refusing to refund the amount deposited by the petitioner no.1 Bharti Airtel Ltd. (petitioners no.2 and 3 are its shareholders and the word “petitioner” hereafter will mean Bharti Airtel Ltd. only); ii) seeks a direction to the respondent UOI to comply with the understanding and obligations recorded in the petitioner’s letters dated 1st August, 2001, 6th November, 2012 and 10th December, 2012; iii) seeks mandamus directing the respondent UOI to refund the sum of Rs.399.92 crores to the petitioner; iv)

seeks mandamus directing the respondent UOI to also pay interest on the said amount of Rs.399.92 crores i.e. a total sum of Rs.2495.87 crores to the petitioners with future interest till the date of refund; and, v) alternatively seeks permission for the petitioner to adjust the amount so refundable by the respondent in the future licence fee payments due to the respondent UOI from the petitioner.

2. Notice of the petition was issued and a counter affidavit has been filed by the respondent UOI and to which a rejoinder has been filed by the petitioner. The counsels were heard on 8th October, 2015 and 4th November, 2015 when judgment was reserved.

3. It is the case of the petitioner:

- (i) that the petitioner was granted a licence dated 26th December, 1995 under Section 4(1)(b) of the Telegraph Act, 1885, to establish, maintain and work telegraph in the Punjab Telecom Circle;
- (ii) that for reasons attributable to the respondent UOI, the licence of the petitioner was de-facto suspended from 18th April, 1996 to 10th March, 1998 (though the petitioner has made detailed

pleadings in this regard but the need to refer thereto, for the reasons hereinafter appearing, for the purpose of the present petition is not felt);

- (iii) that the petitioner thus did not pay the licence fee payable by it for the period 18th April, 1996 to 10th March, 1998;
- (iv) that the respondent UOI however insisted upon payment of licence fee for the aforesaid period together with interest and penal interest thereon and upon non payment thereof by the petitioner, terminated the said licence on 15th July, 1999;
- (v) that though the petitioner represented to the respondent UOI to refer the dispute aforesaid to arbitration in accordance with the terms therefor in the licence, but to no avail;
- (vi) that on the contrary, the respondent UOI, to arm-twist the petitioner, denied release of eight Basic Service Licences, eight Cellular Licences and one National Long Distance Licence to the associate companies of the petitioner;

- (vii) that the petitioner was thus constrained to deposit the entire licence fee along with interest and penal interest for the aforesaid period with the respondent UOI as “on account payment”, strictly without prejudice to its rights and contentions and with a clear understanding that in the event of the dispute being decided in favour of the petitioner, the respondent UOI will forthwith refund the said amount along with interest for the period the same was retained by the respondent UOI; the said understanding is reflected in the letter dated 1st August, 2001 of the petitioner;
- (viii) that in accordance with the aforesaid understanding, a reference dated 27th September, 2001 was made for arbitration;
- (ix) that the petitioner in the said arbitration made a claim for refund of the amount deposited along with interest at the same rate at which the respondent UOI had demanded interest;
- (x) that the Sole Arbitrator vide arbitral award dated 20th December, 2002 dismissed the claim of the petitioner;

- (xi) that the petitioner filed OMP No.77/2003 under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) before this Court and which had been allowed vide judgment dated 14th September, 2012 by setting aside the arbitral award;
- (xii) that though the petitioner in the aforesaid OMP No.77/2003 sought the relief of refund of the amount aforesaid deposited by it with interest but it was held that the Arbitration Act did not permit the Court to grant the said relief and the petitioner would have to resort to appropriate legal remedies to seek the refund;
- (xiii) that the petitioner accordingly, vide its letters dated 6th November, 2012 and 10th December, 2012, sought refund of Rs.399.29 crores out of Rs.485.58 crores deposited as aforesaid after adjusting the sum of Rs.85.66 crores in a separate matter being Civil Appeal No.5050/2012;
- (xiv) that the respondent is also liable for interest and as on the date of filing of the petition, a total sum of Rs.2495.87 crores was due from the respondent UOI;

(xv) that the respondent UOI however vide impugned letter dated 26th December, 2012, without giving any reason, rejected the demand of the petitioner;

(xvi) that the respondent UOI has filed FAO (OS) No.87/2013 against the judgment dated 14th September, 2012 setting aside the arbitral award; along with the said appeal, the respondent sought stay of the judgment dated 14th September, 2012 but which application was dismissed by the Division Bench vide order dated 16th July, 2013; and,

(xvii) that the respondent UOI is not entitled to retain the aforesaid amount and the respondent UOI by retaining the same is acting unfairly and unjustifiably enriching itself.

4. The respondent UOI has opposed the writ petition by filing a counter affidavit pleading:

(a) that the challenge to the respondent's letter dated 26th December, 2012 cannot be by way of a writ petition and the petitioner ought to have raised a dispute in manner provided under the licence agreement;

- (b) that no dispute in respect of the licence agreement lies before this Court;
- (c) that the petition seeking enforcement of letters dated 1st August, 2010, 6th November, 2012 and 10th December, 2012 written by the petitioner is misconceived;
- (d) that there was no such understanding between the parties as is pleaded by the petitioner;
- (e) that the writ petition to enforce the understanding otherwise also is not maintainable;
- (f) that the writ petition in the garb of various reliefs claimed therein seeks recovery of money and which cannot be allowed in a writ petition;
- (g) that the reliefs claimed in the writ petition are even otherwise beyond the terms of the licence which is a contract under Section 4 under the Telegraph Act;

- (h) that the demand of the petitioner to treat the period from 18th April, 1996 to 10th March, 1998 as a “blackout period” was an afterthought;
- (i) that this writ petition has been filed under a false belief that the judgment dated 14th September, 2012 in OMP No.77/2003 is a money decree in favour of the petitioner;
- (j) that in any case the judgment dated 14th September, 2012 in OMP No.77/2003 is subject matter of FAO (OS) No.87/2013;
- (k) reliance is placed on *Suganmal Vs. State of Madhya Pradesh* AIR 1965 SC 1740 and *Union of India Vs. M/s Orient Enterprises* (1998) 3 SCC 501 to contend that a writ petition under Article 226 is not maintainable for refund of monies;
- (l) that even if the judgment dated 14th September, 2012 in OMP No.77/2003 is a money decree, the remedy of the petitioner is by way of execution;
- (m) that in fact the judgment dated 14th December, 2012 supra refuses refund to the petitioner and the petitioner has not

preferred any appeal thereagainst and cannot agitate the same in writ jurisdiction;

- (n) reliance is placed on *Commissioner of Income Tax Vs. Chhabil Dass Agarwal* 2013 (10) SCALE 326 and *State of Haryana Vs. Jage Ram* (1980) 3 SCC 599 to contend that writ remedy is not available when equally efficacious alternate remedy is available and to facilitate avoidance of obligations arising out of a contract; and,
- (o) that under the licence agreement, the petitioner is bound to pay the licence fee and cannot avoid the same.

5. Need to refer to the rejoinder filed by the petitioner is not felt.

6. I must record that when this petition came up on 24th February, 2014, the counsel for the respondent UOI handed over the copy of the order dated 21st February, 2014 of the Division Bench in FAO (OS) No.87/2013 supra to the effect that the hearing of this petition be not taken up till the next date of hearing i.e. 2nd April, 2014 before the Division Bench. However on 8th October, 2015 and 15th October, 2015 when arguments in this petition were heard, it was not the argument of the counsel for the respondent that the

aforesaid order dated 21st February, 2014 of the Division Bench has been extended or that there was any bar to this Court proceeding with the matter. However verification on the website of this Court shows FAO (OS) No.87/2013 to be still pending.

7. The senior counsel for the petitioner during the hearing on 8th October, 2015, besides apprising me of the facts aforesaid also stated that the petitioner, to secure the interest of the respondent UOI in the event of FAO (OS) No.87/2013 being decided in favour of the respondent UOI is willing to give a bank guarantee in favour of the respondent UOI against the refund of the amount.

8. Per contra, the counsel for the respondent UOI during the hearing on 4th November, 2015 besides raising the same contentions as contained in its counter affidavit, contended:

(i) that when the petitioner, in OMP No.77/2003 has not been found entitled to the relief of refund, it cannot be granted the relief of refund of the amounts deposited in this writ petition;

(ii) that the amount due to the petitioner has not been determined anywhere and without determination, no refund can be ordered;

(iii) that the petitioner has the alternative efficacious remedy before the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) under the Telecom Regulatory Authority of India Act, 1997 for seeking the relief of refund and the writ petition is not maintainable for this reason also;

(iv) that what has been subject matter of arbitration cannot be the subject matter of writ petition;

(v) that the petitioner has not given any reason for its entitlement to refund;

(vi) that as per the letter dated 1st August, 2001 of the petitioner also, the petitioner had deposited the aforesaid amounts with the respondent “on account and with a clear understanding that in the event of a final determination that results in a refund to us, the excess amount paid by us shall be promptly refunded by DoT” and which final determination has not been done since the matter is pending adjudication in FAO(OS) No.87/2013;

(vii) that alternatively, the petitioner has to make a claim for refund of the said amount in accordance with the Arbitration Agreement in the Licence Agreement;

(viii) that the Supreme Court in ***Godavari Sugar Mills Ltd. Vs. State of Maharashtra*** (2011) 2 SCC 439 and ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728 has held a writ petition to be not maintainable in contractual matters, as the present one is and there is no public law character of the disputes and the petition does not disclose any exceptional circumstances for entertaining the writ petition.

9. Per contra, the senior counsel for the petitioner in support of the proposition:

(A) that State cannot arbitrarily retain money without authority of law and the Court has inherent power to prevent unjust enrichment and grant restitution, referred to ***Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. State of Bihar*** (1996) 6 SCC 86, ***Indian Council for Enviro-Legal Action Vs. Union of India*** (2011) 8 SCC 161, ***Kavita Tehran Vs. Balsara Hygiene Products Ltd.*** (1994) 5 SCC 380, ***South***

Eastern Coal Fields Ltd. Vs. State of M.P. (2003) 8 SCC 648 and ***State of Gujarat Vs Essar Oil Limited*** (2012) 3 SCC 522;

(B) that Government cannot renege on its promises or obligations and can be directed to comply with its promise, relied upon ***Gujarat State Financial Corporation Vs. M/s. Lotus Hotels Pvt. Ltd.*** (1983) 3 SCC 379; ***Century Spinning & Manufacturing Company Ltd. Vs. Ulhasnagar Municipal Council*** (1970) 1 SCC 582 and ***All India Employees' State Insurance Corporation Employees' Federation Vs. Employees' State Insurance Corporation*** (2011) 14 SCC 599;

(C) that Contractual matters are no bar to a writ petition; a writ petition for refund of money is maintainable; alternative remedy is no bar to a writ petition; disputed facts also are not a bar to a writ petition and principles of *res judicata* will apply to arbitration proceedings subsequent to an earlier determination of the issues, relied upon ***Union of India Vs. Tania Construction Private Limited*** (2011) 5 SCC 697, ***International Data Processing Company Pvt. Ltd. Vs. Municipal Corporation of Delhi*** 96 (2002) DLT 13, ***ABL International Ltd. Vs. Export Credit Guarantee Corporation of***

India Ltd. (2004) 3 SCC 553, judgment dated 2nd July, 2013 in W.P.(C) No.2673/2011 titled *Piramal Healthcare Limited Vs. Union of India, Godawari Sugar Mills Ltd. Vs. State of Maharashtra* supra and *Whirlpool Corporation Vs. Registrar of Trademarks, Mumbai* (1998) 8 SCC 1.

10. I have perused the documents filed with the writ petition and find:

(I) The respondent to have vide order dated 27th September, 2001 made the following reference to arbitration:

“1. WHEREAS a dispute has arisen between M/s. Bharti Mobile Limited (earlier name J.T. Mobiles Ltd., Licensee and the Licensor i.e. Department of Telecommunications, Ministry of Communications, Government of India with regard to payability of licence fee dues for 18.04.1996 to 10.03.1998 including interest relating to Licence Agreements No.842-65(A)-VAS dated 26.12.1995

2. AND WHEREAS a decision is taken that the dispute be referred to the Sole Arbitrator for determination and adjudication.

3. AND WHEREAS the Condition No.16 Schedule ‘B’ Part III of the Licence Agreement dated 26.12.1995 has provided that any dispute or difference under the said licence shall be referred to sole arbitration of Director General Telecom or the person appointed by him.

4. *NOW THEREFORE under the powers conferred under Condition No.16 referred to above, I, Shyamal Ghosh, Director General, Telecom do hereby nominate and appoint Mr. Justice M. Jagannatha Rao, as a Sole Arbitrator for adjudication and determination of the said dispute.*

5. *The term of reference for the Arbitrator shall be to determine the dispute as below:*

“Whether the licence fee for the period 18.04.1996 to 10.03.1998 including interest on that sum is payable by the company on the basis of the facts and circumstances pleaded by both the parties”.

.....

8. *This reference shall be governed by the Arbitration and Conciliation Act, 1996.”*

(II) The petitioner, as claimant before the Arbitral Tribunal, to have made the following claims:

- “(a) that the amount of licence fee and interest thereon paid by the Claimant to the Respondent in respect of the Black Out Period of April 18, 1996 to March 10, 1998 be refunded to the Claimant;*
- (b) that in any event the penal and other interest charged by the Respondent and duly paid by the Claimant in respect of the licence fee for the Black Out Period of April 18, 1996 to March, 10, 1998 be refunded to the Claimant;*
- (c) that the Claimant is entitled to pendent lite and future interest at the prevalent SBI prime lending rate plus 5% per annum (compounded monthly) on the amount found and ordered to be refunded in*

terms of prayers (a) and/or (b) above till the date of such refund.”

(III) The Arbitral Tribunal to have framed as many as 15 issues and of which Issues No.9, 11, 12 and 15 were as under:

“(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?”

(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?

(15) To what Relief?”

(IV) The Arbitral Tribunal to have in the arbitral award dated 20th December, 2002, with respect to Issues No.9, 11, 12 and 15 awarded as under:

“On Issue 9, I therefore, hold that there is no question of EGTL having become incapable of operating the licence as it was not permitted to run the licence at any stage earlier and that therefore, there is no question of refunding the licence fee for the 693 days or part

thereof on that ground. I decide the issue 9 in favour of the respondent and against the claimant.

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Issues 11 to 13

The question is broadly in regard to the liability of the claimant to pay the licence fee and interest for the period 18.4.96 to 10.3.98. This is divided into various sub-issues under issues 11 to 13.

Under issue 11, question is about liability to pay *licence fee* for the whole period 18.4.96 to 10.3.98.

Under issue 12, liability to pay *interest* for the same period (ground J and M in claim).

.....

I, accordingly, hold on issue 11 and 12 that the claimant was liable to pay the licence fee for the entire period from 18.4.96 to 10.3.98. (As to whether because the Department shifted the effective date from 12.12.95 to 11.6.96 and agreed that no licence fee is payable for that period and the question whether on that ground, interest was not liable to be paid, - need not be decided by me, in view of my order dated 21.1.2002).

.....

I decide issues 11 and 12 against the claimant and in favour of the Respondent. (subject to the reservation as to the non payability of the interest for 52 days from 18.4.96 to 11.6.97, in case the Telecom Dispute Settlement and Appellate Tribunal, or on further appeal, it is decided that since the licence fee was not payable for the 52 days, interest is not payable).

Issue 15:

In the light of my finding on issues 1 to 14, I hold that the claim for refund of the amount of Licence fee and interest paid by claimant to the Department is liable to be dismissed, (subject one reservation stated below). Neither on facts, nor in law nor in equity are there any grounds to direct refund of Licence fee and interest which had been deposited. This is, however, subject to my finding on issue 12 and the reservation mentioned there, namely, that, for the period of 52 days from 18.4.96 to 11.6.97, for reason (b) referred to therein, (i.e. that interest is not payable for this period because Licence fee was admittedly not liable to be paid because of postponement of effective date) if the Telecom dispute Settlement and Appellate Tribunal or in any further appeal/further proceedings, the claimant is finally held not liable to pay the interest for these 52 days, the Department shall refund the same. It will be for that authority which will finally decide that question to decide whether claimant is also entitled to any interest on that sum from the Department.”

(V) This Court in judgment dated 14th September, 2012 in OMP No.77/2003 to have *inter alia* observed / held as under:

“39.....

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.

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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

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*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.

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56.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.

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59.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.

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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

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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.....

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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.....”

(VI) The respondent along with FAO(OS) No.87/2013 filed CM No.2445/2013 for stay and which was vide order dated 16th July, 2013 dismissed as under:

“CM 2445/13 (stay)

Having regard to the circumstances, the rival contentions and also award made in this case, the Court is of the opinion that the request for stay of operation of the impugned order is not warranted.”

11. What emerges from the aforesaid is:

- (a) that claim for adjudication in the arbitration between the parties was of the entitlement of the petitioner to refund of the amounts aforesaid deposited with the respondent UOI towards licence fee for the period 18th April, 1996 to 10th March, 1998, with interest;
- (b) that the Arbitral Tribunal disallowed the aforesaid claim of the petitioner;
- (c) that the petitioner preferred OMP No.77/2003 under Section 34 of the Arbitration Act with respect to the aforesaid arbitral award and by way of amendment of the said OMP No.77/2003 wanted to take the ground of the arbitral award not granting its claim being also bad

for the reason of the dispute which had been referred to arbitration being required to be decided by the TDSAT and not by way of arbitration but was not allowed to take the said ground after the time for applying under Section 34 of the Arbitration Act had lapsed;

(d) that however this Court in judgment dated 14th September, 2012 in OMP No.77/2003, even otherwise considered whether the arbitral award was liable to be set aside on the ground of the disputes subject matter of arbitration being not arbitrable but found the arbitral award to be not bad on this count;

(e) that however this Court vide judgment dated 14th September, 2012 in OMP No.77/2003 otherwise set aside the arbitral award on merits;

(f) that though the petitioner as a consequence thereof sought a direction in judgment dated 14th September, 2012 in OMP No.77/2003 for refund of the amount (as was claimed in arbitral proceedings) but the same was not granted for the reason of being beyond the competence of the Court exercising jurisdiction under Section 34 of the Arbitration Act;

(g) that though the respondent in FAO(OS) No.87/2013 preferred against the judgment aforesaid sought stay of operation of the judgment dated 14th September, 2012 but the same has not been granted.

12. The questions which according to me arise for adjudication and on which outcome of this petition depends are:

- (I) Whether there has been adjudication in the arbitral award dated 20th December, 2002 and in the judgment dated 14th September, 2012 in OMP No.77/2003 preferred thereagainst on the claim of the petitioner for refund of the licence fee for the period from 18th April, 1996 to 10th March, 1998 and what is the effect thereof;
- (II) What is the effect of the pendency of FAO(OS) No.87/2013 against the judgment dated 14th September, 2012 and of the dismissal of the application for interim stay filed therein;
- (III) If the above two questions were to be answered in favour of the petitioners, whether in exercise of jurisdiction under Article 226 of the Constitution of India the respondent can be directed to

refund the licence fee for the period from 18th April, 1996 to 10th March, 1998 to the petitioner.

13. Having bestowed consideration, I am of the opinion that the respondent, after receiving payment of Rs.399.92 crores towards licence fee for the period 18th April, 1996 to 10th March, 1998 from the petitioner and which the petitioner was disputing, having referred the said dispute to arbitration in accordance with the Arbitration Agreement in the licence, cannot now urge that there has been no determination / adjudication in the arbitration proceedings of the said entitlement of the petitioner to refund of the said amount.

14. I also entertain no doubt that the arbitral award unequivocally finds the petitioner not entitled to refund of the licence fee paid.

15. However, the judgment dated 14th September, 2012 in OMP No.77/2003 though setting aside the aforesaid arbitral award, does not at the same time hold the petitioner entitled to refund of the licence fee paid for the period from 18th April, 1996 to 10th March, 1998. Though the arbitral award has been set aside, not on any technicalities but “on merits”, but giving the ground of setting aside, of being against the public policy of India and not

the ground of erroneously finding the petitioner to be not entitled to refund when the petitioner in fact was entitled to refund.

16. I have wondered whether the setting aside under Section 34 of the Arbitration Act of the arbitral award (not finding petitioner entitled to refund of licensee fee) amounts to, the petitioner being entitled to refund of the licence fee for the period from 18th April, 1996 to 10th March, 1998.

17. In my view, once the parties go to arbitration on a question whether one party is entitled to the monies claimed from the other or not and the arbitral award not finding that party to be entitled to the monies claimed is set aside in exercise of powers under Section 34 of the Arbitration Act, the order of the Court has but to be read as finding the claimant party to be entitled to the monies claimed unless the arbitral award has been set aside on technical grounds as enumerated in Section 34(2)(a) or Section 34(2)(b)(i) of the Arbitration Act. To give any other meaning to the order of the Court in exercise of power under Section 34 of the Act would severely undermine / prejudice efficacy of arbitration and would lead to arbitration ceasing to be an alternative dispute resolution mechanism.

18. It cannot be lost sight of that the Court, in exercise of power under Section 34 of the Arbitration Act, has not been empowered to set aside an

arbitral award on merits of the claim. The only ground besides the technical grounds enumerated in Section 34(2)(a) or Section 34(2)(b)(i) on which the Court has been empowered to set aside an arbitral award, is the ground of the arbitral award being in conflict with the public policy of India. The expression “public policy of India” has been held to mean fundamental policy of Indian law, justice and morality. Once the Court in exercise of power under Section 34 of the Arbitration Act has set aside an arbitral award rejecting a monetary claim, on the ground of the same being against the public policy of India, as the arbitral award in the present case has been set aside, the necessary corollary and inference, in my opinion is that the Court finds the award rejecting the monetary claim to be contrary to law and resultantly finds the monetary claim to have been proved/established. If it were to be held otherwise, and it were to be held that the order of the Court means nothing more than setting aside the arbitral award (rejecting the monetary claim), it would leave the claimant who applied under Section 34 and succeeded therein, inspite thereof, being left high and dry and without a relief. A litigant litigates not for academic purposes or to score a moral victory but to secure the relief claimed and benefit therefrom. If such a litigant who has secured setting aside “on merits” of the arbitral award

(rejecting his monetary claim) is told that he has to start another litigation either by way of suit or arbitration to secure his monetary claim, people will hesitate from incorporating arbitration clause in the agreements and / or from agreeing to arbitration for the fear of not getting effective relief at the end of the proceedings under the Arbitration Act. Further, it may then be an unending exercise. Even if such a litigant were to again commence arbitration (since the arbitration clause in the agreement/contract will continue to bind and suit would not be maintainable) and in that arbitration succeeds or fails but Section 34 application is again preferred with respect to the award and award again set aside, would such litigant then be required to commence another round, and so on. After all, in the present state of law with respect to Arbitration Act, particularly Section 34 thereof, it is possible that the arbitral tribunal (which is not bound by rules of Code of Civil Procedure, 1908) decides the claim before it on any one reason and the Court finding that reason to be contrary to public policy of India sets aside the award; when the parties again go to arbitration, the arbitral tribunal may again decide, even if for a different reason but the said award will again be subject to scrutiny under Section 34 of the Act. This way, the *lis* will never attain finality.

19. It is for this reason that I say, that the order/judgment dated 14th September, 2012 of this Court setting aside “on merits” the arbitral award dated 20th December, 2002 (rejecting the monetary claim of the petitioner) has to be read as finding the petitioner entitled to the said monetary claim and the said question having attained finality subject of course to outcome of FAO(OS) No.87/2013 and does not require any further adjudication in any other proceeding.

20. However, having said, that I must mention that a Division Bench of this Court recently in *Steel Authority of India Vs. Indian Council of Arbitration* MANU/DE/0745/2016 was concerned with the challenge by way of writ petition to the appointment of an Arbitrator, after the earlier arbitral award between the parties was set aside and on the ground that what had already been the subject matter of arbitration could not again be the subject matter of arbitration. The challenge was dismissed holding that once the arbitral award was set aside, the dispute between the parties stood revived and such a course did not amount to repeated / multiple arbitrations. Reference, to reach this conclusion was made to *Mcdermott International Inc Vs. Burn Standard Co. Ltd.* (2006) 11 SCC 181 observing that in the event of arbitral award being set aside by the Court under Section 34, the

parties can again invoke arbitration clause on the basis of the same cause of action and to Section 43(4) of the Arbitration Act providing that “where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceeding (including arbitration) with respect to the dispute so submitted”.

21. Another Division Bench of this Court in *Nussli Switzerland Vs. Organizing Committee, Commonwealth Games* MANU/DE/2301/2014, also relying on Section 43(4) of the Arbitration Act held that a party which has its claim rejected, even if succeeds in the objections to the award, would at best have the award set aside and the Court has to leave the matter at that leaving it open to the party concerned to commence fresh proceedings including arbitration.

22. Though I am bound by the dicta aforesaid of the Division Benches of this Court but respectfully add that sub-section (4) of Section 43 titled “Limitations” ought not to be read as a substantive provision governing the rights of a party to the arbitration and Section 34 proceedings arising therefrom and requiring them to re-arbitrate. The law/provision relating to

limitation has to be read, in my humble opinion, merely as laying down the limitation for commencing an action where under the substantive law there is a right or need to commence such an action and cannot be read as creating a right or requirement to commence an action or as prescribing the procedure to be followed i.e. of re-commencing litigation, whether by way of suit or arbitration when an arbitral award is set aside or as laying down the law as to the meaning and consequence of an order under Section 34 of setting aside of the arbitral award. That however still begs the question, why was Section 43(4) at all incorporated if the order of the Court in exercise of power under Section 34 of setting aside of an arbitral award were to mean and read as converse to what the Arbitral Tribunal had found. In my opinion, Section 43(4) was included in the Act to provide for the contingency of the arbitral award, under Section 34 being set aside on technical grounds enumerated in Section 34(2)(a) and Section 34(2)(b)(i) and without the court dealing with or pronouncing on the merits of the claim adjudicated by the Arbitral Tribunal. It is for this reason that Section 43(4) excludes the time mentioned therein in computation of limitation “for the commencement of the proceedings (including arbitration) with respect to the dispute” and not “for the commencement of arbitration.” If the arbitral

award were to be set aside on the ground under Section 34(2)(a)(ii) or (iv) or Section 34(2)(b)(i), of the arbitration agreement being not valid or the arbitral award being with respect to a dispute not falling within the terms of submission to arbitration or the subject matter of the dispute being not capable of settlement by arbitration, the question of commencing another arbitration proceedings on the basis of same arbitration agreement would not arise and the aggrieved party will have to commence proceedings, say by way of a suit. However if the setting aside of the arbitral award under Section 34 is on the grounds enumerated in Clauses (i), (iii), (v) of Sub-Section (2)(a) thereof i.e. of the party to arbitration proceedings, being under some incapacity or having not been given proper notice of appointment of arbitral tribunal or of arbitral proceeding or of the composition of arbitral tribunal or the procedure adopted by arbitral tribunal being contrary to the agreement, the aggrieved party will have to commence fresh arbitration proceeding. However Section 43(4) cannot be read as requiring commencement of fresh proceeding even where arbitral award is set aside under Section 34(2)(b)(ii) i.e. on the ground of being in conflict with public policy of India i.e. of finding the award refusing or granting relief being contrary to law, if otherwise not required under the law. As aforesaid, a

provision in a statute with respect to limitation cannot be read as creating or extinguishing (save on ground of limitation) rights or requiring a thing to be done if not otherwise in law required to be done.

23. The Arbitration Act only amends the law relating to arbitration which as aforesaid is a dispute resolution mechanism alternative to the Courts. It is not a substantive law governing the rights of the parties. Per Section 28(a) thereof, the disputes submitted to arbitration are to be decided in accordance with the substantive law for the time being in force in India. I have already hereinabove observed that the expression “public policy of India” in Section 34(2)(b)(ii) has also been held to *inter alia* mean fundamental policy of Indian law. Thus if the award is in conflict with public policy of India i.e. fundamental policy of Indian law, it constitutes a ground for setting aside thereof, again meaning that the award has to be in accordance with fundamental policy of Indian law. The rules i) of issue estoppel; ii) of *res judicata* and constructive *res judicata*; and, iii) prohibiting re-litigation, if I may respectfully say, constitute fundamental policy of Indian law and are not merely procedural rules. In accordance therewith, a claim which has been subject matter of arbitration and the arbitral award resulting wherefrom has been subjected to scrutiny of Court under Section 34 of the Arbitration

Act, cannot again be the subject matter of arbitration or suit or other legal proceeding unless the arbitral award has been set aside on technical grounds as aforesaid. In my view the said fundamental policy of Indian law has not been affected or was intended to be affected by the Arbitration Act. Applying the said principles to the facts of the present case it has but to be held that the judgment / order dated 14th September, 2012 of this Court has to be held to be finding the petitioner entitled to refund and which refund can be ordered in writ jurisdiction subject of course to outcome of FAO(OS) No.87/2013 and cannot be now subject matter of fresh arbitration or suit.

24. As far as reliance placed by the Division Benches of this Court on *Mcdermott International Inc.* supra is concerned, though I am of the view that *Mcdermott International Inc.* cannot be said to be as precedent on the proposition, the question having not arisen therein for consideration, but my view, though canvassed by the counsel for the petitioner in *Steel Authority of India* supra, did not find favour with the Division Bench.

25. I am further of the opinion as aforesaid, and strongly feel, that to so leave a party, whose claim has been rejected by the Arbitral Tribunal and who succeeds in having the arbitral award set aside “on merits” in a petition under Section 34 of the Arbitration Act, in a lurch would make a mockery of

arbitration, defeating the very purpose thereof as an alternative dispute resolution process and make the same lengthy and costly. Supreme Court recently in *Lal Shah Baba Dargah Trust Vs. Magnum Developers* 2015 SCC Online SC 1319 reiterated *Mangin Vs. IRC* (1971) 1 ALL ER 179 (PC) laying down that the object of construction of statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. Similarly, in *Jogendra Yadav Vs. State of Bihar* (2015) 9 SCC 244 it has been reiterated that rule of purposive interpretation requires construction of a statute in such a manner so as to see that the object of the statute is fulfilled which in turn will lead the beneficiary under the statutory scheme to fulfill its constitutional obligation. I am however bound by the judgments earlier mentioned of the Division Bench and have no option but to follow the same.

26. I thus answer the first of the aforesaid questions by holding that there has been adjudication in the arbitral award dated 20th December, 2002 and in the judgment dated 14th September, 2012 in OMP No.77/2003 on the claim of the petitioner for refund of licence fee but the effect of the judgment dated 14th September, 2012 in OMP No.77/2003 is not of the petitioners being

entitled to the refund of the licence fee for the period from 18th April, 1996 to 18th March, 1998, howsoever strange the said result may sound.

27. Though the petition is liable to be dismissed for the aforesaid reason alone but for the sake of completeness, the other questions framed above may also be answered.

28. The pendency of FAO(OS) No.87/2013 against the judgment dated 14th September, 2012 in OMP No.77/2003 in my view does not act as automatic stay of the judgment appealed, specially after the application for interim stay therein has been dismissed.

29. Reference in this regard may also be made to ***Decore India Pvt. Ltd. Vs. National Building Construction Corporation Ltd.*** 142 (2007) DLT 21 where a Division Bench of this Court held that if the execution of the decree followed by award is to be delayed by treating the pendency of appeal as automatic stay then the new legislation i.e. Arbitration Act, instead of being an efficient and speedy remedy would be reduced to a remedy worse than what we already had that is civil suits and the deep routed procedural delays till passing of the decree and even thereafter.

30. As far as the third question framed above is concerned, if the question No.(I) aforesaid were to be answered in favour of the petitioners then

according to me, the respondent could not have been permitted to retain the monies which would have been due from it by taking technical pleas. I have in ***DLF Limited Vs. Punjab National Bank*** 180 (2011) DLT 435 dealt in detail on the aspect of the State being required to be a model litigant, not expected to take technical pleas encouraging litigation. Supreme Court subsequently also in ***Punjab State Power Corporation Ltd. Vs. Atma Singh Grewal*** MANU/SC/1393/2013 has deprecated the dependency on the part of the government and the Public Sector Undertakings to file frivolous appeals and expressed its anguish thereon and reminded the government its policy to be a responsible litigation. Reference in this regard can also be made to ***Special Land Acquisition Officer Vs. Karigowda*** (2010) 5 SCC 708, ***Urban Improvement Trust, Bikaner Vs. Mohan Lal*** (2010) 1 SCC 512, ***Vithalbhai Pvt. Ltd. Vs. Union Bank of India*** (2005) 4 SCC 315 and ***Virender Sharma Vs. Director Enforcement Directorate*** MANU/DE/0546/2012 (DB).

31. Else, the other contentions of the respondent, of the writ petition being not maintainable in a contractual matter or for enforcing monetary claim, are not found to have any merit therein. The said principles are not an absolute bar to the maintainability of a writ petition and if the answer to the question No.(I) above had been in favour of the petitioners, the conduct of the

respondent would have been utterly unreasonable and arbitrary and a writ would have followed, directing the respondent to refund the monies.

32. The petition thus fails and is dismissed; however no costs.

RAJIV SAHAI ENDLAW, J.

MAY 11, 2016

‘gsr/bs’..

