

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.05.2017

+ **O.M.P. (COMM) 90/2017**

DEPARTMENT OF TELECOMMUNICATIONS Petitioner

versus

TATA TELESERVICES LIMITED Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Praveen Kumar Jain and Mr Naveen

Kumar Jain, Advocates with Ms Divya
A.B. (Deputy Administrator of the petitioner).

For the Respondent : Mr P. Chidambaram and Mr A.S. Chandhiok,
Senior Advocates with Mr Mansoor Ali Shoket,
Mr Kunal Singh and Ms Alvia Ahmed,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Department of Telecommunications (hereafter 'DoT') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* seeking to set aside the preliminary award dated 13.10.2016 (hereafter 'the impugned award') made by the arbitral tribunal constituted by the sole arbitrator, Justice Deepak Verma (Retd.), Former Judge, Supreme Court of India.

2. By the impugned award, the arbitral tribunal determined that it possesses the jurisdiction to decide certain issues referred to it as

preliminary issues. It also directed that Circulars dated 13.10.2010 and 06.07.2011 (hereafter collectively referred to as ‘the Circulars’) were not binding upon the respondent, Tata Teleservices Ltd.

3. DoT is a department under the Ministry of Communications, Government of India (hereafter ‘GoI’) and is *inter alia* responsible for formulating developmental policies for the accelerated growth of telecommunication services in India. It is also responsible for grant of licences related to various telecom services including Unified Access Service Internet and VSAT service. Tata Teleservices Ltd. (hereafter ‘TTL’), a part of the Tata Group of Companies, is a public company operating in the telecom sector.

4. In the year 1999, GoI formulated the ‘New Telecom Policy’ (hereafter ‘NTP’) to provide access to basic telecom services to all at reasonable prices. Pursuant thereto, the Universal Service Support Policy (hereafter ‘USSP’) was framed, which envisaged providing basic telecom services in the rural and remote areas at affordable prices. In furtherance of the objective, the Universal Service Obligation Fund (hereafter ‘USOF’) was established under the Indian Telegraph (Amendment) Act, 2003, with effect from 01.04.2002 to provide financial support/ subsidy to enable access to all types of telecom services including mobile and broadband connectivity and for infrastructure creation in rural and remote areas.

5. GoI invited bids for installation of ‘*Direct Exchange Lines in Rural Areas*’ (hereafter ‘RDELs’). To support this initiative, the successful bidders, known as ‘Universal Service Providers’ (hereafter ‘USPs’) were to receive subsidy through the USOF. Selection of USPs for subsidy disbursement towards provision of RDELs in specified Short Distance

Charging Areas (hereafter ‘SDCAs’) was on a reverse auction basis, that is, bidding on least quoted subsidy support by a USP.

6. Out of the three USPs selected, TTL’s bid was accepted across eight different service areas namely Bihar, Haryana, Karnataka, MP, Punjab, Rajasthan, UP (East) and UP (West). Eight different agreements for the different service areas covering 172 SDCAs were signed between the parties.

7. On 24.03.2005, parties entered into the ‘*Agreement for Subsidy Disbursement Towards Provision of Rural Household Direct Exchange Lines (RDELs) in Specified Short Distance Charging Areas (SDCAs)*’ (hereafter ‘the Agreement’) for Bihar, valid for five years from 01.04.2005. Clause 4, Part I given under Schedule II to the Agreement enabled the USP to request for extension of time, if required.

8. On TTL’s request, period of installation of RDELs was extended thrice upto 31.03.2010. The provision of subsidy was also extended upto 31.03.2010 from the initial period of 01.04.2005 to 31.03.2007. For the installation of RDELs in Bihar, subsidy was payable as follows:-

“a. Initial Period between 01.04.2005 to 31.03.2007:

- i FLS - SDCA wise, which varied from Rs. 6,984/- to Rs. 4,984 per RDEL.
- ii EAS - SDCA wise, which varied from Rs. 2,250 to Rs. 0 per RDEL per annum.

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- 1. Subsidy support provided on revised representative rates being:

- a. Front Loaded Subsidy - Rs. 1627/- per RDEL; and
- b. Equated Annual Subsidy - Rs. 200/- per RDEL per annum."

9. It is the case of DoT that a number of references were received by it regarding serious discrepancies pertaining to RDELs installed under an Agreement, therefore, DoT - after six months of the expiry of the term of the Agreement - issued a Circular dated 13.10.2010 to all Sr. CCA/CCA/Jt. CCA as also the three USPs for special verification of RDELs installed in the last quarter of 2009-2010 under the RDEL scheme.

10. The special verification carried out by CCA, Bihar, indicated that the percentage of eligible RDELs of TTL was only 3.58%. It is stated that as the percentage of eligible RDELs was below 80%, the results of the verification were extrapolated in terms of the Circular dated 06.07.2011 for all the quarterly claims for the extended period of the Agreement, that is, from Quarter ending (QE) 30.06.2007 to QE 31.03.2010. By a letter dated 08.09.2011, Jt. CCA, Bihar informed TTL that only 2.13% RDELs qualified for subsidy. Thereafter, demand note dated 12.09.2011 was issued to TTL to deposit the amount recoverable, that is, the disallowed amount against the subsidy amount disbursed earlier, by the approval of CCA, Bihar. This was followed by various reminders. Notice dated 18.07.2012 was also issued from USOF headquarter to deposit the recoverable amount by 27.07.2012 to avoid invocation of the performance bank guarantee.

11. On receipt of the aforesaid notice, by a letter dated 25.07.2012, TTL invoked the arbitration clause. TTL also filed a petition under Section 9 of the Act to stay the effect and operation of the demand notices issued to it

and to restrain DoT from invoking the bank guarantee furnished by it. This court, by an order dated 27.07.2012 stayed the invocation of the bank guarantee. The petition under Section 9 was disposed of on 22.11.2012.

12. Before the arbitral tribunal, DoT filed its statement of claims for ₹27,74,53,532/- along with interest and costs. TTL also filed its counterclaims for an amount of ₹84.12 lacs along with interest and costs. On the basis of the pleadings, the arbitral tribunal framed eight issues, which are set out below:

- “1. Whether Claimant, under the provision of the Agreement between parties, has rightly conducted Special Verification of the RDELs provided by Respondent in the areas defined under the Agreement, even after disbursement of subsidy claimed?
2. Whether the Circulars dated 13-10-2010 and 06-07-2011 are in terms of the Agreement entered into between the parties?
3. If so, whether they are binding on the Respondent as the same have been issued after the expiry of the Agreement, and could they be given retrospective effect?
4. Whether Claimant on the verification of last quarter ending 31-03-2010, could have sought refund for the entire period?
5. Whether Claimant has rightly issued Demand Notices for recovery of subsidy amounts already disbursed to the Respondent due to non-performance of the Agreement by the Respondent?
6. Whether Claimant is entitled for the Relief(s) as prayed for against the Respondent?

7. Whether Respondent is entitled for any Counter Claim, with Interest?

8. Reliefs and Cost to both the parties?”

13. TTL requested that issue nos. 2 and 3 (as quoted above) be treated as preliminary issues, being pure questions of law. TTL submitted that there was no provision in the Agreement which permitted special verification to be conducted or extrapolation of results and that too after the period of the Agreement had expired. According to TTL, the Circulars could not be applied retrospectively and only the provisions of the Agreement were to be considered for releasing the funds. Once subsidy has been disbursed in terms of the Agreement, no refund can be sought except for the limited purpose of adjustment and that too not later than one year after the disbursement of subsidy. It was stated that Sub-clause 18.13 of Schedule II to the Agreement only provided for modification/ alteration for verification of the claim statement and documents provided and not for any other verification including physical / special verification.

14. Countering the same, DoT asserted that issue nos. 2 and 3 are central to its claims and could be decided only after a proper trial. It claimed that the question regarding accuracy of the Special Verification Report was a question of fact and thus its correctness can only be ascertained by way of trial and not by taking up the relevant issues as preliminary ones. DoT submitted that verification, post-release of the subsidy amount as well as extrapolation of the results was in consonance with Sub-clauses 18.9, 18.12, 18.13 and Clause 22 of Schedule II to the Agreement, making recovery upon actual verification permissible. DoT further contended that legality of the Circulars could not be questioned as they were issued as per

the relevant provisions of the Indian Telegraph Act, 1885 (hereafter ‘the Telegraph Act’) and the Indian Telegraph Rules, 1951, (hereafter ‘the Telegraph Rules’) and also under the relevant clauses of the Agreement.

15. The arbitral tribunal accepted TTL’s request to consider issue nos. 2 and 3 as preliminary issues as it was of the view that the decision in both the aforesaid issues was based entirely on the interpretation of the provisions of the Telegraph Act, the Telegraph Rules and the Agreement between the parties, which did not necessitate any factual enquiry.

16. Thereafter, the arbitral tribunal noted that Part IV of the Agreement provides for Financial Conditions, wherein Clause 17 of Schedule II to the Agreement speaks of subsidy from USOF and Clause 18 of Schedule II prescribes the schedule for disbursement of subsidy by the Administrator to the USP. It considered Rule 527 of the Telegraph Rules which provides that funds shall be released to the USP in a manner and at such intervals as may be specified in the Agreement. The arbitral tribunal held that Rule 527 of the Telegraph Rules made it evident that the procedure for releasing funds was to be governed by the Agreement between the parties.

17. After examining Rule 524(iv) of the Telegraph Rules, which provided for settlement of claims by the Administrator after due verification, the arbitral tribunal held that neither post-facto verification of the claims after disbursement of subsidy nor extrapolation of the results of such verification was permissible in terms of Rule 524. In the light of the above, the arbitral tribunal held that prescribing new methods for allocating/disbursement of funds by issuing circulars in that regard is in contravention of Rule 527 and thus, extrapolation which was not a part of

the Agreement between the parties, is not in consonance with Rules 527 and 524(iv).

18. In addition, it was noted that Clause 22 of Schedule II to the Agreement provided the right to the Administrator to conduct enquiries, however, the same did not confer a power to issue circulars after the expiry of the Agreement. Similarly, it was held that Clause 18 of Schedule II to the Agreement only provided for verification of the claim statement and the documents provided for subsidy claim.

19. As the arbitral tribunal concluded that only the terms of the Agreement could be referred to for release of funds, the Circulars were held to have no effect in law and not binding on TTL.

20. In view of the above, issue of retrospective application of the Circulars - issue no. 3 - also did not survive.

Submissions

21. Mr Jain, learned counsel appearing for DoT contended that the arbitral tribunal had grossly erred in treating issue nos. 2 and 3 as preliminary issues. He referred to Order XIV of the Code of Civil Procedure, 1908 (hereafter 'the CPC') and submitted that only those issues that relate to (a) the jurisdiction of the Court or (b) a bar to the suit created by any law for the time being in force, can be considered as preliminary issues. He submitted that the issues in question neither related to the jurisdiction of the arbitral tribunal nor were related to any bar to the proceedings. He further submitted that DoT ought to have been given a chance to lead evidence before the said issues were taken up for decision.

22. Mr Jain also contended that the arbitral tribunal had grossly erred in proceeding on the basis that the Agreement between the parties had expired

and, therefore, no instructions for verification of RDELs could be issued. He referred to the decision of the Supreme Court in ***National Insurance Company Limited v. Boghara Polyfab Private Limited: (2009) 1 SCC 267*** and submitted that the contract can only be discharged by performance or termination. He submitted that in the present case, the obligation related to performance by TTL continued and, therefore, the Agreement was subsisting and valid. He further contended that even after the expiry of the term of the Agreement, TTL was obliged to maintain the RDELs in terms of Clause 4 of Schedule II to the Agreement and, therefore, the Administrator had the right to issue instructions regarding verification of the subsidy claims. He also referred to Sub-clauses 18.12, 18.13 and 22.2 of Schedule II to the Agreement in support of his contention that the Administrator would have the right to alter any of the conditions of the Agreement relating to verification and, thus, it was within his powers to issue the Circulars.

23. Mr Jain contended, rather emphatically, that the impugned award is opposed to public policy. He submitted that the object of the RDEL scheme was to ensure basic telephonic service in rural areas and subsidy was provided for the specific purpose of expanding telephonic services. However, it was apparent that TTL had claimed excess subsidy and this was opposed to public policy. He earnestly contended that the impugned award was adverse to public interest and, therefore, contrary to public policy.

24. Mr Jain also contended that the nomenclature of circulars given to the letters dated 13.10.2010 and 06.07.2011 (the Circulars) is also misleading. He submitted that the Circulars were merely instructions issued

to the staff and officers of DoT to carry out verification of RDELs and to process the claims for subsidy in a particular manner. The Circulars were merely letters and the Administrator could not be faulted for issuing the same as it was within his right to issue such instructions to the officers and staff of DoT.

25. Mr P. Chidambaram and Mr A.S. Chandhiok, learned Senior Advocates appearing for TTL, supported the impugned award and submitted that there was no patently illegality or error in the impugned award that would warrant any interference by this Court.

Reasoning and Conclusion

26. At the outset, it is necessary to refer to the contents of the Circulars dated 13.10.2010 and 06.07.2011. Circular dated 13.10.2010 provides for the procedure for a special verification of RDELs for the QE 31.03.2010 for the purpose of determining the subsidy payable. The said circular indicates that a number of references had been received regarding discrepancies pertaining to RDELs installed under an Agreement, particularly during the fourth quarter of 2009-10 and, therefore, it was decided that a sampling procedure be adopted to verify the same. The Circular included instructions, including the sampling technique, for RDEL verification, which were to be implemented by the officers and staff entrusted with the said task.

27. The second Circular dated 06.07.2011 sets out the procedure for settlement of claims. As per the said circular, the subsidy payable was to be determined on the basis of the sampling results of the special verification carried out for the QE 31.03.2010. The results of the special verification

were to be *‘extrapolated and applied to all the quarterly claims of RDELs for the extended period i.e. from QE 30.06.2007 to QE 31.03.2010’*, if the results were below 80%.

28. TTL did not accept the aforesaid method of special verification and is also aggrieved by the extrapolation of the sample results *‘for the extended period i.e. from QE 30.06.2007 to QE 31.03.2010’*.

29. The principal controversy involved in this case is whether the arbitral tribunal has grossly erred in holding that the said Circulars are not binding on TTL.

30. The contention that the impugned award is opposed to public interest and public policy is fundamentally flawed. Mr Jain had earnestly contended that the object of RDEL scheme was laudable and in public interest and the conduct of TTL in claiming excess subsidy without performing its obligation was opposed to public interest and, therefore, the impugned award was also opposed to public policy. This contention is premised on the basis that TTL had breached its obligations under the Agreement and the arbitral tribunal has countenanced such breach. Both the aforesaid assumptions are wrong. First of all, there is no finding of the arbitral tribunal to the effect that TTL has not breached the terms of the Agreement. It was always open for DoT to establish that TTL had not performed its obligations and had claimed excess subsidy, by leading evidence to that effect. The arbitral tribunal has only held that the Circulars are not binding on TTL as they have neither the force of law nor has TTL agreed to be contractually bound by the said Circulars. The assumption that TTL has breached its obligations under the Agreement is also pre-mature; TTL

disputes such assumption and no findings in this regard have been returned by the arbitral tribunal as yet.

31. Mr Jain's contention that the arbitral tribunal had grossly erred in deciding the issue nos. 2 and 3 as preliminary issues is also unmerited. The arbitral tribunal is not precluded from making an award in regard to certain issues prior to making a final award in regard to the remaining issues. The procedure/ the manner in which the arbitral proceedings are to be conducted is - subject to the agreement between the parties - at the discretion of the arbitral tribunal provided of course that the parties are given equal opportunity to represent their case. In the present case, the arbitral tribunal had concluded that the issue nos. 2 and 3 did not require determination of any facts, which required the parties to lead any evidence. The arbitral tribunal was of the view that the question whether the Circulars are binding on TTL could be adjudicated on the basis of the provisions of the Telegraph Act, the Telegraph Rules and the provisions of the Agreement.

32. Although, it was contended by Mr Jain that the issues in question also required leading of evidence, he has been unable to point out any factual question that was required to be determined in order to address the issues in question - issue nos. 2 and 3 as framed by the arbitral tribunal. Plainly, there is no controversy with regard to any fact that required adjudication in order to address the issue whether the Circulars in question would be binding on TTL. Thus, this Court finds no infirmity in the arbitral tribunal adjudicating issue nos. 2 and 3 and making a preliminary award prior to deciding other issues.

33. It is also relevant to refer to Section 2(1)(c) of the Act which specifically provides that *"arbitral award" includes an interim award*. Section 31(6) of the Act also expressly provides that *the arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award*. It is, therefore, apparent that an arbitral tribunal can make a preliminary award in respect of any part of the subject matter of disputes referred to it and such award would, for all intents and purposes, be an arbitral award within the meaning of the Act. Thus, there is no merit in the contention that the arbitral tribunal had erred in making the award on the two issues in question.

34. As stated earlier, the main controversy is whether the arbitral tribunal had erred in holding that the Circulars in question were not binding on TTL.

35. The arbitral tribunal had noted that the Telegraph Act was amended in 2003 (with effect from 01.04.2002) and Part IIA was inserted to provide the statutory framework for the constitution of the USOF. Further, clause (eea) was also inserted in sub-section (2) of Section 7 of the Telegraph Act to empower the Central Government to make rules for administration of the USOF. In exercise of such powers, the Telegraph Rules were amended to include Part X for administration of the USOF.

36. Clause (a) of Rule 523 of the Telegraph Rules defines "Administrator" to mean the Administrator of the Fund appointed by the Central Government and Clause (b) of Rule 523 defines "Agreement" to mean the agreement made between the Administrator and one and more of

the USPs for the purpose of implementation of the Universal Service Obligation.

37. Rule 524 of the Telegraph Rules provides for the powers of the Administrator and reads as under:-

“524. Administration of the Universal Service Obligation Fund. –The Administrator shall have powers to-

- i. formulate bidding procedures including its terms and conditions for the purposes of implementation of Universal Service Obligation;
- ii. evaluate the bids called for the purposes of implementation of Universal Service Obligation;
- iii. enter into Agreement with the Universal Service Provider for the purposes of implementation of Universal Service Obligation;
- iv. settle the claim of Universal Service Provider after due verification, and make disbursements accordingly from the Fund;
- v. specify relevant formats, procedure and records to be maintained and furnished by the Universal Service Provider;
- vi. monitor the performance of the Universal Service Provider as per the procedure specified by him from time to time.”

38. Rule 527 provides for the release of funds to USPs and is set out below:-

“Rule 527 Release of Funds to Universal Service Providers. - Fund shall be released to the Universal Service Provider in a manner and at such intervals as may be specified in the Agreement.”

39. The arbitral tribunal considered the aforesaid Rules and concluded that Rules 524 and 527 of the Telegraph Rules made it clear that the disbursement of subsidy to the USP was to be done as per the provisions of the Agreement, which was a part of the statutory scheme, in terms of Rule 527 of the Telegraph Rules. Thus, on a plain reading, the Agreement between the parties would determine the procedure for release of funds/subsidy. This conclusion is also not seriously disputed. On the contrary, it was contended that the Circulars were in terms of the Agreement between the parties.

40. In view of the above, the scope of controversy between the parties is narrowed down to whether the Circulars are in terms of the Agreement between the parties.

41. The term of the Agreement was five years as is plainly reflected under Clause 2 of the Agreement which reads as: *“This Agreement will remain valid for 5 (Five) years from the effective date unless revoked earlier for any reason whatsoever”*. Sub-clause 3.1 of Schedule II to the Agreement also provides that *“The Agreement shall be valid for a period of FIVE years from the effective date unless revoked earlier for reasons as specified elsewhere in the document”*. Thus, there is no denying the fact that the term of the Agreement was limited and had come to an end on 31.03.2010. Although, there may be certain rights and obligations that would survive the term of the Agreement, however, the contention that the Agreement was valid and subsisting beyond the specified term, is unpersuasive. The reliance placed by Mr Jain on the decision of the **Boghara Polyfab** (*supra*) is also misplaced. Clearly, an agreement which is of a specified term would expire with the efflux of time.

42. Mr Jain had relied on Sub-clause 4.1 of Schedule II to the Agreement to contend that the impugned award insofar as it records that the term of the Agreement had expired is erroneous. Sub-clause 4.1 of Schedule II reads as under:-

“4.1 The Administrator may extend, if deemed expedient in public interest, the validity of the Agreement for such period and on such terms as may be mutually agreed which shall be reviewed during the fifth year of the Agreement. The decision of the Administrator shall be final and binding in this regard on the USP. On expiry of the Agreement period, the responsibility of operation maintenance of the RDEL shall lie on the USP.”

43. It is apparent from the above that the Administrator could extend the Agreement. However, it is nobody's case that the Agreement had been extended beyond 31.03.2010. Extension of Agreement in terms of Sub-clause 4.1 of Schedule II to the Agreement would have other implications and possibly confer TTL the right to claim further subsidy from DoT for RDELs installed after 31.03.2010. The contention that TTL was obliged to maintain the RDELs after the expiry of the Agreement and, therefore, the term of the Agreement had not come to an end, is unmerited. The last sentence of Sub-clause 4.1 of Schedule II (as quoted above) only indicates that the obligation of TTL to maintain the RDELs would continue *on expiry of the Agreement*. This clause does not indicate that the term of the Agreement would span beyond the specified period as agreed.

44. Mr Jain had also referred to Sub-clause 18.13 of Schedule II to the Agreement to contend that the Administrator would have the right to amend the method of settling of the claims for subsidy at any time. Clause

18 provides for the schedule for disbursement of subsidy by the Administrator to the USP. Clause 18 of Schedule II is set out below:-

“18.0 Schedule for disbursement of Subsidy by the Administrator to the Universal Service Provider”

18.1 The Universal Service Provider shall be eligible to submit the claim for front loaded subsidy at the end of the quarter in which rural household DELs are installed and made functional. The equated annual subsidy, where payable shall be disbursed in four quarterly installments during each financial year, with each quarter ending on 30th of June, 30th of September, 31st of December and 31st of March. The claim for a part of the quarter will be computed with reference to the actual number of days in that quarter. Each installment shall be disbursed quarterly in arrears generally within 30 days of receipt of a valid claim for the RDELs maintained up to the close of previous quarter.

18.2 The Universal Service Provider shall submit their claim for quarterly Subsidy in a STATEMENT in the prescribed form given in Attachments to Annexure 1 showing the computation of Subsidy for the quarter, within 30 days of the end of the quarter. Claims received after this date shall be rejected unless under exceptional circumstances an extension up to 15 days is allowed by the Administrator. The STATEMENT along with Annexure I shall be furnished by USP even if the claim for a quarter is NIL.

18.3 The SDCA wise subsidy claim should be submitted as prescribed in hard copy in the formats of Attachments to Annexure 1 which should be duly signed by the Authorized signatory of the Company. In addition to the hard copy, the USP should also submit the claim on a CD ROM in MS EXCEL format for each Service Area. The Authorized Signatory of the Company should

put his signature and Seal of the Company on the CD ROM Disc.

18.4 The claim shall be duly certified with an Affidavit as per Annexure I by a representative of the Universal Service Provider duly authorized by a Board resolution of the Universal Service Provider. In preparation of the statement, the norms as per Attachments to Annexure I shall be followed.

18.5 The aforesaid quarterly STATEMENTS of each year shall be required to be audited by the Auditors of the Universal Service Provider appointed under Section 224 of the Companies' Act, 1956. The report of the Auditors should be in the prescribed form given in Annexure III to be filed with the Administrator or designated authority as specified within 7 (seven) calendar days of the date of signing of the Audit Report but not later than 30th September of the following year.

18.6 The RDEL that remain faulty for more than 7 days in a quarter, shall not be reckoned for the purpose of disbursement of full equated quarterly subsidy from USF and subsidy payable shall be reduced proportionately for the total number of days the RDEL remains faulty during the quarter. For those SSAs where equated annual subsidy is ZERO, Rs.250/- (Two Hundred and Fifty only) shall be taken as the equated annual subsidy rate at which the deduction shall be calculated.

Provided further that if a RDEL remained faulty for forty-five days or more during the quarter, no equated quarterly subsidy for the entire quarter for that RDEL shall be disbursed.

18.7 The Rural Household DELs (RDELs) that are closed permanently either on account of surrenders, shifts out of the local exchange area or non-payment by the customers shall be eligible to receive only the equated annual subsidy support from USOF from the date of installation till the date on which they are closed.

18.8 All claims for Subsidy shall be accompanied by a pre-receipted bill with revenue stamp. Disbursement of Subsidy shall be by cheque through the Office of the Administrator or Controller of Communication Accounts of the respective Telecom Circulars or any other designated Authority.

18.9 The Administrator shall pay the subsidy for a quarter after making adjustments, if any, for the payments made in the previous quarter.

18.10 Final adjustment, if any in respect of excess, or shortage in the Subsidy disbursed shall be made in the following year based on the quarterly Statements duly certified by the Auditors of the Universal Service Provider.

18.11 In case the Universal Service Provider is found to have claimed and received in excess of 10% of the Subsidy due to them for a financial year, the entire amount in excess shall be recovered along with interest from the date of disbursement at the Prime Lending Rate (PLR) of State Bank of India prevalent on the day the disbursement was made. The interest shall be compounded monthly and a part of the month shall be reckoned as a full month for the purposes of calculation of interest. (Month for this purpose shall be taken as an English calendar month). No further subsidy shall be disbursed until final adjustment of the excess payment. No interest shall be payable for any short payment made to the USP by the Administrator.

18.12 The records of the Universal Service Provider shall be subject to such scrutiny as may be prescribed by the Administrator so as to facilitate independent verification of the Subsidy claimed.

18.13 The Administrator, to ensure proper and correct verification of Subsidy paid, can if deemed necessary modify, alter or substitute and amend whatever is stated herein.”

45. As is apparent from the above and also from the heading of Clause 18, the provisions contained in Clause 18 relate to the schedule for disbursement of subsidy to the USP.

46. Sub-clause 18.1 of Clause 18 of Schedule II to the Agreement provides that USPs shall be eligible to submit the claim for front loaded subsidy at the end of the quarter in which RDELs are installed and made functional. The equated annual subsidy would be payable and disbursed in four quarterly instalments during each financial year. Sub-clause 18.2 requires the USP to submit the claim for quarterly subsidy in a statement in the prescribed form within 30 days of the end of each quarter. Sub-clause 18.3 requires the SDCA wise subsidy claim to be submitted as prescribed in hard copy in the format as attached with the Agreement, in addition to submitting the claim in a CD ROM in MS Excel format for each service area. Sub-clause 18.4 requires the claim to be duly certified with an affidavit as per the norms as annexed. Sub-clause 18.5 requires that the quarterly statements of each year be audited by the auditors of the USP and to be submitted in the form as prescribed in Annexure III within 7 calendar days of signing of the audit report but not later than 30th September of the following year. Sub-clause 18.7 provides that RDELs that are closed permanently either on account of surrender, shifts out of the local exchange area or non-payment by customers shall be eligible to receive only equated annual subsidy from USOF from the date of installation till the date on which they are closed.

47. Sub-clause 18.9 expressly provides that the Administrator would pay subsidy for the quarter after making adjustments for payments made in the previous quarter. Sub-clause 18.10 also provides that final adjustments, if

any, in respect of excess or shortage in subsidy disbursed shall be made in the following year, based on the quarterly statements, certified by the auditors of the USPs. Sub-clause 18.11 provides that in case USP is found to have claimed and received in excess of 10% of the subsidy due to them for a financial year, the excess amount shall be recovered along with interest. Sub-clause 18.12 expressly provides that the records of USP would be subject to scrutiny as may be prescribed by the Administrator to facilitate independent verification of the subsidy claimed. Sub-clause 18.13 enjoins the Administrator to ensure proper and correct verification of subsidy paid and if deemed necessary, to modify, alter and substitute whatever is stated therein. Thus, indisputably, the duty to ensure proper and correct verification of subsidy payable and also the power to modify the contents of Clause 18 as specified in Sub-clause 18.13 was provided in the context of the schedule of disbursement, the manner of making the claim as well as verification for disbursement.

48. Indisputably, in terms of the aforesaid clause, subsidy for several quarters has been disbursed to TTL on TTL making the claims in the manner as prescribed. Clearly, the machinery in Clause 18 had been implemented in respect of subsidy distribution for the past quarters; the term of the Agreement had ended and therefore, it stands to reason that the machinery provisions of Clause 18 having been exhausted (to the extent implemented), the question of now amending the same did not arise. Clearly, there was no scope in this machinery for providing a special procedure for sample checking of RDELs and extrapolating the results of the same for the previous quarters for which subsidy has already been disbursed. The power of the Administrator to ensure proper and correct verification of subsidy in terms of Sub-clause 18.13 is to be read in the

context of the other sub-clauses of Clause 18 and in the context of the schedule of disbursement as prescribed therein. Plainly, the powers under Sub-clause 18.13 cannot be extended to enable the Administrator to devise its own procedure for verification after the term of the Agreement has expired and to apply the same retrospectively to recalculate the subsidy already distributed.

49. Sub-clauses 22.1 and 22.2 of Schedule II to the Agreement, which were also referred to by Mr Jain, are set out below:-

“22.1 The Administrator or his authorized representative shall have the right to inspect the sites used for extending the Service and in particular but not limited to access to leased lines, junctions, terminating interfaces, hardware/software, memories of semiconductor, magnetic and optical varieties, wired or wireless options, distribution frames, and conduct the performance test including entering into dialogue with the system through Input/output devices or terminals. The Universal Service Provider will provide the necessary facilities at own cost for monitoring of the system, as required by the Administrator or its authorized representative(s). The Inspection will ordinarily be carried out after reasonable notice except in circumstances where giving such a notice will defeat the very purpose of the inspection.

22.2 Wherever considered appropriate Administrator may conduct any inquiry either suo-moto or on a complaint to determine whether there has been any breach in compliance of terms & conditions of the Agreement by the Universal Service Provider and during such inquiry the Universal Service Provider shall extend all reasonable facilities without any hindrance.”

50. A plain reading of Sub-clause 22.1 also indicates that the Administrator would have the right to carry out inspections of sites and services as indicated in Sub-clause 22.1 and the USPs were obliged to provide all necessary facilities for the said purpose as required by the Administrator. However, this clause is also of no assistance to DoT as there is no denial of any inspection sought by the Administrator.

51. Sub-clause 22.2 of Schedule II expressly provides that the Administrator may conduct any enquiry either *suo moto* or on a complaint to determine whether there is any breach in compliance with the terms and conditions of the agreement. Thus, it is always open for the Administrator to conduct any enquiry as may be necessary. However, this does not necessarily mean that the results of any enquiry carried out by the Administrator would be binding on the USPs. Further, the USPs are also not obliged to accept any inference drawn by the Administrator from the enquiries conducted. In the present case, DoT is insisting that not only the results of the special verification conducted on a sample basis but also the inference that the results can be extrapolated to determine the quarterly claims for RDELs '*for the extended period i.e. from QE 30.06.2007 to QE 31.03.2010*', be accepted by TTL. This Court is not persuaded to accept the interpretation of Sub-clauses 22.1 and 22.2 as canvassed on behalf of DoT. At any stretch, rejection of such interpretation by the arbitral tribunal cannot be held to be patently illegal or perverse as contended on behalf of DoT.

52. The arbitral tribunal had considered the provisions of the Agreement as well as the Telegraph Rules and concluded as under :-

“8.2.36 The Tribunal is of the considered opinion that Claimant by way of issuing Circulars cannot amend the Agreement or add new clauses. Such Circulars are bad in law. It is pertinent to note that Section 7 of the Act was inserted to prescribe Rules to set the manner in which the funds may be administered. Thus the legislative intent here is clear that the administration of Fund should be as per the Rules and in no other manner. Rule 527 clearly states that the funds to be released to the USP should be as per the terms of the Agreement, therefore till the time there is an amendment in the Rules, only the Contract Agreement is to be seen for releasing the funds.

8.2.37 After perusing the Governing Law, it is found that there is no power granted to the Claimant to unilaterally amend the provisions of the Contract by issuing Circulars. Such amendment/modification after the expiry of the Agreement is invalid.”

53. This Court does not find the aforesaid view to be either patently illegal or unreasonable (on the touchstone of the *wednesbury* principle). In these proceedings, this Court is not called upon to act as a Court of first appeal and to re-examine the rival contentions on merits of the dispute. The parties have agreed that the decision of the arbitral tribunal would be binding and, therefore, they have to accept the same unless they are able to establish that the award can be set aside on any of the grounds as set out under Section 34(2) of the Act. DoT has sought to place its case within the scope of Section 34(2)(b)(ii) of the Act. However, this Court is unable to accept that the decision of the arbitral tribunal offends the fundamental policy of Indian Law or public policy.

54. This Court also does not find any infirmity with the decision of the arbitral tribunal and the Circulars cannot be applied retrospectively.

55. Thus, no interference with the impugned award is called for and the present petition is dismissed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 11, 2017
RK

