

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 31.07.2017

+ **O.M.P. (COMM) 337/2016**

M/S BHARAT SANCHAR NIGAM LIMITED

..... Petitioner

Versus

M/S EXNXT SOFTWARE PRIVATE LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Dinesh Agnani, Senior Advocate with Mr L. B. Rai and Mr Mohit Kumar Sharma.

For the Respondent: Mr Sameer Jain, Ms Anu Sura and Mr Mark Wright.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

IA No.8714/2016

1. Exemption is allowed, subject to all just exceptions.
2. The application stands disposed of.

O.M.P. (COMM) 337/2016

3. Bharat Sanchar Nigam Limited (hereafter 'BSNL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') seeking to set aside the award dated 15.03.2016 (hereafter 'the impugned award') passed by the sole arbitrator. The impugned award was rendered in the context of certain disputes raised by the respondent, EXNXT Software Private Limited (hereafter 'EXNXT'), in

connection with an agreement dated 24.01.2013 (hereafter 'the Agreement') entered into between the parties.

4. BSNL entered into the Agreement with EXNXT to provide '*Mobile TV to Subscribers of BSNL and TV Content/Services for PC/Laptop*' in the East, West, North and South Zones of BSNL's network. The Agreement was valid for a period of fourteen months from the date of signing of the Agreement.

5. In terms of the Agreement, EXNXT was required to submit a bank guarantee of ₹15lacs with a validity period of 20 months within 15 days of signing of the Agreement. Whilst, BSNL claims that the said guarantee was submitted on 22.02.2013, EXNXT claims to have submitted the same on 19.02.2013. Clause 9.7 of the Agreement entitled BSNL to terminate the Agreement and encash the aforesaid bank guarantee on EXNXT's failure to generate top line revenue of ₹1 crore during the validity of the Agreement.

6. It is BSNL's stand that EXNXT failed to generate the requisite revenue for numerous delays on EXNXT's part in acting towards the execution of the agreement for each respective zone. EXNXT disputes the same and contends that BSNL could not provide access and availability of services to the subscribers via its portals and subsequently failed to adequately promote the services which led to failure in generation of revenue as envisaged in the Agreement.

7. EXNXT continued to provide services under the Agreement even after its expiry in March 2014. Thereafter, BSNL invoked the bank guarantee, allegedly, without issuing any notice or intimation to EXNXT.

This led EXNXT to file a petition under Section 9 of the Act, being OMP no.1154/2014, in this Court for seeking an injunction to restrain BSNL from encashing the bank guarantee. By order dated 10.10.2014, this Court directed BSNL to deposit the amount encashed with the Registrar General of this Court.

8. In view of the disputes, EXNXT invoked the arbitration clause and the sole arbitrator was appointed by a letter dated 29.10.2014.

9. EXNXT filed its statement of claims *inter alia* praying as under:-

- "1. Pass an order directing Respondent No. 1 to pay an sum of Rs. 7,89,22,000/- for the expenses incurred by the Claimant while performing his obligations under the contract along with an interest of 24%.
2. Pass an order directing Respondent No. 1 to pay a sum of Rupees 15 Lakhs for the illegal invocation of the Bank Guarantee on their part along with an interest of 24%."

10. On the other hand, BSNL claimed a sum of ₹28,78,00,000/- as losses suffered by it for breach on part of EXNXT.

11. On consideration of the pleadings filed by the parties, the arbitral tribunal framed the following issues:-

- "1) Whether BSNL provided all approvals and access etc on time for the claimant to be able to launch the services in all zones as per schedule? OPC
- 2) Whether non- recovery of 1 crore minimum revenue was due to lapse on part of claimant? OPR
- 3) Whether the claimant, based on representations of BSNL, incurred various costs in providing services to BSNL and is liable for damages? OPC

- 4) Whether the claimant is in breach of the terms of the contract/agreement and has achieved the top line revenue of R. 1 crore as per the contract/ agreement dated 24.01.2013? OPR
- 5) Whether the agreement/ contract dated 24.01.2013 provides for any reciprocal obligation or duty on part of the respondent? OPC
- 6) Whether the respondent is liable to the counter-claim owing to the loss incurred by the respondent due to breach of the claimant? OPR"

12. On considering clause no.5 of the Agreement, the arbitral tribunal observed that EXNXT's obligation of providing services was contingent on BSNL providing the necessary network connectivity. The arbitral tribunal examined the e-mails exchanged between the parties and concluded that EXNXT was ready to commercially launch the Mobile TV services but was only held back by BSNL's failure to provide feedback on the test launch link. The implementation and integration of services were also inordinately delayed by BSNL's laxity. The arbitral tribunal further observed that the e-mails placed on record made it evident that at post-implementation stage too, BSNL continued to stymie the working of services as (i) BSNL did not initiate technical billing and integration parallel, which was a pre-requisite to launch the services; and (ii) BSNL delayed the sharing of 'billable MIS', which prevented EXNXT from knowing the billing status of the services. In view of the above, the arbitral tribunal held that BSNL failed to provide the necessary approvals and access on time, for EXNXT to be able to launch the services as per schedule. Accordingly, issue nos. 1, 3 and 5 (quoted above) as framed by the arbitral tribunal, were decided in favour of EXNXT.

13. Insofar as BSNL's claim that EXNXT was in breach of the Agreement and its counter claim were concerned, the arbitral tribunal observed that no documents were placed on record to indicate that BSNL had made any complaints in the past to EXNXT in respect of any delay. Further, the set of e-mails, statement of revenue and the letter of EXNXT relied upon by BSNL also failed to establish that there was any negligence on EXNXT's part to launch services. Although, perusal of the statement of revenue made it evident that EXNXT was unsuccessful in generating top line revenue of ₹1 crore but the arbitral tribunal was of the view that EXNXT was not responsible for such failure. Accordingly, issue nos. 2 and 6 (quoted above) were also decided in favour of EXNXT. In view of the above findings, the arbitral tribunal did not accept BSNL's assertion that the losses suffered by it were attributable to breach of Agreement on EXNXT's part and therefore, rejected BSNL's counter claim.

14. Further, the arbitral tribunal proceeded to reject EXNXT's claims for bandwidth charges, hardware, software, dedicated streaming server customization charges, content adaption, porting and testing as per formats required by BSNL, dedicated support/ one time billing integration and change requests charges, development of mobile application for android and one time integration charges. However, the arbitral tribunal awarded a total sum of ₹2.8 crores for claims raised towards expenses incurred on live TV content per channel for subscription, live TV content for free services and live TV content for data STV, computed at 50% of such expenses (being the revenue sharing ratio agreed under the Agreement). In addition, the arbitral tribunal also held that EXNXT is entitled to the amount recovered by encashment of the bank guarantee (which was deposited with the Registrar General of this Court) and, accordingly, requested the

Registrar to release the bank guarantee amount of ₹15,00,000/- in favour of EXNXT.

Submissions

15. Mr Agnani, learned Senior Counsel appearing for BSNL assailed the impugned award on the solitary ground that the finding of the arbitral tribunal that BSNL was responsible for the delays was perverse. He submitted that the arbitral tribunal had based its finding on various e-mails, which could not possibly lead to any such inference. He referred to the decision of the Supreme Court in the case of ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49*** and on the strength of the aforesaid judgment, submitted that findings of the arbitral tribunal are perverse and wholly unsustainable and thus amenable to challenge under Section 34 of the Act.

16. Mr Jain, learned counsel appearing on behalf of EXNXT raised a preliminary objection as to the maintainability of the present petition. He submitted that the petition was filed on 20.07.2016 without any application for condonation of delay and, therefore, was beyond the period as specified under Section 34(3) of the Act. He submitted that although the petition was purported to have been filed on 02.07.2016, the same could not have been considered as a petition in the eyes of law as it had fundamental defects. He further submitted that since the defects were not removed within a period of seven days as provided under Rule 5 of Part A(a) of Chapter I of Volume 5 of the Delhi High Court Rules, the re-filing of the petition would necessarily have to be considered as a fresh institution and thus, the date of filing of the present petition was rightly indicated as

20.07.2016, which was admittedly beyond the period specified under Section 34(3) of the Act.

17. Mr Jain further submitted that the arbitral tribunal had taken a holistic view after considering the pleadings of the parties as well as the e-mails placed on record. He further submitted that extensive submissions were advanced before the arbitral tribunal and although no oral evidence was led before the arbitral tribunal, the arbitral tribunal had considered the pleadings as well as the e-mails to draw conclusions. He submitted that the arbitral tribunal was the final adjudicating authority regarding the quality and quantity of evidence and it was not open for this Court to re-appreciate the material on record, while examining the conclusion drawn by the arbitral tribunal.

18. Mr Jain did not contest that the e-mails referred to by the arbitral tribunal, read in isolation, could not lead to the conclusion drawn by it. He, however, sought to valiantly defend the impugned award on the ground that the pleadings of the parties read with the e-mails provided sufficient material for the arbitral tribunal to draw the conclusions that it had. He further submitted that even if the award was considered as non-speaking, it, nonetheless, would be binding on the parties and could not be challenged. He relied on the decision in the case of **Markfed Vanaspati & Allied Industries v. Union of India: (2007) 7 SCC 679** in support of his contention. He further submitted that BSNL was responsible for non-production of the relevant record and thus, could not challenge the impugned award on the grounds of lack of reasons since BSNL was itself responsible for the same. He relied on the decision of the Supreme Court

in *Union of India v. Harbans Singh Tuli and Sons Building Private Limited: (2010) 13 SCC 252* in support of his contention.

Reasoning and conclusion

19. The first and foremost issue to be examined is whether the present petition is beyond the period of limitation as prescribed under Section 34(3) of the Act and whether the delay, if any, can be condoned by this Court.

20. In view of the preliminary objection raised by Mr Jain, this Court had independently sought verification from the Registry and it was confirmed that a duly signed petition supported by an affidavit was filed on 02.07.2016.

21. The learned counsel for the BSNL had also filed an additional affidavit affirming that the Registry had pointed out some defects on 05.07.2016 and had reverted the petition for curing the same. The defects were thereafter cured and the petition was re-filed on 22.07.2016.

22. It is seen that the impugned award is dated 15.03.2016 and the three months period as specified under Section 34(3) of the Act for filing an application for setting aside the award expired on 14.06.2016. However, this Court was closed for vacations till 02.07.2016. This Court had issued a notification dated 01.06.2016, which expressly provided that the period of limitation would not run during the vacation period for the purposes of institution of civil and criminal cases. It was also notified that suits, appeals, applications or other proceedings, which are to be filed on re-opening day could be filed from 27.06.2016 onwards. Thus, indisputably, BSNL could have filed the present petition on 27.06.2016 (which is prior

to re-opening of the Court on 02.07.2016). The language of Section 34(3) of the Act makes it amply clear that a delay in filing of the application within the specified period could also be entertained if filed within a period of 30 days thereafter, provided the Court is satisfied that the applicant "*was prevented by sufficient cause from making the application*". However, in view of the notification clearly stating that the Court would re-open on 02.07.2016, BSNL was well within its right to file the petition immediately on re-opening of the Court; which it did. It is, thus, apparent that there was no delay in filing the petition. The petition was returned for removing defects and was re-filed after curing the same.

23. At this stage, it is necessary to refer to Rule 5 of Part A(a) of Chapter I of Volume 5 of the Delhi High Court Rules, which reads as under:-

"5. **Amendment**-(1) The Deputy Registrar Assistant/ Registrar, In-charge of the Filing counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order XLI, Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not taken back, for amendment within the time allowed by the Deputy Registrar/ Assistant Registrar, in charge of the Filing Counter under sub-rule(1), it shall be registered and listed before the Court for its dismissal for non-prosecution.

(3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar/ Assistant Registrar, in charge of the Filing Counter, under sub-rule(1) it shall be considered as fresh institution.

Explanation: The period of seven days or thirty days mentioned above shall commence from the date, the objections are put on the notice board.

Note: The provisions contained in Rule 5(1), 5(2) and 5(3) shall *mutatis mutandis* apply to all matters, whether civil or criminal."

24. As is apparent from the above, the Deputy Registrar/Assistant Registrar may return memorandum of appeal for amendment and re-filing the same within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him for any reason specified in Order XLI, Rule 3 of the Code of Civil Procedure, 1908. The note to the aforesaid Rules clearly specifies that the provisions of Rule 5 would *mutatis mutandis* apply to all matters, whether civil or criminal. In terms of Rule 5(3), if a memorandum of appeal is filed beyond the prescribed time, it shall be considered as fresh institution. In the present case, the petition has been accepted by the Deputy Registrar as it was filed within the period of 30 days. Since no objection as to delay in re-filing was raised by the Deputy Registrar/Assistant Registrar, In-charge of filing counter, it has to be inferred that time for re-filing had been extended (which was within the outer limit of 30 days). Thus, this Court is not persuaded to accept that the present petition ought to be considered as a fresh institution.

25. In any view of the matter, even if the petition was filed beyond the period of time specified by the Deputy Registrar/Assistant Registrar, In-charge of filing counter, the petition would, nonetheless, for the purposes of Section 34(3) of the Act has to be considered as a re-filing and not as an original filing. This is the authoritative view of the Supreme Court in ***Northern Railway v. M/s. Pioneer Publicity Corp. Pvt. Ltd.: 2016 SCC***

OnLine SC 1583, which arose from a decision of this Court declining to condone a period of 65 days in re-filing objections under Section 34 of the Act. In that case, the award sought to be challenged was delivered on 29.10.2012 and the objections were filed within the period prescribed under Section 34(3) of the Act. The petition was returned under objections on 23.01.2013 and seven days time was granted to remove objections. The petition was finally re-filed on 21.03.2013 which was clearly beyond the time granted by the Deputy Registrar for removal of objections. This Court refused to condone the delay and this led the appellant (Northern Railways) to approach the Supreme Court. The respondent therein referred to Rule 5(3) of the Delhi High Court Rules and contended that since the petition was re-filed beyond the period granted by the Deputy Registrar, its re-filing had to be considered as a fresh institution and such institution was beyond the period specified under Section 34(3) of the Act. This is identical to the plea urged by EXNXT to oppose the maintainability of the present petition.

26. The Supreme Court rejected the aforesaid contention and held that Section 34(3) of the Act "*has no application in re-filing the petition but only applies to the initial filing of the objections under Section 34 of the Act*". The Court further held that if Rule 5(3) of the Delhi High Court Rules is strictly applied, "*it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing*".

27. In view of the aforesaid decision of the Supreme Court, EXNXT's contention that the petition was filed beyond the period as specified under Section 34(3) of the Act, must be rejected. It is also relevant to mention that in an earlier decision of the Division Bench of this Court in **Delhi**

Development Authority v. Durga Construction Co.: (2013) 139 DRJ 133, this Court had considered the question whether delay in re-filing could be condoned if the cumulative period exceeded the specified period of three months plus 30 days, from the receipt of the award. This Court had held that if the petition was filed within the period as specified under Section 34(3) of the Act, this Court would retain the jurisdiction to condone the delay in re-filing notwithstanding that the cumulative delay in filing and re-filing exceeded the period specified under Section 34(3) of the Act. However, this Court had also observed that a liberal view in condoning the delay in re-filing would not be warranted given the legislative intent in Section 34(3) of the Act.

28. In the present case, the petition, as initially filed, had defects but was not incompetent as it was signed and supported by an affidavit. The petition was re-filed within the outer limit of thirty days and thus the petition cannot be rejected as being beyond the period specified in Section 34(3) of the Act.

29. The next issue to be examined is whether the impugned award to the extent that it allows EXNXT's claims is liable to be set aside as being perverse. The arbitral tribunal had examined the set of e-mails exchanged between the parties on 27.08.2013 and 05.09.2013 and concluded that the said documents evidenced that EXNXT was ready to initiate commercial launch of the Mobile TV services and the matter was delayed on account of BSNL's failure to provide feedback on the test launch link. Similarly, the arbitral tribunal had examined another set of e-mails exchanged during the period of 01.06.2013 to 11.06.2013 and concluded that the implementation

and integration of services were inordinately delayed by BSNL's laxity. The relevant extract of the impugned award is set out below:-

"Documents marked as Annexure P-4 are a set of emails exchanged between the parties on 27.08.2013 and 05.09.2013. From these documents, it is quite evident that the Claimant was ready to initiate the commercial launch of the Mobile-TV services and was only delayed by the Respondent's failure to provide feedback on the test launch link. From the bare perusal of these emails, it is further evident that the Claimant had attempted to follow-up on the required feedback and was dealt with in an abrupt and uncooperative manner by the Respondent.

Documents marked as Annexure P-5 are a set of emails exchanged between the parties during the period from 01.06.2015 to 11.06.2015. A perusal of the documents clearly reveals the Respondent's laxity in attaching the requisite banner and link for the Mobile-TV services on their BSNL Live Portal. From this document, it is clearly evident that the implementation and integration of the services were inordinately delayed by the respondent's laxity."

30. Annexure P-4 as referred to by the arbitral tribunal consists of four e-mails. The first email dated 27.08.2013 was sent by Vikas Lacca of BSNL to EXNXT and reads as under:-

"Subject: testing and launch

Ur service are being chkd. Will Give Launch Feedback soon.
Pls be patient."

31. The other three emails, all dated 05.09.2013, are set out below:-

(i) E-mail dated 05.09.2013 at 02.17 PM written by Ashish from EXNXT to Vikas Lacca of (VAS) BSNL :-

“Will request to please let us know your feedback so that we can go live by this weekend.

Your help and support is required to Launch ASAP basis.”

(ii) E-mail dated 05.09.2013 at 04:14 PM written by Vikas Lacca of (VAS) BSNL to Ashish of EXNXT :-

“Subject: Re: testing and launch

Sorry for Delay.

As discussed with Vicky will share details today itself.”

(iii) E-mail dated 05.09.2013 at 10:30 PM written by Ashish of EXNXT to Vikas Lacca of BSNL :-

“Subject : Re: testing and launch

Dear Vikas

We are waiting the details for the commercial launch, Please give us the feed back so that we may launch this week.”

32. The aforesaid e-mails pertain to BSNL, West Zone and indicate that EXNXT had requested for a feedback and on 05.09.2013, BSNL had assured that it would provide its feedback on that date but had not done so till 10:30 PM. However, there is no material on record to indicate when such feedback was actually provided by BSNL to EXNXT. Clearly, a delay of one week in providing a feedback on the test launch link would not be material to conclude that commercial launch of Mobile TV Services was only delayed on part of BSNL's failure to provide feedback. Such conclusion cannot be drawn from the said e-mails, particularly, when there is no assertion as to when such feedback was finally provided. There are no

pleadings to the effect as to when the feedback from the West Zone was requested and when it was provided (if at all).

33. Annexure P-5 as referred to by the arbitral tribunal consisted of a set of 10 e-mails exchanged between the parties between 01.06.2013 to 11.06.2013. The first e-mail dated 01.06.2013 is sent by Dinesh of BSNL to EXNXT Team stating that certain VAS Services as indicated in the mail had been approved for commercial launch with effect from 31.05.2013. The next e-mail is sent by Ramesh of EXNXT to BSNL requesting that EXNXT's Mobile TV portal link be placed on BSNL live portal. Further e-mails exchanged (forming a part of Annexure P-5) read as under:-

(i) E-mail dated 04.06.2013 at 11:30 AM written by Vivek Asthana of BSNL to Ramesh from EXNXT:-

“Dear Ramesh,

Send the banner as per below specifications

1. Width : "234" pixel
2. Height : "25" pixel
3. File Format "Gif"
4. File size should be within "10kb"

(ii) E-mail dated 04.06.2013 at 12:14 PM written by Ramesh of EXNXT to Vivek Asthana from BSNL:-

“Dear Vivek,

Please find the Attached Banner as per your specifications”

(iii) E-mail dated 05.06.2013 at 11:08 AM written by Ramesh of EXNXT to Vivek from BSNL:-

“Hi Vivek,

Please confirm once the Mobile TV Link is placed on the Main Portal”

(iv) E-mail dated 10.06.2013 at 05:36 PM written by Ramesh from EXNXT to Vivek of BSNL:-

“Subject : Re: Launch of Mobile TV Services - Exnxt

Dear Vivek,

Awaiting for your confirmation on making the link live on BSNL Portal”

(v) E-mail dated 11.06.2013 at 10:48 AM written by Bibhu from EXNXT to BSNL:-

“Mr Vivek,

When are we getting a confirmation on this.

Why do we have to wait for so many days for a link to go live.”

(vi) E-mail dated 11.06.2013 at 11:29 AM written by Rajiv Garg from BSNL to Bibhu of EXNXT:-

“Subject : RE: Launch of Mobile TV Service - Exnxt

Dear Bibhu

The services have already been made live and the link was supposed to be made live yesterday, which could not be done due to some technical problems in WAP portal. It will be done by EOD. Further, you are requested to be polite in such communications

Aside Vivek/Manoj

Please confirm the same once done.”

(vii) E-mail dated 11.06.2013 at 01:16 PM written by Bibhu of EXNXT to Rajiv of BSNL:-

“Dear Mr Rajiv,

Apologies if I have sounded impolite that was not the intent.

Will wait for your confirmation.”

(viii) E-mail dated 11.06.2013 at 01:21 PM written by Manoj of BSNL to Bibhu from EXNXT:-

“Subject : Re : Launch of Mobile TV Service - Exnxt

Dear Bibhu

The URL <http://bsnl.zengatv.com> with the Banner is place3d under BSNL TV link on bsnllive.in portal. This is for your kind info.”

34. The aforesaid e-mails clearly indicate that BSNL took about 7 days to place EXNXT's link on its portal due to certain technical problems. These mails do not establish that *“the implementation and integration of the services were inordinately delayed by the respondent's”* (BSNL's) *“laxity”*, as concluded by the arbitral tribunal.

35. The arbitral tribunal also referred to a set of e-mails (forming the part of Annexure P-6) exchanged between EXNXT and representatives from the South Zone during October 2013. The relevant extract from the impugned award reads as under:-

"From these documents, it appears that the Respondent had continued to hamper the working of the services post the stage of implementation and that the Claimant could, consequently, not receive any hits showing the usage of the services."

36. Plainly, no conclusion as was drawn by the arbitral tribunal could have been drawn from the aforesaid e-mails. The e-mail sent from Zenga TV to EXNXT only indicates that on 24.10.2013, the channel was not receiving any hits and on 28.10.2013, EXNXT had requested Zenga TV for response to resolve the issue.

37. The arbitral tribunal has referred to a second set of e-mails exchanged between March 2013 to April 2013 in relation to initiating technical and billing integration. The first e-mail is dated 04.03.2013 sent at 01:31 PM by Ramesh of EXNXT to Mr Akil of BSNL, which is set out below:-

“Dear Akil

As discussed Just now over Phone, we need to start the Technical Integration for Mobile TV Services.

Request you to provide the SMSC and Billing Integration details.”

38. BSNL responded to the said e-mail on the very said date at 02:21 PM requesting for certain documents, which were listed in the said e-mail. Apparently, the third email is dated 05.04.2013 which was sent by EXNXT to BSNL. The said e-mail reads as under:-

"Subject: Mobile TV Services by Exnxt - Technical Integration Details to be initiated ASAP

Hi All, Please note that all documents as listed below has been couriered to the address as mentioned

Please note the tracking number as 39919939363, it should reach you positively tomorrow. Amy I request you to Initiate

technical billing and Integration parallel so we can plan to launch services on time.

Please do get back with a confirmation on the same."

39. From the set of the aforesaid e-mails, the arbitral tribunal had concluded that a "*perusal of these documents reveals the Respondent also failed to initiate technical billing and integration parallel which was a prerequisite for the Claimant to launch services*". These e-mails do not indicate that there was any failure on the part of BSNL to initiate technical billing and integration parallel. BSNL had requested for certain documents on 04.03.2013 which were apparently sent by EXNXT on 05.04.2013. There is no assertion as to when BSNL initiated technical billing and integration.

40. The arbitral tribunal also referred to a set of e-mails (referred to as Annexure P-7) exchanged in the month of December 2013, which read as under:-

(i) E-mail dated 01.12.2013 at 08.21 PM written by Vikas Lacca of BSNL to EXNXT and Apalya:-

"Subject : Data STV mobile TV implementation

Exnext/Apalya

As per CO circulars attached h/w, kindly share product flow for mobile Tv bundled data STV so that the same can be discussed and approved from IN team before final implementation."

(ii) E-mail dated 02.12.2013 at 09:42 AM written by Ashish of EXNXT to Vikas Lacca of BSNL:-

"Subject: Re: Data STV mobile TV implementation

Dear Viaks,

Please find attached the user flow also we will request to please share the billable MIS so that we can raise the invoices.”

41. The arbitral tribunal referred to the aforesaid e-mails and held as under:-

“From these documents, it is easily gathered that the Respondent was delaying the process of sharing 'billable MIS', which in turn, prevented the claimant from knowing the billing status of the services, which were made live.”

42. Plainly, the aforesaid conclusion is wholly perverse and unsustainable. None of the two e-mails in question can possibly lead to the conclusion that BSNL had delayed the process of sharing billable MIS which prevented EXNXT from knowing the billing status. The first e-mail was sent by BSNL requesting EXNXT to share the product flow for mobile TV bundled data STV. EXNXT had sent an e-mail on the next date providing the use of flow and also requesting to share the billable MIS to enable EXNXT to raise bills. There is no material to indicate whether such request for billable MIS had been made earlier and whether BSNL had failed to comply with the said request. The impugned award clearly indicates that the said e-mails are the only documents relied upon by the arbitral tribunal in arriving at its findings.

43. This Court is acutely aware that the scope of interference in an arbitral award under Section 34 of the Act is very restricted. This Court while examining whether an impugned award falls foul of the public policy of India does not sit as a court of first appeal to re-examine and correct findings of facts returned by the arbitral tribunal. However, one of the

exceptions to this rule is where the finding is based on no evidence or the finding of fact defies logic. In ***H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal & Ors. v. M/s Gopi Nath & Sons & Ors.: 1992 Supp (2) SCC 312***, it was held as under:-

"7. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

44. In a recent decision given in ***ONGC v. Western Geco International Ltd.: 2014 (9) SCC 263***, the Supreme Court had while considering the principles applicable while determining where an arbitral award falls foul of the public policy test held as under:-

"39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223; (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available."

45. The documents referred to by the arbitral tribunal cannot possibly lead to the conclusion so drawn by it. The arbitral award suffers from the vice of irrationality. In the present case, the parties did not lead any evidence and chose only to rely on documents submitted by them.

46. This Court had also examined whether the impugned award could be sustained on the basis of pleadings of the parties. Although general allegations had been made in the pleadings, there are no pleadings as to the relevant particulars, which could be read in conjunction with the e-mails to sustain the conclusion arrived at by the arbitral tribunal. For instance, the arbitral tribunal has relied upon e-mails exchanged on 27.08.2013 and 05.09.2013 (marked as Annexure P-4) to conclude that EXNXT was ready to initiate commercial launch of Mobile TV Services but the same was delayed on account of timely feedback not provided by BSNL on the test launch link. The said e-mails pertain to the West Zone. There are no averments as to when the feedback on the test launch was first requested by EXNXT and when such feedback was finally provided.

47. The decision in the case of *Markfed Vanaspati*(*supra*) is of no assistance to EXNXT as the said decision was rendered in the context of the Arbitration Act, 1940. By virtue of Section 31(3) of the Act, it is mandatory that an arbitral award state the reasons upon which it is based; the only exceptions being: (a) the parties have agreed that no reasons be given or (b) that the award is passed with the consent of parties. Thus, if the arbitral award is considered as non-speaking/unreasoned (as is the alternate submission made by Mr Jain), the same would have to be set aside as falling foul of Section 31(3) of the Act.

48. The decision in the case of *Harbans Singh Tuli* (*supra*) is also inapplicable in the facts of the present case. In that case, the claimant had filed affidavits and the deponents were also available for cross examination but were not cross-examined by the appellant (Union of India). Further, the appellant had failed to produce the relevant records. It is in the aforesaid

context that the Court held that the arbitrator was not in a position to give detailed reasons. Plainly, it is open for the arbitrator to accept averments made in an uncontroverted affidavit. It would not be necessary for the arbitrator to provide detailed reasons for accepting the same. However, in the present case, EXNXT had not filed any affidavit. More importantly, the arbitral tribunal has given detailed reasons, which indicates that he has based his conclusions on reading of the e-mails produced before it. His conclusions, thus, have to be tested on the basis of evidence available on record. As stated earlier, this Court does not find that it was possible to draw the conclusions that the arbitral tribunal had drawn on the basis of the e-mails referred by it. Thus, the impugned award is liable to be set aside.

49. Before concluding, it is relevant to note that BSNL had not assailed the conclusion of the arbitral tribunal rejecting its counter claim; Mr Agnani had unequivocally stated that he was restricting the challenge to the claim awarded in favour of EXNXT. Thus, no interference with the impugned award in regard to rejection of counter claim is warranted.

50. In view of the above, the impugned award to the extent that it awards a sum of ₹2.8 crores in favour of EXNXT is set aside. However, no interference with the direction for release of the bank guarantee amount in favour of EXNXT is necessary.

51. The petition is accordingly, allowed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JULY 31, 2017

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