

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

+ **CS(OS) No.977/1998**

% **22nd May, 2018**

VIPIN MALIK Plaintiff

Through: Mr. R.S. Suri, Senior Advocate
with Ms. Amrita Singh,
Advocate and Mr. Varun
Khanna, Advocate.

versus

ENPRO INDIA LIMITED Defendant

Through: Mr. Darpan Wadhwa, Senior
Advocate with Ms. Seema
Sundar, Advocate, Mr. Daves
Bhatia, Advocate, Mr. Kamal
Taneja, Advocate, Mr. Saurabh
Kumar, Advocate and Mr.
Saurabh Seth, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this suit the plaintiff Sh. Vipin Malik, proprietor of V. Malik & Associates, seeks a money decree against the defendant company M/s Enpro India Limited for a sum of Rs.12,76,81,450.70/- along with *pendente lite* and future interest at 24% per annum. The

cause of action as pleaded in the suit for entitlement of the plaintiff to the money decree is that the plaintiff had performed his obligations under the Agreement dated 22.8.1994 entered into between the parties, and hence in terms of the Agreement the professional fees stated thereunder became due and payable to the plaintiff.

2. The facts of the case as pleaded by the plaintiff are that in the year 1994 Government of India had announced its policy of liberalization and economic reforms by opening of Indian Market in various fields to Multi National Companies and one such field was of telecommunications comprising *inter-alia* of cellular phones. As a result of this government policy the plaintiff pleads that various Indian business houses, including the defendant, wanted to tie up with foreign parties for entering into the field of telecommunications and by entering into business contracts. It is further pleaded in the plaint that on 22.8.1994 an Agreement/MoU dated 22.8.1994 was entered into between the plaintiff and the defendant which required the plaintiff, *inter-alia*, to identify and shortlist foreign investors companies and thereafter introduced such foreign investors companies to the defendant. When the contracts were to be entered into between foreign

investors companies and the defendant, then, the plaintiff was to be part of the process of drafting and vetting of the agreement and also ultimately of signing of the same. The respective rights and obligations between the parties are stated in this Agreement dated 22.8.1994, and which will be referred to in detail hereinafter. The plaintiff claims that since the plaintiff had performed its obligations under the Agreement dated 22.8.1994, therefore the plaintiff became entitled to the professional fees payable to him as stated in this Agreement dated 22.8.1994. Plaintiff pleads that plaintiff identified and introduced various foreign investors companies for the joint venture company to be incorporated and a joint venture agreement to be signed, and three such companies were M/s US Telecom East, Inc, M/s. Fidelity Communications International, Inc. and M/s. Compagnie Internationale Pour Le Radiotelephone SA. Between these three companies and the defendant company a Joint Venture Agreement dated 5.5.1995 was entered into envisaging essentially the investment by these three companies in a special purpose vehicle company and for such company thereafter to bid for the tender and be successful in obtaining a contract for providing cellular services in selected circles

as designated by the Department of Telecommunications. As a result of the Joint Venture Agreement dated 5.5.1995 entered into between the parties, the aforesaid three foreign companies were to invest in a special purpose vehicle company called as M/s Protel India Private Limited. In the plaint there is also reference to certain understanding of the plaintiff with the another group company of the defendant company namely M/s Hindustan Times Limited, with both the defendant company and M/s Hindustan Times Limited being part of K.K. Birla Group of Companies, but this Court notes that it is not concerned with the various other facts which are stated in the plaint inasmuch as the issue between the parties is circumscribed for decision in terms of the Agreement dated 22.8.1994 entered into between them. The basic aspect which is stated in the plaint is that though the foreign investors companies committed a total paid up capital of Rs. 320 crores and that the three foreign investors companies were committed to bringing in 49% of the total equity of Rs. 320 crores amounting to Rs.156.80 crores. The case in the plaint is that in view of this amount of commitment of foreign investment companies being fixed at Rs.320 crores, therefore the plaintiff became

entitled to the professional fees as a percentage of this amount of Rs.320 crores in view of Clauses 4(A) to 4(C) of the Agreement dated 22.8.1994.

3. Plaintiff pleads that he along with his letter dated 05.10.1995 raised on the defendant a bill no.1053 dated 05.10.1995 for US\$ 2,030,000 towards his professional charges, but the defendant denied the claim by sending a frivolous reply dated 28.10.1995. Therefore, the subject suit for recovery has been filed by the plaintiff. The amount which is claimed by the plaintiff in the suit is particularized as per para 34 of the plaint and which para 34 reads as under:-

“34. That as on 27th April, 1998, the defendant is liable to pay to the plaintiff the following amounts:

- | | | |
|-------|--|---------------------------|
| (i) | Professional charges of the plaintiff in accordance with Clause 4(A) & 4(C) of the Agreement dated 22 nd August, 1995 | US \$ 2,030,000.00 |
| (ii) | Interest @ 24% per annum on 2,030,000 US Dollars w.e.f. 6 th October, 1995 | US \$ 1,246,698.12 |
| | Total | <u>US \$ 3,276,698.12</u> |
| | Converted @ Rs.38.95 per US\$ | Rs.12,76,27,391.70 |
| (iii) | Amount due to the petitioner in accordance with Clause 4(B) of the Agreement dated 22 nd August, 1994. | Rs.33,491.00 |
| (iv) | Interest @ 24% per annum on Rs.33,491.00 w.e.f. 6 th Oct. 1995. | <u>Rs.20,568.06</u> |
| | | Rs. 54,059.06 |

Total Rs. 12,76,81,450.70
(Rupees Twelve Crores Seventy Six Lacs Eightyone Thousand Four
Hundred Fifty and Paise Seventy Only).

4. Defendant company has contested the suit. Though there is no dispute raised in the written statement that the parties did enter into the Agreement dated 22.08.1994, however the defendant pleads that the entitlement of the plaintiff to the professional fees would only arise “on success basis” i.e the defendant pleads that the professional fees only became payable to the plaintiff not only because of the *factum* of entering into of a Joint Venture Agreement by the defendant with the foreign investors companies, but the plaintiff had to besides getting the agreement signed had also to perform various other obligations under the agreement dated 22.08.1994, and which however were not performed, including the inward remittance by the foreign investors companies of the paid up capital of the special purpose vehicle company M/s Protel India Private Limited. It is contended in the written statement that the plaintiff is at best entitled to the fees of US\$ 10,000 as stated in Clause 4(C) of the agreement dated 22.08.1994 and which amount is the amount payable at the time of signing of the agreement of the defendant with the foreign investors

companies. The defendant therefore pleads that the suit is liable to be dismissed because the trigger event for payment of professional fees by the defendant to the plaintiff was the bringing in of the capital of Rs. 156.80 crores (49% of equity of the total equity of Rs.320 crores) by the foreign investors companies in the special purpose vehicle company M/s Protel India Pvt. Ltd., did not happen.

5. The following issues have been framed in the suit:-

- “1. Whether the defendant in each of the suits had agreed to pay professional fee to the plaintiff? OPP
2. If the issue No.1 is decided in favour of the plaintiff, whether the plaintiff had performed his obligations under the agreement with the defendants in the two suits so as to be entitled to the professional fee under the agreements and if so, in what amount? OPP
3. Whether the defendants in the two suits had instructed the plaintiff of their joint participation in the agreement with respect where to the MOU of professional fee was entered into with the plaintiff and if so, to what effect? OPP
4. Whether the amendment to the Joint Venture Agreement authored by the plaintiff was authorized by the defendants? OPP
5. If the plaintiff is entitled to pay monies, whether the plaintiff is entitled to any interest thereon and if so, at what rate and for what period? OPP
6. Whether the MOU of the defendants with the plaintiff is null and void and not binding on the defendants? OPD
7. Relief.”

6. At this stage, it is required to be noted that the present suit being CS(OS) No. 977/1998 is connected with two other suits. One of the two other suits is CS(OS) No. 971/1998 filed by the same

plaintiff against the group company of the present defendant company one M/s. Hindustan Times Limited, and in which other suit the present plaintiff, as the plaintiff in that suit, claims professional fees as per a separate agreement. The third suit is the suit filed by M/s Hindustan Times Limited pleading that M/s Hindustan Times Limited is not a party to the Joint Venture Agreement dated 05.05.1995 and that Sh. Vipin Malik had no power or authority to make M/s Hindustan Times Limited as a party to the Joint Venture Agreement through the amendment dated 03.06.1995 signed by Sh. Vipin Malik allegedly for and on behalf of M/s Hindustan Times Limited. The issues which are framed in the two suits filed by the plaintiff are common issues and these issues are reproduced above. No issue has been framed in the suit filed by M/s Hindustan Times Limited being CS(OS) No. 2208/1995 as it has been stated that the decision in this suit will have the consequence of an automatic result of the decision of the suit filed by Sh. Vipin Malik being CS(OS) No. 971/1998. In all the three suits it has been agreed to by the parties that no oral evidence is required and the suits should be decided in terms of the pleadings and the documents admitted by the parties. Accordingly, this Court is

proceeding for the present to decide the present suit CS(OS) No. 977/1998 filed by Sh. Vipin Malik for recovery of monies against defendant company M/s Enpro India Limited.

7. In the present suit being CS(OS) No.977/1998 filed by Sh. Vipin Malik against the defendant company M/s Enpro India Limited, counsels for the parties agree that issue nos. 4 and 6 stated above are not called for decision in the present suit as these are issues which will be particular to CS(OS) No. 971/1998 filed by Sh. Vipin Malik against M/s. Hindustan Times Limited. Also counsels for the parties agree that issue no.3 is not called for decision. This Court therefore is called upon to decide issue nos. 1, 2, 5 and 7 as stated above.

Issue Nos.1,2,5 and 7

8. The basic issue to be decided is that whether the plaintiff is entitled to and the defendant is liable to pay the professional fees to the plaintiff in terms of the agreement dated 22.08.1994.

9. Since decision of this main aspect will almost entirely turn upon the language of the Agreement dated 22.08.1994, it is

deemed fit to reproduce below the entire Agreement dated 22.08.1994 entered into between the parties, and this Agreement reads as under:-

"BETWEEN

MR. SHYAM S. BHARTIA
on behalf of Enpro India Limited
19th Floor, Amba Deep,
14-Kasturba Gandhi Marg,
New Delhi, India-110001
(hereinafter referred to as "Enpro")

AND

MR. VIPIN MALIK
CHARTERED ACCOUNTANT
V. Malik & Associates
H.O. Flat No. 8, Golf Apartments,
Sujan Singh Park, New Delhi and
B.O. GF-12, Mansarovar Building
90, Nehru Place New Delhi-110019
(hereinafter referred to as "VMA")

1. The purpose of this AGREEMENT is to set out the understanding between the "Enpro" and or their designate and the "VMA" and of their designate, in respect of the proposed following activity:

Telecommunications including cellular phones

2. SCOPE OF THE ASSIGNMENT AND ENGAGEMENT OF "VMA"

"VMA" shall: (i) identity, develop and screen a list of corporations, partnerships and other entities in the United States of America or in any other countries of the world in the above field of business which meet certain criteria to be established by "Enpro" or to any such party or parties selected by "Enpro" as suitable candidates for the negotiation of potential business transactions in Telecommunications;

(ii) Upon request of "Enpro" introduce "Enpro" to any such party or parties selected by "Enpro" for the purpose of negotiating a potential business transaction in Telecommunications;

(iii) assist in the negotiation and structuring of any potential business transaction that may result from such introductions.

3. FACILITATION OF BUSINESS TRASACTION:

"VMA" shall: (i) Assist "Enpro" in drafting and vetting of Agreement and Joint Ventures with foreign partners and in securing appropriate governmental approvals with respect to any transaction which "Enpro" may enter into with any corporation, partnership of other entity or entities.

(ii) Upon reasonable notice and at mutually agreeable times, assist and accompany "Enpro" personnel to travel to and fro in U.S.A of any other countries for business related purpose. It is also understood that "Enpro" will always invite "VMA" for all the meetings.

(iii) Perform such other mutually agreed services and duties as may be reasonably necessary to fulfill the **purpose** of this Agreement.

4. **TERMS OF REMUNERATION**

The above steps will require few months to complete, and probably will require overseas visits to negotiate and finalize details. Accordingly, it is understood that for all that "Enpro" agrees to pay "VMA" the professional fees and reimbursement of all expenses as order:

(A) "Enpro" shall compensate "VMA" as follows:

Total consideration	Fee
Up to US \$ million	US \$ 40,000
plus on ever additional	
US \$ 1 million	US \$ 20,000

(For clarification - (or its equivalent in
that means over \$ 1 million fee is 2%) Indian Rupees)

The total consideration shall be the total amount of Equity in the Project as shown in business plan on which bill will be based. However, the minimum fees/compensation shall be US \$ 50,000/- only **on success basis**.

(B) "Enpro" shall reimburse "VMA" for its out-of-pocket expenses incurred in carrying out its obligations under this Agreement. These expenses shall be billed by "VMA" and paid monthly. Such expenses shall include actual travel costs, cost of Five Star Deluxe Hotels, Air Travel by First Class or ACC First Class Deluxe Coach by Rail or by ACC Car, fixing fees, telephone and fax or other related expenses. Travel costs expenses will be paid in advance.

(C) In addition to the above, immediately on signing of the each joint venture with foreign partner or partners on such signing, and amount equivalent to US \$ 10,000/- or its equivalent in Indian Rupees will be paid in cash.

In order that "VMA" may accurately compute the fee to which it is entitled in the event of the **consummation** of a transaction, "Enpro" shall furnish "VMA" with copies of all documentation relating to any transaction hereunder, commencing with the inception of such transaction hereunder, through the **closing** thereof. In addition "Enpro" shall furnish "VMA" with all such other information (including all relevant data with respect to contingent and /or deferred payments or other considerations) relating to such transaction as VMA may from time to time request both preceding and subsequent to the **closing** of any such transaction. Similarly, "VMA" agrees fully to disclose to "Enpro" all facts known to "VMA" which may be material to a decision by "Enpro" as to the terms of or as to whether or not to enter into such transaction "VMA" shall provide

“Enpro” with all documents relating to “VMA” representation of “Enpro” in connection with the transaction described herein.

5. TERMS OF TERMINATION

The initial terms of this agreement shall expire three years from the date hereof and is thereafter renewable upon the mutual consent of the parties. However, the period will automatically be extended in case the negotiations between “Enpro” and foreign partners are in process.

6. SEVERANCE

If any provision of this agreement is declared by any judicial or other competent authority to be void, avoidable, illegal or enforceable, this agreement will remain in full force and effect unless “VMA” gives notice of its termination.

7. Any further agreement between two parties respecting the subject matter herein shall be based on this agreement and subject matter here is the subject of formal agreement to be executed by the parties on judicial paper, which the parties shall enter into good faith.

IN WITNESS WHEREOF the parties hereto have hereinto executed this agreement on 22nd August, 1994.

SHYAM BHARTIA
ENPRO INDIA LIMITED
WITNESS:- "

VIPIN MALIK
V. MALIK & ASSOCIATES
(emphasis added)

10. So far as Clauses 1 and 2 of the Agreement dated 22.8.1994 are concerned nothing much turns upon the same, because these clauses pertain to the identification by the plaintiff of foreign investors companies, short listing of foreign investors companies, introducing the foreign investors companies to the defendant company and assisting in the negotiation and structuring of any potential business transaction which can be entered into between the defendant company and the foreign investors companies. Really the issue will turn upon Clauses 3 and 4 of the Agreement dated 22.8.1994 with its sub-clauses. What the plaintiff contends is that the plaintiff is entitled

to the professional fees as stated in the Agreement dated 22.8.1994 simply upon the happening of the event of the foreign investors companies entering into a Joint Venture Agreement with the defendant company and thereby agreeing to invest in the special purpose vehicle company being M/s Protel India Private Limited, and further also that the plaintiff should get government approvals for the Joint Venture Agreement as provided in Clause 3(i) of the Agreement dated 22.8.1994. The defendant's case however is that a conjoint reading of Clauses 3(i), 3(iii), 4(A) and 4(C) shows that the plaintiff does not become entitled to professional fees merely on account of the Joint Venture Agreement having been signed between the defendant company and the three foreign investors companies and the plaintiff taking necessary government approvals, but that the liability of the defendant company only arises when the foreign investors companies actually bring in their capital in the special purpose vehicle company M/s Protel India Private Limited, and which contention of the defendant company is based upon the expression "success basis" appearing in Clause 4(A) of the Agreement dated 22.8.1994 additionally with the point that the second para of Clause 4(C) of the

Agreement dated 22.8.1994 talks of consummation and closure of the transaction meaning thereby that consummation and closure of transaction would come about only when in terms of the transaction, the equity capital of Rs.156.80 crores is brought in by the three foreign investors companies, and only at which stage the percentage of fees from the total paid up capital of Rs.320 crores would then become payable to the plaintiff.

11. Counsels for the respective parties in support of their respective stands have emphasized and placed reliance upon different paragraphs, different lines and different words and expressions as found in the Agreement dated 22.8.1994.

12. In my opinion, the plaintiff is found to be not justified or correct in contending that the fees/remuneration payable to the plaintiff from the defendant would arise as per what is stated in Clause 4(A) of the Agreement dated 22.8.1994 of simply and only on the plaintiff getting the Joint Venture Agreement signed between the defendant and the three foreign investors companies and the plaintiff obtaining the government approvals with respect to investment by the three foreign investors companies in the special purpose vehicle

company M/s Protel India Pvt. Ltd., on account of the detailed reasons given hereinafter. I may note that there is no dispute between the parties that plaintiff indeed got the government approval for entering into of the transaction of the Joint Venture Agreement between three foreign investors companies and the defendant company through special purpose vehicle company M/s Protel India Pvt. Ltd. This Court therefore has to only determine as to whether there were other services and obligations which were to be performed by the plaintiff for the defendant only then to be entitled to claim the fees as specified in the Agreement dated 22.8.1994.

13. The reasons for the conclusion of the disentitlement of the plaintiff to get the professional fees only on the Joint Venture Agreement being signed between the defendant company and the three foreign investors companies for investment through the special purpose vehicle of M/s Protel India Pvt. Ltd, are the following reasons:-

I.) Indubitably Clause 3(iii) of the Agreement dated 22.8.1994 specifically provides that the plaintiff will perform such other “mutually agreed services” and also other duties which are reasonably

necessary to fulfill “the purpose of this agreement”. Therefore it is not as if the duties of the plaintiff stopped as per Clause 3(i) of the Agreement dated 22.8.1994 of the agreement between the defendant company and the foreign investors companies being drafted and signed and government approvals obtained, inasmuch as otherwise there was no need of Clause 3(iii) of the Agreement dated 22.8.1994 entered into between the parties.

II.) There is a clear cut demarcation in terms of the clauses of the agreement being Clauses 4(C) and 4(A) because one amount is provided for being paid to the plaintiff on the signing of the Joint Venture Agreement with the foreign investors companies and the balance amount payable in terms of Clause 4(A) of the Agreement dated 22.8.1994 is only on “success basis”. Obviously therefore the expression “success basis” has to have some meaning because it has been specifically agreed to by the parties, and which has to be read with the fact that in Clause 3(iii) of the Agreement dated 22.8.1994, there is a clear cut requirement of the plaintiff to perform reasonably necessary duties to fulfill the purpose of the agreement. Therefore one set of fees becomes due to the plaintiff on the signing of the agreement

and the balance amount of fees would only become payable on success basis and on the plaintiff performing duties as stated in Clause 3 of the agreement and more particularly the general duties specified in Clause 3(iii) of the agreement including towards the purpose of the agreement.

III.) The second para of Clause 4(C) of the Agreement dated 22.8.1994 uses categorically the expression “consummation” and “closure” as regards the transaction which are subject matter of the Agreement dated 22.8.1994. The words consummation and closing are interlinked with the expression “transaction” which is subject matter of the Agreement dated 22.8.1994. In my opinion, the expressions “consummation” and “closure” only add teeth to the expression “success basis” and to fulfill the purpose of the agreement as stated in Clauses 4(A) and 3(iii) of the agreement. It is therefore seen that there are four expressions of “fulfill the purpose of agreement”, “success basis”, “consummation” and “closure” used in the Agreement dated 22.8.1994 and when all these expressions are read together in the context of the language of the entire agreement, one cannot but draw the conclusion that entitlement of fees on success

basis to the plaintiff necessarily means success basis on the transaction being effectuated or consummated i.e the transaction of entering into of the Joint Venture Agreement between the defendant company and the three foreign investors companies is effectuated and consummated by the three foreign companies bringing in their share capital of Rs.156.80 crores. In case the amount of Rs.156.80 crores is not brought in by the three foreign investors companies, then in my opinion there does not result any success of the transaction or the purpose of the agreement being fulfilled or that there is brought about consummation or closure of the transaction. After all these aforesaid four expressions have been specifically put in the agreement entered into between the parties and therefore they have to be given meaning, and when we look at the Agreement dated 22.8.1994 in a holistic manner, each of the aforesaid four expressions are having the same flavour as that of the transaction being successful only on the three foreign investors companies bringing in their share capital of Rs.156.80 crores.

IV.) One other way of looking at the issue in favour of the defendant and against the plaintiff would be that the second para of Clause 4(C)

of the Agreement dated 22.8.1994 requires documentation being given by the defendant to the plaintiff so as to determine the total consideration *qua* the special purpose vehicle company of M/s Protel India Pvt. Ltd. The total consideration by the very language of Clause 4(C) second para includes deferred payments or deferred consideration to be brought in by the foreign investors companies. Obviously the deferred payment necessarily means that payment is being brought in and which is definitely subsequent to the entering into of the Joint Venture Agreement. The expression “deferred payments” has to be contra-distinguished with the expression “contingent” which is immediately found before the words “deferred payments” and thereby communicating that besides a contingent consideration there would also be a definite consideration but the definite consideration part of the Joint Venture Agreement could be by deferred payments. Any doubt remaining with respect to interpretation of the expression “deferred payments” is removed once we refer to immediate subsequent words which are “other considerations”. Therefore once the defendant company has to give details of each and every type of consideration which is brought into the special purpose vehicle

company M/s Protel India Pvt. Ltd, obviously this is on account of follow up and acting upon of the Joint Venture Agreement by bringing in share capital in M/s Protel India Pvt. Ltd. Therefore in my opinion when the agreement at various places over a dozen times uses the expression “transaction” the transaction necessarily means transaction as a whole including of the deferred payments being received at much later stages than entering into of the Joint Venture Agreement, with the categorical result that obviously the payment which the plaintiff is entitled to in terms of the Agreement dated 22.8.1994 can only be on performance of the transaction in the nature of bringing in their share capital by the three foreign investors companies.

One example, though not necessarily completely apposite, for being compared to the terms of the Agreement dated 22.8.1994 is a transaction when an immovable property is sold or purchased. In such a transaction a commission is paid by both the buyer and the seller for the transaction, but this commission is paid only when the transaction is fructified i.e the sale deed is entered into and the buyer pays the sale consideration to the seller. In the facts of the present case surely what is being received by the plaintiff in terms of the Agreement dated

22.8.1994 as remuneration or consideration is a commission because this commission payment is the percentage payment in terms of the total consideration of the transaction on fructifying of the Joint Venture Agreement. Any doubt, in this regard is removed because Clause 4(A) of the agreement specifically uses the expression “success basis”. Not only the expression used is “success basis” but it is to be noted that, since there could be less or more consideration which will come in from the foreign investors companies in the special purpose vehicle company, there is also fixed a minimum commission payment of US\$ 50,000 meaning thereby the consideration payable to the plaintiff is necessarily linked to the consideration which comes in by the foreign investors company in M/s Protel India Pvt. Ltd, the special purpose vehicle company.

14. I must concede at this stage that there is ambiguity in the meaning of the expression “fulfill the purpose of this agreement” as found in Clause 3(iii) of the Agreement dated 22.8.1994. I wish there was evidence before this Court in terms of the depositions of the parties and their witnesses which would have elaborated on the expression “fulfill the purpose of this agreement”, but unfortunately

parties have agreed to get this case decided without leading oral evidence, and this aspect will hurt the plaintiff more than it will hurt the defendant because if the plaintiff had led evidence to show the meaning of the expression “fulfill the purpose of this agreement” i.e that purpose was satisfied by entering into of the Joint Venture Agreement with the plaintiff having necessary government approvals, then the plaintiff could have successfully canvassed his case. The provision of Section 95 of the Indian Evidence Act, 1872 provides that if the meaning of a word in the agreement is such that it requires evidence to be explained, then such evidence can be led, and therefore pursuant to Section 95 of the Indian Evidence Act plaintiff could have surely led some evidence to elaborate the meaning of the expression “fulfill the purpose of this agreement” or for that matter the meaning of the words “success basis” or “consummation” or “closure”. Plaintiff therefore having lost out on the opportunity, and which it was entitled to do so in view of the Section 95 of the Indian Evidence Act, then as per the existing evidence on record being the pleadings and documents admitted by the parties, this Court is unable to arrive at the conclusion on preponderance of probabilities that plaintiff is entitled

to remuneration of the claim as stated in the Agreement dated 22.8.1994 simply because a Joint Venture Agreement has been signed and the plaintiff has got the necessary government approvals.

15. Learned counsel for the plaintiff in support of the case of the plaintiff has sought to place reliance upon the plaint filed by the sister company of the present defendant company i.e M/s Hindustan Times Ltd in CS(OS) No.2208/1995 being paras 6 to 8 thereof, and it is argued that these paras 6 to 8 show that the professional fees payable to the plaintiff in terms of the Agreement dated 22.8.1994 has become payable simply only on signing of the Joint Venture Agreement and the plaintiff being obtained government approvals. In order to appreciate the argument of the plaintiff, paras 6 to 8 are reproduced as under:-

“6. The Plaintiff states that by an agreement dated 22.8.1994, a copy of which is annexed and marked as ANNEXURE-C, the Defendant No.1, entered into an agreement with Mr. Shyam Bhatia, Managing Director of the Enpro India Limited, New Delhi. By this agreement, the Defendant No.1 agreed to identify and introduce Enpro India Limited, New Delhi to selected parties for the purpose of negotiating a potential business transaction in telecommunications and to assist in the negotiating and structuring of any potential business that might result from such introduction. In consideration, Enpro India Limited, New Delhi agreed to pay to the Defendant No.1 professional fees as a more particularly set out in Clause 4 thereof. In the context of the subject JVA, these fees would have amounted to approximately US Dollars 2 Millions. The direct personal and financial interest of the Defendant No.1 in the events that transpired after this agreement was executed by Compagnie International

Pour Le Radiotelephone, France, Fidelity Communications International, Inc., U.S.A., U.S. Telecom East, Inc., U.S.A., Enpro India Limited, New Delhi (India) cannot therefore be under-estimated or overlooked.

7. Sometime in or around December, 1994, the Plaintiff and an American Company called U.S. Global Telecommunication Inc. entered into a Memorandum of Understanding dated 9.12.94 which Memorandum of Understanding represented the desire and understanding of the parties for entering into a Joint Venture on the terms and conditions more particularly set out in the said MOU. The purpose envisaged under the said Joint Venture was for the parties to enter into the field of telecommunications. The MOU envisaged a Joint Negotiating Committee. The plaintiff was represented on this Committee, inter-alia, by the Defendant No.1. However, the Joint Venture between the Plaintiff and the said U.S. Global Telecommunications Inc. did not fructify and no Joint Venture was entered into by and between the parties.

8. The Plaintiff states that sometime in or around March, 1995, the Defendant No.1 proposed a Joint Venture with a number of companies for submitting bids for a tender floated by the Department of Telecommunications, being Tender No. II-28/94-MMTTM. It was for the purpose of making the said bid that PROTEL was incorporated as a Private Limited Company in March, 1995.”

16. I am unable to agree with the argument urged by the plaintiff by placing reliance upon paras 6 to 8 of the plaint of CS(OS) No.2208/1995 because I for one reason do not find anything in these paras 6 to 8 which in any manner state that professional fees of the plaintiff in terms of the Agreement dated 22.8.1994 becomes payable only upon the Joint Venture Agreement being signed and the plaintiff taking government approvals. In any case a pleading which is drawn up in a suit is drawn up because of the facts of that suit, and additionally and more importantly as a narration of facts, but once the narration of facts is a conclusion for being drawn from the terms of a

document, it is the term of the written terms of the document which will prevail and not the narration of such document in a pleading. Of course, if the terms of the documents are not clear, then other evidence is looked into if that other evidence was clear, but the other evidence being paras 6 to 8 of the plaint in CS(OS) No.2208/1995 in my opinion does not lead to any conclusion that the Agreement dated 22.8.1994 is interpreted by the sister company of the present defendant company that the professional fees of the plaintiff became payable simply and only on the signing of the Joint Venture Agreement and the plaintiff obtaining the government approvals.

17. In view of the aforesaid discussion, the issue no.1 is answered that the defendant had no doubt agreed to pay the professional fees to the plaintiff, but that professional fee was only payable on the necessary pre-conditions as specified in the Agreement dated 22.8.1994 being satisfied.

18. Issue no.2 is therefore decided by holding that plaintiff has not performed all his requisite obligations under the Agreement dated 22.8.1994 for claiming the professional fees as stated in this agreement because by the very nature of the agreement, expressions

used in the agreement the purpose of the agreement was to ensure that there is necessarily success or consummation or closure and which only takes place on the foreign investors companies bringing in the necessary share capital in the special purpose vehicle company M/s Protel India Pvt. Ltd.

19. Issue nos.5 and 7 are therefore decided against the plaintiff that in the facts of the present case it is held that the plaintiff is not entitled to moneys from the defendant as also any interest thereon.

20. At this stage, I would like to note that there is an admitted liability of the defendant towards plaintiff in terms of the Clause 4(C) of the Agreement dated 22.8.1994 because the defendant became liable to pay the plaintiff a sum of US\$ 10,000 or its equivalent in Indian rupees once the Joint Venture Agreement was signed. The Joint Venture Agreement was signed on 5.5.1995 and therefore on 5.5.1995 rupees equivalent to US\$ 10000 became payable by the defendant to the plaintiff. This amount of US\$ 10000 is admittedly not paid to the plaintiff. Counsels for the parties agree that conversion rate on 5.5.1995 of one US\$ to Indian rupees can be taken as 32 Indian

rupees and therefore the defendant would be liable as on 5.5.1995 to pay a sum of Rs.3,20,000/- to the plaintiff. Therefore the plaintiff is entitled to a money decree for a sum of Rs.3,20,000/- along with interest at 9% per annum simple from 5.5.1995 till payment.

Relief

21. The suit of the plaintiff is dismissed for the total amount claimed of Rs.12,76,81,450.70/- but the same is decreed against the defendant for a sum of Rs.3,20,000/- along with interest at 9% per annum simple from 5.5.1995 till the date of payment including for the *pendente lite* period. Parties are left to bear their own costs. Decree sheet be drawn up.

MAY 22, 2018
Ne/AR/ SRwt

VALMIKI J. MEHTA, J