

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

FAO (OS) NO. 166/2017

Reserved on: 12th September, 2018

Date of decision: 3rd December, 2018

MAHANAGAR TELEPHONE NIGAM LTD Appellant

Through: Mr. Kirti Uppal, Senior Advocate
with Mr. S.K. Singh, Mr. Rameezuddin Raja and
Mr. Abhimanyu, Advocates.

versus

WORLD PHONE INDIA PVT LTD Respondent

Through: Mr. Abhinav Vasisth, Senior Adv.
with Advocate with Mr. Virender Goswami,
Ms. Soni Singh and Mr. Shamik Saha, Advocates

FAO(OS) (COMM) 119/2017

MAHANAGAR TELEPHONE NIGAM LTD Appellant

Through: Mr. Kirti Uppal, Senior Advocate
with Mr. S.K. Singh, Mr. Rameezuddin Raja and
Mr. Abhimanyu, Advocates.

versus

WORLD PHONE INDIA PVT LTD Respondent

Through: Mr. Abhinav Vasisth, Senior Adv.
with Mr. Virender Goswami, Ms. Soni Singh and
Mr. Shamik Saha, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.:

The above captioned intra-Court appeals by Mahanagar Telephone Nigam Ltd. ('MTNL' for short) assail the order dated 10th February, 2017 passed by the learned single Judge dismissing OMP No.562/2008 filed by MTNL and partly allowing OMP (COMM) No.575/2016 filed by World Phone India Pvt. Ltd. (WPIPL, for short) under Section 34 of the Arbitration and Conciliation Act, 1996 (A & C Act, for short) challenging the arbitral award dated 25th July, 2008, passed by a sole Arbitrator, Mr. B.K. Khurana.

2. MTNL, a Government of India undertaking registered under the Indian Companies Act, 1956, is a licensee of the Central Government under the Indian Telegraph Act, 1885 and authorized to establish and operate telephone and telegraph services in Delhi and Mumbai.

3. Pursuant to the Department of Telecommunication's decision to introduce Intelligent Network Service ('IN service' for short) on an experimental basis from 1st April, 1999, MTNL had invited applications for providing Premium Rate Services (PRM Services) to its customers/subscribers in Delhi. Paragraph 15 of the instructions and information to the applicants read;-

“15. Premium Rate Service (PRM): It enables services subscribers to provide Value Added Information based service to user. Different type of information related to stock market, astrology, weather condition, consultation services etc. can be provided through PRM. The subscriber of this service will be allocated a 'premium rate number'. The calls made to this number are charged to Calling Subscriber at a higher rate than the normal call rate. (Premium Rate Charging).

The revenue generated by premium rate call is shared between MTNL and PRM subscriber as per the terms agreed upon.”

4. Pursuant to the invitation on the above instructions, WPIPL vide letter dated 7th December, 1998 had submitted duly signed application form, which had set out the following broad terms and conditions;-

- “1. Subletting of Premium Rate Service is not allowed.
2. The subscriber is required to fully comply the provisions of the Indian Telegraph Act, 1885, and the Indian Telegraph Rules made thereunder and any amendments or replacement made there to from time to time.
3. The subscriber is required to ensure that he or any other person does not make objectionable or obscene activities, which are inconsistent with the established laws of the country on his Premium Rate Number.
4. MTNL/DOT may revise the tariff for MTNL Premium Rate Service from time to time at its discretion.
5. Subscriber is required to take a dedicated telephone connection for Premium, Rate Service and keep this telephone PSTN number secret. MTNL will share the revenue for only those incoming calls, which are logged at IN platform at Bikhaji Cama Place. The call will be logged at IN Switch only when the subscriber has accessed Premium Rate Service number through 1605 Code.
6. It is the responsibility of the subscriber to advertise the rate alongwith Premium Rate number by which they are going to charge their customers for their valued service.

I/We have carefully read the terms and conditions of the agreement and technical specifications of MTNL Premium Rate Service and agree to abide by the same.”

5. Application of WPIPL was accepted and it was granted registration for providing PRM Services to MTNL subscribers in Delhi. WPIPL and MTNL accept that the allotment was on experimental basis without any formal written agreement being executed. The broad outlines set out in the instructions inviting the offer and the application form were to govern the mutual arrangement.

6. As noticed and held below this experimental or preliminary phase was from 1st April, 1999 to 31st March, 2000.

7. The tariff or call rate fixed by MTNL for all telephone calls during the period was Rs. 1.25 per pulse. This call rate was also applicable to calls made by subscribers to avail the PRM service. However, WPIPL as a PRM service provider, in terms of the application form, had the option to keep/fix the pulse rate at 2, 3, 4, 8 or 12 seconds per unit. Each unit/pulse was chargeable as per tariff fixed by MTNL for the subscribers. WPIPL had elected and opted for 2 seconds pulse or 30 pulses for every minute of the call to avail PRM Service. In other words, the subscribers were liable to pay Rs.1.25 for every two seconds or Rs. 37.50 per minute for availing PRM service from their phones.

8. Paragraph 15 of the instructions and information had stipulated that the revenue generated by premium rate call would be shared between MTNL and the PRM subscriber as per the terms agreed. The application form had stipulated that MTNL would share the revenue for only those incoming calls that were logged at IN platform at Bikhaji Cama Place. The calls would be logged at IN switch only when the subscriber had accessed Premium Rate Service number through 1605 Code.

9. It is an accepted position and both sides state that WPIPL was paid by MTNL at the rate of Rs.0.75 per pulse for the month of April, 1999 and thereafter at the rate of Rs. 0.70 per pulse as per calls recorded in the IN switch Platform. The reduction to Rs.0.70 per pulse was accepted by WPIPL and was not a dispute referred to arbitration.

10. MTNL had made payments to WPIPL on the above pulse rate of Rs.0.75/0.70 on basis of calls recorded in the IN switch, whether or not the revenue was realized from the customers. In absence of proper data and verification it took time for MTNL realize that the bills raised for the PRM service were not being paid by the customers/subscribers. Thus, MTNL instead of sharing the revenue generated, was making payments to WPIPL for payments not received by them from the subscribers.

11. MTNL thereupon took steps to correct their folly and imprudence on 'revenue sharing' with WPIPL on the IN switch data and not on the basis of actual payment realized. MTNL wrote letter dated 15th February, 2000 to WPIPL proposing:-

“To
M/S World Phone India (P) Ltd
M-2, L G Floor GK-II, N.D.-48

Sub: Payment of Revenue Share in respect of PRM Service

As you may be aware, in respect of PRM Service provided by you, the revenue earned is shared between the service provider and network provider. For this purpose, the number of unit that are registered against each PRM number are made available by our Intelligent Network.

In this connection, based on detailed discussion held, the following decisions were taken:

1. In order to ensure that in accordance with DOT instructions, the bills in respect of calling parties are issued before releasing the revenue share to the service provider, it has been decided that , in respect of called units registered during a particular bi-monthly period of January - February 2000, the revenue share will be paid to the service provider in May 2000 instead of March 2000.
2. Even though certain selected categories of telephone connections have been barred from calls to PRM numbers, in respect of calls/ units registered in the past periods, the bad debts, if any, will be shared between the service provider and the network provider in the same ratio as that for commission sharing.
3. Bank guarantee equivalent to one months's revenue taking an average of last 6 months, (and for the initial 6 months equivalent to the actual revenue of 1st 2 months) will be taken from the service providers to safe guard the interest of M.T.N.L.
4. An agreement will also be entered between the service provider and the network provider ie, MTNL.

In accordance with above and considering your immediate needs, we have released 50% of November- December 99 revenue shares in January 2000. Balance 50% will be released in March 2000.”

Referring to the Department of Telecommunication instructions, WPIPL was informed that the revenue share of WPIPL would be released after issue of calling party bills and accordingly bi-monthly payment for the period January-February, 2000 would be made in May, 2000 and not March, 2000. To deal with bad debts, select categories of subscribers had been barred from making calls to PRM numbers. Further, the past period bad debts, if any, shall be shared between the service provider i.e. WPIPL and the network provider i.e. MTNL in the same ratio as commission sharing.

Formal agreement was envisaged to be entered into between MTNL and the 'service provider'.

12. MTNL, having learnt from the experience that could be described as experimental and ad-hoc arrangement, wanted a formal agreement on revenue sharing on actual realization and not on calls recorded in the IN switch data. Past bad debts, they had asserted, should be equally shared by WPIPL in the same ratio as commission sharing.

13. WPIPL vide letter dated 24th February, 2000 responding to MTNL on the issue of bad debts had stated:-

“2. Bad Debts: As per the existing system, the company providing the PRM service is only paid for the units that come through the IN switch. Due to lack of features in several exchanges and lack of secrecy in the system, quite a few calls come to our call centers that are not coming through the IN switch and we are not paid for this. In addition to this if we also have to face the uncertainty of bad debts, it may make the whole business very risky and unviable. We do our best by advertising the rate of the call in all our advertisements and MTNL too has bared the PRM numbers from all non-STD phones. We feel that as before, the service provider should be paid for all traffic, which comes through the IN switch, irrespective of its origin.”

WPIPL while not clearly rejecting the proposal in paragraph 2 of the letter of MTNL dated 15th February, 2000, had raised the grievance and issue of some calls not being routed through the IN switch and consequently not being recorded and paid. WPIPL had pleaded uncertainty on account of bad debts making the business risky and unviable. WPIPL had stated that they on their part had done their best to advertise the call rates and MTNL had barred PRM numbers from all non-STD phones.”

14. WPIPL was clearly aware of the problem of bad debts and non-recovery. They were also conscious and aware of the reasons, namely extremely high call rates, lack of awareness and knowledge about the high call rates amongst the users. MTNL was insisting that they would share revenue on the actual revenue earned. WPIPL did not completely reject the proposal for revenue sharing on actual recovery, albeit had stated that they should be paid for all traffic through the IN switch irrespective of its origin. The statement that “we (i.e. WPIPL) have to face the uncertainty of bad debt, it may make the whole business very risky and unviable”- would equally apply and was the very argument of MTNL that the risk and revenue must be shared equally. MTNL had made it clear that actual revenue realized would be shared. MTNL had pressed that WPIPL must share the past bad debts in the same ratio as the commission.

15. Correspondence followed and letters were exchanged. MTNL had thereupon circulated a draft agreement which vide clause 5 inter-alia had provided that MTNL would pay only for the amount realized from customers. Revenue sharing was not to be on the basis of pulse recorded in the IN switch. WPIPL had responded raising objections to different clauses of the proposed agreement. WPIPL in one of their letters dated 14th February, 2001 referring to clause 5 on sharing of actual revenue had stated:-

“This has reference to the draft agreement received by us in connection with the above. We take this opportunity to submit a few clarifications which may kindly be incorporated after your due consideration.

XXXXXX

3. Clause 5: Payments made only for amounts realised: There should be a provision for credit to the PRM Service Provider for realization of amounts beyond the specified period.”

16. By the subsequent letter dated 19th June, 2001 WPIPL informed MTNL that they had agreed with most of the clauses of the draft agreement, but had reservations on two aspects. Firstly, the agreement should be applicable from the date of signing, as the revenue share of the uncollected amount as commission had already been paid as per the previous agreement and precedent. Secondly, there was no need for bank guarantees from WPIPL as MTNL had been releasing commission payment after 2 to 4 months. The relevant portion of the said letter dated 19th June, 2001 reads as under:-

“ This has reference to our letter no. WPI:MTNL dated 06.06.2001 (Copy Enclosed) addressed to Sh. S.R. Singh, Assistant General Manager (B.C), MTNL, K.L. Bhawan, New Delhi-110050. In response to his, letter no. CO(NS)/PRM/Genl/2000-2001 dated 19.05.2001 signed by him on 23.05.2001, received by us on 26.05.2001 and copy to your good self as well as to The CGM, MTNL, K.L. Bhawan, New Delhi-50 vide which we are in agreement with most clauses of the Draft agreement there are two points that we felt(sic) are most important to be included in this agreement, which have been discussed since October 2000.

A. The agreement should be applicable from the date of signing of this agreement. This is important especially for cause relating to the revenue share of uncollected amount, commission for which has already been paid as per previous agreement and precedence.

B. As MTNL is releasing our commission to us after 2 to 4 months, we feel that there is no need for any bank guarantee from our side.

As our best efforts to have the above points incorporated in the agreement have not yielded any results. We are extremely sorry to point out that inspite of our repeated requests we neither heard any think(sic) nor we received any communication in the matter under report till date.”

17. We would now refer to others facts required to be noticed before we examine the reasoning and findings given in the arbitral award and the reasons recorded in the impugned order to reverse the findings and conclusion of the arbitrator. MTNL had continued making payment to WPIPL on the calls recorded in the IN switch till June, 2000, notwithstanding the bad debts (unrealised amounts from users) incurred by them and even after they had asked WPIPL to agree to commission being paid on revenue actually realized retrospectively. Thereafter, MTNL had paid WPIPL on actual revenue received basis and not on the pulse rate recorded in the IN switch. MTNL had quantified and claimed that WPIPL had received excess payment of Rs. 1,74,95,735/- during the period April, 1999 to June, 2000. (The quantification is disputed by WPIPL.) Post June, 2000 MTNL had commenced recovery of excess payment by way of adjustments from bi-monthly payments made to WPIPL. On 16th July, 2001 the arrangement was terminated with the MTNL withholding the PRM service from all phones.

18. The disputes raised and decided by the Arbitrator were primarily the claim of WPIPL for recovery of commission as per calls recorded in the IN-switch for the period 1st June, 2000 till termination on 16th July, 2001. Secondly, MTNL was not entitled to recover ‘excess’ payment made during the period 1st April, 1999 till June, 2000, by making adjustment from the payments made post June, 2000. Accordingly, the adjustments made should

be paid. MTNL had defended the proceeding on merits and had also prayed for recovery of the entire amount of Rs.1,74,95,735/-. Plea and contention were that 'revenue sharing' means actual revenue generated and not IN switch call data.

19. Arbitrator rejected MTNL's contention regarding breach of conditions by not offering services like job consultation, share market etc. and by offering services like filmi chat and cool chat as MTNL should have taken objection and stopped such services and not continued to honour the bills. Allegation of misuse on account of obscene and objectionable content in violation of the agreed broad arrangement was rejected by the Arbitrator observing that the terms 'obscene' and 'objectionable' had not been formally defined and were difficult expressions to define. Arbitrator held that MTNL had failed to prove misuse of services for objectionable and obscene calls.

20. Arbitrator divided the period of dispute into two parts or periods. The initial or the experimental phase was till 31st March, 2000 and the second phase was from 1st April, 2000 till termination of PRM service on 16th July, 2001. For the experimental phase, Arbitrator held that MTNL was liable to pay commission to WPIPL on IN switch data and not on actual recovery. However, for the second period from 1st April, 2000 till termination on 16th June, 2001 MTNL was liable to pay commission to WPIPL on actual recovery and not on recordings as per IN switch data. To appreciate and understand the reasoning of the Arbitrator we would reproduce paragraph 28 of the award, which reads :-

“ 28. Issue No. -12 & 13

As per documents placed in file, MTNL adopted a policy for bill settlement, which was circulated internally vide letter dated 23.7.99. There can be no manner of doubt that internally, commission was paid to the Claimant on the basis of pulses received from the IN switch and the same was also admitted by Respondent. It was submitted by the Respondent that when it came to their knowledge that a large amount of o/s dues can not be realized from the subscribers who have called PRM numbers, they decided to pay the commission on the amount which is realized rather than on the date received from the IN switch. For the purpose of calculating unrealized amounts, they developed a software which could bifurcate the realized and unrealized amount. However, the Claimant denied the existence of such a software. Arbitral Tribunal directed the Respondent to give a demo of said software but it was submitted by Respondent that the said software was developed in 2000 and after the shutting down of PRM services, the said software is not operational. The vendor who has developed the said software is also not available, however they produced on record computer generated sample statements of the said software for a certain period, and handwritten voluminous data for some of the earlier period.

The PRM service was started on 1.4.99. The experimental phase was for one year i.e. up to 31.3.2000. As per the Broad Terms and Conditions, the revenue generated was to be shared between the parties. Respondent continued to pay the commission on the basis of revenue generated on the basis of exchange meter reading irrespective of revenue realized or not till it came to his notice that heavy bad debts are being accumulated on account of PRM service. Respondent decided to pay the commission on revenue realized instead of revenue generated and the same was communicated to the claimant vide letter dated 15.2.2000 and reconfirmed in reply to Claimant's initial objections. MTNL also unilaterally started adjusting previous period's unrealized payments on this account from the future commission. Since MTNL is a government PSU, and as per DoT policies, it had the right and privilege to alter the terms after the "experimental phase" based on the experience gained in the light of overall public and company interest. Therefore, Respondent forwarded an agreement to the Claimant consisting of various terms to run the said service including the terms that the

commission will be paid on realized amount and that too retrospectively. Claimant protested against the said agreement and did not agree to sign the same and returned back to the Respondent with some modifications. The main concern of the Claimant was that the terms that commission will be paid on realized amount at the most can be agreed prospectively. In the controversy period neither agreement could be signed nor services were closed by the respondent or the claimant, and the service continued as before, including release of revenue share till June 2000, and on the proposed Respondent's terms thereafter.

On the basis of above facts, I am of the view that services were started on 1.4.99 and were guided by broad terms and conditions which was a basis of frame work to start the said services. The experimental phase was ending on 31.3.2000 and the problems encountered in the experimental phase needs to be addressed before starting services in full fledged way. Respondent seems to be genuine in their contention that how they can pay the commission on the amount which was never received by them and that too from public money, on the other hand Claimant has a right to the mutually agreed terms of settlement and also to know, as to how the disputed amounts are settled? Respondents forwarded modified draft agreement to claimant which was however, not agreed to by the Claimant, who instead, reverted back-with their objections. The Respondent did not agree and reiterated its earlier stand. If the same was not agreed by the Claimant, they should have stopped the service but they continued with the service without signing any agreement. At the same time even the respondent did not initiate any action to disconnect the network facilities. It is simply a case of acquiescence. Services were continued to run without any valid agreement between the parties. Even revenue share payments were said to have been released. Hence, I am of the view that broad term and conditions hold good, at the most upto the end of experimental phase i.e. 31st March 2000, since respondent MTNL (Govt. undertaking) informed of its revised bill settlement procedure vide its communication of 15th February, 2000.

Claimants are entitled to commission on the revenue generated irrespective of whether realized or not, only upto that date. It was

brought to the notice of claimant by respondent on 15.2.2000 that in future they are going to receive commission on the realized amount only and there was sufficient time till end of March, for the claimant to wind up the service. Therefore claimant is entitled to commission on only realized amount after 31.3.2000. However, details of unrealised amounts PRM no. wise need to be furnished to the Claimant.

In any case, Respondents are not entitled to withhold the future payments in the name of excess payments made by them to the Claimant upto 31.3.2000 i/e commission upto 31.3.2000 is payable irrespective of amount realised or not. Therefore MTNL may work out the actual payments based on the IN switch data, and settle the claims, after adjusting the amounts already paid. The issues no. 12 & 13 disposed of accordingly.”

21. We would now turn to and examine the reasoning given in the impugned order whereby the learned single Judge had upset and reversed the Arbitrator's finding and held that WPIPL would be entitled to payment from MTNL even post the experimental phase that had ended on 31st March, 2000 on the basis of pulse recorded through the IN service even if MTNL had not been able to realize and receive payment from the subscribers/customers. In other words, MTNL would have to bear the burden and pay from their pocket @ 70 paisa per pulse for the calls recorded through the IN service even in respect of the unrealised revenue i.e. bills raised but not paid by the subscribers. Learned single Judge has interfered with the award and reversed the finding of the Arbitrator for the following reasons:-

“37. In the present petitions, it is not in dispute that there was no written agreement between the parties which would form the basis of providing PRM service and the payment of commission to be made therefor by MTNL to WPIPL. The basis of the claims and in fact the counter-claim of MTNL was the broad terms and conditions contained in the instructions accompanying the application notified

by MTNL for IN services. These broad terms and conditions give information about the PRM service. It stated that the revenue generated by premium rate call would be shared between MTNL and the service provider as per the terms agreed upon. It is significant that these terms and conditions included the tariff for Free Phone Service and PRM service. As far as PRM services are concerned under the title „Feature Charges“ there were:

(a) basic feature charge (which is treated as ‘Nil’ in the experimental phases)

(b) bi-monthly charges for each additional feature (payable in advance) (where again, it is indicated as ‘Nil’ in the experimental phases)

38. However, under Clause B for ‘Tariff for FPH & PRM Services’, it was indicated that “the pulses duration offered will be two, three, four, eight & twelve second per unit call.” It was further indicated that “each unit will be charged as per existing tariff.” It was clearly stated that the commission will be paid by MTNL to the service provider at 75 paisa per unit. It is on this basis that bills were raised by WPIPL and paid by MTNL at least till 31st March, 2000. The letter dated 23rd July, 1999 also instructed the officers of MTNL to process the bills for commission for providing PRM service on the above basis.

39. Mr. Kathpalia is right in pointing out that there were internal contradictions in the impugned Award which are under challenge in these petitions. Indeed under Issue No. 3, the finding is that by its letter dated 15th February, 2000, MTNL attempted to “unilaterally supplement the broad terms and conditions with a new set of conditions.” Having given this finding, it is inexplicable that the learned Arbitrator proceeded to hold that if WPIPL did not agree with the changed terms proposed by MTNL, then WPIPL should have stopped the service. However, the fact further noted by the learned Arbitrator is that services in fact “continued to run” even thereafter.

40. Indeed, there could not have been a unilateral termination of the PRM services by MTNL. The internal letter dated 23rd July,

1999 of MTNL whereby instructions were issued as to the procedure to be followed for processing of the bills of WPIPL is sufficient indication that MTNL was aware of its obligation to pay on that basis. The revenue sharing model did not necessarily mean that the payment of commission was linked to what was collected by MTNL from its subscribers. If that was the basis, then WPIPL could never raise a bill on the basis of the pulses recorded till information was made available by MTNL whether the subscribers had in fact paid the bills raised by MTNL on them. That would render the system of WPIPL raising bills for the PRM services impractical and delay the payments due to WPIPL indefinitely. Therefore, it was logical that the parties did not proceed on that basis. The basis of the payment of commission for IN services appears to be the recording of pulses. There was no rational basis for the Delhi office of MTNL to unilaterally alter the said basis of payment of commission.

41. The impugned Award passed by the learned Arbitrator proceeds on the basis that MTNL being a PSU had an obligation to cater to public interest. The learned Arbitrator was in terms of Section 28 (2) read with Section 28 (3) of the Act required to adhere strictly by the agreed terms on the basis of which the services were provided by WPIPL to MTNL. In fact, those agreed terms formed the basis for the payment of commission till at least 31st March, 2000. With WPIPL having acted on that agreement and spent money for laying out infrastructure, it was not open to MTNL to unilaterally announce by its notice dated 15th February, 2000 that it would pay commission only on the basis of the amounts realized from its subscribers. This part of the impugned Award, therefore, appears to be contrary to the statutory mandate of Section 28 (2) read with Section 28 (3) of the Act.”

22. We begin by referring to the reasoning given in paragraph 41 of the impugned order, which states that the Arbitrator was required to strictly adhere to the terms on the basis of which services were provided by WPIPL to MTNL under Section 28(2) read with Section 28(3) of the A & C Act. It is also recorded that these terms have to be made the basis for payment till at

least 31st March, 2000. Accordingly, it was not open to MTNL to unilaterally announce by letter dated 15th February, 2000 that it would pay commission only on the basis of amount realized from the subscribers. We feel there are fallacies and incongruities in the aforesaid reasoning. The reasoning accepts that the broad terms and conditions were 'in existence at least' till 31st March, 2000. In other words, broad terms and conditions were not squarely applicable after 1st April, 2000. In these circumstances, reliance placed on sub-section (2) read with sub-section (3) to Section 28 of the A & C Act would falter. Further, paragraph 37 of the impugned order specifically records that there was no written agreement between the parties, which would form the basis for providing PRM services and commission. The broad terms and conditions which were agreed upon had stipulated 'revenue sharing'. Method and manner of 'revenue sharing' was not defined and elaborated. MTNL had initially made payments to WPIPL on the basis of pulse rate recorded through the IN service @ 75 paisa per unit, which was reduced and then @ 70 paisa per unit. The broad terms and conditions were as per the award valid only during the experimental phase till 31st March, 2000. Accordingly, the Arbitrator had rejected MTNL's plea for refund/adjustment of payments made to WPIPL from 1st April, 1999 to 31st March, 2000 on actual payment received. However, for the period post 1st April, 2000 learned Arbitrator for detailed reasons had held that payment of commission to WPIPL should be on the basis of actual receipts and not on call data recorded in IN switch.

23. The impugned order does not disturb or comment on the finding given by the Arbitrator that the preliminary or experimental phase was from 1st April, 1999 to 31st March, 2000. Paragraph 2 of the Award states that IN

service were introduced by the Department of Telecommunication from 1st April, 1999. The tariff for experimental phase, which was upto 31st March, 2000, were governed by the tariff circular dated 9th April, 1999. The said finding recorded in the Award has not been set aside and quashed. No reason to deviate from and ignore the said finding has been stated in the aforesaid paragraphs of the impugned order. However, paragraph 7 of the impugned order records that WPIPL had denied that the experimental phase was from 1st April, 1999 to 31st March, 2000. Further there was no document on record that substantiated the assertion of MTNL. This was the assertion of MTNL and finding recorded by the Arbitrator. On Court question, learned counsel for WPIPL stated that they had challenged the said finding in their objections under Section 34 of the Act. This is correct. At the same time, we notice that WPIPL in their rejoinder have not controverted and denied that the experimental or preliminary phase was from 1st April, 1999 to 31st March, 2000. On the said aspect, we would quote the relevant portion of the pleadings of MTNL and WPIPL, which are as under:-

“Counter statement of fact and counter claims on behalf of MTNL

“4. That the Intelligent Network Services were introduced by the DOT on experimental basis for the period from 1.4.99 to 31st March, 2000.”

Rejoinder/reply on behalf of the claimant to the counter statement/counter claim of the respondent

“3-5. That paras 3 to 5 of the preliminary submissions/objections need no reply being matters of record.”

Clearly, the specific assertion that the experimental phase ended on 31st March, 2000 has not been specifically denied by WPIPL. Arbitrator was therefore justified in dividing or bifurcating the period of dispute into two periods. The division was as per and in consonance with the pleadings.

24. Given the aforesaid facts, the Arbitrator was justified in relying upon the conduct of MTNL and the asymmetrical division or sharing of revenue post 1st April, 2000, as MTNL had already raised a red flag for good and valid reasons stating that WPIPL should be paid only on the basis of actual receipts and not on the basis of billing. The actual payments received being much lower or less than the billing. Arbitrator held that this would be fair and just.

25. The tariff fixed for PRM services by WPIPL was rather high at about Rs.37.50/- per minute on the pulse rate of 2 seconds, chargeable @ Rs.1.25 per pulse. If the pulse rate had been taken at 12 seconds, the charges payable would have been lower and possibly the bad debts would have been less. Therefore, there were bound to be defaults and cases of non-payment. MTNL was responsible and liable for the initial period as they had paid commission in spite of reservations on call data recovered in IN switch. They had suffered on this account. Arbitrator looking at the conduct of the parties, the letter dated 15th February, 2000 written by MTNL, correspondence exchanged and draft agreement circulated has held that the revenue actually earned should be shared and that it would be unfair and unjust to burden and make MTNL liable to pay from their own pocket and earnings, charges @ 70 paise per pulse i.e. Rs.21/- per minute to WPIPL even when they had not received payments from the customers. Paragraph 6

of the impugned order refers to and quotes from the tariff circular dated 9th April, 1999, the last sentence of which, *inter alia*, states-“For this service call charges will be at the higher rate and the revenue earned is shared between service provider and network provider(DOT).” Revenue earned would mean the actual and not notional or hypothetical.

26. Paragraph 38 of the impugned order refers to letter/internal communication dated 23rd July, 1999 by MTNL to its officers, in respect of bills for payment to WPIPL on the basis of pulse rate. Accordingly, payments were made by MTNL to WPIPL. However, the internal letter dated 23rd July, 1999 was written before the reality had dawned on MTNL. The arbitral award records that based upon the experience in the experimental phase MTNL had made it clear that they would share revenue on actuals. MTNL had incurred and suffered loss as they were making payment to WPIPL @ 70 paisa per pulse even for amounts which were not received or paid to them by the customers and could not be recovered. The arbitral award had held that this was unjust, unfair and inequitable.

27. Paragraphs 39 and 40 of the impugned order refer to letter dated 15th February, 2000 by MTNL, which it was observed was an attempt by MTNL to unilaterally supplement the broad terms and conditions. As per the Arbitrator this was inexplicable, further if WPIPL could not change the terms then neither could MTNL have changed the terms. The reasoning ignores that the Arbitrator had not interfered with this ‘revenue sharing’ arrangement till 31st March, 2000 by treating the first year as the experimental period. Unilateral alteration of terms of payment to WPIPL was examined and considered by the Arbitrator and not accepted for the

experimental phase. The Award thereafter proceeds to record and hold that based on the learning and experience during the experimental period, MTNL had clarified and clearly stated that the revenue sharing has to be on actuals i.e. the payment received and not on the basis of billing made. On the question of contradiction, it is equally plausible to urge and argue that the Arbitrator had contradicted himself when he had accepted the stand of MTNL for the period post 1st April, 2000, but not for the period between 1st April, 1999 till 31st March, 2000. The argument cuts both ways, therefore, it cannot be the determinative reason. Paragraph 40 of the impugned order refers to the internal letter of the MTNL dated 23rd July, 1999 for processing of bills of WPIPL. This letter was written within a few months after PRM services were introduced with effect from 1st April, 1999. We observe that internal communication can always be amended and are not final till communicated. This internal letter cannot be treated as binding. Further, this letter was written within the experimental phase and thereafter MTNL had issued letter dated 15th February, 2000 to WPIPL based upon experience and reality check. This letter/communication would modify the earlier internal communication. It is difficult to accept the reasoning that there was no rational basis for MTNL to pay on actual revenue earned.

28. We would possibly accept MTNL's submission that revenue sharing during the experimental phase as held by the Arbitrator appears to be somewhat contrary to the broad terms and conditions. Tariff circular of the Department of Telecommunication had mandated that the revenue earned shall be shared between the service provider and the network provider and not what should have or could have been earned. Revenue sharing did not mean and imply that MTNL would be liable to pay from their own pocket if

they are unable to realize the amount due from the subscribers/customers. Nevertheless, MTNL in the beginning had interpreted the term as referring to call data recorded in the IN switch and not the actual revenue earned. Therefore, the Arbitrator had refused to interpret the term 'revenue sharing' differently and had adversely commented on MTNL's attempt to unilaterally enforce a 'new term' or rather a different interpretation on 'revenue sharing' to mean actual revenue earned and not mere calls recorded in the IN switch. At the same time the Arbitrator had affirmatively held that MTNL initially did not visualize large-scale non-payments resulting in unpaid debts. Arbitrator has elaborately discussed and given his reasons justifying revenue sharing on actual receipts post 1st April, 2000.

29. In spite of our view on the expression 'revenue sharing', we would hesitate to set aside and quash the arbitral award to this extent given the limited jurisdiction of the Court under Sections 34 and 37 of the A&C Act. Equally this legal position would apply to the reasoning given in the impugned order in so far as it sets asides and nullifies the reasoning for the period post 1st April, 2000 and as directs that WPIPL would be paid on the basis of actual realization for the period post 1st April, 2000.

30. In the aforesaid circumstances, the reasoning of the Arbitrator predicated on principle of equity, fairness and justice carries weight and cannot be discarded and rejected. The standards used by the Arbitrator in the present case are absolutely clear. It is urged that the arbitrator is required to follow the law, notwithstanding the epithet in *Oliver Twist*. Contra view being fair and just is law. Arbitrators like Courts may consider the 'apparent fairness' of the respective parties' positions instead of strictly following the

law, which would result in a less favourable outcome for the party who is favoured by a strict reading of the law. Equity or law as an issue has been present since antiquity. Aristotle had said "an arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity." This consideration should not be overlooked in evaluating the applicability of equity to arbitration. In broad sense equity is fairness. If Courts can't escape the basic notions of equity, arbitrators can't either. Just as Courts within law award equitable remedies when a legal remedy is insufficient or inadequate, Arbitrator may also apply equitable principles to do justice. Privy Council had stressed on this aspect in ***Ramdutt Ramkissendass v. F.D. Sassoon & Co.***, AIR 1929 PC 103, stating that "in a modern arbitration, the principles of equity must be applied just as they would now be applied in a court of law." Though the Code of Civil Procedure, 1908 and the Evidence Act, 1872 are not applicable in arbitration, yet the principle of natural justice, equity and fair play do apply even in such proceedings as, by the award the Tribunal decides the rights for and against the parties. It is true that arbitrators can't violate the express terms of the contract. However, when the terms of the contract are ambiguous or are silent on a particular issue or not fully settled as in the present case, nothing prevents an arbitrator from taking recourse of principles of equity. Arbitrators enjoy a degree of flexibility within four corners of law when they decide and adjudicate or rather arbitrate on the disputes. This must be respected. Highlighting the aspect of fairness and equity, the Supreme Court in ***F.C.I. v. Joginderpal Mohinderpal***, (1989) 2 SCC 347 had observed that :

".....But in proceedings of arbitration there must be adherence to justice, equity, law and fair play in actions. However, the proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure which will lead to a proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to. It is, therefore, the function of courts of law to oversee that the arbitrators act within the norms of justice. Once they do so and the award is clear, just and fair, the courts should, as far as possible, give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of correction by the court of an award made by the arbitrator. We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done....."

31. Learned Senior Advocate for WPIPL had drawn our attention to communication dated 24th March, 2000 by MTNL office in Mumbai by which instructions were issued to make payment of commission to WPIPL irrespective of whether the subscribers/customers had paid the bills or not. We may note that this letter was written by the Mumbai office during the test and trial phase i.e. the experimental phase. This letter not issued by the Delhi office and related to a different agreement. It was argued that the Mumbai office had made payments on the basis of the pulse units recorded irrespective of whether the subscribers/customers had paid the bill. This would reflect that there was miscommunication and lack of coordination between the Delhi and Mumbai offices of MTNL. Facts regarding Mumbai agreement/arrangement do not find any elucidation and examination in the award. There were two separate agreements/arrangements with regard to the

Mumbai area and the Delhi area. By the same reasoning, the letter/communication dated 15th February, 2000 etc. can be held equally applicable to the Mumbai area and the arrangement between MTNL and WPIPL with respect to Mumbai area. This factum alone would not be material. In any case, this factor cannot be used as a ground or reason to set aside the arbitral award under section 34 of the A & C Act.

32. The last issue relates to payment of interest. The impugned order on the said aspect has interfered with the arbitral award recording the following reasons:-

“44. As far as the Award in respect of Issue No. 15 is concerned, there is no basis or reasons given by the Arbitrator for denying WPIPL the pre-claim and pendente lite interest. The impugned Award of the learned Arbitrator in regard to Issue No. 15 is hereby set aside.

45. Consequently, the Award in respect of Issue No. 16 which denies MTNL refund of commission is not interfered with. The Award in respect of Issue No. 18 which denies MTNL interest on its counter-claim also does not call for any interference.

46. The net result is that the impugned Award the challenge by WPIPL to the impugned Award in respect of Issue Nos. 12, 13 and 15 succeeds in part and the impugned Award to the above extent is hereby set aside. It is held that WPIPL would be entitled to commission on the basis of the pulses recorded from the date of commencement of the PRM services till the date of discontinuation i.e., from 15th April, 1999 till 16th July 2001. It would also be entitled to pre-claim and pendente lite interest on the aforementioned amount at the same rate awarded by the learned Arbitrator as future interest.”

33. On the said aspect, we find that the arbitral award with reference to issue nos. 15 and 17 on interest had stated as under:-

“30. Claim No. -15

Claimant is not entitled to any past or pendente lite interest; except on any pending or deducted payments due, covering the period upto 31st March, 2000 that too upto the date of commencement of Arbitration proceedings.”

“32. Claim No.-17

The Respondents should work out the revenue share claims of the Claimant for the period upto 31st March, 2000 as per IN switch data, balance amount if any to be paid, should be released along with interest @ PLR, till the commencement of Arbitral proceedings.

In addition, from that day onwards, till the closure of the service, accounts of the Claimant should be settled as per proposed terms of the draft agreement.”

Last paragraph of the Award relating to post award interest states;-

“Respondent (i.e. MTNL) is directed to pay the above mentioned amount within 90 days of the receipt of the award failing which Claimant (i.e. WPIPL) is entitled to recover the said amount along with interest @12% p.a.”

On conjoint reading of the arbitral award with respect to issue nos. 15 and 17, in our opinion, the Arbitrator had awarded interest for the revenue share as per IN switch data at the PLR, i.e., prime lending rate, till the commencement of arbitration. It is also recorded that post the closure of service, WPIPL would be entitled to accounts as per the draft agreement i.e at PLR. The arbitral award with reference to issue no. 15 does not contradict itself for it states that WPIPL would be entitled to interest on the pending or deducted amounts for the period upto 31st March, 2000, i.e., the payments which had been deducted or adjustments were made on account of

payments made upto 31st March, 2000 would be refunded with interest as stipulated. However, interest was specifically restricted till the date of commencement of Arbitration. Future interest has been awarded at the rate of 12% in case MTNL do not pay the amount due in terms of the award within 90 days. Arbitrator has exercised his discretion not to award *pendente lite*. No reasons are stated for not awarding *pendente lite* interest. However, given the facts of the present case, partial success of WPIPL and the manner in which the Award has struck a balance between the respective claims, it would not be appropriate and proper for the Court to modify and amend the award. Award of *pendente lite* would also depend on conduct of the parties during arbitration. We would not speculate the reason, albeit the award does mention that WPIPL had filed documents in August, 2004 and documents pertaining to generation of bills etc. as late as in February, 2008. Further the amount payable to WPIPL on the impugned order being set aside would come down substantially.

34. In view of the aforesaid discussion, we would partly allow the present appeals filed by MTNL and uphold the arbitral award dated 25th July, 2008 in entirety. In other words, the impugned order dated 10th February, 2017 to the extent it partly allows the OMP (COMM) No.575/2016 filed by the WPIPL, is set aside. The impugned award in a way is incomplete, as the arbitral award in paragraph 28 has directed MTNL to work out actual payments based on the IN switch data for the period upto 31st March, 2000, and settle the claims, after adjusting the amounts already paid. MTNL would carry out the said exercise as expeditiously as possible and preferably within a period of 60 days from the date copy of this order is received. We have made the aforesaid observation out of abundant caution as the matter has

remained pending in the Court. Notwithstanding this time of 60 days, MTNL would be liable to pay post award interest in terms of the award. Deposit made pursuant to the order in this appeal would be treated payment in terms of the award. Interest accrued, if any, on the amount deposited and payable, would be paid to the respondents. In case of any shortfall interest in terms of the award would be payable. In the facts of the case, there would be no order as to costs.

-sd-

(SANJIV KHANNA)
JUDGE

-sd-

(CHANDER SHEKHAR)
JUDGE

DECEMBER 3, 2018
VKR/ssn

न्यायमेव जयते