

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.10.2018

+ **O.M.P. (COMM) 562/2016 & IA No. 15462/2016**

VIDEOCON TELECOMMUNICATIONS LIMITED ...Petitioner

Versus

IBM INDIA PRIVATE LIMITED

...Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Akhil Sibal, Senior Advocate with Mr
Aniruddha Deshmukh, Mr Yashvardhan and
Ms Tanvi Misra.

For the Respondent :Mr Pramod Nair and Ms Manini Brar.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner (hereafter 'VTL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), *inter alia*, impugning the arbitral award dated 06.08.2016 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of three arbitrators, namely, Mr R.C. Lahoti (Presiding Arbitrator), Mrs Sujata Manohar and Mr R.V. Raveendran (hereafter 'the Arbitral Tribunal').

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to an agreement –

‘Service Agreement’ dated 16.09.2009 – for execution of the work of supply, installation, commissioning, integration, maintenance and operation of information technology systems to roll out, support and expand the GSM Network in India. The said agreement is hereafter referred to as ‘the Agreement’.

3. By the impugned award, the Arbitral Tribunal has awarded an aggregate sum of ₹135,25,39,824/- alongwith interest at the rate of 12% per annum (except the amounts awarded against the claim of late payment fees, taxes on hardware, return of spares and not to use IBM’s software till the payment of Termination Charges) in favour of IBM. The Arbitral Tribunal has also awarded an aggregate sum of ₹33,35,98,591/- alongwith interest at the rate of 12% per annum (except the amount of ₹48,70,79,281/- awarded against the claim of refund of Annual Service Charges, ₹30,87,19,267/- towards interest on counter claims and refund of hardware price) in favour of VTL.

4. The principal controversy involved in the present case relates to the award of ₹135,25,39,824/- on account of Annual Service Charges, Project Service Charges and other charges in favour of IBM. According to VTL, IBM had defaulted in rendering services under the Agreement and, therefore, the said award is erroneous and opposed to the public policy of India. VTL also claims that the Arbitral Tribunal had erred in rejecting its claim for an amount of ₹508 crores as damages.

Factual background

5. Videocon Telecommunications Limited (VTL) – previously known as Datacom Solutions Ltd – is a telecom company belonging to the Videocon Group. It is a telecom operator providing Unified Access Services (UAS) and is, *inter alia*, engaged in providing Information Technology (IT) functions including managing of network infrastructure; marketing of telecom products and services; after sale customer service; managing billing arrangements etc. IBM (Service Provider) is engaged in providing Information Technology and allied services and solutions based on a combination of hardware, software, services and consulting.

6. VTL was allotted a UAS license by the Department of Telecom (DoT) in order to set up and operate mobile communication services in twenty one License Areas for a period of twenty years.

7. On 10.06.2008, VTL issued a Request for Proposal (RFP) inviting bids for providing IT related services of supply, installation, commissioning, integration, maintenance and operation of information technology systems to roll out, support and expand the GSM network in India (hereafter ‘the Works’).

8. IBM submitted its bids pursuant to the aforesaid invitation. Thereafter, on 16.09.2009, VTL awarded the contract to IBM and the parties entered into the Service Agreement (the Agreement) for execution of the Works. The Agreement was amended on 01.06.2010 and thereafter once again on 13.09.2010. The period stipulated for

completion of the Works was four years from the commencement of the Works – that is, four years from 05.02.2010 – or until the termination of the Agreement.

9. On 09.09.2013, IBM filed its statement of claims before the Arbitral Tribunal and, thereafter, on 13.12.2013, VTL filed its Statement of Defense and Counter Claims before the Arbitral Tribunal.

Impugned award

10. The Arbitral Tribunal framed the following issues for consideration:-

“List of Disputes

Claims of IBM

1. Whether VTL is liable to pay to IBM Rs. 95,28,18,835.85/- towards Annual Service Charges?
2. Whether VTL is liable to pay to IBM Rs. 8,47,27,529/- towards Project Service Charges?
3. Whether VTL is liable to pay to IBM Rs. 36,80,70,172.11/- towards Termination Charges?
4. Whether VTL is liable to pay to IBM Rs. 16,84,16,381.40/- as late payment fees, from the due dates up to date of Statement of Claim and further during the pendency of the arbitration proceeding?
5. Whether VTL is liable to pay IBM, Rs.64,50,446/- by way of taxes on the hardware portion of the IBM assets that were transferred to VTL in accordance with the order dated 29.05.2013 passed by the Delhi High Court?

6. Whether VTL is liable to return the spare parts belonging to IBM and its sub-contractors, as listed in Schedule V of Statement of Claim?

7. Whether VTL cannot use the Software listed in the Asset Register till payment of termination charges to IBM?

Claims of VTL

8. Whether IBM is liable to refund Rs. 48,70,79,281/- to VTL towards excess payment of Annual Service Charges?

9. Whether IBM is liable to refund Rs. 15,23,96,186/- to VTL towards excess payment of Project Service Charges?

10. Whether IBM is liable to refund Rs. 22,20,504/- to VTL towards excess payment of Increased Resource Usage Charges?

11. Whether IBM is liable to refund Rs. 13,70,99,396 to VTL towards “other claims and credits” enumerated in Schedule A to the Counter Claim?

12. Whether IBM is liable to pay Rs. 30,87,19,267/- to VTL, by way of interest at the rate of 18% per annum on Rs. 77,87,95,304/- (aggregate of amounts mentioned in disputes 8 to 11 above) from the dates of payment to date of claim statement?

13. Whether IBM is liable to pay to VTL, Rs. 508 crores towards “financial and business loss” by reason of the delays, defaults and wrongful termination of the Services Agreement?

14. Whether IBM is liable to refund Rs. 13.50 crores to VTL, towards the depreciated value of hardware paid in terms of the order dated 29.05.2013 passed by the Delhi High Court?

15. Whether IBM is liable to return three laptops of VTL or the monetary value thereof?

16. Whether IBM should provide to VTL, all information media

passwords and other details/support (enumerated in Schedule E) required by VTL to use and enjoy the benefits thereof?

Re: Issue Nos. 1 & 8, Claim of ₹95,28,18,835/- towards Annual Service Charges by IBM and counter claim of ₹48,70,79,208/- towards refund of excess payment of Annual Service Charges by VTL.

11. It was contended on behalf of VTL that the liability for payment of Annual Service Charge (ASC) to IBM was based on IBM providing the service and performing its obligations under Clause 2.2, Annexure 11 of the Agreement. IBM contested the aforesaid submission and submitted that the payment of ASC had no bearing with the delays, delivery failure and completion of the works. He contended that the Agreement expressly provides that ASC was to compensate the service provider for the resources used to provide services that IBM had deployed viz hardware, software and human resources to support VTL's telecom operations and that the expenditure for providing such resources was substantial and ASC was payable on a periodical basis for such services. The Arbitral Tribunal was of the view that delivery of projects/milestones was not the only services to be rendered by IBM and there were other services to be rendered by the service provider, which were admittedly rendered by IBM and which were utilized and enjoyed by VTL. Therefore, the Arbitral Tribunal was of the view that it is not possible to bifurcate the consideration for the different types of services rendered by IBM, if the service provider

(IBM) fails to provide a part of the services, VTL is only entitled to damages and not proration of the consideration, as ASC is a fixed amount due during the subsistence of the contract. Thus, the Arbitral Tribunal accepted the claim of IBM of ₹95,23,18,835/- being unpaid ASC from February, 2012 and rejected the counter claim of VTL for refund of ₹48,70,79,208/- paid towards ASC.

Re: Issue Nos. 2 & 9, Claim of ₹8,47,27,529/- towards Project Service Charges by IBM and counter claim of ₹15,23,96,186/- towards refund of excess payment of Project Service Charges by VTL.

12. Clause 2.2(a) of Annexure 11 to the Agreement describes Project Service Charges (PSC) to be paid by VTL to IBM. These charges are milestone linked charges associated with the deliverables to be executed by the service provider (IBM). The milestone linked payments contemplates PSC to be paid in five stages on achieving the stipulated milestone: (i) Project Kick off (Stage 1); readiness of Infrastructure (in short 'Infra-Ready' – Stage 2); User Acceptance Test (in short 'UAT' – Stage 3); Built to operate (in short 'B2O' – Stage 4); and ninety days after Built to Operate (in short 'B2O+90' – Stage 5).

13. It was contended that IBM did not take up all the 44 projects (hereafter 'the Projects') for which PSC was payable, nor did IBM completed all the Projects that were taken up. IBM contended that although VTL made payment of several PSC invoices raised by it, but

VTL did not make payment of twelve of the PSC invoices raised by it, thus, IBM claimed an amount of ₹8,47,27,529/- as VTL had committed breach of its obligation under the Agreement. Whereas, VTL contended that IBM had submitted invoices aggregating ₹47,25,67,340/- towards PSC and that it had paid ₹38,26,39,955/- towards PSC to IBM with respect to the milestone achieved/Projects delivered, IBM was eligible only for a sum of ₹23,02,43,769/- towards PSC and, therefore, according to VTL, it had made an excess payment of ₹15,23,96,186/- towards PSC. VTL also contended that the Agreement provided for on-account payment on achieving four milestones and a final payment to be made on achieving the fifth and final milestone on the assumption that the project will be ultimately completed and be of use and utility to VTL. It contended that since IBM had merely commenced the Project and had left it unfinished, it was of no use to VTL, and IBM was not entitled to any payment with respect to achieving any of the milestones even if invoices had been raised and any payments had been made. VTL claimed that IBM had not fully operationalised majority of the project till 31.03.2011 and had not delivered approximately 67% of the Projects; IBM had submitted invoices only about 54% of the scoped project.

14. The Arbitral Tribunal observed that as per the Agreement, IBM would be entitled to the on-account payments from VTL in respect of a Project only on successful completion of that Project; that is, on achieving all the five milestones of that Project. It also observed that where any Project is deleted or its scope is reduced by VTL for its

own reasons after completion of a particular milestone but before the completion of all the milestones, IBM will be entitled to the payments for the completed milestones and will not be obliged to return the payments received, as the non-completion of the remaining milestones is due to action/breach on the part of VTL. On the other hand, if IBM, on receiving payment for particular milestone fails to achieve the subsequent milestones and complete the Project due to its own default, then IBM will not be entitled for the payment of the entire project and will have to refund the on-account milestone payments already received.

15. The amount of ₹8,47,27,529/- was claimed by IBM towards twelve PSC invoices. The same were considered and dealt with by the Arbitral Tribunal in the manner as indicated below:-

- i. Claim towards invoices for ₹37,13,073/- and ₹35,08,296/- out of ₹82,43,022/- both dated 28.02.2011.

The first invoice (for ₹37,13,073/-) relates to the second and third milestone (Infra-Ready and UAT) billings of the project 'RA&FMS Drop1 till Feb 2011' and the second invoice relates to first, second and third milestone (Kick Off, Infra-Ready and UAT) of the said project. The items of first and second invoice relates to Infra-Ready and UAT of the same project. The Arbitral Tribunal was of the view that IBM had done double billing for the same work even though the amounts claimed are different. The Arbitral Tribunal was also of the view that IBM

did not complete the subsequent stages/milestones after UAT. Thus, the Arbitral Tribunal observed that any payment made to IBM towards initial stages (stages 1 to 3) of the project on-account payment had to be refunded to VTL and, therefore, rejected the claims made by IBM.

ii. Claim towards invoice for ₹18,51,879/- dated 27.04.2011.

This is an invoice relating to all the five milestones of the project 'E-Top Up-Drop2'. The Arbitral Tribunal was of the view that the Project was completed successfully and, therefore, IBM is entitled to the payment of ₹18,51,879/- under this claim.

iii. Claim towards invoice for ₹35,11,807/- dated 27.06.2011.

This invoice relates to the fourth milestone (Built to Operate – B2O) of the project 'Interconnect Drop-1'. IBM claimed an amount of ₹35,11,807/- out of the invoice amount of ₹39,02,008/- The Arbitral Tribunal observed that IBM was not able to complete the said Project and failed to deliver Inter-Connect Billing and Partners Settlement Mode, hence VTL had to engage M/s MACH Mobile Solutions Pvt Ltd for the said work. VTL had withdrawn the approval of Inter-Connect B2O on the ground that IBM was not able to demonstrate compliance to the agreed scope/DRD for the inter-connect. The Arbitral Tribunal also observed that IBM did not raise any invoice for milestone five (B2O+90) and if the said project had been completed in all respects by IBM, it would have raised an

invoice for the final and fifth milestone. Failure to do so indicates that the project was not completed by IBM. Therefore, the Arbitral Tribunal was of the view that IBM is not entitled to payment in regard to this fourth milestone invoice and rejected the aforesaid claim.

iv. Claim towards invoice for ₹12,50,123/- dated 30.08.2011

This invoice relates to the fifth milestone (B2O+90) of the project 'MNP-Drop1'. IBM completed all the stages of the said Project. The Arbitral Tribunal accepted the claim of ₹12,50,123/- by IBM.

v. Claim towards invoice for ₹26,18,351/- dated 29.09.2011

This claim relates to the first milestone of the project 'OSS-Drop1'. The Arbitral Tribunal was of the view that IBM has not raised any invoices in regard to the next four stages/milestones and neither it commenced nor completed the said project. Thus, the Arbitral Tribunal rejected the said claim.

vi. Claim towards invoices for ₹31,98,235/- and ₹24,01,405/- both dated 23.09.2011

These invoices relate to the second milestone of the project 'B1-Drop2' and 'B1-Drop3'. IBM did not submit invoices for the remaining three stages of the project, therefore, IBM did not proceed beyond the second milestone. The Arbitral Tribunal was of the view that IBM is not entitled to the payment for the

said claims and rejected the said claims.

vii. Claim towards invoice for ₹2,17,76,555/- dated 26.12.2011

This invoice relates to 'Milestone billing YR2 Data Center'. The Arbitral tribunal was of the view that IBM is not entitled to the payment towards claim of ₹2,17,76,555/- for milestone billing YR2 Data Center and rejected the said claim.

viii. Claim towards invoice for ₹10,84,251/-

This invoice relates to 'network service management billing'. An invoice for an amount of ₹1,95,53,736/- was raised by IBM and IBM claimed an amount of ₹10,84,251/- as due under the PSC invoice. The Arbitral Tribunal was of the view that IBM is not entitled to the payment of the said claim and rejected the said claim.

ix. Claim towards invoices for ₹4,41,379/- and ₹3,93,72,175/-

These two claims were also rejected by the Arbitral tribunal.

16. In view of the above, the Arbitral Tribunal held that IBM is entitled to only ₹3,16,50,817/- towards the unpaid PSC invoices (12 in number) as against the claim of ₹8,47,27,529/- and the claims under other PSC invoices are rejected. The Arbitral Tribunal also held that VTL is entitled to refund of ₹5,82,47,804/- and its claim for ₹3,41,04,244/- was rejected.

Re: Issue No. 3, Claim of ₹36,80,70,172/- towards Termination

Charges by IBM

17. The Arbitral Tribunal accepted the said claim made by IBM and held that Clause 18.1.2 of the Agreement makes it obligatory for VTL to pay the termination charges in the event of termination by IBM. And, in terms of Annexure 11 to the Agreement, IBM is entitled to an amount of ₹36,80,70,172/- towards Termination Charges.

Re: Issue No. 4, Claim of ₹16,84,16,381/- by IBM as late payment fees with respect to delay in payment from the due date to the date of statement of claims.

18. Clause 2.4 of Annexure 11 to the Agreement provides for payment of late fee where the amounts due to the service provider (IBM) are not paid within thirty days from the due date. The late fee based on a rate of 1% on such payment for every thirty days and the late fee is to be invoiced by IBM and shall be paid by VTL. It was contended on behalf of VTL that it had made payment in excess of what was actually due under the Agreement. VTL also contended that IBM was raising premature invoices, as they were raised before the completion of the work/Project. It was observed by the Arbitral Tribunal that according to Clause 2.4 of Annexure 11 to the Agreement, it is required by IBM to raise an invoice for the late fee with respect to the delay in payment. Admittedly, IBM did not raise any invoice for the late fee regarding the delay in payment by VTL. The Arbitral Tribunal observed that IBM is not entitled to the claim for late fee and rejected the aforesaid claim.

Re: Issue No.5, Whether VTL is liable to pay to IBM an amount of ₹64,50,446/- by way of taxes (VAT) on the value of the hardware portion of IBM assets transferred to VTL?

19. The Arbitral Tribunal observed that VTL was liable to pay a tax amount of ₹64,50,446/- to IBM but IBM is not entitled for an award to the said amount as that amount has already been paid by VTL to IBM on 04.06.2013 alongwith the price of hardware.

Re: Issue No. 14, Whether IBM is liable to refund ₹13.5 crores to VTL, which was paid by VTL towards depreciated value of hardware?

20. The Arbitral Tribunal observed that IBM's hardware was taken over by VTL and after the termination of the Agreement, VTL was obliged to return the IBM's hardware. VTL failed to do so. This led IBM to seek an injunction restraining VTL from using the hardware without paying its dues. VTL agreed to pay ₹13.5 crores towards the depreciated value of the hardware provided by IBM. Thus, having paid the amount towards depreciated value of the hardware and having retained them, VTL could not seek refund of the sum of ₹13.5 crores paid towards depreciated value of the IBM's hardware. Therefore, the Arbitral Tribunal rejected the aforesaid claim for refund of ₹13.5 crores.

Re: Issue No. 16, Whether IBM should provide to VTL, Media Passwords and other details enumerated in Schedule E to the Statement of Defence?

21. The Arbitral Tribunal observed that VTL has paid for the hardware, therefore, it is entitled to use the embedded software. Thus, the Arbitral Tribunal accepted the aforesaid claim of VTL and directed IBM to furnish the information, media, passwords and other details with respect to the hardware to VTL within one month.

Re: Issue No. 6, Whether VTL is liable to return the spare parts as listed in Schedule V of the Statement of Claim to IBM and its sub-contractors?

22. IBM alleged that it and its sub-contractors had maintained a stock of valuable spare parts required for performance of its obligations under the Agreement in the premises of VTL. On termination of the Agreement, VTL took possession of the said spare parts kept at its premises and did not return them to IBM. The Arbitral Tribunal rejected the aforesaid claim of IBM.

Re: Issue No. 7, Whether VTL can use the software listed in the Assets Register till payment of termination charges to IBM?

23. As per Clause 18.6.3(b) of the Agreement, IBM is required to assign software to VTL only upon payment of termination charges and according to IBM, VTL refused to pay the termination charges. The Arbitral Tribunal observed that even though Clause 18.6.3(b) of the Agreement may entitle IBM to some relief with respect to “*software owned by IBM and used for providing services, which were to be transferred to VTL upon termination of the Agreement*”, IBM is not entitled to the said claim.

Re: Issue No. 10, Counter claim of ₹22,20,504/- by VTL by way of refund of excess payment of IRUC.

24. It was contended by VTL that an excess payment of ₹22,20,504/- was made towards IRUC. VTL contended that the amount payable towards IRUC was ₹4,36,48,323/- and VTL had paid an aggregate amount of ₹4,58,48,323/- to IBM. Thus, VTL claimed that it had made an excess payment ₹22,28,504/-. The list of invoices raised by IBM in Schedule I to the IBM's Statement of Claim indicated that the said sum was a credit given by IBM to VTL by reversing an earlier claim on account of additional Circle OTC in January, 2012. VTL contended that while some of the other credits were adjusted against the outstanding invoices, this credit was not adjusted. The Arbitral Tribunal accepted this claim of VTL against IBM.

Re: Issue No. 11, Counter claim of VTL against IBM for payment of ₹13,70,99,396/- towards various claims mentioned in Schedule A to the Statement of Defence.

25. The Arbitral Tribunal rejected all the miscellaneous claims (claims 1 to 12) aggregating to ₹13,70,99,396/- made by VTL and mentioned in paragraph 221 of the impugned award.

Re: Issue No. 12, Counter claim of VTL for ₹30,87,19,267/- as interest on ₹77,87,95,304/-.

26. The Arbitral Tribunal rejected the counter claim of VTL for

₹30,87,19,267/- as interest upto the date of commencement of arbitration proceedings.

Submissions

27. Mr Akhil Sibal, learned Senior Counsel appearing for VTL has assailed the impugned award, essentially, on three fronts. First, he submitted that the Arbitral Tribunal had grossly erred in awarding the Annual Services Charges (ASC) to the extent of ₹95,28,18,835/- in favour of IBM even though it was admitted that IBM had defaulted in providing part of the services as required under the Agreement. He submitted that although, the Arbitral Tribunal had held in paragraph no. 113 of the impugned award that “it is not possible to bifurcate the consideration for different types of services rendered by IBM”; in paragraph no.96, the Arbitral Tribunal held “that the parties had agreed upon a consideration structure with a fixed component (that is, the ASC as a periodical unconditional payment) and a variable component (comprising of PSC, IRUC and other charges) which were linked to achieving milestones or performance of obligations”. He submitted that although, the Arbitral Tribunal had held that Annexure 11 to the Agreement only provided a methodology of payment of consideration to IBM, yet the Arbitral Tribunal had proceeded to hold that there was an absolute obligation to pay ASC. Thus, the findings of the Arbitral Tribunal were inconsistent.

28. Second, he contended that the payment of Termination Charges of ₹36,80,70,172 in favour of IBM was wrongful and in the nature of

penalty/liquidated damages. He submitted that since IBM had led no evidence for any loss suffered by it, the termination charges could not be awarded in favour of IBM.

29. Lastly, he submitted that the Arbitral Tribunal had grossly erred in holding that the petitioner could not maintain a claim for damages as well as reduction in the amount of consideration payable to IBM. He contended that the Arbitral Tribunal erred in holding that once VTL has accepted part performance that was defective, its remedy could only be by way of damages for delayed/defective/incomplete performance.

30. Mr Pramod Nair, the learned counsel appearing for IBM countered the aforesaid submissions. He submitted that the contract between the parties was a complex one and the Agreement was required to be understood in the context of the commercial background. He submitted that VTL was a new company and was not desirous of making any upfront capital investment necessary to purchase the IT Infrastructure that could support its telecom operations. In the aforesaid background, the parties had entered into the Agreement in terms of which IBM was required to purchase on its own costs hardware, software and firmware for providing the necessary support to VTL telecom operations. He submitted that IBM had deployed more than 100 skilled employees exclusively to work on the project. He submitted that IBM had placed a list of assets before the Arbitral Tribunal and the upfront cost for procuring the hardware and the software was in excess of ₹100 crores. This amount was to be

paid by IBM. VTL on its own part had agreed to pay consideration on a periodic basis, under the Agreement, to compensate IBM for the deployment of its resources. He referred to Appendix 11 to the Agreement, which expressly provided “payment of the charges which intended to compensate the Service Provider for the resources used”.

31. He submitted that since it was envisaged that IBM may not be able to provide the requisite level of service, IBM had agreed that for any deficiency in services, VTL would be provided service level credits by way of credit notes. He submitted that it is in this context that the Arbitral Tribunal had held that IBM was entitled to Annual Service Charges. Next, he submitted that the termination charges were not in the nature of penalty, as contended on behalf of VTL and the said charges were payable irrespective of the reason for premature termination of the Agreement. He submitted that this was part of the consideration as agreed under the Agreement.

Reasons and Discussions

32. At the outset, it is necessary to observe that the scope of judicial review under Section 34 of the A&C Act is restricted and it is settled law that this Court is not called upon to examine and re-appreciate the evidence and material considered by the Arbitral Tribunal. An arbitral award can only be set aside on the grounds as set out in Section 34 of the A&C Act. In the present case, VTL has sought to assail the impugned award on the ground as set out in Section 34(2)(b)(ii) of the A&C Act; that is, that the impugned award is contrary to the public

policy. *Explanation 1* to Section 34(2)(b)(ii) of the A&C Act expressly clarifies that an award would be in conflict with the public policy of India, only if, (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. In the present case, there is no allegation that the impugned award is induced or affected by fraud or that it offends the most basic notions of morality.

33. Thus, the only issue to be addressed is “whether the impugned award is in contravention with the fundamental policy of Indian law”. *Explanation 2* to Section 34 (2)(b)(ii) of the A&C Act further clarifies that “the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.”

34. Bearing the aforesaid in mind, the first issue to be addressed is whether the decision of the Arbitral Tribunal to reject VTL’s claim for a *pro rata* reduction in the consideration payable is flawed.

35. Clause 7 of the Agreement provides for the consideration payable by VTL to IBM. Clause 7.1 of the Agreement provides that the consideration payable by VTL to the Service Provider (IBM) in respect of the services to be provided and the schedule of payment thereof is set out in detail in Annexure-11.

36. Paragraph B of Clause 1 of Annexure 11 to the Agreement

provides that the charges as set forth in the Agreement are intended in the aggregate to compensate the service provider for the resources used to provide the services. Clause 2.2 of Annexure 11 of the Agreement stipulates the charges payable by VTL. The said charges include Annual Service Charge (ASC); Project Service Charge (PSC); Increased Resource Usage Charge above base line (IRUC); termination fee; and other charges.

37. In terms of Clause 2.2(b) to Annexure 11 of the Agreement, IBM was required to raise quarterly invoices for the ASC Charges as set forth to Annexure 11 of the Agreement. Appendix (ii) to Annexure 11 of the Agreement stipulates the ASC payable by VTL. Clause 2.2 (a) of Annexure-11 expressly stipulates that PSC would be milestone-linked charges associated with deliverables to be executed by IBM. Further IBM was required to raise invoices.

38. It was IBM's case before the Arbitral Tribunal that the payment of ASCs was unconditional and based on fixed schedule and there was no linear relationship between the ASCs and the deliverables. It was contended that ASCs were fixed to compensate IBM for the upfront capital investment made by it. It was further contended that IBM had made the necessary investment and had provided the necessary support for the telecom operations. Further VTL had never disputed its liability to pay the ASC till the decision rendered by the Supreme Court in 2G Spectrum case (*W.P.(C) 423/2010* captioned "***Centre for Public Interest Litigation & Ors v. Union of India & Ors***") dated 02.02.2012. VTL had, thereafter, set up a case that there was

deficiency in the services and it was entitled to a *pro rata* reduction in the ASC. This contention was rejected by the Arbitral Tribunal. The Arbitral Tribunal held that “*it was not possible to bifurcate the consideration for different types of services rendered by IBM even by holding an inquiry*”.

39. Before the Arbitral Tribunal, VTL had contended that ASCs were in the nature of an advance and for the continuous obligations to be discharged by IBM. It was asserted that since IBM had rendered only part of the services, VTL was entitled to a *pro rata* reduction in the ASCs and, therefore, was entitled to refund of the ASCs already paid. The aforesaid submission was countered by IBM. IBM contended that there was no linear co-relation between the projects to be delivered and the ASCs. IBM contended that the Agreement was entered into in the commercial background where VTL was a new entrant and was not in a position to make upfront capital investment necessary to purchase IT infrastructure to support services for its telecom operations. IBM had agreed to make the necessary investment for setting up the IT infrastructure to provide the necessary support for VTL’s telecom operations. The ASCs were essential to ensure a fixed payment to compensate IBM for the upfront investment made by it.

40. IBM further pointed out that the Project’s delivery was not the only service contemplated under the Agreement and the bulk of the services comprised of providing the infrastructure services (hardware/software/firmware, etc.) for the telecom operations for which IBM had invested in excess of ₹100 crores. IBM had submitted

that there were more than 100 skilled IT professionals assigned by IBM for VTL's project. IBM had also rendered different services and the same were noted by the Arbitral Tribunal in the impugned award. The Arbitral Tribunal had considered the nature of the Agreement and observed as under:-

“92. A careful reading of the Services Agreement shows its complex nature. It was not a simple and straight forward agreement meant for sale of goods or for supply of materials or for providing services. It was a special limited version of “Build & Operate Contracts” where the service provider is required to provide and install the IT infrastructure in VTL's premises indifferent parts of the country for providing IT solutions and IT related services by using its own personnel to roll out, expand and support its GSM operations in India. This required IBM to provide the hardware, software and firmware; to provide skilled human resources to develop the required software/IT technology and IT solutions and the manpower to maintain the IT services during subsistence of the contract. It also provides for performance of obligations by IBM in accordance with the implementation schedule (amended from time to time-clause 4.2 of the contract) and for payment of compensation/liquidated damages by IBM to VTL (described as ‘Service Level Credits’) if the service provider does not provide minimum service levels as per the Service Level Agreement subject to a ceiling.

93. The table of service hours given in Section 2 also indicates that a large number of skilled personnel had to be deployed for discharge of IBM's obligations. The Change Control Procedure (Annexure 10 to the Services Agreement) shows that 10,000 man days were initially allocated towards the services for VTL during contract years one & two and another 10,000 man days were also

available to VTL to be allocated after initial allocation was exhausted. The fact that large number of employees were required to be deployed by IBM for the work of VTL emerges from the terms of the contract. Therefore, there is considerable force in the submission of IBM that it was not being compensated separately for deploying software, hardware and human resources to support the VTL telecom operations and that ASC was intended to be paid as a fixed charge spread over the contract period to meet IBM's expenditure for providing IT infrastructure and human resources, appears to be logical.

94. It is also seen that in addition to supplying IT infrastructure, skilled personnel resources and delivery of projects, IBM had to provide the following services which had nothing to do with the delivery of projects: (i) transition services; (ii) IT infrastructure management; (iii) maintenance for the in-scope hardware and software; (iv) maintenance and management of VTL-supplied IT equipment; (v) operation and maintenance of VAS equipment; (vi) bear the initial and on-going charges such as licence fee, AMC, updates, upgrades, subscription charges, etc. (vide section 2 of the Annexure 3 to SA).

95. The contract contemplates payment of charges (remuneration) to IBM to compensate it for providing the hardware, software and firmware, for providing the manpower required to develop the necessary IT solutions and for providing IT solutions and IT services. The charges to be paid were: (i) a fixed return described as Annual Service Charge (ASC) payable every quarter; (ii) a variable charge linked to results, that is, achievement of milestones by delivering projects (PSE); (iii) a bonus in the form of Increased Resource Usage Charge (IRUC); (iv) a termination charge for premature termination; and (v) other charges for any new services not contemplated in the contract.

96. The scheme of SA makes it clear that the parties had agreed upon a consideration structure, with a fixed component (that is, ASC as a periodical unconditional payment) and a variable component (comprising PSC, IRUC and other charges which were linked to achieving milestones or performance of obligations). To elaborate: (a) ASC was intended to be a fixed periodical return throughout the period of the contract; irrespective of the quantum of progress or performance; (b) PSC was intended to be a variable charge linked to IBM achieving milestones by IBM; (c) IRUC was intended to be a bonus to IBM, when VTL used the resources above the baseline by serving a larger number of subscribers; (d) other charges was intended to be paid for new services not contemplated under the Agreement; and (e) the termination charge was intended to compensate IBM for any premature termination resulting in denial of further payments of ASC, PSC and IRUC. The structure of the consideration further shows that out of the four types of charges payable to IBM as consideration during the subsistence of the agreement, ASC alone is a fixed amount and not dependent upon the performance of any specific obligation or the happening of any event. All other charges are dependent on either completion of projects and achievement of milestones (PSC), or VTL's subscriber base levels increasing beyond the baseline (IRUC) or VTL requiring any new services not provided in the agreement (other charges). At the same time, IBM is subjected to penalties by way of "Service Level Credits" for any delay or deficiency in performance of its obligations or any delay in achieving any of the milestones for specified projects. The object was to guarantee the service provider, a minimum payment for the investments made and resources deployed by it; and the interests of the client (VTL) were protected to ensure that the service provider (IBM) did not walk away with the entire consideration without performing its obligations. A balance was sought to be achieved by

providing a minimum payment every quarter and providing for other payments only on achievement of certain levels.

97. A combined reading of the provisions of the Services Agreement shows that IBM was required to invest huge amount for the IT infrastructure for providing the licenses, by investing on hardware, software and firmware, and also deploy a large number of skilled personnel to develop IT solutions, and provide IT related services, apart from maintaining such IT services on a continuing basis during the subsistence of the Agreement. The contract recognises that IBM is entitled to a fixed consideration by way of ASC, to compensate the service provider for the resources used to provide the services, ASC is a fixed amount, namely Rs.275.36 crores made up of Rs.31.45 crores payable during the first contract year, Rs. 59.42 payable during the second contract year, Rs. 84.70 crores payable during the third contract year and Rs. 99.9 crores payable during the fourth contract year. Further, the amount payable for every contract year was prorated into equal quarterly payments and to be paid as per ASC invoices. Payment of ASC is not subjected to any condition precedent nor made subject to performance of any specific obligations, so long as the contract subsisted and IJBVI was performing the contract by providing the IT infrastructure and resources, and making available the human resources required for developing and providing IT solutions and maintaining IT services.”

41. It is also apparent from the above that the decision of the Arbitral Tribunal that IBM was entitled to ASCs is based on an appreciation of the terms of the Agreement and this Court finds no infirmity with the same. Thus, the conclusion that IBM would be entitled to Annual Service Charges (ASC) cannot be interfered with in these proceedings.

42. VTL had contended that since admittedly certain Projects had not been delivered, it was entitled to a *pro rata* reduction in the payment of charges. This contention was rejected by the Arbitral Tribunal and the Arbitral Tribunal held that “*it is not possible to bifurcate the consideration for different types of services rendered by IBM even by holding an inquiry*”. It is contended that this conclusion of the Arbitral Tribunal runs contrary to its decision that ASCs were required to be paid to IBM in respect of the other deliverables.

43. The above contention is plainly unmerited. The observations of the Arbitral Tribunal that it is not possible to bifurcate the consideration for different types of services rendered must be read in the context in which such observation is made. VTL had claimed that since some of the Projects had not been delivered, there can be a *pro rata* reduction in the consideration payable. Given the nature of the Agreement, the Arbitral Tribunal was of the view that such bifurcation was not possible in the manner as claimed by VTL. The Arbitral Tribunal had also observed “that the parties had agreed upon a consideration structure with a fixed component (that is, the ASC as a periodical unconditional payment) and a variable component (comprising of PSC, IRUC and other charges) which were linked to achieving milestones or performance of obligations”. There is no inconsistency in the conclusion of the Arbitral Tribunal that ASCs were required to be paid in respect of the services and the consideration as provided under the contract could not be bifurcated in the manner as claimed by VTL.

44. The contention that the Arbitral Tribunal had grossly erred in holding that VTL could not seek both remedies: (i) ₹508 crores as damages for financial losses incurred by it due to purchase on the part of IBM; and (ii) rejection of the consideration payable to IBM proportionately with reference to the projects delivery. Mr Sibal had contended that a claim for damages and a *pro rata* reduction in the consideration commensurate with the shortfall in performance are not mutually exclusive.

45. The above mentioned observations must be understood in the context of the facts and issues being considered by the Arbitral Tribunal. Undisputedly, the above observations are not of universal application. In a given case, it may be possible for a party to seek damages for non-performance of the contract as well as a *pro rata* reduction in consideration commensurate with the shortfall in performance. However, this is only possible where the consideration for part performance can be determined with sufficient accuracy. In the context of the Agreement between the parties, the Arbitral Tribunal found that a proportionate reduction on the basis of Projects delivered was not feasible, as the delivery of the Projects was not the only services to be rendered by IBM. It was pointed out on behalf of IBM that the Project was only one of the deliverables under the Agreement and setting up of the IT infrastructure support for the telecom operations, which entailed an upfront investment in excess of ₹100 crores, was the substantial part of the service to be rendered under the Agreement. The observations made by the Arbitral Tribunal

to the effect that VTL could not seek both remedies – damages for financial loss and reduction of pro rata consideration – must be read in that context and in the light of the Arbitral Tribunal’s discussion with regard to the nature of the Agreement. In view of the above, this Court finds no reason to interfere with the decision of the Arbitral Tribunal to reject IBM’s claim for a pro rata reduction in the consideration payable.

46. The next question to be addressed is whether the Termination Charges as awarded by the Arbitral Tribunal amounts to penalty. Mr Sibal had referred to Section 74 of the Indian Contract Act, 1872 and contended that where a contract is broken, the non defaulting party is entitled to receive from the party who has broken the contract a reasonable compensation not exceeding the amount stipulated. He submitted that the termination charges were not reasonable, as there was no stipulation that the said charges were reasonable and pre estimate of the damages that would be suffered on a breach of the Agreement.

47. The aforesaid contention is also bereft of any merit. This is so because the Agreement provides for payment of the termination charges irrespective of either party breaching the Agreement. Clause 18 of the Agreement contains provisions for termination of the Agreement. Clause 18.1.1 of the Agreement provides for termination with cause by Datacom (VTL) and sub-clause 18.1.2 of the Agreement provides for termination of the Agreement by the service provider (IBM) with cause. In either event VTL was liable to pay the

termination charges to IBM. Similarly, Clause 18.2 of the Agreement provides for termination by Datacom (VTL) without any cause. Clause 18.3 of the Agreement provides for termination for insolvency or on account of *force majeure*. In either case VTL is entitled to receive the termination charges. It is thus, clear that the termination charges are not contingent only on breach of the Agreement and, thus, cannot be construed as liquidated damages in terms of Section 74 of the Indian Contract Act, 1872. The termination charges are clearly a part of the contractual consideration agreed to by the parties.

48. In view of the above, this Court finds no ground to interfere with the impugned award. The petition is, accordingly, dismissed. The pending application also stands disposed of.

OCTOBER 01, 2018
pkv

VIBHU BAKHRU, J