



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

% **Reserved on : 11th April , 2023**
Pronounced on: 26th May, 2023

+ O.M.P. (COMM) 10/2021 & I.A. 19218/2022

BHARAT SANCHAR NIGAM LIMITEDPetitioner

Through: Mr. A.K. Singh, Advocate
 (Through VC)

versus

SMART DIVISION PRIVATE LIMITEDRespondent

Through: Mr. Prateek Kumar, Ms. Sneha
 Jankiraman & Ms. Saloni Gupta,
 Advocates.

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act, 1996") has been filed on behalf of the petitioner seeking the following reliefs:

"Under the aforesaid facts and circumstances of the case and in the interest of justice, the applicant most respectfully prays as under:

a) that the arbitral award dated 12.06.2020 be set aside.

b) That the counter claim of the petitioner be allowed,

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namely:

(i) demand note of the petitioner dated 5.12.2017 of Rs. 26,07,99,874/- (Rupees Twenty Six Crore even Lacs Ninety Nine Thousand Eight Hundred and Seventy Four Only) be upheld and respondent be directed to pay the same with compound interest of 12% per annum from 2008 onwards (start of the first demand note) till date. The overall demand with interest comes to about Rs. 79.89 Crores (Rupees Seventy-Nine Crores and Eighty-Nine Lakhs Only).

(ii) the petitioner may be permitted to enforce the performance Bank Guarantee submitted by the respondent

(iii) petitioner may be allowed litigation costs

c) The claim of the respondent/ claimant be dismissed

d) any other order/ direction that this Hon'ble Court may deem fit may be passed."

FACTUAL MATRIX

2. The petitioner is Bharat Sanchar Nigam Limited (BSNL), a company incorporated under the Companies Act and, is engaged in the telecommunications business, a unified access service provider that has been granted a license under Section 4 of the Indian Telegraph Act 1885.

3. Petitioner floated an Expression of Interest dated 19th September 2007 calling for bids in respect of its enabling projects.

4. The respondent, Smart Division Private Limited (SDPL) submitted its bid in response to the Expression of Interest (EOI). Respondent's bid was selected pursuant to which Franchise Agreements (FA) dated 10th December 2007 were entered into between the parties.

5. Under the said FA, the respondent was to provide internet protocol



/ broadcast TV/radio, video, audio on demand, and interactive gaming services to the subscribers of the respondent in 53 cities in India on a non-exclusive and revenue-sharing basis. The project had to begin by first doing a trial run in Gurugram and then in the other 52 cities.

6. In accordance with Clause 4.7 of the FA, the respondent had also duly submitted to the petitioner, 53 performance bank guarantees, one in respect of each of the cities allocated to it. The respondent was the content aggregator for the provision of the Services, which were to be delivered on the petitioner's infrastructure. In terms of Schedule III, Clause 3.6.3 of the Franchise Agreement, inter-city bandwidth was to be provided by the petitioner to the respondent for the provision of the services at competitive rates by the petitioner. However, no pricing guidelines regarding the said competitive rates were set out.

7. Further, the petitioner had a right of first refusal for the provision of bandwidth to deliver the services, in the exercise of which right, it was providing the intercity bandwidth services to the respondent.

8. The respondent consistently faced infrastructure and network issues concerning the delivery of the Services which were repeatedly flagged to the petitioner.

9. The petitioner raised a provisional Demand Note dated 28th August 2008 for the cities of Ghaziabad, Faridabad, and Noida for intra-city band-width charges from Gurugram for an amount of Rs. 1,12,36,000/-.

10. The respondent *vide* its letter dated 6th October 2008 asked the petitioner to fix the charges as per Telecom Regulatory Authority of India (TRAI) rates. After the mandate of TRAI, a 50% discount was provided to Internet Protocol Television (IPTV) franchisees like the respondent.

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11. The petitioner raised revised provisional demand note(s) separately for intracity bandwidth charges for the city of Faridabad, Noida, and Ghaziabad, dated 24th November 2008 giving a 50% discount as envisaged in the tariff circular of the applicant/ petitioner dated 14th November 2008.

12. The respondent *vide* letter dated 4th December 2008 asked for a revision of tariff based on incremental costs contrary to the TRAI guidelines and further intimated that it received an offer from Videsh Sanchar Nigam Limited (VSNL) for 4 cities at a price of Rs. 2.8 Crore for 15 years Indefeasible Rights of Use (IRU) without naming the cities.

13. In due course, various communications were exchanged between the parties with regard to the request for revision of tariff rates and bill amounts.

14. The petitioner/applicant *vide* letter dated 15th May, 2011 called upon the respondent to show cause as to why the FA should not be terminated in view of their failure to enroll the required number of subscribers for the services and for their failure to pay for the intercity bandwidth charges for the period for which they utilized the services.

15. The respondent *vide* its letter dated 21st September 2011 intimated to the petitioner/applicant that it is discontinuing its services in 47 cities, however, it wants to continue to provide services in the cities of Gurugram, Faridabad, Noida, Ghaziabad, Ambala, and Meerut only.

16. The petitioner raised a Demand Note dated 6th July 2012 for 51 Cities for STM 4 intercity bandwidth on annual charges basis for Financial Years 2008-09, 2009-10, 2010-2011 & 2011-12 for a total amount of Rs. 38,74,57,797/- (Rupees Thirty-Eight Crore Seventy-Four



Lacs Fifty-Seven Thousand Seven Hundred and Ninety-Seven Only).

17. The respondent *vide* its letter dated 27th July 2012 admitted that out of 53 cities, it was able to launch services in only 43 cities and alleged that due to network issues the services stands closed at the said time Multiprotocol Label Switching (MPLS) ports and consequently services were active only in 6 cities with very few subscribers in each.

18. The respondent *vide* its letter dated 11th December 2012 disputed the time period for which it has been charged for intercity bandwidth usages arguing that petitioner/ applicant themselves had earlier indicated that the period would commence only from the date of opening of ports/ launch of services in the respective cities and requested the petitioner that for the purpose of billing, the date of launch of services in the respective cities may be considered as the date of start for MPLS billing.

19. The petitioner *vide* its letter dated 12th December 2012 intimated the respondent that its request for deactivation of MPLS port link for 46 cities has been accepted with immediate effect. The respondent ceased operation as a franchisee.

20. The respondent in spite of repeated demands chose not to make any payment, towards bandwidth charges, and hence the petitioner/ applicant exercised its right on about 16th September 2017 and invoked the Performance Bank Guarantee (PBG) submitted by the respondent.

21. The respondent *vide* its letter dated 13th October 2017 admitted that the parties were having continuous discussions regarding the computation of bandwidth charges.

22. The petitioner replied *vide* its letter dated 28th October 2017 conveying its approval to bill the respondent for the intercity bandwidth



from the date of launch of services in the respective cities and accordingly revised final Demand Note dated 5th December 2017 was raised for an amount of Rs. 26,07,99,874/- (Rupees Twenty-Six Crore Seven Lacs Ninety-Nine Thousand Eight Hundred and Seventy-Four Only) for 39 cities for intercity bandwidth charges commencing from the date of launch of services in the respective cities.

23. The respondent vide its notice dated 8th December, 2017 invoked arbitration.

24. On 12th June 2020 the impugned award was passed by the learned Arbitral Tribunal which has led to the present petition filed by the petitioner being aggrieved of the Impugned Award.

SUBMISSIONS

(On behalf of the petitioner)

25. Learned counsel for the petitioner submitted that the learned Arbitrator is duty-bound to restrict himself by the terms of the FA in determining the rights and obligations of the parties. The learned Arbitrator cannot unilaterally add or delete the FA's terms to adjudicate whether a party to the FA acted in terms of the FA or in violation thereof.

26. Learned counsel for the petitioner submitted that the learned Arbitral Tribunal has exceeded its mandate in holding that the tariff of the respondent regarding intercity bandwidth charges was not reasonable, justified, and not commensurate with revenue generated.

27. It is submitted that the telecommunications tariffs are matters of expertise and the law of the land has left it to TRAI, the sector regulator to regulate the same. It is submitted that under Section 11 (2) of the TRAI



Act stipulates that TRAI shall notify in the official gazette from time to time the rates of telecommunication services to be provided in India. It is submitted that such rates prescribed by TRAI can be challenged before TDSAT under Section 14 of the TRAI Act.

28. It is submitted that Section 15 of the TRAI Act provides that no Court or any other authority shall adjudicate on any matter entrusted to the Appellate Authority under the Act. Section 25 of the TRAI Act bars the jurisdiction of the Civil Court. It is submitted that had the respondent been aggrieved by the tariff, could have challenged the same before TRAI and not having done that the respondent is estopped from raising such dispute before the learned Arbitrator.

29. It is further submitted by the learned counsel for the petitioner that Clause 3.6.3 when read with clauses 4.3.4 and 4.5.2 of the FA makes the following absolutely clear and unambiguous,

- (i) that the respondent/ franchisee has to get the intercity bandwidth from open market and the petitioner/ applicant has to be given first right of refusal by the respondent/ franchisee in this regard;
- (ii) BSNL shall provide the intercity bandwidth subject to availability on competitive rates of BSNL;
- (iii) Inter-City bandwidth shall be provided on chargeable basis at the competitive port tariff for MPLS services, from time to time;
- (iv) The intercity bandwidth charges were to be paid by the respondent/franchise based on the commercial condition of the petitioner/ applicant on the subject (intercity Bandwidth) issued from time to time;
- (v) The intercity bandwidth charges were to be paid by the



respondent/franchisee to the petitioner/applicant in advance.

30. It is submitted that the competitive rates of BSNL, as provided in clause 3.6.3 when read with clauses 4.3.4 & 4.5.2, leave no scope for interference on grounds of ambiguity.

31. It is submitted by the learned counsel for the petitioner that the findings of the learned Arbitral Tribunal that "*...Had the respondent been aware of the competitive rates it would not have issued three provisional, review demand note and two final demand notes, There was a vast difference between the demands raised by the respondent at different times...*"; is perverse and contrary to records of the case.

32. It is submitted that Clause 4.3.4 stipulates that bandwidth charges were payable by the respondent/franchisee in advance. The first Provisional Demand Note dated 28th August 2008 i.e., towards intercity bandwidth charges from Gurugram to the three cities of Ghaziabad, Faridabad and Noida for an amount of Rs. 1,00,00,000/- plus Taxes.

33. It is submitted that the demand note is provisional and it clearly states that it's *ad-hoc* payment. Further, it is to be remembered that the contract of services between the parties was for an initial period of 10 years and the tariff rates prescribed in Schedule IV of the intercity bandwidth charges were amended by TRAI in 2005 *vide* the 36th, 37th & 38th amendment and the aforesaid provisional demand note is less than one-hundredth of the annual ceiling tariff prescribed by TRAI. Further, the petitioner/ applicant in accordance with the mandate of TRAI had already published its tariff.

34. Learned counsel for the petitioner further submitted that the respondent in their entire communication exchanged with the petitioner/



applicant over a period of about 10 years did not allege that the demand notes raised by the applicant/ petitioner were inconsistent or arbitrary and it was only during the arbitration proceedings that respondent made such allegations for the first time, needless to say without any supporting documents.

35. It is further submitted by the petitioner that the learned Arbitral Tribunal has committed illegality by not only setting aside the tariff of the petitioner/ applicant but by deciding a new tariff (for intercity bandwidth) to be based on revenue share, and that at the rate of Rs. 51/- per connection per month.

36. It is submitted that the learned Arbitral Tribunal fixed the rate arbitrarily and against settled industry practice. Under item 2 (c) of the Tariff Order 1999, promulgated by TRAI, it is provided that tariff for leased circuits (intercity band-with) shall be calculated either,

- (i) As a combination of tariffs given under "Ready Reckoner Tariff" and tariffs given under "other additional costs, as applicable"; or
- (ii) On rent and guarantee terms.

37. It is submitted that under the circumstances the tariff arrived at by the learned Arbitral Tribunal on the basis of revenue share is contrary to the law laid down by TRAI and hence illegal and needs to be set aside.

38. It is further submitted by the learned counsel for the petitioner that Telecommunications Tariff Order (Thirty Sixth Amendment) Order, 2005 made it mandatory for all service providers to report to TRAI the commercial and economic basis of their terms and conditions with respect to leased circuit tariffs.

39. It is submitted that it is further stipulated that the service providers



may provide discounts on ceiling tariffs but the same has to be transparent, non-discriminatory, and has to comply with reporting requirements.

40. It is further submitted that the findings of the learned Arbitral Tribunal that there is no basis for charging rent on an annual basis or IRU basis are contrary to the law laid down on the subject by TRAI and hence liable to be set aside. It is submitted on behalf of the petitioner that all the averments, amendments, news, tariffs, revisions, rates, etc. have been duly communicated to the respondent from time to time.

41. Therefore, the learned counsel of the petitioner submits that the impugned award is liable to be set aside under Section 34 of the Act, 1996.

(On behalf of the respondent)

42. *Per Contra*, learned counsel for the respondent started by submitting that each ground raised by the petitioner is factual in nature and seeks reappreciation of evidence. It is submitted that as a matter of fact, it is evident from the petition itself that:

- a. no averments have been made by the Petitioner in respect of any grounds specified under Section 34(2)(a) of the Act; and
- b. the maintainability of the petition is entirely reliant on skeletal averments concerning alleged patent illegality of the Award or violation of public policy by the Award included almost as an afterthought, which submissions are also heavily reliant on re-appreciation of evidence and are beyond the purview of the present proceedings.



43. Learned counsel for the respondent submitted that it is settled law that courts exercise limited jurisdiction over proceedings seeking setting aside of an arbitral award under Section 34 of the Act, 1996. It is submitted that a court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An arbitrator is the sole Judge of the quantity and quality of evidence before him.

44. It is further submitted on behalf of the respondent that as far as grounds under Section 34(b)(ii) of the Act, 1996 are concerned, it is not the petitioner's averment in the petition that any of the said provisions apply to the Award, and no specific pleading has been adduced to this effect.

45. It is submitted that explanation 2 to Section 34(b)(ii) of the Act is explicit that the test as to whether there is a contravention of the fundamental policy of Indian law cannot entail a review on the merits of the dispute.

46. It is submitted that consequently, this Court can neither review the merits of the dispute, forming the subject matter of the Award, nor re-appreciate or re-examine the evidence led by the parties before the learned Tribunal.

47. It is further submitted that it is settled law that the reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd since the Court in a petition under Section 34 of the Act, 1996, does not sit in appeal over the arbitrator's decision on facts, reached after careful scrutiny of the evidence on record.





48. It is submitted that so long as the view taken by the arbitrator is a plausible view, though perhaps not the only correct view, the award ought not to be interfered with by the court.

49. It is submitted by the learned counsel for the respondent that in as far as averments concerning patent illegality of the Award are concerned, it is evident from Section 34(2A) of the Act, 1996, an arbitral award may be set aside by the court only if the court finds that the award is vitiated by patent illegality “appearing on the face of the award”. It is submitted that the proviso to the said section further clarifies that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. It is submitted that consequently, the present petition that is entirely reliant on the re-appreciation of evidence by this Court is not maintainable and ought to be dismissed at the very outset.

50. It is submitted on behalf of the respondent that the Demand Notes raised by the petitioner are not based on competitive rates, which is evident from the abject failure of the petitioner to justify the same, be it in its pleadings or during the course of oral arguments before the learned Arbitral Tribunal. It is further submitted that had the petitioner expected to receive the amounts demanded it ought to have:

- a. established that the said Demand Notes have been raised on the basis of ‘competitive rates of BSNL’;
- b. that such rates are what is being charged to other franchisees; and
- c. that such rates are commensurate with the quality of infrastructure/ facilities and network connectivity provided by the



Petitioner such that seamless IPTV Services may be delivered to end consumers.

51. Learned counsel for the respondent vehemently opposed the averments made by the petitioner and further submitted that the petitioner never communicated the basis for computation of the various demands above. It is submitted that the arbitrariness of the demands is evident from the conduct of the petitioner in revising the Demand Notes without any justification. It is further submitted that it is also evident from the extracts from the minutes of the 336th meeting of the management committee of the petitioner held on 13th September 2017 that the petitioner itself had no clarity on the basis and manner in which MPLS bandwidth charges were to be levied.

52. Learned counsel for the respondent further submitted that the petitioner's contention that the disputes forming the subject matter of the impugned Award could not have been referred to arbitration on account of Section 25 of the TRAI Act is baseless.

53. It is submitted that Section 14 of the TRAI Act confers jurisdiction upon the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) only in respect of adjudication of disputes inter alia between:

- a. licensor and licensee;
- b. two or more service providers; or
- c. between a service provider and a group of consumers.

54. It is further submitted on behalf of the respondent that it is evident from a plain reading of Clauses 3.6.3 and 4.5 of the FA that the terms on which the provision of inter-city bandwidth is chargeable is in itself uncertain and the said provisions are consequently void in terms of



Section 29 of the Indian Contract Act, 1872 as rightly held by the learned Arbitral Tribunal. It is submitted that it is a trite law that a definite price is an essential element of a binding agreement.

55. It is further submitted that although a definite price need not be stated in the contract it must be worked out on some premise as was laid down in the contract. Further, a contract cannot be vague or uncertain.

56. It is submitted that it is critical to note in this regard that the petitioner has not even during the course of arguments before the learned Arbitral Tribunal, refuted or reconciled as to how Clauses 3.6.3 and 4.5 of the FA are not contradictory or uncertain and void as has been duly noted by the learned Arbitral Tribunal, nor has the petitioner established any benchmarked standard as per the applicable rates.

57. Learned counsel for the respondent submitted that none of the conditions for invocation of the PBGs, as set out in Clause 4.7 of FA, have been satisfied as has been rightly held by the Ld. Tribunal. Further, the petitioner could only set off any sum of money due and payable to the Franchisee under the agreement against any claim to the petitioner for payment in terms of Clause 5.14 of the FA and consequently, Clause 5.14 of FA is not applicable in the facts of this case since the petitioner is not seeking a set-off its claim of money. Therefore, intercity bandwidth charges cannot be set off against the PBGs, because that would be in contravention to clause 4.7.3 of the FA. Consequently, the Ld. Tribunal has rightly held, after also taking into account the conduct of the petitioner in not invoking the PBGs until 16th September 2017 for alleged failure to meet roll-out obligations which occurred in 2008, that the



Petitioner is not entitled to invoke the 53 PBGs, which finding ought not to be interfered with by this Court.

58. Therefore, it is submitted that the instant petition is liable to be dismissed for being devoid of any merit.

FINDINGS AND ANALYSIS

59. Heard learned counsel for the parties and perused the record. I have also perused the impugned arbitral award as well as the entire arbitral record brought on record. I have also given thoughtful consideration to the submissions advanced by the parties.

60. The challenge to the impugned arbitral award *inter alia* has been made on the ground that the impugned Award dated 12th June 2020, is patently illegal and is contrary to the public policy of India and hence, is liable to be set aside.

61. The law regarding a challenge to an arbitral award under the Act, 1996 is no more a *res integra*. The challenge of an award under Section 34 arising out of Arbitration proceedings must satisfy the tests laid down by virtue of the provisions of the Act, 1996, and the law settled by way of pronouncements by the Hon'ble Supreme Court.

62. As per the legal position clarified through decisions of this Court, a violation of Public Policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of justice of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award.

63. The concept of the fundamental policy of Indian law would cover compliance with statutes and judicial precedents, adopting a judicial



approach, and compliance with the principles of natural justice and reasonableness.

64. It is pertinent to reiterate that the intention of the legislature while enacting the Act, 1996 was the expeditious and effective disposal of matters. The Act has been set forth with the intention to limit the interference of the courts in Arbitral Proceedings.

65. Arbitration has evolved over the years as the ideal tool for the resolution of disputes that saves the court's time and is largely instrumental in assisting the parties to resort to quick remedial measures. Every arbitration is based on insightful application of law and its evolution is proof of its significance in the actual proceedings. Thus, arbitration has emerged as the most preferred platform for quick resolution of disputes, especially in the industrial and corporate realms.

66. In order to facilitate this process and to maintain a check on it, a provision to set aside the Award was included. But even then, the Award may only be set aside as it fulfils certain criteria to qualify as being bad in law.

67. The Arbitrator empowered to resolve such a dispute, may do so only after careful consideration of the facts and evidence on record. The statement of claims and statement of defense is taken onto the record and the Arbitral proceedings are conducted according to the provisions set by the Act, 1996.

68. Adjudication of the disputes should be in perfect harmony with the contract, which is the “birth-giver”, and the existing provisions of law.

69. An unfettered scope of intervention into the functioning of Arbitral Tribunal functioning would defeat the spirit and purpose of the



Arbitration Act. Therefore, the Hon'ble Supreme Court has repeatedly reiterated that the Court's scope of intervention is limited in the cases of a challenge under Section 34.

70. As far as Section 34 of the Act, 1996 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may not interfere on merits. The Court may only interfere on the limited grounds provided under Section 34 of the Act, 1996 i.e., if the award is against the public policy of India.

71. In ***UHL Power Co. Ltd. v. State of H.P.***, (2022) 4 SCC 116, the Hon'ble Supreme Court reiterated the narrow scope under Section 34 of the Act, 1996 and held as under:

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of





the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. A similar view, as stated above, has been taken by this Court in *K. Sugumar v. Hindustan Petroleum Corpn. Ltd.* [*K. Sugumar v. Hindustan Petroleum Corpn. Ltd.*, (2020) 12 SCC 539] , wherein it has been observed as follows : (SCC p. 540, para 2)

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.””

72. Further in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, the Hon’ble Supreme Court went on to say that reappreciation of evidence cannot be permitted under the ground of patent



illegality in a Section 34 petition under Act, 1996. The relevant portion has been reiterated below:-

38. *“Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality on the face of award.”*

73. In ***P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594***, the Hon’ble Supreme Court held that a Court does not sit in appeal over the Award of an Arbitral Tribunal by reassessing or reappreciating the evidence. The relevant paragraph is reproduced below:

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

74. A reference to the above-stated pronouncements makes it clear that this Court while exercising its jurisdiction under Section 34 of the Act,



1996 shall not sit in appeal and/or re-examine the facts and evidence of the case.

75. The key grounds to examine whether the impugned award is liable to be set aside as per Section 34 of the Act, 1996 are:

1. **Whether the impugned Award is patently illegal?**
2. **Whether the learned Arbitral tribunal exceeded its jurisdiction or mandate in passing the impugned Award?**
3. **Whether the interpretation of the terms of the FA is within the domain of the Learned Arbitral Tribunal ?**
4. **Whether the Arbitral Tribunal duly considered the evidence on record?**

I. Patent illegality:

76. It is settled law that courts exercise limited jurisdiction over proceedings seeking to set aside an Arbitral Award under Section 34 of the Act, 1996, as reiterated in *Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131*, by the Hon'ble Supreme Court, it was held that, patent illegality or perversity on the face of the Award warrants interference by this Court. The relevant paragraphs of the said judgment are reproduced herein below:

“22. The 1996 Act was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation and for matters connected therewith, by taking into account the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial



Arbitration and the UNCITRAL Conciliation Rules. One of the principal objectives of the 1996 Act is to minimise the supervisory role of Courts in the arbitral process. With respect to Part I of the 1996 Act, Section 5 imposes a bar on intervention by a judicial authority except where provided for, notwithstanding anything contained in any other law for the time being in force. An application for setting aside an arbitral award can only be made in accordance with provisions of Section 34 of the 1996 Act.

23. Relevant provisions of Section 34 [as they were prior to the Arbitration and Conciliation (Amendment) Act, 2015] read as under:

“34. Application for setting aside arbitral award.—(1) *Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

(2) *An arbitral award may be set aside by the Court only if—*

(a) *the party making the application furnishes proof that—*

(i) *a party was under some incapacity; or*

(ii) *the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*

(iii) *the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

(iv) *the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the





arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.—Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.”

24. *An amendment was made to Section 34 of the 1996 Act by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter “the 2015 Amendment Act”). A perusal of the Statement of Objects and Reasons of the 2015 Amendment Act would disclose that the amendment to the 1996 Act became necessary in view of the interpretation of the provisions of the 1996 Act by Courts in certain cases which had resulted in delay of disposal of arbitration proceedings and increase in interference by Courts in arbitration matters, which had the tendency to defeat the object of the 1996 Act. Initially, the matter was referred to the Law Commission of India to review the shortcomings in the 1996 Act in detail. The Law Commission of India submitted its 176th Report, recommending various amendments to the 1996 Act. However, the Justice Saraf Committee on*





Arbitration constituted by the Government, was of the view that the proposed amendments gave room for substantial intervention by the court and were also contentious. Thereafter, on reference, the Law Commission undertook a comprehensive study of the amendments proposed by the Government, keeping in mind the views of the Justice Saraf Committee and other stakeholders. The 246th Report of the Law Commission was submitted on 5-8-2014. Acting on the recommendations made by the Law Commission in its 246th Report, amendments by way of the 2015 Amendment Act were made to several provisions of the 1996 Act, including Section 34.

25. The amended Section 34 reads as under:

“34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

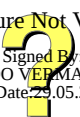
(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from





those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if—

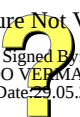
(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(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.

Explanation 2.—For the avoidance of doubt, 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.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:



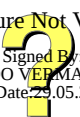


Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.”

26. *A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of matters of fact as well as law. (See Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] , Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] .)*

27. *For a better understanding of the role ascribed to Courts in reviewing arbitral awards while considering applications filed under Section 34 of the 1996 Act, it would be relevant to refer to a judgment of this Court in Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] wherein R.F. Nariman, J. has in clear terms delineated the limited area for judicial interference, taking into account the amendments brought about by the 2015 Amendment Act. The relevant passages of the judgment in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] are noted as under : (SCC pp. 169-71, paras 34-41)*

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental





policy of Indian law” as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as



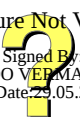


understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an





award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.””

77. In *Shiga Energy Pvt Ltd V. GE Power India Ltd.*, Neutral Citation No. 2023: DHC:3103, this Court expanded on the scope of interference under Section 34 and the nature and scope of patent illegality. The relevant paragraphs are reproduced below:

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“39. There are essentially three areas in which the arbitral award is likely to be challenged before this Court or the Hon’ble Supreme Court.

(i) Firstly, an award may be challenged on jurisdictional grounds.

(ii) Secondly, an award may be challenged on what may broadly be described as “procedural, close grounds, such as failure to give a party an equal opportunity to be heard”.

(iii) Thirdly, and most rarely, an award may be challenged on substantive grounds on the basis that the Arbitral Tribunal made a mistake of law.

40. The grounds for successfully challenging an award under Section 34 of the Act are elaborated hereinunder:

(a) Adjudicability:- An Arbitral Tribunal is empowered to decide for itself whether or not it has jurisdiction over a particular dispute under the doctrine of “competence-competence”. If its jurisdiction is challenged, the Arbitral Tribunal may decide the point as preliminary issue in an interim award or as part of its award on the merits. In the United States, the standard depends on whether the jurisdictional decision was based on compliance with procedural pre-conditions, in which case differential review applies or consent to arbitrate at all.

(b) Another ground for challenge is that the Arbitral Tribunal has exceeded its power in the decision that it has rendered. This ground of challenge contemplates a situation in which an award has been made by the Tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with claims that had not been submitted to it.

(c) Arbitrability:- The concept of Arbitrability which



provides another ground to challenge the award. If any arbitration arises, it is necessary to have regard to relevant law of the State. These are likely to include the law governing the party involved where the agreement is with a State or State entity, the law governing the arbitration agreement, the law of the seat of arbitration and the law of ultimate place of enforcement of the award. Whether or not a particular type of dispute is “arbitrable, close under a given law is, in essence, a matter of public policy for that law to determine.” “Against the public policy the determination of any dispute is not permissible under the law”.

Procedural Grounds

41. It is broad category of grounds for challenging arbitral awards relating to deficiency in the way in which the Arbitral Tribunal was appointed or the Arbitral procedure was conducted. As per Section 34 of the Act, an award can be challenged when the party making the application was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

(a) Lack of due process:-procedural irregularity: Certain minimum procedural standards may be observed in the fair and proper conduct of arbitration. These procedural standards are designed to ensure that the Arbitral Tribunal is properly constituted that the arbitral procedure is in accordance with agreement of the parties, and that the parties are given proper notice of the proceedings, hearings and awards. In other words, the aim is to ensure that the parties are treated with equality and are given fair hearing with proper opportunity to present their respective cases.

(b) Further Procedural Issues: An award is also at





risk of challenge where the composition of the Arbitral Tribunal and the procedure adopted in the arbitration are not in conformity with the agreement of the parties or failing such agreement, with the law.

Substantive Grounds

42. If the Tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award i.e. good, bad or indifferent is final and binding on the parties. It matters not that the Tribunal erred in its review of the evidence or misapplied the applicable law. The question, arises as to whether there should be a great degree of judicial review of the merits or is it enough to ensure that the correct procedures have been observed as the law requires or is something more needed to ensure that the learned Arbitral Tribunal has reached the correct decision.

43. As per the Section 34 of the Act, the award of the learned Arbitral Tribunal can be challenged on the ground if the award is contrary to the public policy, patent illegality and passed without any evidence. In the instant case, the main ground for challenging the award is that the learned Arbitral Tribunal while passing the award has not taken into consideration any evidence led by the parties, particularly, by the petitioner.”

78. In order to apply the test for patent illegality in the Award, a relevant portion of the Award is reproduced hereinbelow:

“59. Counsel for the claimant contended that it is only in two conditions as stipulated under clause 4.7.3 that PBG could be encashed. The invocation letter dated 16.09.2017 does not indicate that the PBG had been invoked on the ground that claimant was not able to complete the validation successfully or that claimant was not able to launch the Services in a particular city within the stipulated time. In fact the PBG has been invoked by the respondent on the ground that claimant had failed to pay intercity bandwidth



charges as demand by the respondent. Hence invocation is bad in law because it is not in term of clause 4.7.3 of the FA. There is no provision in the contract that for non-payment of charges PBG could be encashed. Clause 4.8 provides penalty which the respondent could impose if the claimant had committed breach of the terms of the agreement. But respondent has no power to encash the BG on the alleged ground of committing breach of terms of the contract therefore invocation be set aside.

60. Moreover the respondent had not issued a notice for encashment of the BG as required under clause 2.2.5, which provides that if the claimant failed to comply with the provision of 2.2.5 it may lead to forfeiture of BG for that city. It was for the respondent to have intimated to the claimant that claimant had failed to comply the provision of the FA in a particular city. Respondent could not have issued a composite notice asking for the encashment all the 53 BGs vide one letter. For each city separate letter for the encashment of BG ought to have been issued. But the respondent has failed to do so. Respondent's action was not bonafide.

61. Rebutting the arguments of the claimant, counsel for the respondent contended that since claimant failed to roll out in time therefore per the terms of clause 4.7.3. BG was ordered to be encashed. The respondent was justified in invoking the encashment of the BG because claimant failed to roll out in time i.e. within 9 months of the agreement.

62. After considering the contention of the counsel for the parties, one thing is clear that under the clause 4.7.3 the Respondent could invoke the BG only if the claimant had failed to meet roll out of the obligation. The Respondent has not placed on record any notice issued prior to the invocation of the BG indicating that claimant had failed to meet roll out obligation. In fact the respondent has nowhere pleaded that BG was invoked due to claimant's failure to meet roll out. In fact respondent could only set-off any sum of money due and payable to the Franchisee under the agreement or otherwise could be appropriated by the BSNL





and the same may be set-off against any claim to BSNL for payment in term of clause 5.14 of the FA. Clause 5.14 is not applicable in the facts of this case, nor the respondent has sought for set-off its claim of money. In view of clause 5.14 of the FA intercity bandwidth charges cannot be set-off against the BG, because that would be in contravention to clause 4.7.3 of the FA.

63. Contention of the Respondent that claimant did not launch in 9 months in any city hence committed breach of the agreement and amounts to failure of roll out. This argument of the respondent has not been substantiated on record rather the conduct of the respondent as discussed above show, the delay in roll out was on account of the acts of the respondent. Had there been any fault of delay on the part of the claimant in not rolling out in time which time expired by July, 2008, if there had been delay on the part of the claimant in roll out in time, the respondent would have invoked the BG in 2008 itself. But respondent knowing that it was its fault and inaction which led to delay, therefore did not invoke the BG in 2008 nor thereafter till 2017. Moreover vide letter dated 12.12.2012 the respondent exceeded the request of the claimant to deactivation of 46 cities. It is only when the claimant had roll out that respondent permitted the deactivation of the 46 cities. The BG has been invoked after 5 years i.e. in 2017 after deactivation of 46 cities on 12.12.2012. Moreover 53 BGs were given separately for each city. The respondent has failed to point out in which city there was delay of roll out. In the absence of any such details the invocation of BGs all the 53 cities is bad in law.

64. Under the above circumstances I am of the considered view that the invocation of 53 PBG is bad. The respondent is directed to return all the 53 Performance Bank Guarantees to the claimant.”

79. A bare reading of the aforementioned portion of the impugned Award makes it clear that the learned Arbitrator considered the invocation letter dated 16th September 2017 and carefully read Clause



4.7.3 of the FA to declare that the invocation is bad in law and accordingly, the learned Arbitrator directed to return the PBG to the respondent. The learned Arbitrator most evidently considered the contentions raised by the petitioner but did not find any merit in the petitioner's contentions as they were not properly corroborated with evidence.

80. Hence, no perversity can be observed in the impugned Award to declare it patently illegal, and warranting any scope of interference of this Court under Section 34 of the Act, 1996.

81. The test for patent illegality or perversity must be applied to the grounds appraised to effectively analyse the impugned award.

II. Jurisdiction or Mandate of the Arbitral Tribunal:

82. A key ground raised by the petitioner is that the learned Arbitral Tribunal exceeded its jurisdiction or mandate in passing the impugned Award.

83. In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises*, (1999) 9 SCC 283, the Hon'ble Supreme Court held that to find out if the learned Arbitral Tribunal has acted in excess of its powers, it needs to be checked if there exists any provision in the Contract or the law which bars the claimant from raising such a claim or precludes the Arbitrator from deciding such a dispute. The relevant paragraphs of the same are reproduced herein below:

“44. From the resume of the aforesaid decisions, it can be stated that:



(a) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

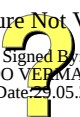
(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

(d) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award





passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd. [(1988) 3 SCC 82 : (1988) 3 SCR 103] by relying upon the following passage from Alopri Parshad v. Union of India [AIR 1960 SC 588 : (1960) 2 SCR 793] which is to the following effect: (SCC p. 88, para 5)

“There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an un contemplated turn of events, the performance of the contract may become onerous.”





(i) *The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.*

(j) *The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law.”*

84. Further, in ***Delhi State Industrial & Infrastructure v. Bawana Infra Development (P) Ltd.***, 2023 SCC OnLine Del 1570, this Court held as under:

“50. As a creature of Contract, upholding the Contract and adjudicating on the lines drawn by it, is the Learned Arbitrator's responsibility. The onus of the rightful interpretation of the Contract is also on the Learned Arbitrator. This Court refers to Foo Jong Peng v. Phua Kiah Mai, (2012) 4 SLR 1267, where the Hon'ble Supreme Court of Singapore delved into the interpretation of Contracts by the Learned Arbitrator during the Arbitral Process. The relevant portion of the judgment is reiterated below:—

“36. In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a specific form or conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). Indeed, the process of the implication of terms necessarily involves a situation where it is precisely because the express term(s) are missing that the court is compelled to ascertain the presumed intention of the parties via the “business efficacy” and the “officious bystander” tests (both of which are premised on the concept of necessity). In this



context, terms will not be implied easily or lightly. Neither does the court imply terms based on its idea of what it thinks ought to be the Contractual relationship between the Contracting parties. The court is concerned only with the presumed intention of the Contracting parties because it can ascertain the subjective intention of the Contracting parties only through the objective evidence which is available before it in the case concerned. In our view, therefore, although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional “business efficacy” and “officious bystander” tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore.”

51. *Further, in the case of Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, the Hon'ble Supreme Court made the following pertinent observations:*

“40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a Contract is primarily for an Arbitrator to decide, unless the Arbitrator construes the Contract in a manner that no fair-minded or reasonable person would; in short, that the Arbitrator's view is not even a possible view to take. Also, if the Arbitrator wanders outside the Contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

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76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it





is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the Agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the Agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the Agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the Contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new Contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the Agreement by another formula dehors the Agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract can never be foisted upon an unwilling party, nor can a party to the Agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an Arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section





34 of the 1996 Act, as has been noted earlier in this judgment.”

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53. It is evident from the aforementioned judgments that in the instant matter the Arbitral Tribunal cannot steer away from the Contract. It should consider accessory pieces of evidence to base their decisions, but the pulp of the impugned Award should depend entirely upon the Contract and the interpretation that the Arbitral Tribunal gives it in accordance with the general principles that govern such interpretations.

54. In the case of *Delhi State Industrial & Infrastructure Development Corpn. Ltd. v. Well Protect Manpower Services (P) Ltd.*, (2022) 2 HCC (Del) 118 : 2022 SCC OnLine Del 901 this Court held as under:

“34. The scope of examination under Section 34(2-A) of the A&C Act is limited. This Court is not required to reevaluate and reappraise the evidence and supplant its opinion over that of the Arbitral Tribunal. Unless the decision is found to be patently illegal, no interference with the Arbitral Award is called for. In *Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corpn. Ltd.* [*Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corpn. Ltd.*, (2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330], Supreme Court had authoritatively explained that even an erroneous view would not vitiate the Arbitral award on the ground of patently illegality unless the error is manifest and one that strikes at the root of the matter. It is trite law that an Arbitral Tribunal is a final adjudicator of the evidence and its conclusion cannot be interfered with except where it is found to be patently illegal or in conflict with the public policy of India. In *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1], the Supreme Court had held that courts would not interfere merely because an alternative view on facts exists. Similarly, in *Associate Builders v. DDA* [*Associate Builders v. DDA*, (2015) 3





SCC 49 : (2015) 2 SCC (Civ) 204], the Supreme Court had observed that “a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his Arbitral award.”

55. In view of the aforementioned judgment, it is evident that the learned Arbitrator, being the ultimate master of the Arbitration, can adjudicate the Claims in a manner that is on the lines of basic tenets of Law and the Principles of Natural Justice and Jurisprudence. As long as the Award does not shock the conscience of the Court, it warrants no interference of the Court.”

85. It is pertinent to reproduce the ruling of the Hon’ble Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co., (1984) 4 SCC 679*** relating to the amplitude of the Arbitration clauses hereinbelow:

“19. In Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd. [AIR 1962 SC 1810 : (1963) 3 SCR 183] this Court, though ultimately it held that a dispute as to the validity of the underlying commercial contract containing an arbitration clause was not one which the arbitrators were competent to decide and that when the contract was invalid every part of it including the arbitration clause was also invalid, on question of construction of the expressions used in the arbitration clause did hold that the expressions used were wide enough to cover a dispute as to the validity of the contract. At p. 188 of the Report (SCR) Justice Venkatarama Aiyar has observed thus:

“It cannot be disputed that the expression ‘arising out of’ or ‘concerning’ or ‘in connection with’ or ‘in consequence of’ or ‘relating to this contract’ occurring in clause 14 are of sufficient amplitude to take in a dispute as to the validity of the agreement dated September 7, 1955.”



25. Four propositions emerge very clearly from the authorities discussed above:

(1) Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ.

(2) Expressions such as “arising out of” or “in respect of” or “in connection with” or “in relation to” or “in consequence of” or “concerning” or “relating to” the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

(3) Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the court to decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operative.

(4) If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope), is contained in the underlying commercial contract then decided cases have made a distinction between questions as to the existence and or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement i.e. to decide the issue of arbitrability of the claims preferred before him.”

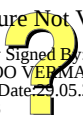




86. It is substantial to mention that the Arbitral Tribunal can be said to have dealt with matters beyond the scope of submissions only when the Arbitral Tribunal has decided matters either beyond the scope of the Arbitration Agreement or beyond the disputes referred to it, and this has been reiterated thus in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (Supra)***. The relevant paragraphs are reproduced hereinbelow:

“68. A conspectus of the above authorities would show that where an Arbitral Tribunal has rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the Arbitral Tribunal, as understood in Praveen Enterprises [State of Goa v. Praveen Enterprises, (2012) 12 SCC 581] , the arbitral award could be said to have dealt with decisions on matters beyond the scope of submission to arbitration.

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must





refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal.

87. It is important to reproduce Clause 5.8 of the FA for the proper adjudication of this ground. The clause is reproduced hereinbelow:

“5.8 Arbitration

Except as provided in this agreement, in case of any dispute or differences, breach & violation relating to the terms of the Agreement. The said matter or dispute, difference shall be referred to sole arbitration of Chairman and Managing Director (CMD) of BSNL or any other person appointed by him. That the award of the arbitrator shall be final and binding on both the parties. In the event of such Arbitrator to whom the matter is originally referred, to is being transferred or vacates his office on resignation or other wise or refuses to do work or neglecting his work or being unable to act as Arbitrator for any reasons whatsoever, the CMD BSNL shall appoint another person to act as Arbitrator in place of out going Arbitrator and the person so appointed shall be entitled to proceed further with the reference from the stage at which it was left by his predecessor. The Franchisee will have No Objection in any such appointment, that arbitrator so appointed is employee of BSNL. The said Arbitrator shall act under the Provisions of the Arbitration and conciliation Act, 1996 or any statutory modifications or reenactment thereof or any rules made thereof.”

88. Clause 5.8 of the FA is broad in its scope and provides that “*in case of any dispute or differences, breach & violation relating to the terms of the Agreement*”, the same shall be referred to arbitration. It is settled law that using expressions like “relating to” increases the amplitude of disputes, in the Contract.



89. Thus, a bare reading of the aforementioned clause and the collective reading of the judicial precedents quoted make it evident that the Arbitral Tribunal has acted within its mandate. It is clear from the aforementioned clause that the scope of the subject matter of the dispute in this instant case is very wide, and the learned Arbitral Tribunal has determined the issues accordingly.

90. Therefore, the learned Arbitral Tribunal can be said to have duly determined the issues forming the subject matter of the Arbitration as within its power, and thus the impugned Award does not call for any interference by this Court on this ground under Section 34 of the Act, 1996.

III. Interpretation of the terms of Contract

91. Another key ground raised by the petitioner is that the interpretation of the terms of the FA is not within the domain of the Learned Arbitral Tribunal.

92. In *DDA v. Joint Action Committee, Allottee of SFS Flats, (2008) 2 SCC 672*, the Hon'ble Supreme Court held that a contract cannot be vague or uncertain. The relevant paragraphs are reproduced below:

“80. A definite price is an essential element of binding agreement. A definite price although need not be stated in the contract but it must be worked out on some premise as was laid down in the contract. A contract cannot be uncertain. It must not be vague. Section 29 of the Contract Act reads as under:

“29. Agreements void for uncertainty.—Agreements, the meaning of which is not certain, or capable of being made certain, are void.”



A contract, therefore, must be construed so as to lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. No mechanism has been provided for interpretation of the terms of the contract. When a contract has been worked out, a fresh liability cannot be thrust upon a contracting party.

81. It is well settled that a definite price is an essential element of a binding agreement. Although a definite price need not be stated in the contract, but assertion thereof either expressly or impliedly is imperative.”

93. It is pertinent to reiterate that in the interpretation of the Contract if the clause of the Contract is capable of being interpreted in more than one way, the court may not interfere with the Arbitral Award even if it is of the view that another interpretation would have been a better one, as held by the ***Delhi High Court in Modi Construction Co. v. Ircon International Ltd., 2023 SCC OnLine Del 1500***. The relevant paragraphs are reproduced below:

“11. The Majority Tribunal however, held that when in the Clause providing for interest, the rate of interest was left blank and was not specified, the entire clause could not be operated, suffered from uncertainty and was ineffective. Thus, the entire clause became defunct ipso facto. The observations of Majority Tribunal invalidating Sub-Clause 60.8 of COPA are as under:

“[139] Having concluded that the Tribunal is empowered under the Contract to award interest claimed along with a Claim, the issue to be addressed is as to whether interest, compounded monthly or simple interest, be awarded.

The case laws relied upon by the Claimant cannot be disputed; it is well settled that payment of compound interest is in order, subject to the provisions of the Contract



(emphasis given).

Provisions of the Contract, therefore, now need to be examined by the Tribunal. Sub-Clause 60.8(b) requires that the rate of interest will be that prescribed in the Appendix to Bid. It is undisputed that the said Appendix does not prescribe interest; in fact, it does not even mention it. Without the rate of interest, the said Clause cannot be operated, suffers from uncertainty and is ineffective. The said Clause is, therefore, void under Section 29 of The Indian Contract Act

(emphasis added).

The Claimant's argument that notwithstanding the absence of mention of a rate of interest in the Appendix, prevailing/current prime leading rates must be considered as the Contract between the Parties is a commercial contract has no legal basis, as also his submission that the rate of interest to be adopted in the Contract was to be as per actual and accordingly the Parties willingly did not mention any specific rate in the Appendix to Bid. The Arbitral Tribunal cannot amend a contract and introduce new conditions and provisions.

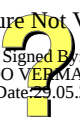
Further, the Claimant's argument of comparing and seeking support from the stipulations relating to Bridging Finance in the Contract Agreement is misplaced. The stipulation relating to Bridging Finance prescribed interest to be charged 'as per actual'; and as what constitutes actual was determined by the Conciliator in his Award. The stipulation relating to interest payable was thus not totally absent and, in any event, settled by a due process prescribed under the Act.

The Tribunal concludes that the contention of the Claimant that he is entitled to payment of compound interest on a monthly basis under the said Clause as untenable. In other words, the Claimant cannot seek any shelter under this Sub-Clause and the Respondent's objection, sustains."



24. It further held that because the rate of interest was left blank in Clause 60.8 (b) in the Appendix to the Bid to which a reference was made in the said clause. It was held to be uncertain and ineffective and therefore void under Section 29 of the Indian Contract Act. Further, the claimant claimed interest free “mobilization Advance” as a percentage of the Contract value. The second type of advance to which the claimant was entitled was Machinery Advance which was also free of interest. The respondent, in turn, was entitled to interest free advances for the above two from the Principal Employer under the Main Contract and consequently these two types of advances were in the nature of pass on and therefore, not relevant to help arrive at a reasonable rate of interest by the Tribunal. The third type of advance was Bridging Finance for which the interest was claimed @ 15.5 % on the principle of reciprocity of rate of interest by stating that the same is the rate that it had to pay its bankers in the overdraft maintained by it. The Respondent submitted that the interest rate was calculated on a monthly compounding basis by taking an arbitrary rate of 15.5% as the same was not indicated in the contract or adopted for any transaction between the parties. The Tribunal noted that the petitioner's claim of interest @ 15.5% by comparing and seeking support from stipulations related to Bridging Finance in the Contract Agreements was misplaced. The Tribunal concluded that the claim of the Petitioner of compounded interest on a monthly basis was untenable for this reason as well.

26. The Arbitral Tribunal interpreted the terms of the contract and while rejecting the claim of the petitioner for compound Interest, it gave various reasons in which the clause providing for interest was also considered and held to be defunct, null and void being incomplete and vague. The objections of the Appellant that there being no pleading seeking clause 60.8 (b) to be declared null and void, the Ld. Arbitrator has made out a 3rd case in itself, is totally not tenable as it was within the domain of the Arbitrator to interpret the terms of the contract. The Tribunal exercised its





discretion on the rate of interest to be granted, in absence of an agreement to this effect. The Majority Award has given a well reasoned Award while granting simple interest.

31. As the scope of interference of this Court under Section 34 of A & C Act, 1996 is very limited and the court must restrict itself to the above principles, this court does not find any infirmity in the Award regarding grant of simple interest by the Tribunal. The Arbitrator has interpreted the terms of contract and the petitioner's claim of interest was based on the interpretation of the term of contract and clause 60.8 (b) of the COPA in particular and applied the principles of law in the impugned award. As established by the above mentioned principles, this court does not sit in appeal over the Award made by an Arbitral Tribunal and cannot substitute its own reasoning for that of the Arbitrators, especially when the same is reasonable. This Court does not find merit in the claim of compound interest raised by the Petitioner herein."

94. In order to adjudicate upon the ground raised regarding the interpretation of the Contract, it is pertinent to analyze the key clauses of the FA. Clauses 3.6.3 and 4.5 are reproduced hereinbelow for the same:

"3.6.3 Inter-City bandwidth shall be provided to the Franchisee on competitive rates of BSNL as the Franchisee is expected to locate a separate VoD server for the additional city. BSNL shall be given first right of refusal by the bidder for providing the intercity bandwidth requirement of the franchisee.

4.5 Charges payable by the Franchisee to BSNL for Bandwidth & Collocation

4.5.1 For provision of VoD & IP TV/Broadcast TV services to the customers, Intra-city connectivity and bandwidth shall not be charged by BSNL within city tariffs. Beyond city limits, shall be provided on chargeable basis at the competitive tariffs for last mile for leased line services from time to time.



4.5.2 For provision of VoD & IP TV/ Broadcast TV services to the customers, Inter-City bandwidth shall be provided, provided on chargeable basis at the competitive port tariff for MPLS services from time to time.

4.5.3 Collocation for Gaming & Video servers shall be provided to the Franchisee on chargeable basis at the competitive tariffs for Web Collocation from time to time.”

95. The relevant paragraph of the impugned Award is reproduced below for clarity:

“45. From record it is clear that the respondent never communicated "competitive rates" claimant had always been objecting to the demand notes raised on the ground, firstly no basis given, secondly those were not competitive rates and thirdly these suffer from uncertainty. Moreover FA does not contemplate that the claimant was buying bandwidth from the respondent, such a bandwidth was to be used by claimant for providing IPTV services to BSNL's customers only under the FA.

Clause 3.6.3 of FA envisage "competitive rates of BSNL". Clause 4.5.1 and 4.5.2 of FA provide:-

(a) That intercity connectivity and bandwidth shall be provided on chargeable basis at the competitive tariffs for the last mile for leased line services from time to time.

(b) That intercity bandwidth shall be provided, on chargeable basis at the competitive. Port tariff for MPLS services from time to time.

Admittedly competitive rates have not been defined either in FA or in EOI. It was put to counsel for Respondent how he would reconcile clause 3.6.3 and 4.5 of FA, counsel for respondent had no answer. Reading the above clauses leaves no manner of doubt that these suffer from uncertainty which is also reflected from the conduct of the respondent. Section 29 of the Indian Contract Act clearly stipulates that contract cannot be vague or uncertain. I find that the term competitive rate mentioned in clause 3.6.3 suffer from



uncertainty and is vague.

At the stage of concluding arguments counsel for the respondent in order to prove competitive rates of BSNL sought to place on record Additional documents such as

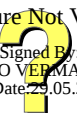
- (i) Letter No. VO no.111-1/2007 dated 29.1.2009 issued by respondent setting out MPLS VPN port tariff for the services provided by franchisee;*
- (ii) Extracts of the TRAI's Notification dated 21.04.2005;*
- (iii) Extracts of the TRAI performance indicators published on 06.05.2013;*
- (iv) TRAI's Telecommunication Tariff order 2014 dated 14.07.2014."*

96. The aforementioned clauses make it evident that the terms on which the provision of inter-city bandwidth is chargeable are in itself uncertain, and these terms are void in terms of Section 29 of the Indian Contract Act. The learned Arbitral Tribunal has properly adjudicated upon this, as observed from the aforementioned paragraph of the impugned award.

97. It is trite law that a definite price is an essential element of a binding agreement. As the aforementioned judicial decisions stipulates, a contract cannot be vague or uncertain.

98. The learned Arbitral Tribunal observed in paragraph no. 45 that the petitioner has not refuted or reconciled as to how Clauses 3.6.3 and 4.5 of the FA are not contradictory or uncertain and void, even during the course of the arguments.

99. It is imperative to reiterate here that even if the interpretation of the clauses of the contract by the Arbitral Tribunal is incorrect, it still is an error within the jurisdiction of the Arbitral Tribunal and it may not be the





subject matter of interference by this Court under section 34 of the Act, 1996.

IV. Analysis of provisions of contract and evidence by Arbitral Tribunal:

100. It was also contended by the petitioner that the learned Arbitral Tribunal did not duly consider the provisions of the telecommunications tariff orders in arriving at its findings regarding the applicable bandwidth charges payable by the respondent.

101. It is settled law that the learned Arbitrator is the sole Judge of the quantity and quality of the evidence placed before him, as reiterated in *Associate Builders v. DDA*, (2015) 3 SCC 49, by the Hon'ble Supreme Court. The relevant paragraph is reproduced hereinbelow:

52. It is most unfortunate that the Division Bench did not advert to this crucial document at all. This document shows not only that the Division Bench was wholly incorrect in its conclusion that the contractor has tried to pull the wool over the eyes over the DDA but it should also have realised that the DDA itself has stated that the work has been carried out generally to its satisfaction barring some extremely minor defects which are capable of rectification. It is clear, therefore, that the Division Bench obviously exceeded its jurisdiction in interfering with a pure finding of fact forgetting that the arbitrator is the sole Judge of the quantity and quality of evidence before him and unnecessarily bringing in facts which were neither pleaded nor proved and ignoring the vital completion certificate granted by the DDA itself. The Division Bench also went wrong in stating that as the work completed was only to the extent of Rs 62,84,845, Hudson's formula should have been applied taking this figure into account and not the entire contract value of Rs 87,66,678 into account.



102. The relevant paragraphs of the award are reproduced hereinbelow to adjudicate upon the instant ground:

“46. Counsel for the claimant objected to the taking on record these documents, inter alia, on the grounds that these were placed on record at a very belated stage when final arguments were virtually completed. If these documents are considered by the tribunal it would prejudice the interest of the claimant as these documents neither form part of pleading nor of respondent's evidence, claimant had no opportunity to rebut the same.

47. Thinking that these documents may have some bearing in understanding the basis of competitive rates hence in the interest of justice these were taken on record for whatever their, worth. These have been discussed upon.

48. So far relevance of these documents in determining the "competitive rates", to my mind, these are of no help to the respondent. First document i.e. letter dated 29.01.2009 which is an internal communication of the respondent. It was not marked to the claimant nor brought to the notice of the claimant prior to filing these proceedings. Even otherwise it provides that claimant shall enter into a strategic agreement with the respondent for the purpose of bandwidth provision and determination of payment of bandwidth charges. No such strategic agreement was entered into between the claimant and the respondent. This shows there was no consensus ad idem between the parties regarding MPLS bandwidth

*charges. Therefore this document is of no help to the respondent nor can be relied upon. In arriving at this conclusion reliance can be placed on the decision of Supreme Court in the case of **Bharat Sanchar Nigam Ltd. & Anr. Vs. M/s BPL Mobile Cellular Ltd. & Ors.** wherein their lordship held:*

"Such a huge difference in the contractual rate and the demand on the flat rate could be made provided the contract provided therefor. The difference





admittedly was based upon the internal circular letters. They might have been published by some publisher but indisputably they are not statutory in nature. They have not been framed under any statute. The Indian Telegraph Act or the Rules framed thereunder do not provide for issuance of such circulars. The circular letters collected at one place are loosely called rules. They, as noticed hereinbefore, are meant for office use only. The directions contained in the said circular letters are relevant for the officers who are authorized not only to grant licences but also enter into contracts and prepare bills. The circular letters having no statutory force undoubtedly would not govern the contract."

49. As regard TRAI's notification dated 21.04.2005 it talks about ceiling tariffs for domestic leased line and circuits which is different from MPLS ports. So reliance on this notification is of no help to respondent. As regard TRAI Performance Indicators published on 06.05.2013, Respondent has failed to establish any relevance of this documents to the present dispute regarding "competitive rates of BSNL".

50. During the pendency of these proceeding dated 30.04.2019 on behalf of claimant following statement was made:-

"Mr. G. D. Singh proposes the rate of Rs. 51- per subscriber per month. On that basis he is prepared to pay the charges. On this basis when calculated the amount works out approximately to Rs. 14 lakhs which the claimant is prepared to pay. Alternatively the Claimant has already paid revenue share of 10% and proposes to increase it to 50% of which works out to Rs. 1.9 crores. After deducting the amount of Rs.38 lakhs revenue share already paid the additional Rs. 1.52 crores claimant is prepared to pay as full and final settlement. It would be without prejudice to the rights of the claimant and that respondent should release the Bank Guarantee to the claimant."



This was not accepted by the respondent.

51. Claimant had made investment to the tune of Rs.1 00 crores but could only generate revenue to the tune of Rs.3.85 crores because of poor network availability caused by the respondent. Out of Rs.3.85 crores claimant has already paid Rs.38,00,000/- as revenue share of respondent. I find force in the submission of the claimant that claimant was required to establish necessary infrastructure for making I PTV services operational. The tariff to be charged from the customers was also decided by the Respondent. Parties entered into agreement without any agreement vis-avis as to how the intercity bandwidth charges would be arrived at. What would be the charges for use of intercity bandwidth which had not been agreed to between the parties. Respondent made exorbitant demand of Rs.26,07,99,874/- of MPLS/bandwidth charges without furnishing the basis. Claimant entered into this agreement believing that bandwidth charges would be within the commercial viability of the business. If respondent was expecting high bandwidth charges, it should have decided customer's tariff in such a way that the cost of bandwidth charges could be recovered from the revenue so generated. But that was not done.

52. I find that the charges demanded by the Respondent are not justified nor reasonable nor commensurate with the revenue generated. Charges claimed by Respondent of intercity bandwidth are excessive much more than the revenue generated. Hence these charges cannot be called competitive. The expenses incurred by the claimant compare to revenue generated were much more and if Bandwidth charges are added then whole business would become unviable. Accordingly demand note dated 05.12.2017 issued by the respondent being not justified nor reasonable is hereby set aside.

53. Another franchisee namely M/s Aksh Optifibre Ltd. having a similar agreement with BSNL challenged the demand. The Arbitrator gave the Award which was challenged in the Delhi High Court. The Hon'ble Delhi High Court in the case Bharat Sanchar Nigam Ltd. Vs. M/s Aksh



Optifibre Ltd. OMP (Comm) 131/2017 & IA 3378/2017 & 2642/2019 decided on 04.03.2010 after referring to the relevant extract of the Award given by Arbitrator namely that since "the FA had no parameters for deciding the "competitive rates" and that there was vast gap between the different demands made by BSNL show that no rates were available with BSNL. Hence the Arbitrator set aside the demand of the BSNL." Delhi High Court held;

" Having gone through the Award, this Court is of the view that there is no patent illegality or perversity in this part of the Award. The Tribunal has relied on the clear wordings of the clauses 3.6.2 and 3.6.3 where it was clearly stipulated that intercity bandwidth would be provided to the respondent on chargeable basis. In so far as the second issue is concerned, the entire record was replete with the fact that the petitioner sent repeated demand notices for paying the inter-city bandwidth charges, but each notice contained a different figure payable by the respondent and that too, provisional. As rightly held by the Tribunal the figures were nowhere near each other clearly indicating that there was no set parameter to decide the rates and this also fortified the stand of the respondent that there were no rates placed by the petitioner on the website. The Tribunal was right in its observations that the contract did not have any provision stipulating the actual rates chargeable and nor was the petitioner able to point out any such provision. The witnesses of the petitioner on the other hand admitted that there was no fixed criteria under the contract for determining the charges. There is thus no illegality in this finding of the Tribunal."

54. In the absence of any competitive rates available on record, the question arises at what rate claimant should make the payment in the absence of there being any stipulated rates in the Agreement. Claimant had requested the respondent to close the MPLS ports in the 16 cities specified in the said letter and stop billing. Vide letter dated



05.01.2012 claimant confirmed that all MPLS ports of 16 cities have been stopped w.e.f. 27.12.2011. Vide letter dated 27.01.2012 Respondent acceded to the request of the claimant for disconnection of MPLS ports from Gurgaon NOC for the 7 cities mentioned therein. When no response came claimant vide letter dated 15.05.2012, informed that MPLS ports in 5 cities mentioned therein have been stopped as on 10.05.2012. Vide letter dated 12.12.2012 AGM of Respondent accepted the request of claimant and deactivated MPLS ports and billing in respect of 46 cities.

55. Claimant submitted to respondent a proposal received from VSNL for providing STM 4 connectivity for connecting 4 cities at the price of Rs.2.8 crores for a 15 years Indefeasible Right of Use (IRU) Rs.66,000/- per year. Claimant also suggested the rate of Rs.5/- per subscriber per month. Alternatively proposed to increase the revenue share to 50% which works out to Rs.1.9 crore. Respondent in its response dated 04.05.2019 intimated that this was not acceptable. Counsel for Respondent submitted that proposal to increase revenue share is not acceptable because there was no dispute raised by BSNL regarding the Revenue share. Moreover parties are bound by the terms of the agreement. Those terms cannot be changed. In view of this objection this proposal cannot be considered.

56. Claimant's proposal to pay Rs.5/- per connection per month appears to be reasonable in compare to the VSNL offer received by claimant. Hence I hold that claimant shall pay to the Respondent intercity bandwidth charges at the rate of Rs.5/- per connection per month for the period of actual operations in all 53 cities. Admittedly after 12.12.2012 IPTV services were not provided in any of the cities by the claimant."

103. It can be thus inferred from a plain reading of the aforementioned portion of the impugned award that the learned Tribunal has duly considered the provisions of the telecommunications tariff orders while adjudicating upon the dispute.



104. It is thus inferred from the simultaneous reading of the facts and evidence on record along with the impugned Award, that the learned Arbitral Tribunal has not erred in a patently illegal manner, and thus has not rendered an Award which has perversity on the face of it.

105. Therefore, it can be understood by the discussions in the foregoing paragraphs that the learned Arbitral Tribunal has not exceeded its jurisdiction or mandate and has duly considered all the evidence placed before it and rendered a well-reasoned Award.

106. Therefore, following the principles of natural justice and equity, it is apparent that the learned Arbitrator has acted well within his power to adjudicate the dispute effectively, by working within his mandate and giving due consideration to the “Birth-giver” Contract and the evidence placed on record, and thus, it does not warrant the interference of the Court under Section 34 of the Act, 1996.

CONCLUSION

107. In light of the facts, submissions, and contentions in the pleadings, this Court finds that the petitioner has failed to corroborate with evidence how the Learned Arbitrator had erred in adjudicating the dispute.

108. The law which has been settled by the Hon’ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of the Act, 1996 is fairly limited and narrow. The Courts shall not sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, the master of evidence, after due consideration of facts, circumstances, evidence, and material before him.



109. In the instant petition, it was argued that the impugned award dated 12th June 2020 was patently illegal and thus liable to be set aside. As stipulated by the aforementioned precedents, it is essential that there be illegalities or deficiencies at the face of the Award and/or shock the conscience of the Court in order for it to qualify to be set aside by an act of this Court.

110. The petitioner has failed to make out such a case and was unable to show that the Award is patently illegal on the face of it.

111. A perusal of the impugned award makes it evident that there is no patent illegality or error apparent on the face of the record. The learned arbitrator has passed the impugned award after considering all the relevant material placed before it during the arbitral proceedings. The award dated 12th June 2020 is well-reasoned and is not in contravention of the fundamental policy of Indian law, and thus there is no reason for interfering in the impugned award.

112. The petitioner has failed to show that any grounds that are stipulated under Section 34 of the Arbitration Act are being met.

113. In view of the above discussion of facts and law, this Court finds no reason to set aside the Impugned Arbitral Award.

114. The petition is, accordingly, dismissed.

115. Pending applications, if any, also stand disposed of.

116. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MAY 26, 2023

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