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

% **Pronounced on: 20th December, 2023**

\+ O.M.P.(COMM) 209/2019 & I.A. 7398/2019

INDUS TOWERS LIMITED ..... Petitioner

Through: Mr. Gopal Jain, Sr. Advocate with Mr. Chirag Sharma, Ms. Sakshi Tibrewal and Ms. Swarna Kashyap, Advocates.

versus

SISTEMA SHYAM TELESERIVICES LIMITED ..... Respondent

Through: Mr. Akhil Sibal, Sr. Advocate with Mr. Shivek Trehan and Mr. Nikhil Chawla, 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"), has been filed on behalf of the petitioner seeking the following reliefs:

> "*a) Set aside the Majority Award dated 17 February 2019 passed by the Learned Arbitral Tribunal comprising of Hon 'ble Mr. Justice S.N. Variava (Retd.) and Hon'ble Mr. Justice Manmohan Sarin (Retd.);*

b) Allow the Dissenting Award dated 17 February 2019 passed bythe Learned Arbitral Tribunal comprising of Hon'ble Mrs. Justice Usha Mehra (Retd.); and
c) Pass such other and any further orders as this Hon'ble Court may deem fit and proper in the facts of the present case."

FACTUAL MATRIX

2. The details of the parties to the instant dispute is as under:

a. M/s Bharti Infratel Limited, i.e., the petitioner herein, is stated to be the company incorporated under the Companies Act, 1956, having a registered office at 901, Park Centra, 9th Floor, Sector-30, NH-8, Gurgaon-122001, Haryana.Vide order dated 11th November, 2022, a Coordinate bench of this Court had allowed IA no. 18393/2022, filed by the petitioner, wherein, the name of the petitioner was changed from 'Bharti Infratel Limited' to 'Indus Towers Limited', vide certificate of incorporation dated 10th December, 2020 incorporating the change of name. The petitioner is *inter alia* engaged in providing passive infrastructure and related operations along with maintenance services to various telecommunication operators in India.

b. The petitioner is registered with the Department of Telecommunications, Ministry of Communications and Information (hereinafter "DoT") as a category –I

infrastructure provider (hereinafter "IP-1") for providing passive infrastructure. Being an infrastructure provider, it is tasked with erection of equipment such as communication towers, diesel generator sets, batteries, equipment for conversion of power from AC to DC, air conditioners for cooling the equipment installed, shelter for keeping the equipment to enable airwaves/signals to be transmitted across a territory/circle.

c. M/s Sistema Shyam Teleservices Ltd. (formerly known as Shyam Telelink Limited), i.e., the respondent herein, is a company incorporated under the Companies Act, 1956, with registered office at MTS Tower, 3 Amrapali Circle, Vaishali Nagar, Jaipur- 302201, Rajasthan.

d. The respondent is joint venture, involving equity participation by Sistema (LSE:SSA) of Russia, the Government of the Russian Federation and the Sham Group of India. The respondent is the majority shareholder in the joint venture company which operates its telecom services under the 'MTS' brand.

3. On 27th March, 2008, the respondent was granted Uniform Access Licenses by the DoT (Hereinafter "UAS Licence") in the following 21 telecom circles, which are Andhra Pradesh, Assam, Bihar, Delhi, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Karnataka, Kerala,

Kolkata, Madhya Pradesh, Maharashtra, Mumbai, North East, Orissa, Punjab, Tamil Nadu, Uttar Pradesh (East), Uttar Pradesh (West) and West Bengal. The respondent got the above said licence under the First-Come-First-Serve Policy for Rs. 1,626 Crores. Under the First-Come-First-Serve Policy, each license was granted on payment of a fixed entry fee and spectrum came bundled with the license. These licenses were valid for a period of 20 years. In the year 2003, the respondent had already procured a license for Rajasthan and this license was not under the First-Come-First-Serve Policy.

4. The respondent approached the petitioner to utilise its towers and passive infrastructure services. On 1st April, 2008, the petitioner and the respondent (hereinafter collectively called as Parties"), entered into the Master Services Agreement (hereinafter "MSA"), whereby, the petitioner agreed to provide the respondent with the passive infrastructure permitting the respondent to install to its equipment on the petitioner's passive infrastructure in 11 circles. Thereafter, the parties performed their respective obligations in accordance with the terms of the MSA. The MSA was an umbrella agreement which contained the basic terms and conditions and provided for site specific service contracts to be executed thereunder. Each site had a specific service contract under the MSA which could be terminated independent of the MSA.

5. In the year 2010, the First-Come-First-Serve Policy was challenged before the Hon'ble Supreme Court and on 2nd December, 2012, the Hon'ble Supreme Court passed judgment in ***Centre for Public Interest Litigation v.***

Union of India, **(2012) 3 SCC 1** (hereinafter "2G judgment'), wherein, it declared the licenses granted to the private operators on or after 10th January, 2008 and the subsequent allocation of spectrum to the licensees as illegal and quashed the same. It held that the First-Come-First-Serve Policy is arbitrary and unconstitutional. As a result, the spectrum bundled with the quashed licenses was freed up and the Hon'ble Court directed the same to be auctioned.

6. Due to the same, the respondent announced closure of business and exit from certain telecom circles. On 21st February, 2013 the respondent issued a communication to the petitioner, thereby, terminating the individual site agreements in the exited circles on account of quashing of licenses by the Hon'ble Supreme Court.

7. On 8th March, 2013 the petitioner replied to the respondent's letter dated 21st February, 2013 and refuted the respondent's claim stating that the 2G judgment does not amounts to change in law or a *Force Majeure event* and the petitioner sought to rely on Clause 5.3.3 to state that the MSA required the respondent to obtain/maintain its license after the quashing.

8. Thereafter, on 11th March 2013, the respondent participated in the subsequent auction conducted by the DoT for spectrum in eight telecom circles and emerged successful at a cost of Rs. 3,639 Crores. Subsequently, the respondent issued another communication dated 21st March 2013, wherein, the respondent claimed that the quashed licenses were the very foundation of the MSA and the service contracts thereunder, and the quashing of the same by the Hon'ble Supreme Court amounted to frustration

of the service contracts/agreements. Pursuant to the same, the petitioner filed a petition under Section 9 of the Act, 1996, bearing OMP (I) COMM no. 34/2016 before this Court.

9. The petitioner disputed and contested the respondent's stand and raised a demand for payment of Exit Charges to the tune of Rs. 87,91,70,268/-. The petitioner contended that the termination by the respondent was voluntary as it selectively chose to participate only in eight telecom circles in the fresh auction conducted by the DoT, whereas, it could have re-obtained licenses in all the affected circles and continued. operations. According to the petitioner, the respondent's termination was voluntary as it was a commercial decision and as per the terms of the contract, any premature termination (before the minimum fixed term often years) had to be accompanied by a levy of Exit Charges.

10. Accordingly, the petitioner initiated arbitral proceedings against the respondent. The petitioner had claimed Rs. 87,91,70,268/- towards the Exit Charges along with interest of Rs. 39,16,85,872/- up to March, 2016. Rejecting the contentions and arguments of the petitioner, the learned Arbitral Tribunal held that no Exit Charges were payable by the respondent in its Award dated 17th February, 2019. The learned Arbitral Tribunal returned a finding that the quashing of the licenses by the Hon'ble Supreme Court were in fact an unforeseeable event which was beyond the control of the respondent.

11. The learned Tribunal held that 2G judgment resulted in a change in policy in allocation of spectrum and brought an end to the erstwhile licenses

allotted under the 2008 First-Come-First-Serve Policy. This amounted to a change of law under the MSA and the resulting termination of the service contracts owing to change of law exempted the respondent from payment of Exit Charges. The learned Tribunal was also of the view that the quashing of the licenses by the Hon'ble Supreme Court was a *Force Majeure Event* and termination by the respondent as a result of the same was not voluntary termination. It further held that the MSA did not contain any obligation to 're-obtain' a quashed or a cancelled license.

12. Vide the aforesaid Award, the learned Arbitral Tribunal by a majority of 2:1 passed the impugned Majority Arbitral Award (hereinafter "majority Award") rejecting the claims of the petitioner and allowing the counterclaims of the respondent. Thus, having failed before the learned Arbitral Tribunal, the petitioner has filed the present petition under Section 34 of the Act, 1996, seeking setting aside of the majority Award and allowing the minority Award.

SUBMISSIONS

(On behalf of the petitioner)

13. Mr. Gopal Jain, learned Senior Advocate appearing on behalf of the petitioner submitted that the impugned Award is being challenged *inter alia* on the ground that the relevant contractual provisions have not been considered by the learned Tribunal at all while delivering the impugned Majority Award.

14. It is submitted that the majority Award is against the settled principles of law, as it states that the 2G Judgment constituted "Change of Law." However, the majority Award, in complete ignorance of the vital evidence on record, lost sight of the fact that the respondent was availing services in the Rajasthan Circle under the same MSA till the year 2017. It was respondent's own argument that the MSA being an umbrella agreement could continue to be performed *qua* the Rajasthan Circle. This shows that the MSA was still alive till the year 2017, and the 2G Judgment had no effect on the MSA.

15. It is submitted that the majority Award is based on the premise that the quashing of licenses by the 2G Judgement was a *Force Majeure event*, but this premise is in complete ignorance of the vital evidence on record. It is pertinent to mention here that the respondent, vide its letter dated 29th April, 2013 had itself abandoned the force majeure clause.

16. It is submitted that, in its notice dated 21st March, 2013, the respondent, while terming the said notice as "Termination of Master Services Agreement" stated that the respondent shall, however, continue to avail services under the said MSA, which it actually did till the year 2017. This is a clear case of approbation and reprobation by the respondent, which was ignored in the majority Award.

17. It is also submitted that the minority Award rightly observes the contentions of the petitioner when it says: *"Admittedly in the present case, the Respondent enjoyed services of the Claimant under this very MSA even after the quashing of licenses and till as recently as July 2017. Reading of*

Clause 11.2.3 makes it clear that the said provision is attracted where there is change of law which has not been stayed by a Court and which necessarily rendered the existence or the performance of MSA void or invalid."

18. It is further submitted that it is inconceivable that the respondent kept on availing services under the MSA which was purportedly terminated on account of "Change of Law."

19. It is submitted that the impugned majority Award failed to acknowledge a crucial aspect of the case that it was the respondent's deliberate decision to bid for and obtain spectrum in only 8 circles, which happened to be the same circles for which the Supreme Court had cancelled licenses. This decision was not a legal necessity but a strategic commercial choice and there is substantial evidence on record that supports this contention.

20. It is further submitted in a press release dated 21st February, 2013, the respondent explicitly stated its intention to devise an optimal strategy for the auctions, taking into account various factors, including spectrum pricing and competition levels.

21. It is submitted that in a subsequent press release dated 11th March, 2013, it was reiterated that MTS India had carefully considered numerous variables, such as spectrum pricing, carrier slots, and competition, while participating in the spectrum auctions.

22. It is further submitted that the respondent's 2013 Annual Report revealed that the decision to bid for these 8 circles was a result of meticulous

evaluation of several variables, including spectrum pricing, carrier availability, competition levels, and future data potential in those circles. This strategic approach was confirmed during the cross-examination of respondent's witness no. 3, where it was clarified that the decision to close operations in 13 circles was based on a range of considerations, including the quantum of available spectrum, competition levels, potential for data services, and the price of spectrum.

23. It is submitted that the minority Award has rightly held that the decision to bid for only 8 circles was a purely commercial decision. It was further held that in such circumstances, termination of MSA cannot be said otherwise than voluntary.

24. Learned senior counsel for the petitioner places his reliance on ***Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India*, (2019) 15 SCC 131,** wherein it was held that a finding based on no evidence at all or an award that ignores the vital evidences in arriving at a decision would render the said finding as a perverse and a patently illegal decision. Further reliance has been placed on the judgment **dated 14th September, 2012** passed in the matter of ***Bharti Cellular Limited vs. Department of Telecommunications*, OMP No. 77 of 2003,** wherein a Coordinate bench of this Court while setting aside a majority Award where material evidence was ignored by the Arbitrator, held that in the event it is found that material evidence was overlooked by the Arbitrator then then the said award is liable to be set aside.

25. It is submitted that the majority Award has attempted to rewrite the Contract between parties by stating that the obligation to obtain and maintain the license as provided in Clause 5.3.3 of the MSA did not cast an obligation upon the respondent to re-obtain the license after the same was quashed.

26. It is further submitted that the respondent's own conduct is contrary to the abovementioned clause due to the reason that in its letter dated 21st February, 2023, the respondent expressed its intention of participating in the upcoming spectrum auctions for the areas other than the areas termed by the respondent as 'Unviable Service Areas'. Admittedly, the respondent did obtain spectrum in 8 circles. As has already been submitted herein before, the decision to bid for only 8 circles was a purely commercial decision. All that the respondent intended was to terminate the MSA in the garb of the 2G Judgment as the performance under the MSA had become onerous.

27. Reliance in has been placed upon the judgment passed by the Hon'ble Supreme Court in the matter of ***Energy Watchdog vs. CERC &Ors.*, (2017) 14 SCC 80**, wherein it was held that the Court do not have power to absolve a party from the performance of its part merely because the said performance has become onerous on account of an unforeseen turn of events.

28. It is further submitted that the minority Award, on the other hand, has rightly held that Clause 5.3.3 of MSA mandated the respondent to "obtain and maintain" the sharing operator's license. The prerequisite of entering this MSA was that the respondent must have a valid sharing operator's license, which the respondent had at the time of entering the Agreement. Clause

5.3.3 mentions that the said sharing operator will "obtain" the same in case, for any reason, it got extinguished. This provision was drafted in the MSA for the purpose of continuity of the contract. Therefore, the MSA mandated that the respondent has the license that it had at the time of entering into the Agreement. When the clause says "obtain", it means re-obtain. The judgement of ***Axios Navigation Co. Ltd. vs. Indian Oil Corporation Limited, 2012 (3) Mh.L.J.,*** is relied on, to further substantiate the abovementioned submission.

29. It is submitted that as per Clause 5.3.3, the respondent had the obligation to obtain, maintain, and comply with all applicable laws and permits. The minority Award held that the decision to exit from 13 circles was a commercial decision. It is important to note that if an arbitrator goes beyond the contract and addresses matters not within their jurisdiction, it constitutes an error of jurisdiction.

30. It is submitted that the petitioner further submitted that, as per Clause 18.2 of the MSA, the Sharing Operator is liable to pay the Exit Amount where the termination of the Service Contract is voluntary. As has already been stated hereinbefore, the termination was voluntary for two reasons: *first*, the 'Change of Law' argument taken by the respondent is not sustainable as the respondent was admittedly availing services under the same MSA till the year 2017, and *second*, the reliance on the *Force Majeure* clause was abandoned by the respondent.

31. It is submitted that the respondent's liability to pay exit charges directly flows from voluntary termination as envisaged in Clause 18.2 of

MSA. The same had nothing to do with proving the damages suffered, as has been argued by the respondent.

32. It is submitted that since there was no *Force Majeure* event and the respondent was taking advantage of the Agreement even after the purported 'Change of Law', it cannot be said that the termination was involuntary. Thus, the afore mentioned Exit Amount is payable. The case of respondent is clearly covered under Clause 18.2 as admittedly, on the basis of respondent's own documents on record and vital evidence, termination of the Agreement was a purely voluntary act. The majority Award is, thus, hit by patent illegality as it ignored the vital evidence and material on record and has rewritten Clause 18.2 of MSA as per its own convenience.

33. It is submitted that in view of the foregoing submissions, the instant petition may be allowed and the reliefs as prayed for may be granted.

(On behalf of the respondent)

34. *Per Contra* Mr. Akhil Sibal, the learned senior counsel appearing on behalf of the respondent vehemently opposed the instant petition and submitted that the same is liable to be dismissed being devoid of any merits.

35. It is submitted that the reliefs sought by the petitioner are misconceived, insofar as the petitioner seeks that the majority Award be substituted by the dissenting Award. By seeking substitution of the majority Award with the dissenting Award, in essence the petitioner is seeking modification of the Arbitral Award, which, as per the settled law, is not permissible under Section 34 of the Act, 1996.

36. It is submitted that under the scheme of the Act, 1996 and more particularly under Section 34, if this Court were to allow the present petition, the disputes between the parties would have to be referred to arbitration afresh and it cannot upheld the minority Award. The petitioner, however, seeks that the majority Award be set aside, and the so-called dissenting Award be substituted in its place. Clearly, this would amount to modification of the Arbitral Award.

37. It is submitted that the petitioner's reliance on the decision in ***Ssangyong Engineering (Supra)*** is patently erroneous and highly misplaced because in the said decision, the Hon'ble Supreme Court while setting aside the majority Award and upholding the minority Award, exercised its powers under Article 142 of the Constitution of India and not under Section 34 of the Act, 1996. Thus, from the decision in ***Ssangyong Engineering (Supra)*** itself, it is clear that this Court under Section 34 of the Act, 1996, cannot modify the majority Award by substituting it with the dissenting Award, and the decision in the afore cited judgment is clearly distinguishable from the facts of the present case.

38. It is submitted that in a recent judgment **dated 24th August 2023**, passed by the Hon'ble Supreme Court in the case of ***Hindustan Construction Co. Ltd. v. National Highways Authority of India,*** **2023 SCC OnLine SC 1063**, it has been has held that the dissenting opinion of an Arbitrator cannot be treated as an award if the majority Award is set aside. The learned senior counsel appearing on behalf of the respondent placed

further reliance on ***Project Director, NHAI Vs. M. Hakeem***, **(2021) 9 SCC 1**.

39. It is submitted that the Act, 1996, does not contemplate majority Award or minority Award. Under Section 29 of the Act, the Award is the decision made by the majority of the members of the Tribunal. The Arbitral Award in this case has been passed by a majority of the members of the Arbitral Tribunal. The dissenting view authored by one of the learned Arbitrators is not an Arbitral Award under Section 29 of the Act. Furthermore, Section 30 (2) of the Act, 1996, provides that signatures of the majority of all members of the tribunal on the Award shall be sufficient. Therefore, the Act, 1996, only contemplates one Arbitral Award, and there is no concept of a minority Award. The minority Award, at best, is merely a dissenting opinion and the same cannot be termed or accepted as an Arbitral Award.

40. It is submitted that the petitioner has not demonstrated any perversity or patent illegality in the impugned majority Award. The petitioner's primary contention revolves around their belief that the minority opinion's interpretation of the facts and contractual clauses in the MSA is correct, as opposed to the view taken by the Majority. However, this, in itself, does not provide sufficient grounds for challenging the majority Award. Reinterpreting contractual clauses or re-evaluating evidence is not within the purview of Section 34 of the Act, 1996. Unless the majority Award is afflicted by patent illegality or perversity, mere challenges on the merits of

the Award are not permissible. The petitioner has failed to identify any such perversity or patent illegality in the impugned majority Arbitral Award.

41. It is submitted that the impugned Arbitral Award hinges on interpreting the MSA's clauses to determine whether the respondent's termination of service contracts was voluntary or involuntary. The leaned Arbitral Tribunal found it to be involuntary due to the quashing of licenses by the Hon'ble Supreme Court, which it deemed a 'Change of Law' under the MSA, thereby, exempting the respondent from Exit Amount payment as per Clause 15.3. The petitioner's challenge on the merits of this interpretation is not permissible under Section 34 of the Act, 1996. The learned Arbitral Tribunal has further disagreed with the petitioner's interpretation of Clause 5.3.3 of the MSA and categorically held that the MSA does not cast any obligation on the respondent to 're-obtain' quashed licenses.

42. It is submitted that the 2G Judgment was a supervening event beyond the control of the respondent. The termination of the Service Contracts under the MSA by the respondent was on account of the quashing of the licenses by the Hon'ble Supreme Court and was therefore, involuntary. The 2G Judgment being an order of the court amounts to "Law" as defined under the MSA and the consequent quashing of licenses, thus, amounted to a Change of Law as envisaged under Part 2 of Schedule 5 of the MSA which permits termination of Service Contracts without levy of 'Exit Amounts'.

43. It is submitted that pre-mature termination of Service Contracts attracts levy of Exit Amounts only if the termination is voluntary; or on

account of insolvency; or on account of material default. Termination of Service Contracts on account of quashing of the licenses occasioned by the 2G Judgment was not voluntary.

44. It is submitted that there was no material default by the respondent as Clause 5.3.3 of MSA does not cast any obligation upon the respondent to re-obtain quashed licenses. The petitioner failed to prove any loss on account of the premature termination of the Service Contracts by the respondent.

45. It is further submitted that the petitioner failed to prove actual loss that it may have suffered on account of premature termination of the Service Contracts by the respondent. Hence, in terms of Section 73 and 74 of the Indian Contract Act, 1872, the petitioner is not entitled to the Exit Amounts, which are in the nature of liquidated damages or penalties.

46. It is submitted that the word 'obtain' used in Clause 5.3.3 simply means that the respondent was obligated to keep the already obtained licenses alive and the word 're-obtain' cannot be read into Clause 5.3.3 to say that the respondent had an obligation to obtain quashed licenses.

47. It is submitted that while the MSA provides for termination of the MSA as a whole on account of Change of Law under Clause 11.2.3, it also provides for termination of the Service Contracts on account of Change of Law under Part 2 of Schedule 5. The respondent terminated Service Contracts under the MSA in 6 circles and not the MSA. As aforesaid, the respondent was taking the petitioner's services in certain circles, including Rajasthan. The Rajasthan license was obtained in the year 2003, under a previous regime and was never quashed. Thus, continuance of services in

Rajasthan has no relevance as the MSA being an umbrella agreement, the Service Contracts in Rajasthan Circle were capable of being performed.

48. In view of the submissions made above, it is submitted that the instant petition is devoid of any merit and the same be dismissed.

ANALYSIS AND FINDINGS

49. The matter was heard at length with arguments advanced by the learned counsels on both sides. This Court has duly considered the factual scenario of the matter, judicial pronouncements relied on by the parties and pleadings presented by the learned counsel of the parties.

50. Before embarking on the technical paraphernalia of the case, it is pertinent to understand the context and legislative intent behind the passing of the Act, 1996. The petitioner before this Court has invoked Section 34 of the Act, 1996, to challenge the impugned Award. The relevant portion of the said provision is reproduced hereunder for perusal and consideration:

> "***Section 34 – Application for setting aside arbitral awards---***
> *(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 [1][establishes on the basis of the record of the arbitral tribunal 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.[1]*[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][(2A) 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.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) [3]An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.].."

51. The Arbitration and Conciliation Act, 1996, has been enacted to consolidate and amend the law relating to domestic arbitration as well as international commercial arbitration in India after taking into account the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985.

52. The law regarding patent illegality, public policy, and fundamental policy of India is no longer res integra. The Act, 1996 has been well interpreted with regard to Section 34 through various judicial precedents. The scope of Section 34 being very limited in nature, has been thoroughly explored by the Indian legal system.

53. 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. The Act, 1996 has been set forth with the intention to limit the interference of the Courts in the arbitral proceedings.

54. The Arbitral Tribunal, who in its wisdom, passes an Award, upon conducting the arbitration proceedings with the participation of parties to the dispute, considering the Statement of Claim and Statement of Defence presented by and on behalf of the parties, the relevant documents placed on record by the parties, is considered as Court for the purposes of adjudicating

the dispute before it. An unfettered scope of intervention in its functioning would defeat the spirit and purpose of the Act, 1996. Therefore, the Hon'ble Supreme Court has time and again reiterated that the scope of intervention of the Courts is limited in the cases of challenge under Section 34.

55. The Hon'ble Supreme Court in ***Delhi Airport Metro Express (P) Ltd. v. DMRC,*** **(2022) 1 SCC 131**, has observed as under:

> "*28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.*
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> *x x x*
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> *30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by*

the 2015 Amendment Act, clarified the expression "public policy of India" and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

31. In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held that the meaning of the expression "fundamental policy of Indian law" would be in accordance with the understanding of this Court in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the "national economic interest", and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of "patent illegality" as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would

not be enforced given the prevailing mores of the day. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]"

56. The above-mentioned judgment by the Hon'ble Supreme Court states that the concepts which are to be followed under Section 34 of the Act, 1996 is crystal clear. When a court applies the 'public policy' test to an arbitration award, the court does not function as a court of appeal, and as a result, any mistakes of fact that may have been made, cannot be rectified. This is something that must be recognized very well. Since, the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when delivering his arbitral award, each possible view that the arbitrator may have on the facts needs to pass his approval in order for it to be considered. Therefore, an award that is based on scanty evidence or on evidence that a trained legal mind deems to be of insufficient quality would not be deemed to be invalid on the basis of this criterion. After it has been established that the arbitrator's method is neither arbitrary nor capricious, then it can be said that he has the final word on the facts. There is also no dispute on the position of law that an Arbitrator being creature of a Contract, has to confine himself to the provisions of the Contract while deciding the dispute.

57. Under Section 34 of the Act, 1996, it is a well-settled position that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground as provided under Section 34(2)(b)(ii) of the Act, 1996, 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 in the 1996 Act in 2015, a violation of India 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 existence of patent illegality in the arbitral award. The concept of the fundamental policy of Indian Law would cover the compliance with the statutes under judicial precedents adopting a judicial approach, compliance with the principles of nature justice, and reasonableness.

58. It is only if one of the conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii) of the Act, 1996, but the said interference does not entail a review of the merits of the dispute as it is limited to the situations where the findings of the arbitration are arbitrary, capricious, or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with, if the view taken by the learned arbitrator is a possible view based on the facts.

59. Hence, there is a limitation on the powers of this Court while examining its jurisdiction under Section 34 of the Act, 1996, however, at the same time, if the interpretation put forward by the Arbitral Tribunal, on the face of it is incorrect and rendering a Clause in the Agreement to be redundant, such interpretation cannot be sustained.

60. This Court relied on the case of ***Reliance Infrastructire Ltd. v. State of Goa***, **2023 SCC OnLine SC 604**, wherein, the Hon'ble Supreme Court held as under:

"*47. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act of 1996.*

48. In MMTC Limited (supra), this Court took note of various decisions including that in the case of Associate Builders (supra) and exposited on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, inter alia, held as under:—

> *"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 v. Wednesbury Corpn., [1948] 1 K.B. 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.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]).

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the

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

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

49. In the case of Ssangyong Engineering (supra), this Court has set out the scope of challenge under Section 34 of the Act of 1996 in further details in the following words:—

"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."

50. The limited scope of challenge under Section 34 of the Act was once again highlighted by this Court in the case of PSA SICAL Terminals (supra) and this Court particularly explained the relevant tests as under:—

"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. 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". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the

ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, 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.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in Associate Builders (supra), which read thus:

> *"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
>
> *(i) a finding is based on no evidence, or(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

> *32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officercum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)*
>
> *"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."....*"

61. It is settled law that the ground under Section 34 of the Act, 1996, gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of Section 34 if the Award is simply against them. Section 34 of the Act, 1996, requires a distinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal.

62. Keeping the principles observed in the foregoing paragraphs, this Court will now examine the present case.

63. At this juncture, it is pertinent to peruse the impugned majority Award. The relevant extracts of the same have been reproduced as under:

> <u>Impugned Majority Award –</u>
>
> "*....32. On the pleadings between the parties the following Issues/Points for Determination were framed:*

1. Whether the Claimant is entitled to an amount of Rs. 87,91,70,268.00/-; (Rupees Eighty Seven Crores, Ninety One Lakhs, Seventy Thousand, Two Hundred and Sixty Eight Only) towards Exit Amounts under Schedule 5 to the Master Services Agreement dated 01.04.2008?

2. Whether the Claimant is entitled to an amount of Rs. 39,16,85,872.00/- ,(Rupees Thirty Nine Crores, Sixteen lakhs, Eighty Five Thousand, Eight Hundred and Seventy.· Two Only) towards Interest upto 22.03.2016 on the Exit Amounts claimed under Schedule 5 to the Master Services Agreement dated 01.04.2008?

3. Whether the Claimant is entitled to pendente lite Interest with effect from 22.03.2016 and future interest on the aforesaid amounts?

4. Which of the parties is entitled to, claim for cost and expenses including legal fees, and cost of Arbitration Proceedings. If so, what would be reasonable costs and expenses to be awarded?

5. Whether the Service of Contracts executed. under the Master Services Agreement dated 01.04.2008 stood frustrated as a consequence of the' quashing of Unified Access Service Licenses by the Hon'ble Supreme Court of India vide Judgment and Order dated 02.022.2012 passed in Writ Petition (Civil) No. 423 of 2010 and Writ petition (Civil) no. 10 of 2011?

6. Whether the Judgment and Order dated 02.02.2012 ipassed by
the Hon'ble Supreme Court of India in Writ Petition (dvil) No. 423
of 2010 and Writ Petition (Civil) No. 10 .of 2011 cc:lnstitutes a
change of law under Clause 2to Schedule 5 of the Master Services
Agreement dated 01.04.2008?

7. Whether the Respondent is entitled to an amount of Rs. 1,33,24,177.00/- (Rupees One Crore, Thirty· Three Lakhs, Twenty Four Thousand, One· Hundred and Seventy Seven Only) towards refund of Security Deposit deposited by the Respondent with the Claimant in terms of Clause 12.6 of Schedule 3 to the Master Service Agreement dated 01.04.2008?

8. Whether the Respondent is entitled to an amount of Rs. 62,83,901.00/- (Rupees Sixty Two Lakhs, Eighty Three Thousand, Nine Hundred and One Only) towards Interest on the amount claimed towards refund of Security Deposit above With effect from 21.02.2013 till the date of the filing the Counter Claim (pre suit) i.e. 30.06.2016?

9. Whether the Respondent is entitled to pendente lite and future. interest on the aforesaid amounts?

10. Whether the Respondent is entitled to unhindered and unrestricted access to the Claimant's sites as mentioned in Schedule A to the Counter Clause aim in order to enable the Respondent to remove all its active infrastructure installed at the said sites?

ll. What Order as to Costs

12.And Generally.

x x x

170. We have heard the parties, There can be no dispute with the principle that a party cannot be a11owed to aprobate and reprobate but the question is whether this principle, applies to this case at all. As held by the Supreme Court the case, of Nabha Power Ltd. (Supra); even in commercial contracts "the explicit terms of the contract are always the final word with regard to intention of the parties". Thus, one has to look at 1:he terms of the MsA to decide who is right. Before we look into the terms of the MSA, it becomes necessary to see the case of the Claimant In the Statement of Ciaim, in the evidence and in submissions.

171. In the Statement of Claim, a case is made out that the business of Passive Infrastructure Provider is capital intensive. it is claimed that the Claimant currently incurs costs ranging from Rs. 18,00,000 to Rs. 32,00,000 for setting up a tower. It is claimed that additionally large sums are involved towards operation and maintenance of towers. in the Statement of Claim, it is claimed that 'Exit Amounts' are provided to protect investment made by Claimant. The expenses involved for setting up towers and: maintaining the towers can easily be proved. No proof or evidence is adduced in support of these averments. The Respondent, in its Statement of Defence avers that the Claimant had, not_ set up any towers because the towers had already been set up by Airtel when Claimant Company was formed. Thus in the evidence, the case changes to Claimant having incurred monies to upgrading' and enhancing- the towers to accommodate the Respondent '(Paragraphs 20 & 42 or Affidavit- of Evidence CW1). It is also pleaded in paragraph 43 that with the addition of each Shari Operator the rentals increase. These averments were missing in the Statement of Claim. It would have been simple to show and prove what upgradation and enhancement was made by the Claimant to accommodate the Respondent. CW1 stated in answer to Q.66 during cross examination that detail were voluminous but could be produced. In answer to Q68 CW1 stated that he had seen Purchase Orders Issued to various vendors and other financial data. Witness was called upon to produce the records which he mentioned.CW1 failed to produce any Purchase Order or financial record. Instead CW1 submitted a tabular chart which does not show or prove any upgradation or enhancement of any site. Thus, the case of enhancement/upgradation could have been proved, was attempted to be proved but not proved. Claimant thus gave up, in evidence, its case of "capital intensive industry', set up, in evidence, a case of 'enhancement/upgradation' which it tried to prove but failed to

prove and therefore in the rejoinder submissions it is now submitted that the 'Exit Amount' is genuine pre-estimate of loss. It is so argued even though the heading of the Clause 18.2 reads 'Liquidated Damages'.

x x x

174. .... Thus, Clause 11.2 provides for Termination of MSA and Schedule 5 provides for termination of Service Contracts. One of the grounds of termination is the Sharing Operator being in 'material default' of obligations under the Service Contract. In the letter dated 8th March 2013 (Exhibit C-10) Claimant had alleged 'material default of obligations. However, during submissions it is clarified that the material breach is not paying the 'Exit Amounts'. Thus, now the only ground on which 'Exit Amounts' are claimed is that Respondent has voluntarily terminated the Service Contracts. It is claimed that Respondent has voluntarily terminated as Respondent did not bid for Spectrum in all the circles in which their Licences were terminated. At this stage, it is to be noticed that under Clause 18.2, as well as paragraph 2 of Schedule 5 the provision is "voluntarily terminated" and not "failed to renew licences.

175. Admittedly, the Claimant is a Passive Infrastructure Provider registered with Department of Telecommunications (DOT). Claimant is registered IP-I Category Infrastructure provider and as per the guidelines of DOT has to provide its services on a non-discriminatory basis to all Licensed Telecom Operators. Claimant cannot offer its services to unlicensed operators. Thus, it only enters into a Master Service Agreement (MSA) with Licensed Operators. The MSA is entered into by Claimant with all Operators to whom it provides the Passive Infrastructure. In other words, MSA is not entered into by Claimant only with Respondent. As submitted by Mr. Jain MSA is an Agreement unique to the Industry. It is based on legal advice MSA is an Agre and drafted after careful deliberation. It

cannot be claimed that when MSA was drafted the possibility of an Operator exiting or terminating the contract was not contemplated. Clause 18.2 and paragraph 2 of Schedule 5 show that such a possibility/contingency was envisaged. It must also be remembered that a Company providing Passive Infrastructure cannot compel Operators to continue to operate telecom services or dictate in which sectors or what kind of services are to be rendered by them. How to run their businesses is the sole decision of the operator. Thus, Mr. Jains' submission that premature exit is a right. Of course, Mr. Jain qualifies it by saying that it is a right only on paying 'Exit Charges'. But we have to look at the contract to see when Exit Charges' are payable and when not. As set out above Clause 11.2 provides that either party may terminate the MSA at any time on i) expiry or termination of all applicable Service Contracts ii) occurrence of insolvency event iii) Change of Law. Clause 18,2 also provides that the Operator will only pay 'Exit Charges' upon termination of Service Contracts if i) Operator has voluntarily terminated ii) Such termination is on account of an Insolvency Event in respect of the Operator ii) Such termination is on the account of material default by Operator of its obligations under the Service Contract. To be noticed that in the contract, which is based on legal advice and drafted after careful deliberation there is no obligation provided to renew or reobtain the License if lost/cancelled due to no fault of the. telecom Operator. An Operator may lose his License for many reasons like voluntarily giving it up, by reason of insolvency of the Operator, by cancellation of License for committing a breach of some license term or condition. These contingencies are anticipated and provided for. In such cases the Operator has to pay (Exit Charges'. By providing for 'voluntary termination' it is also anticipated that there may be an 'involuntary termination'. Significantly... there is no provision that in cases of 'involuntary termination' of License the Operator is bound to 'reobtain or renew his License.

176. Even though there is no provision in either Clauses 11.2 or 18.2 that a License involuntarily lost must be reobtained or renewed Mr. Jain submits that such an obligation is contained in Clause 5.3.3 by the use of the words "Obtain and Maintain". Thus, Clause 5.3.3 must now be construed. It has been set out above but for the sake of convenience it is repeated here. It reads:

> *5.3.3 obtain, maintain and comply with all applicable Laws and applicable Permits, including any Sharing Operator Licence, and, to the extent the same are applicable to infratel, shall not do or permit anything to be done which might cause or otherwise result in a breach by infratel of the same or of any Infratel Licence.*

However, to be noted that Clause 5.3.3 appears under the 'Heading' "Sharing Operator Warranties and Covenants". As set out above, it was submitted by Mr. Jain that at the time the MSA was signed by the parties herein the Respondent already had Licences. It was submitted that therefore, the word "Obtain" necessarily meant reobtain if lost or terminated. This argument overlooks the fact that the MSA is not drafted only for purposes of entering into an Agreement with the Respondent. The MSA is a general document in which the Passive Infrastructure Provider enters into with all Licensed Operators who want to use Claimants' Infrastructure. Thus, Clause 5.3.3 cannot be read in isolation, It has to be read with other sub-Clauses of Clause 5 particularly 5.3.2 which reads:

> *"5.3.2 not commence use of the Sharing Operator Equipment at any Site until:*
>
> *(i) it has secured any and all Sharing Operator Licences and any Permit that the Sharing Operator requires from any Government Authority or any consent, approval,*

licence, authorisation or permission that the Sharing operator requires from any third party for the Permitted Use; and"

Thus, even though Respondent had already obtained Licenses it is still provided that Respondent it shall not commence use of equipment at the site "until it has secured Licences". If Mr. Jains submissions that, as Respondent already had a Licence Clause 5.3.3 of the MSA does not call upon the Respondent to "Obtain a Licence" but requires them to re- obtain" the Licence if lost or terminated, were to be accepted, then there is no explanation as to why under Clause 5.3.2 it should be provided that Respondent cannot use their equipment unless they first procure a Licence. Mr. Jain had no explanation for this. In any case Clause 5.3.3 Is nothing else but a warranty and covenant by the Respondent. Clause 5.3.3 is in the nature of nature of a warranty by the Respondent to comply with all applicable laws, including maintaining permits/Licences to the extent that it does not cause or result in any breach of any law by the Claimant. Clause 5.3.3 has to be seen In light of the terms of the Claimant's IP-1 Registration Certificate. When so done it becomes clear that the warranty contained therein is for the limited purpose of safeguarding the Claimant against cancellation of its registration certificate and not in terms of an obligation to re-obtain/maintain cancelled licenses. There is another difficulty in accepting Mr. Jain's submissions. If interpreted in the manner suggested by Mr. Jain then Clause 5.3.3 would be in conflict with Clause 11.2, 18.2 and paragraph 2 of Schedule 5. Under Clause 11.2 either party can terminate the MSA 1) on expiry or termination of all Service Contracts 2) Insolvency and Change of Law. As set out above the term "Law" has been defined to mean any statute law, ordinance, rule, regulation, administrativé interpretation, approval, press note, order, writ, injunction, directive, judgment or decree issued by the government of any nation or any of its ministries,

departments, secretariats, agencies or any legislative body, court or tribunal. Thus, if pursuant to an Order/Judgment of Court (in this Supreme Court), the policy of allotment of Spectrum/ Licence changes it would be a 'Change of Law'. As set out above Clause 18.2 provides that Exit Amounts are only payable upon termination of a Service Contract if 1) the Sharing Operator has validly terminated 2) Insolvency 3) Sharing Operator is in default of its obligations under the Service Contract. Paragraph 2 of Schedule 5 also provides for termination of a Service Contract on 1) failure to remedy material default within 30 days 2) Change of Law 3) A Force Majeure Event. Thus, In the provisionsTM pertaining to early termination there is no provision for re-obtaining of a lost Licence. If Clause 5.3.3 was imposing an absolute obligation to re- obtain a terminated Licence then in the provisions (of MSA) specifically dealing with termination there had to be a provision that there can be on termination if the Licence can be re-obtained. Conversely Clauses 11.2, 18.2 and paragraph 2 of Schedule 5 had had to be subject to provisions of Clause 5.3.3. Significantly they are not.

177. As seen and as could not be denied the termination of Respondents' Licences was because they were cancelled by the Supreme Court. In our view, on such cancellation a Force Majeure event occurred. The Respondent did all that could have been possibly done by them. They engaged Senior Counsel to oppose the Writ Petitions, they filed a Review Petition and also a Curative Petition. In spite of their best endeavour, the Supreme Court still cancelled their Licences. In our view, this was an Force. Majeure event. That Respondent could not have prevented the quashing of Licences by the Supreme Court, is not seriously disputed. It is however, claimed that Respondent had an obligation to maintain its Licences and therefore, it ought to have participated in the Auctions held by the Government and re-obtained its Licenses. In our view, the word

"maintain" would imply an obligation to keep the Licences alive. But if due to unforeseen circumstances the Licenses are quashed/terminated, there is no obligation to re-obtain the Licences.

178. We are supported in our view by the Judgment of TDSAT in the case of Unitech Wireless (Supra). As pointed out above an Appeal against this Judgment has been dismissed by the Supreme Court. As mentioned above, the Delhi High Court has also, in the Petition filed by Claimant, prima-facie held that an obligation to maintain Licences cannot continue after the Licence has terminated due to unforeseeable circumstances beyond the control of Respondent.

179. For the above reasons, we are unable to accept submissions of Mr. Jain that Respondent was obligated to re-obtain the quashed Licences. It is thus, held that the quashing of Licences was an unforeseeable event beyond the control of the Respondent and that it is a Force Majeure event and thus, the termination was valid. It is held that the Respondent is not liable to pay any 'Exit Amount'.

180. That brings us to the Counter-claim. Respondent have filed the Counter- claim praying that the amounts deposited as Security Deposit be returned to them with interest. The only reason Claimant was not returning the Security Deposit was that Respondent owed them large amounts by way of 'Exit Charges'. As it is held that Claimant is not entitled to the 'Exit Amount', the Claimant is bound and liable to return the Security Deposit. The Claimant is directed to return the Security Deposit. There is therefore, an Award directing the Claimant to return the Security Deposit forthwith. As the Claimant has retained the Security Deposit without any justification they must pay interest at 18% p.a. pre suit and pendente lite as well as post Award.

181. Vide an Order dated 08.07.2016 in OMP No. 472 of 2014 and OMP No. (I) (COMM) 34 of 2016 Respondent had given the security of shares of Reliance Communication Ltd. held by it to the extent of Rs.16 Crores. In terms of the aforesaid Order, the shares could be disposed of only with the permission of Arbitral Tribunal. By an Application, during the Arbitral Proceedings dated 16.05.2018, Respondent sought permission to dispose off the aforesaid shares and in lieu thereof, furnish an FDR in the amount. of Rs. 16 Crores as security. Vide Order dated 22.05.2018, the Tribunal allowed the Respondent to dispose off the sald share subject to it tendering an FDR of the amount of Rs. 16 crores. Respondent in compliance thereof, tendered an FDR dated 21.05.2018 bearing no. 4412669948 in the sum of Rs: 16 crores issued by Kotak Mahindra Bank. In view of the Award in respect of Claimant's claim for exit charges and interest, the FDR is returned to the Respondent together with accrued interest.

Interim Orders, if any, will now come to an end.

182. For facility of reference, the Issues are reproduced below and answered.

1. Whether the Claimant is entitled to an amount of Rs. 87,91,70,268.00/- (Rupees Eighty Seven Crores, Ninety One Lakhs, Seventy Thousand, Two Hundred and Sixty Eight Only) towards Exit Amounts under Schedule 5 to the Master Services. Agreement dated 01.04.2008?

2. Whether the Claimant is entitled to an amount of Rs. 39,16,85,872.00/ (Rupees Thirty Nine Crores, Sixteen Lakhs, Eighty Five Thousand, Eight Hundred and Seventy Two Only) towards interest upto 22.03.2016 on the Exit Amounts claimed under Schedule 5 to the Master Services Agreement dated 01.04.2008?

3. Whether the Claimant is entitled to pendente lite interest with effect from 22.03.2016 and future interest on the aforesaid amounts?

4. Which of the parties is entitled to, claim for cost and expenses including legal fees, and cost of Arbitration Proceedings. If so, what would be reasonable costs and expenses to be awarded?

5. Whether the Service of Contracts executed under the Master Services Agreement dated 01.04.2008 stood frustrated as a consequence of the quashing of Unified Access Service Licenses by the Hon'ble Supreme Court of India vide Judgment: and Order dated 02.02.2012 passed in Writ Petition (Civil) No. 423 of 2010 and Writ Petition (Civil) No. 10 of 2011?

6. Whether the Judgment and Order dated 02.02.2012 passed by the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 423. of 2010 and Writ Petition (Civil) No. 10 of 2011 constitutes a change of law under Clause 2 to Schedule 5 of the Master Services Agreement dated 01.04.2008?

7. Whether the Respondent is entitled to an amount of Rs. 1,33,24,177.00/- (Rupees One Crore, Thirty Three Lakhs, Twenty Four Thousand, One Hundred and Seventy Seven Only) towards refund of Security Deposit deposited by the Respondent with the Claimant in terms of Clause 12.6 of Schedule 3 to the Master Service Agreement dated 01.04.2008?

8. Whether the Respondent is entitled to an amount of Rs. 62,83,901.00/- (Rupees Sixty Two Lakhs, Eighty Three Thousand, Nine Hundred and One Only) towards interest on the amount claimed towards refund of Security Deposit

above with effect from 21.02.2013 till the date of the filing the Counter Claim (pre suit) i.e. 30.06.2016?

9. Whether the Respondent is entitled to pendente lite and future interest on the aforesaid amounts?

10. Whether the Respondent is entitled to unhindered and - unrestricted access to the Claimant's sites-as-mentioned In Schedule A to the Counter Clause aim in order to enable the Respondent to remove all its active infrastructure installed at the. said sites?

11.What Order as to Costs?

12.And Generally.

Issues 1,2 & 3	*In the Negative*
Issues 4 & 11	*No Order as to costs*
Issues 5 & 6	*In the Affirmative*
Issues 7,8,9 10	*In the Affirmative*

183. The Award is engrossed on a Stamp Paper of Rs. 100/-. The deficiency in the Stamp Duty to be made up by the Respondent within one month from the date of the Award…..

64. Upon perusal of the above quoted portion of the impugned majority Award, it is observed by this Court that the impugned majority Award passed by the learned Arbitral Tribunal dismissed the claim of the petitioner by observing the following:

a. There is no obligation on the respondent to renew or reobtain the license if lost/ cancelled due to no fault of its own.

b. MSA is a general document which the petitioner enters with all the licensed operators, including the respondent, who wants to use the petitioner's passive infrastructure.

c. Clause 5.3.3 of the MSA is in nature of a warranty by the respondent to comply with all the applicable laws, including maintaining permits/ licenses to the extent it does not cause or result in breach of any law by the Claimant, i.e., the petitioner herein.

d. In the provisions pertaining to early termination of MSA, there is no provision for re-obtaining of a lost or cancelled license.

e. Quashing of the licenses of the respondent was an unforeseeable event beyond the control of the respondent and that is a *force majeure* event, thus termination of the MSA by the respondent was valid.

f. The petitioner was directed to return the security deposit to the respondent with interest at 18% p.a. pre-suit, pendente lite and post Majority Award.

g. The Fixed Deposit Receipt of Rs. 16 crores which was tendered by the respondent was returned to the respondent together along with the accrued interest.

65. For the purpose of adjudication of the instant petition, the relevant extracts of the minority Award have been reproduced as under

Minority Award –

"*…The issue of Exit fee for early termination was hotly contested by the parties. Clause 18.2 read with para 1 of schedule 5 of the MSA and para 2.5.1 of Schedule 3 have been reproduced by Justice Variava in para 105 of his award hence I am not reproducing the same except where it is so required. Moreover facts which are necessary in arriving at the conclusion have been produced in brief…*

x *x* *x*

14. In any event it is settled law that a contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has becomes onerous on account of an unforeseen turn of events. It is so held by Hon'ble Supreme Court in the case of ***M/s Alopi Parshad & Sons Vs. Union of India (1960) 2 SCR 793.***

x *x* *x*

16. As far as clause 11.2.3 is concerned, it is stated that the change of law cannot be a reason for terminating the service order. Clause 11.2 deals with termination of MSA itself. Admittedly in the present case, the Respondent enjoyed services of the Claimant under this very MSA even after the quashing of licences and till as recently as July, 2017. Therefore Respondent cannot fall back in its support on clause 11.2. Reading of clause 11.2.3 makes it clear that the said provision are attracted where there is change of law which has not been stayed a Court and which necessarily rendered the existence or

performance of the MSA void or invalid. The 2G Judgment was kept in abeyance by the Apex Court for a period of almost one year thus it had not rendered the performance of the MSA void or invalid. The Respondent availed the services of the Claimant as stated above even after the 2G Judgment till July, 2017. Therefore change of Law is a bogus ground raised by the Respondent to get out of this contract voluntarily.

x x x

18. Exit Amounts are not in the nature of Liquidated damages. It belongs to a different Class, Liquidated damages are pre-determined damages stipulated in the contract, which a party agrees to pay in case of a breach of the contract. Liquidated damages will only be triggered in the event of a Breach and not otherwise. Exit Charges on the other hand do not dependent on breach. Hence it is different. These are crystallized amount 'agreed to' by the parties as a part of a commercial bargain at the time of entering into the contract to be paid by a party upon the happening of the event, other than breach i.e. in the instant case, pre- mature exit from the contract.

19. The obligation to pay the Exit charges in the event of early exit from sites is a condition so stipulated in the MSA. It is not a penalty. Exit amount was agreed upfront, to be paid in the event of pre-mature termination of a Service Contract. The Respondent is contractually bound to make the payment, having prematurely exited from the Site.

20.I have pursued Ex.C1/18 it is based on the formula provided in the MSA hence Claimant is entitled to receive Exit amount from Respondent as claimed vide Ex.C1/18 amounting to Rs.8,79,170,268/- beside interest @ 9% from the date of reference till payment. Claimant would also be entitled to the cost of this Arbitration. Order Accordingly……"

66. Upon perusal of the above quoted portion of the minority Award, it is observed by this Court that the minority Award on the other hand observed that the 2G judgment passed by the Hon'ble Supreme Court of India neither affects the respondent nor the said judgment changes the law. It only held that the spectrum should be obtained in auction in a transparent manner. The respondent could have obtained the same in auction, but it was its voluntary decision for not doing so. So far as the spectrum is concerned, the respondent took commercial decision to bid only for the 8 circles instead of all the 11 circles. It was also observed in the dissenting Award that since the respondent was conducting business under the very same MSA till the year 2013 and even continued the same till July, 2017, and the same shows that the MSA was not frustrated and hence Exit amounts are payable to the petitioner for the premature termination.

67. Now adverting to the facts of the matter in hand.

68. In the present petition, the petitioner has alleged that the respondent on the pretext of the 2G judgment showed its inability to continue the MSA and served a termination notice to the petitioner in particular circle areas. However, it confirmed that it will participate in the auctions for the spectrum allocation. The respondent, however, owing to its commercial decision voluntarily did not participate in auctions for all the 21 circles and participated only for auction in the 8 circles. The respondent took a stand that due to passing of 2G judgment, a *Force Majeure* event has occurred which has rendered the performance of MSA impossible. The petitioner pertinently submitted that in terms of Clause 11.2.3, either -party can

terminate the Contract for the reason of Change of law provided such occurrence is not stayed by the competent authority within 30 days. The 2G judgment passed by the Hon'ble Supreme Court was kept in abeyance for around 1 year and admittedly even the respondent continued availing the services under the MSA till July, 2017 which invalidates the stand taken by the respondent regarding impossibility to perform the Contract.

69. It has been submitted on behalf of the petitioner that while the petitioner has to incur considerable expenses towards the maintenance and upkeep on the various sites, the respondent has no such concerns and is unfettered with capital expenses and considerable outlay. Therefore, in order to protect the petitioner, the MSA provides for the payment of Exit Amount to the petitioner by the respondent, if the Site/Service Contract is terminated prior to its agreed term. The levy of Exit Amount is a standard industry practice whose basis and rationale is to compensate the petitioner for expenditure already incurred on account of the respondent's agreed usage of the Site. In addition to the above, the petitioner also stated that the 2G Judgment passed by the Hon'ble Supreme Court did not constitute a Force Majeure Event nor made the MSA impossible to perform.

70. The petitioner also submits that the respondent's decision to continue operations in some circles and to exit from others clearly brings out that the cancellation of licenses by the Hon'ble Supreme Court is made as a pretext by the respondent to exit from the concerned circles under the MSA, for reasons best known to the respondent alone. The petitioner further contends, in arguendo, that in the event of occurrence of a *Force Majeure* event, the

Sharing Operator (i.e., the respondent herein) was liable to use all the reasonable endeavours to mitigate the consequence of the *Force Majeure* event. However, the respondent did not take adequate steps to maintain their licences. In fact, the respondent chose not to bid in the auctions that took place in November, 2012 and March, 2013 for the telecom circles covered under the MSA. Therefore, the respondent is liable to pay the Exit Amount by being in material default of its obligations under the MSA. By virtue of the above contentions, the petitioner has prayed that the observations made by the learned Arbitrator while passing the minority Award is in accordance with the law, and accordingly, the same ought to be upheld since the learned Arbitral Tribunal whilst passing the impugned majority Award has failed to appreciate the facts and law as per the settled legal propositions, therefore, the same is patently illegal and hence, is liable to be set aside.

71. In rival submissions, it has been submitted on behalf of the respondent that because of the quashing of the licenses, the respondent was constrained to terminate services in 21 service areas/ telecom circles which were affected due to the passing of the 2G Judgment. In the subsequent auction conducted by the DoT in March 2013, the respondent participated in bidding for spectrum in 8 telecom circles and emerged successful. It has been submitted that, having exited completely from the other 13 service areas, the respondent terminated the service contracts with the petitioner owing to the cancellation of licenses by the Hon'ble Supreme Court. The respondent claims that the quashing of the licenses by the Hon'ble Supreme Court was an unforeseeable supervening event which was beyond its control and it

constituted a ‘Change of Law’ under the MSA which allowed it to terminate the service agreements without any further liability.

72. The petitioner contended that the termination by the respondent was voluntary as it selectively chose to participate in only 8 telecom circles in the fresh auction conducted by the DoT, whereas it could have re-obtained licenses in all the affected circles and continued operations. According to the petitioner, the respondent's termination was voluntary as it was a commercial decision and as per the terms of the contract, any pre-mature termination (before the minimum fixed term often years) had to be accompanied by a levy of Exit Charges.

73. The aforesaid contention of the petitioner has been vehemently opposed by the respondent submitting to the effect that on a plain reading of Clause 2 of Schedule 5 as a whole, which consists of two parts - it is manifestly clear that in the event that a Service Contract is terminated by the respondent on grounds mentioned in the first part of Clause 2 of Schedule 5, no Exit Amount is payable by the respondent. It is only in the event that termination of the Service Contract is on the basis of one of the grounds mentioned in the second part of Clause 2 of Schedule 5 that the respondent is liable to pay the Exit Amount. Thus, it is clear that the liability to pay Exit Amount in the event of a termination of a service contract prior to its minimum fixed term is not absolute. Rather, the liability to pay Exit Amounts arises in very exclusive scenarios as mentioned in the second part of Clause 2 of Schedule 5. It has been submitted that ‘Involuntary Termination’ (entailing no Exit Amount) has been described and dealt with

in the first part of Clause 2 of Schedule 5 while 'Voluntary Termination' (entailing payment of Exit Amount) has been described and dealt with in the second part of Clause 2 of Schedule 5. Involuntary Termination by the respondent would include termination on the ground of material default by the petitioner, Change of Law or *Force Majeure* and in such cases Exit Amount is not payable. Finally, it is contended that the petitioner by way of the present petition is seeking modification of the Arbitral Award by praying for upholding of minority Award and the same amounts to modification of Award which is not permissible under Section 34 of the Act, 1996. Further, the petitioner has not been able to show any ingredients required for in petition filed under Section 34 of the Act, 1996, hence, in the absence of any patent illegality, the present petition is liable to be dismissed.

74. In light of the foregoing submissions advanced by the parties, this Court is of the view that for deciding the issues with regard to the technicalities of the instant petition, this Court will first have to decide whether the 2G Judgment passed by the Hon'ble Supreme Court due to which the licenses of the respondent were cancelled would amount to 'Change in Law', i.e., a *Force Majeure* event which led to the frustration of the Contract among the parties. In the event the same is decided in negative, only then it will be appropriate for this Court decide the other issues. The second issue which this Court needs to decide is whether in a petition under Section 34 of the Act, 1996, the Court can set aside the majority Award and uphold the minority Award?

75. While dealing with the first issue, this Court is of the view that 'frustration' is a helplessness arising from impossibility. The Doctrine of Frustration discharges the concerned party from its obligation to perform a contract when the same is hit by an event that makes its performance impossible. One such event that would make a contract impossible to perform is an event of *Force Majeure*.

76. The expression '*force majeure*' ordinarily means a drastic or a fundamental change to the substance of the contract that is brought about by an event that was neither anticipated by the parties nor under their control, resulting in non-performance of their contractual obligations.

77. The Hon'ble Supreme Court in the matter of ***Energy Watchdog v. CERC*, (2017) 14 SCC 80**, while determining the terminology of a *force majeure* event held that the same would define itself as an event or a particular circumstance or a combination of such events and circumstances which ultimately renders or makes it impossible for either of the parties to perform their obligations towards the contract executed among them. The pertinent instance necessary for determination of a *force majeure* event is that the said unforeseen event could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices.

78. In light of the instant petition, the MSA recognises the rights and obligations of the parties during a *Force Majeure* event. The MSA contemplates that no party would be liable for failure to comply with the terms of the MSA to the extent caused by any *Force Majeure* event, provided the procedure contemplated under Clause 16 of the MSA is duly

followed. It is pertinent to mention that even on occurrence of a *Force Majeure* event, it is necessary for the parties to use all reasonable endeavours to mitigate the consequences of the *Force Majeure* event and the relief under this clause continues only till the operation of the *Force Majeure* event. Further, that the exemption from performance of obligations under the MSA would prevail only during the subsistence of the *Force Majeure* event. The relevant clause is extracted as follows:

> "***Force Majeure (Clause 16)***
> ***16. 1. Force Majeure Events***
> *Neither party shall be liable to the other for failure to comply with a Service Contract to the extent caused by any Force Majeure Event, subject to the party being unable to comply with the Service Contract (the "**Affected Party**"):*
>
> ***16.1.1.*** *giving written notice to the other party (the "**Other party**") as soon as reasonably practicable on becoming aware of the Force Majeure Event, such notice to contain the following information:*
> *(i) details of the Force Majeure Event that has occurred;*
> *(ii) the date from which the event has prevented or hindered the Affected Party in the performance of its duties under the relevant Service Contract;*
> *(iii) the duties under the relevant Service Contract so affected; and*
> *(iv) its best estimate of the date upon which it will be able to*
> *resume performance of the affected duties under the service contract; and*

16.1.2. *continuing at all times to take such steps in accordance with Good Industry Practice to resume full performance of its obligations under the Service Contract;*

16.1.3. *providing at reasonable intervals updated information to the Other Party on the status of the Force Majeure Event and the steps taken to resume full performance of its obligations; and*

16.1.4. *using all reasonable endeavours to mitigate the consequences of the Force Majeure Event;*

and the relief from liability from under this clause 16 shall last for the duration of the event for the Force Majeure Event only…"

79. A bare perusal of the above clause states that as per the MSA executed among the parties, there are certain situations wherein the parties can terminate the MSA altogether, i.e., under Clause 11.2. Under the said clause, either party may terminate the MSA by written notice to the other party at time following – expiry or termination of all Service Contracts, insolvency event of either party, change of law or notification of any Government Authority which renders the existence or performance of the MSA void or invalid. The relevant portion of the aforesaid Clause is reproduced as under:

"***11.2 Termination by either Party***
Either Party may terminate the Agreement by written notice to the other Party at any time following:
11.2.1 *the expiry or termination of all applicable Service Contracts;*

> ***11.2.2*** *the occurrence of Insolvency Event in respect of the other Party; or*
> ***11.2.3*** *a change of law or notification of any Government Authority (which has not been stayed by a court of law or by a competent authority within 30 days of its occurrence) which necessarily renders the existence or performance of this Agreement void or invalid.*"

80. Clause 11.2 provides for termination of MSA and Schedule 5 (on record) provides for termination of Service Contracts. It is noted that one of the grounds of termination of the contract is if the respondent performs any material default. The learned Arbitral Tribunal while passing the impugned Award has duly noted that the only ground on which the Exit Amounts are claimed is that the respondent has voluntarily terminated the Service Contracts, therefore, it is pertinent to decide whether the 2G judgment would amount to change in law, thereby, making the same a *Force Majeure* event.

81. On 2nd December, 2012, the Hon'ble Supreme Court passed judgment in 2G judgment, wherein, it declared the licenses granted to the private operators on or after 10th January, 2008 and the subsequent allocation of spectrum to the licensees as illegal and quashed the same. The Hon'ble Court whilst quashing and cancelling the already allocated licences of spectrum held that the FCFS Policy is arbitrary and unconstitutional. As a result, the spectrum bundled with the quashed licenses was freed up and the Hon'ble Court directed the same to be auctioned. Due to the same, the respondent announced closure of business and exit from certain telecom circles. Accordingly, on 21st February, 2013 the respondent issued a communication to the petitioner, thereby, terminating the individual site

agreements in the exited circles on account of quashing of licenses by the Hon'ble Supreme Court. Further, on 8th March, 2013 the petitioner replied to the respondent's letter dated 21st February, 2013 and refuted the respondent's claim stating that the 2G judgment does not amount to change in law or a *Force Majeure event* and the petitioner sought to rely on Clause 5.3.3 to state that the MSA required the respondent to obtain/maintain its license after the quashing.

82. It will be prudent to note that by passing of the 2G judgment the Hon'ble Supreme Court had held that that the First Come First Serve policy was arbitrary and was intended to favour certain specific entities at a grave detriment to the public exchequer. As contended by the petitioner that the majority Award is based on the premise that the quashing of licenses by the 2G Judgement was a *Force Majeure event*, but this premise is in complete ignorance of the vital evidence on record, is unacceptable to this Court.

83. This Court further observes that in the Contracts signed and executed among the parties, only after deliberation, there is no obligation provided to renew or re-obtain the license if lost/cancelled due to no fault of the telecom Operator. It is noted that an Operator might lose his license for many reasons like voluntarily giving it up, by reason of insolvency of the Operator, by cancellation of license for committing a breach of some license term or condition. These contingencies are anticipated and provided for, and in only in such events, the Clause which provides for the respondent to obtain the licenses is valid and not otherwise. In such cases only, the Operator, i.e., the respondent herein, might have been liable to pay the Exit Charges.

Moreover, by providing for 'voluntary termination' it is also anticipated that there may be an 'involuntary termination'. Significantly, it is observed by this Court that the entire Contract nowhere provides for any provision that in cases of 'involuntary termination' of license the Operator is bound to 'reobtain or renew' his license.

84. Clause 11.2.3, which stipulates that a contract may be terminated if there is a change of law or notification of any Government Authority (which has not been stayed by a court of law or by a competent authority within 30 days of its occurrence) which necessarily renders the existence or performance of this Agreement void or invalid. It is imperative to consider that *prima facie* the respondent's license for which the services of the petitioner were being availed by the respondent, were quashed/cancelled since rendering of the 2G judgment. The same led to involuntary termination of the licenses of the respondent and as discussed above, the contract nowhere provides to apply or reobtain the licenses in the event the same was not due the fault of the respondent, hence the respondent was not liable to reobtain the said licences. Therefore, due to the supervening event which is 'change in law' by way of the 2G judgment which frustrated the FCFS Policy by virtue of which the respondent had initially obtained licenses, the contract among the parties stood infructuous since the respondent was under no obligation to re-obtain the licence in the fresh auction.

85. The 2G Judgment being an order of the Highest Court of the Land court amounts to *"Law"* as defined under the MSA and the consequent quashing of licenses, thus, amounted to a Change of Law as envisaged under

Part 2 of Schedule 5 of the MSA which permits termination of Service Contracts without levy of Exit Amounts. Moreover, premature termination of Service Contracts attracts levy of Exit Amounts only if the termination is voluntary; or on account of insolvency; or on account of material default. Termination of Service Contracts on account of quashing of the licenses occasioned by the 2G Judgment was not voluntary. There was no material default by the respondent as Clause 5.3.3 does not cast any obligation on the respondent to reobtain quashed licenses. Hence, this Court is of the view that the petitioner has utterly failed to bring out any patent illegality in the impugned majority Award.

86. By passing the 2G judgment, the Hon'ble Supreme Court scrapped the FCFS Policy which was the earlier usual procedure under the law for grant of spectrum/licenses and later on the Hon'ble Supreme Court passed directions that the spectrum/licences would only be granted after conducting fresh auctions, hence, it is apparent that the decision in the aforesaid judgment would amount to change in law and the same was rightly construed by the learned Tribunal in the impugned majority Award.

87. Taking into consideration the same, it is held by this Court that the reasoning provided by the learned Tribunal whilst passing the impugned majority Award does not suffer from any illegality and the contentions advance by the petitioner in view thereof, is rejected outrightly as the same does not hold any water.

88. Second major contention advanced by the petitioner is that this Ocurt is empowered to set aside the impugned majority Award and upheld the

minority Award. The respondent has opposed this argument of the petitioner submitting to the effect that under Section 34 of the Act, 1996, if the prayer of the petitioner is allowed, the same would lead to modification of the Award which is *per se* not permitted.

89. This Court is of the view that the award with which the law is concerned is the award of the majority. Reasons given by the minority are not reasons of the majority and as such does not form part of the majority.

90. At this point, it is imperative to look into the decision of the Hon'ble Supreme Court in the matter of ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131**, wherein, it held that the ground for interference under Section 34 of the Act, 1996, is very limited to the point that the award impugned must shock the conscience of the Court. The relevant portion is as under:

> **"*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.

77. *The judgments of the Single Judge [Ssangyong Engg. and Construction Co. Ltd. v. NHAI, 2016 SCC OnLine Del 4536] and of the Division Bench [Ssangyong Engg. and Construction Co. Ltd. v. NHAI, 2017 SCC OnLine Del 7864 : (2017) 240 DLT 711] of the Delhi High Court are set aside. Consequently, the majority award is also set aside. Under the scheme of Section 34 of the 1996 Act, the disputes that were decided by the majority award would have to be referred afresh to another arbitration. This would cause considerable delay and be contrary to one of the important objectives of the 1996 Act, namely, speedy resolution of disputes by the arbitral process under the Act. Therefore, in order to do complete justice between the parties, invoking our power under Article 142 of the Constitution of India, and given the fact that there is*

a minority award which awards the appellant its claim based upon the formula mentioned in the agreement between the parties, we uphold the minority award, and state that it is this award, together with interest, that will now be executed between the parties. The minority award, in paras 11 and 12, states as follows:

"11. I therefore award the claim of the claimant in full.

12. Costs — no amount is awarded to the parties. Each party shall bear its own cost...""

91. The petitioner has relied upon the judgment passed in the abovementioned case, but a bare perusal of the above quoted portion reveals that the said setting aside of the Award by the Hon'ble Supreme Court was under the exercise of its powers under Article 142 of the Constitution of India, wherein, the Hon'ble Court's powers have a wider ambit and taking into consideration that this Court has very limited powers under Section 34 of the ACT, 1996, this Court has to act accordingly. Moreover, a perusal of the decision in ***SsangYong (Supra)***, more particularly paragraph no. 77, would reveal that the Hon'ble Supreme Court was consciously aware of the limitations of Section 34 while invoking its powers under Article 142.

92. In ***Hindustan Construction Co. Ltd. v. National Highways Authority of India,* 2023 SCC OnLine SC 1063**, the Hon'ble Supreme Court, while enunciating the aspect of dissenting opinion in an arbitration proceeding held and observed as under:

"*29. Before ending the discussion, it would be also necessary to highlight one aspect which is likely to arise in some arbitration*

proceedings, especially when it involves adjudication by multi-member tribunals. This aspect was highlighted in Russel on Arbitration, where the relevance of a dissenting opinion was explained as follows [as quoted in Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd (hereafter, "Dakshin Haryana Bijli Vitran Nigam Ltd")20]:

> *"6-058. Dissenting opinions.—Any member of the Tribunal who does not assent to an award need not sign it but may set out his own views of the case, either within the award document or in a separate "dissenting opinion". The arbitrator should consider carefully whether there is good reason for expressing his dissent, because a dissenting opinion may encourage a challenge to the award. This is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award.".21*

30. This court also quoted Gary B. Born's commentary on International Commercial Arbitration22 opinion:

> *"Even absent express authorization in national law or applicable institutional rules (or otherwise), the right to provide a dissenting or separate opinion is an appropriate concomitant of the arbitrator's adjudicative function and the Tribunal's related obligation to make a reasoned award. Although there are legal systems where dissenting or separate opinions are either not permitted, or not customary, these domestic rules have little application in the context of party-nominated co-arbitrators, and diverse Tribunals. Indeed, the right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his/her adjudicative mandate, particularly in circumstances where a reasoned award is required. Only*

clear an explicit prohibition should preclude the making and publication to the parties of a dissenting opinion, which serves an important role in the deliberative process, and can provide a valuable check on arbitrary or indefensible decision making. [.]
[…]

There is nothing objectionable at all about an arbitrator "systematically drawing up a dissenting opinion, and insisting that it be communicated to the parties". If an arbitrator believes that the Tribunal is making a seriously wrong decision, which cannot fairly be reconciled with the law and the evidentiary record, then he/she may express that view. There is nothing wrong — and on the contrary, much that is right — with such a course as part of the adjudicatory process in which the Tribunal's conclusion is expressed in a reasoned manner. And, if the arbitrator considers that the award's conclusions require a "systematic" discussion, that is also entirely appropriate; indeed, it is implied in the adjudicative process, and the requirement of a reasoned award."
[…]
… the very concept of a reasoned award by a multi-member Tribunal permits a statement of different reasons — if different members of the Tribunal in fact hold different views. This is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process."

31. In Dakshin Haryana Bijli Vitran Nigam Ltd, the court recollected the previous holding in Ssangyong Engg. & Construction Co. Ltd. v. NHAI (hereafter, "Ssangyong Engg. & Construction Co. Ltd.") 23, wherein the court had set aside the

majority award, but issued consequential directions in the peculiar facts of the case:

> *"In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 7 SCR 522], this Court upheld the view taken by the dissenting arbitrator in exercise of its powers under Article 142 of the Constitution, in order to do complete justice between the parties. The reason for doing so is mentioned in para 77 i.e. the considerable delay which would be caused if another arbitration was to be held. This Court exercised its extraordinary power in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI,] keeping in mind the facts of the case, and the object of expeditious resolution of disputes under the Arbitration Act."*

32. However, the court did not, in Dakshin Haryana Bijli Vitran Nigam Ltd. (supra) direct the dissenting opinion to be treated as an award. In the opinion of this court, that approach is correct, because there appears to be a slight divergence in thinking between Russel and Gary Born. The former, Russel is careful to point out that a dissenting opinion is not per se an award, but "is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge." However, Gary Born does not expressly say that the opinion is not a part of the award. That author yet clarifies that "This is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process."

33. It is, therefore, evident that a dissenting opinion cannot be treated as an award if the majority award is set aside. It might provide useful clues in case there is a procedural issue which

becomes critical during the challenge hearings. This court is of the opinion that there is another dimension to the matter. When a majority award is challenged by the aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the majority award. The minority award (or dissenting opinion, as the learned authors point out) only embodies the views of the arbitrator disagreeing with the majority. There is no occasion for anyone-such as the party aggrieved by the majority award, or, more crucially, the party who succeeds in the majority award, to challenge the soundness, plausibility, illegality or perversity in the approach or conclusions in the dissenting opinion. That dissenting opinion would not receive the level and standard of scrutiny which the majority award (which is under challenge) is subjected to. Therefore, the so-called conversion of the dissenting opinion, into a tribunal's findings, [in the event a majority award is set aside] and elevation of that opinion as an award, would, with respect, be inappropriate and improper."

93. Interpretations drawn from the observations made in afore cited judgment crystalizes the law that the where the Court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would be required to be decided afresh. Also, under Section 34 of the Act, 1996, the Court may either dismiss the objections raised by the petitioner, and upheld the Award, or set aside the Award if the limited grounds for interference are made out.

94. The reference to the phrase "arbitral award" in Sections 34 refers to the decision of the majority of the members of the Arbitral Tribunal. A party cannot file a petition under Section 34 for setting aside of a majority or a dissenting opinion. What is capable of being set aside under Section 34 is

the "arbitral award" i.e. the decision reached by the majority of members of the Tribunal. In the event the Courts follow the trend of setting aside the majority award, the same would mean as modification of an award which is not permissible under the Act, 1996. At this stage, it is pertinent to refer to a recent judgment passed by the Hon'ble Supreme Court in the matter of ***Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.*, (2021) 7 SCC 657**, relevant portions of the same, reads as under:

> *"33. In the treatise on International Commercial Arbitration authored by Fouchard, Gaillard and Goldman, it has been opined that:*
>
> > *"1403. A dissenting opinion can only be issued when the majority has already made the decision which constitutes the award. Until then, any document issued by the minority arbitrator can only be treated as part of the deliberations. However, once the majority decision has been reached, it is preferable for the author of the dissenting opinion to communicate a draft to the other arbitrators so as to enable them to discuss the arguments put forward in it. The award made by the majority could then be issued after the dissenting opinion, or at least, after the draft of the dissenting opinion…" [Fouchard, Gaillard, Goldman, International Commercial Arbitration, Eds. Emmannuel Gaillard, John Savage, p. 786 (Kluwer Law International).]*
>
> *x* *x* *x*
>
> *44. In law, where the court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate*

proceeding. Under Section 34 of the Arbitration Act, the court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2-A) are made out. There is no power to modify an arbitral award. In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under : (SCC p. 208, para 52)

> *"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*
>
> *(emphasis supplied)*"

95. On the basis of observations made by this Court with regard to the facts and reasonings given by the learned Tribunal whilst passing the impugned Award, it is held that the decision of the majority members of the learned Arbitral Tribunal based on an analysis of the material before them was a possible view to take. Merely because another view as evidenced by the dissenting opinion is possible interference by this Court under Section 34 of the Act, 1996, is not warranted.

96. In light of the aforesaid discussions, this Court is of the considered view that there is a possibility that a majority of the arbitrators agree on a particular form of award, and a minority arbitrator does not. In such a peculiar situation the minority is not obligated to sign an award prepared by the majority of arbitrators. It is open to the minority of arbitrators to prepare their own opinion. The minority award no bearing on the rights and obligations of the parties as determined by the majority of arbitrators. Consequently, it is incapable of, and not required to be challenged or objected to as an award under Section 34 of the Act, 1996.

97. This Court under Section 34 of the Act, 1996, cannot in any manner modify the award and petitioner by way of his plea of seeking setting aside of the impugned majority Award and upholding the minority Award is seeking modification of the Arbitral Award and in the even the said is allowed, the same would require the issued to be decided a fresh which is beyond the powers of this Court under Section 34 of the Act, 1996.

98. It is held that merely because the petitioner's version of interpreting a contractual clause differs from that of the majority of the arbitrators of the learned Tribunal and that the petitioner's version is followed by the minority arbitrator is no ground for interfering with the impugned majority Award. Doing the same would be a palpable error on the part of this Court and against the law which stipulates that this Court has very limited scope of interference with an Arbitral Award.

99. In view of the abovementioned judgments and discussion, this Court is of the view that patent illegality should be an illegality which goes to the

foundation of the matter. To put it another way, not every violation of the law that was committed by the Arbitral Tribunal would be considered an instance of patent illegality. Furthermore, an incorrect application of the law cannot be classified as blatantly breaking the law. In addition, the term patent illegality does not apply to violations of laws that are not connected to public policy or the interest of the general public.

100. Since it has been a settled law that it is against the law for the Courts to re-evaluate the evidence, in order to reach the conclusion that the award suffers from patent illegality, apparent on the face of the award. This is because Courts do not sit in appeal against arbitral awards under Section 34 of the Act, 1996. When an arbitrator takes a view that is not even a possible one, or interprets a clause in the contract in such a manner that no fair-minded or reasonable person would, or if an arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters that are not allotted to them, these are examples of situations in which it is permissible to interfere with a domestic award under Section 34(2-A) on the ground of patent illegality.

101. In addition to the above, the aforementioned principle states that the arbitral award is to contain reasons which are intelligible and adequate. Such reasons need not be elaborate, but must have three characteristics of being proper, intelligible, and adequate. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent to providing no reasons at all.

102. Moreover, an arbitral award that does not provide any explanations for its conclusions leaves itself open to legal scrutiny for the reasons given above. The arbitrator has reached certain perverse conclusions, and those conclusions, to the extent that they are based on no evidence or have been arrived at by ignoring essential evidence, can be set aside on the basis that they are obviously illegal. The practice of taking into account evidence that has not been made available to the opposing party is another example of the perversity that is encompassed by the term patent illegality.

103. This Court finds that the Arbitrator being the ultimate master of the Arbitration, can adjudicate the claims in a manner that is on the lines of basic tenants 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.

104. 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.

105. It has been held in a catena of judgments of the Hon'ble Supreme Court that, there is a legal presumption in favour of the Award being valid and the person challenging the Award has to make out one of the grounds enumerated under Section 34(2) of the Act, 1996. In pursuant to the above, this Court is of the view that the learned Arbitral Tribunal in the instant case

has considered the relevant contractual provisions and has passed the impugned majority Award as per the law.

106. Perusal of the impugned majority Award shows that there has been a lengthy discussion of facts and law by the learned Arbitrators and this Court does not find any point of dispute which shocks the conscience of this Court, thereby, not inclined to interfere. Since, it has been established that passing of the 2G Judgment amounts to change in law which ultimately made it impossible for the respondent to perform its obligations under the MSA and the service contracts, hence the same cannot be termed to not be a *Force Majeure* event as per the clauses agreed by the parties itself. There cannot be any fixed or particular definition to define a *Force Majeure* event and the same in basic sense means to be an unforeseen event, hence, in the present petition, quashing/cancelling of respondent's license as also held by the learned Tribunal in impugned majority Award is an unforeseen event.

107. Further, this Court is not inclined to entertain the petitioner's contentions to set aside the impugned majority Award and upheld the minority Award as this Court does not find any force in the propositions put forth by the petitioner and the petitioner has not been able to ascribe any ingredients of Section 34 thereto.

CONCLUSION

108. The petitioner has failed to corroborate with evidence, how the learned Tribunal's findings regarding the Claims and counter claims is patently illegal. The learned Tribunal has dealt with the clauses in detail and

has construed, and applied the same correctly while dealing with the claims and counter claims of the petitioner and the respondent respectively.

109. Thus, no ground has been made out to set aside the impugned majority award inasmuch as the threshold to interfere in an arbitral award has not been made out. Further, with regards to the instant petition, the allegations of misinterpreting and illegally defining the terms of the Contract by the learned Tribunal is rejected and it is held that the Contractual provisions have been constructed in a harmonious manner.

110. It is a cardinal duty of the constitutional Courts to adhere to this check on the powers of the Court and always keep in mind that the Arbitral Award which has been passed by respecting the mandate of the disputing parties, should not be set aside unless and until it suffers from a grave error that shocks the entire conscience of the Court.

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

112. Considering the factual matrix of the case, authorities cited, pleadings presented and arguments advanced, this court comes to the conclusion that the impugned Arbitral Award dated 17th February, 2019 passed by the learned Arbitral Tribunal in the matter titled as ***'Bharati Infratel Ltd. V.***

Sistema Shyam Teleservices Ltd.' does not suffer from any infirmities and any kind of patent illegality that per se violates any law that is fundamental in nature, enshrined in Section 34 of the Act, 1996.

113. The impugned majority Award is not patently illegal and is neither in conflict with the public policy of India nor contrary to the terms of the Contract entered into between the petitioner and the respondent. The learned Arbitral Tribunal has rightly construed the terms of the Contract to impart justice to the party whose rights have been affected.

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

115. Accordingly, the instant petition being bereft of any merit is dismissed along with pending applications, if any.

116. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

DECEMBER 20, 2023
gs/ryp/db