IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved On	**07.07.2022**
Order Pronounced on	**12.08.2022**

C O R A M **:**

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.(Comm.Div)No.20 of 2022

1. The Principal General Manager,
   BSNL Telecom Building,
   Office of the Principal General Manager,
   No.2, Bharathi Park Road -2,
   Coimbatore – 641 043.

2. The Divisional Engineer,
   Network Operations, CMTS,
   BSNL, Telephone Exchange,
   Saibaba Colony, Coimbatore – 641 011..... Petitioners

Vs

The Administrator,
Isha Foundation,
ISHA Yoga Centre,
Velliangiri, Coimbatore-641 114 ..... Respondent

PRAYER : This Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 23.01.2021.

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For Petitioners : Mr.P.Wilson, Senior Advocate,
Assisted by Mr.R.Priyakumar

For Respondent : Mr.S.Rajendrakumar
for M/s.Norton & Grant

O R D E R

The claimants before the Arbitral Tribunal are the petitioners herein, and challenge the Arbitral Award dated 23.01.2021(the Award) under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

2. The respondent herein applied for a service connection called the Global System of Mobile Communications Primary Rate Interface(GSM PRI) on 08.06.2010. Such connection was provided initially with 100 Direct Inward Dialing (DID) numbers ranging from 8903515600 to 8903515699. Subsequently, on 22.12.2017, 400 numbers ranging from 8903815300 to 8303815600 were added. The GSM PRI circuit provides a 2MB stream to the premises of the respondent and can support 30 junctions. The 2MB stream originates from the BSNL GSM switch and is connected to the premises of the respondent through an optical fibre cable. The other end of the stream terminates in the premises of the respondent in

a Private Automatic Exchange(PBX) installed by the respondent. The respondent further extended the GSM PRI circuit of BSNL through local extensions. Outgoing calls from the extensions of the respondent would land on the PBX board and be routed to the BSNL switch through the available free PRI junctions and calls would be connected to the called destination by the BSNL switch. Similarly, incoming calls to the respondent would be routed through the available free junctions from the BSNL switch.

3. Upon installation of the said connection, services were provided by the petitioners to the respondent without any untoward incident until November 2018. The dispute relates to bills issued by the petitioners to the respondent for the months of December 2018 and January 2019. In particular, the respondent disputed the invoice dated 02.01.2019 for a sum of Rs.20,18,198.23 for the billing period 01.12.2018 to 31.12.2018 and invoice dated 02.02.2019 for a sum of Rs.2,50,47,462.19 for the billing period 01.01.2019 to 31.01.2019.

4. According to the respondent, even prior to receipt of the invoice for December 2018, an oral complaint was made to the petitioners on 12.12.2018, but the said complaint was not attended to. Thereafter, on 21.12.2018, the respondent sent an email to the petitioners stating that certain extensions were not receiving incoming calls. Upon receiving the said complaint, the petitioners found no technical problem with the BSNL connectivity to the PBX and therefore advised the respondent to contact the PBX vendor. Once again, on 10.01.2019, an oral complaint was received from the respondent that no calls are landing on the PRI circuit of the respondent. On examination, the petitioners observed that all the junctions were in use and therefore suggested that the respondent should consult the PBX vendor. Meanwhile, the bills for December 2018 and January 2019 were sent to the respondent. Since the respondent did not pay the bills by citing a fault in the petitioners' connection, a committee was constituted to visit the site and examine the equipment. Upon such examination, the petitioners' discovered that the respondent had extended net connectivity and enabled Voice Over Internet Protocol(VOIP) to the IP-PBX and consequently, the GSM PRI circuit became vulnerable. Hence, the respondent was directed to disconnect the said facility.

5. Thereafter, the respondent filed W.P.No.11007 of 2019 for a direction to prevent the respondents therein/petitioners herein from demanding amounts due under the bills for December 2018 and January 2019. The said writ petition was disposed of by order dated 23.10.2019 by appointing Mr.Justice E.Padmanabhan as the Sole Arbitrator to resolve the dispute. Thereafter, the petitioners filed the claim statement for recovery of an aggregate sum of Rs.2,50,47,462/- towards the value of the two invoices along with interest thereon at 24% per annum from the dates of the respective bills until payment in full. The respondent filed a counter statement denying the petitioners' entitlement to the amounts claimed. The Arbitral Tribunal framed the following issues upon considering the pleadings:

> *(A) Whether the Claimants are entitled to the claims advanced in the statement of claim? Whether the Claimants are entitled claim interest on the claim advanced by them?*
>
> *(B) Whether the Respondent made complaints to the Claimants? If so when? What action taken by the Claimants to the complaints?*

(C) Whether the Claimants had advised the Respondent with respect to the exceeding of the ceiling limit by the Respondent?

(D) Whether the Respondent is liable to pay for all the calls received in its PBX box including international calls? If not, who is liable to pay for those international calls which were routed through internet connection?

6. The claimant examined Mr.T.R.Madhavan, Divisional Engineer, BSNL, Zonal Core, CMTS, Coimbatore as C.W.1. Through C.W.1, Exhibits C1 to C20 were marked. The respondent herein cross examined C.W.1. Mr.T.Senthil, Junior Telecom Officer(IMS), BSNL, Coimbatore, was examined as C.W.2. He was also cross examined by the respondent. The respondent adduced evidence through Swami Panija, who was examined as R.W.1, and cross examined by the petitioners. Eventually, the arbitral proceedings were concluded by rejecting the claim made by the petitioners herein for the sum of Rs.2,50,47,462/- and, instead, directing the respondent to pay a sum of Rs.44,000/- with interest at 15% per annum from 15.04.2019 till the date of payment. The Award is challenged in this proceeding.

7. Oral arguments were advanced on behalf of the petitioners by Mr.P.Wilson, learned senior counsel, assisted by Mr.R.Priyakumar, learned counsel; and for the respondent by Mr.S.Rajendrakumar, learned counsel, for M/s.Norton & Grant. Both parties also filed written arguments.

8. Learned senior counsel for the petitioners contended that the security of the GSM PRI connection was breached by creating the VOIP facility. According to the petitioners, this resulted in innumerable calls being made in December 2018 and January 2019. All these calls were recorded in the form of Call Data/Detail Records (CDRs). The petitioners exhibited the CDRs as Ex.C-10 series before the Arbitral Tribunal. In fact, learned senior counsel pointed out that the CDRs were also available with the respondent, albeit only the last ten thousand calls could be retained by the IP-PBX of the respondent. This was handed over by the respondent to the petitioners and was also exhibited as C-7. Learned senior counsel contended that the respondent admitted that the calls were duly registered in the CDRs and that the invoices were issued on the basis of calls registered in the CDRs. By referring to the issues framed by the Arbitral Tribunal, including in particular issue 'D', learned senior counsel pointed out that the

issue framed by the Arbitral Tribunal was whether the respondent is liable to pay for all the calls received in its PBX box and not whether the calls were registered in the PBX box. However, while recording the submissions, both in paragraph 56 and 59, it was pointed out that the Arbitral Tribunal erroneously recorded that the respondent denied that the calls were made through the PBX or that the calls originated from the GSM PRI. By drawing reference to paragraph 12 of the affidavit in support of the writ petition, learned senior counsel contended that the case of the respondent was that the system had been hacked by fraudsters and not that the calls were not registered in the CDR from the respondent's GSM PRI. In spite of the said pleadings and the issue framed on such basis, learned senior counsel pointed out that the Arbitral Tribunal committed the patent illegality of recording the submissions erroneously.

9. The next contention of learned senior counsel for the petitioners was that the Arbitral Tribunal completely disregarded the CDRs and the evidence of C.W.1. In specific, learned senior counsel contended that the petitioners instituted the proceedings to recover monies due and payable in respect of two invoices. In support of the said claim, the CDRs

and invoices were produced. If the respondent wanted to establish that the calls were not made through the GSM-PRI connection, the respondent should have established the same by requesting the Arbitral Tribunal for appointment of an expert. In the absence of such contra evidence, it was contended that the Arbitral Tribunal should have awarded the claim. Learned senior counsel also pointed out that an expert committee was constituted by the petitioners and the report of the said committee was exhibited as Ex.C-5. The said expert committee concluded that there was no abnormality in the GMSC switch and that the billing could be due to abnormality in the customer's premises. This report was also disregarded by the Arbitral Tribunal.

10. By drawing reference to paragraphs 64, 65, 67 & 69 of the Award, learned senior counsel contended that the findings recorded therein are speculative. For instance, with reference to the finding at paragraph 65 of the Award that the huge quantum of calls could not have been made by the respondent and its inmates, learned senior counsel submitted that this conclusion is not based on evidence inasmuch as the invoice amount is entirely based on CDRs. Turning to paragraph 72 of the Award, learned

senior counsel also pointed out that the Arbitral Tribunal committed the patent illegality of referring to question 21 and the answer thereto of C.W.2 to conclude that the CDRs are either incorrect or false. He pointed out that C.W.2 is a Junior Telecom Officer and that the CDRs were not exhibited through him. Although the CDRs were exhibited through C.W.1, learned senior counsel pointed out that the learned Arbitrator attached undue importance to C.W.2's answer that he was not aware about the calls registered in the CDR from number 8903815555.

11. By referring to paragraphs 77 and 78 of the Award, learned senior counsel pointed out that the learned Arbitrator also committed the patent illegality of disregarding the CDRs merely because the petitioners could not get the concurrence from the management for referring the matter for the expert opinion of the Telecom Enforcement Resource and Monitoring Cell(TERM). In this regard, he submitted that the petitioners were given 20 minutes to obtain such concurrence and that it is unreasonable to expect a PSU to obtain concurrence within the limited time. He also pointed out that an adverse inference was drawn merely because concurrence could not be obtained by the petitioners.

12. In support of these contentions, learned senior counsel for the petitioners referred to and relied upon the following judgments:

*(1) Oil and Natural Gas Corporation Limited v. Saw Pipes Limited (**ONGC**)(2003) 5 SCC 705.*

*(2) Associate Builders v. Delhi Development Authority (**Associate Builders**)(2015) 3 SCC 49.*

*(3) Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India(NHAI) (**Ssangyong**)(2019) 15 SCC 131.*

(4) Dyna Technologies Private Limited v. Crompton Greaves Limited (2019) 20 SCC 1.

(5) Patel Engineering Limited v. North Eastern Electric Power Corporation Limited (2020) 7 SCC 167.

*(6) PSA Sical Terminals Pvt Limited v. Board of Trustees of V.O.Chidambaranar Port Trust, Tuticorin and others (**(PSA Sical)**, 2021 SCC Online SC 508.*

13. Mr.Rajendrakumar, learned counsel, made submissions in response and to the contrary. His first submission was that the respondent

took the connection initially in the year 2010. During the extended period from 2010 till November 2019, the average consumption was between Rs.20,000/- per month to Rs.22,000/- per month. In order to substantiate this contention, he relied upon the invoices exhibited as Ex.R2 series. With regard to the stand of the respondent, by referring to paragraph 4 of the affidavit in support of the writ petition, he submitted that the respondent took the categorical stand that it was charged for calls which were not made by the respondent.

14. The next contention of learned counsel for the respondent was that the bill for December 2018 was received by the respondent only on 16.01.2019. Similarly, the bill for January 2019 was received on 26.02.2020. In fact, he submitted that initially the bill for November 2018 was sent instead of the bill for December 2018. On account of the belated receipt of bills from the respondent, the respondent could not take preventive steps. By way of illustration, he submitted that if the bill for December 2018 for a sum of about Rs.20 lakhs had been received on or about 02.01.2019, the respondent would have issued immediate instructions to bar the ISD facility on the GSM PRI connection. In such event, the

respondent would not have received a bill for about Rs.2.3 crores for January 2019. The third contention of the respondent was that the invoices indicate the credit limit. Although the credit limit was breached by a huge margin as per the invoices, the petitioner did not provide any warning to the respondent. The fourth contention was that the petitioners had the ability to bar the ISD facility upon noticing that the call volume was abnormal. He referred to the cross-examination of C.W.1 to substantiate this contention and pointed out that this was not done. By referring to the pleadings and the evidence of R.W.1, his fifth contention was that VOIP was not used by the respondent. The sixth contention was that the GSM PRI system and the equipment of BSNL were both located in a portion of the respondent's property, which had been taken on lease by the petitioners. By drawing reference to the lease agreement dated 27.03.2014 and questions 47 to 52 and the answers thereto of C.W.1, learned counsel pointed out that the witness admitted that the PBX was installed in the same room wherein the equipments of BSNL were placed. Therefore, he contended that all the equipments were within the control of the petitioners and not the respondent.

15. With reference to the Award of the Arbitral Tribunal, learned counsel submitted that the Arbitral Tribunal considered the entire evidence placed before the Tribunal and arrived at conclusions upon a reasonable appraisal thereof. With specific reference to paragraph 64 of the Award, learned counsel pointed out that the Arbitral Tribunal closely examined the CDRs. After doing so, in paragraphs 67, 69, 71 and 72 of the Award, the Arbitral Tribunal entered categorical conclusions that the calls were not made by the respondent. Learned counsel submitted that the settled legal position is that the Arbitral Tribunal is the final arbiter of facts and that evidence should not be re-appraised in proceedings under Section 34 of the Arbitration Act.

16. In support of these contentions, learned counsel for the respondent referred to and relied upon the following judgments:

(1) Oil and Natural Gas Corporation Limited v. Saw Pipes Limited (2003) 5 SCC 705.

(2) Oil and Natural Gas Corporation Limited v. Western Geco International Limited (2014) 9 SCC 263.

(3) Associate Builders v. Delhi Development Authority (2015) 3 SCC 49.

(4) Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India(NHAI) (2019) 15 SCC 131.

(5) Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited ***(Delhi Airport Metro Express)****(2022) 1 SCC 131.*

17. In view of the rival contentions, at the outset, the scope of interference with an arbitral award under Section 34 of the Arbitration Act should be noticed. In ***ONGC***, the Hon'ble Supreme Court held that an arbitral award could be interfered with if it is contrary to public policy or patently illegal. An award which is contrary to substantive law or the relevant contract or the Arbitration Act was considered to be patently illegal provided the infirmities in the award went to the root of the matter. In this judgment, the expression public policy was construed widely. This judgment was followed in several judgments, including in ***Associate Builders.*** In paragraph 31 and 32 (SCC Report) of ***Associate Builders,*** the Hon'ble Supreme Court concluded that an award which is perverse is contrary to public policy. The Supreme Court further held that a finding

based on no evidence or irrelevant evidence or by ignoring vital evidence is perverse and, consequently, contrary to public policy. Paragraphs 31 and 32 of ***Associate Builders*** are set out below:

> "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-cum-Assessing Authority v. Gopi Nath & Sons, 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."

In Kuldeep Singh v. Commissioner of Police, it was held: (SCC p.14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be interfered with."

Thereafter, the Arbitration Act was amended by Act 3 of 2016 and public policy was re-defined more narrowly. In this context, it should be noticed that patent illegality was expressly inserted into the Arbitration Act by the above amendment as a ground to set aside an award in a domestic arbitration proceeding [Section 34(2A)]. After such amendment, in

Ssangyong, the Hon'ble Supreme Court re-visited the law laid down in ***Associate Builders*** and concluded in paragraph 41 of the SCC Report that perversity would no longer be a ground under the head 'public policy' but would qualify as a ground to set aside the award under the head 'patent illegality'. This position was reiterated in paragraphs 44 and 45 of ***PSA Sical*** and in paragraph 29 of ***Delhi Airport Metro Express***.

18. From the above discussion, it follows that the challenge by the petitioners should be tested on the benchmark of patent illegality. Learned senior counsel for the petitioners contended that the Award is patently illegal because it disregarded vital evidence and relied on irrelevant evidence. Therefore, this aspect should be examined. Before doing so, a more preliminary and fundamental issue should also be taken note of. The petitioners were the claimants before the Arbitral Tribunal. The claim was for a sum of Rs.2,50,47,462/- towards the value of two invoices which had not been paid by the respondent. The petitioners relied on the CDRs for the purpose of establishing that the respondent was charged on the basis of calls recorded in the CDRs. The petitioners also asserted that the respondent admitted that all the calls were registered in the CDRs, including in the PBX

system of the respondent. On examining paragraph 12 of the affidavit in support of the writ petition and paragraph 20 of the counter before the Arbitral Tribunal, it is clear that the respondent did not take the stand that the calls did not pass through its PBX or that the calls were not registered in the CDRs. Indeed, as contended by learned senior counsel for the petitioners, issue 'D' also discloses that the disputed question was whether the respondent is liable to pay for calls registered in the PBX and not whether the calls were registered in the PBX.

19. In an action to recover money on the basis of invoices issued on the basis of CDRs for services provided, the burden of proof would shift to the respondent if the respondent intends to controvert its liability to pay for calls registered in the CDRs. In this case, however, the respondent did not adduce evidence to establish that the GSM PRI connection provided by the petitioners was defective or that the equipment was defective and that such defects were attributable to the petitioners and not the respondent.

20. With this preamble, the Award should be examined. With regard to the CDRs, the contention of learned counsel for the respondent

that the Arbitral Tribunal took the CDRs into consideration is liable to be accepted on perusal of the award, particularly paragraph 63 thereof. Upon analysis, the Arbitral Tribunal recorded the finding that the call volumes were abnormal especially between particular pairs of source and destination numbers. The Arbitral Tribunal also proceeded to record, *inter alia*, the following findings on the basis of its analysis:

> "(vii) It seem humanly possible to initiate such call volume as mentioned above in findings 4 and 5. How this much call volume has been generated needs to be investigated thoroughly.
>
> (viii) Unnatural and abnormal calls alleged to have originated from the PABX as evidenced from call data records during the period under dispute.
>
> (ix) As evidenced from the call record unnatural and abnormal traffic volume has been generated from PABX causing spike in the billing.
>
> (x) The claimants have dealt this as an excess meter complaint without making any in depth analysis on the volume of calls and the pattern that emerges on such analysis. The Respondent denied making of calls and adduced material to support the same.
>
> (xi) The pattern of calls made to specific destinations showing high volume of calls causes

concern and definitely needs a detailed analysis and study in the interest of the Claimants as well as Respondent."

21. The above appraisal of evidence and findings recorded on such basis indicate beyond doubt that the bills were raised on the basis of calls registered in the CDRs. The Arbitral Tribunal also concluded that the call volume was abnormal and that this required further investigation and detailed analysis. These conclusions are eminently reasonable. Given the fact that telecommunication equipment had to be examined, expert opinion was clearly required for purposes of further investigation or analysis.

22. Another significant piece of evidence should be noticed. The petitioner also exhibited the complaint filed by the respondent to the police as Ex.C-13. In the said complaint, the respondent draws reference to the findings of its IP-PBX vendor, DIGI-TeL, with regard to the complaint made by the respondent on the problems encountered with the IP-PBX. Paragraph 7 of the complaint, which is relevant, is set out below:

"On 8th January 2019, again there was problem in calling and receiving calls and the same was

informed to DIGI-TeL on 9th January 2019. There was no response for this. On 11th January 2019, upon DIGI-TeLs instructions, we checked the system usage status which showed that calls were progressing with abnormal call patterns. This was inforned to DIGI-TeL, who asked us to check the outgoing SMDR call report and when we informed them of the report, **they informed that our IP-PBX system has been hacked** and told us to disable certain settings and then all the mobile apps and connections working through IP stopped working." (emphasis added)

On examining paragraph 7, it is evident that the respondent categorically admitted that the abnormal calls were on account of the respondent's system being hacked. Thus, Ex.C-13 is a material document that should have been taken into consideration but was not considered. Significantly, this document reinforces the conclusion that bills were raised on the basis of calls being registered on the IP-PBX. What remained was further investigation and analysis on the cause for the abnormal call volume and

thereafter attribute responsibility. It was not possible to undertake the above without expert opinion.

23. Instead, the Arbitral Tribunal proceeded to record definitive findings in subsequent paragraphs that the CDRs are incorrect without undertaking the investigation or detailed analysis, which was considered imperative in paragraph 63. Thus, in paragraph 64, the Arbitral Tribunal recorded the following findings:

> "(ii) Extension 1008 appears to have been predominantly pointed out as having been used for the ISD calls at odd hours, but the Respondent has taken the definite stand that the said extension was not at all functioning during the relevant period. **This being the factual position it will be too hard to suggest that all the disputed calls originated from Respondent's GSM PRI.** (emphasis added)
>
> (iv)....The calls alleged to have been made are not only innumerable but also continuous made for the entire day without interruption and such huge quantum of calls could not be made at all by Respondent, much less manually."

24. The finding, emphasised above, is speculative, not based on evidence and in direct conflict with the finding in paragraph 63 that unnatural and abnormal calls originated from the PABX. Indeed, these findings also contradict the pleadings and Ex.C13 of the respondent which are to the effect that its system was hacked and not that the calls were not registered in the respondent's PBX or through the GSM PRI connection.

25. The Arbitration Act empowers the Arbitral Tribunal to call for expert evidence in terms of Section 26 thereof unless otherwise agreed by the parties. The expression “unless otherwise agreed by the parties” refers to a situation where both parties to the dispute agree that expert evidence would not be relied on. Such a situation did not exist in this case where the record shows that the respondent agreed to refer the matter for expert opinion. In the context set out above, expert evidence was imperative. As per Section 26, in the absence of mutual agreement not to call for expert evidence, the Arbitral Tribunal does not require the consent of parties to call for expert evidence. In this case, after suggesting to the parties at the hearing on 14.12.2020 that the matter should be referred to the TERM, the Arbitral Tribunal called upon the parties to consent thereto. Merely because

the petitioners did not concur within twenty minutes, the Arbitral Tribunal proceeded to conclude proceedings by recording categorical but speculative findings without further investigation or analysis.

26. Another aspect that warrants consideration is the evidence of C.W.1. C.W.1 was the Divisional Engineer, BSNL Zonal Core at the time of deposition. The documentary evidence on behalf of the petitioners was exhibited through him. In particular, these exhibits include the CDRs which were exhibited as Exs.C-7 and C-10. In response to question 19 in course of cross-examination, C.W.1 stated that he was part of the technical team which analysed the CDRs. In paragraph 6, 7 and 8 of the proof affidavit of C.W.1, C.W.1 stated categorically that there was no fault with the BSNL switch and that the issue was purely in the customer-owned EPABX board. He further deposed that any fault in EPABX is purely the customer's responsibility and that BSNL cannot monitor or control the customer-owned EPABX and its extensions. In paragraph 11 of the proof affidavit, he deposed that all the calls emanated from the EPABX extensions of the respondent and that the same is clear from the call data/details record. In paragraph 15, he deposed that BSNL has no control or access to the EPABX

of the customer, its extensions, IP connectivity or any other allied services. He further deposed that, during inspection by BSNL on 05.02.2019, it was found that the EPABX was enabled with VOIP and Internet access by the respondent. Also during that visit, he stated that the respondent agreed that it had tried mobile SIP clients by enabling VOIP ports in the EPABX equipment. He also deposed that the provision of VOIP by the respondent rendered the EPABX not only vulnerable but that this was the exact reason for the high consumption.

27. In the face of the above evidence of C.W.1, the Arbitral Tribunal considered the cross-examination of C.W.1 in paragraph 74 by reproducing certain questions and the answers thereto. Without doubt, no reasonable person would conclude on that basis that the CDRs are incorrect, and the Arbitral Tribunal also does not draw the conclusion on that basis in paragraph 75 of the Award. Instead, the Arbitral Tribunal examined the evidence of C.W.2 and R.W.1. C.W.2 was a Junior Telecom Officer and no documents were exhibited through him. In paragraph 72 of the Award, Q.21 and the answer thereto of C.W.2 was set out. The question and answer are as follows:

Q 21: I put it to you that the number 8903815555was never used by ISHA and yet as per the CDRs most of the calls alleged to have emanated from the said unused number. Is it not?

Ans: I am not aware of this.

Based on this answer by C.W.2, the learned Arbitrator concludes as under:

"*….From his reply to question 21, it is obviously clear that the recordings in CDRs are either incorrect or false and therefore the entries in CDRs do not deserve acceptance. Hence it has been concluded that the entries in CDRs which are pressed and heavily relied upon by the claimants cannot be accepted as a true document reflecting the alleged calls claimed to have been made by the Respondent from number 8903815555. The CDRs heavily relied upon by the claimants do not deserve acceptance in the light of the answer given by CW-2 during cross examination as well CW-1. In other words, the reliance placed by the claimants on CDRs in respect of ISD calls do not deserve acceptance and it has to be concluded that CDRs do not reflect the correct or true details of ISD*

calls alleged to have originated from the Respondent EPABX."

28. The above conclusions appear to have been reached on the basis of the answer of C.W.2 that "I am not aware of this". Without doubt, the scope for interference with the appraisal of evidence of an arbitral tribunal is limited, but these conclusions are patently erroneous and bear no correlation to the evidence tendered by C.W.2. In effect, the above conclusion is based on irrelevant evidence and vitiates the Award. The Arbitral Tribunal also analysed the evidence of R.W.1 in paragraph 70 of the Award. Q.13 and the answer thereto of R.W.1 are set out below:

> "**Q.No.13:** What was the period during which, high consumption(high volume of calls) emanated from your PBX system and pushed through the BSNL GSM PRI junctions?
>
> **Ans**: We were never aware of the high consumption until BSNL shared their invoice upon our repeated requests from 08.01.2019 and also on 10.01.2019, the invoices shares only on 16.01.2019 without any call break-up, upon requesting the call breakup they

shared call breakup on 19.01.2019 which is incomplete, again we intimated them about the incompletion they sent one more breakup on 20.01.2019, that is also partial only. The full breakup of December month call shared to us along with the Januray 2019 month breakup on 26.02.2019. By verifying these shared records by BSNL, we came to know about the high volume of calls made in GSM PRI from 18.12.2018 TO 11.01.2019. In the same period, we made many complaints to BSNL which were not addressed properly by BSNL."

R.W.1's answer also lends credence to the petitioners' assertion that all the calls were registered in the CDRs both at the petitioners' end and on the PBX at the respondent's end. Based on the above evidence and the appraisal thereof, a reasonable conclusion would be that the call volume was abnormal and that neutral expert analysis was necessary before drawing conclusions on responsibility and liability. To put it differently, it was not possible to draw reasoned conclusions on attribution of responsibility and liability based on this evidence. Indeed, if any conclusion were to be drawn,

it could only be that the respondent failed to discharge the burden of establishing that it is not liable to pay the bills although the calls were registered in the CDRs. Such conclusion would also be unsatisfactory. This aspect was also recognised by the Arbitral Tribunal in paragraph 63, when the Tribunal observed that further investigation and analysis is required.

29. Thereafter, the Arbitral Tribunal referred to its request to the parties to consent to reference of the matter for the expert opinion of TERM and the refusal of the petitioners to concur thereto. On that basis, an adverse inference was drawn in paragraph 79 that the petitioners did not want the truth to be ascertained. Further, in paragraphs 80 and 81 of the Award, the Tribunal concluded that “the respondent's denial deserves to be sustained”, and that “the only conclusion is that ISD calls were never made by the residents of ISHA centre”. These conclusions are not based on evidence, and are purely speculative and presumptive.

30. As stated at the outset, the burden of proof was on the respondent to rebut the CDRs. For such purpose, expert opinion was imperative. Although the Arbitral Tribunal did consider the CDRs, the Tribunal recorded findings that the matter required further investigation. Strangely, without undertaking such further investigation by appointing an

expert, the Arbitral Tribunal proceeded to record that the CDRs are incorrect. These conclusions are patently erroneous, qualify as perverse as instructed by the Hon'ble Supreme Court in decisions referred to above, and resulted in the rejection of the petitioners' claims. Therefore, interference with the Award is warranted. By the Award, the Arbitral Tribunal concluded that the petitioners are entitled to Rs.22,000/- each for the two relevant months. This conclusion was consequential to the conclusion that the CDRs are unreliable. In view of the above conclusion that the findings of the Arbitral Tribunal are patently erroneous, the consequential direction to pay Rs.44,000/- with interest thereon does not survive.

31. In the result, the Award is set aside. As a corollary, the petitioners are granted leave to institute *de novo* arbitration proceedings. If such proceedings are instituted, the petitioners shall be entitled to the benefit of Section 43(4) of the Arbitration Act. Arb.O.P.(Comm.Div)No.20 of 2022 is allowed on the above terms without any order as to costs.

Index : Yes
Internet:Yes
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12.08.2022

SENTHILKUMAR RAMAMOORTHY J.,

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