

(2009) 05 DEL CK 0436

Delhi High Court

Case No: OMP 350 of 2005

Union of India (UOI)

APPELLANT

Vs

Modi Korea Telecom Ltd.

RESPONDENT

Date of Decision: May 21, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34
- Contract Act, 1872 - Section 56

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: P.P. Malhorta, ASG, Keerappa and Prinkya Kumari, for the Appellant; Rajiv Nayyar Darpan Wadhwa, Diwakar Maheshwari and Ajay, for the Respondent

Final Decision: Allowed

Judgement

Shiv Narayan Dhingra, J.

The respondent being the successful bidder for grant of Radio Paging Service for Madhya Pradesh Circle excluding Bhopal was issued a Letter of Intent (LOI) by petitioner on 30th October 1995 indicating that the respondent has been provisionally selected for franchisee of Radio Paging Service. The respondent was told that an amount of Rs. 1102 lac was payable for the license period. The respondent was to convey the acceptance by 30th November 1995 and was also required to furnish 10% of the first year license fee in the form of a bank draft from the scheduled bank and 90% of the first year's license fee in the form of financial bank guarantee. A performance bank guarantee valid for a period of three years for an amount of Rs. 25 lac was also to be furnished by the respondent in accordance with the LOI. The respondent submitted a sum of Rs. 4.72 lac as 10% of the first year's license fee. The respondent vide letter dated 29th November 1995 sought extension of four weeks for furnishing bank guarantee. Vide letter dated 8th December 1995, the extension was granted by petitioner upto 12th January 1996, however, subject to the condition that the effective date of license shall be 30th

November 1995. The respondent submitted financial bank guarantee dated 18th December 1995 for Rs. 90,70,000/- and submitted performance bank guarantee dated 18th December 1995. On 20th December 1995, the respondent informed the petitioner that the name of respondent has been changed to Modi Korea Telecommunications Ltd. and sought approval of change of name in DOT records. The respondent also sought further extension of time for giving acceptance, till change of name was brought on record. By letter dated 8th January 1996, the extension was granted up to 31st January 1996 subject to condition that effective date of license shall remain 30th November 1995.

2. The parties executed the license agreement on 15th January 1996 whereby respondent was granted license on non exclusive basis to establish, maintain and operate Radio Paging Service upto the subscriber's terminal connection in Madhya Pradesh Circle, except the local area served by Bhopal Telephone District and Indore Telephone District. The respondent was required to commission the Radio Paging Service within a period of 12 months from 30th November 1995. Thus, the Radio Paging Service was to be commissioned by 29th November 1996. For commissioning of Radio Paging Service it was necessary for the respondent to get allocation of appropriate radio frequency from DOT and to obtain a separate license from WPC (Wireless Planning and Coordination) Wing, Ministry of Communication and the site clearance in respect to the fixed stations and its antenna from SACFA(Standing Advisory Committee on Frequency Allocation).

3. The Radio Paging Service was not commissioned by the due date i.e 29th November 1996 by the respondent. Vide letter dated 11th December 1996, the petitioner asked the respondent to send details of latest status of the project with respect to the commissioning of Radio Paging Service and also informed the respondent that 15% of the first year license fee had become due and the respondent should make arrangement for payment of the same by demand draft and the balance license fees for the year be paid by way of post-dated cheques. The respondent was reminded by the petitioner of Clause 13.2 which provided for levy of liquidated damages in the event of delay in commissioning of Radio Paging Service. Vide another letter dated 30/31st December 1996, the petitioner asked respondent to provide information District Headquarter/ important town-wise in respect of various matters mentioned therein. The respondent gave necessary information to petitioner vide its letter dated 6th January 1997. The respondent informed petitioner that activities of Radio Paging Service would be made operational after SACFA clearance and frequency allocation. The 15% of the license fee that had become due, was not paid by the respondent. The petitioner vide another letter dated 31st January 1997 again asked the respondent for payment of 15% of the license fee and told the respondent to arrange the remittance of the dues immediately, not later than 7th February 1997 along with penal interest. The respondent was informed that in case it does not remit the license fee, action would be taken as per the contract and the amount would be realized through financial bank guarantee in

terms of the contract without further intimation. The respondent did not pay the license fee even after this. The petitioner invoked the financial bank guarantee for Rs. 90,17,000/- to the extent of 42,20,924/- i.e. the amount due towards quarterly license fee with penal interest. The respondent moved TRAI and obtained an interim order against encashment of the bank guarantee. This interim order was subsequently vacated. The respondent then moved this Court and a learned Single Judge of this Court granted interim stay against encashment of bank guarantee, which was also later on vacated. Against that order, an appeal was preferred by respondent before the Division Bench of this Court. During pendency of this appeal, the respondent paid Rs. 75,14,000/- to the petitioner and the bank guarantees were returned to the respondent duly discharged by the petitioner. In the meantime, petitioner vide letter dated 10th February 2000 terminated the license agreement with effect from 18th March 1997. The respondent raised disputes vide letter dated 15th December 2000 which resulted into appointment of the Arbitrator and passing of the award which is under challenge.

4. The claim of respondent before the Arbitrator was that the termination of license agreement by petitioner was illegal and unjustified and was not in accordance with the terms of the contract and the invocation of bank guarantees by petitioner was also illegal and unjustified. It was stated that since the site approval by SACFA had not been granted to the respondent, the question of starting Radio Paging Service from the due date did not arise and the contract stood terminated/ frustrated on 29th November 1996 and, therefore, no license fee became due on that date. In the alternative, it was submitted, that even if the respondent was at fault on account of delay of commissioning of Radio Paging Service, the petitioner could only claim liquidated damages to the tune of Rs. 20 lac as per the Condition 13.2, Schedule B, Part-II of the license agreement. The respondent had also relied upon Clause 18.6 of the license agreement and stated that in terms of this clause, a termination notice would have been deemed to be served on the respondent on 28th February 1997 and the notice for termination dated 10th February 2000 was therefore invalid. In view of these submissions, the respondent raised following claims against petitioner before learned Arbitrator:

- a) Refund to the Respondent of Rs. 75.14 lakhs appropriated by the petitioner by way of encashing the Financial Bank Guarantee and the Performance Bank Guarantee on May 26, 2001;
- b) Payment of a sum of Rs. 18.30 lakhs by the petitioner as interest @ 20% per annum compounded monthly, on the said amount from May 26, 2001 till the date of filing of the Statement of Claim, i.e. June 28, 2002;
- c) Refund by the petitioner of Rs. 10.02 lakhs paid by the respondent/ Claimant towards 10% advance of license fee paid at the time of signing of License Agreement along with interest amounting to Rs. 27.21 lakhs, thereon @ 20% per annum compounded monthly from the date of payment till the date of filing of the

Statement of Claim;

d) Payment by the petitioner of Future interest @ 20% per annum compounded monthly from the date of filing of the Statement of Claim till final realization of the amounts referred to in claims (a), (b) and (c);

e) The claim of the petitioner for liquidated damages under Clause 13.1 of the License Agreement was illegal.

5. The learned Arbitrator dealt with the issue of validity of the termination of contract by petitioner and came to conclusion that the contract between the parties stood frustrated and it could not have been possible for the claimant to perform its part of obligation under the license agreement by 29th November 1996 in absence of site clearance by SACFA, which was necessary for establishing and commissioning of Radio Paging Service under the license agreement. Since the contract stood terminated due to frustration, the liability of the respondent under the contract stood discharged on 29th November 1996 by the termination of license agreement and the letter dated 10th February 2000 issued by the respondent was of no consequence. The learned Arbitrator did not consider the alternative submissions made by the respondent i.e. even if the respondent was at fault on account of delay in commissioning of Radio Paging Service, its liability was limited to maximum amount of liquidated damages under Condition 13.2, Schedule B, Part-II of the license agreement. After holding that the contract stood frustrated, the learned Arbitrator upheld the claim (a) of the respondent and partly allowed claim (b) and observed that the invocation of performance bank guarantee and financial bank guarantee by the petitioner on 18th March 1997 was not valid and the respondent was entitled to refund of Rs. 75.14 lac appropriated by the petitioner by way of encashment of bank guarantee and the respondent was entitled to interest on this amount @ 12% per annum. All other claims of the respondent were disallowed except the costs of arbitral proceedings to the tune of Rs. 3 lac.

6. The award of learned Arbitrator has been assailed by the petitioner on the ground that the learned Arbitrator travelled beyond the reference and the Arbitrator completely omitted to decide the terms of reference. It is pleaded that following were the disputes and differences between the parties as defined at the time of appointment of the Arbitrator:

a) Whether the Respondent (UOI) illegally and wrongfully terminated the License agreement dated 5.6.95 between the parties? If so, whether the demand made by the Respondent (UOI) consequent upon the said illegal termination is null and void, non-est, bad in law and of no effect whatsoever?

b) Whether the Invocation and encashment of the bank guarantees furnished by the Petitioner in favour of the Respondent (UOI) is illegal, null and void and bad in law?

(c) If the answer to (b) is in the negative, whether the maximum amount which the Respondent (UOI) could claim from the Petitioner could only be limited to the amount of license fee for one quarter 30.11.95 to 29.2.96 and not additionally for any other amount whatsoever?

(d) Whether, in the absence of grant of SACFA approval as aforesaid, consequent whereupon only the service could be commissioned, no license fee was due and payable by the petitioner to the Respondent?

(e) Whether the Respondent is liable to return along with interest, the monies received by it on encashment of the Bank Guarantee furnished by the Petitioner in pursuance of the License agreement?

7. The petitioner assailed the award on the ground that the doctrine of frustration of contract as applied by the Arbitrator was not at all applicable nor it was the matter referred to the Arbitrator. The Arbitrator failed to take note of the fact that the parties had arranged a meeting at the instance of respondent even after the so-called date of frustration of license agreement to review and thus the principles of frustration of the contract were not applicable. Nor frustration of contract was pleaded by the respondent at any stage during the period when the respondent was seeking extension of time for commissioning of Radio Paging Service and was seeking concessions. It was submitted that the Arbitrator grossly erred in law when he relied upon 1996 (1) SCC 405 to cover the initial delay on the part of respondent in taking steps towards commissioning and took a stand that the respondent was not obliged to take immediate steps. It is submitted that the Arbitrator was referred the issue of validity of the termination of the contract, but the learned Arbitrator derailed himself and held that termination was of no consequence due to frustration of contract. It is further submitted that the award given by the Arbitrator was contrary to the terms of the contract.

8. The license agreement as entered into between the parties on 15th January 1996 contained following clauses, which are relevant for the purpose of considering this petition:

6. The Licensor may at any time revoke this license by giving a notice of 90 days on the breach of any of the terms and conditions herein contained or in default of payment of any consideration payable hereunder.

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Part-II: Terms & Conditions:

1.3 For the purpose of providing the Services, he may install suitable equipment to meet the Technical Specifications of Tender Document No. 44-113/94-MMT.

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2.1 The licensee shall within three months of date on which this license comes into force and from time to time as the Authority may require, furnish details of the installation and other related aspects to the Authority. He shall also submit report of progress every three months till the Service is provided.

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3.1.1. The licensee shall be responsible for installation, testing and commissioning of all the equipment to provide the services. All performance tests required for successful commissioning of the services shall be carried out by the Authority before the services are commissioned for public use. The Licensee shall supply all necessary literature, drawings, installation materials regarding the equipment installed for commissioning of the services. The Licensee shall supply all the tools, test, instruments and other accessories to the testing party of the Authority for conducting the tests. The Authority reserves the right to measure the quality of service during the currency of the license. Notwithstanding the above, the quality of service shall be measured and confirmed to the acceptable before bringing into commission the services. Should a need arise the Authority reserves the right to measure the same.

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3.2.1 The Licensee shall provide the Services within twelve months of the Effective date.

3.2.2 The time required for conducting the performance tests by the Authority is included in the twelve months commissioning period. The Licensee should offer the Services for such testing at least 30 days in advance so that time over run do not occur. Delay caused due to rectification of deficiencies, if any, in the commissioned/provision of Services would be to the account of the licensee.

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6.1 A separate license shall be required from the WPC Wing of Ministry of Communications, which will permit utilization of appropriate radio frequencies for the establishment and operation of Radio paging Service under usual terms and conditions of the license. Grant of license will be governed by normal rules, procedures and guidelines and will be subject to completion of necessary formalities.

6.2 For this purpose, an application shall be made to the "Wireless Advisor to the Government of India, WPC Wing, Ministry of Communications, Sardar Patel Bhavan, Sansad Marg, New Delhi- 110001" in a prescribed application form available from WPC Wing.

6.3. Siting clearance in respect of fixed stations and its antenna shall be obtained from the WPC Wing for which the applicant shall apply to the Secretary, SACFA

(Standing Advisory Committee on Frequency Allocations) in the prescribed application form, to the following address:

The Secretary (SACFA), WPC Wing,
Ministry of Communications,
Sardar Patel Bhavan, Sansad Marg,
New Delhi-110001

Note: SACFA is the apex body in the Ministry of Communications for considering matters regarding frequency allocations and related issues. (siting clearance refers to the agreement of major wireless users for location of proposed fixed antenna from the point of view of compatibility with other radio systems and aviation hazard. It involves inter departmental coordination and is an involved process.

6.4 Initially one frequency with adjacent channel spacing of 25 KHz would be assigned on case by case basis, after due coordination wherever considered necessary. Thereafter, it and when necessity arises, use of 2nd frequency would be considered for which suitable justification would be provided by the applicant.

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13.1 The date of delivery of the Service stipulated in the scheduled C Part III Clause 1.1 of this license shall be deemed as the essence of the license and the Service must be brought into commission not later than that date. Extension will not ordinarily be given. Should , however the Service be brought into commission after the expiry of the stipulated date of commissioning, without prior concurrence of the licensing Authority and be accepted by it, such commissioning will not deprive the Authority of its right to recover liquidated damages under this Condition. When, however, the commissioning of the service is effected within 15 days of the licensed commissioning period, Authority may accept the Services and in such cases the provision of the Condition 13.2 will not apply.

13.2 In case the Licensee fail to bring the Service or any part thereof into commission within the period prescribed for the commissioning, Authority shall be entitled to recover Rs. 1 lakh (Rupees: One Lakh) for each week of the delay or part thereof, subject to maximum Rs. 20 lakhs (Rupees Twenty Lakhs), for each service area. For delays of more than 20 weeks the license will be terminated as per Condition 14.

13.3. The liquidated damage charges shall be calculated from the last date of the bringing into commissioning without grace period of 15 days as per paragraph 13.1 above. Commissioning shall mean complete installation of main equipment and offer of Service to general public, so as to meet at least 10% of the registered demand, all over the service area and subject to the relevant performance/ quality tests to be carried out by the authority.

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14.1 Termination for Default:

The Authority, may, without prejudice to any other remedy for breach of conditions of license, by written notice of default, give to Licensee at its registered office 90 days in advance, terminate this license in whole or part under any of the following circumstances:

- (a) if the Licensee fails to provide any or all of the Services within the time period(s) specified in Schedule B, Part II Clause 1.1 of this license or any extension thereof granted by the Authority.
- (b) if the Licensee fails to perform any other obligation(s) under the license including timely payments due to the Authority as mentioned in Clause 18.
- (c) if the Licensee, in either case of the above circumstances, does not rectify the failure within a period of 30 days (or such longer period as the Authority may authorize in writing) after the receipt of the default notice from the Authority.

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17.4 Performance bank guarantee:

The Licensee shall execute a Performance Bank Guarantee as per details given in Clause 9 of Commercial Conditions of tender document on Radio Paging Service (No. 44-113/94-MMT) before the license can become effective. This shall be submitted by the Licensee along with the acceptance of letter of intent in the performa given in Annexure-II. Bank Guarantee Amount for each territorial circle quoted which has installed capacity of telephone exchange lines (as on the last day of the month previous to the month in which license is granted) will be as under:

Installed Telephone Exchange Capacity	Bank Guarantee Amount
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i) More than 5 lakh lines	Rs.50 lakh
ii) More than 1 lakh lines & upto 5 lakh lines	Rs.25 lakh
iii) Upto 1 lakh lines	Rs.10 lakh
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The Performance bank guarantee amount is subject to annual review as per dynamic changes in the installed capacity of telephone exchange lines of the licensed area (within the above mentioned slabs). The performance bank guarantee (s) shall be renewed at least 4 months prior to its expiry. Separate performance bank guarantee shall be submitted by the Licensee for each territorial circle for which the license is issued.

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18.1 (d) Schedule of payments of paging levy/license fee will be as follows:

(i) 10% along with the acceptance of letter of intent in the form of a bank draft.

(ii) 15% to be paid 10 days prior to the date of commission/operation of service for which due notice will be given by the licensee well in advance.

(iii) License fee/ paging levy for the balance period of first year will be paid in advance 10 days prior to the date of commission/operation of service by way of post dated cheques (Account Payee) drawn on scheduled bank in India at Delhi or else where (to be specified by the Telecom Authority).

(iv) License fee/ paging levy for each year is to be paid at the beginning of the year by way of post dated cheques (Account payee) drawn on scheduled bank in India at Delhi or else where (to be specified by the Telecom Authority).

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18.5 In case of overdue payments, interest will be charged @ 20% p.a. compounded monthly for each month or part thereof and is payable by demand draft. In case of default, it may be recovered through the Bank Guarantee or Bank Account maintained for the service in the Bank, if required. However the Authority reserves the right to revise the penal interest rate from time to time. The penal rate notified on the due date of payment shall be applicable. Where the penal rate is revised upward before the actual payment, then the interest for the delayed payment at such revised rates shall be recovered.

18.6. If the due payment is not received in time for a maximum period of three months, an adjustment will be made through Bank Guarantee and notice for termination of Contract would be deemed to have been served from the date the payment becomes due. DOT will retain option to discontinue the use of its facilities by the vendor immediately thereafter. Telecom Authority may also withdraw the facility under Clause 18.1 (d) (ii) and only permit further operation as per Clause 18.1(d) (i). This without prejudice to any other remedy, the Telecom Authority may decide to resort to.

9. It is argued by counsel for the petitioner that the learned Arbitrator had ignored the terms of the contract and had held that the contract got frustrated. This finding was contrary to the terms and conditions of the contract and contrary to law. Per contra, it is contended by counsel for petitioner that the arbitrator had given a reasoned award. This Court cannot sit in appeal over the award passed by the Arbitrator and give a finding on the issue of frustration of contract even if the Court held different view. The petitioner has failed to make out a case for interference by this Court as envisaged u/s 34 of the Arbitration & Conciliation Act, 1996.

10. The learned Arbitrator had observed that it was for the licensee to obtain the allocation of frequency and then clearance from WPC and SACFA. The application for allocation of WHF and UHF Frequency was submitted by respondent (claimant) on 13th May 1996. Both frequencies were assigned to the respondent on 6th September 1996. Thus, there was no delay in allocation of frequency. Regarding SACFA clearance, it is observed by learned Arbitrator that in view of the simplified procedure for expeditious disposal of application for grant of SACFA, the claimant submitted the application for grant of SACFA approval during pendency of application for allocation of frequency. The SACFA was the Apex body in the Ministry of Communication for considering the matters regarding frequency allocation and related issues and site clearance to the major wireless user for location of proposed fixed antennas from the point of view of compatibility with other users including the member of SACFA.

11. Learned Arbitrator noted the procedure being followed for the SACFA clearance and after noting down the procedure, the learned Arbitrator found that the application for SACFA clearance was made by respondent on 17th April 1996 in respect of 45 sites. The copy of the application was sent to different authorities as per the procedure and by letter dated 6th May 1996 to Airport Authority of India had intimated the claimant that height of the site above mean sea level given in the application was not authenticated by the municipal authority and the relevant government authorities. The claimant/ respondent was requested to submit certificate of authenticated of height of proposed sites for early clearance.

12. The application of respondent was considered by SACFA and a meeting was held on 26th July 1996 and the minutes of meeting placed on record of the Arbitrator showed that following was recorded:

1. DOT & AIR Requires correct AMSL.

2. U/Exam. By AAI and DCPW." [Vol.5, p.93].

13. This application was again considered in the meeting of SACFA held on November 29, 1996 and the minutes recorded that the application was cleared.

14. Though the sites were cleared but the respondent was supposed to produce the copy of agreement between WPC and respondent, to get a formal letter of site clearance. The respondent did not produce this copy of agreement and, therefore, the clearance was not finalized. When the respondent produced a copy of agreement, clearance letter was issued to the respondent on 11th March 1999 after receiving the copy of agreement. The respondent, however, claimed that the clearance letter was received by it on 9th April 1997. The learned Arbitrator observed that the SACFA clearance itself was given in respect of the sites mentioned in the application of respondent on 29th November 1996 and was intimated after the expiry of the due date of commissioning of Radio Paging Service. He observed since SACFA clearance was not given by the due date fixed for commissioning of

Radio Paging Service, the contract between the parties got frustrated and come to an end. The learned Arbitrator turned down the arguments of petitioner /Union of India that there was a delay in applying for SACFA clearance by the respondent because the application itself was made after more than five months from the issuance of letter of intent. The learned Arbitrator observed that it was not necessary for respondent to submit application after grant of letter of intent. The grant of letter of intent does not result into a concluded contract and this plea cannot be taken by the petitioner. The learned Arbitrator also observed that minutes of meeting of SACFA do not show that delay in giving clearance to application by SACFA was due to discrepancies in the application. The Arbitrator concluded that the grant of clearance of site by SACFA was delayed till 11th March 1997 and for this delay the respondent was not responsible. The respondent therefore could not take necessary steps for installation of equipment at fixed stations for commissioning of Radio Paging Service till 29th November 1996 in terms of the license agreement and failure on the part of claimant to install and commissioning of service was on account of circumstances beyond the control of respondent namely non- availability of SACFA clearance which was a condition precedent for establishment and operation of Radio Paging Service. The learned Arbitrator observed that on account of impossibility of performance of the contract i.e. on account of impossibility of starting Radio Paging Service on 29th November 1996 in absence of clearance of SACFA, the contract between the parties stood discharged by frustration on 29th November 1996 and the termination letter issued by the petitioner/Union of India dated 10th February 2000 was of no consequence.

15. It is apparent that the learned Arbitrator lost sight of all important provisions of the contract regarding commissioning of Radio Paging Service and delay in commissioning of Radio Paging Service. There is no doubt that the commissioning of Radio Paging Service was to be done by 29th November 1996 but respondent was very categorically informed by petitioner at the time of granting extension for acceptance in November 1995 that the effective date of license shall be considered as 30th November 1995. This itself shows that the respondent was made clear that he had to take steps for commissioning of Radio Paging Service within 12 months from 30th November 1995. The respondent had no time to loose and he was supposed to make the applications for clearance forthwith. This was again emphasized to the respondent while granting the second extension on 18th December 1995. Since the respondent had expressed his desire to accept the offer given in letter of intent and wanted time only for submission of bank guarantees and deposit of 10% of the license fee, there was no hindrance on the respondent in starting the work on the project of commissioning Radio Paging Service from 30th November 1995, when it was made clear to the respondent that the effective date of license will be considered as 30th November 1995. The agreement between the parties specifically notified to the respondent what will be the different types of clearances required by respondent, who will be the authorities to whom the

respondent will have to apply, what will be the conditions which would be required to be fulfilled by respondent while seeking clearances.

16. Clause 13.1 of the contract had envisaged permitting a delay in grant of clearance and it provided that in case the commissioning of Radio Paging Service was brought after expiry of the stipulated date without prior concurrence of the licensing authority, then it will be accepted by it but such commissioning will not deprive the authority of its right to recover the liquidated damages under this condition. It is apparent from this clause that the contract was not supposed to come to an end on 30th November 1996 if the clearance had not been granted by that date due to any reason. In those cases wherein clearance was not granted and there was delay in commissioning of service, the concurrence could be obtained from the licensing authority for this delay and if no concurrence was obtained then the respondent would have been liable for liquidated damages. Clause 13.1 also provided that if the commissioning of Radio Paging Service was effected within 15 days of license of the commissioning period, the authority may accept the Radio Paging Service in such case without invoking the clause of liquidated damages provided under Condition No. 13.2. Clause 13.2 provided for imposition of liquidated damages where there was delay in commissioning of Radio Paging Service to the tune of Rs. 1 lac per week. It is obvious from the contract that the parties had entered into an understanding that all steps for obtaining clearances would be taken expeditiously and clearances would be obtained within a period of 12 months from the effective date of license. When there was a delay on the part of respondent and the respondent had not obtained clearances, the respondent would have to pay the liquidated damages and if there was no delay on the part of respondent, the petitioner could give concurrence for commissioning of Radio Paging Service after due date of commissioning without liquidated damages. This is also clear from Clause 14.1 which provides for termination of the license in the event of failure to commission of Radio Paging Service. Clause 14.1(a) provides that if licensee failed to provide any or all the services within the time period specified in the license or any extension thereto granted by the authority, the license may be terminated. When there is a provision for grant of extension by the authority for commissioning of Radio Paging Service with or without damages, the contract cannot be said to be frustrated only because the commissioning was not possible on the due date because of non-granting of clearance by SACFA before due date.

17. It is settled law that the Arbitrator cannot clothe himself with the jurisdiction it does not have and cannot act independent of the contract. When no specific question of law is referred to the Arbitrator, the decision of the Arbitrator on the question of law, framed by him and decided by him, would not be final, however, much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. Only when in a case where specific question of law touching upon the jurisdiction of the Arbitrator was referred to him for determining his jurisdiction by the parties, then finding of the Arbitrator on the said question of law

may be binding [Union of India \(UOI\) and Others Vs. Banwari Lal and Sons \(P\) Ltd.,](#)

18. The Supreme Court in above case also observed that an award can be set aside when the Arbitrator has mis-conducted the proceedings. The mis- conduct refers to legal mis-conduct which arises if the Arbitrator on the face of award arrived at a decision ignoring the material documents. In case of a reasoned award, the Court can interfere if the award is based upon a proposition of law which is unsound in law and which erroneous proposition of law vitiates the decision of the Arbitrator.

19. In the present case, the learned Arbitrator arrived at a conclusion of frustration of the contract ignoring the provisions of the contract which provided for extension of time for commissioning of Radio Paging Service in appropriate circumstances. This extension of time could be with or without damages depending upon the circumstances. There was no provision in the contract that in case of non grant of clearance by SACFA, WPC or other authorities before the due date of starting service, the contract shall stand frustrated. In fact, it was obligatory on the respondent to act with dispatch right after grant of license and to obtain permissions within a period of 12 months. If the delayed grant of clearance was not due to the respondents failure to apply in time whether the petitioner was liable to impose damages or liable to cancel the contract or not. Instead of deciding the issue whether in view of given facts, the petitioner rightly cancelled the contract and forfeited certain amount out of bank guarantees, the learned Arbitrator held that the contract itself was frustrated due to non grant of SACFA permission by the due date of commissioning of service. Even otherwise, the doctrine of frustration of contract in its original meaning as applicable in English Courts, is not followed in India. In India, the doctrine of frustration of contract, is valid to the extent as provided u/s 56 of Indian Contracts Act which lays down as under:

56. Agreement to do impossible act

An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful: A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful: Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

20. The Supreme Court in [Govindbhai Gordhanbhai Patel and Others Vs. Gulam Abbas Mulla Allibhai and Others,](#) observed that the meaning of expression "impossible of performance" as used in Section 56 of the Indian Contracts Act has to be taken the same as observed by Lord Loreburn in *Tamplin Steamship Co. Ltd. v.*

Anglo-Mexican Petroleum Products Co. Ltd. (1916) 2 AC 397 in following exposition of the law relating to frustration. "The parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible".

21. In *Travancore Devaswom Board v. Thanath International* (2004) 13 SCC 44 the Supreme Court observed that in the performance of a contract, one often faces, in the course of carrying it out, a turn of events which are not anticipated e.g. an abnormal rise or fall in prices, sudden depreciation of currency, an unexpected obstacle to execution or the like. It was held that these do not affect the bargain that has been made. There was no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an unanticipated turn of events, the performance of the contract has become onerous.

22. This Court in [Eacom's Controls \(India\) Limited Vs. Bailey Controls Company and Others](#), observed that in the cases of self-induced disability, which could have been removed by the petitioner himself, Section 56 of Contracts Act was not applicable. Unless the supervening event is such which can be said to have struck at the root of the contract and the basis of the agreement has been taken away, the party is not justified in pleading frustration of contract.

23. In [Interore Fertichem Resources SA Vs. MMTC of India Limited](#), this Court observed that while considering frustration of contract, the real question is whether the frustrating event relied upon is truly an outside or extraneous change of situation or whether it is an event which party seeking to rely on had the means and opportunity to prevent it, but nevertheless caused or permitted it to come about.

24. Section 56 of the Indian Contracts Act provides for applicability of frustration of contract only in those cases where by some reason or some event, which the promisor could not prevent, the contract could not be performed. Wherever the events can be prevented or contract can still be performed despite happening of events, I think the contract cannot be said to be frustrated u/s 56 of the Indian Contracts Act.

25. Counsel for the respondent, has vehemently argued that this Court has only supervisory role u/s 34 of the Arbitration & Conciliation Act, 1996 and this role should be kept at minimum level and the interference is envisaged only in rare cases of violation of natural justice etc. Interference on account of patent illegality was permissible only if same goes to the root of the matter as held in [McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others](#), The reliance is also placed on other judgments. In view my, it is a case where the arbitrator paid no attention to the terms of the contract and had not even considered the fact that operation could be started even with a delay. The termination of contract was one of the facets of the contract and the termination could have been done by the petitioner under

appropriate circumstances as provided under the contract. The arbitrator was to adjudicate if the termination was invalid or valid. The learned Arbitrator had also not considered the question whether the levy of damages by the petitioner on the respondent was as per the terms of the contract or not. The Arbitrator found out a very simple solution to the whole problem by holding that the contract got frustrated. Unfortunately this was held without referring to the terms of the contract.

26. I consider that the award passed by the learned Arbitrator is contrary to the terms of contract and the question of law decided by the Arbitrator regarding frustration of contract is contrary to settled legal proposition. The petition is allowed and the award passed by the learned Arbitrator is hereby set aside. No orders as to costs.