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

Reserved on: 29th July, 2021
Pronounced on: 7th September, 2021

\+ **ARB. A. (COMM.) 32/2021 & I.A. 8724/2021**

BHARAT SANCHAR NIGAM LIMITED (NZ) ..... Appellant
Through: Mr. Dinesh Agnani, Senior Advocate with Ms. Leena Tuteja, Advocate.

versus

CHANNEL VAS SERVICES INDIA PVT. LTD. ..... Respondent
Through: Mr. Krishnan Venugopal, Senior Advocate, Mr. Ajoy Roy, Mr. Shantanu Tyagi, Ms. Neha Goel, Mr. Gaurav Ray and Mr. Shivendra Singh, Advocates.

\+ **ARB. A. (COMM.) 33/2021 & I.A. 8773/2021**

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Through: Mr. Dinesh Agnani, Senior Advocate with Ms. Leena Tuteja, Advocate.

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CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J.

1. The Appellant – Bharat Sanchar Nigam Limited [*hereinafter referred to as* '***BSNL***'], in the present appeals under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as* '***the Act***'] is aggrieved by a common order dated 17th May, 2021 passed by the learned Sole Arbitrator [*hereinafter refer to as the* '***Impugned Order***'] which disposed of, with certain directions, the applications filed by the Appellant (being the Respondent therein) under Section 17 of the Act in respect of two arbitration proceedings which are the subject matter of the captioned petitions.

BRIEF FACTS:

2. Before proceeding to decide the scope of challenge, it would be apposite to briefly note some relevant dates and events.

2.1. On 06th August 2015, BSNL floated a tender for development of systems for installing and operating an Easy Credit Platform service [*hereinafter referred to as* '***ECP'***] to enable BSNL's subscribers to avail loan/ talk time/ data facility, for deployment in four zones i.e., East, West, North and South.

2.2. The Respondent – Channel Vas Services India Pvt. Ltd. [*hereinafter referred to as* '***CVSIPL'***] participated in the same and was declared as the successful bidder for North and South Zones.

2.3. CVSIPL was required to submit a performance bank guarantee for 20% of the financial quote for the first year, with add-on performance bank guarantees of 35% for the second year and 45% for the third

year [*hereinafter referred to as* '***PBGs***']. However, no PBGs was submitted by CVSIPL for the second and third year.

2.4. Thereafter, Work Order dated 25th January 2017 was placed by BSNL for South Zone, [in Arb. A Comm. 33/2021] and Work Order dated 31st January 2017 for North Zone [in Arb. A Comm. 32/2021]. These are the Contracts from which disputes have arisen in the present petitions [*The two work orders are hereinafter collectively referred to as the* '***Contracts***']. The Contracts were for a period of 40 months, including four months of regular deployment-cum-integration period from the date of respective Work Order.

2.5. The dates of soft launch were 24th August 2017 [for South Zone in Arb. A Comm 32/2021] and 01st November 2017 [for North Zone in Arb. A Comm 33/2021] and the commercial launch was specified as 18th June 2018. The date of commercial launch, however, is disputed by CVSIPL alleging that no commercial launch has happened till date in South Zone. The ECP services have been opened for all customers for South Zone from the date of soft launch.

2.6. According to BSNL, the first-year financial target/ business done by CVSIPL was INR 5.72 Crores, i.e., only 13% of the financial target for the first year, and 2.6% of the total target under the Contract.

2.7. CVSIPL *vide* notice dated 27th November 2018, claimed default/ breach on the part of BSNL, alleging: (i) failure of BSNL to communicate complete and correct details of the bid before awarding the Contracts; (ii) failure on the part of BSNL to effectuate the

Contracts within specified timelines; (iii) significant reduction in the number of active subscribers and average revenue per user (ARPU) even after award of Work Order in January 2017 and change in business model of BSNL; (iv) award of PBG and additional PBG being disproportionate and *in terrorem*; (v) lack of good faith and fundamental breach on the part of BSNL amounting to misrepresentation; (vi) once the entire substratum and essential subject matter of the Contracts has been significantly eroded, the Contracts are rendered frustrated in entirety; (vii) the entire agreement envisaged through the Tender and the Work Orders is rendered nugatory, and stands frustrated due to reasons not attributable to CVSIPL; and (viii) BSNL has imposed unconscionable and unreasonable terms for obtaining PBG which too has rendered the Tender null and void. In the aforesaid notice, CVSIPL further stated:

> *"22. We therefore call upon BSNL (i) to treat the contract as closed and the original agreement as cancelled; (ii) forthwith return the PBG provided by CVSIPL; (iii) pay an amount of INR 78,998,031.79 towards all investments made as well as the monthly recurring/ running costs and expenses suffered by Channel VAS until November 30th, 2018 alongwith an interest 20% from the date of this notice."* [emphasis supplied]

2.8. Thereafter, in 2019, BSNL invoked the PBG submitted by CVSIPL for the first year.

2.9. CVSIPL invoked arbitration in February 2019 and a Sole Arbitrator was appointed for adjudication of disputes pertaining to the Contracts. CVSIPL filed its claims seeking nearly identical reliefs in

both proceedings. In order to understand the perspective of CVSIPL and the scope of proceedings, the relief sought with respect to North Zone is extracted below:

> *"(a) pass an Award declaring the Contract/ Work Order dated 31.01.2017 entered by and between the Claimant and the Respondent is void.*
>
> *(b) pass an Award declaring that the Contract/ Work Order dated 31.01.2017 entered by and between the Claimant and the Respondent is void at the instance of the Claimant.*
>
> *(c) pass an Award declaring that the Claimant is entitled to the following payments from the Respondent:*
>
> > ***Claim 1**: amounts under PBG and other cost in respect of the same; **Claim No. 2**: cost of installation of ECP system; **Claim No. 3**: amounts spent in purchasing or time from the Respondent; **Claim No. 4**: cost of integration with the system of the Respondent and /or its third party vendor; **Claim No. 5**: cost of operation and deployment of resources for the ECP system**; **Claim No. 6**: damages towards opportunity cost of the amount blocked for the purpose of furnishing the SBLC/CBG; **Claim No. 7**: interest on the said claims; **Claim No. 8**: cost."*

2.10. The said arbitral proceedings are presently underway and are stated to be at the stage of cross-examination of BSNL's witnesses.

2.11. In the said proceedings, BSNL filed an application for interim relief under Section 17 of the Act, *inter alia*, contending that the contractual term has come to an end, and therefore, BSNL should be given liberty to disintegrate the ECP software developed by CVSIPL, from the system of BSNL. The application made the following prayers:

> *"a. The Respondent be given a liberty to disintegrate the ECP developed by the Claimant from the system of the Respondent/ BSNL;*
> *b. The Claimant may be directed to hand over all the CDR data and any further data of the Respondent in power and possession of the Claimant and also to transfer all the rights with respect to all the software and documents developed for the ECP System in accordance with the terms of the contract;"*

2.12. CVSIPL contested the aforenoted application, *inter alia*, alleging that BSNL has no justification for approaching at a belated stage. CVSIPL urged that BSNL's intentions were *mala fide* and the application had been filed to deliberately delay the timelines in the pending arbitration. The nature of relief sought was final, and BSNL should not be allowed to seek the same in the garb of an interim relief. Instead, BSNL should await the outcome of the arbitral proceedings.

2.13. On 17th May, 2021, after considering the submissions of the parties, the Impugned Order was passed by the learned Arbitrator, giving certain directions in the form of a protective order, in favour of BSNL. The operative portion of the order reads as follows:

> *"19. (...) In view of the aforesaid premises, it is directed:-*
> *(i) The Claimant shall not create any third-party interest in the ECP developed by it from the system of the Respondent -- BSNL;*
> *(ii) The Claimant shall not transfer the CDR data and any further data of the Respondent in its power and possession in any manner to anyone;*
> *(iii) The Claimant shall maintain all software and documents developed for the ECP system and would be in a position to transfer the same in terms of the contract depending on the nature of the final award;*
> *(iv) If, in the ultimate eventuality, the Respondent would be entitled to the items as claimed, the Tribunal may consider any other*

consequential relief as permissible in law and assessable in thisarbitral proceedings"

2.14. BSNL is aggrieved from the Impugned Order, as it is silent with respect to prayer 'a' sought in its Section 17 application i.e., seeking disintegration of the ECP developed by CVSIPL from the system. This is the grievance raised in the present appeals.

CONTENTIONS OF THE PARTIES:

3. Mr. Dinesh Agnani, Senior Advocate for BSNL, contended as follows:

3.1. The Arbitral Tribunal has ignored the fact that BSNL is well within its right to disintegrate ECP from its system, as it cannot be forced to continue to fulfil its contractual obligations beyond the expiry of the term of the Contracts. In fact, BSNL had approached the Arbitral Tribunal under Section 17 only by way of an abundant caution, and for showing its deference to the arbitral proceedings.

3.2. The pendency of arbitral proceedings cannot be a ground to compel BSNL to keep the Contracts alive when the same have expired. Irreparable injury shall be caused to BSNL in case the ECP is not disintegrated. Forced continuation of contractual obligations cannot be compensated by way of monetary damage.

3.3. As long as the ECP system stands integrated, CVSIPL holds unlimited access to BSNL's entire customer database, which is thus exposed. This is impermissible and contrary to the Contracts.

3.4. CVSIPL cannot be allowed to argue that Contracts should subsist during the arbitral proceedings. There is no provision in the Contracts which gives CVSIPL the right to access BSNL's system, software, or customer database, post the termination of the contract. On the contrary, after expiry of the contractual period, there is an obligation on the part of CVSIPL to hand over entire data including the software developed during the contractual period, to BSNL.

3.5. Moreover, the disintegration of the system would not affect any rights created in its favour under the Contracts, especially when it is before the Arbitral Tribunal.

4. Mr. Krishnan Venugopal, Senior Advocate for CVSIPL, strongly resisted the prayer made in the present appeals by making the following submissions:

4.1. The learned Arbitrator has exercised discretion in a fair manner. There is no arbitrariness or perversity in the Impugned Order which may warrant interference.

4.2. The relief sought by BSNL in its counter-claim and the one sought in its Section 17 application have no nexus.

4.3. The ad-interim relief of disconnecting CVSIPL's ECP software from BSNL's system represents a final relief and is not 'interim' in nature. Thus, the relief sought in the application before the learned Arbitrator was beyond the scope of Section 17(1)(ii) of the Act. The said Section must be invoked for an interim relief and must also be protective in nature. The relief sought by BSNL is not protective in character, because it involves a mandatory interlocutory injunction.

4.4. Moreover, the relief sought does not even meet the requirements for a mandatory interlocutory injunction. Reliance was placed upon the judgment in ***Metro Marins v. Bonus Watch Co. (P) Ltd***.,[1] where the Supreme Court approved the tests laid down in ***Dorab Cawasji Warden v. Coomi Warden***,[2] for grant of an interim mandatory injunction. Mandatory injunction can be granted only in cases falling within the exceptions noted in ***Dorab Cawasji*** (*supra*).[3] The holding in ***Metro Marins*** (*supra*) squarely applies in the present case because BSNL is also praying for mandatory interim relief of disconnection of CVSIPL's system on the ground that the contract period has ended. The exceptional situation(s) as identified in ***Dorab Cawasji*** (*supra*) do not apply because it is not even BSNL's case that connection of CVSIPL's ECP system to its system was done

[1] (2004) 7 SCC 478.
[2] (1990) 2 SCC 117.
[3] The exceptional situations recognised are: (i) compelling the undoing of those acts that have been illegally done, (ii) restoration of that which was wrongfully taken from the party complaining, and (iii) preservation or restoration of the status quo of the last non-contested status which preceded the pending controversy.

illegally or wrongfully. Therefore, this is not a fit case for passing a mandatory injunction for disconnection, as sought by BSNL.

4.5. BSNL stands adequately protected, as the learned Arbitrator has fully safeguarded BSNL's interest by passing directions in the Impugned Order, such as directions to CVSIPL to maintain confidentiality of BSNL Call Data Records ('CDRs') vis-à-vis third parties. This interim arrangement, as set out in the Impugned Order, has worked seamlessly for the last two and a half months, and BSNL has not been able to point out a single reason as to why any interference is necessary at this stage.

4.6. The balance of convenience is in favour of CVSIPL as it stands to lose a great deal in the event that its equipment is disconnected, for reasons that are as follows:

(i) The value of the unsold talktime already purchased by CVSIPL from BSNL is significant, and it can be sold only if the equipment is not disintegrated as CVSIPL continues to provide ECP services to BSNL's subscribers, which BSNL has consistently claimed is of vital importance for its business.

(ii) The significant amount of credit already extended by CVSIPL to BSNL's subscribers that has not been recovered, is possible only if the equipment is not disintegrated.

(iii) The relief of disconnection of CVSIPL's equipment from BSNL's system will also pre-empt, to some extent, CVSIPL's

prayer for award of cost of the installation of the equipment, as sought for in the arbitral proceedings.

4.7. Relief sought by BSNL cannot be granted at this stage as CVSIPL's reliefs in its Statement of Claim remain to be adjudicated by the Arbitral Tribunal. If the learned Arbitrator finds in favour of CVSIPL, under Section 65 of the Indian Contract Act, 1872 [*hereinafter referred to as* ***'Contract Act'***], the parties would have to be restored to the same position as they would have been, but for the Contracts. In that view of the matter, allowing BSNL's prayer, at this stage, would prevent the Arbitral Tribunal from restoring *status quo ante*.

4.8. In order to show and prove misrepresentation before the Arbitral Tribunal, under Section 19 of the Contract Act, CVSIPL would be required to rely on the information stored in the CDRs of CTOP-UP from August, 2015 i.e., since the date of floating of the Tender; however, CVSIPL has access to the CDRs of the CTOP-UP only from when the functional testing began, i.e., August 2017 for North Zone and November 2017 for South Zone.

4.9. CVSIPL intends to cross-examine BSNL's witness on certain quantitative information relating of CDRs of CTOP-UP system, which contains information vital for reconciliation of ECP services. Once the systems have disintegrated, BSNL could contest the numbers and value of CDRs of the CTOP-UP system. If the same is

downloaded by CVSIPL alone, it would not be able to disprove the same during cross-examination. It is, therefore, imperative to take all measures to protect and maintain the CDRs of CTOP-UP system from August 2015 onwards and also ensure preservation of evidentiary value of the information stored and maintained in the CDRs of CTOP-UP, at least till the cross-examination of BSNL's witness.

4.10. No prejudice would be caused to BSNL if disintegration of the system is not carried out for another three months, by which time such cross-examination is likely to be concluded.

4.11. Disintegration of the ECP by BSNL should not be allowed in the first place. However, in the alternative, suitable directions should be passed to protect the interest of CVSIPL so as secure the information in the CDRs of the CTOP-UP system and permit it to allow and confront BSNL's witness during cross-examination, which could be done as follows:

> *"a. Either allowing the parties to the Appeal to jointly download the information stored in the CDRs of CTOP-UP starting from August 2015 onwards or;*
> *b. By allowing the Respondent herein to download the information stored in the CDRs of CTOP-UP from August 2015 along with the applicable filtering keys, in the presence of an authorised representative of the Appellant."* [emphasis supplied]

ANALYSIS AND FINDINGS:

5. The Court has considered the submissions advanced by the parties. It is noted that the learned Arbitrator has observed in the Impugned Order that with respect to construction and interpretation of the clauses of the Agreement, findings would have to be returned on merits at the stage of final arguments. In these circumstances, a protective order has been passed, in favour of BSNL with respect to prayer 'b', which is extracted at paragraph no. 2.11 above. However, no findings were returned by the learned Arbitrator on prayer 'a', whereunder, BSNL sought liberty to disintegrate the ECP from its system. The challenge to the Impugned Order thus lies in this limited scope.

6. The factual background for making the aforenoted prayer 'a' is premised on two factors. Firstly, and predominantly, the term of the Contracts has come to an end. Secondly, as CVSIPL is before the Arbitral Tribunal for declaring the Contracts to be void or voidable, there can be no reason to deny BSNL the right to disintegrate the ECP from its system.

7. Let's now scrutinize the grounds for opposing the disintegration.

<u>What is the scope of the on-going arbitral proceedings?</u>

8. The scope of the pending arbitral proceedings can be gathered from:

8.1. The nature of reliefs sought by CVSIPL in its statements of claim in both the arbitration proceedings, which is identical. The relief sought with respect to South Zone is culled out as follows:

"*a. Pass an award declaring that the contract / Work Order dated 25 January 2017 entered into by and between the Claimant and the Respondent is void;*

b. Pass an award declaring that the contract / Work Order dated 25 January 2017 entered into by and between the Claimant and the Respondent is voidable at the instance of the Claimant; (...)"

8.2. The points for determination encapsulated by the learned Arbitrator in his order dated 24th September, 2019, which are also noted in the Impugned Order, reads as follows:

> *"4. The points for determination have been finalized. They are as follows :*
>
> *I. Whether the Claimant is entitled to a declaration as prayed for in prayers (a) and (b)?*
>
> *II. Whether the Claimant breached its obligations under the Contract and, if so, its effect?*
>
> *III. ... ...*
>
> *IV. Whether the Claimant is entitled to recover an amount of INR 74,97,723.00 from the Respondent towards the cost of installation of the Easy Credit System incurred by the Claimant?*
>
> *V. Whether the Claimant is entitled to recover an amount of INR 1,12,10,000.00 from the Respondent towards the money spent by it in purchasing Airtime?*
>
> *VI. Whether the Claimant is entitled to recover an amount of INR 5,73,103.00 towards the costs incurred for integration of its system with that of the Respondent and/or its third party vendors?*
>
> *VII. Whether the Claimant is entitled to recover an amount of INR 1,90,96,041.60 towards the costs incurred for operations and deployment of resources for the ECP system?*
>
> *VIII. Whether the· Claimant is entitled to damages to the tune of INR 2,77,72,539.11 towards the opportunity costs of the amounts blocked for the purposes of furnishing the Counter Bank Guarantees / Standby Letter of Credit in tum to furnish the Performance Bank Guarantee?*
>
> *IX. ... ...*
>
> *X. ... ..."*
>
> [emphasis supplied]

How has the integration between the ECP software developed by CVSIPL and BSNL's system come about?

9. The first and foremost question that begs an answer is how did the integration of ECP software with BSNL's system come about? There can actually be no doubt about the response thereto. The same is a condition arising out of the relationship between the parties flowing from the Contracts i.e., the Work Orders dated 25th January 2017 [for South Zone, in Arb. A Comm. 33/2021] and 31st January 2017 [for North Zone, in Arb. A Comm. 32/2021].

What stand has CVSIPL taken in the ongoing arbitration regarding the Contracts?

10. The contractual relationship has been called in question by CVSIPL. Upon a reading of the reliefs sought in the Statement of Claim and the issues framed by the Arbitral Tribunal in para no. 8, it becomes apparent that the case of CVSIPL is that the agreement between the parties is either void, or voidable at its option. In other words, the stand of CVSIPL is that the Contracts have no legal effect – i.e., it is not enforceable under law – and thus CVSIPL has no obligation to fulfil its contractual duties.

11. As CVSIPL has sought to avoid the Contracts in the arbitral proceedings, it is incomprehensible and incongruent that it would like the contractual obligations (i.e., integration of the system) to continue during the arbitral proceedings. If ultimately CVSIPL succeeds in the arbitration, its

stance will be declared absolute, and the Contracts be declared void/voidable, by way of the arbitral award. At that stage, CVSIPL could perhaps seek restoration to pre-contractual position, as contended by it before this Court, by relying upon Section 65 of the Contract Act. However, even that does not entitle CVSIPL to seek continuation of contractual obligations, which are presently being fulfilled inter-se the parties, on the strength of the Contracts, which are being avoided by it. The Court finds this stance taken by CVSIPL to be inherently contradictory to the relief claimed by it in the arbitration. It cannot approbate and reprobate its stand *qua* the Contracts as per its convenience.

12. Further, in terms of Section 65 of the Contract Act, if parties will be restored to pre-contract positions, then the integration of the ECP software would have to be undone i.e., disconnected. Hence, whatever the outcome, CVSIPL cannot claim a right to cling on to BSNL's system under an expired contract. CVSIPL has not acquired a right on account of continuation of obligations, certainly not beyond the terms of the Contracts.

13. Further, it has also to be borne in mind that the stand of CVSIPL with regard to the Contracts is evident from the Statement of Claim made by it. In addition to the relief of declaration that the Contracts are void or voidable at its option [as noted in para 4(I) and (II) of the Impugned Order], CVSIPL has also sought monetary claims, [as noted in para 4(I) and (II) of the Impugned Order] which, *inter alia,* includes the cost of installation of the ECP system; the amounts spent in purchasing talktime from CVSIPL; cost of integration with the system of BSNL and/or its third-party vendor, etc.

These monetary claims are consequential to the relief of declaration. CVSIPL is seeking compensation towards damages it has allegedly suffered on account of a void/ voidable contract. If that is its stand, then all the more, the Court does not find any ground or reason for CVSIPL to insist that the integration of ECP with BSNL's system continue till such time they succeed in the arbitral proceedings.

14. Be that as it may, as of now, this dispute is subject matter of adjudication, and the scope of the present appeals is confined to the disconnection of the technical infrastructure that is presently integrated. Nonetheless, CVSIPL, as the wronged party, which is seeking to avoid the Contracts under the arbitration, cannot compel BSNL to remain contractually obligated till the time the arbitration attains finality. The narrative before the Court is disjointed and it is hard to understand the rationale of CVSIPL's stand.

What is the legal effect of the expiry of term of the Contracts?

15. BSNL has asserted that the terms of the Contracts expired on 24th May 2020 [with respect to South Zone] and 30th May 2020 [with respect to North Zone] respectively. CVSIPL's stand with respect to North Zone, is that the contractual period ended on 6th March 2021 and for South Zone, it contends that there was no commercial launch till date, and that the ECP services have been opened for all customers for South Zone from the date of soft launch (i.e., 24th August 2017).

16. Irrespective of this disputed stand with respect to expiry, the date of execution of the Contracts and provisions stipulated therein, are beyond doubt. Even if CVSIPL's contention that contract period ended on 6th March 2021 is taken, then too, *ex-facie* the agreement has lived its term. On expiry thereof, parties are discharged of their obligations, unless the Contracts expressly provided for covenants that would survive termination/expiry. No such clause for mitigation of loss or utilization of the talktime, has been shown to the Court which could be cited by CVSIPL as a ground to remain connected to BSNL's system beyond expiry or termination of the contract.

17. In view of the foregoing, as well as the stand taken by CVSIPL that the Contracts are void/ voidable, the Court is unable to find any ground whatsoever for CVSIPL to insist that the ECP developed by them should not be allowed to be disintegrated from BSNL's system.

What was contemplated under the Contracts regarding the disintegration of systems upon expiry of term?

18. Next, BSNL has explained that on expiry, they are entitled disintegrate the system. Since the parties were before the learned Arbitrator, BSNL considered it prudent to make an application under Section 17 by way of abundant caution. Pertinently, the Court does not *prima facie* find any fact or law which restrains or prevents BSNL from *suo moto* disconnecting from or disintegrating from the software. However, since the parties were continuing in a relationship where they were fulfilling their rights and obligations under the Contracts, perhaps it was felt appropriate to approach

the Arbitral Tribunal for seeking liberty for the same. In the absence of any restrain, nothing in law or on under contract prevented BSNL from executing the disintegration, as and when it pleased. Making prayer 'a' in the application to the Tribunal was not even necessary. Possibly for this reason, the Tribunal did not consider it appropriate to make any observation on this point, one way or the other. Therefore, CVSIPL's resistance to disintegrate, in the absence of any restrain, is wholly misconceived. If CVSIPL desired that the contractual obligations should continue beyond the contractual term, it should have sought such a direction from the Tribunal.

Would allowing BSNL to disintegrate entail a mandatory injunction?

19. It is worth noticing that in the Impugned Order, as noted by the learned Arbitrator, CVSIPL's counsel had opposed the reliefs sought by BSNL on the ground of it being mandatory in nature. However, after some deliberation, CVSIPL did not press that point.

20. Further, the entire argument of CVSIPL – *being* that the relief sought in the application is in the nature of a mandatory interlocutory injunction – is mis-conceived. The relief sought by BSNL does not seek any direction to CVSIPL. In fact, during the course of arguments, on a query put to Mr. Agnani, Senior Advocate for BSNL, the Court was informed that technically, it is possible for BSNL to disintegrate the software now. BSNL was only seeking liberty which, in fact, amounted to bringing the culmination of the contract period to the notice of the Tribunal. However, as observed above, in the absence of any restrain order against BSNL passed by

the learned Arbitrator, the Tribunal conceivably did not consider it necessary to grant such a liberty.

No merit in CVSIPL's contentions

21. It is also pertinent to note that CVSIPL had not approached the Tribunal under Section 17 of the Act, seeking a direction against BSNL to restrain it from disconnecting the software or for such other reliefs, beyond the term of the contract. Thus, the Court does not find any merit in the contention of CVSIPL that the balance of convenience lies in its favour or that it stands to lose a great deal in the event its equipment is disconnected. The Court is in fact unable to appreciate this argument, as the entire claim of CVSIPL before the Arbitral Tribunal is to declare the Contracts to be void or voidable and claim damages. In fact, CVSIPL *vide* notice dated 27th November, 2018, called upon BSNL to "*treat the contract as Closed and the original agreement as cancelled*" [as extracted in para 2.7 above]. This stand, coupled with the reliefs sought before the Tribunal, cannot, therefore, create a balance of convenience in favour of CVSIPL. In fact, CVSIPL's argument that unsold talktime already purchased by CVSIPL from BSNL can only be sold if the equipment is not disintegrated, is untenable. These concerns and vulnerabilities are overplayed and have no legal footing. This, in fact, amounts to seeking a specific performance of the Contracts, which is completely contradictory and incongruous to its claim that the contract is cancelled/ void/ voidable. Besides, even if there is some semblance of contractual obligations existing between the parties that entitles CVSIPL to continue to keep the systems integrated, the same cannot, by any extent of

imagination, continue beyond the term of the Contracts. The monetary loss, if any, which is caused by such disintegration of the system, can only be the subject matter of a claim of damages, which CVSIPL is already seeking before the Arbitral Tribunal. Thus, the reasons set out by CVSIPL to contend that it would suffer loss are all in the nature of monetary claims, which cannot be a ground to foist liability on BSNL to continue with the integration beyond the term of the Contracts.

22. CVSIPL's contention that the reliefs claimed are final in nature is also misconceived. BSNL has filed a counter-claim before the learned Arbitrator, and has sought an amount of INR 130.02 crores for losses suffered by it on account of non-performance by CVSIPL and non-fulfilment of its three-year commitment under the Work Orders. This relief is not founded on the continued integration of the system. The disintegration of the system would not sustain, if either party succeeds. Thus, the Court does not find any merit in the contention of CVSIPL that the relief sought by BSNL, represents a final relief. Moreover, for the adjudication of claims or counter-claims, it is not necessary for the system to remain integrated. Thus, reliefs sought by either party before the Arbitrator, cannot preclude BSNL from disintegrating the software.

23. Next, let's look at CVSIPL's contention that the disintegration of the software would prejudice CVSIPL in its cross-examination of BSNL's witness during the arbitral proceedings on account of information relating to CDRs on the CTOP-UP system not being available. This ground, too, cannot be availed by CVSIPL to insist on continued of integration of the system.

The onus of proof for the claims sought by CVSIPL, is certainly on them. CVSIPL is required to prove its case in accordance with law. If certain information is necessary for proving any document, there are provisions available under law that CVSIPL can exercise. That cannot be construed to vest in CVSIPL a right to insist that the intimation should continue in order to aid CVSIPL in proving its claim before the Arbitral Tribunal.

24. Lastly, it is improper on the part of CVSIPL to contend that no prejudice will be caused to BSNL if disintegration of its system is not affected. The continuation of the integration of the two platforms entails several consequences. BSNL has indicated that the integration exposes its entire customer database by giving unlimited access to CVSIPL. This poses a serious question of data security and accountability and thus access to BSNL's system cannot continue beyond the term of the Contracts. The Court cannot, by way of an interim order, direct BSNL to sustain the connection between the two platforms, only in order to enable CVSIPL to cross-examine BSNL's witnesses.

CONCLUSION:

25. As discussed above, BSNL has not been restrained from disintegrating the software by the Arbitral Tribunal. However, in the proceedings before this Court, it is being given a colour as if the silence of the Tribunal with respect to this relief amounts to an injunction against BSNL. This interpretation cannot be gathered from the Impugned Order at

all. However, since BSNL had made a prayer seeking liberty, and since the Impugned Order is silent to that effect, it can be construed that such a relief has not been allowed.

26. In view of the above, the present appeals are allowed to the limited extent that, it is clarified that the Impugned Order does not in any way prevent BSNL from disintegrating its software, as prayed for in prayer 'a' of its applications under Section 17 of the Act, before the Arbitral Tribunal.

27. The Court has also considered CVSIPL's alternate prayers as noted in paragraph 4.11 above. However, in the opinion of the Court, the present appeals are limited in scope and confined only to the challenge to the non-grant of prayer 'a' in the Impugned Order. As already discussed above, CVSIPL made no application under Section 17 of the Act for any such relief. The Impugned Order is only silent on prayer 'a', on which a clarification has been made in paragraph 22. CVSIPL's request for directions, as sought for, thus cannot be the subject matter of the present appeals.

28. The appeals are disposed of, in the above terms. The pending applications also stand disposed of.

SANJEEV NARULA, J

SEPTEMBER 07, 2021
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