

**TELECOM DISPUTES SETTLEMENT & APPELLATE
TRIBUNAL
NEW DELHI**

**HON'BLE MR. JUSTICE D.P. WADHWA,
CHAIRPERSON**

For Petitioner : Mr.I.J.Desai,Advocate
For Respondent No.1 : Mr. Navin Chawla,Advocate
For Respondent No.2 : Mr. Jagdish A. Talati,Advocate

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S.14 (a) (i) of TRAI Act – Two ISP licenses were granted to Petitioner – Performance bank guarantee were furnished by 2nd respondent- Petitioner failed to provide service within stipulated time – Petitioner vide letter dated 01.05.2000 surrendered license - PBG revoked – Second respondent also paid interest for delay in encashing PBG – Suit filed in Surat court in respect of the right of the Respondent No. 1 to invoke and encash the PBG – exit policy for ISP's was announced in February 2002 under which license can be surrendered after payment of 5% of PBG- Respondent No.1 argued that the petitioner was not covered under the exit policy – Held – Action of the 1st respondent not justified - Refund PBG after deduction of the 5% of the PBG – Petition allowed – No order as to costs

ORDER

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This petition is filed under Section 14(a) (i) of the Telecom Regulatory Authority of India Act, 1997 (for short the TRAI Act). The petitioner a licensee of two Internet (ISP) licenses seeks the following reliefs:

- “63. The petitioner, therefore prays that:
- (a) This Hon'ble Tribunal may be pleased to pass a decree/order declaring that recovery of any amount from Resp. No.2 Bank by Resp.No.1 Union of India under the said Performance Bank Guarantees is illegal, unjustified and unauthorized in the facts and circumstances of this case.
 - (b) This Hon'ble Tribunal may be pleased to pass a decree/order directing refund of the amount of Rs.6,34,000/- in respect of the said PBGs by Res.No.1 Union of India to Resp.No.2 Bank or to the petitioner with interest at the rate of 12% till the date of refund.
 - (c) This Hon'ble Tribunal may be pleased to order costs of this petition to be paid to the petitioner company in respect of this petition.

- (d) This Hon'ble Tribunal may be pleased to grant such other relief or reliefs as may be found just and proper in the nature and circumstances of this case".

There are two respondents. First respondent is the Department of Telecommunication (the licensor) in the Ministry of Telecommunication & Information Technology and the second respondent is the Bank namely the Surat Peoples' Cooperative Bank Ltd. The record of the case is rather voluminous though the issue involved is quite simple.

These Two ISP licenses were granted to the petitioner on 4.12.1998 for the cities of Baroda and Surat (service area 'C'). Under the terms of these two licenses the Petitioner furnished Performance Bank Guarantee (PBG) for Rs. 6.00 lakhs by the 2nd respondent bank. Petitioner was to commence telecom service within 18 months from the effective date of the licenses and offer the services on demand to its customers. The petitioner failed in providing service, even though, the first respondent had reminded it by its letter dated 1.5.2000. On the failure of the petitioner to provide the service the Performance Bank Guarantee was invoked. The second respondent also paid Rs.34,000/- towards interest for its delay in encashing the Performance Bank Guarantee. Petitioner by its letter dated 15.5.2000 surrendered the licenses which was also in terms of the licenses. Bank Guarantee was, however, invoked and payment received by DOT, the first respondent. Surrender of the licenses was accepted by the first respondent by its letter dated 17.11.2000 and the petitioner was informed that the licenses were terminated for "convenience" w.e.f. 15.6.2000.

Dispute arose between the petitioner and the first respondent in respect of the right of the first respondent to invoke and encash the bank guarantee in the circumstances of the case. Petitioner filed a civil suit in Surat Court which was transferred to this Tribunal by the order of the Gujarat High Court. It is this very petition. Petitioner also filed a suit in the Gujarat High Court seeking a stay on the encashment of the Bank Guarantee. Since there was no stay the Bank Guarantee was encashed which led the petitioner to seek amendment of the petition before us and thus the prayers in the petition aforesaid. In the meantime, the first respondent came out with a

policy for ISPs which was stated to be published sometime in February 2002. This Exit Policy is as under:

“The Department of Telecom (DOT) has finalized a simplified exit policy, which permits Internet Service Providers (ISPs) to surrender the ISP license without starting the service, by paying surrender charges. The surrender charges would be equivalent to 5% of the Performance Bank Guarantee (PBG) amount.

The companies desirous of surrendering their licenses under the above policy shall be required to submit following documents:-

(a) A demand draft equivalent to 5% of the Performance Bank Guarantee in the name of Pay and Accounts Officer, Department of Telecom (HQ), New Delhi, payable at Delhi.

(b) Board of Directors' resolution indicating company's decision to surrender the license under the exit policy.

All communications in this regard should be addressed to ADG(LR-I), Room No.1021, Sanchar Bhawan, New Delhi.

Department of Telecommunication
Chairman,
Vinod Vaish.”

During the pendency of this petition we required the first respondent to consider the case of the petitioner if it fell under the Exist Policy. However, petitioner was denied if his case fell under the Exit Policy. Then during the course of arguments the following order was made on 27th November, 2003:

“I have heard arguments to some extent.

At the outset, Mr. Desai said he will address his arguments firstly limited to the alternative prayer that he is covered by the Exit Policy announced by the Department of Telecommunications for ISPs. That Exit Policy was announced in February 2002. A copy of that has been placed on record. It does not show the date on which this Policy was issued and if it was prospective in nature. Mr. Navin Chawla, learned counsel for the department submits that as far as the petitioner is concerned, he is not covered. According to Mr. Chawla case of the petitioner stood concluded inasmuch as the Bank Guarantee had already been encashed. He says license was given to the petitioner on 4.12.1998 and the petitioner was to commence service on or before 4.6.2000. Since no steps were taken by the petitioner to commence service, show cause notice was issued to him on 1.5.2000. However, the petitioner desired to surrender the license and he issued termination notice invoking clause 10.3 of the license (p.122 of Vol.1). At the same time the petitioner filed a Civil Suit on 5.6.2000 seeking declaration and injunction of Bank Guarantee. During the pendency of the suit, the petitioner was requested to extend Bank Guarantee on 18.10.2000 and on his refusal to do so Bank Guarantee was invoked on 31.10.2000 under clause 13.6 (p.125 of Vol.1).

Payment under the Bank Guarantee was demanded from the bank and since no action was being taken by the bank, Banking Ombudsman was approached and it was then that the bank made the payment on 28.12.2001. At the same time on 17.11.2000 notice of the petitioner seeking termination of the license was accepted. The Exit Policy however came to be issued in 2002 when whole transaction, as far as the petitioner is concerned, stood concluded. Mr Chawla said in these circumstances, petitioner is not covered under the Exit Policy.

I would like to know from DoT the background which led the issue of the Exit Policy and further, did any service provider who was given license similar to that of the petitioner and was to commence services on or before 4.6.2000, was given advantage under the aforesaid Exit Policy. Let an affidavit be filed by an officer of the department to this effect within four weeks' time, with a copy to the petitioner.

To be listed for hearing in the 4th week of January,2004.

Registry to inform the next date of hearing to the parties one week in advance”.

At this stage it will be appropriate to incorporate the relevant clauses of the licenses dealing with the commissioning of the licenses (clause 1.1), Termination for Convenience (clause 10.3), Return of the Performance Bank Guarantee (clause 10.5.4) and Performance Bank Guarantee (PGB) (clause 13.6):

“1.1 The LICENSEE shall commission the Applicable Systems within 18 months from the effective date of the licence and offer the service on demand to its customers.

10.3 TERMINATION FOR CONVENIENCE

If the LICENSEE desires to surrender the licence, it shall give an advance notice of 30 days to the Licensor to this effect. If the service is in operation, the licensee shall also intimate its subscribers of consequential withdrawal of service by serving a 15 days notice to them. The financial liability of the licensee company for termination of the licence for convenience shall be as follows:-

(a) After start of service: If during the notice period, the acceptable level of service is not delivered to the customer, the licensee shall forfeit all claims on the Performance Bank Guarantee which shall be encashed and the amount shall be adjusted towards damages.

(b) Before start of service: (Either prior to or after the scheduled date of commissioning) - Amount equivalent to Performance Bank Guarantee (PBG) shall be recovered by encashment of PBG and money so recovered shall be forfeited.

10.5.4 The Performance Bank Guarantee, if due, shall be returned to the licensee company 6 months after the termination of the license and after ensuring clearance of any dues which the licensee company is liable to pay.

13.6 Performance Bank Guarantee (PBG):

A performance bank guarantee of Rs. 2.00 crores for category 'A' Service Area, Rs.20.00 Lakhs for each category 'B' Service Area and Rs.3.00 lakhs for each category 'C' Service Area valid for two years from any Scheduled Bank in

the prescribed form (Schedule 'D' of the draft Licence Agreement) shall be submitted along with the application for each service area. The licensee will be liable to extend the validity of Performance Bank Guarantee two months prior to its date of expiry on its own without demand from the Licensor for a further period of one year on year to year basis. On any failure to do so which failures shall amount to the breach of this Licence, the performance bank guarantee will be encashed without giving any notice. This is without prejudice to any other action that may be taken under the terms and conditions of the licence”.

In pursuance of the order dated 27th November, 2003 an affidavit of Mr. G.S. Joshal, Director (LR-1) of the first respondent has been filed. Relevant paras are 3 and 4 which we reproduce:

“3. That it is most respectfully submitted that the issue regarding the course of action against the ISP Licensees who did not start the service within the stipulated time (18 months later extended to 24 months from the Effective Date) was examined by Government. The Government has considered the above issue specially in light of the fact that there has a general slow down of IT and Internet Industry world over and the same was also evident in India. Even extension of time for commencement of service had not helped and the IT Industry did not really pick up. About 20 companies who had started the Internet Service had surrendered their ISP Licence. This gave an indication that even those who had started the service some were finding it difficult to survive in the market. Therefore, it may not be prudent to expect that others who had not started the service would do so in near future. It was therefore, recommended to provide an exit route to these licensees who want to surrender their licence without starting the service by paying surrender charges equivalent to 5% of the PGB amount.

4. That it is further submitted that the following three companies, who could not start the services which was due before 4.6.2000, were also considered under the Exist Policy.

(a)M/s. SNC Inotech Pvt. Ltd.- Licence Agreement dated 09.11.1998
Terminated on 28.05.2002

(b)M/s. Somani Overseas Ltd.- Licence Agreement dated 18.11.1998
Terminated on 11.07.2002.

(c)M/s. Zaverchand Cyber Infotech Pvt. Ltd. – Licence Agreement dated 20.11.1998
Terminated on 11.07.2002.

After going into the affidavit I find it hard for the first respondent to justify the rejection of the case of the petitioner in terms of the Exit Policy. First respondent, to my mind, was not justified in refusing the case of the petitioner to fall under the Exit Policy and thus denying it the relief which the circumstances of the case required. I have not been able to get any explanation as to how the case of the petitioner was treated different than the three cases mentioned in Para 4 above of the affidavit. Simply because in the case of the Petitioner, Bank Guarantee had already been invoked and amount received would certainly make no difference to the case of the petitioner. Further when I look into Para 3 of the affidavit, it would appear that the Petitioner was given time upto 04.12.2000 to commence service as the time was extended by 24 months and yet the Bank Guarantee was invoked on 31.10.2000. This was not correct.

Mr. Jagdish A. Talati, counsel for the Bank submitted that the Bank may be refunded the amount of the interest of Rs.34,000/- paid by it. I do not think that prayer can be allowed. In spite of clear statement of law by the Supreme Court the Bank could not hold on to the Bank Guarantee and would pay the amount only after Banking Ombudsman intervention. For delay in payment of the amount of Bank Guaranteed Bank was rightly saddled with the interest which it paid @ 5% being the rate for the Saving Bank Account. The prayer of the Bank for refund of the interest is, therefore, rejected.

Considering the whole aspect of the matter, I would, therefore allow this petition and direct the first respondent to refund the amount of Rs.6,34,000/- to the petitioner after deducting a sum of Rs.30,000/- being the 5% of the Bank Guarantee amount as per the terms of the Exit Policy. Parties shall bear their own costs.

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(D.P. Wadhwa)
Chairperson