

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

Dated 8TH SEPTEMBER, 2005

**Petition No.83 (C) of 2005
(With M.A. No.204 of 2005)**

Vertec Communications Ltd.
Through its authorized signatory
Mr. Aminuddin Kagzi
Registered Office
140, City Centre, Sansar Chandra Road,
Jaipur – 302 001 (Rajasthan)

... .. Petitioner

VERSUS

Union of India,
Through its Secretary,
Ministry of Communications & Information Technology,
Department of Telecommunications,
Sanchar Bhawan,
20, Ashok Road, New Delhi

AND

Assistant Director General (LR-I)
Ministry of Communications &
Information Technology,
Department of Telecommunications,
Sanchar Bhawan, 20, Ashok Road,
New Delhi

... .. Respondents

BEFORE:

**HON'BLE MR.JUSTICE N.SANTOSH HEGDE
CHAIRPERSON**

**MR.VINOD VAISH, MEMBER
LT.GEN. D.P. SEHGAL (RETD), MEMBER**

For Petitioner : Ms.Meenakshi Arora, Advocate with Mr.Anshul
Singal, Advocate

For Respondent : Mr.Rakesh Gosain, Advocate with Mr.Shiv Narain,
Director(LR), Mr.J.L. Gupta, ADG and Ms.Ritu
Pandey, ADG from Department of
Telecommunications.

ORDER

Petitioner in this petition has prayed for a direction to the Respondents to release the performance bank guarantee furnished by it in favour of the 1st Respondent primarily on the ground that period for which guarantee was given had expired, therefore, there is no obligation on the part of the Petitioner to keep the guarantee current and there is no right on the Respondents to invoke the said bank guarantee.

Brief facts necessary for the disposal of this petition are as follows:-

Petitioner entered into an Internet Service Provider (ISP) Licence Agreement dated 24.11.1999 with the Department of Telecommunications, now 1st Respondent, for category 'B' service area in Rajasthan. Under the said Licence Agreement, the Petitioner has to provide internet access to various customers through dial-up connection as well as leased lines connection. Under clause 3.6 of the terms and conditions governing the said ISP Licence Agreement, the Petitioner Company was required to furnish a performance bank guarantee for Rs.20 lacs valid for two years from any scheduled bank in the prescribed form. The Petitioner Company accordingly furnished a performance bank guarantee dated 6.11.1999 for the said amount of Rs.20 lacs. It is stated that during the course of its ordinary business it had provided internet leased line connection to one M/s. Rachna Towers Pvt. Ltd., who in turn was found to be misusing the internet leased line connection provided by the Petitioner Company. When the Petitioner came to know of the same, it disconnected the connection given to the said customer. However, Petitioner received a show cause notice dated 10.12.2002 from the Respondents calling upon it to show cause as to why the ISP Licence granted to it be not terminated for default. Since at that time Petitioner's business of providing internet services became a non-profit making

business, the Petitioner preferred to terminate/surrender the Licence in terms of clause 10.3 of the terms of the Licence Agreement which, inter alia, provided:-

“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.”

This decision to terminate the Licence was communicated to the Respondents as per the letter of the Petitioner dated 9th January, 2003 which under the terms and conditions of the Licence was to become effective after 30 days of the termination letter. Thus, according to the Petitioner, ISP Licence stood terminated w.e.f. 8th February, 2003 and according to the Petitioner, it surrendered the said ISP Licence and ceased to operate the business of providing internet service. Petitioner also submits that in response to the show cause notice dated 10.12.2002, it sent its reply on 24th January, 2003 wherein it categorically denied all the allegations made against it by the Respondents and stated that the Petitioner Company had maintained all the terms and conditions of the Licence and was nowhere found to be a defaulter at any point of time. It is the contention of the Petitioner that since it terminated the Licence and surrendered the same w.e.f. 8th February, 2003, Petitioner was entitled to release of the performance bank guarantee furnished by it on 6.11.1999, after expiry of a period of six months from the date of its letter of termination as per clause 10.5.4 of the Licence Agreement. Therefore, after the said period, which would be w.e.f. 8th August, 2003, the Respondent had no claim to enforce the said guarantee against the Petitioner. Petitioner relies on clause 10.5.4 of the Licence Agreement which reads thus:-

“10.5.4 The Performance Bank Guarantee, if due, shall be returned to the licensee company 6 months after termination of the licence and after ensuring

clearance of any dues which the licensee company is liable to pay.”

Based on the language of the above clause, it is the case of the Petitioner that if Respondents had not invoked the bank guarantee on or before 8th of February, 2003 that is a period of six months after the termination of the Licence, the Respondents had no legal right to either get the guarantee renewed from time to time thereafter or to invoke or enforce the same after the said period of six months. It is the case of the Petitioner that instead of returning the bank guarantee, the Respondents coerced the Petitioner to keep the bank guarantee alive and renew it from time to time as and when the same was due to expire. Thus, the Respondents without any authority of law have been compelling the Petitioner, contrary to the terms of the Licence, to keep the performance bank guarantee alive, consequently the burdening Petitioner with the expenditure involved in keeping the guarantee current.

During this period, by an order dated 13th September, 2004 pursuant to the show cause notice dated 10th December, 2002, the Respondents imposed a penalty of Rs.10,50,000/- on the Petitioner for the alleged violation of the internet connection usage by M/s. Rachna Towers Pvt. Ltd. Though according to the Petitioner, no specific role of connivance was attributed to the Petitioner, the said order of imposition of penalty was challenged by the Petitioner before this Tribunal by way of Petition No.45 of 2004 titled as “Vertec Communications Ltd. Vs. Union of India & Another”. When the matter came up for final hearing before this Tribunal, it was submitted before this Tribunal that the Respondents have voluntarily withdrawn the order of penalty on 25.11.2004. Consequently, this Tribunal recording the said submission of the Respondents, disposed of the said petition.

After the disposal of the above Petition by this Tribunal, it is stated that another show cause notice came to be issued on 23rd December, 2004 on the very same facts

and circumstances based on which the previous show cause notice was issued and the said show cause notice dated 23.12.2004 was replied to by the Petitioner as per its letter dated 28th March, 2005. It is also stated by the Petitioner that a personal hearing of these proceedings was given to the Petitioner on 10.5.2005, however, thereafter no orders as on the date have been made by the Department in those proceedings. But in the meantime, the Petitioner alleges that the Respondents are now seeking to enforce the bank guarantee without there being any legitimate demand made on it. Therefore, it has filed the above Petition.

The Respondents in their affidavit have opposed the petition contending that in view of the fact that the Petitioner has allowed its lessee, M/s. Rachna Towers Pvt. Ltd., to misuse the Internet Leased Line Connection, the Petitioner has violated clause 1.2.3 of the Agreement and hence is liable to be proceeded with for such violation. It is also contended that the termination of Licence unilaterally by the Petitioner or surrender of the same has not been accepted by the Respondents and according to the Respondents as per the terms and conditions of the Licence, the Respondents have to finalize the order for levy of penalty and only thereafter the Petitioner's request for surrender of Licence could be considered. It is also submitted that in terms of the licence conditions, it is obligatory to keep the performance bank guarantee alive during the validity of the Licence period and according to the Respondents, in the instant case, since Petitioner's request for surrender of the Licence has not been accepted, the Licence is deemed to be current. Hence, there is an obligation on the Petitioner to keep the bank guarantee alive. The Respondents also contend that any surrender that is sought to be made by the Petitioner could only be considered in terms of clause 10.3 of the Licence Agreement, which reads thus:-

"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 below:-

(a) After start of service:- If during the notice period, 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.”

The Respondents further contend that the fact that it submitted to this Tribunal in the earlier Petition that it is withdrawing the order of penalty does not preclude it from initiating fresh proceedings and as a matter of fact such fresh proceedings have been initiated which are at a final stage. Therefore, with a view to satisfy the penalty which may be imposed on the Petitioner, there is a legal necessity to keep the bank guarantee current.

From the above pleadings of the party, the question that arises for our consideration are as follows:-

- (a) Can the Petitioner unilaterally terminate the Licence or surrender the same purporting to act under clause 10.3 of the licence condition?

- (b) In view of the mandatory language of clause 10.5.4 of the terms and conditions of the Licence is it open to the Respondents to compel the Petitioner to keep the bank guarantee alive even after the expiry of six months period, in anticipation of a likely penalty which may be levied on the Petitioner?

Though the parties have joined issue as to the liability/culpability of the Petitioner in the misuse of the internet access provided by M/s. Rachna Towers Pvt. Ltd., we desist from going into that issue since that is an issue pending before the Department of Telecommunications. Therefore, we express no opinion on that issue. We will confine our consideration of this petition to the issues framed by us hereinabove only.

It is an admitted fact that the rights and obligations of the licensor and licensee are governed by the terms and conditions of the Licence Agreement executed by the parties to this Petition which is produced in the petition as Annexure P-I. Under clause 6 of the said Agreement the licensor i.e. the Respondents at any point of time may revoke the Licence by giving a notice of 30 days after affording a reasonable opportunity of hearing for the breach of any of the terms and conditions mentioned in the Licence and for default in payment of consideration payable by the licensee under the terms of the Licence.

Under clause 9 of the said Agreement, the Petitioner (licensee) has to furnish a performance bank guarantee of a requisite amount in the proforma provided in Schedule 'D' annexed to the Licence. In the instant case, the Petitioner contends that it has provided such a performance guarantee for a sum of Rs.20 lacs. Schedule 'C' to the Licence lays down further terms and conditions wherein under condition 10 provision is made for termination of the Licence. Under condition 10.1, the licensor (the Respondents herein) is empowered, without prejudice to any other remedy for

breach of conditions of Licence, to terminate the Licence by a written notice of 30 days. It is nobody's case that the licensor has invoked this term of the licence condition.

Term 10.3 of the terms and conditions of the licence in Schedule 'C' empowers the licensee, if it so desires, to surrender the Licence by giving an advance notice of 30 days to the licensor to that effect. It also obligates the licensee to intimate its subscriber of consequential withdrawal of service by serving a 15 days notice to them. The said term also contemplates the financial liability of the licensee as a ground for termination of the Licence. Sub-clause (a) of the said terms provides that if during the notice period, referred to in term 10.3, acceptable level of service is not delivered to the customer, the licensee shall forfeit all claims on the guarantee which shall be encashed and amount shall be adjusted towards damages. In the instant case, there is no material to show that any of the customers of the Petitioner has complained of any non-acceptable level of service which has caused them damage so as to entitle the Respondents to enforce the guarantee towards any such damage. Therefore, this sub-term of the licence condition is not applicable nor is it the case of the Respondents that have invoked this right.

Sub-term (b) of term 10.3 contemplates the recovery of certain amount by enforcing performance guarantee for dues arising under the said sub-clause which again is not the case of the Respondent, hence the this sub-term also is not applicable to the facts of the case. Term 10.5 contemplates action pursuant to termination of licence as per the clauses 10.1, 10.2, 10.3 and 10.4 of the terms and conditions of the Licence.

We have already noticed that a licensee is empowered under term 10.3, if it so desires, to surrender the Licence on conditions mentioned therein. Petitioner contends that it has invoked this term and has communicated to the Respondents as

per its letter dated 9th January, 2003 informing the Respondent of its decision to terminate and surrender the licence which, according to the Petitioner, became effective from 8th February, 2003 in view of the language of term 10.3 of the terms of the Licence.

If that be so and if that surrender is a valid termination or surrender of licence, then under term 10.5.4 the performance bank guarantee will have to be returned to the licensee by the Respondents six months after the termination of the licence after ensuring adjustment of any dues which the licensee is liable to pay as on that date.

Based on this term it is argued on behalf of the Petitioner that the Petitioner having terminated its licence and surrendered the same as per its letter dated 9.1.2003 under clause 10.3 of the terms and conditions of the licence and the said letter having taken effect 30 days after the date of the termination/surrender notice i.e. 8th of February, 2003, the license stood terminated/surrendered. Consequently as per the term 10.5.4 and in view of the mandatory language "shall" used therein, it is obligatory for the Respondents to return the performance bank guarantee to the Petitioner after adjusting any dues from the licensee.

In our opinion, language of term 10.5.4 is clear, it creates an obligation on the Respondents/licensor that on termination or surrender of Licence, it will have to compute the loss or dues, if any, payable by the Petitioner within six months and if nothing has become payable on that date, the Bank Guarantee has to be returned.

The learned counsel for the Respondents contended that there is no provision in the terms and conditions of the Licence for unilateral termination or surrender of Licence by a licensee. Any surrender contemplated under term 10.3 is subject to acceptance by the licensor/respondents, which has since not been done till date and, therefore, the question of returning the performance bank guarantee does not arise.

He seeks to support this argument by placing reliance on term 13.8 wherein the licensor is empowered to decide in each case, the penalty to be levied for any breach of the terms and conditions of the licence and which term also provides that if the penalty is not discharged or complied with, the licensor has a right to encash, in part or in full, in performance of the bank guarantee.

We cannot accept either of the above arguments advanced on behalf of the Respondents. Term 10.3 which provides for termination for convenience has not provided for the acceptance or non-acceptance of the surrendered licence by the licensor, on the contrary it enables a licensee to surrender a licence by giving an advance notice of 30 days to the licensor. The right of the licensor accepting or rejecting such surrender is not contemplated under this term of the licence condition. The consequence of such surrender or termination envisaged in term 10.5.4 obligates the return of the bank guarantee by the licensor after expiry of six months by making adjustments towards any dues which the licensee is liable to pay as on that date. It is an admitted fact that as on date of expiry of the period of six months i.e. 8.8.2003, no determination of any dues liable to be paid by the Petitioner has been made, hence right of the Respondents over the Performance Bank Guarantee ceases w.e.f. 8.8.2003 and in view of the mandatory language of term 10.5.4 of the terms and conditions of licence there is obligation on the Respondents/licensor to return the guarantee. The provision made in terms of 13.8 on which the reliance has been placed by the learned counsel for the Respondents, in our opinion, does not override the obligation of the Respondents/licensor from returning the performance bank guarantee contemplated under term 10.5.4 on the expiry of six months after termination of the licence. Term 13.8 only provides a right on the licensor to decide the penalty that may be levied for breach of terms and conditions of the licence and if a bank guarantee is current at that point of determination, then such penalty as determined could be appropriated from the bank guarantee if it is current. This view of ours finds some support from a Judgment of the Apex Court in the case of "Makharia Brothers Vs. State of Nagaland"

[AIR 1999 SC 3466] wherein of course considering the terms of the guarantee conditions the Apex Court held:-

“The bank guarantee stated that unless a suit or action to enforce the claim under it was filed within 6 months from the date of its expiry, all the State's rights under the bank guarantee would stand forfeited and the bank would be released and discharged from all liabilities thereunder. There was, therefore, in our view, no way in law in which it could be declared that the bank guarantee would remain effective and enforceable for so long as the work under the contract was successfully commissioned or the amounts due under the bank guarantee were paid or an injunction could issue to the bank to so renew the period of the bank guarantee.....”

This view of the apex Court, in our opinion, applies to the facts of this case also. In the instant case, as per term 10.5.4 there was an obligation on the Respondents/licensor to return the bank guarantee after adjusting any dues from the licensee within six months of termination of licence. We have held that the termination of the licence took place on 8.2.2003 on the expiry of 30 days notice from the petitioner/licensee. Therefore, so far as the bank guarantee is concerned at the expiry of six months from the said date of 8.2.2003, it is not open to the Respondents/licensor to expect the guarantee to be kept alive for future adjustments. Therefore, in our opinion, the petitioner is right in contending that the Respondents cannot coerce or compel the Petitioner to keep the bank guarantee alive after the expiry of six months from 8th of February, 2003 when the letter of termination/surrender of licence became effective.

The learned counsel for the Respondents, however, contended that the performance bank guarantee will have to be independently construed from the terms and conditions of the licence and, if it so construe, it is clear that there is an obligation on the licensee to keep the bank guarantee alive even after the licence is terminated for the possible demand that may be made by the licensor. For this purpose, he has placed reliance on proforma for performance of the bank guarantee wherein it is stated:-

“licensee hereby revocably and conditionally guarantee to the authority that licensee shall render all efficient and necessary services which may be required to be rendered by the licensee in connection with and/or for the purpose of licence..... shall be actually performed in accordance with the terms and conditions of the licence to the satisfaction of the authority.

From the above language of the performance bank guarantee, the learned counsel submitted that there is an obligation on the bank as well as the licensee to keep the bank guarantee current till such time as the Department decides finally that all the dues payable by the licensee to the licensor are closed. In the case of “Makharia Brothers Vs. State of Nagaland” (supra) at para 6, the Court had held that the bank guarantee has to be read in conjunction with the terms of the contract in pursuance of which it is issued. If that be so, the question of relying on the language of the bank guarantee independent of the terms and conditions is impermissible. That apart on the face of language of term 10.5.4 of the terms and conditions of the licence, it is not open to the Respondents to contend that it can compel the Petitioner to keep the bank guarantee current till such time as it thinks necessary. Therefore, this petition is liable to succeed with a direction to the Respondents to release the performance bank guarantee dated 6.11.1999, as extended up to 5th September, 2005, the bank guarantee being for a sum of Rs.20 lacs, within four weeks from

today. We also direct that the said guarantee shall not be enforced towards any dues that may be payable by the Petitioner.

By the above direction we are not holding that the proceedings pending against the Petitioner cannot be continued. It is open to the Respondents to complete the proceedings in accordance with law. We also make it clear that it is open to the Respondents that if it is found that any penalty is to be levied, same could be recovered through other procedures known to law but without enforcing the above mentioned bank guarantee. The petition is allowed accordingly.

.....J
(N. Santosh Hegde)
Chairperson

.....
(Vinod Vaish)
Member

.....
(D.P. Sehgal)
Member