

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

DATED 19th October , 2006

PETITION No. 75 OF 2006

M/s ICONET Communication Pvt. Ltd.
Through its Managing Director
Capt. A.K. Midha
Mataji Complex,
1, Wallers Lane, Mount Road,
Chennai-600002

...Petitioner

Vs.

1. Union of India
Through the Secretary
Ministry of Communications and Information Technology
Department of Telecommunications
Sanchar Bhawan,
New Delhi – 110 001

2. Director General (VAS)
Department of Telecommunications
Room No.306, Sanchar Bhavan
New Delhi – 110 001

...Respondents

BEFORE:

**HON'BLE MR. JUSTICE ARUN KUMAR, CHAIRPERSON
LT.GEN. D.P. SEHGAL (RETD.), MEMBER**

For Petitioner	:	-	Dr. M.P. Raju, Advocate
For Respondents	:		Mr. Rakesh Gosain, Advocate

ORDER

1. The petitioner, M/s ICONET Communication Pvt. Ltd., registered under the Companies Act, 1956 is in the field of radio communication and is providing Public Mobile Radio Trunking Services (PMRTS). For this purpose, it is associated with companies like Motorola, Kenwood, ICOM and uses their radio equipment. For the purpose of provision of PMRTS at Kodai Kanal, Kotagiri and Yercaud in Tamil Nadu, the Company has obtained three licences. In addition, the petitioner has obtained licences for the purpose of demonstration of their equipment at various localities. The respondents are Union of India, Department of Telecommunications, who issued the licences to the petitioner. The petitioner had given bank guarantees of Rs.5 lakhs each for the three licences respectively amounting to Rs.15 lakhs by way of three securities for the due observance of licences. According to the petitioner, it had been operating its services strictly in accordance with the terms of the licence agreements, but was issued notice by the respondent on 2nd June 2003 who subsequently encashed the bank guarantee of Rs.15 lakhs despite the reply having been given to all the issues raised in the show-cause notice. The petitioner in this petition filed under section 14(a)(i) of TRAI Act, 1997 has prayed for the following reliefs:-

(i) Call for the records relating to the present case and the present impugned actions and orders and quash and set aside the impugned actions and orders dated 2/6/03, 29/7/03 and 11/2/04 vide annexures XIV, XIX and XXXIII respectively, as illegal, arbitrary, malafide, violative of the principles of natural justice and also violative of the fundamental rights of the

petitioner under Articles 14 and 19 of the Constitution of India and contrary to and in violation of the terms of the licence agreements in question;

- (ii) declare and set aside the action of the respondents in refusing to accept the surrender of the licences by the petitioner as motivated by malafide, illegal, discriminatory, arbitrary and violation of the terms of the licence agreements;
- (iii) direct the respondents to reimburse and repay Rs.15 lacs which is the total amount of the bank guarantees with appropriate interest;
- (iv) direct the respondents to accept the surrender of the licences by the petitioner w.e.f. the date of offer to surrender i.e. 23.7.2003;
- (v) direct and order the respondents to pay appropriate compensation for the damages and loss caused to the petitioner due to the impugned actions and orders of the respondents amounting to a reasonable amount as narrated in the petition with due interest thereof;
- (v) award the cost of the petition.

Pending final decision on the petition, the petitioner seeks the following interim orders:-

Direct the respondents to restore and keep alive the three Bank guarantees which have been invoked by the respondents during the pendency of the case.

2. Since the bank guarantee had already been invoked by the respondent, the interim prayer sought for by the petitioner, therefore, became infructuous. The case was finally heard on 09.10.2006.

3. The learned counsel for the petitioner, Dr.M.P.Raju stated that the show-cause notice issued by the respondent lacks merit and the issues raised therein were of frivolous nature. He contested all the issues one by one.

The petitioner contended that the respondent had quoted from the internet website of the petitioner company, wherein it is stated that "*the Company also provides Radio Trunking Services in Tamil Nadu. It is possible to talk from a mobile in Tuticorin to another mobile in Hosur over a distance of 650 Kms.*" According to it, the respondent has assumed that the website implies that the petitioner is actually providing PMRT Service in these areas which are beyond the licensed areas. The petitioner stated that it was totally a mis-interpretation of the facts stated in the website. The petitioner wholly accepts the factual existence of these words in its website, but disputes the very interpretation of the respondent that the petitioner is providing communication over a distance of 650 kms in Tamil Nadu. It contends that the website is basically meant to promote the business and accordingly it is stated that it is *possible* to talk over this distance using the radio equipment of the petitioner company. It in no way means that the petitioner company is providing communication over this long distance, thus, violating the licence agreement. The petitioner contends that it is restricting its service to areas for which it has got licence, ie. Kodai Kanal, Kotagiri and Yercaud in Tamil Nadu. The respondent, however, contended that the insertion of providing communication over 650 Kms of area in the website is misleading and amounts to provision of communication over this large area. It was further stated that why would petitioner claim provision of communication over 650 km if it was actually not providing it. Respondent therefore stood by its show cause notice on this ground. On this the petitioner contested that the respondent's view was not true, but it was a fact that communication could be provided in all these areas by establishing a number of repeaters. It further stated that another company M/s KPN Travels (India) Ltd. which has purchased equipment from the petitioner is providing PMRT Service in larger areas of Tamil Nadu. But KPN Travels has its separate licence for provision of this service which has been issued by the respondent. The petitioner has no role to play except that KPN Travels has purchased equipment from it. On this the respondent contended that in fact the petitioner has integrated its network with KPN Travels and therefore is violating the terms of licence for revenue share which is resulting in loss of revenue to the respondent. The respondent was of the view that petitioner was obliged to pay revenue for the subscribers of KPN Travels also. The petitioner denied any such integration of networks.

4. Having heard the arguments of both the sides, we do not find much merit in this particular aspect of show-cause notice. Possibility of provision of communication is different from actually providing the same. The respondent has not been able prove its point by showing some evidence of such communication having been provided by the petitioner. The integration of two networks also seems to be only a statement without any substantive documentary evidence. In any case, if a third company like KPN Travels has got its licence, it is for the respondent to take revenue from that third company. Quoting from the website only does not prove the point of the respondent.

5. The petitioner contended that para 2.2 of the notice is also on the same issue, which quotes again from the website that *“Radio Trunking is an instant two way communication service that allows mobile work force to communicate with one another. The services are currently available in most parts of Tamil Nadu excluding Chennai”*. The petitioner contended that it was absolutely true statement which is a technology demonstration and strength of their equipment and not actual provision of communication. It is stated that by using their radio, two way communication can be provided, but for provision of the service the formalities of licence etc. and clearance from WPC for frequency has to be obtained by the user. The petitioner in no way was providing two way communication in areas outside the licensed areas. In the instant petition, this was not being physically done. The communication was provided by the petitioner exactly as per the three licences in these service areas mentioned therein. The learned Counsel for the respondent, Mr.Rakesh Gosain, however, stated that the petitioner by stating these words in the website amounts to providing two way communication in areas beyond those for which it is authorized. We feel that this argument without any proof/evidence does not appear sound enough to take note of.

6. The learned Counsel for the petitioner, Dr. Raju stated that the third issue raised by the respondent in the show-cause notice is that the petitioner was providing PMRT Service to M/s Vijay Dairy and Farm Products Pvt. Ltd. at Trichy. It vehemently denied that any such service was provided by the petitioner company. He said that the equipment was demonstrated at Trichy in the premises of M/s Vijay Dairy and Farm Products Pvt. Ltd. for which petitioner holds separate licence, i.e. licence for demonstrating their equipment. We were made to go through this licence which was found to be in order and according to it, the petitioner was not violating any terms of licence by demonstrating their equipment at Trichy. The respondent, however, contended that its monitoring section had visited Vijay Dairy and found the equipment working therein. We were shown a noting sheet in the file, but it was not clear if it had been clearly established that the petitioner company had provided PMRT Services to Vijay Dairy and Farm Products Pvt. Ltd. Neither was any evidence of affidavits from Vijay Dairy and Farm Products produced to show any evidence of this allegation. In response to the notice the petitioner had informed the respondent that the equipment was taken to Vijay Dairy at Trichy only for demonstration purpose and it further contended that the communication was not even found feasible and, therefore, no such service was undertaken. It stated that the equipment after demonstration was immediately withdrawn. Having heard the arguments we tend to agree with the petitioner's contention. Therefore, we are of the view that the respondent has not been able to make a clear case for violation of Schedule-A of the said licence agreement.

7. The learned Counsel for the petitioner stated that the last issue raised in the show-cause notice was that the petitioner had not responded to the letters of the respondent, viz., letter No.L-14027/195/96-NTG dated 22.01.2002, 22.03.2002, 20.05.2002 and 03.01.2003, thereby violating the condition 12.1 of Schedule-B in para 3 of the licence agreement, which states that the information asked by the authorities will be furnished by the licensee. The petitioner contended that it had been providing all the information and details as required by the licence agreement and as required by the respondent from time to time without any failure whatsoever. The learned Counsel, Dr.Raju, stated that the first letter from the petitioner company dated 22nd January 2002 pertained to claim of some dues from the petitioner and submission of the number of subscribers. The petitioner contends that this was immediately replied to along with a demand draft of Rs.1,54,700/- and also number of subscribers by way of an affidavit vide its letter dated 16th March 2002. Despite this having been sent the petitioner got a reminder dated 22nd March 2002

to which the petitioner through its Managing Director vide letter dated 1st April 2002 informed the respondent about the demand draft and affidavits having already been sent. It is stated that it also sent monthly subscriber base for June 2002 relating to all the three service areas by its letter dated 16th July 2002. The petitioner, therefore, contended that despite the submissions and supplying of information as required by the respondent, the notice dated 2nd June 2003 was issued for termination of the licence. The petitioner also submitted that the respondent in its notice gave only one week's time for the reply, whereas the notice took seven days to reach the petitioner. The petitioner contends that relevant term for the period of licence agreement contemplates 90 days period for notice period to be issued by the respondent. The relevant clause is reproduced below:

“The Licensor may at any time revoke the licence 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.”

The petitioner further submitted that since the director of the Company was out of the country a submission was made to the respondent that reply will be sent on his return, which was done on 22nd July 2003. We were made to go through the reply to the notice sent by the petitioner where all the issues raised by the respondent were covered. The petitioner also stated that it was contemplating surrender of the licence on its own for a long time since business of PMRTS had become non-profitable and unrealistic because of the terms and conditions of the respondent and stiff competition from the cellular operators. The petitioner contends that it had, in its reply to show cause notice, mentioned that it was willing to close the business and surrender its licence. This was as part of the petitioner's letter No. ICPL/DoT/343/03 dated 23.07.2003 and this was followed by another letter on the same date specifically offering surrender of the licence. The petitioner contended that on 29th July 2003 the respondent encashed the bank guarantees notwithstanding the petitioner's response and justification of all the issues raised by the respondent in their show cause notice. It further stated that on 11th February 2004, the respondent terminated its licences by its letter No.311-78/95-VAS (Vol.II)/64 (page 250 of petition). The petitioner submitted that all the actions of the respondent were unjustified and without any reasons. Accordingly, the petitioner had written to the respondent to refund the amount of Bank Guarantee. The respondent, however, refuted the claim of the petitioner and stated that the service areas in the licence are mentioned specifically which were not adhered to by the petitioner and hence as per para 11 of the licence agreement it was at liberty to take action as it deemed fit. It further contended that this power flows from the Indian Telegraph Act, 1885. Para 11 of the licence agreement is reproduced as under:-

“The Licensor reserves the right to, in case of a default, impose any penalty as it may deem fit.”

Learned Counsel Shri Rakesh Gosain emphasised on the words “*as it deems fit*” which gives power to licensor to act the way it wants.

8. The issue of invocation of bank guarantee itself was discussed. Para 4 of the Bank Guarantee (page 147 of the petition) is reproduced as under:-

“We the bank hereby also undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the Authority stating that the amount claimed is due by way of loss or damage caused or would be caused to or suffered by the Authority by reason of breach by the said Licensee of any of the terms or conditions contained in the said licence or by reason of the licensee's failure to perform any of the obligations under the said licence.”

The petitioner contended that as per this term, the respondent is supposed to mention in specific terms the loss or damage caused to it forcing it to encash the bank guarantee which has not been done at all.

It further contended that the respondent vide its letter No.10-10/95-PMRTS/LF dated 29.07.2003 addressed to the Karur Vysya Bank Ltd. which is holding the bank guarantee, in para 2 stated that “*On review it is found that the above mentioned*

company has violated the conditions of the licence agreement and this has caused loss/damage to the Licensor by reason of failure of the licensee in non-complying with the terms and conditions of the licence agreement". While further contesting its case the learned Counsel stated that nowhere in this letter the respondent has mentioned about the actual loss or damage caused to the licensor. The statement of the respondent in the above-mentioned letter that the reason for encashment of the bank guarantee is the failure of the licensee to comply with the terms and conditions of the licence agreement which as per petitioner was not correct since all terms had been complied with. The petitioner, therefore, submitted that the encashment of bank guarantee was not in order and hence its prayer for refund of the same.

On this Mr. Rakesh Gosain stated that though the loss or damage was not mentioned in actual terms but the fact was that according to the respondent, the petitioner had violated the terms and their replies were not forthcoming in time and hence as per the licence agreement the bank guarantees were encashed.

9. Having gone through all the documents and having heard both the counsel, we are of the view that the Department of Telecommunications has not been able to establish its case against the petitioner as regards violation of the terms of the licence agreement and is therefore not justified in encashing the bank guarantee of the petitioner. We, therefore, direct that the amount of Rs.15 lakhs with interest on prevailing bank rate from the date of encashment of Bank Guarantee till the date of refund be refunded to the petitioner.

The petition is disposed of.

.....J
(Arun Kumar)
Chairperson

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(D.P. Sehgal)
Member