TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 18TH DECEMBER, 2009

Petition No. 58 of 2006

Tata Teleservices (Maharashtra) Ltd
Ispat House, B G Kher Marg
Worli, Mumbai-400 018 ….Petitioner

Vs.

Union of India
Through the Secretary
Department of Telecommunications
Ministry of Communications
Sanchar Bhawan
20, Ashoka Road
New Delhi-110 001

Assistant Director General (LR)
Department of Telecommunications
Ministry of Communications
Sanchar Bhawan
20, Ashoka Road
New Delhi-110 001 …Respondents

BEFORE:
HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G. D. GAIHA, MEMBER

For Petitioner : Mr. Ramji Srinivasan, Senior Advocate
Mr. Mansoor Ali Shoket, Advocate
Mr. Mohit Jolly, Advocate

For Respondents : Mr. Sanjay R. Hegde, Advocate
Mr. A. Rohen Singh, Advocate

JUDGMENT

S.B. Sinha

The petitioner is holder of two licenses; one for providing basic service commonly known as Unified Access Service (UASL) being dated 14.11.2003 and the second being Internet Service Provider (ISP) being dated 11.5.2004.

Whereas a substantial sum is required to be paid towards license fee in respect of UASL, a token sum of Rupee one is payable towards license fee for ISP license.

2. The petitioner introduced a service commonly known as Push-To-Talk (PTT) service. Before, however, introducing the same on a commercial basis, the petitioner held discussions on 18.5.2004 with the Members of the Telecom Regulatory Authority of India (Authority). It with its letter dated 26.5.2004 enclosed a brief write-up, covering technical aspects, network architecture diagram and highlights of PTT service, some of the relevant portions whereof are as under:-

> "**Service description** : The service will enable TTSL subscribers exchange half duplex voice within TTSL coverage areas.
>
> **Technology behind PTT** : PTT is based on Internet Protocol (IP), allowing half duplex voice between compatible terminals / handsets. It is implemented using application servers in the CDMA 1x network. The servers handle call set-up signaling for PTT calls, reservation of talk spurts for one speaker at a time and real time routing of IP packets."

It was stated–

(1) In simple terms, PTT, combines walkie-talkie or a two-way radio-functionality with that of a normal mobile phone. However, it offers more than just a walkie-talkie.

(2) PTT on a cellular network is based on half-duplex VoIP over a CDMA 1x or a GPRS network.

(3) The service allows half-duplex or one way voice communication between users. In other words, only one person can talk at a time, while the other listens.

(4) Available commercially in Nextel, USA as Direct Connect^{TM} service on its iDEN network with over 13 Mn subscribers.

(5) Verizon Wireless, USA is the first CDMA operator to launch PTT during August '03.

Push-to-talk technology was explained as being one to one communication through touches, i.e., when within one group, one speaks and other listens and unless and until, the person calling, pushing the button switches it off, other cannot speak.

The petitioner also took up the matter with the respondent in terms of its letter dated 19.1.2005.

3. By a letter dated 21.4.2005, the petitioner provided detailed explanations with regard to the authorized features of the said service.

4. According to the petitioner, the new application is based on internet protocol under the category of ISP license and its service area being throughout the territories of India, it was eligible to provide the said services throughout India. By a letter dated 3rd /4th February, 2005, the petitioner informed the Additional Director General (BS-II) of Department of Telecommunications, that the customers were not being charged, as the service was being provided on a trial basis. It was furthermore pointed out that the said service was introduced only in Mumbai in the State of Maharashtra. The other details were also furnished which were sought for by the DoT.

By a letter dated 7.2.2005, the respondent stated as under:-

"With reference to your letter dated 3.2.2005 while issues raised in this letter are being examined, the undersigned is directed to inform that:

(i) No Licensee is authorized to violate the terms and conditions of any licence on the pretext of march of technology or otherwise in any manner and provide services and features which changes the character of services permissible under the licence.

(ii) This decision has finality and is not subject to any advisory from other sources."

5. At that stage the petitioner, by its letter dated 9.2.2005, stated–

"2. We reiterate the position explained in our letter dated 03.02.2005 that PTT is yet another application based on Internet Protocol that is permissible under the Category 'A' ISP License (with Internet Technology). Thus, there is no bypass of ADC.

3. In order to facilitate our correct understanding of your letter, may we request you to clarify whether your letter requires us to temporarily suspend offering PTT services till you are able to take a final view. Should you require us to do so, we will immediately comply with your direction.

4. TTML has no intention of being in breach of any of its License conditions, and would welcome all opportunity to cooperate with the DOT and participate in any discussions that you may require us to and would appreciate an opportunity of personal hearing, before you expeditiously take a final decision in the matter."

6. By a letter dated 9.2.2005 the Chairman of the petitioner company also wrote a demi-official letter to the Hon'ble Minister of Communications and Information Technology, stating as under:-

"3. The DoT (Basic Services Section) asked for some information in January 05 on TTML's PTT service, which was furnished. While our reply continues to be under the consideration of the DoT, we have received a letter dated 7.2.2005 (copy enclosed) indicating that 'no Licensee is authorized to violate the terms and conditions of any licence on the pretext of march of technology.' In TTML's reply (copy enclosed) to the letter, we have assured the DoT that we have no intention to breach any conditions of any licence.

4. At the cost of repetition, let me assure you Sir, that TTML, which is a Tata Group Company, has absolutely no intention whatsoever to breach, or to be seen to breach, any law, rule or conditions of any licence.

5. We believe that it is in the interest of the Indian consumer to have access to the latest value adding services that advancements in Internet technology provide, and our PTT service is one such application that we are extremely proud to have brought to the Indian market. We sincerely believe that this service is fully compliant with all conditions in our licence, and hope that under your forward-looking leadership, such innovations for the benefit of the Indian customer will be strongly encouraged."

7. The petitioner also explained the technical details of the petitioner's PTT service to the Authority on 9.2.2005, whereafter it responded to various querries raised therein. The attention of the DoT was also drawn by the petitioner by a letter dated 16.2.2005 that 'Hutch' and other telecom operators were also providing the said service. It was furthermore stated—

"We would like to draw your kind attention to the correspondence resting with our letter referred above.

While we await reply to our letter under reference, we reiterate the position explained in our letter dated 03.02.2005 that PTT is yet another application based on Internet Protocol that is permissible under the Category 'A' ISP Licence (with Internet Telephony). Further "Push to Talk" is an Application, which enables users to communicate in a half duplex manner only. Thus, there is no bypass of ADC.

It may not also be out of place to mention that one GSM operator is offering PTT service in India since November, 2004.

We would like to reassure you that TTML has no intention of being in breach of any of its License conditions, and would welcome all opportunity to cooperate with the DoT and participate in any discussions that you may require us to and would appreciate an opportunity of personal hearing, before you expeditiously take a final decision in the matter."

8. Only on 18.2.2005, the respondent asked the petitioner to stop PTT service. Thereafter, a Show Cause Notice was issued on 22.2.2005, the operative portion whereof reads as under:-

"Provision of Push to Talk (PTT) service is not permitted under the terms and conditions of licensing agreement No. 820-438/2003-LR dated 11.03.2004. Your action of providing of PTT service is substantive violation of terms and conditions of Clause 35 of Schedule C part I of the License agreement.

You have caused by your act or omission the serious violation of the terms and conditions of clause 35 of Schedule C part I of the License Agreement by indulging in activities detailed herein above. Therefore, you are hereby given a notice to show cause why the License Agreement No. 820-438/2003/LR dtd 11.03.2004 should not be terminated, for default under clause 10.1 and/or action taken as per the clause 13.8 of Schedule C part I of the License Agreement. Your reply should reach this office within 30 days of the date of issue of this letter. This is without prejudice to any other action, which may be taken by the Government.

Please acknowledge the receipt of this letter."

9. Cause thereto was shown by the petitioner on or about 18.3.2005. It is, however, not denied or disputed that with effect from 22.2.2005 itself, the PTT service was suspended by the petitioner and it was disconnected with effect from 25.2.2005, which was communicated to the respondent by a letter dated 28.2.2005. Only on the said date, namely, 28.2.2005, the respondent by a letter raised the question of security in the following terms:-

"With reference to the subject mentioned above, the undersigned is directed to forward the note on monitoring of MMS/GRPS traffic as received from Jt. Director, IB for making necessary arrangements without fail.

The contents of this letter should not be disclosed to any unconcerned employees and the confidentiality of this letter should be maintained in terms of the license agreement."

10. Although the petitioner had not charged its subscribers, it without prejudice to its rights and contentions tendered to BSNL a sum of Rs. 3,86,648/- on the basis of the record of calls maintained by it. The respondent, by a letter dated 10.5.2005, asked the petitioner as to how the lawful inspection/monitoring of service of law-enforcement agency was ensured. To the same effect another letter dated 13.5.2005 was issued. By a letter dated 13.5.2005, the petitioner stated as under:-

"TTSL/TTML has written to you about re-launching of PTT application under UASL licence and it would ensure that all security monitoring equipment are installed before providing the services on a commercial basis and ensure compliance with applicable security provisions for PTT calls."

11. It furthermore provided the detailed architecture on how the requirements of security agencies were being met in respect of CRI and CCI by a letter dated 31.5.2005. The petitioner also asked as to whether the said service could be launched through UAS Service, to which, the respondent agreed by a letter dated 7.7.2005.

A second Show Cause notice was issued asking the petitioner to show cause as to why a penalty of Rs. 50 crores should not be levied. By reason of the said notice a part of the operative portion of the first notice was sought to be amended, as therein the cause required to be shown in the first Show Cause Notice, i.e., as to why the license should not be determined, was not mentioned. The petitioner responded to the second show cause notice on 17.8.2005.

12. By reason of the impugned order dated 21.1.2006, a penalty of Rs. 50 crores has been imposed on the petitioner.

13. It is on the aforementioned premise, the petitioner has filed the present petition praying inter alia for the following relief:-

> "Set aside the impugned Order dated 31.1.2006 imposing a penalty of Rs. 50 crores on the Petitioner alleging violation of the terms and conditions of its ISP Licence dated 11.3.04."

14. Learned Senior Counsel of the petitioner herein, Mr. Ramji Srinivasan, in support of the present petition, raised the following contentions:-

> 1. No amount of penalty having been provided for in the ISP licence, respondent had no jurisdiction to specify the amount of penalty purported to be relying on or on the basis of UASL licence under clause 10.2(ii)
>
> 2. The power to levy penalty must meet the requirements of Article 14 of the Constitution of India.
>
> 3. While passing the order imposing penalty of Rs. 50 crores, the respondent did not take into consideration the objections raised by the petitioner in its reply to

the show cause notice dated 17.08.2005.

4. The DOT in similar situation having not levied any penalty on one of the service providers, the impugned order is violative of Art 14 of the Constitution of India.

5. TRAI having recommended that no penalty need be imposed, the impugned order is vitiated in law as no due weight thereon was bestowed.

6. A Committee having been appointed by DOT in regard to quantification of penalty for violations of terms and conditions of licence agreement, the impugned order deserves to be reviewed by DOT in the light of the recommendations made by the said committee.

15. Mr. Sanjay Hegde, the learned counsel appearing on behalf of the respondent, on the other hand, would argue :

(i) The petitioner has clearly violated the terms of the license and as such, penalty has rightly been imposed on it.

(ii) The petitioner having been put to sufficient notice not only with regard to the acts of violation but also the amount of penalty proposed to be levied, the impugned orders are wholly unassailable.

(iii) The license granted to a licensee by the Government of India of an ISP must conform to the provisions of the Indian Telegraphs Act 1885 and the rules framed thereunder.

16. The petitioner, admittedly, was granted two licenses – one for providing basic service and another being an ISP license. The correspondences exchanged between the parties, as also the materials brought on record, clearly show that the question as to whether PTT would conform to the requirements of an ISP license or not was a contentious issue. Our attention has been drawn to a communication from Motorola, the manufacturer of PTT, dated 2.3.2006 as contained in

Annexure 'A' to the rejoinder filed on behalf of the petitioner to the counter affidavit filed by the respondent, which reads as under:

> "RTP/UDP/IP to interface between the handset and the server for the bearer path, and SIP/UDP/IP for the signalling path. The major advantage of this service is carrier's need minimal or no network resources provision in the existing network. The PTT service is purely a data service from the signaling to bearer done over the IP data network and the routing is done over SIP URI in the format SIP 9820434537@ptt.india.com which again gets translated into IP address of the PTT handset currently held after the present PPP session or the PDP context, finally the routing happens at the IP address."

17. It may be true that in terms of the license granted to the petitioner, certain architecture was to be followed and the same in turn was required to conform to the requirements as contained in Annexure 'R-1' to the counter-affidavit. The PTT server, however, provides Internet Protocol but not the internet itself. Our attention, however, has been drawn to the following terms of license:

> **"Clause 1.12.5 :** Terminating the voice communication to Telephone within India is not permitted.
>
> **Clause 1.14.3 :** Except whatever is described in conditions 1.14.1 and 1.14.2 herein above, no other form of Internet Telephony is permitted."

18. Mr. Hegde contended that from the aforementioned provisions, it would be evident that the petitioner was not permitted to be engaged in any other telecom service and such prohibition being an absolute one, the violation of conditions of license is evident.

19. The petitioner, however, is also a UASL licensee. It is beyond any controversy that PTT service could have been provided by the petitioner through the said license. The petitioner, furthermore, has contended that through the PTT license, no voice communication was to be undertaken but it was a data communication. It being one way connectivity, as contra-distinguished from two-way communications, was merely a half-duplex and not the full-duplex

providing equipment. It may be that the data communication is converted into a voice communication but as contended by the manufacturer, it was not a voice communication.

20. In law, existence of *mens rea or actus reus* may not be necessary for commission of civil wrong as contra-distinguished from a criminal wrong. However, imposition of penalty leads to a serious civil consequence. For the said purpose, conduct of the parties would be a relevant criteria. The petitioner, at all stages, brought it to the notice of the DoT and TRAI that it intended to launch PTT service. It had even offered to stop such services if the same was directed, but neither the DoT nor the TRAI, despite clear communication by the petitioner, had issued such direction. The contention of the petitioner that introduction of such services would not bring within its purview a voice service or internet telephony had not been refuted at the threshold. PTT does not envisage any internet telephony. The petitioner had made presentations in regard to PTT services both before DoT and TRAI. Even at that stage nobody had pointed out that the same would lead to violation of the conditions of license.

21. The petitioner, furthermore, was served with two show cause notices – one asking it to show cause as to why the license shall not be terminated and penalty be imposed and the second, as to why only penalty would not be imposed. By reason of the impugned order, penalty has been imposed. The license was not terminated. Effect has, thus, been given to the second show cause notice and not the first one.

22. The petitioner had shown cause in response to both the notices. Before issuance of the second show cause notice no opportunity of personal hearing was granted. The conduct of the respondent clearly establishes that before the penalty was imposed, which would have to be preceded by determination of the question as to whether the petitioner was guilty of violation of condition of license, an opportunity of personal hearing was to be given. Despite the same,

findings of fact were arrived at. The tenor of the second show cause notice would demonstrate that respondent had proceeded to determine the issues with a pre-determined mind which would be evident from the following:

> "**5.** The explanations submitted by TTML were examined thoroughly and it was reconfirmed that PTT services as offered by TTML are not covered/permitted under the license for provision of Internet service (including Internet Telephony). Clause 35 of Schedule C Part II of the license agreement defines service of services as Internet access /internet content services including internet telephony as mentioned in Clause 1.14 of the Schedule C. The clause 1.14 of the Schedule C Part II defines Internet Telephony as…."
>
> "6.1 As per Clause 7.5 of Schedule C Part II of the license agreement, the licensee is required to obtain clearance from WPC Wing of DoT for using radio links in last mile linkages. M/s TTML did not obtain the requisite clearance from WPC for providing radio links to the subscribers for operating PTT services under ISP license thereby violating the Clause 7.5 of Schedule C Part II of the license agreement."

In **H.L. Trehan v. Union of India, AIR 1989 SC 568,** the Supreme Court of India held as under:-

"Even if any hearing was given to the employees of CORIL after the issuance of the impugned circular, that would not be any compliance with the rules of natural justice or avoid the mischief of arbitrariness as contemplated by Article 14 of the Constitution. The High Court, in our opinion was perfectly justified in quashing the impugned circular."

In **Gullapalli Nageswara Rao v. APSRTC AIR 1959 SC 308**, the Supreme Court of India held as under:

"Though the wording of the information published speaks of the decision of the Government, the Chief Secretary obviously must have been referring to the contents of the notification published two days earlier, on 24-12-1957. We cannot from this publication in the newspapers come to the conclusion that the Government having finally decided to reject all possible objections, went through a farce of an enquiry. We therefore hold, for the first two reasons, that the quasi- judicial enquiry held by the State Government was vitiated by the violation of the aforesaid fundamental principles of natural justice."

In **V.K. Ashokan v. Asstt. Excise Commnr. & Ors JT 2009(5)SC 121,** the Apex Court held:

"The submission of Mr. Iyer that in few of the matters Assistant Commissioner of Excise had served notices before the recovery proceedings had been initiated cannot be accepted for more than one reason. Such a notice had been issued only pursuant to the

order passed by the higher authority, namely, the Commissioner of Excise. As the higher authority had already made up his mind and confirmed forfeiture of the security as also cancellation of license, administrative discipline would require that it is complied therewith. Issuance of such notices was, therefore, a mere formality.

In **K.I. Shephard v. Union of India,**[JT 1987(3) SC 600 ; 1987 (4) SCC 431], this Court observed:

"It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose."

Secondly, because when an authority has already made up his mind, the formality of complying with the principles of natural justice may be held to be a nominal and sham one.

In **Rajesh Kumar & Ors. v. Dy. CIT & Ors.** [JT 2006 (10) SC 76 ; 2007 (2) SCC 181], this Court held:

"15. Effect of civil consequences arising out of determination of lis under a statute is stated in **State of Orissa v. Dr. (Miss) Binapani Dei and Ors.** [1967 (2) SCR 625]. It is an authority for the proposition when by reason of an action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice are required to be followed. In such an event, although no express provision is laid down in this behalf compliance of principles of natural justice would be implicit. In case of denial of principles of natural justice in a statute, the same may also be held ultra vires Article 14 of the Constitution."

23. The respondent, therefore, not only had arrived at finding of facts in regard to the violation of the conditions of license as a result whereof, the petitioner was preempted from giving an effective reply.

In **V.C. Banaras Hindu University v. Shrikant, AIR 2006 SC 2304,** the Apex Court has held that the V.C. appears to have made up his mind to impose the punishment of dismissal on the respondent herein. A post decisional hearing given by the High Court was found to be illusory in that case.

In **Pepsico India Holdings P. Ltd. v. Union of India & Ors, 2009(8)SC 645,** the Supreme Court of India held:

"Ordinarily, this Court would not have gone into the findings of the fact arrived at by the statutory authorities but was only required to consider the correctness of judgment of the learned Single Judge as also the Division Bench of the High Court. However, even in a case of this nature, the authorities stuck to their own stand which is not expected from a statutory authority."

24. It now stands admitted that the ISP license did not contain a clause for imposition of a penalty of a fixed sum. It is, therefore, difficult to conceive as on what premise, imposition of penalty for a sum of Rs. 50 crores was proposed. It is beyond any controversy now that clause 10.2(ii) of the UASL License provided for imposition of penalty to the said effect, which reads as under:

> **"10.2(ii).** The Licensor may also impose a financial penalty not exceeding Rs. 50 crores for violation of terms and conditions of licence agreement. This penalty is exclusive of Liquidated Damages as prescribed under clause 35 of this Licence Agreement."

Besides the same, liquidated damages were also leviable in terms of clause 35.1 which reads as under:-

> "The time period for provision of the Service stipulated in this Licence shall be deemed as the essence of the contract and the service must be brought into commission not later than such specified time period. No extension in prescribed due date will be granted. If the Service is brought into commission after the expiry of the due date of commissioning, without prior written concurrence of the licensor and is accepted, such commissioning will entail recovery of Liquidated damages (LD) under this Condition. Provided further that if the commissioning of service is effected within 15 calendar days of the expiry of the due commissioning date then the Licensor shall accept the services without levy of LD charges."

25. The respondent, thus, proceeded on a wrong premise. If no amount of penalty was specified in terms of the ISP License, the respondent had no jurisdiction to initiate a proceeding for imposition of penalty for a sum of Rs.50 crores. The respondent is a 'State' within the meaning of the Article 12 of the Constitution of India. It must, therefore, act fairly and reasonably. A provision for levy of penalty of such a huge amount must meet the requirements of law as provided for in the Indian Contract Act. The petitioner in its reply to the second show

cause notice clearly stated that so far as the purported violation of clause 13.8 is concerned, the same was not attracted, inter alia, having regard to the fact that they had not charged the subscribers at all and thus, there was no reason to levy any penalty much less an amount as high as Rs. 50 crores. The petitioner in its reply furthermore gave the example of Hutch, a GSM operator which had been providing PTT service from similar lines since May, 2004.

26. It may be true that GSM Hutch services had been providing the said services on its UASL license but if the contention of the respondent is correct, insofar as the same would have given rise to security problems is concerned, both service providers stood on similar footing. Admittedly, the respondent had not levied any penalty on the providers of services of similar nature. The impugned Order, therefore, attracts the wrath of Article 14 of the Constitution of India.

27. The petition is, therefore, allowed. The impugned Order is set aside. However, as the petitioner itself has offered, a sum of Rs. 3.86 lakhs to BSNL towards the loss, which might have been incurred towards inter-connection charges, in our opinion, the petitioner should be directed to pay the said amount to the DoT, which in our opinion would meet the ends of justice. The respondent must pay and bear the costs of the petitioner Advocate's fee assessed at Rs. 50,000/-.

……..... J
(S.B.Sinha)
Chairperson

…….....
(G. D. Gaiha)
Member