

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****DATED 19th NOVEMBER, 2009****Petition No.123 of 2008**

1. Cellular Operators Association of India
14, Bhai Veer Singh Marg
New Delhi
2. Bharti Airtel Ltd.,
Qutub Ambience (at Qutab Minar)
Mehrauli Road
New Delhi
3. Bharti Hexacom Ltd.
Qutub Ambience (at Qutab Minar)
Mehrauli Road
New Delhi
4. Idea Cellular Ltd.,
Suman Towers
Plot No.18, Sector 11
Gandhinagar,
5. Reliance Telecom Ltd.
H Block, 1st Floor
Dhirubhai Ambani Knowledge City
Navi Mumbai,
6. Spice Communication Ltd.
(Earlier Modicom Network Pvt.Ltd.)
60-D, Sainki Farms
New Delhi,
7. Vodafone Essar East Ltd.
(Hutchison Telecom East Ltd.)
Constantia Office Complex, 11
Dr.U.N. Brahamachari Street
Kolkata – 700 017
8. Vodafone Essar Mobile Services Ltd.
(Earlier Hutchison Essar Mobile Services Ltd.)
C-48, Okhla Industrial Area Phase II

New Delhi – 110 020

9. Vodafone Essar Cellular Ltd.
(Earlier BPL Mobile Cellular Ltd.)
1046, Avanashi Road
Coimbatore – 641 018
10. Vodafone Essar Gujarat Ltd.
(Earlier Fascel Ltd.)
6th Floor Sakar II, Ellis Bridge
Ahmedabad – 380 006
11. Vodafone Essar Ltd.
(Earlier Hutchison Essar Ltd.)
Peninsula Coporate Park
Ganpatrao Kadam Marg
Lower Parel
Mumbai – 400 013
12. Vodafone Essar Digilink Ltd.
(Earlier Aircel Digilink India Limited)
C-48, Okhla Industrial Area Phase II
New Delhi -110 020

....Petitioners

Vs.

1. Department of Telecommunications
Ministry of Communications
Sanchar Bhawan
20, Ashoka Road
New Delhi -110 001
2. Assistant Director General (WR)
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 Petitioners

: Mr. C.S.Vaidyanathan, Senior

Advocate
Mr. Manjul Bajpai, Mr. Ashish Yadav,
Ms. Devika Bajpai, Advocates

For Respondents : Mr. Vineet Malhotra, Advocate
Mr. K. Singhal, Advocate

JUDGMENT

S.B. Sinha

The first petitioner is an association of the cellular operators. Petitioners No. 2 to 12 are cellular operators. Indisputably, for the purpose of operating their services, the petitioners are required to take licenses from the first respondent. They have been granted licenses by the Department of Telecommunications, the respondent no. 1 herein. License fee is levied in terms of the licence which was earlier payable in quarterly instalments. They are also required to enter into an agreement with DoT, wherefor Royalty to the Wireless Planning and Coordination Wing (WPC) is required to be paid. The mode and manner in which the license fees and royalty etc are to be paid, have been laid down in the agreements entered into by and between the respondent no. 1 and the respective cellular operators. The petitioners 2 to 12 had been granted licenses by the respondent no. 1 in the year 1995.

2. The Central Government framed a National Telecom Policy in the year 1999, pursuant where to or in furtherance whereof, in stead of levying fixed charges, charges were to be levied on revenue sharing basis.

3. The question which arises for consideration in this petition is as to whether the respondents can levy penalty upon the petitioners for the period February, 1999 and December, 2001 on the outstanding WPC dues. The demand for payment of penalty, it may be noticed, on royalty was made for the first time in the year 2006. We may furthermore notice hereto below, a copy of a demand made on M/s Idea Mobile Communications Ltd dated 10.7.2006 which reads as under :-

“As per the reconciled outstanding as on 31.12.2001(with interest) intimated WPC branch, accounts for Haryana, Kerala and UP(West) service areas have been recalculated and outstanding dues as on 30.06.2006 are as follows.

S.No.	Service Area	Amount outstanding as on 30.06.06 (Rupees)
1	Haryana	8,12,76,446/-
2	Kerala	11,26,24,684/-

3	UP(West)	16,71,71,193/-
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2. A detailed report showing calculation of outstanding dues as well as interest thereon pertaining to above circles are enclosed. It is requested to make payment of the outstanding dues within 15 days of issue of this letter.”

4. We may furthermore place on record that no interest or penalty has been charged for the period 1995 to January, 1999. The principal amount has been paid in 2002. A no dues certificate has also been issued in the year 2003.

5. With the aforementioned backdrop of events, we may notice some of the conditions contained in the agreement.

Before us, the parties referred to the terms and conditions of the agreement which was executed in a prescribed format on or about 28.12.1995 between respondent no. 1 and M/s Aircel Digicable (India) Ltd.

The said agreement is in several parts. We are concerned with the part dealing with the payment of license fees contained in para 19 thereof and WPC Wing’s license contained in para 20.

6. Each of the conditions mentioned deals with a particular subject matter. Para 19, as indicated hereinbefore, deals with payment of license fees. The license fees in terms of the said condition were payable in advance for the first year and on quarterly basis for the subsequent years. Para 19.4 excludes the applicability of royalty payable to Wireless Planning & Coordination(WPC) Wing of Ministry of Communications by stating in unequivocal that the same shall be paid separately by the licensee at the rates prescribed by the WPC and as per procedure specified by it. The clause dealing with interest is contained in para 19.8 of the agreement which reads as under:-

“In case of over-due payments, interest shall be charged on the amount due at the prime lending rate as specified by State Bank of India from time to time plus 5% (compounded monthly).”

7. We may also place on record that the petitioners have furnished bank guarantees in the year 2002 separately for license fees and WPC Charges. The mode of grant of license by the WPC Wing is contained in condition-20. We would refer to paras 20.1 & 20.4 of the said agreement which read as under:-

“20.1 A separate licence shall be required from the WPC Wing of Ministry of Communications, which will permit utilization of appropriate radio frequency spectrum

for the establishment & operation of the C.M.T.S. under usual terms and conditions of that licence. Grant of licence will be governed by normal rules, procedures & guidelines and will be subject to completion of necessary formalities.

20.4 Licence fee and Royalty shall have to be paid for grant of licence which shall be subject to revision from time to time.”

8. Interpretation of the aforementioned provisions calls for our decision, but before adverting thereto, we may notice some correspondences which have passed between the parties and some office orders so as to enable us to ascertain the intent and purpose of the covenants contained in the said agreement. On or about 20.7.1995, Government of India issued an Office Order in terms whereof the mode of fixation of rate of royalty for GSM Cellular mobile telephone service was fixed, paragraph 7 whereof reads as under:-

“7. Royalty for the first year may be charged on quarterly basis, the quarter being January-March, April-June, July-September and October-December.”

9. It is accepted by the parties that whereas license fees are determined on the basis of competitive biddings and thus varies from area to area, royalty payable is a fixed and/or uniform amount. We may also notice that the Government of India by a letter dated 23.8.1996 addressed to J.T. Mobiles Limited and Another stated that frequency agreement would be issued on supply of copy of license agreement by DoT. The said letter was issued on or about 12.6.2007 forwarding therewith an agreement which was not to be treated as a license and informing the addressees that the Ministry had agreed in principle to grant licenses to them for establishing wireless telegraph station wherefor license fee of Rs. 1,00,100/- p.a. would be payable and royalty would payable at Rs. 14,30,400/- p.a. Para 13 of the said letter reads as under:-

“13. This agreement as well as any licence issued by WPC Wing, DOT will be without prejudice to the terms and conditions contained in the letter of agreement entered into by you with this Department.”

10. The respondents furthermore issued licenses on or about 26.12.2001 which were valid upto 31.12.2001 (co-terminus with DoT license), clauses 4 & 5 whereof read as under:-

“4. Pay to the Central Government (W.P.C. Wing) such royalty & license fees as enforced from time to time.

5.(a) Spectrum charges for Cellular service spectrum shall be paid annually on percentage revenue share basis of Adjusted Gross Revenue (AGR) covering Royalty payment for use of cellular spectrum and licence fee for cellular mobile handsets,

cellular base stations and also for possession of wireless telegraphy equipment vide GOI order No.L-14014/06/2000-NTG Dated 22.9.2001.

(b) Annual royalty and License Fee for use of spectrum for point to point links and MW-Access/Mw-Back bone links shall be paid in accordance with the existing rules (vide Government of India order No.R-110014/4/87-LR dated 20.7.95).”

11. Whereas clause (a) of Para 5 above relates to the aforementioned Office Order No. L-14014/06/2000-NTG dated 20.7.1995, clause (b) thereof relates to the Office Order No. R-110014/4/87-LR(PT) dated 20.7.1995 – one dealing with the charge of royalty and another dealing with the license fees for the grant of license to establish, maintain and work GSM Cellular Mobile Telephone Service (CMTS), Microwave point to point and point to multi-point networks under the provisions of the Indian Telegraphs Act.

It is also not in dispute that 1995 Order continued upto 2001. An amendment took place in 2001 as a result whereof certain changes were effected.

A proposal for amendment was made by the Government of India by its letter dated 25.9.2001 wherein it was inter alia stated:-

“3.5 Any delay in payment of Licence Fee, or any other dues payable under the LICENCE beyond the stipulated period will attract interest at a rate which will be 5% above the Prime Lending Rate (PLR) of State Bank of India prevalent on the day the payment became due. The interest shall be compounded monthly and a part of the month shall be reckoned as a full month for the purposes of calculation of interest.”

12. We may notice that by reason of such proposal only, the words “or any other dues” were inserted. However, we may hasten to add that even then, two different licenses were to be issued.

Clause 3.8 of the proposed license was to be in the following terms:-

“3.8. In case, the total amount paid on the self assessment of the LICENSEE as quarterly Licence Fee for the 4 (four) quarters of the financial year, falls short by more than 10% of the payable Licence Fee, it shall attract a penalty of 150% of the entire amount of short payment. This amount of short payment along with the penalty shall be payable within 15 days of the date of signing the audit report on the annual accounts, failing which interest shall be further charged per terms of Condition 3.5. However, if such short payment is made good within 60 days from the last day of the financial year, no penalty shall be imposed.”

It refers to payment of license fees on quarterly basis. Clause 3.9 provided for payment of royalty towards WPC charges, stating-

“3.9 The Fee/royalty payable towards WPC Charges shall be payable at such time(s) and in such manner as the WPC Wing of the Ministry of Communications may prescribe from time to time.”

13. Clauses 4.1 and 4.2 provide for securitization of the dues. However, for the aforementioned purposes also, the dues were to be separately securitized and not jointly. It has not been denied or disputed that for the first time, demand of interest was made by the respondents by a letter dated 10.7.2000; paras 2 and 3 of which read as under:-

“2. It may be noted that in this context, the Group on Telecom & IT Convergence (GOT-IT) under the Chairmanship of Honorable Finance Minister has decided that such operators who are defaulting in the payment of WPC dues may be asked to pay the pending dues, and adjustments, if required, may be made subsequently.

3. It may also be pointed out that interest shall be levied on any outstanding dues not paid in time. Interest at @ 15% shall be charged on such outstanding WPC dues.”

14. Various other communications also passed between the parties but therein no mention of levy of penal interest was made. One of the petitioners, however, sought for clarification, inter alia, with regard to the levy of the applicability of the penal interest, if any, from which date and how the same would be computed.

In reply thereto, the respondents by a letter dated 30.9.2002 stated as under:-

“I am directed to refer to your letter dated 26th September, 2002 on the subject mentioned above and to say that the interest amount shall be charged on the actual amount becoming due as on 1st April 02 after necessary reconciliation/settlement of data based on the information/documents submitted by the company. It shall however be in the fitness of things if provisions payment of the huge outstanding amount is made without further delay to avoid loss of penal interest being accrued day by day.”

By another Office Order dated 26.3.2002, the respondent stated as under:-

“(E) Penal interest shall be levied as per the existing practice and procedure in vogue for delayed receipt of payments as applicable and on the same terms and conditions contained under main DOT Licence Agreement and;

(F) Financial settlement/accounting of spectrum charges based on audited AGRs (subject to physical verification) shall now be undertaken on financial year basis on the same lines, and procedures/terms and conditions as for the main DOT Licence Agreement.

3. Accordingly, the cellular service providers are requested to submit actual AGRs figures for the period 1.8.1999 to 31.12.2001 and the estimated AGR figures for the current quarter (1.1.02 to 31.3.02) immediately. The service providers should make payment of the spectrum charges for the quarter 1.1.02 to 31.3.02 immediately and the balance for the period 1.8.1999 to 31st March 02, based on the difference between provisional and actual AGRs.

4. Outstanding dues (if any) for the period prior to 1.8.1999 based on the Government of India orders dated 20.7.1995 are also to be settled separately by the 15th April, 2002 positively, failing which these will invoke penal interest at the same rate as stipulated in terms and conditions of the revised DOT Licence Agreement.”

15. A bare perusal of the aforementioned office order would clearly show that the payments were to be made in terms thereof and the amendment was sought to be made effective on and from 1st September, 2001. It is also of some interest to note that even in the demand for some periods interest has been charged @ 17% p.a., whereas for some other periods, interest at the rate of 15% has been levied.

16. The stand of the respondent, before adverting to their submissions, as contained in para 1 under the heading “parawise reply” may be noticed:-

“1. That the contents of para under reply save and except what is a matter of record are wrong and hence denied. It is denied that the respondents have wrongly levied interest, as alleged or that the same is unfair, unjust etc., as alleged. It is not denied that the demand Notes were issued by the Wireless Finance Branch (WFD), DOT in 2006. The Wireless Planning and Coordination (WPC) Wing has reconciled the closing balance as on 31.12.2001 for the licenses issued up to 30.6.2000 taking into account the conditions laid down for the payment of penal interest in the service licenses for the belated payments. It is submitted that interest on delayed payment has been charged @ 15% per annum in view of WPC Wing D.O. no.L-14041/09/99-NTG dated 10.07.2000 for the period 1.7.2000 to 31.3.2002 and thereafter at the same rate as stipulated in terms and conditions of the revised DOT Service License Agreement as also WPC Wing order No.L-14047/07/2002-NTG dated 26.3.2002. A copy of the above mentioned D.O. dated 10.07.2000 and the order dated 26.03.2002 are annexed herewith as Annexure R-I (colly).”

17. We would assume that the agreement is bilateral in nature and not a statutory one. The agreement contains several conditions. Each of the conditions contained in specified paragraphs are separate and distinct.

18. Mr. Vineet Malhotra, the learned counsel for the respondent, would contend that clause 19.8 covers both license fees as also WPC Charges. Sustainance for the said contentions has been sought to be drawn from clause 20.4 of the said agreement submitting that same talks both of the license fees as also royalty.

19. It is a well-known principle of law that the chapter-heading can be noticed for the purpose of interpretation of a document/statute. A document, although should be read in its entirety so as to ascertain the intention of the maker thereof, but it is well-settled that contractual obligations providing for levy of interest or penalty would not be inferred in absence of any express provision contained therein.

In TATA Power Co. Ltd. Vs. Maharashtra Electricity Regulatory Commission & Ors.

– 2009(5) UJ 2440(SC), It is stated:

“123. Chapter heading, therefore, is a permitted tool of interpretation. It is considered to be a preamble of that section to which it pertains. It may be taken recourse to where an ambiguity exists. However, where there does not exist any ambiguity, it cannot be resorted to. Chapter heading and marginal note, however, can be resorted to for the purpose of resolving the doubts.

124. It furthermore appears that there is a drift from the old value in recent times.

125. We may notice that the English decisions whereupon reliance had been placed by this Court in various judgments and in particular Chandler v. DPP (1962) All ER 142, str considered to be a no longer a good law in the country of origin, as stated in Bennion on Statutory Interpretation Fifth Edition at page 748:

Superseded dicta Phillimore LJ referred to a 'general rule of law' to the effect that marginal notes must be disregarded 'upon the principle that those notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons'. In fact, with occasional trifling exceptions, the marginal notes in an Act are not inserted by parliamentary clerks - or even drafters - but are contained either in the Bill as introduced or in new clauses added by amendment. Furthermore, the clerks are not 'irresponsible persons', but are subject to the authority of Parliament. Avory J. said that 'marginal notes form no part of a statute'. He added: 'They are not voted on or passed by Parliament, but are inserted after the Bill has become law'. This is not the case however. The entire Act is passed by Parliament and is entered, or deemed to be entered, in the Parliament Roll with all non-amendable components included. These components mostly remain unchanged throughout the passage of the Bill. They are certainly not inserted after the Bill has become law. Willes J. after asserting that the marginal notes and other 'appendages' are not part of an Act, said of any Act, passed after the practice of actually engrossing Acts on the Parliament Roll ceased in 1849:

‘The Act, when passed, must be looked at just as if it were still entered upon a roll, which it may be again if Parliament should be pleased so to order; in which case it would be without these appendages....

126. It is, however, evident from the decision of this Court in Indian Aluminium Company v. Kerala State Electricity Board MANU/SC/0310/1975 : [1976]1SCR70 , that the modern trend is to take into consideration the marginal note. It could be used, as has been held, in R.S. Joshi, Sales Tax Officer, Gujarat and Ors. v. Ajit Mills Limited and Anr. MANU/SC/0300/1977 : [1978]1SCR338 . Relevance of marginal note was also taken note of in Ramesh Chand and Ors. v. State of U.P. and Ors. MANU/SC/0389/1979 : [1980]1SCR498 .

127. In Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors. MANU/SC/1197/2006 : AIR2006SC1489 , marginal note has been taken into consideration as an intrinsic part of the Section. In Deewan Singh and Ors. v. Rajendra Pd. Ardevi and Ors. MANU/SC/0207/2007 : AIR2007SC767 it has been held that the marginal note may be taken into consideration for the purpose of proper construction of the provision although there is no ambiguity. Sarabjit Rick Singh v. Union of India (UOI) MANU/SC/0041/2008 : (2008)2SCC417 follows Deewan Singh (supra).

20. Condition No. 19 deals with license fee. Condition No. 19.4 excludes any charges payable to the WPC Wing whether by way of royalty or license fee. Clause 13 of the agreement dated 12.6.1995 clearly refers to two different components thereof, namely, license fee and other charges. The correspondences passed between the parties as also the Office Orders issued from time to time clearly go to show that license fee and royalty for availing the permission of the WPC Wing bear different concepts. Clause 20.4 of the agreement refers to license fee and royalty payable separately to WPC Wing of the respondent and thus the same has nothing to do with payment of license fee as provided for in Condition No. 19 thereof. This aspect of the matter also becomes clear from the Office Orders dated 20.7.1995, reference whereof has been made by us heretofore.

21. For the purpose of ascertaining the intention of the parties, it is possible to take into consideration the fact as to how the respondents understood the same. In our considered view, the very fact that the respondents talked in different voices at different point of time and furthermore as they did not levy any interest for a long time, is itself a pointer to show that no interest or penalty was leviable.

22. Levy of interest or penalty must be supported by an authority of law. The respondents themselves quantified/crystalised the amount and/or rates payable towards WPC Charges only in the

year 2002. Any modification or novation on a contract is permissible when both the parties thereto agree. If no interest or penalty could be levied in terms of the provisions of the contract, the purported Office Orders, which have no force of law, would not make a demand of interest enforceable in law. Having regard to the fact that the respondents did not initiate any proceeding and no demand was made prior to 2006, even the provisions of the Interest Act, 1998 would not be applicable in the facts and circumstances of this case. Even the respondents had not issued any notice directing that payment should be made on a particular date failing which interest would be charged. The only communication received by the petitioner from the respondents was made on 26.3.2002 in terms whereof, time for making payment was extended till 15.4.2002. It has not been denied or disputed that the petitioners have made payments prior to the said date. The respondents, therefore, could levy interest and/or penalty prospectively and not retrospectively. The imposition of penalty @ 150% of the dues, thus, even if otherwise valid, could have been enforced only with a prospective effect. Even otherwise, if the demand of interest is not sustainable, no question of levy of penalty could arise in respect of the license fee and the WPC Charges. The demand of interest and penalty, thus, being not authorized under the contract, must also be, in the facts and circumstances of the case, held to be without any authority in law.

23. For the reasons aforementioned, the petition is allowed.

The impugned demands of penalty are set aside. The respondents are hereby directed to recalculate the dues of each of the cellular operator and adjust all excess amount wrongfully charged from the future bills of the petitioners.

In the facts and circumstances of this case, the respondent shall pay and also bear the costs incurred by the petitioners. Counsel's fee assessed at Rs.50, 000/-.

....., J
(S.B.Sinha)
Chairperson

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(G. D. Gaiha)
Member