TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 12th February, 2010

Petition No.283 of 2009

The Arvind Mills Ltd … Petitioner

Versus

Department of Telecommunications (DoT) & Anr. … Respondent

BEFORE:

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

For Petitioner : Mr. Brij Kishore Roy, Advocate

For Respondent : Mr. K. Singhal, Advocate
Mr. Anurag Sharma , Advocate

JUDGMENT

S.B. Sinha

The petitioner is a licensee under the provisions of the Indian Telegraphs Act, 1885 (1885 Act). The license agreement was entered into by and between the petitioner and the first respondent on or about 10.5.1996 for Public Mobile Radio Trunking Service (hereinafter called and referred to for the sake of brevity as PMRTS) in respect of 9 cities namely Allahabad, Faridabad, Vashi, Delhi, Bangalore, Chennai, Surat, Baroda and Mumbai. The said license agreements are valid up to the year 2011.

Inter alia, on the premise that the petitioner has not paid the license fees in terms of the said license, a demand for a sum of Rs. 28,18,347/- was made by a letter dated 2.6.2004, for the financial years 2001-02 and 2002-03. Along with the said demand the statement of revenue and license fee, duly audited for the said years as also auditor's report on statement of revenue and license fee for the said year were enclosed. The petitioner was also asked to pay interest upto 30.4.2009 calculated at prime lending rate of the State Bank of India + 5% compounded monthly. Reminders thereto were also sent by the respondent in terms of their letters dated 10.3.2005. However, the petitioner, by a letter dated 14.3.2005, inter alia, contended that such demand was not legally tenable; in reply whereto, the respondent by its letter dated 15.3.2005 stated as under:-

"With reference to your letter no.NIL dt.14.03.05 the following is stated:

PENALTY:

As per condition 1.10 of Financial Condition of License Agreement, penalty is levied if there is shortfall in payment of payable license fee by more than 10% and if such shortfall is not made good within 60 days from the last day of the Financial Year. The payable license fee as per calculation of L.fee branch for F.Y. 2001-02 and 2002-03 are Rs.1692990/- and Rs.3823302/- respectively. The license fee based on revenue share has been provisionally arrived at after excluding the non-PMRTS revenue from Gross revenue shown in P&L Account. The shortfalls in payment for these two years are Rs.316356/- and Rs.1137848/- respectively on 30.05.02 and 30.05.03 which are more than 10% of payable license fees. Hence penalty has been rightly levied @ 150% of shortfall, viz; Rs.316356/- and Rs.1137848/- respectively.

INTEREST ON PENALTY:

As per condition 1.10 Financial Condition of License Agreement, short paid License fee and penalty has to be paid within 15 days of signing of the Audit Report on the ANNUAL ACCOUNTS failing which interest shall be further charged as per Condition 1.7. Audit Reports in the Annual Accounts for the F.Y. 2001-02 and 2002-03 were signed on 30th August’02 and 29th May’03 respectively. Thus shortfall and penalty for these two years should have been paid by 14th September

’02 and 13th June ’03 respectively. But payment of shortfall was received only on 18/12/02 (for 2001-02) and on 15/07/03 (for2002-03). In fact the penalty is yet to be paid.

In view of the above your are once again requested to make the payment of outstanding dues immediately together with interest as already communicated to you vide this office letter of even no. dated 10/03/05.”

The respondent, however, by another letter dated 15.2.2006 raised a revised demand for a sum of Rs. 30,31,871/- along with interest upto 28.2.2006 on the alleged shortfall of license fee for the years 2001-02 and 2002-03. Indisputably, the respondent has levied penalty @ 150% on shortfall of license fee payable by the petitioners to it.

According to the petitioner, it had paid the correct license fee on revenue sharing basis i.e. on the basis of the activities relatable to telecom licenses but the respondent had illegally added revenue/income from many other items which were not part of such activities. The petitioners had filed a petition questioning levy of Adjusted Gross Revenue (AGR) before this Tribunal, being Petition No.21 of 2005 which has been allowed. The contention of the petitioner is that no agreement has been entered into by and between it and the respondent which contained an agreement in terms whereof, penalty of 150% was payable. The petitioner for execution of the decree passed in its favour, in the aforementioned Petition No.81 of 2005 filed an Execution Application. It

was marked as MA No. 118 of 2007. In the said MA, this Tribunal directed that the matter relating to payment of penalty would be taken up separately. Pursuant to the said observations, the petitioners filed an application for tagging the said MA along with the connected matters being Petition no. 8 of 2003 and other connected matters.

However, as it was found that levy of penalty should be treated as a separate subject and not relatable to execution of a decree, this Tribunal by an order dated 18.11.2009 granted leave to the petitioners to file a formal substantive application. Pursuant thereto, or in furtherance thereof, this Petition has been filed, inter alia, for setting aside the demands made by the respondent in terms of its acclaims dated 2.6.2004, 10.3.2005, 15.3.2005 and 15.2.2006 demanding penalty.

The petitioner contends that having regard to the provisions contained in Section 74 of the Indian Contract Act, no penalty can be imposed in view of the fact that the respondent had levied penal interest on the amount of the alleged shortfall in license fee.

It was furthermore contended that in any event, the question of levy of penalty does not arise since the actual amount of AGR on which the license fee is calculated, having been far in excess of the correct amount of license fee, the petitioner must be held to have paid license fee in excess which the respondent is liable to refund.

The respondent, however, contend that the demand made by reason of the aforementioned orders are in accordance with the terms and conditions of the license agreement.

Clause 18.6 of the license agreement reads as under:-

> "In case of overdue payments, an interest shall be charged at the highest commercial lending rate of State Bank of India applicable on the date on which the payment becomes due and may be recovered though the bank account(s) to be opened as per sub clause 18.4 above."

There did not exist any provision for levy of penalty of 150% in the year 2001-02 and 2002-03. In any event, the petitioners had furnished performance Bank Guarantees along with the license which could have been encashed in the event of default. The respondent, therefore, could have obtained payment by encashing the bank guarantee. It was also entitled to levy interest.

Indisputably, TRAI had made various recommendations in respect of AGR and other matters.

The license agreement dated 05.12.2007 for Public Mobile Radio Trunking Service signed between the parties stated the Schedule of Payment of Annual License Fee and other dues, the relevant provisions whereof are:-

"19.2 License fee shall be payable in four quarterly installments during each Financial Year (FY). Quarterly installments of License Fee for the first three quarters of an FY shall be paid within 15 days of the completion of the relevant quarter. This fee shall be paid by the Licensee on the basis of actual revenues (on accrual basis) for the quarter duly certified with an affidavit by a representative of the LICENSEE, authorized by a Board Resolution coupled with General Power of Attorney. However, for the last quarter of FY, the licensee shall pay the License fee by 25th March on the basis of expected revenues for the quarter, subject to a minimum payment equal to the actual revenue share paid of the previous quarter.

19.5 Any delay in payment of License fee or any other dues payable under the LICENSE beyond the stipulated period will attract interest at a rate which will be 2% above the Prime Lending Rate (PLR) of State Bank of India existing as on the beginning of the Financial Year (namely first April) in respect of the license fees pertaining to the said Financial Year. 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.

19.6 Final adjustment of the license fee for the year shall be made on or before 30th June of the following year based on the Gross Revenue Figures duly certified by the AUDITORS of the Licensee

in accordance with the provision of Companies Act, 1956.

19.7 A reconciliation between the figures appearing in the quarterly statement with those appearing in annual accounts shall be submitted along with a copy of the published annual accounts and audit report, within 7 (seven) days of the date of signing of the audit report. The annual financial account and the statement as prescribed in Condition No.19.3 shall be prepared following the norms as prescribed in Annexure-IV.

19.8 In case, the total amount paid on the self assessment of the LICENSEE as quarterly License Fee for the 4(four) quarters of the financial year, falls short by more than 10% of the payable license fee, it shall attract a penalty of 50% of the entire amount of the 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 as per terms of Condition 19.5. 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 almost stands admitted, subject to the decision of the Supreme Court of India in the pending Appeals in the AGR matters, that the petitioner has paid excess amount to the respondent in view of the judgment of this

Tribunal. The penalty clause could have been given effect to only from the date the agreement came into force. The last agreement entered into by and between the petitioner and the respondent appears to be dated 5.12.2007. According to the petitioner, the Cellular Operators Association of India had raised a number of contentions in respect of the said agreement in terms of its letter dated 31.8.2007.

We, however, as at present advised need not go thereinto.

When a license is granted in terms of a provision of a statute, the provisions thereof must be strictly complied with.

If a penal clause does not exist in the license agreement, the question of invoking the same does not and cannot arise. The petitioner contends that it has not signed the ‘addenda’ wherein the penal clause occurs.

It is, thus, not a case where the penal clause could have been invoked.

Mr.Malhotra, the learned counsel appearing for the respondent in the written-submissions have referred to certain decisions which dealt with the matter of a license for duty liquor. Liquor rightly or wrongly is considered to be ‘Res Extra Commercium’. Telegraph would not fall within the purview of the said term.

It would also not be correct to contend that only because the petitioner has acted upon the said agreement, the penal clause contained in the ‘Addenda’ would also be binding on it. If the petitioner is not a party to the

said agreement, the question of invoking the penal clause would not arise.

A penalty clause, unless there is an express provision in the contract, cannot furthermore be given a retrospective effect.

A clause by way of penalty may be found even in a contract. It is now a well-settled principle of law that a court of law may award only a reasonable amount of compensation even if a sum has been named by way of damages for commission of breach of contract.

In these cases, we would assume that the interest is not penal in nature. Keeping, however, the amount of interest required to be paid by the petitioner to the respondent, we are of the opinion that it is not a fit case where the penalty should have been levied.

We may in this connection refer to certain decisions of the Supreme Court of India:

(1) In Maula Bux v. Union of India - AIR 1970 SC 1955, the Supreme Court of India stated the law as under:

> "There is authority, no doubt coloured by the view which was taken in English cases, that Section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach : Natesa Aiyar V Appavu Padayachi, ILR[1913] Mad 178 Singer Manufacturing Company. v. Raja Prosad ILR (1909) Cal.960;

Manian Pattar v. The Madras Rly Co. ILR (1906) Mad. 188. But this view is no longer good law in view of the judgment of this Court in Fateh Chand's case (1964) 1 SCR 515 : (1964) 1 SCR 515 This Court observed at p. 526 (of SCR)= (at p.1411 of AIR):

Section 74 of the Indian Contract Act deals with the measures of damages in two classes for cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulations by way of penalty **** The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for"

The Court also observed:

"It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is, however, no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgement the expression "the contract contains any other stipulation by way of penalty comprehensively applies to every covenant involving

a penalty whether it is for payment on breach of contract of money contract contains any other stipulation by way of penalty comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

It was further observed:-

> "There is no ground for holding that the expression 'contract contains any other stipulation by way of penalty' is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract which by the terms of the contract expressly or by clear implication are liable to be forfeited."

(2) In ONGC v. Saw Pipe Ltd. - AIR 2003 SC 2629, the Supreme Court considered the said question in the following terms:

> " Section 74 emphasizes that in case if breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss prove to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and party is only entitled to reasonable compensation for the loss suffered But if the compensation named in the contract for such breach is genuine pre estimate of loss, which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other parties to lead evidence for proving that no loss is likely to occur by such breach."

(3) In Fateh Chand Vs. Bal Kishan Dass - AIR 1963 SC 1405, the Supreme Court of India held as under:

> "The measure of damages in the case of breach of stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages, the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the court to award

compensation in case of breach of contract is unqualified except as to maximum stipulated; but compensation has to be reasonable, and that imposes upon the court duty to award compensation according to settled principles. The Section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby, it merely dispenses with proof of " actual loss or damage" ; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

(4) In Union of India v. Raman Iron Foundary - AIR 1974 SC 1265, the Supreme Court of India held:

"The claim is admittedly one for damages for breach of the contract between the parties. Now it is true that the damages which are claimed are liquidated damages under clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether whether it be so liquidated or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a

stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle even if there is a stipulation by way of liquidated damage, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It therefore, makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for liquidated damages."

In a case of this nature, furthermore, the principles of natural justice should have been followed.

Having regard to the factual matrix involved therein, we are of the opinion that the imposition of penalty was not warranted. The impugned demands are set aside and the petition is allowed.

The respondent shall pay and bear the costs of this petitioner. Counsel's fees assessed at Rs.1,00,000/-.

……….…., J
(S.B.Sinha)
Chairperson

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(G. D. Gaiha)
Member