

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI****Dated 12th February, 2010****Petition No.138 of 2006**

M/s Archana Telecom Services Ltd.
908, Ansal Bhawan,
16, Kasturba Gandhi Marg,
New Delhi-110001

...Petitioner

Vs.

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

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. Jayant K. Mehta, Advocate

For Respondent : Mr. K.P.S. Kohli, Advocate for
Ms. Maneesha Dhir, Advocate

R D E R**S.B. Sinha**

The petitioner is aggrieved by and dissatisfied with the encashment of the financial Bank Guarantee and performance Bank Guarantee, furnished by the petitioner in terms of the license agreement dated 5.12.1994 as also imposition of liquidated damages to the extent of Rs. 5 lakhs by the respondent.

Bereft of all unnecessary details, the fact of the matter is as follows.

2. The petitioner obtained a license from the respondent herein for providing electronic mail service in India on non-exclusive basis on or about 15.12.1994. The term of license was for a period of five years.

The license fees payable by the petitioner were as under:

Year	Licence Fee
1 st Year	Rs. 25 Lakhs
2 nd Year	Rs. 25 Lakhs
3 rd Year	Rs. 35 Lakhs
4 th Year	Rs. 35 Lakhs
5 th Year	Rs. 50 Lakhs

3. In terms of the said license agreement, performance guarantee as also financial bank guarantees were furnished by the petitioner for a sum of Rs. 35 lakhs. For operationalisation of the said services, the petitioner obtained various facilities from its bankers for the purposes of mobilizations of resources. The said services were to be provided in five cities in the country, namely, Delhi, Bangalore, Hyderabad, Ahmedabad and Madras.

4. Indisputably, for the aforementioned purpose, the parties herein entered into an agreement on or about 15.12.1994 in terms of the provisions of the Indian Telegraphs Act, 1885, the relevant clauses whereof are as under:

“2. The Licence is granted provisionally for a period of five years.

6. The Licensor may at any time revoke the licence on the breach of any of the terms and conditions therein contained or in default of payment of any consideration payable thereunder.”

5. Five schedules were appended to the said license.

Schedule ‘A’ provided for the definition of service Area. The licensee was to make available the service at least in any planned service areas within 12 months of signing of the license agreement provided for in Schedule ‘A’ thereof.

Schedule ‘B’ provided for payment of license fee, the relevant clauses whereof are as under:

“3. The annual licence fee shall be payable in advance every year in four quarterly instalments as follows:

(a) 1st Quarter - 20% of annual licence fee.

(a) 2nd Quarter - 20% of annual licence fee.

(a) 3rd Quarter - 30% of annual licence fee.

(a) 4th Quarter - 30% of annual licence fee.

4. The licence fee for the first quarter will be paid in two parts. The first part of the licence fee amounting to 10% of the first year's licence fee shall be paid before or at the time of signing the licence agreement. The second part amounting to 10% of the first year's licence fee shall be paid within 30 days of signing the licence agreement. The subsequent components shall be paid within 10 days of the beginning of each quarter.

5. The licence fee shall accrue from the date of signing the licence agreement.

6. For the subsequent Quarters, the following will apply:-

(i) The licensee shall make the payment on quarterly basis in advance, where the service is made operational at the time of signing the licence agreement or during the first quarter of the licence.

(ii) Where the service is made operational any time before the end of one year of licence, the licensee shall pay the licence fee of all the previous quarters and the current quarter end of the first year of licence.

(iii) Where the service is not made operational before the end of first year of licence, the licensee shall pay the licence fee for all the previous quarters and the current quarter before the end of the first year of licence.

6. Some of the relevant clauses of the Schedule of payment of license fee are:-

“For the second quarter of first year of licence—

(i) 20% of first year's licence fee, where the service is made operational at the time of signing the licence agreement or within the first quarter, shall be paid within 10 days of the beginning of the second quarter.

(ii) 20% of the first year's licence fee, where the service is made operational during the second quarter, shall be paid within 10 days of making the service operational.”

7. Schedule 'C' refers to the table of contents, definitions, interpretations etc. It contains a provision for payment of liquidated damages in clause 4 thereof; such clauses 4.1 and 4.2 read as under:

“4.1 The date delivery of the service stipulated in clause 3.3 shall be deemed as the essence of the licence and the Service must be brought into commission not later than the date specified therein. Extension will not ordinarily be given. Should, however, the Service be brought into commission after the expiry of the licensed date of commissioning, without prior concurrence of the licensing authority and be accepted by it, such commissioning will not deprive the Authority of its right to recover liquidated damages under this article. When, however, the commissioning of the Service is effected within 15 days of the licensed commissioning period, the Authority may accept the Services and in such cases, the provision of the Condition 4.2 will not apply.

4.2 Should the Licensee fail to bring the Service or any part thereof into commission within the period prescribed for the Commissioning, the Authority shall be entitled to recover for each Service Area Rs. 5000/- (Rupees Five Thousand) for each week of the delay or part thereof subject to maximum Rs. One lakh for each service area. The authority may without prejudice to any of its other rights under the licence, terminate the licence in case if the delay in commissioning the service exceeds twenty weeks.”

8. Clause 7 provided for extension of license in the following terms:

“7.1 The validity of this provisional licence is for a period of five years unless terminated under Condition B. (Extension may be granted by the Authority if requested by the Licensee for a period of Two years at a time. The decision of the Authority will be final in the matter. In case the licensee does not wish to extend the licence beyond the expiry period, he will inform the authority accordingly atleast 365 days prior to the expiry of the licence.

7.2 The Authority reserves the right to grant more than one licence per geographical area/service area.”

9. Clause 8 provides for termination of license. We may notice para 8.3 which is as follows:

“8.3 TERMINATION FOR CONVENIENCE :

If the licensee is to surrender the licence, he shall give a notice of 365 days. If during the period,, the criteria of Quality of Service are not met, the bank guarantee provided by the licensee will be invoked.”

10. The said license was to expire on 15.12.1995.

The petitioner applied for extension of the said license by a letter dated 9.10.1995, inter alia, stating that although it had made all arrangements in respect of finance, manpower, e-mail system and software/hardware infrastructure in readiness, sought for extension of 20 weeks to the validity of license.

As no immediate response was received thereto, the petitioner by its letters dated 10.11.1995 and 13.12.1995, urged the respondent to grant extension of license for providing e-mail services. Extension of the license for a period of 3 months was granted in favour of the petitioner by a letter dated 14.3.1996.

According to the petitioner, as the extension was granted almost at the end of the tenure, it had no other option but to ask for another extension of 3 months, i.e., till 14.6.1996 by a letter dated 18/19.12.1995. The respondent, by a letter dated 5.1.1996 granted such extension for another 3 months, stating ----

“The Telecom. Authority is pleased to grant further extension to the date of commissioning of E-mail service unto 2.5.96 in continuation of three months extension already granted, i.e., upto 14.3.96, vide this office letter of even number dated 19.12.95. Thus, the total extension comes to a period of 20 weeks, which is the maximum permissible limit under the terms and conditions of the License Agreement. This extension has been granted subject to payment of liquidated damages for the period of delay in commissioning of the service reckoning with effect from 15.12.95 (the specified date of commissioning) at the rate which would be intimated to you later on.

You are requested, to intimate the progress made so far in respect of procurement and installation of equipment etc. urgently and to commission the service within this extended period, as further extension will not be granted.”

11. The petitioner, however, by a letter dated 2.5.1996 expressed its inability to operationalise the said services and expressed its desire to drop the project, raising, inter alia, the following contentions :

“6. The aforesaid resulted in a typical ‘CATCH 22’ situation since, with licence extension for only 3 months i.e., up to 14.3.96 the implementation & commissioning of the system would not have been possible as the time given was insufficient to come out with the public issue, allot shares to public and utilize the funds for launch of the service.

7. It was only after repeated requests (personal visits & written letter) the license for commissioning of the service was extended to a maximum permissible limit of 20 weeks up to 2.5.96, vide DOT’s letter no. 845 12/93-TM dated 5.1.96.

8. By the time extension was granted in January 1996 that the share market started becoming unfavourable for the launch of the new public issues. Accordingly Archana's public issue also had to be delayed till the market improves.
9. The rest, as you know, is the history viz., announcement of elections and other financial environment factors resulting in continued sluggish primary market for launch of public issues and overall shortage of liquidity.
10. It may please be appreciated that in spite of best efforts of promoters of Archana Telecom Services Ltd., the reasons for inordinate delay to launch E-mail service were totally beyond control.
11. If DOT would have given timely extension of licence, Archana Telecom. Services Ltd, could have launched the E-mail service in time.
12. Under the circumstances, since, company's promoters have already sunk Rs. 2.35 crores in this project by virtue of :
 - Hardware and software already purchased and now lying unused.
 - Hiring of premises in different cities &
 - Training of manpower,we request you to consider our case for waiving of penal clauses of the licence, by the competent authority."

12. The respondent, however, sought to terminate the license by a letter dated 9.5.1996, the relevant portion whereof reads as under:

2. The licence agreement for operation of E-mail services was signed and issued to you on 15.12.94. As per terms and conditions of the Licence Agreement, the service was required to be started on or before 14.12.95. On your request, a 20 week extension was granted to you to commission the service. You should have commissioned the service on or before 2.5.96. You have failed to commission the service even after the expiry of 20 weeks extension beyond stipulated 12 months from the date of signing of licence agreement.
3. We would like to inform you that the licence fees for the second, third and fourth quarters of the first year and the first and the second quarters of the second years and the penal interest for the delay in payments have not been paid. The licence fee for second, third and fourth quarters of first year is to be paid 10 days before the completion of 12 months of licence agreement and for the subsequent period, the license fee is to be paid quarterly within first 10 days of each quarter.
4. You are, therefore, once again requested to make the payments of all the outstanding licence fees alongwith penal interest at the rate of 20% compounded monthly or part thereof within 30 days of the issue of this letter failing which the financial bank guarantee of Rs. 25 lakhs and two performance bank guarantees of Rs. 5 lakhs each, submitted by you, shall be forfeited and encashed. The Licence No. 845 12/93-TM dated 15.12.94 issued to you shall also be terminated after 90 days from the issue of this letter."

13. However, the respondent encashed the bank guarantees for the said sum of Rs. 35 lakhs. The petitioner contends that having regard to the fact that the provision for payment of license fee was made in the agreement only if certain events were to take place and it was, thus, imperative on the part of the respondent to acknowledge that the petitioner was to pay license fee depending upon the ability of the licensee to recover the payment from the consumers by providing for services; the respondent could only invoke the liquidated damages class and not the license fee.

In any event, the respondent -itself having terminated the license in terms of its letter dated 9.8.1996, the impugned demand must be held to be bad in law. Our attention in this behalf has been drawn to the evidence of Shri B.K. Singhal, a Director of the Company, who in his evidence, inter alia, stated -

"14. However, in 1996, the capital market in the country witnessed an unprecedented decline and this ultimately ruined the prospect of Petitioner's public issue.

15. The Petitioner submits that the actions on part of the Respondents were actuated by discrimination against the Petitioner. As a result of the actions and omissions on part of the Licensor, not only was the Petitioner unable to make the licensed service operational, huge amounts, which it had invested in the project, were also lost. Moreover, the business reputation of the Petitioner also received a heavy blow as a result of which numerous other projects of the Petitioner also came under shadow. Such actions on the part of the Respondent No. 2 fundamentally altered the circumstances to the detriment of the Petitioner. On the one hand, the Petitioner faced the prospect of multitude of service providers and the onset of internet services and on the other it had to face a hostile and discriminatory treatment from the Respondent."

14. However, it appears that the said witness, in his cross-examination stated as under :-

“Que : Do you remember how much amount was paid towards licence fee obligation?

Ans : It's an old case. So far as I remember Rs. 5 lakhs were paid towards licence fee to the respondent.

Que : Have you filed or record the progress report mentioned in para 3.8 of the petition?

Ans : We had been filing with DOT the progress reports of the project. I am not in a position to say whether copies of reports have been filed on record or not.

I deny the suggestion that averments made in Para 7 of the affidavit dated 29.11.2007 by way of evidence are baseless. We have filed complete set of papers in relation to this para with SEBI.

It is correct that the respondent granted maximum extension which was permissible under the licence to us but this maximum came very late i.e. after expiry of the one year period. Therefore, SEBI did not accept our proposal and the banks refused to grant the sanctioned loans.

Our raising of funds through public issue was not a condition precedent for grant of licence to us. But this was discussed in every meeting with DOT officials that we are arranging the funds through public issue and from the banks.

I do not know if DOT granted extensions in some case beyond the maximum period allowable under the licence.

I can produce documents in support of averments contained in para (iii) of para 3.16 of the petition. I do not have the same at present with me.

Same is my answer with respect of paras (i) and (ii) of para 3.16 of the affidavit.

My field staff used to go for the meetings with DOT. They were technical persons. Normally, I was not personally attending the meetings, therefore, I cannot give names of the officials of DOT who used to be present in the meetings.

We requested for extension much before the expiry of one year.”

15. The respondent, however, has filed counter-claim in the following terms:

“Paras 3.24 to 3.25 - That in response to the averments/allegations made in the instant paras, it is submitted that the Exit Policy is applicable only for the existing ISPs and it is not applicable for the email service providers where the license has already been terminated/surrendered prior to migration in internet Service Providers license. The Migration to the Email Service Providers was allowed by the respondent without the condition of 365 days notice. This was allowed only to those who clear all dues of Email licence.

Licence fee outstanding as on 15.6.96 was Rs. 2,50,000/- on 15.9.96. Licence fee was Rs. 7,50,000/- on 15.12.96, licence fee was Rs. 7,00,000/- on 15.3.97. Licence fee was Rs. 3,73,333/- . Hence, total licence fee comes to be Rs. 20,73,333/-. The PLR is taken as per SBI Bank rate interest of that year. The total interest on belated payments comes to be Rs.2,58,42,513/-. The original amount to be covered by DOT was licence fee Rs. 20,73,333/- and LD charges Rs. 5,00,000/- Hence, total comes to be Rs.25,73,333/-. The interest components on the licence fee is Rs. 2,58,42,513/- and interest on LD is Rs. 47,22,520/-. Hence, total amount comes to be Rs. 3,31,38,366/-. Copy of Work Sheet is filed herewith as **Annexure-R7.**”

16. One Mr. Subodh Saxena examined himself on behalf of the respondent. His deposition, however, is not of much relevance.

17. Mr. Mehta, the learned counsel appearing on behalf of the petitioner, would submit:

- (i) In view of the peculiar facts and circumstances of the case, the license fee was not payable as the respondent also committed breaches of contract.
- (ii) It granted extension only at the last minute and, thus, the petitioner could not complete the project.
- (iii) The respondent did not take into consideration the capital expenditure involved and the number of people employed by the petitioner.
- (iv) It also failed to take into consideration the practical difficulties on the part of the petitioner to operationalise the license.

- (v) The respondent could only invoke the clause for claiming liquidated damages for breach of contract and not beyond the same and in that view of the matter, the petitioner is entitled to the reliefs sought for herein.
- (vi) For similar services, namely, ISP Service, an exit policy having been formulated by DoT, there is no reason as to why the same should not be made applicable in respect of the petitioner.

18. Mr. K.P.S. Kohli, learned counsel appearing on behalf of the respondent, however, urged that in view of the provisions contained in the license agreement, the petitioner could not have been granted any exemption from payment of license fee.

It was submitted that the petitioner having obtained extension of license up to 2.5.1996, it could not have surrendered its license without giving notice of 365 days and in that view of the matter, the respondent would be entitled to the license fee for the period 15.12.1994 to 3.5.1997, the break-up whereof is as under:

It was furthermore urged that it is not correct to contend that e-mail service was not commercially viable and in any event, by reason thereof, the petitioner cannot be absolved from payment of license fee.

19. The license was granted to the petitioner by the respondent in terms of the provisions of Section 4 of the Indian Telegraph Act, 1885 which reads as under:

“4. Exclusive privilege in respect of telegraphs, and power to grant licenses.

(1) Within [India], the Central Government shall have exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of [India]:

[Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working-

(a) of wireless telegraphs on ships within Indian territorial waters [and on aircraft within or above [India], or Indian territorial waters], and

(b) of telegraphs other than wireless telegraphs within any part of [India].

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose.]”

20. The terms and conditions of the license, therefore, could have been specified by the respondent. The validity of the license is not in question. By reason of the provisions of the said license, the petitioner was required to pay license fee in the manner specified therein. It stands admitted that the petitioner has deposited only a sum of Rs. 5 lakhs towards payment of license fee for the first quarter. It even did not pay any amount towards the license fee for the first year of the license.

21. The petitioner had entered into the said agreement with its eyes wide open. It is beyond any controversy that the petitioner had not rendered e-mail services in any of the circles. It sought for and was granted extension by the respondent for 20 weeks. It may be true that first extension was granted almost immediately prior to expiry of the tenure of first year of the period of license but it is evident from the records that the second extension was granted promptly. The license does not contain any provision in terms whereof even the respondent could grant exemption to the

petitioner from payment of the amount of license fee. The petitioner, therefore, in our opinion, was bound to pay the license fees as prescribed in the license. For the period 15.12.1994 to 14.12.1995, the petitioner was, thus, bound to pay a sum of Rs. 20 lakhs towards the license fees. It was also liable to pay the license fees for the next year.

22. The core question which, however, would arise for our consideration is whether Clause 8.3 of Schedule 'C' would mean that the petitioner was bound to inform the authority at least 365 days prior to the expiry of license.

23. Clause 7.1 provides that the provisional license was to be for a period of five years. Payments were to be made in terms of Clause 6 of the Schedule 'B'. Clause 8.8 provides for termination of license. The license could be terminated inter alia for breach of conditions of the license, wherefor, 90 days' notice was required to be issued for the reasons specified therein. Clause 8.2 provides for termination of license due to insolvency. Clause 8.3 provides for termination of license.

24. The said provisions, in our opinion, must be read in their entirety. The very fact that Clause 8.3 speaks about meeting of the criteria of quality of service on the part of the licensee as also invocation of bank guarantee, there cannot be any doubt, whatsoever, that the said provision would have been applicable only after operationalisation of the services and not prior thereto.

25. The petitioner had surrendered the license by a notice dated 2.5.1996. The petitioner vide notice dated 9.5.1996, thus, was asked to make payment of license fee. It was clearly stipulated that if license fee is not paid, the license issued would also be terminated after 90 days from the issue of the said letter. It is beyond any dispute that the petitioner did not pay any amount towards license fee. It is also admitted that no other order of termination was issued. If the respondent did not issue any letter of termination, despite clear breach on the part of the petitioner in making payment of license fee, in our considered opinion, the respondent cannot take advantage of its wrong. It, for the said purpose or otherwise, even, was not entitled to invoke clause 8.3. Encashment of bank guarantee for realization of the part of the license fee, therefore, was within the power of the respondent. (See UOI vs. Millenium Mumbai Broadcast (P) Ltd – 2006(10)SCC 510).

26. The contention of Mr. Mehta that the only provision which was applicable in the aforementioned situation was Clause 4.2 being payment for liquidated damages cannot be accepted. The said Clause was to be invoked only in the event a breach of contract wherefor, a reasonable sum is pre-estimated towards damages which might have been suffered by it. The provisions for the payment of liquidated damages clause, which could be invoked if otherwise the petitioner was found to be guilty of breaches on its part in performing the contract.

27. The clause for payment of interest contained in the agreement, thus, was also invocable. However, the respondents are not entitled to any interest on damages. [See UOI Vs. A.L. Raliaram; AIR 1963 (SC) 1685].

28. For the reasons aforementioned, there is no merit in this petition. It is dismissed accordingly.

29. The counter claim filed by the petitioner is allowed in part and to the extent mentioned hereinbefore. However, we are of the opinion that the respondent may not be granted any interest pendente lite. The petitioner may pay the decretal amount to the respondent within a period of 90 days from the date of this judgment failing which the respondent would be entitled to interest at the rate of 9% per annum. No costs.

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

.....
(G.D.Gaiha)
Member