

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

**DATED 28<sup>TH</sup> JUNE, 2010**

**Petition No. 78 of 2006**

GAIL (India) Limited

... Petitioner

Vs.

M/s. Digital 2 Virtual ISP Pvt. Ltd.

... Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON**  
**HON'BLE MR. G. D. GAIHA, MEMBER**  
**HON'BLE MR. P.K. RASTOGI, MEMBER**

For Petitioner : Mr. Sanjeev Sagar, Advocate

For Respondent : Mr. D.N. Ray, Advocate  
Mr. Lokesh Choudhary, Advocate

**ORDER**

**S.B. Sinha**

The petitioner, which is a Public Sector Undertaking and carries on business in lease of Bandwidth capacity, has filed this petition inter alia for recovery of a sum of Rs.8,31,353/- with interest at the rate of 18% per annum thereon on and from 1.7.2004

till realization thereof. The said claim of the petitioner is based on the premise that the parties hereto entered into a contract for grant of lease in Bandwidth capacity and for the said purpose the respondent issued a Purchase Order for 2 Mbps connectivity from Gail Vadodra to GAIL – Ameya Hotel Bandra on an annual fees of Rs.9,01,913/- per annum for a distance of 415.52 Kms.

2. The said Purchase order inter alia contained the following terms & conditions:-

*“Terms & Conditions :*

1. *Prices are inclusive of all the taxes and up to VSNL-Prabhadevi, with upto GAIL-Bandra.*
2. *Installation : Immediately from the date of purchase order.*
3. *Payment : Quarterly advance within 15 days from the date of successful commissioning of the link.*
4. *GAIL has to provide possible support to establish last mile in both the location at no extra cost. GAIL has to provide necessary place and power to put/establish wireless link at Vadodara.*
5. *GAIL has to provide and responsible for uptime & technical support for 2Mbps link from GAIL-Vadodara to GAIL-Bandra. (Near future up to VSNL).”*

3. It was stipulated that the respondent would put link from D2V-Alkapuri to GAIL, Alkapuri and GAIL has to provide connectivity of Fibre for 2 Mbps from the said distance providing EI link from GAIL-Bandra to VSNL-Prabhadevi. GAIL, for the said purpose, was to establish own Fiber/infrastructure up to VSNL-Paradevi and was also to provide 2 Mbps link up to VSNL-Prabhadevi at no additional cost. The expected time to reach the said destination was the first week of November, 2002. The said purchase order stipulates that Service Level Agreement (SLA) for 5 years would follow.

4. Indisputably, by another office order dated 12.8.2002, the respondent herein accepted the said offer on the following terms:-

- “1. *The applicable lease charges for the above capacity shall be @ Rs.9,01,913/- per annum for a period of 5 years shall be payable.*
2. *The payment shall be deposited on quarterly advance basis.*
3. *Service tax @ 5% shall be chargeable over the above lease charges.*
4. *In case D2V takes last mile capacity in Mumbai from GAIL, GAIL shall charge D2V for the same separately.*
5. *For collection at GAIL, Vadodara D2V shall pay to GAIL Rs.1 lakh per annum as out standard rental for the space and power used by D2V for their equipment.*
6. *GAIL’s standard terms and conditions given in the SLA draft already forwarded at your end apply.”*

5. In terms of the said contract, the petitioner raised four invoices.

It is, however, admitted except payment of the first invoice, the respondent did not make any other payment. We may notice that the petitioner itself in paragraph 6 of the petition stated that it had apprised the respondent that the service level was required to be maintained at 98.5%.

6. The respondent herein by a letter dated 26.8.2002 confirmed that the commissioning date for the aforementioned contract would be 26.8.2002.

It is not in controversy that the petitioner had not been able to maintain the service level at 98.5% during the period of contract. We may furthermore notice that for the first quarter, the petitioner maintained service level at 95.5%, for the 2<sup>nd</sup> quarter of 92.3%, for the 3<sup>rd</sup> quarter 93.73% and for the 4<sup>th</sup> quarter it was 96.69%. The respondent inter alia contends that having regard to the fact that as the petitioner had not been able to maintain service level at 98.5%, it suffered loss.

7. The respondent, apart from filing its reply to the petition, has also lodged a counter claim for a sum of Rs.1,03,86,597, the details whereof are as under :-

<i>Sl. No.</i>	<i>Particulars</i>	<i>Claim (in Rs.)</i>
1.	<i>Additional Cost spent in Upgradation of Bandwidth from 2 Mbps to 3 Mbps from GNFC during the period January 2003 to March 2003 due to poor quality of Service being provided by GAIL Media</i>	<i>32,38,750.00</i>
2.	<i>Additional media taken from Hutch during October 2002 to June 2003 due to poor quality of service being provided</i>	<i>2,74,000.00</i>
3.	<i>Non-utilisation of Tata-VSNL media due to poor quality of Service being provided by GAIL Media</i>	<i>42,91,368.00</i>
4.	<i>Loss in business (i) M/s. Alembic Ltd. (cancellation of order)</i>	<i>8,39,479.00</i>

	(ii) <i>EMT(C) Engineering Ltd.</i> <i>(Non-renewal of the order)</i>	17,43,000.00
5.	<i>GRAND TOTAL</i>	1,03,86,597.00

8. The petitioner herein in support of its case has examined one Sh. Shailesh Sunagar, whereas the respondent examined Sh. Dushyant Goswami and Mr. Samir H. Pathak.

The witness examined on behalf of the petitioner namely Sh. Shailesh Sunagar accepted that he had no personal knowledge with regard to the transaction entered into by and between the parties and was also not aware as to whether the service level was guaranteed at 98.5% in all the quarters.

The attention of the said witness was drawn to the following chart, which was filed by the petitioner itself. It reads as under :-

<i>MONTH</i>	<i>TOTAL DOWNTIME (HRS)</i>	<i>AVAILABILITY FOR THE MONTH (%)</i>	<i>QUARTERLY AVAILABILITY (%)</i>
<i>Sep-02</i>	<i>23.816</i>	<i>96.69%</i>	
<i>Oct-02</i>	<i>56.8</i>	<i>92.37%</i>	
<i>Nov-02</i>	<i>17.68</i>	<i>97.54%</i>	<i>95.50%</i>
<i>Dec-02</i>	<i>47.81</i>	<i>93.57%</i>	
<i>Jan-03</i>	<i>53.76</i>	<i>92.77%</i>	

<i>Feb-03</i>	<i>51.15</i>	<i>92.39%</i>	<i>92.93%</i>
<i>Mar-03</i>	<i>61.38</i>	<i>91.75%</i>	
<i>Apr-03</i>	<i>63.1</i>	<i>91.24%</i>	
<i>May-03</i>	<i>14.05</i>	<i>98.11%</i>	<i>93.73%</i>
<i>Jun-03</i>	<i>23.83</i>	<i>96.69%</i>	<i>96.69%</i>

9. The said witness accepted that the said chart had been supplied by the petitioner to the respondent. In that view of the matter, the correctness of the said chart and/or failure on the part of the petitioner herein to maintain the service level at 98.5% is not denied or disputed.

The petitioner, however, contends that having regard to the fact that it had granted rebate for deficiency in service, the respondent was bound to make payment of the invoiced amount to the petitioner therefor. It was furthermore submitted that having regard to the fact that the service level was almost 95% and keeping in view the fact that cable had to be laid in the NHAI projects and road was ongoing repairs for 425 Kms Baroda Mandal, the link was disrupted due to optical fiber cuts and for the said reason, the drop in service to the extent of 3% to 8% took place.

10. The learned counsel for the petitioner would furthermore submit that having regard to the fact that the petitioner had supplied the media and except for the 1<sup>st</sup> quarter, no other payment was made, it is bound to reimburse for the claimed amount. Our attention in this behalf was drawn to the admission made by Mr. Dushyant that the respondent had been catering to all the 1200 customers of the said media only and as per the respondent itself and the other media suppliers were only backup suppliers.

The learned counsel furthermore contended that the media supplies made by the petitioner and having been utilised, and the other media being backup thereof, the question of sufferance of any loss by the respondent and, that too, to the extent of more than one crore is wholly misconceived.

It was furthermore submitted that the petitioners were entitled to collection charges in view of the letter dated 12.08.2001. Even under the said head, according to the learned counsel, the petitioner is entitled to the other charges also.

11. Mr. Ray, the learned counsel appearing on behalf of the respondent, on the other hand, submitted that having regard to the admitted deficiency in the service level, which would amount to a lapse of the service provided by it, the petitioner is not entitled to any relief. It was urged that the very nature of the service provided by the petitioner require a minimum service level of 98.5% and a dip in the service level actually rendered was completely illusory. It was argued that the 5% drop from 100% connectivity in a given quarter would result in 'No Service' for the period of 108 hours during the said period as distribution of the lack of service would mean a complete outage of services for several hours on a given day. The chart at page 44 of the paper book would clearly demonstrate that the downtime reports for which the customers of the respondent had been making complaints.

Our attention in this behalf has been drawn to various correspondences; notably the one dated 22.7.2003 by the respondent, the relevant portion whereof reads as under :-

*“Digital 2 Virtual ISP Pvt. Ltd. is a leading internet service provider in Gujarat region since last two and half years and was the first customer of GAIL in Gujarat. We have been connected via your fiber infrastructure for E1 (2 Mbps) link between Varoda-Mumbai to procure 2 Mbps Internet Port from VSNL-Mumbai.*

*As you are already aware, that after commissioning, this fiber link downtime has been extremely high. The result of this erratic media, on D2V ISP, has been extraordinary. In order to compensate and save our business, reputation, and existing customers, from the extended downtime (4+hours every time the media was down), D2V ISP had to procure additional 2Mb Internet Port plus Media at a huge cost of 60 Lacs- this does not include the Internet Port charges we continued to pay VSNL, Mumbai. Due to GAIL media failure, our “real” utilization of the VSNL Internet Port was pathetic at the best-in-essence, paying for services which were not being utilized properly. We believe that GAIL has cost D2V ISP an additional 45 Lacs because of unreliable VSNL Internet Port due to an extremely poor GAIL media. Furthermore, till today, there is still not any “automatic” redundancy for our GAIL media “*

12. Similar other letters were also addressed to the respondent.

Our attention has also been drawn to the complaints made by its customers in this behalf namely Alembic, vide letter dated 15.12.2002, which reads as under :

*“This is to bring to your notice that there have been frequent failure in your internet leased line. In spite of repetitive verbal complaints and notices the service delivery has not improved.*

*Alembic has decided to procure additional Internet Bandwidth from some other Internet Service Provider instead of upgrading the Internet Bandwidth of D2V ISP Pvt. Ltd. & if the frequent outages in VSNL backbone due to Baroda-Mumbai GAIL media failure is not rectified shortly, Alembic might think for discontinuation of Internet services from D2V ISP Pvt. Ltd.”*

13. Similar is a letter from Alembic dated 6.8.2003. It is however of some interest to notice that by an e-mail dated 22.7.2003 the respondent lodged a claim of one crore which is the subject matter of the counter claim.

However, by a letter dated 27.7.2003 the respondent stated as under :-

*“D2V ISP understands teething problems and keen to keep long term relationship for fruitful business association. We are not at all intending to recover/claim our 20 Lacs loss due to this trouble, but considering this kind of situation we are not able to pay or clear your dues for 8 months. We are waiting for your own redundancy and looking for at least 99% uptime for the existing link to ensure reliability to our esteemed customers. We had already paid Rs.2,25,478 last year as a first quarter and after that we had been faced hard time as your services were gone haywire. We are happy since last 1 month but not up to the mark as per the commitment because the link was down 2-3 time due to OFC but at a same time on both the path.*

*Based on your mail and according to our internal meeting at our office, we will pay the charges from 1<sup>st</sup> of June 2003 only. Kindly confirm the same so that we can clear our papers or accounts. We can sign SLA once GAIL is having its own redundancy. D2V also wants additional 2 EI between Vadodara to Mumbai provided prompt up-time and redundancy available.”*

14. Apart from the aforementioned correspondence, according to Mr. Ray, the respondent had received a large number of invoices to show that it had to pay a huge amount to Gujarat Narmada Valley Fertilizers Co. Ltd. to which it was constrained to opt for.

15. The short question which arises for our consideration is as to whether the petitioner is entitled to relief prayed for and/or whether the respondent is entitled to the relief of Rs.1.05 crore as has been claimed by way of Counter Claim.

16. The parties hereto agreed that the petitioner could provide only a single redundancy path. According to the respondent, the petitioner was to supply the redundancy path but in fact the same had never taken place. The respondent, as noticed heretofore, raised a contention that the media could be completely useless service wherefor some backup was necessary.

Mr. Sanjeev Sagar would urge that in a case of this nature the principles of quasi contract, as contained in Section 70 of the Indian Contract Act, should be invoked. We are not in a position to accept the said contention.

The petitioner has filed this petition inter alia for enforcing a contract. We have noticed heretofore that parties had agreed that service level of the petitioner would be maintained at 98.5%. There is no doubt or dispute that at a given point of time the service level of media may fall. It is rightly stated that if for a continuous period of 3-4 hours, the services do not become available to the respondent, which had to serve many customers, would suffer loss. It is admitted that the petitioner had never been able to maintain service level at 98.5% which was guaranteed.

A submission was made by Shri Sanjeev Sagar that the parties had never agreed for maintenance of the service level at 98.5%.

It may be true that according to the petitioner no service level agreement was entered into but there cannot be any doubt or dispute keeping in view the fact stated in para 6 of the petition that the petitioner itself has accepted that service level at 98.5% was to be maintained . Admittedly the petitioner has failed to do so.

17. In our opinion, thus, the provisions of Section 70 of the Contract Act namely the principles of Quasi Contract would not be attracted in a case of this nature.

18. It is not a case where the petitioner has rendered some service not meant to be done gratuitously. It is also not a case that the agreement entered into by and between the parties herein was invalid or otherwise not enforceable.

19. The question, in our opinion, would be as to whether the petitioner is guilty of breach of contract.

20. It, keeping in view the admitted facts, is indisputably guilty of breach of contract. For the purpose of maintenance of supply at the aforementioned service level, it was necessary on the part of the petitioner to take requisite steps. The petitioner was required to prepare itself for repair of the cable at the place where National Highway Authority of India was working.

It is not a case of the petitioner that the work of the said Highway was going on in the entire stretch of 425 Kms at the same time. The witnesses examined on behalf of the respondent and in particular Mr. Samir H. Pathak has categorically stated as under :

*“Q. Was your company aware that the petitioner has single redundancy path for optical media supply?”*

*A. No.”*

In his deposition, he stated that long time would not be required to repair the road in view of the long distance between Mumbai and Vadodara.

21. Mr. Dushyant Goswami in his evidence stated as under :-

*“We have not, however, given any notice to the petitioner that only because invoices were not issued no payment would be made.*

*I am aware of optical fiber media as also optical fiber cuts.*

*The time required for repairing of optical fiber would depend upon the availability of manpower and pro-activeness of the organization.*

*My estimate is that if manpower is available and the organization is proactive, it should not take more than one hour.*

*It will also depend upon the distance also sometime it is necessary to locate the cuts.*

*I was aware that works on NHAI Bombay Vadora Highway about 425 Kms was going on.*

*Vol – The work was going on Vasi where maximum fiber cuts occurred and not through the entire stretch of 425 Kms.*

*I do not agree that this is one of the primary reason for disturbance of the media supply. Because network can be designed on Star Topology i.e. if one cut occurs traffic is diverted automatically to available alternate path.*

*Only after fiber cut, we came to know that GAIL had only a single path and alternative paths.*

*Only after the scenario which took place GAIL informed us that they had single path and they are in process of making alternate paths.*

*We did not ask as to whether the petitioner had a Star Topology arrangement as we are clear with our service level agreement, which covers everything in writing. Our SLA is to be found in our purchase orders.”*

22. The respondent, in order to keep its business was, thus, required to pay a huge amount to CNFC for the back up connectivity. It also take the services of other internet service providers. We are, therefore, of the opinion that having regard to the admitted fact the Petitioner has failed to comply with the terms of the contract. Keeping in view the factual matrix involved herein to the effect that the respondent has failed to comply with essential condition of contract, it is not entitled to the balance

amount of consideration. The next question which arises for our consideration is as to whether the respondent has been able to prove its counter claim.

The respondent in support of its case has relied upon some invoices. A bare perusal of the said invoices would show that the respondent has failed to connect the same with the work awarded to them. In fact, the invoices issued by the respondent would show that the Vadodara-Bharuch or Vadodara to Anand. It does not show that it is not Vadodara to Mumbai connecting thereby the entire route.

23. The invoice issued by Gujarat Narmada Valley Fertilizers Co. Ltd. does not show any route at all. We have noticed heretofore that whereas on or about 22.7.2003 the respondent has raised a purported claim for a sum of Rs.1.05 crore but only a few days later namely 27.7.2003 it reduced its claim to Rs.22 lacs. However, the said letter will show that the respondent itself did not want to enforce the same for whatsoever reason it may be.

24. So far as counter claim of the respondent is concerned, the onus to prove the same was on it. It was obligatory on the part of the respondent to clearly prove the amount of damages to which it was entitled to.

25. The claim of damages has been made under four different heads namely (1) Additional cost spent on upgradation of Bandwidth; (2) Additional media taken from Hutch during October 2002 to June 2003; (3) Non-utilization of Tata-VSNL media; and (4) Loss in business.

26. The respondent has not produced any of the agreements by and between the parties. It has also not been shown that any step was taken by it to mitigate the losses. The witness of the respondent, Mr. Samir H. Pathak clearly quantified the damages on the basis of some heads. No evidence has been adduced to probe the actual amount of loss suffered by it.

27. Having regard to the facts and circumstances of this case and for the reasons stated heretofore, we are of the opinion that both the petitioner and the respondent have failed to prove their respective cases. Both the petition and the counter claim are, therefore, dismissed. The parties shall pay and bear their own costs.

....., J

**(S.B.Sinha)**  
**Chairperson**

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

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**(P.K. Rastogi)**  
**Member**