

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

DATED 28th MAY, 2010

**Petition No. 174(C) of 2008
(With M.A. No. 169 of 2009)**

Power Grid Corporation of India Ltd.

...Petitioner

Vs.

M/s SAB Infotech Limited

...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. Tejveer Singh Bhatia,
Advocate

For Respondent : Mr. Deepak Sabharwal,
Advocate.

ORDER

The petitioner is a Public Sector Undertaking.

It carries on a business of providing bandwidth connectivity to various business houses through its fibre network spread all over the country.

The respondent is a service provider. For the purpose of supplying bandwidth connectivity for their operations in Northern India, the parties herein entered into an agreement for the said purpose, pursuant where to and in furtherance whereof, purchase orders were issued.

The first purchase order was issued on 29.8.02.

It is also not in dispute that the parties hereto had entered into an Umbrella Memorandum of Understanding on or about 15.9.03.

The parties again entered into a purchase agreement on or about 30.4.2004. We are concerned with clauses 3, 6 and 11 thereof having regard to the fact that interpretation of the aforementioned provisions are in question before us. We would notice the same at an appropriate stage.

It is furthermore not in dispute that the petitioner herein had been raising invoices and serving the same on the respondent in terms of different purchase orders issued from time to time.

It is also not in dispute that although the tenure of the agreement was one year, it remained operative only for a period of 10½ months.

The petitioner, inter alia, on the premise that the respondent had not paid a sum of Rs.10,04,499/- has filed this petition for recovery thereof along with the interest @ 18% p.a.

It is, however, not in controversy that during pendency of this petition, the claim of the respondent for a sum of Rs.13,353/- was found to be correct and as such the petitioner confines its claim to a sum of Rs.9,99,146/-.

In this petition, the aforementioned basic facts are not in dispute.

The respondent, however, in its reply has claimed certain deductions relying on or on the basis of the applicability of the aforementioned clauses 3,6 & 11 of the agreement dated 30.4.2004, which are as under:-

Down Time not adjusted by PG	80,731
Compensation not given by PG as per PO	2,91,872
Service Tax Wrongly Charged by PG	1,54,419
Diff. Due to Commissioning Dates	13,353
Network Element Charged in Bill	1,00,000
Increase Bill No. 96/04-05/4 As per previous statement bill Amount Rs136869/- (2mb. For 20 days in place of 31 days) & current statement Rs.212147/-)	75278
Increase bill 95/04-05/04 As per previous statement bill amount Rs.294269/- (4mb. For 15 days in place of 16 days Rs.205304/- + 2mb. For 13 days in place of 12 days Rs.88965/-) & Current Statement Rs.301112/-).	6843

According to the respondent, the down-time ought to have been adjusted by the petitioner in view of the clause 6 of the said agreement.

Mr. Bhatia, the learned counsel appearing on behalf of the petitioner would contend:-

- (1) Although the respondent has claimed a sum of Rs. 2.25 lakhs allegedly on the ground that the said payment has been made by cheques dated 10.4.05 and 1.6.05 for a sum of Rs. 1 lakh and Rs. 1.25 lakhs respectively, the same having been denied by the petitioner in its rejoinder, as also by its witness in his affidavit and no question having been asked in regard thereto the said claim must be held to have been given up;
- (2) The debit note for a sum of Rs. 80,751/- towards down-time is not payable as clause 6 is not applicable in this case in as much as no debit note or cash discount was contemplated under the agreement therefor. Mr. D.K. Verma, the witness examined on behalf of the respondent, furthermore, being not aware of the affairs of the respondent company, must be held to have failed to prove that the respondent is entitled to any down time credit, it having also not made any request in that behalf prior to the petitioner's raising the demands.
- (3) Similarly, no debit note was required to be issued in respect of compensation for free service as the period of service for one month could have been given only when the tenure of 12 months was complete and not prior thereto.
- (4) The petitioner having charged service tax in terms of the notification dated 1.7.03, the respondent is not entitled to any deduction on that account.

(5) The respondent also is not entitled to 'Networth Element Charges' in as much as a sum of Rs.5,50,000/- was payable to the petitioner. The service fee having been charged only for 57 days in the invoice dated 17.11.2003, the same had rightly been calculated having regard to the fact that the service has started on 5.11.03 and the only charges were payable till 3.11.04 and as by an e-mail dated 20.10.04, the petitioner requested for continuation of service, another sum of Rs.1 lakh was charged.

Mr. Sabharwal, the learned counsel appearing on behalf of the respondent , on the other hand, urged :-

- (i) The invoice for the year 2003-04 for a sum of Rs. 3,98,759/- and another for the year 2004-05 for a sum of Rs. 8,67,240/- totaling a sum of Rs.12,60,999/- must be held to be barred under the law of limitation as the petition had been filed before this Tribunal only on 14.8.08.
- (ii) So far as the claim for the down-time charges is concerned, it will appear from a letter dated 6.3.06 issued by the petitioner that as on 31.12.05, a sum of Rs.13,09,262/- was found payable but from the letter dated 24.3.06 it would appear that the same had been brought down to Rs.11,99,437/-. It is, therefore, not known what type of credits was being granted to the respondent.
- (iii) It is also curious to notice that the petitioner has filed this petition for recovery of a sum of Rs.1,00,499/- as would appear also from the last demand dated 29.4.08.
- (iv) From the above facts, it would be evident that the method of accounting adopted by the petitioner was not correct and thus a reconciliation thereof should have been allowed to be taken place between the parties.

- (v) Clause 6 of the agreement would clearly demonstrate that the respondent was to claim outage for each month at the end of the month on the basis of the tickets lodged by the respondent.
- (vi) The petitioner was either required to provide service or pay the amount for its inability to carry out its contractual obligations for which the respondent is entitled to due credit.
- (vii) The requisite averments having been made by the respondent in its reply having not specifically denied or disputed, the payability of down-time charges for a sum of Rs.80,731/-, it must be held to have been admitted.

Our attention has been drawn to the evidence of cross-examination of Shri S.K. Mathur, the witness of the petitioner, which is to the following effect:-

“As per the provisions of purchase order the down time credit is to be given in the form of service credit, i.e., one hour service credit for every one hour of down time. The down time credit is to be given at the end of the contract.

No down time credit was given to the respondent as the contract has not been completed.”

Our attention has also been drawn to termination clause contained in clause 11 of the Purchase Order, which reads as under:-

“The contract period will be for one year (12 Months) and service for 13th month shall be provided free of cost.”

- (viii) The respondent could not have terminated the contract, which would be evident from the fact that an amendment to that effect was made in the memorandum of understanding dated 15.9.03, providing for such particulars to the respondent.
- (ix) Having regard to the fact that the petitioner had terminated the contract, the switches whereof being with them and it being admitted that the respondent had availed the service only for 10½ months and furthermore, no notice for termination has been served on the respondent, the aforementioned item of claim should be held to be allowable. In this connection, our attention has been drawn to the cross-examination of Mr. Mathur to show that the same was purported to have been done on the oral request of the respondent which must be held to be incorrect, the relevant portion of the cross-examination reads as under:-

“It is not correct to say that the lease line agreement was closed by the petitioner and that too because of the violations committed by it.

It is incorrect to suggest that the respondent did not request for the closure of the lease line.

It is incorrect that the lease was to be given by petitioner for a period of 13 months.”

- (x) So far as the claim of the compensation for the 13th month is concerned, in view of the statement made by the petitioner’s witness in para 19 of the affidavit, it is evident that concept of continuous service, although was claimed to be the principal reason for not allowing the claim of the respondent, no such provision is to be found out in the clause itself.
- (xi) Service Tax was not payable in terms of the purchase order dated 30.4.04, the relevant portion whereof reads thus:-

“Taxes : Although no taxes are applicable at present, yet any tax made applicable by Government at any later stage shall be reimbursed on actual basis to Power Grid by SAB Infotech Ltd., subject to production of proof of such notification by Power Grid.”

In the light of the aforementioned provisions, the notification dated 9.7.01 will have to be construed, which reads as under:-

“Another point raised relates to applicability of service tax on inter-connectivity services provided by the ISP to another and the charges recovered for such services. It is understood that this is done to inter connect various networks so as to reach the server where the information is stored. It is informed that interconnection of one ISP to another is a commercial and technical arrangement under which service providers connect their equipment, networks and services to enable their customers to have access to the data or information. Through this arrangement, it is the customer of an ISP who ultimately receives on-line information and database access and/or retrieval service. Service tax on the amount charged from him is payable. Therefore, interconnection charges paid by one ISP to another ISP are not liable to service tax.”

- (xii) From a perusal of the said notification, it would appear that exemption for renovation of such type of service, namely, interconnection of one as ISP to another, the petitioner cannot claim the service tax element in its demand.
- (xiii) So far as the ‘Network Element Charge’ is concerned, the same was not payable as would appear from the following :-

“1. 2Mbps Leased Circuit between Glide Chandigarh and Glide Karnal.

Annual Rentals for 2 Mb Transmission Link Rs.5,50,000/-.

between Glide Chandigarh & Glide Karnal
including last mile with G 703 interface at
Powergrid's equipment

Taxes: Although no taxes are applicable at present, yet any tax made applicable by Government at any later stage shall be reimbursed on actual by M/s Sab Infotech Limited, subject to proof of such notification by Powergrid.

Payment Terms: Annual Rental payable quarterly in advance byDD.

Delivery: Powergrid will execute the order within 4 weeks from the date of Purchase Order and will sign SLA for provisioning of service.

SCOPE OF POWERGRID: 1) Powergrid will install optinux at both the locations of M/s Sab Infotech Ltd at their own cost and will provide G. 703 Interface. 2) Powergrid will ensure that usage rights of the capacity granted to M/s Sab Infotech Ltd will be available 99% (excluding 0.5% scheduled service maintenance) of time on yearly basis except for Force Majeure Events and for reasons attributable to M/s Sab Infotech Ltd.

SCOPE OF M/S SAB INFOTECH LTD : M/s Sab Infotech Ltd at its PoPs shall provide 1) AC/DC Power Supply as per requirement 2) Air-conditioning space for installation of equipment and grounding as required for telecommunication equipment.”

According to the learned counsel, the sum of Rs. 1 lakh twice over was thus wrongly charged.

In view of the rival contentions of the learned counsel, inter alia, the following questions arise for our consideration:-

- (i) Whether this petition is barred under the law of limitation?
- (ii) Who is responsible for termination of the contract?
- (iii) Whether the deductions claimed by the respondent from the bills of the petitioner should be allowed?
- (iv) Whether the petitioner was entitled to charge Service Tax?

(v) Whether other deductions sought for by the respondent should have been considered in terms of the 'work done' principle?

So far as the question of some claims being barred under the law of Limitation is concerned, the petitioner in its petition has not pleaded as to how it seeks for an exemption as provided for in Order 7 Rule 6 of the Code of Civil Procedure (CPC). However, the provisions of the CPC, *stricto sensu*, are not applicable so far as this Tribunal is concerned.

We may, however, notice the statement made in **Para 11 of the petition**, which reads as under:-

“It is respectfully submitted that the respondent replied to both the aforesaid communications vide letter dated 28.3.06 stating that there are discrepancies in the accounts of the petitioner and as per the respondent only a sum of Rs.3,79,394/- is payable to the petitioner. Copy of letter dated 28.3.06 is annexed herewith as **Annexure P-9**.”

The respondent, in its letter dated 28.3.200 stated as under:-

“This has reference to your Letter No. Ch/Telecom/Glide/5264 dt 24/3/06 vide which you have asked for outstanding payment of Rs.11,99,437/-, whereas your Delhi Office vide their Letter No. Telecom.F & A Debtors dated 6.3.06 are claiming the outstanding to be Rs.13,09,262/- which is contradictory.

While going through both these letters, a number of discrepancies have been observed. However, we are able to reconcile the account. As per reconciliation statement attached, a sum of Rs.3,79,394/- is payable to you.”

Along with the said letter, a conciliation statement had been annexed, on the basis whereof, the following statement was made:-

“As per reconciliation statement attached, a sum of Rs.3,79,394/- is payable to you.”

The short question which arises for consideration is as to whether the same amounts to an acknowledgement of dues of the petitioner by the respondent. The petitioner used to raise advance invoices. The deductions, if any, for down-time payment etc., was to be adjusted at the end of the month. No such adjustment had been made. The bills in question, as noticed hereinbefore, are dated 17.11.04 and for the year 2004-05. The relevant statements made in the petition are as under:-

“The petitioner after reconciling the aforesaid discrepancies pointed out by respondent found that an amount of Rs.10,04,499/- is due and payable by the respondent. This was also communicated to the respondent vide letter dated 29.4.2008 is annexed herewith as **Annexure P-15**. A copy of statement of account prepared by the petitioner after taking into consideration all the deductions/claims of the respondent is annexed herewith as **Annexure P-16**.”

The respondent has not denied or disputed the contents of the said bill or his contractual obligations to pay the same. The respondent also has not denied or disputed the relevant agreement or purchase orders pursuant where to or in furtherance whereof, the invoices were raised. The respondent in its reply, traversed the statements made in para 11 & para 17 in the following terms:-

“That the contents of para 11 of the petition as stated are matter of record. However, after further reconciliation between the representatives of Petitioner and Respondent on 14th & 15th June, 2008 and further corrections as per agreed terms the

net amount payable by the respondents comes to Rs.1,82,000/- and not as stated in letter dated 28.3.06. A copy of the said reconciliation statement is annexed as annexure R-1.

That the contents of para No. 17 of the petition as stated are wrong and denied. It is wrong and denied that the petitioner has reconciled discrepancies in their accounts or that after reconciliation of the discrepancies, which totaled to a sum of Rs.8,82,766/- or that after giving credit for the same the balance sum of Rs.10,04,499 is due and payable by the respondent to the petitioner. It is stated that despite repeated request and reminders, the petitioner has not given credit /adjustment of the aforesaid sum of Rs.8,82,776/- and has been illegally demanding the aforesaid sum of Rs.10,04,499/-. The petitioner is called upon to strictly prove, having given credit / adjustment of the aforesaid sum of Rs.8,82,766/- to the respondent and to show this Hon'ble Tribunal the treatment of each and every entry details whereof have been given in Para No. 16 above. As regards the letter dated 29.4.08 is concerned, it is stated that the contents thereof are not correct neither the statement of account annexed as Annexure P-16 is correct, as no credit for the aforesaid of Rs.8,82,466/- has been given by the petitioners to the respondents. The petitioner has also not attached his statement of account to show/clarify the amount credit by him from time to time. The petitioner shall be asked to provide their detailed accounts statement to adjudicate the dispute between the parties in a proper manner.”

It is, therefore, evident that no statement was made to the effect that the aforementioned letter dated 28.3.06 does not amount to acknowledgement within the meaning of Section 18 of the Indian Limitation Act, 1963. The said provision reads as under:-

“18. Effect of acknowledgment in writing - (1) Where before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derived his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation - For the purposes of this section, -

(a) An acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) The word "signed" means signed either personally or by an agent duly Authorised in this behalf ; and

(c) An application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

The ingredients of the aforementioned provision clearly show that the same would be attracted when an acknowledgment had been made in writing.

We have noticed hereinbefore, that the petitioner for all intent and purport, has pleaded the effect of its letter dated 28.3.06, which has not been denied by the respondent. The statements made in the petition, as noticed heretofore, in our opinion, substantially satisfy the requirements of law of pleading as provided for under Order 7 Rule 6 of the CPC. As the period of limitation having regard to the pleadings by the parties and acknowledgment of the amount due from the petitioner would start from 28.3.06 and this petition having been filed on 14.8.08, the claim of the petitioner is not barred by limitation.

The next question which arises for consideration is as to who is responsible for discontinuance of the service?

Mr. Bhatia would contend that although in terms of the purchase order the petitioner could terminate the agreement, admittedly, the respondent having not protested against the purported illegal termination, or the invoices cannot, at this stage, take any shelter under clause 11 of the purchase order.

The agreement in question, the memorandum of understanding and various purchase orders issued contained the commercial terms of the contract. The petitioner is a public sector undertaking. All its actions should, therefore be in writing; it being a 'State' within the meaning of Article 12 of the Constitution of India.

It is not denied or disputed that having regard to the changes brought about in clause 11 of the purchase order, the petitioner alone could terminate the contract. There cannot, however, be any doubt whatsoever that in the event any request for termination of contract had been made on the part of the respondent, the petitioner could have accepted the same.

It is, however, difficult to agree with the submission of Mr. Bhatia that the oral request of the respondent had been accepted for more than one reason. Firstly because the petitioner has not raised any pleading in this behalf. The respondent at least from 28.3.06, if not earlier, had been making demands for grant of deductions relying on or on the basis of the various clauses contained in the agreement. It is true that whether the respondent is entitled to such deductions or not would depend upon the interpretation of the terms of the contract in question. But, in our opinion, it is for the said purpose the termination of contract assumes importance.

A party to a contract cannot take advantage of its own wrong.

A party to a contract, furthermore, even if two interpretations are possible, would not be permitted to lay any claim, which unless the provisions are clear and explicit, which would enrich itself unjustly. If for the aforementioned purpose, the burden of proof was on the petitioner, it was obligated to raise such a plea both in its petition as also in the affidavit of its witness. It did neither.

Mr. Mathur, in his evidence did not speak about any oral request made by some officer of the respondent. Nothing has been brought on record to show as to whether he had the requisite authority to accept such requests. Mr. Mathur, even does not remember who had made the said request. We would assume that supply of the services were stopped after a period of 10½ months in terms of the request made by somebody. But had such a request been made, an authorized officer of the petitioner, it being a Public Sector Company, would be required to make notings in this behalf to avoid incurring of any liability on the part of the petitioner.

The Tribunal cannot raise a presumption that such a request must have been made by somebody on behalf of the respondent in absence of any plea or proof having been raised or furnished in that behalf. T

The terms of the commercial contract are expected to be followed by both the parties. If the tenure of the agreement was 12 months, as it was, why and how the same was terminated after 10½ months, was a matter which was required to be explained by the petitioner, being within its knowledge. The equipments providing service, admittedly, were with the petitioner.

The respondent in its reply in this behalf has made the following averments:-

“As per agreement dated 30.4.04 the respondent is to pay Rs.68 lakhs per anum for service of 6 mbps for a period of 13 months and the payment have been agreed to be paid in advance on monthly basis over 12 months. The respondent availed service 10½ months only, i.e., from 1.6.04 to 15.4.05. The parties had agreed to provide and receive service for a period of 13 months at a total price of Rs.68 lakhs. Thereby making net price of Rs.5,23,077 per month. The respondent availed services for the period from 1.6.04 to 15.4.05, i.e., 10½ months only when the services were discontinued by the petitioner, therefore, the respondent is liable to pay Rs.33,12,821 only whereas the respondent has already paid a sum of Rs.36,04,693 to the petitioner on this account, therefore, the respondent is entitled for refund of Rs.2,91,872/- from the petitioner. Detail calculations are as per annexure R-IV.”

A specific averment in regard to the discontinuation of service by the petitioner, therefore, was pleaded. The petitioner in its rejoinder to the aforementioned paragraph of the reply did not rebut the same.

In regard to the debit note towards compensation for free services as stated by the respondent in para 2(b) aforementioned, we may notice the same being as under:-

“It is respectfully submitted that the respondent has claimed a Debit Note for Rs.2,91,872/- towards one month of free service to be provided. The allegation of the respondent is that the amount of Rs.68 lakhs taken by the petitioner for 12 months is in fact for 13 months and therefore the extra amount has to be debited to the petitioner. It is respectfully submitted that Clause 3 & Clause 11 of the purchase order clearly provide that the contract has in fact for one year (12 months) and the service for the 13th month would be provided free of cost. Therefore, the period of 13th month would have only started after the respondent had availed the service for 12 months and have paid Rs.68 lakhs to the petitioner. However, the respondent has only availed the services for 10½ months and is not entitled for any benefit of free service for 13th month as alleged by the respondent or otherwise.”

Furthermore, even no notice for termination had been given. The respondent having no right to terminate the contract, it was for the petitioner to raise the requisite plea. It having failed to do so and in any event, it having failed to traverse the statements made in the reply and/or in its evidence we have no other option but to hold that the petitioner had stopped supply of signals unilaterally.

Clauses 3, 6 and 11 of the terms of the contract contained in the letter dated 30.4.04 must be construed keeping in view the aforementioned conduct of the parties. Indisputably, the contract was for a period of 12 months and on the completion thereof, the services for the 13th month have to be rendered without any charges.

The petitioner having terminated the said contract illegally so as to deprive the respondent from its legitimate claims, is bound to reimburse the respondent to the said extent. It, in our opinion, does not lie in its mouth to say that even if the termination of contract is illegal, it was not bound to give effect to the contractual terms which had conferred certain benefits on the respondent.

In view of our findings aforementioned, we are of the opinion that the petitioner having illegally terminated the contract was bound to render service for the period proportionate to the tenure of the contract. Even under the Law of Contract, it was bound to pay damages to the respondent.

To the aforementioned extent, the respondent would be entitled to lay proportionate claims for the period of 10½ months, to which it could become entitled to, but for illegal termination of contract by the petitioner, as if the same was continued uninterruptedly for a period of 12 months.

The claim of the respondent for payment towards down-time charges may now be considered.

We may, apart from its letter dated 28.3.06 in its reply, notice the statements made by the respondent, which is as under:-

“That the petitioner despite having been given details of the down-time amounting to Rs.80,731/- and having reconciled the same has not given credit of that to the respondent. During the period from Jun 2004 to Feb 2005 the total down time as per settled procedures i.e. ticket and emails was to the tune of 9295 Minutes, equal to 155 hours 6.5 days. The petitioner was under contract to provide capacity of 4 MBPS to the respondent at the rate of Rs.45,33,335/- per annum used as per the PO No. 204-05/012 dated 30.4.04 annexure P-4 that comes to Rs.12,420/- per 4mbps per day and which comes to Rs.80,731/-. The petitioner during the course of the operation despite having followed the standard procedure raised ticket for the down time and having sent emails to that effect has not given the credit thereof to the respondent despite having not disputed the said fact. The petitioner, therefore, is liable to give credit to the respondent for the same. This credit is to be given to the respondent is also mentioned in letter dated 16.6.07, but despite the same, no credit has been given to the respondent by the petitioner. List of detail calculations and of the Tickets along with Emails dated 25.5.04 to 27.2.05 claiming down-time from the Petitioner during the period from June 04 to Feb 05 is attached as **Annexure – R-III Colly.**”

The petitioner does not dispute, as noticed hereinbefore, that the respondent was required to make payments in terms of the advance bill raised by the petitioner and the down-time payment, if any, was to be adjusted upon completion of the month. It is also not in dispute that no such adjustment had been made nor the respondent has been given any credit therefor.

Before, however, adverting to the interpretation of clause 6 of the agreement, the only contention raised by the petitioner, we may notice, in its rejoinder, is as under:-

“It is respectfully submitted that no debit note or cash discount have been contemplated under the agreement towards down time as sought by the respondent.”

Clause 6 postulates grant of creditable outage by the petitioner automatically. It was to be given in the form of equivalent service extension. Admittedly, the same has not been done. The petitioner, it will bear repetition to state, cannot take advantage of its own wrong. If it had failed to provide services and it had not given equivalent service extension in terms of clause 6 of the agreement, the requisite amount in respect thereof must be paid, as claimed by the respondent.

We, therefore, are of the opinion that the respondent is entitled to deduction of a sum of Rs.80,731/-.

So far as the respondent's claim towards compensation for free service for the period of 13th month is concerned, we may notice clause 11.

Mr. Mathur in his evidence does not deny or dispute the applicability of the said clause. As noticed hereinbefore, the only contention which was raised is that the termination of contract was on the oral request of the respondent. We have held hereinbefore that the said contention is unacceptable. We, therefore, are of the opinion that the respondent would be entitled to the charges proportionate to the one month's period for one year and not for the whole month, i.e., [(Rs. 68 lakhs/12) x 10.5 / 12].

We furthermore are of the opinion that it is not correct as has been contended by Mr. Bhatia that burden of proof in this behalf would be on the respondent. So far as the down-time payment is concerned, the same has been claimed, inter alia, on the following basis:-

Sl No.	Ticket No.	Docket No.	Problem	Start Time	End Time	Total Down-time (mins)
7/305	2485	01650	Repeater at Lucknow Was faulty	27.2.05 03:50:02 AM	27.2.05 06:00:39 AM	140
4/312	1918		Fiber cut at An-dheri, Mumbai	25.7.04 07:26:43 AM	25.7.04 08:14:00 AM	48
7/312	1937	731	Power problem At Lucknow	30.7.04 10:19:27 AM	30.7.04 06:06:06 PM	460
5/313	1830		Power Grid Fiber Cut between Alla-bad & Lucknow	12.6.04 1:04:38 AM	12.6.04 02:14:03 AM	70

As the respondent has claimed damages for breach of contract on the part of the petitioner, it is not correct to say that the respondent had been asking something which is contrary to the terms of the agreement. If a period of 12 months had not expired, the petitioner itself must thank therefor. Only because no specific claim has been raised by the respondent during subsistence of the contract, the same by itself would not mean that the respondent cannot do so at the end of the contract.

Admittedly, the respondent has raised its claim in its letter and thus it was obligatory on the part of the petitioner to plead and prove as to why the said claim was incorrect.

So far as the Network Element Charge is concerned, the petitioner has denied the said claim annual charges of Rs.5,50,000/-, Rs.4,50,000/- and Rs. 1 lakh towards annual network element charges for two periods. We have noticed the relevant terms of the contract as contained in clause 1 of the purchase order dated 29.8.03. It does not contemplate any network element claim charge. It was, therefore, contrary to the agreement. The amount of service fee for the period 5.11.03 to 31.12.03, thus, being for a period of 57 days as calculated, having regard to the service charges payable at Rs.5,50,000/- per annum and not at Rs.4,50,000/- per annum. The corresponding benefit derived by the petitioner, therefore, must be given back to the respondent.

Mr. Bhatia, however, would submit that the invoice had been raised on 17.11.03, but the respondent should have protested thereto. Even in its letter dated 6.3.06, no protest has been made to the first demand. However, in respect of purchase order dated 13.4.05, the respondents objected thereto. We have noticed hereinbefore, the invoice dated 17.11.03. We may also notice the invoice dated 30.4.05 which is as under:-

“Name of the Link : Chandigarh – Karnal

Capacity : E1 1

Network Element Charges 1 Day Rs. 1.00.000/-

Bandwidth Charges 30 Days Rs. 36,986/-“

It is true that for the period 2003-04, a period of 12 months having expired, the respondent is not entitled to any Network Element charge, but it shall be entitled to the proportionate charge for 10½ months as the period of next 12 months did not expire.

We may notice the pleadings of the respondent in this behalf.

“That the petitioner at the time of installation of the link vide their Invoice No. C/48/01/glide/Chd-Karnal datd 17.11.03 Charged a sum of Rs.1.00 lakh from the respondent as installation charges. Copy of the said Invoice is attached as **Annexure P-6**. This amount was paid to petitioner inadvertently because as per PO no such amount qua installation was payable. The petitioner thereafter again vide their Invoice No. 172 dated 30.4.05 charged a sum of Rs.1.00 lakh towards the installation charges (Annexure P-6, Page 83). The respondent claimed credit of the said amount of Rs. 1.00 lakhs for the period from 1.4.05 to 30.4.05 and the petitioner vide their reply dated 16.6.07 in para 6 thereof has stated that since the said charges were annual charges the respondent was liable to pay the same for the second year as well. However, it is an admitted fact that the petitioner provided services for 10½ months only i.e. from 1.6.04 to 15.4.05, therefore, question of petitioner claiming annual charges of Rs.1.00 lakh does not arise. Further as per the normal practice installation charges are payable only once at the time of actual installation & they can never be said to be of recurring in nature as there was no new installation. Further, as per Purchase Order dated 29.8.03 no network annual charges were payable by the respondent to petitioner, but the Petitioner has paid in good faith Rs.1.00 lakh to the petitioner on account of this annual network charges. Therefore, in any case the respondent is not liable to pay any annual network charges as claimed by the

petitioner vide their Invoice dated 17.11.03 (page 70 of the petition) and vide Invoice dated 30.4.05 (page 83). It is, therefore, stated that the respondent is entitled to be given benefit of Rs.2.00 lakhs as, as per Purchase Order dated 29.8.03 as no annual network charges are payable by the respondent.

It is respectfully submitted that the total amount charged by the petitioner in the Pay Order dated 29.8.03 includes network element charges. It is respectfully submitted that the respondent was well aware of the same and had therefore paid annual network element charges for the said circuit. It is respectfully submitted that the invoice at page 70 of the petition has charged Rs. 1 lakh for the network element charges and Rs.70,274/- as service fee for 57 days. It is respectfully submitted that service fee for 1 day would come to Rs. 1232.83 (70,274/57) and the annual fee charged for 367 days would come to Rs. 4,50,000 (1232.87 x 365). Therefore the purchase order at page 13 correlating to page 70 has added both and given the figure of Rs.5,50,000/- per annum for both service fee and annual rental fee. It is respectfully submitted that the invoice at page 70 is for a different purchase order and at page 83 is for different purchase order. The respondent is merely trying to confuse this Hon'ble Tribunal that both the invoices are pertaining to same purchase order. It is respectfully submitted that at page 70, the services had started on 5.11.03 and therefore the annual charges were only till 3.11.04. It is respectfully submitted that thereafter the respondent had sought for continuation of service vide e-mail dated 20.10.04 and therefore annual network element charges were again levied. A copy of purchase order dated 20.10.04 sent by the respondent to Powergrid vide e-mail is annexed herewith and marked as **ANNEXURE P-19**. All submissions made contrary to the above are misconceived, incorrect and are denied.”

In this connection, we may also notice the statement of Mr. Mathur in his cross examination which is as under:-

“As per the provision of the purchase order in network element charge of Rs.1.00 lakh was to be charged on annual basis. As per the purchase order dated 29.8.03, the respondent was liable to pay network element charge of Rs. 1 lakh per annum.

Network element was charged between 5.11.03 to 3.11.04 vide our invoice dated 17.11.03.

For the subsequent purchase order

So far as the other contracts are concerned the respective page may be seen from the invoice dated 17.11.03 and 30.4.05 exhibit as II and II/A (page 70 and 83).”

Keeping in view the provisions of the contract, we are of the opinion that the respondent although is not entitled to the entire claim, but a proportionate claim for the aforementioned period as has been noticed heretobefore.

This brings us to the question as to whether any service tax was payable.

We have noticed heretobefore the relevant provisions of the contract in terms whereof, the service tax was to be paid.

However, indisputably, the Central Government had issued an exemption notification, the relevant provisions whereof also, we have noticed heretobefore. The exemption notification, it is trite, should be construed strictly. From a bare perusal of the relevant provision it would appear that what has been exempted is interconnection of one ISP to another. The agreement between the parties, however, was an internet package. It was not a case of interconnection, *stricto sensu*. It provided for the

links and not strictly for interconnection. It was a subject matter of services. So far as the provision of bandwidth is concerned, in our opinion, service tax was payable. The claim of the respondent in this behalf, in our opinion, should be rejected.

It is not in dispute that the commission for a sum of Rs.13,353/- has already been given credit by the petitioner. The same, therefore, is no longer being in dispute before us, no discussion thereon is warranted. So far as the respondent's claim in respect of bill No. 95 of 2004-05 and No. 96 of 2004-05 is concerned, we may notice that such a claim had not originally been raised in the reply. An application for amendment to reply was filed which was rejected by an order dated 19.2.2000. In that view of the matter, we are of the opinion that no evidence in that regard was admissible. The said claim for reduction for a sum of Rs. 6,843/- and Rs.75.278/- respectively is rejected.

The petition, therefore, is allowed in part and to the aforementioned extent. The petitioner shall also be entitled to the interest @ 18% p.a. as prayed for by the petitioner. However, having regard to the divided success, we direct that the costs of this petition be borne by each party.

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

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

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