TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 29TH September, 2010

Petition No.172 of 2009

Star (India) Pvt. Ltd. ….Petitioner

Vs.

Bharat Sanchar Nigam 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. Saikrishna Rajagopal, Advocate
Mr. Saurabh Srivastava, Advocate

For Respondent : Mr. Maninder Singh, Sr. Advocate
Mrs. Prathiba M. Singh, Advocate
Mr. Paras Anand, Advocate
Mr. Vadivelu Deendayalan, Advocate

JUDGMENT

S.B. SINHA

The core question involved in this petition is as to whether the parties had entered into a settlement in relation to the admitted dues of the petitioner as evidenced by three invoices dated 11.12.2006, 31.3.2007 and 31.3.2007.

2. Before adverting to the said question, we may notice the factual matrix involved herein.

The parties hereto are service providers within the meaning of the provisions of the Telecom Regulatory Authority of India Act, 1997 (The Act), although the petitioner is a broadcaster and the respondent is a service provider in respect of the telecom sector. An agreement was entered into for providing certain types of services as envisaged in clause 1.1 thereof.

3. The petitioner herein served three invoices, the first being dated 11.12.2006 for a sum of Rs.1,18,88,926 for the period September, 2006 to November, 2006. It is said to be an unsigned photocopy and was handed over to an official of the respondent. The second invoice was dated 31.3.2007 for the period December, 2006 to February, 2007, for a sum of Rs.12,54,381/-, which was sent by registered post on 3.5.2007 which was again an unsigned photocopy. The third invoice was for a sum of Rs.41,877/- for the month of March, 2007.

4. Indisputably, apart from the aforementioned three invoices, payments, in respect of other invoices received by the respondent herein from the petitioner, were made.

According to the respondent, keeping in view the amount involved, vis-à-vis, the other invoices raised by the petitioner, by a letter dated 1.11.2007 the respondent was informed that it had not received the originals of the said

three invoices.

5. Indisputably, the invoices were re-submitted on or about 30.11.2009 along with two other invoices. The petitioner reminded the respondent to make payments in respect of the aforementioned invoices by letters dated 24.4.2008, 4.7.2008. A legal notice dated 21.7.2008 was also served in response whereto, the respondent, by a letter dated 6.8.2008, requested the petitioner to submit month-wise ink-signed original copies of the invoices. Admittedly, the respondent received five invoices from the petitioner on 4.9.2008. The respondent cleared the invoices for the period April, 2007 to September, 2007 but according to it, it received the said three invoices for the first time which were ink signed. According to the respondent, discrepancies having been found in the said three invoices in question, a committee was constituted to process the same on or about 3.2.2009, whereupon, upon entering into the merit of the matter it submitted a report on 6.3.2009.

6. The petitioner, by a letter dated 13.3.2008 addressed to the Chairman-and-Managing Director of the respondent, sought for his intervention in the matter. It moreover invoked the arbitration clause on or about 13.4.2009. According to the respondent, it had assigned reasons for not settling the outstanding invoices by its letter dated 20.4.2009, stating :-

"Your kind attention is hereby drawn regarding Non-Payment of outstanding revenue share. The case has been examined in UP W) Circle. The competent authority in UP (W) circle has approved for consideration of provisional payment of pending bills for the months of Sept.-2006, October-2006, November-2006 and December-2006 on the basis of average of subsequent three months i.e. January-2007, February-2007 and March-2007. You are requested to clarify the following discrepancies/points which have been observed by UP(W) circle, while processing the case in the UP (W) circle for the outstanding revenue share payments.

1. As per clause No. 1.9 of part II Financial conditions of the agreement signed with your company, revenue share bills were not submitted on monthly basis.
2. The invoice No. ST/VAS/01 dated 11.12.2006 for the month of September-2006, October-2006 and November-2006 and invoice No. ST/VAS/05 dated 31.03.2007 for the month of December-2006, January-2007 and February-2007 as submitted were unsigned and as in the shape of photocopy.

3. In the bills for the period September-2006 to December-2006, there is a huge variation in the MoUs figure in comparison to the MoUs in the bills for the later months. You are requested to provide the details of the services/promotional scheme/contest etc. as run by your company on monthly basis.

The above detailed analysis may be sent directly to CGM UP (W) circle, BSNL, Meerut, with copy to this office so as to settle the case.

7. Pursuant to the dispute settlement clause contained in the said agreement, the parties appointed their respective arbitrators. Although the respondent submitted to the jurisdiction of the arbitrators, the petitioner filed this petition for a recovery of a sum of Rs. 1,29,79,541 and a sum of Rs.62,82,982 towards interest calculated @ 18% p.a.

It also prayed for the stay of the arbitration proceedings.

8. The respondent appeared in the proceedings and raised a preliminary objection with regard to the jurisdiction of this Tribunal.

We may, however, notice that one of us (Mr. G.D. Gaiha, Member) by his order dated 17.8.2009 observed that the parties may explore the possibility of an amicable settlement.

On or about 4.9.2009, said to be in pursuance of the said observation, the parties met at Meerut. The petitioner was represented by one Mr. Ravi Srivastava. According to the respondent, a representation was made by Mr. Srivastava that by way of an amicable settlement, the respondent would have to pay a sum of Rs.1,27,06,743/- towards full and final settlement, upon which, this petition shall be withdrawn. However, the respondent by its

letter dated 14.9.2009 sought for certain clarifications allegedly on basis of the discussions held between the parties in the aforementioned meeting dated 4.9.2009. It is not in controversy that the petitioner by a letter dated 30.9.2009 rendered clarifications to the respondent.

9. The parties yet again met at Meerut on 26.10.2009. Allegedly, Mr. Srivastava again informed the respondent that it would have to pay a sum of Rs.12706743 towards full and final settlement and the petitioner shall withdraw this petition.

We may, in this regard, notice the averments made by the respondent which reads as under:-

> *"It is most respectfully submitted that the officials of the BSNL at Meerut had met with Mr. Ravi Srivastava, Sr. Manager (Legal) of STAR at least on ¾ occasions including on 4.9.2009 and 26.10.2009 etc. In each of the meetings Mr. Ravi Srivastava, stating to be the Sr. Manager (Legal) of STAR, as a matter of amicable settlement had clearly and specifically stated that the payment of Rs. 1,27,06,743 (after deducting TDS) by BSNL to STAR will be towards the full and final settlement of the demand of STAR against BSNL. Upon such payment by BSNL to STAR, the petition before the Hon'ble TDSAT will be withdrawn by STAR. This was so stated by Mr. Ravi Srivastava, of STAR in the abovementioned meetings held with the officials of the BSNL namely, Mr. J. C. Goel, AGM (IT), Mr. P. K. Srivastava, GM(CFA) Mr. Parmod Yadav, DGM(IT) and Mr. Prem Chand, DGM(CMTS) Meerut."*

10. This Tribunal dismissed the application filed by the respondent herein by an order dated 22.1.2010 holding that this Tribunal has jurisdiction to entertain the present petition.

11. On or about 16.2.2010, the respondent issued a cheque for the aforementioned sum of Rs.1,27,06,743/-, stating :-

> *"This is in full and final settlement of your claim in respect of aforesaid bill/invoice.*
>
> *Receipt of the cheque may please be acknowledged."*

The aforementioned cheque was encashed. The petitioner, however, by a letter dated 26.2.2010, stated as under:-

> *"We are in receipt of letter dated 16th February, 2010 forwarding a sum of Rs. 1,27,06743/-, under which admitting your liability towards our long outstanding invoices with respect to IVR services, you have forwarded a sum of Rs. 1,27,06,743/- allegedly stating the amount to be towards full & final settlement of our claims in respect of our outstanding invoices.*

You will appreciate that claims pertaining to our outstanding invoices is under adjudication before the Hon'ble Telecom Disputes Settlement & Appellate Tribunal (TDSAT) vide petition No. 172 of 2009, hence we are acknowledging receipt of aforementioned amount without prejudice to our rights and claims made before Hon'ble TDSAT. We are, therefore, appropriating the aforementioned amount first against interest and then towards principal."

Yet again, by another letter dated 12.3.2010, it was given out that the payment of the said sum of Rs.1,27,06,743/- was only upon the petitioner's representation to withdrawal of the instant petition.

12. Inter alia, on the premise that the counsel for the respondent and/or the officers, who had been instructing him, had no knowledge about the aforementioned settlement by and between the parties hereto, the same could not be brought to the notice of this Tribunal earlier. On the said premise the respondent filed an application on 19.3.2010 which was marked as M.A. No. 66/2010 praying inter alia for the following reliefs:-

"(a) Pass appropriate orders to read the affidavits deposed by Mr. P. K. Srivastava, GMTD Faridabad, Mr. Pramod Yadav, DGM(IT) and Mr. Prem Chand, DGM(CMTS) dated 04.05.2010 in evidence.

(b) Pass any other/further orders as this Hon'ble Tribunal deems fit and proper in view of the facts and circumstances of the instant case."

13. However, as the respondent objected to the contentions raised by the respondent herein in the said application, by an Order dated 17.5.2010, this Tribunal directed as under:-

> *"Indisputably, the petitioner has claimed a sum of Rs.1,29,79,591/- as the principal sum and Rs.62,82,982/- towards interest thereon. The respondent has already paid a sum of Rs.1,27,06,743/- which covers the principal amount as TDS has been deducted therefrom. The respective contentions of the parties, in our opinion, may not detain us at this stage. At the time of hearing, two principal questions would arise for our consideration, namely:-*
>
> *(i) Whether having regard to the payment already made by the respondent, the petitioner is entitled to any interest; and*
>
> *(ii) Whether having regard to the adjustment of the amount paid by the respondent, the petitioner could have adjusted the same towards interest?*
>
> *The question with regard to the conduct of the parties so far as the alleged settlement stated to have been arrived at being itself a contentious issue and having regard to the fact that those officers of the respondent and the petitioner who have affirmed their affidavits in support of their respective cases in all probability would be examined by them in this proceeding, we are of the opinion that the interest of justice would be sub-served if the contentions raised in the petition are directed to be determined at the final hearing of the petition and not separately.*

We say so inasmuch as this Tribunal at the hearing (although not specifically raised by the parties hereto) will also be required to consider the effect of Sections 59 and 60 of the Indian Contract Act. Furthermore, whether the petitioner is also entitled to interest having regard to the facts and circumstances of the case would also be required to be determined.

We, therefore, are of the opinion that interest of the justice would be subserved if this application is considered along with the final hearing of the petition."

14. Pursuant to or in furtherance of the observations made therein, the parties filed evidence of their witnesses by way of affidavits.

The petitioner examined Shri Srivastava, whereas the respondent examined four witnesses, being Shri J.C. Goel, Shri Pramod Yadav, Shri Prem Chand.

We shall refer to their depositions before this Tribunal a little later.

15. Mr. Saikrishna Rajagopal, learned counsel appearing on behalf of the petitioner in support of this petition would contend:-

(i) The respondent has failed to prove that any settlement has been arrived at by and between the parties hereto in the meetings held on 4.9.2009 and 21.10.2009.

(ii) The tender of the aforementioned amount by the respondent on 16.2.2010 being an unilateral act on its part and pending litigation, it must be held that the settlement could not be said to have been arrived by reason of forwarding a letter in a routine manner. The settlement between the parties must be in writing.

(iii) The petitioner having served invoices upon the respondents for which there was no specific format and the same being computer-generated, the respondent committed an illegality in insisting upon a signed invoice and in any event, ink-signed invoices having been delivered to the respondent on 4.9.2008, interest on the sum due would run from expiry of 17 days therefrom in terms of clause 1.9 of the agreement, the petitioner in its invoices having clearly stated that in the event of failure on the part of the respondent to pay the said sum within the stipulated period, interest @ 18% p.a. shall be charged.

(iv) In any event, clause 1.9 of the agreement read with the invoices must be held to be an agreement between the parties for payment of interest as provided for in Section 3 of the Interest Act, 1978.

(v) Having regard to the provisions contained in Section 69 and 60 of the Indian Contract Act, part payments made by the respondent is liable to be adjusted first towards interest and later on towards the principal.

16. Mr. Maninder Singh, the learned senior counsel appearing on behalf of the respondent, on the other hand, urged :

(a) Having regard to the fact that petitioner had sent its representative to Meerut on 4.9.2010, whence certain clarifications were sought for, to which, Mr. Srivastava asked the respondents to put the said queries by a letter and thereafter, the letter having been issued, the delay in making payments cannot be said to be unreasonable particularly in view of the fact that it had paid all other dues of the petitioner but it could not pay the same immediately as certain clarifications were required, keeping in view the fact that the invoiced amount was on a higher side compared to the invoices of other months.

(b) The petitioner having accepted the payment from the respondent by way of full and final settlement cannot now be permitted to raise a contention that the forwarding letter dated 16.2.2010 was a routine one and thus cannot be acted upon and in that view of the matter encashment of the cheque, must be held to be the acceptance of the payment in full and final settlement.

17. In view of the aforementioned rival contentions of the parties, the questions which arise for our consideration are:-

(i) Whether any amicable settlement had been arrived at by and between the parties hereto;

(ii) Whether the petitioner having accepted payment of a sum of Rs.1,27,06,743/- is estopped and precluded from claiming any other or further sum by way of interest or otherwise.

(iii) Whether the petitioner is entitled to any adjustment of the amount of interest from the amount paid and then from the principal amount.

18. It may be true that it was not necessary for the petitioner to submit original invoices and that too, inked signed ones. There, however, exists a dispute as to whether the three invoices dated 11.12.2006 and 31.3.2007 were photocopies of the original or the computer-generated ones.

We need not delve deep into this matter, keeping in view the admitted fact that the original invoices were filed on 4.9.2008.

Clause 1.9 of the agreement reads, thus:-

"The revenue share of the STAR shall be settled monthly basis upon receipt of the bill from the Franchisee. The Franchisee shall have to submit the bill to the TAX In-charge. The concerned In-charge shall verify the bill within seven days from the data available in the TAX. This verified bill shall be forwarded to the designated Finance Officer of the Circle who will release the payment within ten days of the receipt of the verified bill. The revenue share payment shall then be released to the franchisee."

19. The question as to whether any settlement had been arrived at by and between the parties, may have to be considered having regard to the factual matrix involved herein.

The fact that a meeting was held on 4.9.2009 is not in dispute. We may, however, notice that by a letter dated 8.9.2009, the respondent stated as under:-

> *"It is stated that BSNL has been very prompt in payments of bills of his vendors/operators/franchisees But in case of MIs SIPL, payment of the bills for the period from Sept-2006 to Dec-2006 could no be processed till 04.09.08 in want of monthly original/duplicate ink-signed bills. After receipt of duplicate Ink-signed bills, this office processed the invoices for payment and following points were asked for clarification vide letter No.20-2312006-NS dated 20.04.09 from AGM(VAS-l) BSNL H/Q New Delhi. But reply from your end to BSNL HIQ was not found admittable & third point was not at all clarified. Due to non-availability of justified clarification from your end to BSNL UPW Telecom Circle the invoices are still pending for payment :*
>
> *1. As per clause no. 1.9 of part-Il financial conditions of the agreement signed with your company, revenue share bills were to be submitted on monthly basis but it is on record that 3-4 months clubbed bills were submitted.*
>
> *2. It is also on record that the invoice no. STNASIOI dated 11.12.06 for the month of Sep'06, Oct'06 and Nov'06 and invoice no. STNASIO5 dated 31.03.07 for the month of Dec'06, Jan'07 and Feb'07 as*

submitted were unsigned and as in the shape of photocopy and your reply in this respect is found far from facts as per receipt & dispatch records.

3. In the bills for the period Sep'06 to Dec'06, a huge variation was noticed in the MoUs figures in comparison to the MoUs in the bills for the later months. So as to authenticate the same you were requested to provide the details of the services I promotional schemes I contests etc. as run by your company on monthly basis as per above clause.

Since beginning BSNL is intending to find an amicable solution and make the payments & now Hon'ble TDSAT New Delhi have also passed an order dated 17.08.09 to explore the possibility of an amicable solution of dispute between M/S SIPL and BSNL. In this regard, a meeting with Shri Ravi Srivastava Legal Manager along with other officers from M/S SIPL and BSNL was held on 04.09.2009 in the chamber of GM (NC) BSNL Meerut where all the above mentioned points were discussed & t was emphasized that BSNL UP (W) Telecom Circle will release the payment of disputed invoices after getting satisfactory clarification of all the above points from M/s. SIPL.

In the above light you are once again requested to clarify above points so that your payment may be released at the earliest please."

20. In that letter, only certain clarifications were sought for, but, as has rightly been submitted by the learned counsel for the petitioner, there is no mention about any settlement. However, the letter of the respondent dated

30.9.2009 is of some significance. We may notice the relevant paragraphs of the said letter :-

> *"We were shocked to receive the present letter under reference raising again all those queries which stands satisfied. Be it as it may, to obviate any further complication and to facilitate the process of settlement initiated, we hereby once again submit our reply to the queries raised by you.*
>
> *We presume that the clarifications are sufficient for your records and we request you to release the payment of all the pending invoices by or before 5th October, 2009."*
>
> (Underlining is ours)

21. Three inferences which can be drawn from the said letter are :

(i) The respondent's endeavour to settle the dispute by offering to make payment of the pending invoices promptly had been appreciated;

(ii) Mr. Ravi Srivastava visited the office only to facilitate the said settlement;

(iii) The respondent wanted the said offer of the petitioner to its logical conclusion wherefor the disputes between the parties were discussed amicably.

(iv) During the said discussions, the queries No. 1 & 2 raised by the respondent were explained and additional informations was necessary and in respect of the third query.

(v) The said letter dated 30.9.2009 inter alia was written to obviate any further complication and to facilitate the process of settlement initiated. The clarifications made therein, it was expected, would be found to be sufficient for the respondent's records.

(vi) A request was made to release the payment of all the pending invoices by or before 5.10.2009.

22. In that letter, there was no demand of interest and what was asked for was only payment by 5.10.2009. It was not a sunset clause. A formal demand was, therefore, must be held to have been made only on the said date upon making the clarifications sought for by the respondent herein. In is in the aforementioned context we may notice the letter dated 16.2.2010, wherewith a cheque for a sum of 1,27,06,743/- was issued upon deducting the TDS. A bare perusal of the said letter would clearly go to show that the same was in full and final settlement of the claim in reference to the bills or the invoices mentioned therein.

It is true that the said letter was in a printed format but it would be of some interest to note, the depositions of Mr. Srivastava, Manager (Legal) of the respondent in this behalf. He, in his affidavit, which was filed before this Tribunal on 19.3.2010, on which date this Miscellaneous Application was also filed by the respondent, stated as under:-

"I say that as the talks of settlement had failed between the parties therefore argument had taken place on the preliminary issue raised by the respondent."

23. Why was it necessary to make such a statement? It is also of some interest to notice that in his depositions in his cross-examination, he inter alia stated as under:-

"Que : Where are the annexures to this letter dated 17.10.2007?

Ans. : The copies are not here but they have been sent.

Que. : What is the difference between the invoices placed at page 484, 485 and 486 and the invoices attached with Exhibit-I ?

Ans. : The invoices contained in Exhibit-I are copies of computer generated invoices, which does not require signatures. Pages 484 onwards are ink signed invoices. There is no other difference.

Que. : Please show us the actual copies of the invoices which you have claim to have sent vide speed post receipt at page 488.

Ans. : Copies of the invoices originally sent have not been filed.

Que. : After the 4.9.2009 were you in continued communication with officers of BSNL ?

Ans. : Yes there used to few phone calls between Mr. J. C. Goyal and me.

Que. : What was the subject matter of these calls ?

Ans. : To settle the dispute amicably.

Que. : After meeting dated 04.09.2009 did you receive letter dated 14.09.2009 ?

Ans. : Yes.

Que. : I put it to you that BSNL released the payment pursuant to your meeting with BSNL and negotiations for settlement which you referred to earlier. Therefore, it is incorrect to say that BSNL released the payment on its own.

Ans. : I deny the suggestion.

Que. : Why is there complete silence in your affidavit with respect to your various meetings with BSNL and correspondence for settlement of the dispute with BSNL ? Don't you consider these facts as material facts ?

Ans. : I cannot say whether they are material facts. I have already stated that talks for settlement had failed in para 16. After they have filed their written statement on 03.10.2009 I did not consider it necessary as talks for settlement had already failed.

Que. : Since there was no settlement, why did you not return the cheque for Rs. 1,26,06,743/- which was sent to you ?

Ans. : The petitioner appropriated the sum as the payment was due and by way of part payment.

Que. : What is the meaning of the words "taking the matter to a logical conclusion" as contained in your letter dated 30.09.2009.

Ans. : I used those words in the context of exploring the possibility of a settlement, if possible."

24. The respondent, however, examined, as noticed hereinbefore, three witnesses. They spoke about a settlement. They have been cross-examined. Mr. Raja Gopal has drawn our attention to various parts of the cross-examination of Shri J.C. Goel, Shri Pramod Yadav and Shri Prem Chand. We may notice the relevant portions of their deposition.

Shri J. C. Goel stated as under :-

"Ques: If there is no prescribed format what was the reason for non-payment of invoices raised by Star, being ST/VAS/01 dated 11.12.2006, ST/VAS/05 dated 31.03.2007 and ST/VAS/10 dated 31.03.2007?

Ans: Three invoices, one ST/VAS/01 dated 11.12.2006 for the months September, 06 to November, 06 which is in the shape of the photocopy and un-signed, second one ST/VAS/05 dated 31.03.2007 which is also in the shape of photocopy and un-signed and third one ST/VAS/10 dated 31.03.2007 in the shape of signed photocopy was delivered to the BSNL, UP (West) Circle, Meerut during the month of October, 2007 vide letter dated 17th October, 2007 by SIPL.

Ques: Is it correct according to you that the so called settlement was reached on 4th September, 2009.

Ans. : Yes it is correct.

Volunteers: Under the direction of the Hon'ble TDSAT dated 17.08.2009 to explore the possibility of an amicable settlement between SIPL and BSNL there was a meeting on 4th September, 2009 between the representatives of both and a settlement was reached fruitfully between both of them to release the payment of the pending invoices.

Ques: If a conclusive settlement had indeed been arrived at as you claimed on 4th Sept, 2009, could you explain to us the basis of your instructions to your counsel to proceed with the hearing on the question of maintainability of the petition and framing of issues as late as 22nd Feb, 2010?

Ans: The case was already before the Hon'ble TDSAT since 17.8.2009 and our respected counsel was dealing accordingly.

Attention of the witness is drawn towards para. 11 of M.A. 66 of 2010 at page 415.

Ques: In this para, you referred to a letter dated 12.3.2010 which is claimed to have been sent to the petitioner?

Ans. : Yes, it was sent to the party."

25. Mr. V.K. Srivastava, however, in his cross-examination stated as under:-

"Ques: Could you tell us the terms of the alleged settlement arrived at on 4th Sept, 2009?

Ans: Pursuant to the directions of the TDSAT, we held settlement discussions during the course of which Mr. Ravi Srivastava told that it's a gentleman promise that if you make our payment of dues, we will not ask for any interest, etc and I will withdraw the case from the court. There were no other terms, formalities or requirements discussed."

"Ques: Could you tell us the terms of the alleged settlement arrived at on 4th Sept, 2009?

Ans: The terms were that in case Star invoices are settled, the petition before the Hon'ble TDSAT would be withdrawn.

It was also agreed that Star would again respond to the same queries raised by BSNL through its letter of 20th April, 2009.

Volunteers: Contents of 20th April, 2009 letter were reiterated in letter dated 14th September, 2009."

26. Mr. Raj Gopal would contend that the evidence of Shri Goel vis-à-vis the evidence of other witnesses in regard to the approach of the respondent appears to be contradictory and/or inconsistent on its face as although according to Mr. Goel, payment should have been made irrespective of the fact that as to whether the clarifications were to be issued or not, but according to Mr. Prem Chand, no such settlement was possible, as clarification had a definite bearing on quantum of payment.

We, keeping in view the manner in which the things have proceeded, although, are not in a position to arrive at a definite conclusion that any representation had been made by Mr. Srivastava that in the event any payment is made, the same shall be considered to be in full and final settlement, but in our view there cannot be any doubt, whatsoever, that there had been a talk of settlement. In fact, the terms of the letter of Mr. Srivastava dated 30.9.2009 is clear and explicit. What was insisted was a prompt payment.

It is true that the respondent ought to have brought to the notice of this Tribunal that talks of settlement had been going on and/or the same had attained finality, but, we cannot shut our eyes from the fact that in fact the payment had been made. We cannot also ignore the statements of Mr. Srivastava before this Tribunal as also in his letter dated 30.9.2009. They clearly go to show that the petitioner was trying its best to obtain his payments. It is also of same significance that the parties were in constant touch with each other over phone.

There is, however, no doubt that the payment ought to have been made within the period of 17 days of September, 2008 but in fact it had been made in February, which is contrary to clause 1.9 of the agreement.

We, however, need not consider the evidence of the parties any further in view of the fact that the respondent had accepted the payment without any demur whatsoever, which, in our opinion, in the factual circumstances of the case lead to a conclusion that in fact a settlement had been arrived at. As indicated hereinbefore, the respondent had issued the said cheque and in its forwarding letter stated that the same had been in full and final settlement of

the petitioner's claim. Mr. Srivastava in his evidence not only accepted that the matter was required to be taken to its logical conclusion, (which according to him referred to settlement) went to the extent that it was he who had advised his head office to the effect that the cheques should be encashed and given reply to the letter later on. The said witness furthermore maintained complete silence for reasons best known to it about the meetings he had with the officers.

The question which arises is as to what would be the effect of acceptance of such full payment without any demur whatsoever and in particular in the factual matrix involved herein.

The Allahabad High Court in Amrit Vanaspati Company Ltd v. Union of India [1966 ALD page 104] held as under :-

> *"Section 8 of the Contract Act provides that performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal. The language of the section is rather vague but its meaning is clear. It is based on the principle that if an offer is made subject to a condition, the offence cannot accept the benefit under the offer without accepting the condition. He cannot take the attitude, "I shall accept the benefit but reject the condition." This principle has been followed by this court in several cases. Behari Lal Vs. Radhey Shyam AIR 1953 All 745, Sunder Lal Vs. Ram Krishan 1960 All LJ 152 (AIR 1960 All 544).*

These decisions were based upon an earlier decision of this court Ram Kripal Pande Vs. Shiromani Sugar Mill which was published in 1948 All LW 355. In that case an employee claimed wages for work done by him but the employer sent a cheque for a smaller amount with a letter saying that it was in full satisfaction of the amount due to the employee. The latter cashed the cheque and sued for the balance. The court held that he could not do so after having accepted payment and must be deemed to have accepted the term attached to the cheque."

The said judgment was followed by a learned single Judge of the Gauhati High Court in *Union of India v Rameshwarlall Bhagchand*, reported in MANU/GH/0033/1969 in the following terms:-

"9. Coming now to the facts of the case in hand, the General Manager sent a cheque of Rs. 1173.19 on 8th May, 1964, to the plaintiffs subject to the condition that it was in full and final settlement of the claim, and that ho did after receipt of a letter from the plaintiffs demanding a total compensation of Rs. 2368.25. If the plaintiffs believed that the amount of the cheque fell short of the sum legally due to them, the obvious course for them to adopt was to write immediately to the General Manager, while retaining the cheque with them, that they would not accept the amount of the cheque as fully settling their claim, and that if he (the General Manager) would not agree with them they would send back the cheque to him or each it in partial satisfaction of their claim. The plaintiffs should have proceeded to deal with the cheque after getting a reply from the General Manager to such a communication.

However, without taking any such step the plaintiffs cashed the cheque and about eleven weeks thereafter wrote to the General Manager per Ext. 8 that the cheque did not satisfy their claim which they fixed at Rs. 2368.25. Section 6 of the Act, it may be emphasised, provides for revocation of proposals made. If the plaintiffs had written to the General Manager before encashing the cheque, the General Manager might have withdrawn The Proposal Made by Him on 5th May, 1964. By getting the amount of the cheque first and then writing a letter to the General Manager that its amount did not satisfy their claim fully, the plaintiffs placed the General Manager in a stage where he could not be restored to his former position. Pollock and Mulla have expressed the opinion at Page 65 of their treatise that it is generally sound principle that what is offered on condition must be taken as it is offered. Hence I find the view taken by the Allahabad High Court more rational as also one corresponding with the provisions of Section 8. The Patna High Court decision is clearly distinguishable since it was rested on the provisions of Section 63 without adverting to Section 8 at all."

27. Yet again, the Supreme Court of India in *Bhagwati Prasad Pawan Kumar v. Union of India (UOI)* reported in (2006) 5 SCC 311, opined as under:-

"18. […] However, if the appellant had not encashed the cheques and protested to the Railways calling upon them to pay the balance amount, and expressed its inability to accept the cheques remitted to it, the controversy would have acquired a different complexion. In that event, in view of the express non acceptance of the offer, the appellant could not be presumed to have accepted

the offer. What, however, is significant is that the protest and non acceptance must be conveyed before the cheques are encashed. If the cheques are encashed without protest, then it must be held that the offer stood unequivocally accepted. An 'offered' cannot be permitted to change his mind after the unequivocal acceptance of the offer.

19. […] If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. On the other hand if the evidence disclose that the "offered" had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act.

20. Coming to the facts of this case if the appellant, before encashing the cheques, had sent the communication dated August 20, 1993, it could perhaps be argued that by retaining but not encashing the cheques, it did not intend to accept the offer made in the letter of the Railways dated April 7, 1993. At the same time if the evidence disclosed that it encashed the cheques and later sent a protest, it must be held that it had accepted the offer unconditionally by conveying its acceptance by the mode prescribed, namely - by retaining and encashing the cheques, without reservation. Its subsequent change of mind and consequent protest did not matter."

28. It is not a case where a final bill had been accepted by a contractor upon not making a statement that he would not raise any further claim, as has been held by the Supreme Court of India in Bharat Coking Coal Ltd Vs. M/s. Annapoorna Construction [2003 (8) SCC 154 at Page 159].

We feel bound by the aforementioned decision of the Supreme Court of India in the peculiar factual findings arrived at by us.

In that view of the matter, it must be held that the petitioner is not entitled to any further amount from the respondent.

Mr. Raj Gopal in fairness to the learned counsel, it may be noticed, has relied upon a few judgments to contend that if something is written on the invoice, the same would be binding if similar invoices have been raised and served upon the party concerned. Reliance in this behalf has been placed on the decision of the Delhi High Court in Reliance Industries Ltd. vs. Imperial Pigments (P) Ltd. 104(2003)DLT651 wherein it has been held:-

> *"2. The first question to be addressed is whether the parties had entered into a 'written contract' on the breach of which this summary suit is founded. The Plaintiff argues that all the terms of the parties engagement have been reduced to writing and can be found on the reverse side of each of its Invoices. I had the occasion to consider this very contention in the case titled KLG Systems Ltd. vs . Fujitsu ICIM Ltd., AIR2001Delhi357 . My conclusion was that " it is no longer rest integra that invoices/bills are ' written contracts' within the contemplation of this Order. Reference is directed to Messrs. Punjab Pen House v. Samrat Bicycles Ltd., AIR1992Delhi1 Corporate Voice (Pvt.) Ltd. v. Uniroll Leather India Ltd., 60(1995)DLT321 and Beacon Electronics v. Sylvania and Laxman Ltd., 1998 (3) A D 141." I may only add that if the transaction in question is covered by a single invoice*

or bill the party relying on it should be in a position to indubitably disclose that the adversary's attention was specifically drawn to the terms on the back of the bill, and that it consented to be bound to those terms by failing to lodge any demur. One must not lose sight of the reality that a person does not always read a bill or invoice from its start to its finish, especially the reverse side. Where the bill is preceded by a delivery challan which does not contain all the terms of the transaction, this presumption may be an exception. However, where there have been a series of transactions in respect of which identical terms are printed on the bill, especially where both parties are commercial entities, this presumption would become irresistible. In the case at hand, several supplies have been made and each one is covered by identical and replicated terms. I am in no manner of doubt that a written contract can be found in these invoices such as would sufficiently attract the rigours of Order xxxvII of the C.P.C."

29. The said decision has been followed by another learned Judge of the Delhi High Court in Bennett Coleman and Co. Ltd. vs. Shri Rakesh Kumar Sinha reported in MANU/DE/3234/2009, disposed of on 17.11.2009 stating as under:-

"4. As far as defence of the defendant that suit was not maintainable under Order 37 CPC is concerned I consider this question is no longer res integra. This Court in Reliance Industries Ltd. v. Imperial Pigments (P) Ltd. 104 (2003) DLT 651, after referring to relevant previous cases held that

this question stood settled and invoices/bills did form a written contract within the contemplation of Order 37 CPC and a suit based on bills and invoices shall be maintainable under Order 37 CPC."

30. These decisions were rendered having regard to the provisions contained in Order 37 of the Code of Civil Procedure. A statement contained in an invoice that interest @ 18% would be charged unilaterally cannot, in our opinion, be said to be an agreement arrived at by and between the parties thereto.

With a view to show that the parties were at ad idem, it must be proved that they had entered into the aforementioned contract out of their own free will and with knowledge. However, the intention of the parties, it is trite, may also be gathered from his or her conduct. Furthermore, Code of Civil Procedure, although contains substantive law, but basically deals with the procedural laws. Order 37 provides for adopting a summary procedure in a case where a decree can be passed in a summary pricely. Order 37 has been held to be a self-contained Code, recently by the Supreme Court of India, *in V.K. Enterprises vs. Shiva Steels* decided on 04.08.2010.

31. We, therefore, are of the considered opinion with utmost respect that the decisions of the learned Single Judges of the Delhi High Court are not applicable to the facts of the present case, in as much as the rate of interest cannot but be the matter of an express contract.

Reliance placed by Mr. Raj Gopal on Section 3 of the Interest Act is also misplaced. It reads as under:-

"3. Power of court to allow interest.

(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,-

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, them from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings: Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

(2) Where, in any such proceedings as are mentioned in sub- section (1),-

(a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person or in respect of a person' s death, then, the power conferred by that sub- section shall be exercised so as to include in that sum interest on those damages or on such part of them as the court considers appropriate for the whole or part of the period, from the date mentioned in the notice to the date of institution of the proceedings, unless the Court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section,-

(a) shall apply in relation to-

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is' barred, by virtue of an express agreement;

(b) shall affect-

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 ; (5 of 1908)

(c) shall empower the court to award interest upon interest."

32. The said provision, therefore, speaks of an agreement. It is not the case of the petitioner that the respondent had accepted the rate of interest payable after 17 days @ 18% p.a., in absence of proof of any agreement, the petitioner might have been found entitled to reasonable interest and may not be @ 18% as prayed for. However, in view of our findings aforementioned, the said question need not further be gone into.

We may, in passing, mention that the learned counsel for the petitioner has relied upon a decision of the Supreme Court of India in *M/s. Industrial Credit and Development Syndicate v. Smt. Smithaben H. Patel and Others* [AIR 1999 SC 1036] wherein while considering the question in regard to execution of a decree. It was held as under:-

"12. We have also perused the judgment of the Orissa High Court in Central Warehousing Corporation, Berhampur v. M/s. Govinda Choudhury and Sons, AIR 1989 Orissa 90, and are of the view that the facts of that case are distinguishable and that the learned single Judge of the Orissa High Court fell in error by distinguishing the applicability of Meghraj case (AIR 1970 SC 161)

(supra) to the facts of that case. In view of what we have held hereinabove, we are of the opinion that the learned Judge was not justified to hold 'where a debtor makes payment without making any indication as to how the payment is to be adjusted, it is the option of the creditor to make adjustment first of the interest and then of the principal, but if the debtor has indicated the manner in which the appropriation is to be made, then the creditor has no choice to apply the payment in a different manner. But however he may not agree to the mode of the payment, in which case he must not accept the payment and refund the amount to the debtor."[…]

14. In view of what has been noticed hereinabove, we hold that the general rule of appropriation of payments towards a decretal amount is that such an amount is to be adjusted firstly strictly in accordance with the directions contained in the decree and in the absence of such direction, adjustments, be made firstly in payment of interest and costs and thereafter in payment of the principal amount. Such a principle is, however, subject to one exception, i.e. that the parties may agree to the adjustment of the payment in any other manner despite the decree. As and when such an agreement is pleaded, the onus of proving is always upon the person pleading the agreement contrary to the general rule or the terms of the decree schedule. The provisions of Sections 59 to 61 of the Contract Act are applicable in cases where a debtor owes several distinct debts to one person and do not deal with cases in which the principal and interest are due on a single debt."

33. As the said decision was rendered in relation to a decree passed, we are of the opinion that the same has no application in a case of this nature, as this Tribunal and/or a court of law could have passed a decree keeping in view the interest of the parties as also public interest.

Reliance has also been placed by Mr. Raj Gopal upon a decision of the Supreme Court of India in Gurpreet Singh v. Chaturbhuj Goel [AIR (1988) SC 400] wherein A.P. Sen, J., held :-

> *"9. According to the grammatical construction, the word 'or' makes the two conditions disjunctive. At first blush, the argument of the learned counsel appears to be plausible but that is of no avail. In our opinion, the present case clearly falls within the first part and not the second. We find no justification to confine the applicability of the first part of O. XXIII, R. 3 of the Code to a compromise effected out of Court. Under the rule prior to the amendment, the agreement compromising the suit could be written or oral and necessarily the Court had to enquire whether or not such compromise had been effected. It was open to the Court to decide the matter by taking evidence in the usual way or upon affidavits. The whole object of the amendment by adding the words 'in writing and signed by the parties' is to prevent false and frivolous pleas that a suit had been adjusted wholly or in part by any lawful agreement or compromise, with a view to protract or delay the proceedings in the suit.*

10. Under R. 3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The court most therefore insist upon the parties to reduce the terms into writing."

34. In that case, the Supreme Court of India was considering the effect of Order XXIII Rule 3 of the Code of Civil Procedure. No compromise Petition has been filed before us. It is, therefore, not necessary to consider the said decision.

35. For the reasons aforementioned, we are of the opinion that the petitioner is not entitled to any further relief, keeping in view the factual matrix involved in the matter.

We, however, keeping in view the fact that even the respondent had failed to bring to the notice of this Tribunal that the talks of settlement had been going on, in our opinion, it is not entitled to any costs. Both parties

are therefore directed to pay and bear their own costs.

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

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

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

MKS