

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 22.9.2011

Petition No.59/2011
(with MA Nos.21/2011 & 93/2011)

Idea Cellular Limited, Gujarat

... Petitioner

Vs.

Union of India, New Delhi

... Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

HON'BLE MR.P.K. RASTOGI , MEMBER

For Petitioner

Mr.Maninder Singh, Senior Advocate
with Mr.Navin Chawla and Ms.Nidhi
Mohan Parashar, Advocates

For Respondent

Ms.Maneesha Dhir and Mr.K.P.S.
Kolhi, Advocates.

J U D G M E N T

S.B. Sinha

The petitioner is a licensee; the license having been granted in terms of the provisions of the Indian Telegraph Act, 1885 (the Act).

Inter alia for the circle of West Bengal comprising the State of West Bengal except the Metropolitan town of Kolkatta, the State of Sikkim and Union Territory of Andaman and Nicobar Islands, it entered into a license agreement with the respondent on or about 28.2.2008.

The said agreement contains the following clauses which are material for our purpose:

“Clause 4 – Effective date of this LICENCE shall be 25th January, 2008.

Clause – 8.1 – The LICENSEE shall commission the Applicable Systems within one year from the effective date of the Licence. The date of Test Certificate issued by the Authorized Testing Party of the Licensor as specified from time to time shall be reckoned as the date of commissioning the service for the purpose of calculating liquidated damages in terms of Condition 35 of the Licence Agreement.

Clause – 21.1 – Performance Bank Guarantee:

Performance Bank Guarantee (PBG) in prescribed format shall be submitted for amount equal to Rs.10 cores (for category `B' service area) before signing the Licence Agreement.

Further on completion of one year from the effective date of licence and after meeting the coverage criteria stipulated for first year, the PBG shall be reduced to Rs.10/5/1 crores for category `A'/'B'/'C' service areas on self-certification provided by the Licensee.

Further on fulfilling the roll out obligations as stipulated in Clause 34, the balance PBG shall be released on receipt of test certificate/ test certificates issued by TEC in respect of coverage.

Clause 34 – Roll-out Obligations :

34.1 LICENSEE shall be solely responsible for installation, networking and operation of necessary equipment and systems for provision of SERVICE, treatment of SUBSCRIBER complaints, issue of bills to its subscribers, collection of its component of revenue, attending to claims and damages arising out of his operations.

34.2 (a) Applicable for Category "A", "B" and "C" Service Area Licence (s)

LICENSEE shall ensure that

- (i) Atleast 10% of the District Headquarters (DHQs) will be covered in the first year and 50% of the District Headquarters will be covered within three years of effective date of Licence.

- (ii) The licensee shall also be permitted to cover any other town in a District in lieu of the District Headquarters.
- (iii) Coverage of a DHQ/ town would mean that at least 90% of the area bounded by the Municipal limits should get the required street as well as in-building coverage.
- (iv) The District Headquarters shall be taken as on the effective date of Licence.
- (v) The choice of District Headquarters/ towns to be covered and further expansion beyond 50% District Headquarters/ towns shall lie with the Licensee depending on their business decision.
- (vi) There is no requirement of mandatory coverage of rural areas."

In terms of the said license agreement, therefore, the petitioner was required to carry out its roll out obligations by 26.1.2010 in the first phase, in terms whereof it was to commence rendition of service in at least 10% of the District Head Quarters (DHQ) or such other important towns within the said circle.

On its failure to comply with the said roll out obligation the licensee is required to pay liquidated damages, in terms of Clause 35.1 of the License Agreement, which reads as under:

"35.1 The time period for provision of the Service stipulated in this Licence shall be deemed as the essence of the contract and the service must be brought into commission not later than such specified time period. No extension in prescribed due date will be granted. If the Service is brought into commission after the expiry of the due date of commissioning, without prior written concurrence of the licensor and is accepted, such commissioning will entail recovery of Liquidated Damages (LD) under this Condition. Provided further that if the commissioning of service is effected within 15 calendar days of the expiry of the due commissioning date then the Licensor shall accept the services without levy of LD charges.

Annexure 1 appended to the said license agreement provided for definition of terms and expressions.

The term "commissioning of service" has been defined in Clause 9 of the annexure which reads as under:

"Commissioning of Service means complete installation of all necessary equipments and offer of service to the subscribers so as to meet the stipulated performance roll out obligations."

On or about 10.2.2009, an amendment was carried out in the said license agreement. The relevant portion thereof so far as the petitioner is concerned whose name appears at serial No.13 of the said circular letter reads as under:

“(iii) In non-metro service areas, the licensee shall ensure that in first phase of roll out obligation at least 10% of DHQs where startup spectrum has been allocated are covered within one year of such spectrum. The date of allocation of frequency shall be considered for computing a final date of roll-out obligation.

(iv) Further, in second phase of roll out obligation, the licensee shall ensure that at least 50% of DHQs, where start up spectrum has been allocated are covered within three years of date of allocation of such spectrum in non-metro service areas.

(v) While computing the period of one year under sub- paras (ii) to (iv) above the average delay in SACFA clearance shall be excluded.

(x) For calculation of number of DHQs to be covered, the fraction which comes to 0.5 or above shall be rounded off to the next whole number and if the fraction is less than 0.5 it shall be ignored.

(xi) Date of registration by TEC/TERM is to be treated as date of meeting the roll-out obligation in case of coverage criterion is met for roll-out obligation on testing.

(xii) PBG shall be encashed to the extent of the Liquidated Damages.”

Whereas by reason of the provisions of the original license agreement the roll out obligations were to be carried out in the first phase within a period of one year, as indicated heretobefore, a licensee is entitled to extension thereof for the period taken for obtaining SACFA clearance. It, furthermore, is evident that in the

event 10% of the DHQ referred to in the roll out obligation clause falls short of 0.5% it will be ignored whereas 0.5 and above thereof would be rounded off.

By reason of a letter dated 14.1.2011, the respondent No.1 purported to be on the allegation that the petitioner has failed to comply with its roll out obligations imposed a penalty of Rs.30 lakhs. We may notice the relevant portion thereof.

Name of License Service Area	Date of allocation of startup spectrum	Average SACFA Delay in number of days	Due date for fulfilling the first year roll-out obligations	Date of registration with TEC/TERM Cell of DoT by Licensee (for last DHQ/Town)	Delay in number of weeks	Amount of LD in Rs...Crores
West Bengal	09-Jan-09	18	26-01-10	04/03/2010	6	0.3

The petitioner filed a representation thereagainst.

This petition was filed on 27.1.2011.

During pendency of this petition the impugned demand was amended in the following terms:

Service Area	Date of allocation of startup spectrum	Average SACFA Delay in number	Due date for fulfilling the first	Date of registration with TEC/Term	Delay in number of	Amount of LD in Rs...Crores
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	spectrum	of days	year roll-out obligations	Cell of DoT by Licensee (for last DHQ/Town)	weeks	
West Bengal	09-Jan-09	18	26-01-10	19.2.2010	4	0.20

The petitioner was permitted to amend its petition accordingly.

The short question which arises for consideration is, did the petitioner default in carrying out its roll out obligations?

According to the petitioner which has not been denied or disputed, it carried out its roll out obligations in the town of Ranaghat (District Nadia) and in the town of Memari (District Burdwan) by 1.12.2009. On that date, it applied for the approval/coverage of other networks, requesting the authorities of the respondent to let it know the requirements therefor.

Some discrepancies having been pointed out by the respondent by its letter dated 11.12.2009, the petitioner complied therewith. On or about 23.12.2009 a demand note was served upon the petitioner covering the amount of test fee. A registration certificate was issued in favour of the petitioner for Ranaghat and Memari towns on or about 4.1.2010.

There is a controversy as to whether the parties proceeded on the basis that the West Bengal circle comprised of 23 or 24 districts.

On the said basis, the roll out obligation was required to be carried out only in respect of two districts.

According to the petitioner and as is admitted now that one new district had been created in the Andaman and Nicobar Islands being Mayabender in the year 2006. The petitioner, however, was not asked to complete its roll out obligations in respect of three districts by any communication issued by the respondent.

The petitioner contends that it had by a letter dated 11.1.2010 sought for reduction in the quarter performance bank guarantee to which also no response was received.

The petitioner furthermore wanted to carry out its obligations to the extent of 50% of its roll out obligations inter alia for the circle of West Bengal by providing its services to many other districts. It brought to the notice of the DoT by a letter dated 11.1.2010 that the TERM cell of the West Bengal circle refused to accept the applications submitted for 50% of the TERM registration, stating:-

“You may note that post our extensive coverage in all the above-mentioned service areas, we have now sought local TERM cells registration for 50% completion for these service areas. In this regard, some TERM cells have indicated they cannot accept applications for 50% registration, till the time 10% registration has been certified. You may note that neither our license agreement nor testing guidelines restrict us from submission of application for 50% registration in the absence of TERM certification for 10% rollout. We accordingly request that TERM Cells may kindly be clarified on the same.

In conclusion, we confirm that we are in complete readiness for completion of 50% TERM registration & have even approached the respective TERM cells on the issue. We request that necessary guidance/ instructions may be issued to TERM cells at Tamil Nadu (incl. Chennai), Assam, West Bengal, Kolkata Metro, North East, and Orissa & Jammu & Kashmir, so that our applications for 50% registration are accepted & proceeded as per laid down procedure, without any further delay.”

By a letter dated 11.1.2010 a performa application was supplied relating to carrying out of roll out obligation by the licensee, which is in the following terms:-

“You are requested please provide information relating to launch of your service in the enclosed proforma by return fax on Fax No.23372404 as well as email on mohanshashi@gmail.com

Sl.No.	Name of Service Area	Date of issue of license	No. of District	Date of issue of access service spectrum	Date of commencement of service in District/Town	Remarks

The petitioner by a letter dated 28.1.2010, (wrongly stated to be dated 11.1.2010) stated as under: -

" In this regard you would kindly note our letters dated November 27, 2009 & January 11, 2010, wherein we have highlighted comprehensive completion of our network roll-out obligations (50%) of DHQs, the sole exception being North East (where the roll-out is more than 10% in any case) due to extraordinary security conditions. Further we have also highlighted to you our complete readiness for 50% TERM registration & the problems being faced on submission of the same at TERM cells.

We once again request you to issue necessary guidance/ instructions to respective TERM cells so that our applications for 50% registration are accepted & processed as per laid down procedures, without any further delay."

The said letter contained an enclosure, by reason whereof the requisite informations had been furnished: -

Sl. No	Name of Service Area	Date of issue of licens	No. of Distric ts	No. of districts require for 50% coverag	No. of districts /towns covered by	Date of issue of GSM service spectrum	Date of commencement of Service in District/ town	Remarks

		e		e	IDEA			
7	West Bengal	28/02 /2008	23	12	16	9/1/2009	12/10/2009	TERM registration obtained for 2 DHQ, Self certification done for 6 DHQ

According to the petitioner the self certification was required to be made before applying for the departmental certification. It is furthermore contended that launching of service is permissible at any time wherefor only the said certification was necessary.

The petitioner applied for requisite registration falling within phase II on or about 15.1.2010 for six district headquarters followed by a request for registration of two more DHQs on 22.1.2010 and again for two more on 28.1.2010 totaling 10 DHQs.

A demand was issued by the respondent no.1 on or about 8.2.2010 and the petitioner deposited the requisite amount on 19.2.2010.

By reason of a letter dated 16.3.2010, the respondent no.1, stated :-

“Vide our above referred letter, M/s Spice was asked to forward the explicit compliance of roll out obligations in respect of all your service areas including Delhi, MH, AP & Haryana and excluding Punjab & Karnataka as per the format given in the above referred letter positively by 10th March 2010 through return fax/ email.

2. Till date this office has not received any response from your company. Non-furnishing of timely information is a serious concern.

3. You are requested to send the requisite information immediately without any further delay by return fax/ email, failing which it may be considered that you have not completed your roll out obligation.”

Yet again the petitioner by a letter dated 18.3.2010 stated as under:-

“For the 7 Idea Cellular UAS licenses dated 28.02.2008, for the Service Areas of Orissa, Tamil Nadu (incl Chennai), Assam, North East, J&K, Kolkatta and West Bengal, the license requires us to cover only 10% DHQ/towns as on date. However, we have completed over 50% DHQ/towns in all these 7 service areas. The DoT was informed of this vide our letters of 27.11.2009 and 11.01.2010. Infact, we have even applied and obtained TERM Cell registration for 50% coverage in most of our service areas, except few, which also has been held up only because the TERM Cell is not accepting our application, for which we have sought DoT intervention on several occasions.”

In the meantime, however, the respondent issued another letter on or about 8.3.2010 whereby and whereunder certain details as regards the matters prescribed therein were sought for.

On or about 25.3.2010, the petitioner inter alia furnished the following informations: -

S . N o .	Service area	License No. & Date	Effective date of License	Date of allocation startup spectrum	No of districts	Date of successful LIM/ LIS testing by LEAs	Date of successful LIM/ LIS testing up by TERM Cells DoT	Date of approval by DoT for commercial launch	Date of launch of commercial service	Number of service test certificate issued by TERM cell	HLR as on 28/02/2010	VLR as on 28/02/2010	Future roll-out plan
7	West Bengal	20-201/2008-IDEA-AS-I dated 28/02/2008	25/01/2008	9/1/2009	23	15/01/2010	15/01/2010	Not applicable, pl refer clauses 8.1 of license agreement	12/10/2009	TERM registration / certification completed for 12 DHQs	908800	302262	5 district and 1200 more sites by March-11

We may, however, notice that the respondent in its reply inter alia stated that the State of Sikkim had 4 districts, State of West Bengal have 18 excluding Kolkata and there were 3 districts of Union Territory of Andaman and Nicobar, which came to 25 districts and as such the petitioner was required to carry out its roll out obligations in relation to the three districts and not two.

It is also pertinent to mention that in its sur-rejoinder, the respondent contended as under: -

“However, it is pertinent to state that in the present case the Demand Letter was issued by the respective TERM Cell on 08.02.2010 and the Petitioner deposited the requisite amount against the same only on 19.02.2010 i.e. after 10 days of raising of demand.”

Mr. Maninder Singh, learned senior counsel appearing on behalf of the petitioner would contend :-

- (i) From the records produced by the respondent itself, it would be evident that the `TERM cell' of West Bengal also was not aware that the circle comprises of 25 districts, and in that view of the matter it must be held that the parties proceeded on a common mistake, and, thus, equity demands that no liquidated damages should be imposed.
- (ii) In a case of this nature the principles of equitable estoppel shall apply, as the respondent was required to apply its mind so as to find out as to whether a bonafide error has crept in while making calculations.

- (iii) The rule of estoppel shall also apply in the instant case.
- (iv) The petitioner, in any event, having been asked to deposit the amount only on 8.2.2010 should have been given some reasonable time to deposit the same.
- (v) The period of 15 days being treated to be an extendable period and, in any event, the respondent itself having made a delay of 13 days, it would not have taken benefit of its own wrong.

Ms.Manisha Dhir, learned counsel appearing on behalf of the respondent, on the other hand, submitted :

- (a) The petitioner was bound to carry out its roll out obligations in respect of 3 DHQs and the same having not been done, the impugned order levying liquated charges cannot be faulted.
- (b) It is wrong to contend that respondent had not accepted the application for registration for the second phase, although the same has been offered within a period of one year.

(c) Mayabander having been notified to be a separate district in the year 2006, it is idle to contend that the West Bengal Circle had only 23 or 24 districts and the petitioner could have and should have found out the number of actual districts and it ought not to have relied upon the official website alone which was issued by the Census Department in the year 2001.

(d) In a case of this nature the rule of equitable estoppels would have no application.

(e) The provisions of the license agreement must be given its full effect in terms whereof, the petitioner was obligated to comply with its roll out obligations in respect of 10% of the DHQs which having regard to the notification issued in the year 2006 in terms whereof Andaman and Nicobar islands must be held to have 3 districts and not 2 districts.

(f) The website relied upon by the petitioner being confined to 2001 census and the revised website was to be launched in the year 2011 i.e. after

a period of 10 years, no reliance can be placed thereupon.

(g) The period from 25th January to 8th February 2010 having only 10 working days, the respondent must be held to have complied with the requirements of the license agreement.

(h) In any event the petitioner, having deposited the requisite amount for certification on 19.2.2010, must be held to have failed to comply with the Regulations.

(i) The respondent keeping in view the gazette notification issued in the year 2006 never accepted any mistake on its part and in that view of the matter the doctrine 'of common mistake' and/or 'equitable estoppel' would not apply and, more so, in view of the fact that even it had not acceded to the request of the petitioner to reduce the amount of bank guarantee.

(j) The petitioner cannot be permitted to take benefit of its self-serving letters.

(k) Note III appended to Annexure 6 to the petition would clearly go to show that the local areas were to be taken into consideration in accordance with the respective gazette notification for such local areas wherever issued and in that view of the matter 2006 notification must be given its full effect.

(l) The petitioner cannot be permitted to take advantage of a note sheet issued by one of the officers without examining him on the question as to on what basis he had such a misconception.

Section 20 of the Contract Act reads as under:

“ Agreement void where both parties are under mistake as to matter of fact.

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.- An erroneous opinion as to the value of the things which forms the subject- matter of the agreement is not to be deemed a mistake as to a matter of fact.”

The said provision in a case of this nature, however, is not attracted.

The doctrine of 'Common Mistake' will apply where both the parties called on a 'Common belief' which is found to be a mistaken one at a later stage. Only in a case where existence of a 'common mistake' is established, the doctrine of 'equitable estoppel' shall apply.

Reliance has, however, been placed on a judgment of the Kerala High Court in A.P. Kuchudevassy vs. State of Kerala reported in AIR 1982 Kerala 90 wherein it has been held as under: -

“From the facts it would appear that Shri Panicker is right in contending that both parties were mistaken as regards the distance. Neither the plaintiff nor the concerned government authority had apparently realised the mistake until it was pointed out and corrected in 1971. It was therefore a case of common mistake. The mistake was as regards the distance and not as regards the existence of the subject matter of the contract. It was not a case of a mistake arising from *res extincta* or *res sua*, which, because of the sheer impossibility, as from the very beginning of performance, makes the contract at law a nullity. Any other case of common mistake, unless warranted by a principle of equity, does not vitiate the contract.”

It was furthermore observed

“.... Courts are not without power to grant relief where, as a result of common mistake, substantial injustice has been done, particularly when the interests of third parties are adversely affected. In any such case the Court may on such terms as it thinks

just intervene to set aside the contract and render justice. Another case where the court may intervene to set right a common mistake is where it may rectify a written contract or deed which has not accurately recorded the agreement between the parties. In all other cases equity follows the law and the parties must accept the position which they brought about by their agreement, albeit by a common mistake."

In *Bullington Rural District Council vs. Oxford Corporation* reported in 1936 Vol.3 All ER. 875, the Queen's Bench Division opined in case where there is a common mistake in the matter of payment of income tax, stating the law thus:

"If the parties were wrong in their view as to income tax being chargeable, this was a mistake of law. They agreed as to a total sum payable, and the defendants paid a sum which was agreed to be due on the financial adjustment between the parties. I do not see that the plaintiffs can re-open the matter, even if it be the fact, as to which I express no opinion, that both were mistaken in their view of the law. There was no fraud or concealment. The settlement was on the usual basis at that time between accountants of experience, and it was expressed to be in full satisfaction and discharge of all claims upon the corporation in connection with or arising out of the alteration of the boundaries of the city under the Oxford Extension Act, 1928."

Reliance has been placed by learned counsel on *A Roberts & Co. Ltd. & Anr. vs. Leicestershire County Council*, 1961 2 All Law Reporter

545 wherein a Chancery Division held as under:

“The principles is stated in SNELL’S PRINCIPLES OF EQUITY (25th Edn.), P 569 as follows :-

“By what appears to be a species of equitable estoppels, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common”

The exact basis of the principle appears to be in some doubt. If the principle is correctly rested on estoppel it seems to me that it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendant in such circumstances. If, on the other hand, the principle is rested on fraud, obviously dishonesty must be established. It is well established that a party claiming rectification must prove his facts beyond reasonable doubt, and I think that this high standard of proof must equally apply where the claim is based on the principle indicated above.”

In Indo Rama Synthetics (India) Ltd. Vs UOI & Ors 96 (2002)

DLT 340 the Apex Court held:

“11. It is further well settled that in a case of this nature, the appropriate statutory authority must apply its mind for the purpose of finding out as to whether the contentions raised by the petitioner that a bona

fide error has crept in while making calculation, is correct or not.

12. It is true that the petitioner herein is guilty of gross negligence, but the same, in our opinion, would not mean that the Statute should be construed in such a manner that even a bona fide mistake committed by the petitioner, may be allowed to go unnoticed. If, in relation to an administrative action, the statutory or Administrative Authority is entitled to correct a bona fide mistake, we do not see any reason as to why the State shall take recourse to unjust enrichment only because such a mistake had been committed by the petitioner herein. A mistake, it is trite, can be rectified even by a statutory or executive authority."

It was opined :-

"13. A fair, reasonable and equitable stand in a *lis* by the State is the basic pillar of good governance."

The said principle has been reiterated by the Apex Court in Delhi Development Authority & Anr. vs. Joint Action Committee, Allottee of SLS Flats and Others reported in (2008) 2 SCC 672.

In this case what is in issue is the performance under a contract. Liquidated Damages can be imposed in terms of Section 74 of the Indian Contract Act in case any violation /breach of the contract takes place. In this case the respondent themselves pointed out that, in its

sur-rejoinder (which is, however, now being contended to be a mistake) there has been a delay of only one day on the part of the petitioner.

The issues which arise for consideration are :-

- (i) Whether having regard to a common mistake of fact as regards the number of districts falling in the West Bengal circle, the respondent was justified in issuing the impugned demand notice?

- (ii) Whether assuming that the petitioner did not complete its roll out obligation, having regard to the fact that it had sought for registration of a large number of DHQs much before the expiry of one year from the date of commencement of service, namely, 15.1.2010, was it obligatory on the part of the respondent to respond thereto within 10 days therefrom.

- (iii) Whether the respondent having raised a demand only on 8.2.2010, the petitioner was entitled to deposit the requisite amount in respect of 10 more districts in regard where to it had started its telecom services.
- (iv) Whether the parties were entitled to a reasonable time to deposit the amount, keeping in view the statement made by respondent itself in its sur-rejoinder that had the petitioner deposited the amount by 18.3.2011, no liquidated damages could have been imposed.
- (v) Whether the respondent has acted legally in directing payment of the liquidated damages despite the petitioner depositing in terms of the demand on 19.3.2010.
- (vi) Whether, in any event, the petitioner was entitled to get the benefit of the 15' days period as provided for in the agreement.

We may, at the outset, place on record certain instructions issued to the `TERM cell' which read as under: -

"1. Service provider will submit form A along with complete test results and all the relevant technical documents, as per Test Schedule No.TERM/TSTP/SA 1 September, 2009 for Service Approval of Mobile Services. TERM Cell shall examine the documents along with test results and if all the documents and test results are in order, TERM Cells shall issue letter within 10 days from the receipt of Form-A to the service provider for making payment for the test fee. If all the documents are as per document verification schedule are not in order, the application may be returned to the service provider. The intimation letter shall clearly indicate the reasons for the same.

3 On receipt of Form B with the requisite test fee, TERM Cell shall register the case for testing and allot the unique registration number on the same date.

6 Date of Registration of the case by TERM Cell is to be treated as date of meeting roll-out obligation, in case test results are found in order in the testing carried out by the TERM Cell."

For all intent and purport, therefore, the `TERM cell' was asked to carry out the registration. Moreover, sofar as the obligation on the part of DoT to raise a bill within 10 days' is concerned the same ex-facie appears to be imperative in character. We find no justification to accede to the submissions of Ms.Dhir that 10 days specified in the

license agreement without any other qualifying words would mean 10 working days.

In any event it has now been accepted that during the period 26.1.2010 and 8.2.2010, there were more than 10 working days. In fact it is conceded that there were 13 working days.

Ms.Dhir in support of her contention that 10 days would mean 10 working days has relied upon a decision of the Supreme Court in the case of Jeewanlal Ltd and Ors. vs. Appellate Authority under the Payment of Gratuity Act and Ors. reported in (1984) 4 SCC 356, wherein while considering the provisions of proviso appended to sub-section 2 of Section 4 of the Payment of Gratuity Act, it held :-

“... Sub-Sections (2) and (3) of Section 4 of the Act are designed to achieve two separate and distinct objects and they operate at two different stages. While sub-Section (2) provides for the mode of calculation of the amount of gratuity, sub-Section (3) seeks to impose a ceiling on the amount of gratuity payable at 20 months' wages. It is meant to provide an incentive to employees to serve for the period of 30 years or more. By no rule of construction, sub-Section (2) of Section 4 of the Act which uses the words “fifteen days' wages” and not half a months wages, be called in aid for construction of the words “20 months' wages”, appearing in sub-Section (3) of Section 4 of the Act.”

Thus, the said decision having been rendered in the light of the object involving Payment of Gratuity Act, in our opinion, is not applicable to the facts of the present case.

There was some confusion as to whether the petitioner should be permitted to extend its operation beyond 3 districts within the first phase itself, i.e. in the area exceeding 10% of the total districts falling within the circles.

We, however, do not see as to why such a construction be put particularly in view of the fact that roll out obligation are meant to benefit the general public. In absence of any statutory bar and/or a contractual prohibition, a party to a contract cannot be prohibited from doing something which is meant to be in the second phase and not in the first phase as there is absolutely no reason as to why the party to a contract would not be permitted to do so.

The license agreement provides that deposit of the amount demanded shall be treated to be the date when the registration would be deemed to have been granted. The petitioner in respect of the towns of Ranaghat and Memari had deposited the requisite amount

within the stipulated period i.e. on or about 4.1.2010. It also applied for reduction in performance guarantee.

It made a complaint that 'TERM cell' had not been accepting its application for registration in respect of ten different areas at different points of time. There was no response with regard thereto.

It is true that on a strict interpretation it was obligatory on the part of the petitioner to deposit the amount within a reasonable period after the demand was raised. The demand however, was made 14 days after the due date. The petitioner in the meantime had already filed an application for registration of six more districts on 15th January i.e. much before 26th January, 2010.

The petitioner furthermore in terms of the license agreement was entitled to provide for the services. It was to be exempted from payment of the liquidated damages if services are effected within a period of 15 days of the date by which it was to comply with its roll out obligation in the first phase. The provision for liquidated damages, therefore, was not to be set in motion as a 'sunset' clause. What was necessary was its substantial compliance.

The petitioner could have been expected to make the deposit of the registration fee within a reasonable period from the date of the raising of the demand. It was also not expected to deposit the amount before a demand note was issued. The demand note was raised after a period of ten days. In a situation of this nature, the petitioner could have deposited the amount within a reasonable time, keeping in view the fact that it was entitled to extension for a period of 15 days.

As the DoT has delayed in raising demand for 13 days the due date for fulfilling the first year roll out obligation gets extended by 13 days from 26.1.2010 i.e. upto 8.2.2010. The petitioner has fulfilled its obligation by 19.2.2010 which is within 15 days of exempted period of delay. Therefore, we are of the opinion that the petitioner has not violated any provisions of its roll out obligation.

Ms Dhir, however, has cited a few decision of the Supreme Court of India to contend that any publication in Gazette would subserve the purpose of publication of a subordinate legislation including a notification.

M/s Pankaj Jain Agencies vs. Union of India and Ors. reported in (1994) 5 SCC 198 was noticed in Union of India and Ors. vs. Ganesh

Das Bhojraj reported in (2000) 9 SCC 461 in the following terms: -

“...In our view, as noted above, in Pankaj Jain Agencies case, the Court directly dealt with a similar contention and after relying upon the decision in the case of Mayer Hans George (Supra) rejected the same. That decision is followed in I.T.C. Ltd. (Supra) and other matters. Hence, it is difficult to agree that the decision in Pankaj Jain Agencies case was not helpful in deciding the question dealt with by the Court. Section 25 of the Customs Act empowers the Central Government to exempt either absolutely or subject to such conditions, from the whole or any part of the duty of customs leviable thereon by a notification in Official Gazette. The said notification can be modified or cancelled. The method and mode provided for grant of exemption or withdrawal of exemption is issuance of notification in the Official Gazette. For bringing the notification into operation, the only requirement of the section is its publication in the Official Gazette and no further publication is contemplated. Additional requirement is that under Section 159 such notification is required to be laid before each House of Parliament for a period of thirty days as prescribed therein. Hence, in our view Mayer Hans George (supra) which is followed in the Pankaj Jain Agencies case represents the correct exposition of law and the Notification under Section 25 of the Customs Act would come into operation as soon as it is published in the Gazette of India i.e. the date of publication of the Gazette. Apart from prescribed requirement under Section 25, usual mode of bringing into operation such notification followed since years in this country is its publication in the Official Gazette

and there is no reason to depart from the same by laying down additional requirement.”

In the case of State of A.P. and Ors. vs. Twin City Jewellers Assn. and Ors. (2005) 13 SCC 552 it has held as under: -

“It could not be denied that GO No.303 dated 15.7.1997 was published in the Official Gazette on 23.4.1997. It is settled law that once publication in the Official Gazette takes place, it is deemed to be known to all. Ignorance of law can be no excuse. Once the GO was published, from the date it was published, it became effective. As it became effective from that date, the tax was leviable at the rate of 4%. If some assessing officers, due to their own ignorance or laxity accepted returns at the rate of 2% it did not permit the High Court to ignore the law and continue such laxity to prevail. It must be remembered that the assessing officer, who had assessed wrongly, could always reopen the assessment.”

The notification in question, Mr.Chawla would contend, was in the nature of an administrative order and does not pertain to a law within the meaning of Article 13 of the Constitution of India. But there cannot be any doubt or dispute that any information which is otherwise available in public domain would subserve the requirements of law.

In this case we have proceeded on the basis that the roll out obligations of the petitioner would be three District Head Quarters in view of the fact that Mayabender became district of the Andaman and Nicobar Island in 2006.

Further contention of Ms.Dhir is that the petitioner's conduct is not above board inasmuch as it had proceeded on the basis that West Bengal Circle comprised of 23 districts.

We do not think that keeping in view the facts and circumstances of the case conduct of the petitioner assumes significance as it is not otherwise liable to pay any liquidated damages.

Non reduction of the performance bank guarantee also loses its significance in view of the statement made by Mr. Navin Chawla at the bar, that no order on the petitioner's application for reduction of the performance bank guarantee has yet been passed.

It is not necessary for us to dilate more on the subject matter of dispute between the parties herein having regard to the short question involved, namely, that the respondent itself has caused delay in granting sanction to the petitioner sofar as completion of legal formalities in respect of its roll out obligation is concerned.

Admittedly the respondent has itself not complied with its contractual obligations of the license, namely, to submit a demand note within 10 days from the date of filing of the application, and thus, it cannot take advantage of its own wrong.

The period of limitation thus must be held to have been extended by at least 13 days, having regard to the fact that the petitioner has filed an application for providing services in respect of six DHQs on 15.1.2010 followed by two more on 22.1.2010 and two on 28.1.2010.

In *Roberts & Co. Ltd. and Anr. vs. Leicestershire Country Council* 1961 (2) All.E.R. 545, it was held to be well settled that no person can take advantage of its own wrong.

It is trite that invoking the provisions of liquidated damages ipso facto will not amount to imposition of penalty in the event it is held that pre estimated damages was a reasonable amount. If however, the amount appears to be an unreasonable one to a Court of law, the same would be held to be penal in nature.

The reasonableness of a demand in respect of liquidated damages as envisaged under Section 74 of the Indian Contract Act would in the opinion of this Tribunal not only be concerning the

amount but also the mode and manner in which such demand is made in a case of this nature. The demand of the respondent having regard to the wrong committed by itself in not fulfilling its mandatory contractual obligation cannot be said to be reasonable. It is even otherwise violative of a level playing field.

For the reasons aforementioned, the impugned demand cannot be sustained. It is set aside accordingly. This petition is allowed with costs.

Advocate's fee assessed @ Rs.25,000.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

September 22, 2011
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