

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI
Dated 25th April, 2012

Petition No. 5 of 2012

Sistema Shyam Teleservices Ltd. (Orissa)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 6 of 2012

Sistema Shyam Teleservices Ltd. (Himachal Pradesh)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 7 of 2012

Sistema Shyam Teleservices Ltd. (U.P. West)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 8 of 2012

Sistema Shyam Teleservices Ltd. (Gujarat)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 9 of 2012

Sistema Shyam Teleservices Ltd. (Madhya Pradesh)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 10 of 2012

Sistema Shyam Teleservices Ltd. (Punjab)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 11 of 2012

Sistema Shyam Teleservices Ltd. (U.P. East)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 12 of 2012

Sistema Shyam Teleservices Ltd. (J & K)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 13 of 2012

Sistema Shyam Teleservices Ltd. (North East)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 18 of 2012

Loop Telecom Ltd. (Assam)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 19 of 2012

Loop Telecom Ltd. (Kerala)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 20 of 2012

Loop Telecom Ltd. (Andhra Pradesh)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 21 of 2012

Loop Telecom Ltd. (U.P. East)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 22 of 2012

Loop Telecom Ltd. (Himachal Pradesh)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 33 of 2012

Loop Telecom Ltd. (Tamil Nadu)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 34 of 2012

Loop Telecom Ltd. (West Bengal)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 35 of 2012

Loop Telecom Ltd. (Gujarat)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 36 of 2012

Loop Telecom Ltd. (Bihar)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 37 of 2012

Loop Telecom Ltd. (Karnataka)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 38 of 2012

Loop Telecom Ltd. (Maharashtra)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 39 of 2012

Loop Telecom Ltd. (J & K)Petitioner
Vs.
Union of IndiaRespondent

Petition No. 40 of 2012

Loop Telecom Ltd. (North East)Petitioner
Vs.
Union of IndiaRespondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. P.K. RASTOGI, MEMBER

For Petitioner : Mr. Ramji Srinivasan, Senior Advocate
Mr. Mansor Ali Shoket, Advocate
Ms. Vibha Dhawan, Advocate

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

ORDER

These petitions involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgement.

2. The fact of the matter however is being noticed from Sistema Shyam Teleservices Ltd., Orissa i.e. Petition No. 5 of 2012.

3. Petitioner was granted a license in terms of the proviso appended to Section 4 of the Indian Telegraph Act 1885 (1885 Act) on and about 5th March, 2008.

4. Petitioner in terms of the said license agreement was to comply with its roll out obligations as provided for under Clause 34 thereof, failing which inter alia it was to pay liquidated damages as specified in clause 35 thereof.

5. On the ground of non fulfilment of the said provisions, the Respondent in its capacity as the licensor imposed liquidated damages on the Petitioner.

6. In some matters the Petitioners deposited the entire amount of liquidated damages, but in some they approached this Tribunal.

7. Interim Orders were passed on diverse dates in the cases of the Petitioner as also the connected matters whereby the licencees were directed to deposit 60% of the demanded amount towards liquidated damages and furnish security in respect of the rest 40% thereof.

8. The said Petitions being Petition No. 1 of 2011 and other connected matters were disposed of by an order dated 13.1.2012, wherein this tribunal opined that keeping in view that serious questions of fact and law were raised by the parties, it was obligatory on the part of the Respondent herein to comply with the principles of natural justice.

9. The said principle however was to be applied in a limited sense, that is, had an opportunity of hearing been granted to the Petitioners therein, they could have shown that the delay on various counts were not attributable to them, but infact were attributable to the Respondent.

It was held:

“Had an opportunity been granted as contended by Ms. Dhir herself, that for determination of the issue it is necessary to enter into factual aspect of each and every case. If that be so, the respective licensees could have shown that no delay was attributed on its part. The delay if any, at least to some extent is attributable on the part of the licensor itself, which must be taken into consideration for computing the amount of liquidated damages.

In given cases, it can also be shown that roll out obligation has been met much before the expiry of 52 weeks and, thus, licence cannot be cancelled. We therefore, are of the opinion that the Respondent should give opportunity of hearing to the Petitioner for presenting its case and determine the same in the light of the decisions arrived heretobefore.”

10. Before however, the said judgment was pronounced, the Respondent herein issued the impugned order on 27.12.2011 whereby and whereunder the Petitioners were directed to pay additional amount of liquated damages of Rs. 7 crores

We may notice one of such orders:

“Now therefore, M/s Sistema Shyam Teleservice Ltd., is directed to pay the additional liquidated damages amounting to Rs. 5.15 Crores (in words Rupees Five Crores Fifteen Lakh) as per condition 35.2 of the UASL agreement immediately and in

any case within 15 days of the date of this notice failing which further action may be initiated under the conditions of the UAS license agreement. The amount may be deposited by means of demand draft/banker's cheque drawn on any scheduled bank in favour of PAO, Department telecom headquarters, New Delhi 110001, in the pay and Accounts Office of the Department of Telecommunication at New Delhi.

This notice is issued without prejudice to any other remedy available to the Licensor and also to any other actions for the breach of any of the conditions of the said UAS License Agreement signed with the Company.”

11. The said order was issued principally on the TRAI's recommendations dated 14.7.2011.

12. In each of the said order, tables have been given to show the relevant dates for the purpose of arriving at the conclusion as to how the maximum amount of liquidated damages became payable.

13. Respondent has not filed any reply to the Petition.

14. Only on 24.4.2012, an affidavit has been filed affirmed by Ms. Ireen Cherian, stating

“That the present affidavit is filed in terms of order dated 17.4.2012 passed by this Hon'ble Tribunal. This Hon'ble Tribunal on 17.4.2012, while listing the matter alongwith connected petitions for hearing on 24.4.2012, granted liberty to the Respondent to file its reply, if any, by 24.4.2012.

It is most respectfully submitted that the Respondent has the highest regard for this Hon'ble Tribunal and would comply with all the orders/directions in letter and spirit. It is stated that the issue regarding the demand notices levying additional liquidated damages is pending consideration of the Respondent in view of various circumstances pursuant to issuance of impugned demand notices and legal opinion sought thereto.

That there is no intention of the Respondent to delay the proceedings. It is stated that since the legal opinion is being examined, a detailed reply will be filed based on the legal opinion/decision of the government thereupon. Therefore, it is most respectfully prayed that a time of four weeks be granted to the Respondent for the above stated reasons. “

(Underlining in ours)

15. Some of the Petitions were filed as far back as on 6.1.2012. They came up before this Tribunal on 9.1.2012 under the heading 'Preliminary Hearing'.
16. Mr. Kohli accepted notices on behalf of the Respondent.
17. Two weeks' time was granted to the Respondent to file its reply.
18. The said order, was not complied with.
19. The matter came up before this Tribunal under the heading "For Orders' on 25.1.2012 and by an order of the said date, the operation of the impugned orders of demand was directed to be stayed.

20. On 8.1.2012 this Tribunal again granted four weeks' time to file reply as prayed for by the Respondent.

21. The matter was directed to come up for framing of issues on 29.3.2012.

22. But by the said date also no reply was filed.

23. It may not be out of place to mention that the Petitioner filed an application for a direction upon the Respondent to produce the relevant records on the date of hearing.

24. Keeping in view the stand taken by the parties it was directed that no issue need formally be framed and furthermore keeping in view the fact that liberty was granted to the Petitioner to place on record the stand taken by the DOT in M.A. No. 17 and 18 of 2012 in Petition No. 314 of 2011, it was observed that all endeavours would be made to dispose of these Petitions.

25. The matters came up for hearing before this Tribunal on 17.4.2012. The parties were heard at some length, although no reply was filed.

26. It was directed that the matter be posted for hearing on 24.4.2012 at the top of the list subject to any overnight part heard. Even by reason of an Order of the said date, an opportunity was granted to the Respondent to file its reply.

27. From what has been noticed heretobefore, it is evident that the Respondent has neither made its stand clear as regards the validity or otherwise of the impugned orders vis a vis the grounds taken in the Petition nor did it file its replies to the Petition, despite sufficient opportunities having been granted.

28. Moreover, we may place on record that keeping in view the orders passed by this tribunal in Petition 314 of 2011, whereby and whereunder the Petitioners were directed to securitize the performance bank guarantees to the extent of Rs. 3.45 crores in respect of the circle of U.P.(East) , Rs. 5.5 Crores in respect of circles of U.P.(West), Rs. 6.05 Crores in respect of the circle of Punjab, Rs. 5.85 Crores in respect of circle of H.P. and Rs. 2.25 Crores in respect of the circle of Gujarat totaling an amount of Rs. 22.65 Crores.

29. Mr. Srivinasan leaned senior counsel appearing on behalf of the Petitioners would contend that the Petitioners would be seriously prejudiced if the matter is adjourned again.

30. We find some force in the aforementioned contention of Mr. Srinivasan, particularly in view of the fact that the impugned order has admittedly been passed without giving an opportunity of hearing to the Petitioner.

31. Following our judgement dt. 13.1.2012 passed in Petition No. 1 of 2011 and other connected matters, we are of the opinion that even in a case of this nature, the least the Respondent could do was to grant an opportunity of hearing to the Petitioners.

32. If the principles of natural justice were required to be complied with for the purpose of imposing liquidated damages in terms of Clause 34 of the conditions of license, we fail to see any reason as to why the said principle should not be applied where additional demands are made purported to be relying on or on the basis of the recommendations of the TRAI.

33. We, therefore, are of the opinion that on the said ground alone the impugned orders cannot be sustained. They are set aside accordingly.

34. In the event, the Respondents intend to impose any additional liquidated damages as has been sought to be done by reason of the impugned orders, there cannot be any doubt or dispute that a notice to show cause shall be issued to the Petitioners and, thus, would be entitled to show their causes thereto.

35. These Petitions are allowed with the aforementioned observations and directions without any order as to costs.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

K.D.