

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 21st August, 2012

(M.A. Nos. 402 & 432 & 455 of 2012)

in

Petition No. 494 of 2012

Loop Telecom Ltd.(Orissa) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(M.A. Nos.390 & 433 of 2012)

in

Petition No. 495 of 2012

Loop Telecom Ltd.(H.P.) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(M.A. Nos. 403 & 434 of 2012)

in

Petition No. 496 of 2012

Loop Telecom Ltd.(U.P. West)

...Petitioner

Vs.

Union of India & Anr.

...Respondents

(MA. Nos. 404 & 435 of 2012)

in

Petition No. 497 of 2012

Loop Telecom Ltd.(Bihar)

...Petitioner

Vs.

Union of India & Anr.

...Respondents

(MA. Nos. 405 & 436 of 2012)

in

Petition No. 498 of 2012

Loop Telecom Ltd.(J&K)

...Petitioner

Vs.

Union of India & Anr.

...Respondents

(MA. Nos. 391 & 437 of 2012)

in

Petition No. 499 of 2012

Loop Telecom Ltd.(Assam) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 406 & 438 of 2012)

in

Petition No. 500 of 2012

Loop Telecom Ltd.(Kerala) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 407 & 439 of 2012)

in

Petition No. 501 of 2012

Loop Telecom Ltd.(M.P.) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 408 & 440 of 2012)

in

Petition No. 502 of 2012

Loop Telecom Ltd.(North East) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 409 & 441 of 2012)

in

Petition No. 503 of 2012

Loop Telecom Ltd.(Karnataka) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 410 & 442 of 2012)

in

Petition No. 504 of 2012

Loop Telecom Ltd.(A.P.) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 441 & 443 of 2012)

in

Petition No. 505 of 2012

Loop Telecom Ltd.(U.P. East) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 412 & 444 of 2012)

in

Petition No. 506 of 2012

Loop Telecom Ltd.(Kolkata) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 392 & 445 of 2012)

in

Petition No. 507 of 2012

Loop Telecom Ltd.(Tamil Nadu) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 393& 446 of 2012)

in

Petition No. 508 of 2012

Loop Telecom Ltd.(Maharashtra) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 413,447 & 452 of 2012)

in

Petition No. 509 of 2012

Loop Telecom Ltd.(Delhi) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 414 & 448 of 2012)

in

Petition No. 510 of 2012

Loop Telecom Ltd.(Punjab) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 415 & 449 of 2012)

in

Petition No. 511 of 2012

Loop Telecom Ltd.(Haryana) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 416 & 450 of 2012)

in

Petition No. 512 of 2012

Loop Telecom Ltd.(Gujarat) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

(MA. Nos. 417 & 451 of 2012)

in

Petition No. 513 of 2012

Loop Telecom Ltd.(Rajasthan) ...Petitioner

Vs.

Union of India & Anr. ...Respondents

BEFORE:

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

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

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Sharath Sampath, Advocate
Mr. Manikya Khanna, Advocate

For Respondents : Ms. Maneesha Dhir, Advocate
Mr. K.P.S. Kohli, Advocate
Mr. Tarveen Singh Nanda, Advocate

ORDER

1. The Petitioners were granted licenses by the Respondent herein in terms of the provisions of Indian Telegraph Act, 1885.

They furnished performance bank guarantees at the rates prescribed by the Respondents in terms of clause 21.1 of the license agreements.

According to the Petitioners, except in respect of the circles of Delhi and Gujarat, on the premise that they have failed and/or neglected to complete their first year roll out obligations, penalties were imposed, which have been deposited with the DOT by the Petitioner without prejudice to their rights and contentions.

2. So far as the Delhi circle is concerned, according to the Petitioner, no spectrum having been allocated, it was obligatory on the part of the Respondent, herein to return the entire bank guarantees, having regard to the judgment and order passed by the Supreme Court of India in Centre for Public Interest Litigation Vs. Union of India since reported in 2012 Vol.3 SCC 1. But such a prayer has not been made.

3. As far as the Gujarat circle is concerned, it is stated that no penalty by way of liquidated damages was imposed and the demand for additional liquidated damages was quashed by this Tribunal vide judgment dated 25.4.2012 in Petition No. 35 of 2012. Additional demands for liquidated damages have been quashed by this Tribunal by an order dated 25.4.2012 in Petition No. 35 of 2012.

4. The Petitioner filed a consolidated petition which was marked as Petition No. 468 of 2011, wherein the following directions were issued on 10.1.2010:-

“.....to maintain the equity and as the PBG period will be over by 09.01.2012, we are of the opinion in the peculiar facts and circumstances of the case that the end justice will be subserved if the petitioner is directed to submit the PBG for one year for 50% of the amount in each circle as required under the terms of license and balance PBG for 50% of the amount can be

for the period of 3 months as we direct that the main matter itself must be disposed of within the aforementioned period.”

5. The said order is said to have been complied with. However, the Petitioner failed and/or neglected to comply with the direction of this Tribunal to the effect that separate petitions in respect of different circles were not filed within the time granted therefor. The said Petition No. 468 of 2012, in the aforementioned situation was directed to be confined only to the West Bengal circle.

6. By an order dated 25.6.2012 on the aforementioned premise, the interim order passed in favour of the Petitioner was directed to be confined to the West Bengal circle only.

7. These petitions have been filed on or about 30.7.2012.

Several Miscellaneous Applications were also filed on the said date praying inter-alia to hear out those petitions alongwith Petition No. 468 of 2012. However, as the said petition No. 468 of 2012 has already been heard, the said M.As have become infructuous.

8. So far as the interim prayers made by the Petitioners are concerned, keeping in view its aforementioned conduct of not filing separate applications within a period of one week, this Tribunal rejected the same.

9. The Petitioner filed M.A. No. 462 of 2012 by way of an additional affidavit praying for stay of the impugned demands, as in the meanwhile the Respondent invoked the bank guarantees.

10. Submissions of Mr. Chawla, learned counsel for the applicants are:-

(i) The Petitioner having admittedly deposited the amount of liquidated damages imposed on it by the Respondent, it was liable to reduce the amount of bank guarantees and in that view of the matter the entire amount of bank guarantees could not be invoked.

(ii) The amounts deposited by the Petitioner as demanded from it by the Respondent, the impugned action on its part to invoke the bank guarantee, is vitiated in law.

11. Submissions of Mr. Kohli, learned counsel appearing on behalf of the Respondent, on the other hand, are:-

- (i) This petition is barred under Order II Rule 2 of the Code of Civil Procedure, 1908.
- (ii) The Petitioner having filed Petition No. 329 of 2012 whereby and whereunder it raised a contention that having regard to the judgment and order of the Supreme Court of India dated 02.2.2012, that it was not liable to carry out any licensed activities, the Respondent was bound to see that the bank guarantees invoked by the Petitioner remain valid as is provided for under Clause 21.4 of the license agreement.
- (iii) No case has been made out for grant of interim reliefs prayed for by the Petitioners, keeping in view its conduct.

12. At the outset, it may be placed on record that the Petitioners have placed before us a table showing how and in what manner demands were raised by the Respondent for payment of liquidated damages and deposited by it.

We may notice the same.

S. No.	Petition No.	Date of Allocation of Start-up Spectrum (as per UOI)	Due Date for fulfilling first year rollout obligations (as per UOI)	Date of Registration with TERM Cell (as per UOI)	Period of Delay in fulfilling first year roll out (as per UOI)	Amount of LD imposed (in Rs. crores)	Date of Imposition of LD	Date on which LD Paid (without prejudice)
1.	494/2012 (Orissa)	24.04.2008	30.04.2009	21.05.2009	4 weeks	0.20	14.01.2011	27.01.2011
2.	495/2012 (H.P.)	04.12.2008	30.01.2010	26.02.2010	5 weeks	0.25	28.12.2010	11.01.2011
3.	496/2012 (U.P. West)	26.12.2008	30.12.2009	02.03.2010	10 weeks	0.50	14.01.2011	27.01.2011
4.	497/2012 (Bihar)	03.10.2008	13.10.2009	18.12.2009	10 weeks	0.50	28.12.2010	1.01.2011
5.	498/2012 (J & K)	24.12.2008	30.12.2009	15.03.2010	12 weeks	0.60	28.12.2010	11.01.2011
6.	499/2012 (Assam)	22.12.2008	18.01.2010	19.02.2010	5 weeks	0.25	28.12.2010	11.01.2011
7.	500/2012 (Kerala)	15.05.2008	14.05.2009	22.07.2009	11 weeks	0.55	28.12.2010	11.01.2011
8.	501/2012 (M.P.)	28.08.2008	03.09.2009	05.10.2009	6 weeks	0.30	23.12.2010	05.01.2011
9.	502/2012 (North East)	23.12.2008	05.01.2010	18.03.2010	11 weeks	0.55	23.12.2010	05.01.2011

10.	503/2012 (Karnataka)	30.05.2008	14.06.2009	11.08.2009	10 weeks	0.50	14.12.2010	28.12.2010
11.	504/2012 (A.P.)	27.05.2008	13.06.2009	31.07.2009	8 weeks	0.40	14.12.2010	28.12.2010
12.	505/2012 (U.P. East)	21.01.2009	27.02.2009	20.04.2010	9 weeks	0.45	28.12.2010	11.01.2011
13.	506/2012 (Kolkata)	05.12.2008	20.12.2009	03.06.2010	25 weeks	1.85	14.12.2010	28.12.2010
14.	507/2012 (Tamil Nadu)	22.04.2008	21.04.2009	28.05.2009	6 weeks	0.30	23.12.2010	05.01.2011
15.	508/2012 (Maharashtra)	14.11.2008	13.12.2009	01.01.2010	3 weeks	0.15	23.12.2010	05.01.2011
16.	509/2012 (Delhi)	NO SPECTRUM ALLOCATED						
17.	510/2012 (Punjab)	09.03.2009	10.03.2010	08.03.2010	Nil	Nil		
18.	511/2012 (Haryana)	04.12.2008	31.01.2010	04.03.2010	5 weeks	0.25	14.01.2011	27.01.2011
19.	512/2012 (Gujarat)			23.03.2010	Nil	Nil		
20.	513/2012 (Rajasthan)	23.12.2008	22.02.2010	19.03.2010	4 weeks	0.20	28.12.2010	11.01.2011

13. Mr. Maneesha Dhir, learned counsel appearing on behalf of the Respondent was requested to seek instructions as to whether the data contained in the aforementioned table are correct.

Mr. Kohli, learned counsel appearing on behalf of the Respondent although argued the matter on merit, would contend that the details supplied by the Petitioner in the aforementioned table are required to be re-verified.

14. It, however, appears that the demands for payment of the liquidated damages were made by the Respondent inter-alia by a letter dated 14.1.2011, being the subject matter of Petition No. 494 of 2012 whereby and whereunder it was opined:-

“Whereas the Company has failed to commission the services in atleast 105 of the District Headquarters (DHQs)/ Towns in Orissa Service areas, as it has not registered with the TEC/TERM cell for coverage testing of atleast 10% of the District Headquarters (DHQs)/ Towns within one year of date of allocation of the startup spectrum as per following details:-

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 TERM cell of DoT by Licensee	Delay in number of weeks	Amount of LD in Rs. crores
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Orissa	24 th April,	7	30 th April,	21 st May,	4	0.2
	2008		2009	2009		

Therefore, the Company has violated condition 8 and condition 34 of the UAS Licence Agreement as amended vide DoT letter No. 842-320/2005-VAS-II(Vol.III)/28 dated 10th Feb, 2009.”

15. The Petitioner although protested thereagainst but has deposited the amount under protest as would appear from its letter dated 27.1.2011.

16. It has also produced the challans to establish its contention that the demanded amount had been deposited.

17. Submission of Mr. Kohli, learned counsel that these petitions are barred under Order II Rule 2 of the CPC inter-alia on the premise that Petition No. 484 of 2012 having been confined to the West Bengal circle only, the Petitioners were liable to file separate petitions in respect of each circles, cannot be accepted.

It is true that the said petitions were undertaken to be filed within one week but only because the said undertakings have not been complied with, the

same would not mean that Petitioner in law would not be entitled to file separate petitions.

Order II Rule 2 of the CPC in the aforementioned situation cannot be held to be applicable in the instant case.

18. The Petitioner indisputably relying on or on the basis of the decision of the Supreme Court of India in Centre for Public Interest Litigation (Supra) raised a contention in Petition No. 392 of 2012 that it is not liable to carry out any licensed activities, the licenses having been found to be illegal and having been quashed.

The interpretation of the judgment of the Supreme Court of India is not involved in these petitions.

19. In these petitions, the Petitioners have proceeded on the basis that the Respondent cannot be held to be absolved from complying its obligations, as contained in clause 21.1 of the license agreement.

20. This Tribunal keeping in view the contentions of the parties raised in Petition No. 468 of 2012, had passed an interim order.

The said interim order was directed to be confined to the State of West Bengal only as the said petition was to be treated to be confined to the said State. The interim order dated 10.1.2012, however, covered all the circles.

The petitioner having regard to the fact that it did not comply with this Tribunal's order was not granted the interim relief.

However, the Respondent has now invoked the bank guarantees, on the premise that no interim order had been operating in favour of the Petitioners.

21. In the facts and circumstances of this case, could the Respondent invoke the bank guarantees is the question?

22. From the order dated 10.1.2012, it is evident that this Tribunal while directing the Petitioner to renew the bank guarantee to the extent of 50 % of the original bank guarantee also directed that the balance 50% thereof be securised for a period of three months.

It was expected that during the said period the Respondent would not raise any other or further demand, if it had any. It did not do so.

23. Submission of Mr. Kohli that the Respondent is entitled to raise a further demand is devoid of any merit. An order imposing penalty by a licensor on the

licensee cannot *stricto sensu* be provisional in nature. There cannot, however, be any doubt or dispute that arithmetical or clerical mistakes committed by the licensor would be subject to rectification. A gross or apparent error may also give rise to a right to the Respondent to revise additional demand, albeit in accordance with law and upon following the principles of natural justice.

24. We are not concerned in this case with the compliance of the Petitioners' second phase roll out obligations.

Once the penalty for not complying with the first phase of the roll out obligation has been imposed and the Petitioner deposited the same; albeit under protest, in our opinion, subject to the observations made hereinbefore, the Respondent cannot be held to be entitled to any other or further demands on the said account. Assuming for the sake of argument that it was entitled to do so, a licensee cannot be asked to wait *ad nauseum* therefor and continue to renew the performance bank guarantees year after year in violation of clause 21.1 of the license conditions.

25. The attitude on the part of the Respondent is difficult to comprehend. On the one hand, it contends that having regard to the judgment and order of the Supreme Court of India, the licensees are bound to comply with the licensed activities but at the same time, it raises a contention that it was not liable to comply with its own obligations arising thereunder.

26. On a demurer that the license conditions have to be complied with, the mutual obligations are to be complied with by both the parties.

27. In the event it is found that the Petitioner has not complied with its second phase of roll out obligations, the Respondent will be at liberty to fall back on the remaining 50 % of the bank guarantees which is valid till January 2013, which are valid till January, 2013.

28. These M.As are therefore allowed and the Respondents are restrained from taking any steps pursuant to or in furtherance of its letter dated 8.6.2012.

29. They are directed to refund the bank guaranteed amount to the concerned banks, encashed if any, as a result whereof the bank guarantees furnished in terms of the order of this Tribunal dated 10.1.2012, i.e., to the extent of 50% shall revive.



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

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

HKC/