TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 25TH JUNE, 2012

Petition No.357 of 2011

Vodafone Essar Mobile Services Ltd. … Petitioner

Vs.

Bharat Sanchar Nigam Ltd. … Respondent

BEFORE:

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

For Petitioner : Mr. Navin Chawla, Advocate
Ms. Nidhi Parashar, Advocate

For Respondent : Ms. Maneesha Dhir, Advocate
Mr.K.P.S. Kohli, Advocate
Ms. Debopama Roy, Advocate

O R D E R

This Tribunal by a judgment and order dated 06.03.2012 appointed Mr. J. Gopal, former Advisor, DoT and Mr. R.N. Prabhakar, former Member, DoT and former Member of the TRAI as Commissioners to give a report on the following questions :-

"1. Whether it is possible for the Respondent to carry out the shifting of equipment without augmenting its resources? It is to be kept in view that flow of traffic and quality of calls in accordance with existing norms is maintained?

2. What is the reasonable time required for completing the process of shifting the equipment?"

2. Pursuant to or in furtherance of the said order, the learned Commissioners have submitted their report on 30.4.2012, recommending as under :-

"Based on the written submissions of both the Petitioner and Respondent, discussions held in the meetings, analysis done in regard to submissions of both the parties related to issues stated by the Hon'ble TDSAT in its order and experience of the Commissioners in the Telecommunication field, the Commissioners have come to the conclusion that :

a) The shifting request of the Petitioner can be carried out without augmenting the resources at the Respondent end. It will not affect the flow of traffic as well as the quality of service. The quality of service as per the existing norms will be maintained.

b) The shifting will take 4 to 8 weeks depending upon the procedure followed as per above details."

3. In the report, the learned Commissioners not only considered the past precedents with regard to the request of the operators to shift their equipments without augmenting the resources of the Respondent but also considered in case from the technical aspects of the matter.

For the said purpose, not only oral presentations were made by the parties before the learned Commissioners but they have also placed their contentions in writing.

4. The Respondent, however, filed an objection to the said report on or about 18.05.2012. The principal objection of the Respondent appears to be that if total traffic being about 1319 Erlangs; in terms of the circular letter issued by the DoT if fifty percent spurt is taken into consideration, it would not be possible to shift 50-51 E-1s without augmenting their resources. Moreover, the learned Commissioners' opinion that there are spare E-1s both at Rajender Nagar Exchange as also Eastern Court TAX is not correct.

According to the Respondent, the report is silent on the technical standards governing the field.

5. The Petitioner in its reply while refuting the said allegations contend that the traffic was reduced from 1160 Erlangs and 1317 Erlangs as per the Respondent and the Petitioner respectively in September 2010 to 716 Erlangs

in February, 2012 and in that view of the matter, the learned Commissioners have rightly found that 11/25 E-1s were in excess, so far as Rajender Nagar TAX is concerned.

6. Ms. Maneesha Dhir, learned counsel appearing on behalf of the Respondent, however, would contend that the learned Commissioners have not dealt with the issue of the requirements of having fifty percent spurt and maintaining quality of service as would appear from the circular letter dated 26.7.1994 issued by the DoT. The learned counsel furthermore submitted that technical requirements must be in tune with flow of traffic as would appear from Annexure R-1 to the Reply.

Our attention in this behalf has also been drawn to the table at page 219. Ms. Dheer furthermore would contend that the Petitioner having paid the Port charges without any demur whatsoever in relation to its Ambala Exchange, it is stopped and precluded from raising any contention contrary thereto or inconsistent therewith.

7. Mr. Navin Chawla, on the other hand, submitted :-

(i) From the learned Commissioner's report it would be evident that the Respondent had deliberately and intentionally been

ignoring seven cases of shifting of BSNL's own exchanges as would appear from Annexure-C appended to the Reply to the objection to the learned Commissioner's report as also Annexure-G appended thereto, on a perusal whereof it would appear that the procedures followed therein undoubtedly had been considered in the present case also.

(ii) The question of applying the principle of 'estoppel' in this case does not arise as payments were made under protest, as would appear from the Petitioner's letter dated 11.11.2011.

(iii) Shifting from one type of equipment to another is required for the purpose of providing better quality of service to the customers, which is an ongoing process.

8. The Respondent does not deny or dispute that in the past all the operators shifted from one equipment to the other.

The parties have entered into inter connection agreements, in terms whereof they are required to maintain a level playing field. The new technologies having been evolving and keeping in view the fact the equipments have their own shelf life, such shifting appears to be necessary.

9. The Respondent, unfortunately, has taken recourse to prevaricate its stand from stage to stage.

It started with a purported 'deeming fiction' whereby it claimed Port charges. That having not been found to be legally sustainable, it raised a contention that shifting from one equipment to the other would not be possible in one go.

10. With regard to the question as to why it cannot be done in phases, the Respondent raised a contention that augmentation of resources therefor would be necessary.

In Manohar Joshi v. State of Maharashtra, (2012) 3 SCC 619 at page 682, it is stated :-

> ***"114.*** *As we have seen Section 50 as well as DC Rule 6.6.2.2 have no application to the present case, nor can the power of the State Government under Section 154 of the Act help the appellants. Besides, independent of one's right either under the DP plan or the TP scheme, one ought to have a permission for development granted by the Planning Authority traceable to an appropriate provision of law. In the present case there is none. The appellants are essentially raising all these submissions to justify a construction which is without a valid and legal development permission. The appellants have gone on improving and tried to change their stand from time to time with a view to justify the Government's order in their favour.*

However, "orders are not like old wine becoming better as they grow older" as aptly stated by Krishna Iyer, J. in para 8 of Mohinder Singh Gill v. Chief Election Commr. [(1978) 1 SCC 405] The submissions of the appellants in defence of the decision of the State Government are devoid of any merit and deserve to be rejected."

It is from that point of view and that the matter was referred to the learned Commissioners.

11. This Tribunal in its order dated 06.3.2012, while construing the interconnect agreement between the parties opined that charge can be levied only on reciprocal basis. If a party to the agreement incurs an additional expenditure, the other party would be entitled to be restituted therefor. But if no additional charge by way of augmentation of resources is necessary, the Respondent cannot be permitted to raise a bogey with regard thereto. It was held that the BSNL cannot levy a charge on the basis of the circular letter but only on work done principle. Moreover, such circular letter was not made a part of the interconnect agreement.

It's second contention that the old GMSCs were required to be surrendered and new GMSCs were to be set up, was also held to be not correct.

The said order also takes note of the procedures adopted by BSNL itself in respect of shifting of the GMSCs in various circles wherefor augmentation of resources was not found to be necessary.

12. This Tribunal considered only two examples of the Respondent itself, but before the learned Tribunal, a large numbers of examples were produced, whereby BSNL itself requested the Petitioner to shift their GMSCs from one equipment to the other, which request was heeded to by the Petitioner without levying any charge.

13. In the present case also, no other operator including the MTNL levied any charge.

14. Although the contention of the Respondent could have been rejected only on the aforementioned ground, this Tribunal thought it fit to have an independent opinion of some experts.

15. The learned Commissioner's expertise in this field is not in dispute. They have taken into consideration the practice adopted by the BSNL itself and made recommendations as to how shifting of GMSCs from one equipment to the other in phases is possible.

Having regard to the fact that the learned Commissioners have found that there are excess E1s, we fail to see any reason as to why the recommendations made by it should not be accepted.

16. The Respondent has been taking contradictory and inconsistent stand for levying Port charges in the Petition from the very beginning. It started to do so on the premise that the old GMSCs would be deemed to have been surrendered as would appear form the Petitioner's letter dated 23.3.2011.

The Respondent in its letter dated 10.7.2011 again demanded the Port charges, to which the Petitioner gave a detailed reply contending that no augmentation of resources was necessary.

17, The learned Commissioners analysed the submissions of the parties in great details. It was noticed that the Respondent had not disputed the procedure adopted by it in Gujarat, Sahibabad, Haryana, Ambala and U.P. (East), Lucknow.

18. The procedures so adopted, the learned Commissioners pointed out, did not affect the quality of service during the period of shifting. Having regard to the fact that excess circuits were available, keeping in view the September 2010 as also February 2012 traffic, it was recommended :-

> *"Thus it is observed that there are excess circuits on this route based on September, 2010 traffic as well as February, 2012 traffic. Therefore, one or more E1s but not more than 50% of excess E1s (i.e.*

12 E1s based on February, 2012 traffic) can be easily withdrawn from the present route for providing it on the new route."

19. It was furthermore recommended :-

"Therefore, 2 E1s – one each for NLD and ILD route can be easily withdrawn from the Eastern Court TAX NLD route (it is possible to withdraw more E1s – maximum of 8 E1s) and can be provided to the Ericsson switch of the Petitioner for creation and testing of the NLD & ILD route on the new switch."

20. So far as the question of fifty percent extra circuit requirement before carrying on the shifting process is concerned, the learned Commissioners opined that the same is a matter of interpretation of various agreements.

21. Keeping in view the factual aspect of the matter, we are of the opinion that as the learned Commissioners have found that a large number of spare E1s are available, which can take care of the traffic on the existing route and as the quality of service would not be affected by reason thereof, in our opinion the same answers the first question referred to by us to the learned Commissioner.

22. Having considered the learned Commissioner's report and keeping in view the fact that more than one methods for shifting mechanism has been suggested, which would take about four weeks to eight weeks' time, we find no reason to accept the objections raised by the Respondent herein to the said report.

23. The said objections are, therefore, rejected.

24. Keeping in view the urgency of the matter as the Petitioner has suffered a lot owing to space crunch by reason of storage of its old machines to maintain the interconnection between and the BSNL; whereas all other operators have shifted to new machine without augmenting their resources and/or without incurring an additional expenses and furthermore having regard to the technological aspects involved, we are of the opinion that the entire process of migration should be completed as early as possible.

25. The Respondent is hereby directed to adopt one of the procedures suggested by the learned Commissioners and start the process of shifting forthwith, failing which a serious view shall be taken.

26. We, furthermore, do not find any merit in the submissions of Ms. Dhir that the principle of 'Estoppel' has any application in the instant case.

27. It is unfortunate that the Respondent, which is a 'State' within the meaning of Article 12 of the Constitution of India, did not file before us the letter of the Petitioner dated 11.11.2011 which clearly shows that the payments were made under compulsion and, thus, it was made under protest. The Respondent merely filed a copy of the challan.

28. We deprecate such suppression of facts at the hands of a Public Sector Undertaking.

29. It is now a well settled principle of law that any payment made 'under protest' or without prejudice to the rights and contentions of the parties, cannot give rise to the application of the doctrine of estoppel.

30. We, therefore, find no reason as to why the contentions of the Respondent shall be accepted in that behalf also.

31. This Petition is allowed treating the Commissioner's report as a part of this order with costs quantified at Rs. Fifty thousand only.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

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