

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated 1.11.2012**

**Petition No.42/2012**

Reliance Communication Ltd.

... Petitioner

Vs.

Union of India

... 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  
Mr.Abhishek Kumar Jha, Advocate

For Respondent : Mr.Abhishek Kumar, Advocate  
Mr.Tarveen Singh Nanda, Advocate  
Ms.Maneesha Dhir, Advocate

## **J U D G M E N T**

### **S.B. Sinha**

The Petitioner aggrieved by and dissatisfied with demand of an amount of Rs.88,50,000/- for non-submission of 177 Customers Application Forms (CAF) has approached us.

2 Before however, entering into the merit of the matter, we may notice some basic facts.

3 The Petitioner is a licensee for the Rajasthan circle. In this case we are concerned with a distribution centre of the Petitioner situated in the town of Bharatpur in the State of Rajasthan.

4 A distributorship agreement was entered into by and between the Petitioner and one Arihant Trading Company.

5 The said distributor, in terms of the said agreement was said to "ensure full compliance with all regulations issued by the DoT, TRAI and other regulatory authorities with regard to acquisition and

verification of telecom subscribers” as was provided in Clause 5.1.1 thereof. It was furthermore required to ensure proper collection and verification of completed CAFs and supporting valid and legible documents from the customers and return the same to the Petitioner within the time specified by it.

6 The Respondent herein issued a circular letter on or about 24.12.2008 whereby and whereunder penalty with respect to those cases where the licensee has failed to provide subscriber verification on the graded scale was to be levied. Another circular letter was issued on or about 18.11.2010, whereby and whereunder the scheme for levy of financial penalty in such cases other than monthly CAF audit was provided.

7 On 19.8.2011, a surprise inspection was made at noon in the office of the said distributor.

8 One Mr.Nikhil Gupta the then Assistant Manager of the Petitioner company was present at the office of the distributor during the aforementioned surprise inspection.

9 186 CAFs were seized out of which 177 of them were found to be non-compliant to the said circular letters.

The details thereof are as under :-

" CAFs with distributor	
Date of CAF	Number of CAFs
18.08.2011	8
17.08.2011	75
16.08.2011	2
15.08.2011	2
14.08.2011	3
12.08.2011	2
11.08.2011	33
10.08.2011	1
08.08.2011	1
03.8.2011	2
<hr/>	
CAFs dated August	129
<hr/>	
July, 2011	5
May, 2011	47
December, 2011	1
Not activated	3
July 2009	1"

10 By an e-mail dated 23.8.2011, the Petitioner was asked to supply the dates of activation as also the CDRs in respect of the numbers, CAF whereof were seized on 26.8.2011.

11 Some other e-mails were also issued on 25.8.2011 specifying the period for which the CDRs were to be provided by 29.8.2011 along with the respective dates of activation by the said date.

12 By reason of e-mails dated 30.8.2011 and 31.8.2011, the Petitioner was again asked to provide the said informations within 24 hours.

13 By e-mails dated 1.9.2011 and 2.9.2011, while supplying CDRs as also the respective dates of activation, it was pointed out that in respect of more than 40 numbers call data records did not show any call clearly demonstrating that the said numbers have not been used.

14 The Petitioner was asked to sign a joint audit report pertaining to the said surprise check by an e-mail dated 9.9.2011; in response whereto the Petitioner asked the Respondent to supply the CAFs so as to enable it to evaluate the same before signing the joint audit report.

15 The Petitioner did not file its comments and asked for 10 days' further time by an e-mail dated 19.9.2011. According to the Petitioner the distributorship agreement was terminated on 22.9.2011. A FIR was also lodged against the distributor on 29.9.2011.

16 The Petitioner allegedly having not been supplied with the copies of the said CAFs, by an e-mail dated 28.9.2011, stated that it was ready to sign the said audit report without giving any comments. By another e-mail dated 30.9.2011, the Petitioner again requested the Respondent to supply the CAFs so that its comments thereupon could be provided. On the insistence of the Respondent that the CAFs would be supplied only upon signing of the audit report the same was signed on 12.10.2011.

17 The CAFs were also released to the Petitioner. According to it on receipt of the CAFs, it was discovered that most of them contained photo identity of the subscribers and proof of residence.

18 Yet again on 13.10.2011, further time for 60 days' was sought for filing its reply by the Petitioner, whereto by a letter dated 14.10.2011, the Respondent gave it further 15 days' time.

19 Allegedly on verification of the ground realities, 110 customers were found to be genuine which was communicated to the Respondent by a letter dated 27.10.2011.

20 On 28.10.2011 an alleged `bonafide report' in respect of one customer was supplied. Allegedly again, `bonafide report' of 33 customers were supplied on 11.11.2011.

21 Further time of 15 days' was sought for. The Respondent issued a demand notice for a sum of Rs.88,50,000/- despite having acknowledged receipts of 139 bonafide reports from the Petitioner. A representation was made thereagainst by the Petitioner on 1.12.2011 which has been rejected by a letter dated 30.12.2011.

22 The Petitioner in support of its case has examined one Mr.Sanjeev Nandan Sinha, who was the Alternative Nodal Officer of the Petitioner as also Mr.Nikhil Gupta who is said to have been present in the distributor's office of the Petitioner on the date of the surprise check.

23 The case of the Respondent, however, is that the penalty has rightly been imposed as on the date of the surprising inspection, 177 CAFs were found to be non-compliant, the subsequent purported bonafide report could not have been accepted.

24 Mr.Naveen Chawla, learned counsel appearing on behalf of the Petitioner in support of this petition would contend that 85 out of 127 CAFs clearly show that the customers obtained their SIM cards on 16.8.2011, 17.8.2011 and 18.8.2011 and thus their might have been some delay on the part of the distributor to fill up some blanks in the forms filled in by the concerned customers, and in support whereof the requisite documents were available in respect of 14 cases only the name of the customers was not mentioned and in respect of 10 cases, addresses of the customers were not mentioned, although photographs of the concerned customers were available.

25 In 77 cases, it was submitted signatures of the customers were available.

26 So far as non-putting of stamps and non-signing of CAFs is concerned, in 76 cases stamps were put and in 110 cases stamps and signatures both were available. However, only in one CAF the signature of the distributor was found.

27 The impugned demand, Mr.Chawla urged is vitiated by reason of non-compliance of the principles of natural justice in so far as had

an opportunity of being heard was given, the Petitioner could have shown that the levy of penalty was unreasonable, particularly, in view of the fact that it had supplied the CDRs to the Respondent.

28 From a perusal of the impugned order, it was urged, it would appear that Mr.Nikhil Gupta denied and disputed that those CAFs were randomly picked up and in that view of the matter the quantum of penalty imposed on the Petitioner cannot be sustained.

29 It was contended that in view of the decision of this Tribunal in the case of COAI and Ors. vs. Union of India Petition No.252/2011, disposed on it would be evident that the quantum of penalty has wrongly being assessed.

30 Mr.Abhishek Kumar, learned counsel appearing on behalf of the Respondent on the other hand would contend that :-

- (i) The raiding party called the Nodal Officer whereupon only Mr.Nikal Gupta came, who refused to put his signature on the seizure memo.

- (ii) Having regard to the fact that on 21.8.2011, the Petitioner is said to have de-activated the SIM cards, which contention must be held to be incorrect as it could not have ascertained the phone numbers of the concerned persons without the CAFs.
- (iii) The Petitioner having admitted in paragraph 6 of the petition that 186 CAFs were seized forms with the distributor, clearly goes to show that the intent of the Petitioner was malafide.
- (iv) The Petitioner must be held to be guilty of violation of the circular letters as they could not have activated the SIM cards without being in possession of the CAFs.
- (v) Despite the fact that the Petitioner received the e-mails dated 23.8.2011, 25.8.2011 and 29.8.2011, it did not give any response thereto and only in that situation an e-mail was sent to the Nodal Officer on 31.8.2011.

(vi) From the record it would appear that the Petitioner has produced the CDRs only on 1.9.2011, by an e-mail and the activation data was only supplied on 2.9.2011. Although, a joint audit report was prepared as far back as on 12.10.2011, the Petitioner signed thereupon only on 12.10.2011 and, thus, committed violation of the circulars.

(vii) It is wholly irrelevant as to whether the Petitioner has made purported re-verification of 167 CAFs in 3 instalments which has no bearing with the matter in question.

31 The application of the circular letters issued by the Respondent is not in much dispute.

32 We may, however, notice two of them being dated 1.4.2009 and 24.12.2008 wherein it was inter alia stated:-

"2. In spite of the above provisions/ instructions regarding subscriber verification, it has been observed from the report of TERM Cells that the service providers are not complying with the requirement of subscriber verification fully. Accordingly, the matter has been reviewed and it has been decided to introduce a scheme of penalty for subscriber verification failure cases at graded scales w.e.f. 1<sup>st</sup>

April 2009, so that it works as a deterrent. The graded scales are based on correct subscriber verification percentage i.e. correct subscriber verification percentage of a service provider in any service area will be ascertained and based on this percentage, a financial penalty of corresponding amount for each detected case of unverified subscriber shall be levied on account of violation in respect of subscriber verification failures from the service provider in that service area. According to the said scheme, the correct subscriber verification percentage vis-à-vis financial penalty per unverified subscriber shall be as per table below :

<b>Correct subscriber verification percentage in a service area</b>	<b>Amount of financial penalty per unverified subscriber</b>
Above 95%	Rs. 1000/=
90% -95%	Rs. 5000/=
85% - 90%	Rs. 10000/=
80% - 85%	Rs. 20000/=
<b>Below 80%</b>	<b>Rs. 50000/=</b>

33 In the circular letter dated 18.11.2010 it was stated :-

"...In this regard, it is clarified that such cases reported separately may not be combined with the monthly sample CAF audit for the purpose of calculating overall percentage compliance. These cases may be separately investigated / audited. For the subscriber verification failure cases of these cases also, the financial penalty as prescribed in the DOT letter No. 800-52/2008-VAS-III (Part) Dated 24.12.2008 shall be applicable. The sample size may be taken as total number of reported cases or cases taken for investigation/ surprise check and compliance percentage may be calculated out of these samples

only. The other conditions related to disconnection etc. as applicable in case of other CAF Audit shall also be applicable. Since the referred instruction dated 24.12.2008 is applicable w.e.f. 01.04.2009, for cases reported prior to 01,04.2009 the imposed at the rate of 3s financial penalty may be Rs.1000/- per non-compliant case."

34 Interpretation of the said circular assumes importance in view of the fact that there exists a difference between samples obtained on random basis and samples obtained on selective basis.

35 PW-1 who is the Nodal Officer of the Petitioner on this question is a hearsay witness. But presence of Mr.Nikhil Gupta who happened to be the employee of the Petitioner is not disputed. He was summoned by the Petitioner.

36 According to him he happened to be present in the distributor's place as a matter of routine practice.

37 Question no.9 and the answer thereto being important may be noticed:-

"Q9: Could you describe the happenings of 19.08.2011?"

A: When I reach there 3-4 peoples were checking the CAFs. I asked the distributor who they were. I waited till they finished their job. They were picking out the

CAFs from a bundle and segregating them into two piles. At the end they asked me if I was from the company. I answered in the affirmative. They asked me to sign on some papers, which I refused to sign saying that I am not authorized. When they left, I asked the distributor who these persons were. He informed me that they were from DOT. I immediately informed my boss, Mr. Atul Goel and thereafter I left the premises."

38 On the question as to how long he was present at the said office, the answer was that for an hour and 15 minutes he was present.

In answer to a few other questions, he stated :-

"Q5: When did the DOT officials enter the premises and how long were they present?

A: I do not know when they came but they left after 45 minutes to an hour after I had reached.

Q6: How many CAFs were stored at the distributor premises on that day?

A: Around 1500 CAFs.

Q7: Is it correct that the CAFs were randomly selected and taken by the DOT officials?

A: They were picking up the CAFs one by one and keeping them in two different piles. They took away one of those piles.

Q8: At what time the DOT officials leave the premises?

A: Around 2.00 PM

Q9: Whether DOT officials were segregating the CAFs after examining each and every CAF? .

A. Yes. They were checking each and every CAF.

xxx

Q11: Is it correct that the CAFs were not

skimmed by the DOT officials?

A: After looking into each form they were segregating them into two piles. I do not know what they were looking into in the form since I was sitting at a distance.”

39 The Respondent in view of the aforementioned factual aspect of the matter ought to have examined its witness. It failed and/or neglected to do so and in that view of the matter an adverse inference may be drawn against them.

40 In Petition No.67 (C)/2008 IndusInd Media & Communications Ltd. vs. City Cable & Ors. this Tribunal has referred to the decision of the Supreme Court of India Iswar Bhai C. Patel vs. Harihar Behera & Anr. reported in (1999) 3 SCC 457 and Vidhya Dhar vs. Manikrao & Anr. reported in (1993) 3 SCC 573 wherein such a practice has been deprecated upon analyses of the factual aspect of the matter.

41 However, Mr. Nikhil Gupta, who was present at the time of inspection, did not sign in the inspection report, although he was the employee of the petitioner. It is very difficult to believe that he did not know who were the persons doing inspection and he came to know only after the DOT officials left the premises.

It is difficult to believe the version of the witness that the CAF forms were skimmed. He did not participate in the inspection proceedings. How a person just watching from distance can know exactly the manner in which the same was selected. In any sample collection, separate bundles will have to be made.

Moreover, the petitioner did not raise the issue that the samples of CAF were not taken on random basis although it signed the joint audit report only on 12.10.2011.

42 It is trite that the Respondent would be governed by its circular letter. The Respondent has not applied the principles of law as has been laid down by this Tribunal in Petition No.252/2011 COAI vs. UOI.

43 We are, however, of the opinion that the Petitioner is guilty of violation of the circular letter issued by the Respondent, particularly, in view of the fact that:-

- (i) The CAF forms had not been sent to the Petitioner's office at Jaipur not only on 16<sup>th</sup> and 17<sup>th</sup> August, 2011 but also for a long time.
- (ii) This goes to show that the distributors of the Petitioner company had been violating the

circular letters with impugnt. The Petitioner had also been activating the SIM cards without actually receiving the original CAF forms.

- (iii) Although, the material brought on record clearly go to show that even according to the Petitioner the CAF forms must reach in his office within two days and the SIM cards are energized within three days, the very fact that the CAFs remained in the office of the distributor but they were energized clearly goes to show that in certain cases even the practice adopted by the Petitioner herein has not been followed.
- (iv) The PW-2's conduct in not signing the seizure memo cannot be appreciated. The attempt on the part of the Petitioner herein to provide for an explanation subsequently by purporting to file the bonafide report is not contemplated by the circulars.
- (v) The Petitioner cannot on the one hand, accept the guilt of its distributor and on the other hand, question the imposition of penalty on the ground of the purported bonafide on its part.

- (vi) The Petitioner was also bound to explain the conduct on the part of its distributor forthwith and had been taking time to file its show cause without adequate reasons.

### **Conclusion**

44. Therefore, we are of the opinion that the petitioner is not entitled to the relief as prayed for.

However, the principle of proportionality in terms of Petition No. 252 of 2011 will have to be applied.

45. This petition is disposed of on the above terms. There shall be no order as to costs.

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

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

**November 1, 2012**  
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