

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : November 2, 2012

1. MA No.627 of 2012 in Petition No. 75(C) of 2012

Reliance Infratel Limited ...Petitioner

Vs.

Etisalat DB Telecom Pvt. Ltd. ...Respondent

2. MA No.629 of 2012 in Petition No. 76(C) of 2012

Reliance Communication Limited ...Petitioner

Vs.

Etisalat DB Telecom Pvt. Ltd. ...Respondent

BEFORE:

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

For Petitioner : Mr. Ramji Srinivasan, Senior Advocate
with Mr. Nakul Mohta, Mr Akshat
Hansaria, Mr. Lakshmeesh S. Kamath &
Mr. Vivek Paul Oriel, Advocate

For Respondent : Mr. Ashish Prasad & Mr. Divyakant
Lahoti, Advocates

JUDGMENT

1. These two applications have been filed by the Respondent herein praying for amendment of the replies filed on 23.5.2012.

2. The Petitioner has filed these petitions, inter alia, for recovery of the sums specified in the respective petitions purported to be on the Respondent's failure to pay the amounts specified thereunder in the following agreements entered into by and between the parties hereto, being:

- a. E1 Capacity Agreement dated 07.07.2009 for provision of E1 Capacity;
- b. Term Sheets dated 27.10.2009 for provision of Co-location services; and
- c. Purchase orders for provision of bulk bandwidth."

3. The Respondent raised a preliminary issue as regards jurisdiction of this Tribunal to entertain these petitions.

The said preliminary objection was rejected by an order dated 10.4.2012.

4. It may be noticed that this petition was filed on 23.2.2012 and the Respondent was directed to file its reply within four weeks from the said date, although ordinarily only two weeks' time would have been granted by this Tribunal. The Respondent, however, took adjournments on a few occasions and the reply was filed only on 23.5.2012.

5. Issues between the parties were framed on 3.7.2012. Whereas the Petitioner filed the affidavit of its witnesses by way of Examination in Chief on 24.7.2012 in terms of the order of this Tribunal dated 16.7.2012, the Respondent despite several opportunities granted has not yet filed the affidavits of its witnesses, although the cross-examination of the Petitioner's witness has been going on.

6. On or about 10.9.2012, the Respondent filed an application for leave to amend its reply without furnishing any particulars whatsoever whereupon this Tribunal directed:

" M.A.No.537 of 2012

This application has been filed by the Respondent for seeking permission to amend the Replies filed by the Respondent dated 6.3.2012 and 23.5.2012.

The application nowhere states as to the nature of amendment required to be carried out in the Replies and/or why additional pleadings, if any, are necessary. Neither any other or further fact which relate to the two termsheets agreements dated 27.10.2009 have been pleaded nor any particulars have been furnished with regard to the purchase order for bulk bandwidth services; in respect whereof also claims have been raised by the Petitioner.

We fail to understand as to how in absence of particulars of the amendment to the Replies, leave wherefor has been sought for, this application has been filed. It is dismissed accordingly. The Petitioner may file appropriate application by 17.9.2012 as prayed for.

Across the bar, the Petitioner has filed an application purported to be for postponement of the hearing before this Tribunal inter alia on the premise that the Supreme Court of India has issued notice on

the Petitioner's appeal under Section 18 of the Telecom Regulatory of India Act, 1997 against the order of this Tribunal dated 10.4.2012.

We are informed at the bar that the Supreme Court of India has refused to pass any order of stay.

In that view of the matter, hearing of this Petition, keeping in view the provisions of the Telecom Regulatory of India Act, 1997, must be continued.

The M.A., in our opinion, has been filed to delay the disposal of the matter.

This M.A. is rejected."

7. Despite the said order of this Tribunal granting leave to the Respondent to file its application for amendment to the reply by 17.9.2012, the said order was not complied with. The present applications have been filed only on 30.10.2012.

8. Mr. Ashish Prasad, learned counsel appearing on behalf of the Respondent-Applicant in support of these applications would contend that the Respondent having not been able to raised its contentions on certain issues including:

1. Interdependence of the three agreements;
2. The types of the said agreements were different and there were separate and distinct obligations of the parties thereunder.
3. The deficit commitment charges were not payable and the Petitioner has failed and/or neglected to provide services to the Respondent; the amendment to the original reply has become necessary.

9. It was urged that an `Authorized Person' has been appointed by Hon'ble the Bombay High Court in the proceedings initiated by a creditor for winding up of the Respondent company in July, 2012 whereupon the Respondent is required to take his approval for filing affidavits, applications etc.

10. Mr. Prasad would submit that in view of the judgment and order passed by the Supreme Court in Centre for Public Interest Litigation vs. UOI (2012) 3 SCC 1, the strength in the cadre of the officers of the Respondent-company has drastically gone down and keeping in view the volume of documents as also the nature of claim, the Respondent could raise the contentions which are sought to be raised in these applications for amendment.

11. Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of the Petitioner would oppose the said applications for amendment to the replies.

12. It is true that the Court should adopt a liberal approach in considering the applications for grant of leave to amend the pleadings but the same would not mean that the party is entitled to an indulgence from it on mere asking.

13. From the date of framing of issues i.e. on 3.7.2012 as also 16.7.2012 the matter has been listed before this Tribunal on 11 occasions.

The Respondent has filed several documents despite the affidavits of the witnesses of the Petitioner having been filed including applications for amendment of the reply; application for postponement of hearing, application seeking discovery of documents, application seeking time for filing the evidence, application for clarification of an order, application raising objections to the additional evidence as also application for seeking further time to file evidence.

14. It also filed applications questioning the jurisdiction of the Tribunal and has also preferred an appeal before the Supreme Court of India against this Tribunal's order dated 10.4.2012.

As indicated heretofore, the Respondent had been granted indulgences, by this Tribunal even in the matter of filing affidavits of its witnesses.

15. Be that as it may, the question which arises for consideration is as to whether the application for amendment of the reply should be allowed.

16. The said application which runs into about 20 pages seeks to amend a large number of paragraphs. At the hearing, the amendments sought for were sub-divided in two categories:

1. Ancillary pleadings; and
2. Additional pleadings.

17. So far as ancillary amendments are concerned the Petitioner has added only one or two sentences in the existing paragraphs of the reply which are in the nature of submissions or relate to the interpretation of the agreements.

The said ancillary amendments have not been pressed before this Tribunal.

18. It, however, appears that most of the additional pleadings raised by the Respondent have already been covered in the original reply filed by the Respondent.

19. We may notice by way of example that the Respondent in its original reply although raised the questions of the Petitioner's obligations to assist the Respondent in meeting out its roll out obligations, the same has been repeated again albeit in different languages.

20. The Respondent knew about the nature of the agreements. It beyond any doubt knew about the fact as to whether the parties have fulfilled their mutual obligations or not.

21. Evidently it was also aware about the consequences, if the parties had committed breach of contract.

22. The Petitioners knew as far back as on 10.9.2012, if not earlier, that it has to amend its pleadings. It could file an application therefor at an appropriate stage.

23. It ought to have furnished the details in these applications as to when it was found out that the relevant contentions have not been raised; when the same was brought to the notice of the "Authorised Person" and when he gave his approval to file the applications.

24. It has been noticed heretofore that the learned counsel himself stated on 10.09.2012 that the applications for grant of leave of this Tribunal to amend the reply shall be filed by 17.9.2012.

25. If the Respondent thought that keeping in view the fact that approval of the "Authorised Person" was again required for the same purpose, the learned counsel could have asked for more time.

The Respondent in these applications merely stated:

"5. It is pertinent to mention that one of the shareholders of the Defendant Company has preferred a winding up Petition before the Hon'ble High court of Bombay in C.P. No.114 of 2012. It is further submitted that the Hon'ble High Court has appointed an authorized person for the purpose of management of affairs of the Defendant during the pendency of the Company Petition vide order dated 03.07.2012.

.....

7. It is humbly submitted that pursuant to the instructions from the Authorised Person certain officers of the Respondent Company have been identified and deputed to provide inputs towards examination of the claims made by the Petitioner and preparation of the necessary defense on behalf of the Respondent Company. In this regard such inputs collated from the officers of the Company have been reviewed for the purposes of the present proceedings by the Authorised Person to place on record appropriate defense of the Respondent Company in the aforesaid Petition."

26. It is difficult to conceive that it was not aware of the extent of the amendment to the reply which are required to be brought on record.

It is not the case of the Respondent that after the authorized person has been appointed any new document has been discovered.

27. So far as the filing of the application for amendment is concerned, the authorized person presumably has given necessary instructions.

In the applications for amendment, no statement has been made as to whether despite due diligence, the applicant could not discover any document.

28. If the applicant could file two replies viz. (i) interim reply and (ii) reply to the petition, it may be presumed that the competent officers of the Respondent company had given necessary instructions in that behalf to the learned counsel.

29. No explanation has been offered as to why the additional points had not been taken earlier.

Order VI Rule 17 of the Code of Civil Procedure reads as under:

“Order VI Rule 17 : The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

30. The Parliament, therefore mandates that unless the conditions precedent laid down in the proviso appended to Order VI Rule 17 are satisfied, the Court shall not allow the same. The said provision, thus, creates a bar in the exercise of the jurisdiction of the Tribunal.

31. Moreover, the Tribunal in terms of the provision of the Telecom Regulatory Authority of India Act, 1997 is enjoined with a duty to make all endeavours to dispose of a petition within 90 days from the date of filing thereof.

32. It is in that view of the matter, appropriate directions have been issued from time to time. In *Vidyabai & Ors. Vs. Padamalatha & Anr.* Civil Appeal No.7251 of 2008, (2009) 2 SCC 2009 it was held:

“7. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it

must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule.

Commencement of trial as used in proviso to order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments.

14. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed.

However, proviso appended to Order VI Rule 17 of the code restrict the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no

jurisdiction at all to allowed the amendment of the
plaint.”

33. Moreover, the hearing of the matter has already started. It is well known that the first hearing takes place on the date of framing of the issues.

34. In that view of the matter it was incumbent upon the applicant to show that despite due diligence some informations could not be discovered by it or any new documents has been discovered.

Moreover, it has not been stated that additional pleadings are absolutely necessary.

35. It is not in dispute that all requisite issues have been framed. The issues were also amended.

In these applications furthermore the applicant crave leave to file additional documents but even any of the documents has not been disclosed.

36. Before parting, however, it must be placed on record that Mr. Srinivasan in the course of his submissions very fairly stated that the Respondent’s counsel may put the necessary question to the witnesses of the Petitioner as regards the interpretation of the documents or similar such matters.

There is also no doubt that the Respondent can also put its case to the witnesses of the Petitioner and examine its own witness on such

facts if the foundation thereof has been raised in the pleadings in view of the well settled principle of law that evidence need not be pleaded.

37. For the reasons aforementioned, I do not find any merit in these applications. They are dismissed accordingly.

(S.B. Sinha)
Chairperson

November 2, 2012
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