

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 19th October, 2012

Petition No. 669 of 2012

Loop Telecom Ltd. (Haryana) : Petitioner

Vs.

Bharat Sanchar Nigam Limited : Respondent

BEFORE:

Hon'ble Mr. Justice S.B. Sinha, Chairperson

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

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

Judgement

The Petitioner is a licensee. The licence in its favour has been granted under the proviso appended to Section 4 of the Indian Telegraph Act, 1865. It has filed this petition inter-alia for the following reliefs :-

- a) Quash the demand raised by the respondent in the letter dated 12.9.2012 (Annexure p- 1);
- b) Direct the Respondent to produce the bills/letters bearing no. TR-4/HR/FIN/POIs/10-11/55 dated 22.03.2012, TRA (G)/Leased Line/Misc Corr/dated 06.06.2012 and 18.06.2012 by GMTD Ambala and Emergency calls bill dated 07.07.2012 mentioned in the letter dated 12.09.2012 (Annexure p01) and quash the same;

- c) Restrain the Respondent from taking any coercive steps against the petitioner in respect of and/or under the letter dated 12.9.2012 and the bills referred to therein.”

2. The parties entered into an Interconnect Agreement on or about 23.12.2008.

3. By reasons of the impugned letter the Respondent had raised bills in respect of:-

- (i) IUC charges
- (ii) Lease Line Charges
- (iii) Port Charges; and
- (iv) Emergency charges.

4. The Petitioner has paid the IUC charges as also lease line charges as on 02.7.2012. There is, thus, no dispute in respect of the aforementioned two items.

Port charges, indisputably are payable in advance.

5. It may be noticed that the Supreme Court of India in a public interest litigation titled Centre for Public Interest Litigation Vs. Union of India (since reported in (2012) 3 SCC page 1) held 122 licenses granted by the DOT to be illegal including those of the Petitioner's and directed them to be quashed.

6. The Petitioner is said to have stopped its operations.

From the bill dated 12.9.2012 issued by the Respondent, it appears that so far as the port charges are concerned, the dues in respect of the financial year 2011-2012 for a sum of Rs.41,945/- have been paid.

A sum of Rs.11,000/- was billed for the port charges on or about 01.3.2012 and sum of Rs.2,200/- towards the balance amount of service tax by a bill dated 07.7.2012.

Indisputably the petitioner having not paid the advance port charges on or before 31.3.2012, its ports have been disconnected by the respondent on 03.4.2012. It may also be placed on record that by a circular letter dated 03.02.2009, with regard to the port charges, it was directed as under: -

“In order to ensure uniformity in billing procedure across all the circles and timely recovery of such charges from private operators, bills/demands for recovery of annual charges for the next financial year starting from 1st April, may be raised by the field units on 1st of March of every year with pay-by-date of 20th March. In case of non-receipt of such charges from private operators by pay-by-date, it notice for withdrawal of such facilities shall be issued to concerned private operators for making the payment of the annual charges latest by 31st of March, if private operators still do not make the requisite payments to BSNL by 31st March, the said facilities shall be withdrawn from the private operators w.e.f. 1st of April, of the year”.

7. The Petitioner contends that having regard to the aforementioned circular, the disconnection of the port ought to have been made on 01.4.2012 itself. However, Mr.Navin Chawla would contend that the Petitioner is ready and willing to pay the proportionate port charges upto 3rd April, 2012.

8. Ms. Dhir, on the other hand, would submit that the Petitioner is liable to pay the port charges for the financial year 2012-2013.

9. The averments made by the Respondent in paragraphs 2, 3 and 4 of its reply may be noticed :-

“That the Petitioner has impugned letter dated 12.09.2012 regarding encashment of Bank Guarantee. The said letter was issued as the Petitioner has failed to pay various invoices raised towards port charges, IUC charges, Emergency Call Charges and Lease Line Charges. The various invoices were raised as the Petitioner has availed the said services. The invoices so raised were duly received by the petitioner, but despite the same the Petitioner deliberately did not made any payment against the same. The copy of the various bills raised for above-mentioned services and are outstanding are annexed as ANNEXURE R-1 (Colly.)

That it is pertinent to note that the invoices raised were towards the bonafide services of the Respondent. Thus the Respondent is entitled to the said amount as mentioned in the invoices along with interest for the delay in payment as per the terms of IUC Agreement.

That Respondent is entitled to charges towards Prot charges in terms of the Interconnect Agreement between the parties. The Respondent has kept the ports reserved the Petitioner. Thus it is entitled to rent on the said charges. The respondent has disconnected the Ports of the petitioner on account of nonpayment of the invoices. It may be noted that in Haryana Service Area the petitioner is having two ports with the Respondent that were disconnected on 03.04.2012 due to nonpayment of ports charges. However, the port is kept for the petitioner, on which rent is due to the Respondent.”

10. The question is as to whether the Petitioner having not availed the services is bound to pay the port charges for the period 04.4.2012 till 31.3.2013?

11. Prima facie I am of the opinion that the Petitioner is not bound to do so, keeping in view the circular letter issued by the Respondent itself as also the averments made by it in its reply.

12. It may be noticed that in regard to their lease line connections, the Respondent in its reply stated as under : -

“That the Petitioner is also liable to pay the charges towards lease line bills for the same were issued on 07.07.2012 are annexed as ANNEXURE R-12.

It is pertinent to note that the lease line availed by the petitioner from the Respondent were disconnected on 07.07.2012 on account of non-payment of the charges for the same. The charges for the lease line are on the annual basis and are paid in advance. However, the Petitioner have not paid the said charges for the year 2011-2012 and for the year 2012-2013, the charges are only levied from 01.04.2012 to 07.07.2012. Thus, the Respondent is entitled to its legitimate claims towards lease line.”

13. The bill raised by the Respondent in regard to the said item has been revised to Rs.47,819/- from Rs.3,49,219/- having regard to the fact that the disconnection was caused on 07.7.2012.

It is, therefore, prima facie difficult for this Tribunal to accept the contention of the Respondent that in respect of port charges, a different view should be taken.

14. Coming to the question of emergency charges, it is not disputed that emergency calls can be made by any subscriber from his mobile without paying any charges therefor.

The parties, however, are required to enter into an Interconnect Agreement with regard thereto.

We may notice the relevant Clause of the said agreement.

“All public utility services including Emergency Service viz. 100,101 and 102, etc. relating to Police, Fire and Ambulance etc. and other TOLL FREE services such are railways/road/air accident enquiry, police control, disaster management etc. shall be provided by both the operators independently for their subscribers. For the purpose of using other party’s network for provision of these emergency and other toll free public utility services, a separate agreement on the commercial and technical arrangements will be made on mutually agreed terms from time to time.”

15. The Respondent, however, on or about 13.7.2009 sought to introduce an addenda whereby and whereunder the rate for emergency calls was fixed at Rs.1.20 per emergency call per minute.

16. Admittedly the parties have entered into such an agreement. However, it appears, that the Punjab Police made a complaint to the Telecom Regulatory Authority of India (TRAI) that emergency calls made by their subscribers are being terminated on

different exchange i.e. the exchange other than the one required which would indisputably mean the nearest police station/fire station etc.

The TRAI took up the said matter with BSNL; who in turn by an internal circular dated 03.02.2009, stated: -

“In order to ensure uniformity in billing procedure across all the circles and timely recovery of such charges from private operators, bills/demands for recovery of annual charges for the next financial year starting from 1st April, may be raised by the field units on 1st of March of every year with pay-by-date of 20th March. In case of non-receipt of such charges from private operators by pay-by-date, it notice for withdrawal of such facilities shall be issued to concerned private operators for making the payment of the annual chares latest by 31st of March, if private operators still do not make the requisite payments to BSNL by 31st March, the said facilities shall be withdrawn from the private operators w.e.f. 1st of April, of the year”.

17. The Respondent, thereafter, called upon all the operators to convey their suggestions on technical aspect of the matter pursuant whereto or in furtherance whereof Etisalat DB, an operator gave some suggestions. The Respondent referred the said matter to its Chief General Manger, IT Circle, Pune asking him to offer his comments on the solution to the said problem suggested by the said operator.

The Pune Circle of the respondent, however, was of the view that the said suggestion of Etisalat is not workable.

The Respondent thereafter issued a circular letter to all the operators, stating:-

“In this regard, all CMTS/UASL operators were requested to intimate, within 10 days, the technical arrangements put in place by them for ensuring the termination of calls to the police ‘control room’ of concerned area only. However, BSNL has not received the comments from any of the operator till date.

Termination of calls to proper control room of emergency services such as police, fire and ambulance is a very critical issue and is a mandatory license condition. All these services are required by the customers in very distressed situation and involve public safety and National Security. All the CMTS/UASL operators are, therefore, against requested to intimate the technical arrangements put in place by them for ensuring the termination of calls to the police 'control room' of concerned area only, otherwise BSNL will be forced to withdraw the access to Level – I services extended any it to private mobile service providers.”

18. On or about 15.6.2010, the DOT, however, issued the following directions on the

Respondent, stating:-

“BSNL is directed to accept Level – 1 emergency service calls from the private operators on non-discriminatory basis based on mutually agreed arrangements as per terms and conditions of the License Agreement(s). BSNL is further directed to continue the same treatment with all the operators specially when only 2-3 new operators are remaining. If BSNL wants to revise the agreement conditions, the same can be done with all existing and new operators.

The technical agreements shall be seamlessly applicable to all the private operators with whom BSNL has already entered into agreement for carrying emergency service calls or with whom BSNL enters into agreement now.”

19. Relying on or on the basis of the said directive, the Respondent intimated to all

the operators the following:-

“As you are aware that as per prevailing licensing and regulatory regime every access service provider is required to make its own arrangements for providing the access to its subscribers for public utility services including emergency services such as 100,102 etc. and BSNL is not obliged to facilitate the private operators for these

services. The relevant portion of the UAS license is reproduced herein below for ready reference:

29. Emergency and Public Services:

29.1 The licensee shall provide independently or through mutually agreed commercial arrangements with other Service Providers all public utility services including TOLL FREE services such as police, fire, ambulance, railways/road/air accident enquiry, police control, disaster management etc. While providing emergency services such as police, fire, ambulance etc. it shall be ensured that such calls originated shall be delivered to the control room of the concerned authority for the area from where call is originated.

2. Some of the private operators have entered into arrangements /agreements with BSNL for transiting of calls of their customers to the emergency services such as Police, Fire and Ambulance etc. through the network of BSNL. BSNL had received complaints from Police Authorities or Punjab through TRAI that BSNL, it is not routing the calls originated from mobile subscribers to the proper police control rooms. On scrutiny it is found that calls originated from private operators are not being properly routed by them to the concerned TAX of BSNL which is resulting into termination of these calls at the wrong police control rooms.

3. Being a matter of serious security concern involving public safety, vide this office letter of even number dated 19.01.2010 you were requested to intimate the technical arrangements put in place by you for ensuring the termination of your calls to the police control room of concerned area. Further, reminder was issued to you vide this office letter of even number dated 30.04.2010 in this regard. However, even after reminder dated 30.04.2010, we have not received any response from your side.

4. In order to ensure proper routing of emergency calls of private operators to the correct control room of the concerned authority and to ensure correct billing of such calls, the present arrangement/agreement for Level – 1 services needs to be amended as enclosed with this letter. It is requested to kindly intimate a suitable date falling in next ten days for signing of the same. In case, no reply is received within a period of 10 days from your side, BSNL will be constrained to withdraw the arrangement of Level – 1 services extended to you.”

20. On the premise that the Respondent is bound to treat all operators including new operators in a non discriminatory manner it was stated that the following Interconnect Agreements shall be inserted :-

“6.8.2 - For the calls terminating in emergency services i.e. destination number 100, 101, 102 and 108 the charges payable by UASL shall be Rs.10 Lakhs per annum for entire service area, which shall be revised upward by annual review by BSNL, in addition to Interconnect Usage charges (IUC) payable by UASL at the rate applicable for termination of calls into BSNL’s fixed line network.”

It is not in controversy that the Petitioner has not entered into such an agreement. The Respondent by a letter dated 4.5.2011 stated as under:-

“However, despite several requests of BSNL, M/s. Loop Telecom have not come forward to sign the amended Addenda/Agreement governing Level – 1 services with BSNL since M/s. Loop Telecom have already been given sufficient time and opportunity to sing the amended Level – 1 agreement with BSNL, a final notice of another 10 days is being given to M/s. Loop Telecom to sign the amended Level – 1 agreement with BSNL, failing which BSNL shall be constrained to withdrawn the arrangement of Level – 1 services extended to M/s. Loop Telecom without any further notice.

21. By a letter dated 7.2.2012, the Respondent asked the Petitioner and Etisalat DB Telecom Pvt. Ltd. to enter into the aforementioned Interconnect Agreement, which the Petitioner did not accede to.

22. Whereas Mr. Navin Chawla would contend that the parties are bound only by the bilateral agreement; Ms. Maneesha Dhir urged that the respondent being bound to give effect to DOT's circular, became entitled to insert Clause 6.8.2 in the agreement of all operators.

23. Prima facie, this Tribunal is of the view that the parties hereto are bound by the Interconnect Agreement dated 23.12.2008.

24. The DOT prima facie cannot direct the parties to change the conditions of a bilateral agreement; in fact Interconnect Agreement has to be regulated only when the parties cannot arrive at an agreement.

25. Moreover, there exists a distinction between technical terms and commercial terms. The DOT and the TRAI have asked the respondent to lay down the technical terms on a non discriminatory basis. The same has nothing to do with the commercial arrangements entered into by and between the parties thereto.

A party to a contract is only bound by the terms contained in the bilateral agreement. Even a court of law cannot ordinarily change the terms of the contract. A commercial contract should receive commercial interpretation and in that view of the

matter it is futile to argue that commercial terms may be altered, despite the fact that DOT had asked the Respondent to lay down the technical terms so as to ameliorate the grievances of the subscribers vis-à-vis the Police Authorities etc.

26. In BSNL Vs. BPL Mobile Cellular Ltd. reported in 2008 Vol. 13 SSC page 597, the law has been laid down in the following terms: -

“51. In the instant case, the resources to be leased out were subject to agreement. The terms were to be mutually agreed upon. The terms of contract, in terms of Section 8 of the Contract Act, fructified into a concluded contract. Once a concluded contract was arrived at, the parties were bound thereby. If they were to alter or modify the terms thereof, it was required to be done either by express agreement or by necessary implication which would negate the application of the doctrine of “acceptance sub silentio”. But, there is nothing on recorded to show that such a course of action was taken.”

27. For the reasons aforementioned the Petitioner must be held to have made out a strong prima facie case for the purpose of grant of an interim order of injunction.

So far as balance of convenience is concerned, I am of the opinion that the interest of the Respondent can be protected if the Petitioner is directed to furnish an undertaking that in the event of dismissal of this petition it shall pay the amount

demanded from it in respect of the aforementioned charges. It is directed accordingly.
Such an undertaking should be furnished within one week from date.

28. The view I have taken is prima facie in nature.

This order would be subject to any other or further order which may be passed by
this Tribunal.

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(S.B. Sinha)
Chairperson

/NS/rkc