

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

Dated 2nd July, 2014

Petition No.48 of 2012

M/s Reliance Communications Ltd., Navi Mumbai ...Petitioner
Vs.
Union of India ...Respondent

Petition No.132 of 2012

Reliance Communications Ltd., Navi Mumbai ...Petitioner
Vs.
Union of India, New Delhi ...Respondent

Petition No.133 of 2012

Reliance Telecom Ltd., Mumbai ...Petitioner
Vs.
Union of India, New Delhi ...Respondent

Petition No. 388 of 2012
(With M.A. No. 257 of 2012)

Reliance Communications Ltd. ...Petitioner
Vs.
Union of India ... Respondent

Petition No. 389 of 2012
(With M.A. No. 258 of 2012)

Reliance Telecom Ltd. ...Petitioner
Vs.
Union of India ...Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Ninad Dogra, Advocate

For Respondent : Mr. K.P.S. Kohli, Advocate
Ms. Neha Singh, Advocate
Mr. Prashant Jain, Advocate for
Ms. Maneesha Dhir, Advocate

Judgment

Kuldip Singh:

In this batch of petitions, penalty imposed by the respondent – Union of India for violation of terms & conditions of license agreement with regard to verification of subscribers, has been challenged. Since the questions of law and facts involved are similar, all these petitions are being disposed of by this common judgment.

2. The petitioners - M/s Reliance Communications Ltd. (Petition No. 48 of 2012, 132 of 2012 & 388 of 2012) and M/s. Reliance Telecom Ltd. (Petition No. 133 of 2012 and 389 of 2012) have been granted Unified Access Services License (UASL) under Section 4 of the Indian Telegraph Act, 1885, for M.P. License Service Area.

3. As per clause 41.14 [Part VI] of the UAS License Agreement, licensees are required, inter-alia, to do the following:-

- (i) make a complete list of their subscribers available on their website so that the authorized Intelligence Agencies can obtain the same at any time;
- (ii) Ensure adequate verification of each and every customer before enrolling it as a subscriber;
- (iii) Follow the instructions issued by the licensor in this regard from time to time.

Clause 41.14 of the UAS Licences reads as under :-

“The complete list of subscribers shall be made available by the LICENSEE on their website (having password controlled access), so that authorized Intelligence Agencies are able to obtain the subscriber list at any time, as per their convenience with the help of the password. The list should be updated on regular basis. Hard copy as and when required by security agencies shall also be furnished. The LICENSEE shall ensure adequate verification of each and every customer before enrolling him as a subscriber; instructions issued by the licensor in this regard from time to time shall be scrupulously followed. The SIM Card used in the User terminal shall be registered against each subscriber for his bonafide use. The LICENSEE shall make it clear to the subscriber that the SIM Card used in the user terminal against him is non-transferable and that he alone will be responsible for proper and bonafide personal use of the service.”

On 31.7.2008, the UAS License was amended to incorporate the following clause :-

”The Licensor shall have the right to direct the Licensee to warn, penalize or terminate the franchisee or agent or distributor or servant, after considering any report of conduct or antecedents detrimental to the security of the nation. The decision of the Licensor in this regard shall be final and binding and in any case the Licensee shall bear all liabilities in the matter and keep the Licensor indemnified for all claims, cost, charges or damages in this respect.”

4. Clause 41.14 of the License Agreement is a part of security considerations. The objective of this clause is that the identity as well as address details of any subscriber subscribing to the services of the licensee company should be readily available in case of need. We may note that in case of a fixed phone service, the premises where the phone is installed is well known in contrast to mobile service where the subscriber can be anywhere. It is more so in case of prepaid service for which the phone bill is not required to be issued to the subscriber and the subscriber can avail the services by purchasing prepaid vouchers and charging his account. In case of any need by a security agency, the details of such subscribers must be readily and correctly available. Since the matter may involve the security of the country, the importance of these details cannot be over-emphasized.

5. Department of Telecommunications (DoT) - Union of India has been issuing instructions from time to time for compliance with clause 41.14 of the license. It has also provided for a scheme of financial penalty for violation of terms & conditions of the license agreement in respect of subscriber verification. The Department has also been carrying out the audit of the licensees to ensure their compliance with the instructions issued from time to time. Vide letter dated 01.6.2010 the work relating to imposition of penalty has been decentralized and put on Telecom, Enforcement, Resources and Monitoring (TERM) Cells set up under DOT in various license areas.

Subscribers, while subscribing to the services of a licensee, are required to complete a form which is called as the 'Customer Acquisition Form (CAF)'. The subscribers are also required to submit the proof of identity as well as proof of address, for which certain documents specified by the Department of Telecommunications (DoT) are to be provided. Licensees are also required to follow the guidelines issued in this regard from time to time. To ensure compliance with the instructions in this regard, TERM Cell of the concerned service area conducts monthly audits of the licensees on sample basis. On the total subscriber base of the licensee in that service area, a sample of one percent of the subscribers at random is taken and the licensee is asked to provide copies of the CAF Forms of the subscribers. These copies of CAF forms

are checked for compliance with the instructions and guidelines issued from time to time and in cases of non-compliance, the licensees are given a week's time to discuss the cases and make available the original CAFs. The initial report indicating the findings about compliance/non-compliance is also provided to the licensee. Based on the discussions with the service provider (licensee), the report is finalized and jointly signed by both. Based on this final report, the amounts of penalty are calculated in accordance with the telescopic rate that provide for increasing amounts of penalties for higher percentage of non-compliance. The service provider, if he so desires can make a representation to the Deputy Director General (DDG), TERM whose decision is final.

6. In the present batch of petitions, the dispute pertains to the period starting from July 2011 to March 2012. For these months, the respondent-DoT had imposed penalties on the petitioners with regard to the alleged non-compliance of clause 41.14 with essential requirements of subscriber verification and failure to supply the CAFs. The details of these penalties are given in the table as under:

S.No.	Petition No.	Period	No. of Missing CAFs	No. of cases non compliant	Total rejected	Penalty
1	48/12 RCL vs. UOI	July, 2011	157	806	963	4,81,50,000
		August,2011	2521	21	2542	12,71,00,000
					Total	17,52,50,000
2	132/12 RCL vs. UOI	September, 2011	2525	25	2550	12,75,00,000
		October, 2011	2371	26	2397	11,98,50,000
		November, 2011	1963	112	2075	10,37,50,000
					Total	35,11,00,000
3.	133/12 RTL vs. UOI	August, 2011	565	214	779	77,90,000
		September, 2011	938	155	1093	1,09,30,000
		October, 2011	855	77	932	93,20,000
		November, 2011	1394	179	1573	7,86,50,000
					Total	10,66,90,000

The petitioners have also impugned letters of the respondent dated 31.5.2012 vide which the CAFs for the months of December, 2011, and, January to March, 2012, were not accepted as the same were not submitted within the time limit [Petitions No. 388/12 RCL vs. UOI and 389/12 RTL vs. UOI].

7. It is the contention of the petitioners that they could not produce the relevant Customer Acquisition Forms and related documents like proof of Identity and Address of the customers, for the verification by the TERM Cell as these had been stored in a warehouse and some dispute had arisen between the petitioners and the warehouse owner, namely M/s. Records & Data Warehousing Private Ltd. (RDWPL), who had obtained an ad-interim ex-parte restrain order against the petitioners from accessing these documents.

The petitioners herein had entered into an agreement with M/s. Records & Data Warehousing Private Ltd. (RDWPL) on 28.10.2007 for safe keeping of Customer Application Forms and supporting documents of proof of identity and proof of address of its subscribers. The agreement is annexed with the petition¹[unless otherwise mentioned, the facts are taken from petition no. 48 of 2012]

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¹ Annexure P-7 at pages 176 to 192 of the Paper Book in Petition No. 48 of 2012

Certain disputes arose between the petitioners and RDWPL, who had filed a Petition under Section 9 of the Arbitration & Conciliation Act, 1996 against the petitioner [RCL, hereinafter referred as the petitioner] before the Court of Learned Civil Judge, Bangalore being Petition No. 314 of 2011. An ad-interim restrain order was passed in the petition restraining the petitioner from interfering with RDWPL in taking peaceful possession of the warehouse on 17.8.2011. The petitioner filed its objection to the petition filed by RDWPL. The same were heard and the order reserved on 22.10.2011.

In the meanwhile, as the petitioner was unable to supply all the CAFs and supporting documents to the TERM Cell of the respondent, it made representations to the respondent to extend the time for submission of the documents on the ground of the restrain order and for reasons beyond the control of the petitioner. The respondent, however, imposed penalties vide their impugned demand notices dated 09.11.2011 and 17.11.2011. Aggrieved by the action of the respondent, present petition was filed on 24.01.2012. The Tribunal vide its order dated 08.02.2012, passed an order of injunction restraining the respondent from giving any effect to the impugned orders. It also directed that the petitioner must produce all the relevant data before the concerned TERM Cell within two weeks from the retrieval thereof. The operative part of the order is as under :

“Subject to the condition that in the event the order of learned Civil Court dated 17.8.2011 is modified, the Petitioner must produce all the relevant data before the concerned Term Cell within two weeks from the retrieval thereof, we, for the aforementioned reasons pass an order of injunction restraining the Respondents from giving any effect to the impugned orders dated 9.11.2011 and 17.11.2011.”

8. Vide letter² dated 14.5.2012, the petitioner submitted the CAF Forms to the respondent. CAF forms were further submitted vide letters dated 15.5.2012 and 16.5.2012. The respondent, however, asked the petitioner to take back the CAFs for the months other than July 2011 and August 2011 stating that as per the TDSAT order dated 08.02.2012 in Petition No. 48 of 2012, the CAF forms for these months only have been directed to be deposited. The petitioner again approached the Tribunal by way of M.A. No. 238 of 2012 in Petition No. 132 of 2012 on 18.6.2012 praying, inter-alia, for a direction to the respondent to accept the CAF forms submitted by it. The Tribunal vide order dated 02.7.2012 observed that the respondent should accept the CAF forms which the petitioner intends to deliver not only for the months of July 2011 and August 2011 but also for the subsequent months.

9. The petitioner, in support of its pleadings, submitted evidence by way of affidavit of Mr. Bikram Singh Bhadauria S/O Late Col. K.P.S. Bhadauria. The witness stated that the petitioner company has ensured adequate verification of

each and every customer, as per instructions issued by the respondent and have verified all their subscribers before enrolling them. He further stated that as the CAFs and other supporting documents of proof of identity and proof of address are very voluminous in nature, the petitioner had to make special arrangement for its safe-keeping by hiring the services of warehousing companies and that the petitioner had hired the services of RDWPL for various circles. The witness stated that the services for circle of M.P. were provided to the petitioner by RDWPL under agreement dated 06.06.2007 at pages 352 to 365 of the paper book in Petition No. 48 of 2012 and exhibited the same as Exb. PW-1/3. The petitioner further exhibited the copy of petition before the Court of learned Civil Judge, Bangalore in Petition No. 314 of 2012 and copy of an ad-interim ex-parte order dated 17.8.2011 passed by the learned Additional City Judge, Bangalore City as exhibits PW-1/6 and PW-1/7 respectively.

10. Mr. Navin Chawla, learned counsel appearing for the petitioners submitted that the petitioners had completed the CAF forms before acquiring the subscribers but due to the dispute with RDWPL and injunction order passed by the Civil Court, they could not provide the original CAF forms to the respondent for verification. He further submitted that the scanned copies of the CAF forms for the month of July 2011 were provided to the respondent but the respondent did not find the same acceptable as they were not clear. The petitioner did everything to get the injunction order vacated for which it filed an

² Annexure-P/28 to the rejoinder filed by the petitioner in Petition No. 132 of 2012 at page 377 of the Paper Book

application before the learned City Civil Court. The said City Civil Court posted the case for orders to 12.10.2011. As the order was not passed, the petitioner moved the High Court of Karnataka at Bangalore vide W.P. No.4530 of 2012 on 12.12.2012. The petitioner also filed a Police complaint regarding breach of trust and omission to produce records on 24.9.2011 with Thana In-charge, MP Nagar Police Station, Bhopal. The consequences of non-production of CAFs in terms of the penalties were brought out in the Police complaint. Mr. Chawla submitted that order of the Court was a *force majeure* condition and though it had the CAF forms, the non-submission of the same was beyond the control of the petitioner.

Mr. Chawla submitted that the purpose and intent of the circulars for verification of the subscribers and CAF forms is not to impose penalties and, therefore, in exercise of power under such circulars the respondent must act reasonably and take into account the circumstances faced by the telecom service providers as the justification or reasons for its non-compliance in the few cases, if any. The respondent cannot act mechanically or shut its eyes to the circumstances. He further submitted that prior to month of July 2011, the petitioner had the compliance rate varying from 95% to 97% which went down to 77.4% in July 2011 and was in the range of 40.56% to 52.14% for the months of August 2011 to November 2011. Subsequent to the month of April, 2012 the rate again went up. Similarly, in the case of Reliance Telecom Ltd., the compliance was in the range of 95% to 97%, which went down during these

months.

Mr. Chawla submitted that circular dated 25.6.2007 does not lay down a rigid or mandatory time frame failure to comply with which will necessarily lead to a penalty.

He submitted that both the demand letter and the letter rejecting the appeal of the petitioner are non-reasoned and, therefore, in violation of natural justice. With regard to this submission, Mr. Chawla relied on *Oryx Fisheries Private Limited Vs. Union of India and Others*³.

He further submitted that since all these CAFs have been submitted now, the respondent can audit the same for non-compliance and impose penalties accordingly for any violation, and in any case the penalties imposed should not be as per the slab system being followed by the respondent and the same should be as per TDSAT order in Petition No. 252 of 2012 dated 12.4.2012.

11. Mr. Kohli, learned counsel appearing for the respondent, submitted that the petitioners unequivocally undertook to fully comply with all the terms & conditions stipulated in the license agreement executed with the respondent

³ (2010) 13 SCC 427

and it was their responsibility to maintain the records and produce the same on requisition. In this regard, he drew our attention to clause 3 of the Unified Access Service (UAS) license [Exh. RW-1/2] and the various circulars issued in this regard by the respondent.

He further referred to clause 6.1, terms and conditions of the license agreement, and submitted that petitioner could not have entered into an agreement with a third party. Mr. Chawla, however, argued that as per clause 6.1, the licensee can always employ or appoint agents and employees for provision of the service. Mr. Kohli, persisted that the responsibility of the petitioner's agent lies with the petitioner.

Clause 6.1 of the license is as under :-

*“6.1 The LICENSEE shall not, without the prior written consent as described below, of the LICENSOR, either directly or indirectly, assign or transfer this LICENCE in any manner whatsoever to a third party or enter into any agreement for sub-licence and/or partnership relating to any subject matter of the LICENCE to any/ third party either in whole or in part i.e. no sub-leasing/ partnership/third party interest shall be created. **Provided that the LICENSEE can always employ or appoint agents and employees for provision of the service.**” (emphasis supplied)*

Though we agree with Mr. Kohli that ultimately it is the responsibility of Licensees to maintain and produce the records, it does not mean that a Licensee cannot get its functions performed by an outside agency. Clause 6.1 also provides for the appointment of agents for provision of service and, therefore, we do not find that the petitioner violated any provision of the clause by entering into an agreement with RDPWL for safekeeping of the records.

Mr. Kohli relied on *Avishek Goenka Vs. Union of India and Anr.*⁴ and submitted that the petitioner is required to observe 100% compliance of respondent's instructions regarding subscriber verification. With regard to his submission that the responsibility lies fully with the petitioner, he referred to the Indian Contract and Specific Relief Acts (Pollock & Mulla 14th Edition, 2012 para on 'Vicarious Performance') which is as under :-

"In certain circumstances, the promisor may get his promise performed by getting someone else to do it. The promisor continues to be liable on the contract and not the other person actually doing the work. The promisor will be liable for any breach which may occur. The promisee will be bound to accept performance, if it is in accordance with the terms of the contract. The promisee cannot sue or hold liable such other person performing it, though the latter may be liable to the promisee in tort. Such performance is vicarious performance, and differs from an assignment of contract.

He must perform the promise himself, if such is the intention of the parties. Such intention may be gathered from, (a) the express

⁴ (2012) 5 SCC 275

terms of the contract; or (b) as an inference from the terms of the contract, its subject matter and surrounding circumstances. In ascertaining the intention of the parties, usage may also be considered. Our useful question to ask would be : did the promisor promise personal performance or did he merely promise a result?”

Mr. Chawla, in support of his submissions that the dispute with RDWPL and the Court injunction due to which it could not provide the original of the CAFs to the respondent was beyond its control, relied on M/s. Shanti Vijay And Co. And Others Vs. Princess Fatima Fouzia and Others⁵. Para 45 of the judgment, on which Mr. Chawla puts reliance, is as under :-

“45. The second question is perhaps a more difficult one for the appellants to surmount, though the difficulty was sought to be explained away by saying that they had fulfilled their part of the contract and they should not be deprived of the fruits of their bargain merely because of the Court's injunction. It is unfortunate that this aspect of the case was not submitted to the High Court, and we, therefore, have not the assistance of that Court's opinion. We, however, think that the meaning of Section 56 of the Contract Act is clear. The section, insofar as material, runs as follows:

"56. An agreement to do an act impossible in itself void.

A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor

⁵ (1979) 4 SCC 602

could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

We may note that the UAS License has condition 12 relating to *force majeure* . Sub condition 12.1 of the same is as under:

"12.1 If at any time, during the continuance of this LICENCE, the performance in whole or in part, by either party, of any obligation under this is prevented or delayed, by reason of war, or hostility, acts of the public enemy, civic commotion, sabotage, Act of State or direction from Statutory Authority, explosion, epidemic, quarantine restriction, strikes and lockouts (as are not limited to the establishments and facilities of the LICENSEE), fire, floods, natural calamities or any act of GOD (hereinafter referred to as EVENT), provided notice of happenings of any such EVENT is given by the affected party to the other, within 21 Calendar days from the date of occurrence thereof , neither party shall, by reason of such event, be entitled to terminate the LICENCE, nor shall either party have any such claims for damages against the other, in respect of such non-performance or delay in performance. Provided SERVICE under the LICENCE shall be resumed as soon as practicable, after such EVENT comes to an end or ceases to exist. The decision of the LICENSOR as to whether the service may be so resumed (and the time frame within which the service may be resumed) or not, shall be final and conclusive."

We may also note that by order of Ld. City Civil & Session Judge, Bangalore dated 17.8.2011 the petitioner herein was restrained from interfering with the peaceful possession of the warehouse by RDWPL. The order passed is as below :-

“Issuance of notice is dispensed with.

Respondent, its agents or anybody else on its behalf is hereby restrained by an order of exparte T.I. from interfering with the Plaintiff’s peaceful possession of the Warehouse where all its materials are placed and the order of T.I. will be in force till next date.”

In view of this injunction order passed by the City Civil Court, Bangalore we agree with the submission of Mr. Chawla that the same operated as a *force majeure* condition making it impossible for the petitioner to comply with the time frame specified by the respondent for submission of CAFs. We may observe that the petitioner made all possible efforts including filing an application before the City Civil Court and Writ Petition in the High Court at Bangalore.

12. Mr. Kohli submitted that the injunction order of the Court only says “warehouse” and not “warehouses”. He argued that the same was applicable

only to Bangalore and not to M.P. He further submitted that the same was with regard to M/s. Reliance Communications Ltd. and since M/s. Reliance Telecom Ltd. had a different agreement with RDWPL, the same was not applicable to them. Mr. Chawla, however, submitted that though RDWPL had filed petition only against Reliance Communication Ltd., as the dispute was with both RCL and RTL, RDWPL took advantage of the interim order of the Court not only to restrain the petitioner from accessing their CAFs and supporting documents in the State of Karnataka but also in M.P. for both the petitioners.

We agree with Mr. Chawla that under the circumstances, it would have been practically impossible for the petitioners to obtain any records from the warehouse of RDPWL. We may note that the petitioner had also filed a police complaint and taken all possible steps to get the CAFs from the warehouse expeditiously.

13. Mr. Kohli submitted that as per the instructions/guidelines dated 30.9.2009 and 02.02.2011, the petitioner was required to maintain the desired CAFs in both physical and electronic form. He submitted that the petitioner could have submitted the scanned copies of the CAFs. He further submitted that the requisite copies of CAFs for the month of July 2011 were to be deposited by 25.7.2011 much prior to the injunction order dated 17.8.2011 passed by the City Civil Court of Bangalore.

Mr. Chawla, however, submitted that as the dispute had already arisen with M/s. RDWPL, they were not able to obtain the CAFs but they had submitted scanned copies of the same for the month of July, 2011. As the same was not found clear by the respondent, they requested for some time.

14. It is true that verification of subscribers and obtaining CAFs is absolutely necessary to ensure national safety and security and the failure of the petitioner to do so would lead to penalties. We observe that the circular dated 25.6.2009 lays down the procedure, the purpose of which is that service providers including the petitioners are complying with the guidelines in this regard. Let us now examine whether there is a strict time frame followed by the parties in conducting the audit in this regard.

The guidelines regarding subscriber verification were issued by DoT vide circular dated 25.6.2007. As per these guidelines, the service providers shall be requested to submit the CAFs by 25th day of the month. Sample should start flowing from service provider within 3 to 4 days. Para 1 (iii) of these guidelines provide as under:-

“The Service Providers shall be requested to submit the CAFs/CEFs/SEFs by 25th day of the month. However, samples should start flowing from Service Providers within 3-4 days from the date of VTM request.”

As per these guidelines, the July 2011 CAFs were required to be submitted by 25.7.2011. However, the CAF audit report in respect of M/s. Reliance Communications Ltd. for the month of July 2011 was provided by the respondent to the petitioner on September 30, 2011 vide e. mail (page 387 of the paper book). Further the date for signing the report jointly was given as 10.10.2011. The e-mail is as under :-

“manoj Khatri

To

“arun johari”

Dear Johari Ji,

Kindly find attached herewith the CAF audit report in respect of M/s. RCL of the month of July’11 for remarks discussion. The date of joint sign is 10.10.2011.

Manoj Kumar Khatri,

ADG-IV

Govt. of India MOC&I,

Department of Telecom,

TERM Cell MP Bhopal

Mob : 9425605441”

On 20.10.2011, the petitioner represented to the Dy. Director General, TERM Cell, M.P., Bhopal for grant of some more time stating that the matter with the agency, with whom their CAFs are stored, is sub-judice. On

21.10.2011, the respondent again sent a mail to the petitioner stating that the deadline of signed CAF Audit Report was 10.10.2011 and the same has not been sent by the petitioner even after 10 days of the same and that if the same is not signed by 4 P.M. of 21.10.2011, it would be presumed that the report has been seen and signed. The petitioner replied the same on the same date stating that they have already taken up their plea with DDG, TERM Cell, M.P. and were advised to meet the Director, TERM Cell, M.P. but could not succeed due to his non-availability. The e. mail of the petitioner is as under :-

“Dear Sir,

This has reference to the trail mail content.

Would like to mention here that on 19/October/2011 we have taken up our plea with DDG TERM Cell MP. We were advised to met the Director TERM Cell MP.

When we tried speaking/Meeting to Director TERM Cell unluckily we could not succeed due to his non availability.

As regard subjected matter our submission is as below :-

936 CAF’s have been put under various remark’s which are due to submission of scan images of the CAF’s given in sample.

As we have already shared with you that our matter with the agency (with whom our CAF’s are stored) is subjudice and is expected to get closed soon after which we will be in position to retrieve the originals of these CAF’s and produce the same for remark discussion’s.

We have filed a complaint against the agency for not releasing our documents held in their possession. A copy of the complaint is already submitted to your good office.

We humbly request you to kindly allow us some more time for closing the matter.

With Warm Regards,

Arun Johari.”

On 08.11.2011, the respondent replied the petitioner's letter dated 20.10.2011 and rejected the request of the petitioner to allow more time to jointly sign the CAF audit report for the month of July, 2011 on the ground that sufficient time has already passed. The petitioners represented vide letters dated 25.11.2011 and 28.11.2011 to the DDG, TERM Cell, M.P. for not treating the 111 CAFs as not submitted and 788 as non-complied and imposition of penalties stating that they have all the CAFs but due to the matter being sub-judice, they were unable to produce the same. They also annexed copies of earlier correspondence mentioning that they have also filed a Police complaint against the agency, and stated that as an evidence that these CAFs are available with them, they have got the screen shot captured from their internal system for which the CAFs are not submitted or the CAF scan image is not clear. These representations of the petitioners dated were disposed of by letters dated 14.12.2011 from DDG, TERM Cell, M.P., Letter to RTL is as under :-

“To

Nodal Officer

M/s Reliance Telecom Ltd

Bhopal M.P.

Sub : Representation regarding imposition of penalty for 497 CAF,s are being considered as missing

Ref: 1. This office letter No.DDG/TERM/MP/PI/10-11/38 dated 17 Nov. 11

2. Your letter No. RTL/Aug11/CDMA dated 28 Nov. 2011

With reference to the penalty notice issued by this office vide letter dated 17 Nov. 11, M/s RTL has represented vide letter dated 28 Nov. 11. This is to inform that the case has been scrutinized thoroughly and found that the Penalty imposition by TERM MP is as per the DoT instructions in this regard.

Therefore the representation vide letter dated 28 Nov. 11 has been rejected and M/s. RTL is intimated to deposit the penalty at the earliest to avoid any inconvenience.

This has the approval of Competent Authority.

Sd/- O.P. Agarwal

ADG (TERM)

TERM Cell, MP”

15. From the foregoing, it can be seen that though the CAFs for the samples selected by the respondent were to be submitted by 25th day of the relevant month, there is no clearly specified date by which the respondent-DoT has to complete the checking/audit and sign joint audit report. This is also borne out from the fact that the report for the month of July, 2011 was submitted by the respondent to the petitioner as late as September 30, 2011.

It is an undisputed fact that the petitioner has submitted the CAFs subsequently after vacation of the interim order and settlement reached with its agent – M/s. RDWPL. DoT has not examined these CAFs submitted by the petitioner for their compliance with the guidelines and imposed penalties assuming the CAFs not produced by the date of signing of joint audit report, which in any case is not rigidly specified, as missing and non-compliant. Mr.Chawla argued that equity treats the importance of such time-limits as being subordinate to the main purpose and relied on Swarnam Ramachandran (Smt) and Another Vs. Aravacode Chakungal Jayapalan⁶ . Hon’ble Supreme Court has observed in para 13 as under :-

“13. Applying the above principles to the facts of the present case, we find that there was no justification in claiming, in the circumstances, to treat time as of the essence. At the outset, referring to the original agreement dated 18-2-1981, there is nothing in the express stipulation between the parties to show that the intention was to make the rights of the parties dependent upon the observance of the time-limits. Prima facie, equity treats the importance of such time-limits as being subordinate to the main purpose of the parties. (See Jamshed Khodaram Irani v. Burjorji Dhunjibhai.)”

We agree with the submission of the learned counsel for the petitioner that there is a difference between substantive compliance and procedure to

⁶ (2004) 8 SCC 689

ensure the same. We can understand the imposition of penalties for substantive non-compliance found after the scrutiny of the CAFs submitted by the petitioner but in our view, imposition of penalties assuming non-compliance and non-supply of CAFs under the circumstances when the petitioner was restrained by an injunction order of the Court is not justified. This is especially so when no rigid date is provided for signing of the joint audit report and the DoT itself takes time in scrutinizing and finalizing these reports.

16. Mr. Chawla further submitted that the respondent-DoT has not taken any step to check the CAFs supplied by the petitioner and as a matter of fact, refused to accept the same and it had to approach the Tribunal and only then these were accepted by the respondent. Mr. Chawla relied on *Avishek Goenka Vs. Union of India and Another*⁷ . Para 8 of this is as under :-

“8. We have already noticed that the rapid expansion of the telecom sector and its impact on development, both, equally impose responsibility on the Government of India, the regulatory body and the various stakeholders in the telecom sector to carry out proper verification of the prepaid SIM cards and ensure national safety and security. To achieve this object, it is primarily for the expert bodies and the Government of India to act and discharge their respective functions.”

⁷ Writ Petition (C) No. 285 of 2010

Mr. Chawla submitted that it is the duty of the respondent to check the CAFs. We agree with the submission. The purpose of obtaining the CAFs and subscriber verification is to ensure that the details regarding the identity and whereabouts of the subscribers availing the services of the petitioner and the similarly placed service providers should be available in case the need arises. The purpose of monthly checking on sample basis is to ensure that the service providers are complying with this important requirement. The purpose of this checking is definitely not to impose the penalties but the penalty is to be used as a deterrent and a means to ensure compliance. In this case, the petitioner could not supply the CAFs due to a dispute between M/s. RDWPL and the injunction order from the court. In our view, instead of assuming non-compliance with the guidelines, DoT should have checked these CAFs immediately after they were made available and if still found non-compliant, it would have been well within its right to impose the penalties.

Mr. Chawla also submitted that in terms of the judgment of the Tribunal in Cellular Operators Association of India & Ors. Vs. Department of Telecommunications & Anr. (Petition No. 252 of 2011 dated 12.4.2012) any penalty, if it could be imposed, had to be calculated on the principles as it is followed in the Income Tax system i.e. rate of financial penalty to be calculated separately for each slab and the total amount of penalty arrived at.

17. Considering the facts of the case, we allow these petitions and quash the penalties imposed by the respondent-DoT by the impugned demand letters. We, however, make it clear that the respondent-DoT is free to scrutinize the CAFs submitted by the petitioner and shall be free to impose penalties for any non-compliance found. We further make it clear that if any penalties are found imposable after the scrutiny, the same shall be imposed only in accordance with the judgment in Cellular Operators Association of India & Ors. Vs. Department of Telecommunications & Anr. in Petition No. 252 of 2011.

There will be no order as to cost.

.....
(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

rkc

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

Dated July, 2014

Petition No.48 of 2012

M/s Reliance Communications Ltd., Navi Mumbai
Vs.
Union of India

...Petitioner

...Respondent

Petition No.132 of 2012

Reliance Communications Ltd., Navi Mumbai

...Petitioner

Vs.

Union of India, New Delhi

...Respondent

Petition No.133 of 2012

Reliance Telecom Ltd., Mumbai

...Petitioner

Vs.

Union of India, New Delhi

...Respondent

Petition No. 388 of 2012

(With M.A. No. 257 of 2012)

Reliance Communications Ltd.

...Petitioner

Vs.

Union of India

... Respondent

Petition No. 389 of 2012

(With M.A. No. 258 of 2012)

Reliance Telecom Ltd.

...Petitioner

Vs.

Union of India

...Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Ninad Dogra, Advocate

For Respondent : Mr. K.P.S. Kohli, Advocate
Ms. Neha Singh, Advocate
Mr. Prashant Jain, Advocate for
Ms. Maneesha Dhir, Advocate

Judgment

Kuldip Singh:

In this batch of petitions, penalty imposed by the respondent – Union of India for violation of terms & conditions of license agreement with regard to verification of subscribers, has been challenged. Since the questions of law and facts involved are similar, all these petitions are being disposed of by this common judgment.

2. The petitioners - M/s Reliance Communications Ltd. (Petition No. 48 of 2012, 132 of 2012 & 388 of 2012) and M/s. Reliance Telecom Ltd. (Petition No. 133 of 2012 and 389 of 2012) have been granted Unified Access Services License (UASL) under Section 4 of the Indian Telegraph Act, 1885, for M.P. License Service Area.

3. As per clause 41.14 [Part VI] of the UAS License Agreement, licensees are required, inter-alia, to do the following:-

- (i) make a complete list of their subscribers available on their website so that the authorized Intelligence Agencies can obtain the same at any time;
- (ii) Ensure adequate verification of each and every customer before enrolling it as a subscriber;
- (iii) Follow the instructions issued by the licensor in this regard from time to time.

Clause 41.14 of the UAS Licences reads as under :-

“The complete list of subscribers shall be made available by the LICENSEE on their website (having password controlled access), so that authorized Intelligence Agencies are able to obtain the subscriber list at any time, as per their convenience with the help of the password. The list should be updated on regular basis. Hard copy as and when required by security agencies shall also be furnished. The LICENSEE shall ensure adequate verification of each and every customer before enrolling him as a subscriber; instructions issued by the licensor in this regard from time to time shall be scrupulously followed. The SIM Card used in the User terminal shall be registered against each subscriber for his bonafide use. The LICENSEE shall make it clear to the subscriber that the SIM Card used in the user terminal against him is non-transferable and that he alone will be responsible for proper and bonafide personal use of the service.”

On 31.7.2008, the UAS License was amended to incorporate the following clause :-

”The Licensor shall have the right to direct the Licensee to warn, penalize or terminate the franchisee or agent or distributor or servant, after considering any report of conduct or antecedents detrimental to the security of the nation. The decision of the Licensor in this regard shall be final and binding and in any case the Licensee shall bear all liabilities in the matter and keep the Licensor indemnified for all claims, cost, charges or damages in this respect.”

4. Clause 41.14 of the License Agreement is a part of security considerations. The objective of this clause is that the identity as well as address details of any subscriber subscribing to the services of the licensee company should be readily available in case of need. We may note that in case of a fixed phone service, the premises where the phone is installed is well known in contrast to mobile service where the subscriber can be anywhere. It is more so in case of prepaid service for which the phone bill is not required to be issued to the subscriber and the subscriber can avail the services by purchasing prepaid vouchers and charging his account. In case of any need by a security agency, the details of such subscribers must be readily and correctly available. Since the matter may involve the security of the country, the importance of these details cannot be over-emphasized.

5. Department of Telecommunications (DoT) - Union of India has been issuing instructions from time to time for compliance with clause 41.14 of the license. It has also provided for a scheme of financial penalty for violation of terms & conditions of the license agreement in respect of subscriber verification. The Department has also been carrying out the audit of the licensees to ensure their compliance with the instructions issued from time to time. Vide letter dated 01.6.2010 the work relating to imposition of penalty has been decentralized and put on Telecom, Enforcement, Resources and Monitoring (TERM) Cells set up under DOT in various license areas.

Subscribers, while subscribing to the services of a licensee, are required to complete a form which is called as the 'Customer Acquisition Form (CAF)'. The subscribers are also required to submit the proof of identity as well as proof of address, for which certain documents specified by the Department of Telecommunications (DoT) are to be provided. Licensees are also required to follow the guidelines issued in this regard from time to time. To ensure compliance with the instructions in this regard, TERM Cell of the concerned service area conducts monthly audits of the licensees on sample basis. On the total subscriber base of the licensee in that service area, a sample of one percent of the subscribers at random is taken and the licensee is asked to provide copies of the CAF Forms of the subscribers. These copies of CAF forms

are checked for compliance with the instructions and guidelines issued from time to time and in cases of non-compliance, the licensees are given a week's time to discuss the cases and make available the original CAFs. The initial report indicating the findings about compliance/non-compliance is also provided to the licensee. Based on the discussions with the service provider (licensee), the report is finalized and jointly signed by both. Based on this final report, the amounts of penalty are calculated in accordance with the telescopic rate that provide for increasing amounts of penalties for higher percentage of non-compliance. The service provider, if he so desires can make a representation to the Deputy Director General (DDG), TERM whose decision is final.

6. In the present batch of petitions, the dispute pertains to the period starting from July 2011 to March 2012. For these months, the respondent-DoT had imposed penalties on the petitioners with regard to the alleged non-compliance of clause 41.14 with essential requirements of subscriber verification and failure to supply the CAFs. The details of these penalties are given in the table as under:

S.No.	Petition No.	Period	No. of Missing CAFs	No. of cases non compliant	Total rejected	Penalty
1	48/12 RCL vs. UOI	July, 2011	157	806	963	4,81,50,000
		August,2011	2521	21	2542	12,71,00,000
					Total	17,52,50,000
2	132/12 RCL vs. UOI	September, 2011	2525	25	2550	12,75,00,000
		October, 2011	2371	26	2397	11,98,50,000
		November, 2011	1963	112	2075	10,37,50,000
					Total	35,11,00,000
3.	133/12 RTL vs. UOI	August, 2011	565	214	779	77,90,000
		September, 2011	938	155	1093	1,09,30,000
		October, 2011	855	77	932	93,20,000
		November, 2011	1394	179	1573	7,86,50,000
					Total	10,66,90,000

The petitioners have also impugned letters of the respondent dated 31.5.2012 vide which the CAFs for the months of December, 2011, and, January to March, 2012, were not accepted as the same were not submitted within the time limit [Petitions No. 388/12 RCL vs. UOI and 389/12 RTL vs. UOI].

7. It is the contention of the petitioners that they could not produce the relevant Customer Acquisition Forms and related documents like proof of Identity and Address of the customers, for the verification by the TERM Cell as these had been stored in a warehouse and some dispute had arisen between the petitioners and the warehouse owner, namely M/s. Records & Data Warehousing Private Ltd. (RDWPL), who had obtained an ad-interim ex-parte restrain order against the petitioners from accessing these documents.

The petitioners herein had entered into an agreement with M/s. Records & Data Warehousing Private Ltd. (RDWPL) on 28.10.2007 for safe keeping of Customer Application Forms and supporting documents of proof of identity and proof of address of its subscribers. The agreement is annexed with the petition⁸[unless otherwise mentioned, the facts are taken from petition no. 48 of 2012]

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⁸ Annexure P-7 at pages 176 to 192 of the Paper Book in Petition No. 48 of 2012

Certain disputes arose between the petitioners and RDWPL, who had filed a Petition under Section 9 of the Arbitration & Conciliation Act, 1996 against the petitioner [RCL, hereinafter referred as the petitioner] before the Court of Learned Civil Judge, Bangalore being Petition No. 314 of 2011. An ad-interim restrain order was passed in the petition restraining the petitioner from interfering with RDWPL in taking peaceful possession of the warehouse on 17.8.2011. The petitioner filed its objection to the petition filed by RDWPL. The same were heard and the order reserved on 22.10.2011.

In the meanwhile, as the petitioner was unable to supply all the CAFs and supporting documents to the TERM Cell of the respondent, it made representations to the respondent to extend the time for submission of the documents on the ground of the restrain order and for reasons beyond the control of the petitioner. The respondent, however, imposed penalties vide their impugned demand notices dated 09.11.2011 and 17.11.2011. Aggrieved by the action of the respondent, present petition was filed on 24.01.2012. The Tribunal vide its order dated 08.02.2012, passed an order of injunction restraining the respondent from giving any effect to the impugned orders. It also directed that the petitioner must produce all the relevant data before the concerned TERM Cell within two weeks from the retrieval thereof. The operative part of the order is as under :

“Subject to the condition that in the event the order of learned Civil Court dated 17.8.2011 is modified, the Petitioner must produce all the relevant data before the concerned Term Cell within two weeks from the retrieval thereof, we, for the aforementioned reasons pass an order of injunction restraining the Respondents from giving any effect to the impugned orders dated 9.11.2011 and 17.11.2011.”

8. Vide letter⁹ dated 14.5.2012, the petitioner submitted the CAF Forms to the respondent. CAF forms were further submitted vide letters dated 15.5.2012 and 16.5.2012. The respondent, however, asked the petitioner to take back the CAFs for the months other than July 2011 and August 2011 stating that as per the TDSAT order dated 08.02.2012 in Petition No. 48 of 2012, the CAF forms for these months only have been directed to be deposited. The petitioner again approached the Tribunal by way of M.A. No. 238 of 2012 in Petition No. 132 of 2012 on 18.6.2012 praying, inter-alia, for a direction to the respondent to accept the CAF forms submitted by it. The Tribunal vide order dated 02.7.2012 observed that the respondent should accept the CAF forms which the petitioner intends to deliver not only for the months of July 2011 and August 2011 but also for the subsequent months.

9. The petitioner, in support of its pleadings, submitted evidence by way of affidavit of Mr. Bikram Singh Bhadauria S/O Late Col. K.P.S. Bhadauria. The witness stated that the petitioner company has ensured adequate verification of

each and every customer, as per instructions issued by the respondent and have verified all their subscribers before enrolling them. He further stated that as the CAFs and other supporting documents of proof of identity and proof of address are very voluminous in nature, the petitioner had to make special arrangement for its safe-keeping by hiring the services of warehousing companies and that the petitioner had hired the services of RDWPL for various circles. The witness stated that the services for circle of M.P. were provided to the petitioner by RDWPL under agreement dated 06.06.2007 at pages 352 to 365 of the paper book in Petition No. 48 of 2012 and exhibited the same as Exb. PW-1/3. The petitioner further exhibited the copy of petition before the Court of learned Civil Judge, Bangalore in Petition No. 314 of 2012 and copy of an ad-interim ex-parte order dated 17.8.2011 passed by the learned Additional City Judge, Bangalore City as exhibits PW-1/6 and PW-1/7 respectively.

10. Mr. Navin Chawla, learned counsel appearing for the petitioners submitted that the petitioners had completed the CAF forms before acquiring the subscribers but due to the dispute with RDWPL and injunction order passed by the Civil Court, they could not provide the original CAF forms to the respondent for verification. He further submitted that the scanned copies of the CAF forms for the month of July 2011 were provided to the respondent but the respondent did not find the same acceptable as they were not clear. The petitioner did everything to get the injunction order vacated for which it filed an

⁹ Annexure-P/28 to the rejoinder filed by the petitioner in Petition No. 132 of 2012 at page 377 of the Paper Book

application before the learned City Civil Court. The said City Civil Court posted the case for orders to 12.10.2011. As the order was not passed, the petitioner moved the High Court of Karnataka at Bangalore vide W.P. No.4530 of 2012 on 12.12.2012. The petitioner also filed a Police complaint regarding breach of trust and omission to produce records on 24.9.2011 with Thana In-charge, MP Nagar Police Station, Bhopal. The consequences of non-production of CAFs in terms of the penalties were brought out in the Police complaint. Mr. Chawla submitted that order of the Court was a *force majeure* condition and though it had the CAF forms, the non-submission of the same was beyond the control of the petitioner.

Mr. Chawla submitted that the purpose and intent of the circulars for verification of the subscribers and CAF forms is not to impose penalties and, therefore, in exercise of power under such circulars the respondent must act reasonably and take into account the circumstances faced by the telecom service providers as the justification or reasons for its non-compliance in the few cases, if any. The respondent cannot act mechanically or shut its eyes to the circumstances. He further submitted that prior to month of July 2011, the petitioner had the compliance rate varying from 95% to 97% which went down to 77.4% in July 2011 and was in the range of 40.56% to 52.14% for the months of August 2011 to November 2011. Subsequent to the month of April, 2012 the rate again went up. Similarly, in the case of Reliance Telecom Ltd., the compliance was in the range of 95% to 97%, which went down during these

months.

Mr. Chawla submitted that circular dated 25.6.2007 does not lay down a rigid or mandatory time frame failure to comply with which will necessarily lead to a penalty.

He submitted that both the demand letter and the letter rejecting the appeal of the petitioner are non-reasoned and, therefore, in violation of natural justice. With regard to this submission, Mr. Chawla relied on *Oryx Fisheries Private Limited Vs. Union of India and Others*¹⁰.

He further submitted that since all these CAFs have been submitted now, the respondent can audit the same for non-compliance and impose penalties accordingly for any violation, and in any case the penalties imposed should not be as per the slab system being followed by the respondent and the same should be as per TDSAT order in Petition No. 252 of 2012 dated 12.4.2012.

11. Mr. Kohli, learned counsel appearing for the respondent, submitted that the petitioners unequivocally undertook to fully comply with all the terms & conditions stipulated in the license agreement executed with the respondent

¹⁰ (2010) 13 SCC 427

and it was their responsibility to maintain the records and produce the same on requisition. In this regard, he drew our attention to clause 3 of the Unified Access Service (UAS) license [Exh. RW-1/2] and the various circulars issued in this regard by the respondent.

He further referred to clause 6.1, terms and conditions of the license agreement, and submitted that petitioner could not have entered into an agreement with a third party. Mr. Chawla, however, argued that as per clause 6.1, the licensee can always employ or appoint agents and employees for provision of the service. Mr. Kohli, persisted that the responsibility of the petitioner's agent lies with the petitioner.

Clause 6.1 of the license is as under :-

*“6.1 The LICENSEE shall not, without the prior written consent as described below, of the LICENSOR, either directly or indirectly, assign or transfer this LICENCE in any manner whatsoever to a third party or enter into any agreement for sub-licence and/or partnership relating to any subject matter of the LICENCE to any/ third party either in whole or in part i.e. no sub-leasing/ partnership/third party interest shall be created. **Provided that the LICENSEE can always employ or appoint agents and employees for provision of the service.**” (emphasis supplied)*

Though we agree with Mr. Kohli that ultimately it is the responsibility of Licensees to maintain and produce the records, it does not mean that a Licensee cannot get its functions performed by an outside agency. Clause 6.1 also provides for the appointment of agents for provision of service and, therefore, we do not find that the petitioner violated any provision of the clause by entering into an agreement with RDPWL for safekeeping of the records.

Mr. Kohli relied on *Avishek Goenka Vs. Union of India and Anr.*¹¹ and submitted that the petitioner is required to observe 100% compliance of respondent's instructions regarding subscriber verification. With regard to his submission that the responsibility lies fully with the petitioner, he referred to the Indian Contract and Specific Relief Acts (Pollock & Mulla 14th Edition, 2012 para on 'Vicarious Performance') which is as under :-

"In certain circumstances, the promisor may get his promise performed by getting someone else to do it. The promisor continues to be liable on the contract and not the other person actually doing the work. The promisor will be liable for any breach which may occur. The promisee will be bound to accept performance, if it is in accordance with the terms of the contract. The promisee cannot sue or hold liable such other person performing it, though the latter may be liable to the promisee in tort. Such performance is vicarious performance, and differs from an assignment of contract.

He must perform the promise himself, if such is the intention of the parties. Such intention may be gathered from, (a) the express

¹¹ (2012) 5 SCC 275

terms of the contract; or (b) as an inference from the terms of the contract, its subject matter and surrounding circumstances. In ascertaining the intention of the parties, usage may also be considered. Our useful question to ask would be : did the promisor promise personal performance or did he merely promise a result?”

Mr. Chawla, in support of his submissions that the dispute with RDWPL and the Court injunction due to which it could not provide the original of the CAFs to the respondent was beyond its control, relied on *M/s. Shanti Vijay And Co. And Others Vs. Princess Fatima Fouzia and Others*¹². Para 45 of the judgment, on which Mr. Chawla puts reliance, is as under :-

“45. The second question is perhaps a more difficult one for the appellants to surmount, though the difficulty was sought to be explained away by saying that they had fulfilled their part of the contract and they should not be deprived of the fruits of their bargain merely because of the Court's injunction. It is unfortunate that this aspect of the case was not submitted to the High Court, and we, therefore, have not the assistance of that Court's opinion. We, however, think that the meaning of Section 56 of the Contract Act is clear. The section, insofar as material, runs as follows:

"56. An agreement to do an act impossible in itself void.

A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor

¹² (1979) 4 SCC 602

could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

We may note that the UAS License has condition 12 relating to *force majeure* . Sub condition 12.1 of the same is as under:

"12.1 If at any time, during the continuance of this LICENCE, the performance in whole or in part, by either party, of any obligation under this is prevented or delayed, by reason of war, or hostility, acts of the public enemy, civic commotion, sabotage, Act of State or direction from Statutory Authority, explosion, epidemic, quarantine restriction, strikes and lockouts (as are not limited to the establishments and facilities of the LICENSEE), fire, floods, natural calamities or any act of GOD (hereinafter referred to as EVENT), provided notice of happenings of any such EVENT is given by the affected party to the other, within 21 Calendar days from the date of occurrence thereof , neither party shall, by reason of such event, be entitled to terminate the LICENCE, nor shall either party have any such claims for damages against the other, in respect of such non-performance or delay in performance. Provided SERVICE under the LICENCE shall be resumed as soon as practicable, after such EVENT comes to an end or ceases to exist. The decision of the LICENSOR as to whether the service may be so resumed (and the time frame within which the service may be resumed) or not, shall be final and conclusive."

We may also note that by order of Ld. City Civil & Session Judge, Bangalore dated 17.8.2011 the petitioner herein was restrained from interfering with the peaceful possession of the warehouse by RDWPL. The order passed is as below :-

“Issuance of notice is dispensed with.

Respondent, its agents or anybody else on its behalf is hereby restrained by an order of exparte T.I. from interfering with the Plaintiff’s peaceful possession of the Warehouse where all its materials are placed and the order of T.I. will be in force till next date.”

In view of this injunction order passed by the City Civil Court, Bangalore we agree with the submission of Mr. Chawla that the same operated as a *force majeure* condition making it impossible for the petitioner to comply with the time frame specified by the respondent for submission of CAFs. We may observe that the petitioner made all possible efforts including filing an application before the City Civil Court and Writ Petition in the High Court at Bangalore.

12. Mr. Kohli submitted that the injunction order of the Court only says “warehouse” and not “warehouses”. He argued that the same was applicable

only to Bangalore and not to M.P. He further submitted that the same was with regard to M/s. Reliance Communications Ltd. and since M/s. Reliance Telecom Ltd. had a different agreement with RDWPL, the same was not applicable to them. Mr. Chawla, however, submitted that though RDWPL had filed petition only against Reliance Communication Ltd., as the dispute was with both RCL and RTL, RDWPL took advantage of the interim order of the Court not only to restrain the petitioner from accessing their CAFs and supporting documents in the State of Karnataka but also in M.P. for both the petitioners.

We agree with Mr. Chawla that under the circumstances, it would have been practically impossible for the petitioners to obtain any records from the warehouse of RDPWL. We may note that the petitioner had also filed a police complaint and taken all possible steps to get the CAFs from the warehouse expeditiously.

13. Mr. Kohli submitted that as per the instructions/guidelines dated 30.9.2009 and 02.02.2011, the petitioner was required to maintain the desired CAFs in both physical and electronic form. He submitted that the petitioner could have submitted the scanned copies of the CAFs. He further submitted that the requisite copies of CAFs for the month of July 2011 were to be deposited by 25.7.2011 much prior to the injunction order dated 17.8.2011 passed by the City Civil Court of Bangalore.

Mr. Chawla, however, submitted that as the dispute had already arisen with M/s. RDWPL, they were not able to obtain the CAFs but they had submitted scanned copies of the same for the month of July, 2011. As the same was not found clear by the respondent, they requested for some time.

14. It is true that verification of subscribers and obtaining CAFs is absolutely necessary to ensure national safety and security and the failure of the petitioner to do so would lead to penalties. We observe that the circular dated 25.6.2009 lays down the procedure, the purpose of which is that service providers including the petitioners are complying with the guidelines in this regard. Let us now examine whether there is a strict time frame followed by the parties in conducting the audit in this regard.

The guidelines regarding subscriber verification were issued by DoT vide circular dated 25.6.2007. As per these guidelines, the service providers shall be requested to submit the CAFs by 25th day of the month. Sample should start flowing from service provider within 3 to 4 days. Para 1 (iii) of these guidelines provide as under:-

“The Service Providers shall be requested to submit the CAFs/CEFs/SEFs by 25th day of the month. However, samples should start flowing from Service Providers within 3-4 days from the date of VTM request.”

As per these guidelines, the July 2011 CAFs were required to be submitted by 25.7.2011. However, the CAF audit report in respect of M/s. Reliance Communications Ltd. for the month of July 2011 was provided by the respondent to the petitioner on September 30, 2011 vide e. mail (page 387 of the paper book). Further the date for signing the report jointly was given as 10.10.2011. The e-mail is as under :-

“manoj Khatri

To

“arun johari”

Dear Johari Ji,

Kindly find attached herewith the CAF audit report in respect of M/s. RCL of the month of July’11 for remarks discussion. The date of joint sign is 10.10.2011.

Manoj Kumar Khatri,

ADG-IV

Govt. of India MOC&I,

Department of Telecom,

TERM Cell MP Bhopal

Mob : 9425605441”

On 20.10.2011, the petitioner represented to the Dy. Director General, TERM Cell, M.P., Bhopal for grant of some more time stating that the matter with the agency, with whom their CAFs are stored, is sub-judice. On

21.10.2011, the respondent again sent a mail to the petitioner stating that the deadline of signed CAF Audit Report was 10.10.2011 and the same has not been sent by the petitioner even after 10 days of the same and that if the same is not signed by 4 P.M. of 21.10.2011, it would be presumed that the report has been seen and signed. The petitioner replied the same on the same date stating that they have already taken up their plea with DDG, TERM Cell, M.P. and were advised to meet the Director, TERM Cell, M.P. but could not succeed due to his non-availability. The e. mail of the petitioner is as under :-

“Dear Sir,

This has reference to the trail mail content.

Would like to mention here that on 19/October/2011 we have taken up our plea with DDG TERM Cell MP. We were advised to met the Director TERM Cell MP.

When we tried speaking/Meeting to Director TERM Cell unluckily we could not succeed due to his non availability.

As regard subjected matter our submission is as below :-

936 CAF’s have been put under various remark’s which are due to submission of scan images of the CAF’s given in sample.

As we have already shared with you that our matter with the agency (with whom our CAF’s are stored) is subjudice and is expected to get closed soon after which we will be in position to retrieve the originals of these CAF’s and produce the same for remark discussion’s.

We have filed a complaint against the agency for not releasing our documents held in their possession. A copy of the complaint is already submitted to your good office.

We humbly request you to kindly allow us some more time for closing the matter.

With Warm Regards,

Arun Johari.”

On 08.11.2011, the respondent replied the petitioner's letter dated 20.10.2011 and rejected the request of the petitioner to allow more time to jointly sign the CAF audit report for the month of July, 2011 on the ground that sufficient time has already passed. The petitioners represented vide letters dated 25.11.2011 and 28.11.2011 to the DDG, TERM Cell, M.P. for not treating the 111 CAFs as not submitted and 788 as non-complied and imposition of penalties stating that they have all the CAFs but due to the matter being sub-judice, they were unable to produce the same. They also annexed copies of earlier correspondence mentioning that they have also filed a Police complaint against the agency, and stated that as an evidence that these CAFs are available with them, they have got the screen shot captured from their internal system for which the CAFs are not submitted or the CAF scan image is not clear. These representations of the petitioners dated were disposed of by letters dated 14.12.2011 from DDG, TERM Cell, M.P., Letter to RTL is as under :-

“To

Nodal Officer

M/s Reliance Telecom Ltd

Bhopal M.P.

Sub : Representation regarding imposition of penalty for 497 CAF,s are being considered as missing

Ref: 1. This office letter No.DDG/TERM/MP/PI/10-11/38 dated 17 Nov. 11

2. Your letter No. RTL/Aug11/CDMA dated 28 Nov. 2011

With reference to the penalty notice issued by this office vide letter dated 17 Nov. 11, M/s RTL has represented vide letter dated 28 Nov. 11. This is to inform that the case has been scrutinized thoroughly and found that the Penalty imposition by TERM MP is as per the DoT instructions in this regard.

Therefore the representation vide letter dated 28 Nov. 11 has been rejected and M/s. RTL is intimated to deposit the penalty at the earliest to avoid any inconvenience.

This has the approval of Competent Authority.

Sd/- O.P. Agarwal

ADG (TERM)

TERM Cell, MP”

15. From the foregoing, it can be seen that though the CAFs for the samples selected by the respondent were to be submitted by 25th day of the relevant month, there is no clearly specified date by which the respondent-DoT has to complete the checking/audit and sign joint audit report. This is also borne out from the fact that the report for the month of July, 2011 was submitted by the respondent to the petitioner as late as September 30, 2011.

It is an undisputed fact that the petitioner has submitted the CAFs subsequently after vacation of the interim order and settlement reached with its agent – M/s. RDWPL. DoT has not examined these CAFs submitted by the petitioner for their compliance with the guidelines and imposed penalties assuming the CAFs not produced by the date of signing of joint audit report, which in any case is not rigidly specified, as missing and non-compliant. Mr.Chawla argued that equity treats the importance of such time-limits as being subordinate to the main purpose and relied on Swarnam Ramachandran (Smt) and Another Vs. Aravacode Chakungal Jayapalan¹³ . Hon'ble Supreme Court has observed in para 13 as under :-

“13. Applying the above principles to the facts of the present case, we find that there was no justification in claiming, in the circumstances, to treat time as of the essence. At the outset, referring to the original agreement dated 18-2-1981, there is nothing in the express stipulation between the parties to show that the intention was to make the rights of the parties dependent upon the observance of the time-limits. Prima facie, equity treats the importance of such time-limits as being subordinate to the main purpose of the parties. (See Jamshed Khodaram Irani v. Burjorji Dhunjibhai.)”

We agree with the submission of the learned counsel for the petitioner that there is a difference between substantive compliance and procedure to

¹³ (2004) 8 SCC 689

ensure the same. We can understand the imposition of penalties for substantive non-compliance found after the scrutiny of the CAFs submitted by the petitioner but in our view, imposition of penalties assuming non-compliance and non-supply of CAFs under the circumstances when the petitioner was restrained by an injunction order of the Court is not justified. This is especially so when no rigid date is provided for signing of the joint audit report and the DoT itself takes time in scrutinizing and finalizing these reports.

16. Mr. Chawla further submitted that the respondent-DoT has not taken any step to check the CAFs supplied by the petitioner and as a matter of fact, refused to accept the same and it had to approach the Tribunal and only then these were accepted by the respondent. Mr. Chawla relied on *Avishek Goenka Vs. Union of India and Another*¹⁴ . Para 8 of this is as under :-

“8. We have already noticed that the rapid expansion of the telecom sector and its impact on development, both, equally impose responsibility on the Government of India, the regulatory body and the various stakeholders in the telecom sector to carry out proper verification of the prepaid SIM cards and ensure national safety and security. To achieve this object, it is primarily for the expert bodies and the Government of India to act and discharge their respective functions.”

¹⁴ Writ Petition (C) No. 285 of 2010

Mr. Chawla submitted that it is the duty of the respondent to check the CAFs. We agree with the submission. The purpose of obtaining the CAFs and subscriber verification is to ensure that the details regarding the identity and whereabouts of the subscribers availing the services of the petitioner and the similarly placed service providers should be available in case the need arises. The purpose of monthly checking on sample basis is to ensure that the service providers are complying with this important requirement. The purpose of this checking is definitely not to impose the penalties but the penalty is to be used as a deterrent and a means to ensure compliance. In this case, the petitioner could not supply the CAFs due to a dispute between M/s. RDWPL and the injunction order from the court. In our view, instead of assuming non-compliance with the guidelines, DoT should have checked these CAFs immediately after they were made available and if still found non-compliant, it would have been well within its right to impose the penalties.

Mr. Chawla also submitted that in terms of the judgment of the Tribunal in Cellular Operators Association of India & Ors. Vs. Department of Telecommunications & Anr. (Petition No. 252 of 2011 dated 12.4.2012) any penalty, if it could be imposed, had to be calculated on the principles as it is followed in the Income Tax system i.e. rate of financial penalty to be calculated separately for each slab and the total amount of penalty arrived at.

17. Considering the facts of the case, we allow these petitions and quash the penalties imposed by the respondent-DoT by the impugned demand letters. We, however, make it clear that the respondent-DoT is free to scrutinize the CAFs submitted by the petitioner and shall be free to impose penalties for any non-compliance found. We further make it clear that if any penalties are found imposable after the scrutiny, the same shall be imposed only in accordance with the judgment in Cellular Operators Association of India & Ors. Vs. Department of Telecommunications & Anr. in Petition No. 252 of 2011.

There will be no order as to cost.

.....
(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

rkc

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

Dated July, 2014

Petition No.48 of 2012

M/s Reliance Communications Ltd., Navi Mumbai
Vs.
Union of India

...Petitioner

...Respondent

Petition No.132 of 2012

Reliance Communications Ltd., Navi Mumbai

...Petitioner

Vs.

Union of India, New Delhi

...Respondent

Petition No.133 of 2012

Reliance Telecom Ltd., Mumbai

...Petitioner

Vs.

Union of India, New Delhi

...Respondent

Petition No. 388 of 2012

(With M.A. No. 257 of 2012)

Reliance Communications Ltd.

...Petitioner

Vs.

Union of India

... Respondent

Petition No. 389 of 2012

(With M.A. No. 258 of 2012)

Reliance Telecom Ltd.

...Petitioner

Vs.

Union of India

...Respondent

BEFORE:

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER**

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Ninad Dogra, Advocate

For Respondent : Mr. K.P.S. Kohli, Advocate
Ms. Neha Singh, Advocate
Mr. Prashant Jain, Advocate for
Ms. Maneesha Dhir, Advocate

Judgment

Kuldip Singh:

In this batch of petitions, penalty imposed by the respondent – Union of India for violation of terms & conditions of license agreement with regard to verification of subscribers, has been challenged. Since the questions of law and facts involved are similar, all these petitions are being disposed of by this common judgment.

2. The petitioners - M/s Reliance Communications Ltd. (Petition No. 48 of 2012, 132 of 2012 & 388 of 2012) and M/s. Reliance Telecom Ltd. (Petition No. 133 of 2012 and 389 of 2012) have been granted Unified Access Services License (UASL) under Section 4 of the Indian Telegraph Act, 1885, for M.P. License Service Area.

3. As per clause 41.14 [Part VI] of the UAS License Agreement, licensees are required, inter-alia, to do the following:-

- (i) make a complete list of their subscribers available on their website so that the authorized Intelligence Agencies can obtain the same at any time;
- (ii) Ensure adequate verification of each and every customer before enrolling it as a subscriber;
- (iii) Follow the instructions issued by the licensor in this regard from time to time.

Clause 41.14 of the UAS Licences reads as under :-

“The complete list of subscribers shall be made available by the LICENSEE on their website (having password controlled access), so that authorized Intelligence Agencies are able to obtain the subscriber list at any time, as per their convenience with the help of the password. The list should be updated on regular basis. Hard copy as and when required by security agencies shall also be furnished. The LICENSEE shall ensure adequate verification of each and every customer before enrolling him as a subscriber; instructions issued by the licensor in this regard from time to time shall be scrupulously followed. The SIM Card used in the User terminal shall be registered against each subscriber for his bonafide use. The LICENSEE shall make it clear to the subscriber that the SIM Card used in the user terminal against him is non-transferable and that he alone will be responsible for proper and bonafide personal use of the service.”

On 31.7.2008, the UAS License was amended to incorporate the following clause :-

”The Licensor shall have the right to direct the Licensee to warn, penalize or terminate the franchisee or agent or distributor or servant, after considering any report of conduct or antecedents detrimental to the security of the nation. The decision of the Licensor in this regard shall be final and binding and in any case the Licensee shall bear all liabilities in the matter and keep the Licensor indemnified for all claims, cost, charges or damages in this respect.”

4. Clause 41.14 of the License Agreement is a part of security considerations. The objective of this clause is that the identity as well as address details of any subscriber subscribing to the services of the licensee company should be readily available in case of need. We may note that in case of a fixed phone service, the premises where the phone is installed is well known in contrast to mobile service where the subscriber can be anywhere. It is more so in case of prepaid service for which the phone bill is not required to be issued to the subscriber and the subscriber can avail the services by purchasing prepaid vouchers and charging his account. In case of any need by a security agency, the details of such subscribers must be readily and correctly available. Since the matter may involve the security of the country, the importance of these details cannot be over-emphasized.

5. Department of Telecommunications (DoT) - Union of India has been issuing instructions from time to time for compliance with clause 41.14 of the license. It has also provided for a scheme of financial penalty for violation of terms & conditions of the license agreement in respect of subscriber verification. The Department has also been carrying out the audit of the licensees to ensure their compliance with the instructions issued from time to time. Vide letter dated 01.6.2010 the work relating to imposition of penalty has been decentralized and put on Telecom, Enforcement, Resources and Monitoring (TERM) Cells set up under DOT in various license areas.

Subscribers, while subscribing to the services of a licensee, are required to complete a form which is called as the 'Customer Acquisition Form (CAF)'. The subscribers are also required to submit the proof of identity as well as proof of address, for which certain documents specified by the Department of Telecommunications (DoT) are to be provided. Licensees are also required to follow the guidelines issued in this regard from time to time. To ensure compliance with the instructions in this regard, TERM Cell of the concerned service area conducts monthly audits of the licensees on sample basis. On the total subscriber base of the licensee in that service area, a sample of one percent of the subscribers at random is taken and the licensee is asked to provide copies of the CAF Forms of the subscribers. These copies of CAF forms

are checked for compliance with the instructions and guidelines issued from time to time and in cases of non-compliance, the licensees are given a week's time to discuss the cases and make available the original CAFs. The initial report indicating the findings about compliance/non-compliance is also provided to the licensee. Based on the discussions with the service provider (licensee), the report is finalized and jointly signed by both. Based on this final report, the amounts of penalty are calculated in accordance with the telescopic rate that provide for increasing amounts of penalties for higher percentage of non-compliance. The service provider, if he so desires can make a representation to the Deputy Director General (DDG), TERM whose decision is final.

6. In the present batch of petitions, the dispute pertains to the period starting from July 2011 to March 2012. For these months, the respondent-DoT had imposed penalties on the petitioners with regard to the alleged non-compliance of clause 41.14 with essential requirements of subscriber verification and failure to supply the CAFs. The details of these penalties are given in the table as under:

S.No.	Petition No.	Period	No. of Missing CAFs	No. of cases non compliant	Total rejected	Penalty
1	48/12 RCL vs. UOI	July, 2011	157	806	963	4,81,50,000
		August,2011	2521	21	2542	12,71,00,000
					Total	17,52,50,000
2	132/12 RCL vs. UOI	September, 2011	2525	25	2550	12,75,00,000
		October, 2011	2371	26	2397	11,98,50,000
		November, 2011	1963	112	2075	10,37,50,000
					Total	35,11,00,000
3.	133/12 RTL vs. UOI	August, 2011	565	214	779	77,90,000
		September, 2011	938	155	1093	1,09,30,000
		October, 2011	855	77	932	93,20,000
		November, 2011	1394	179	1573	7,86,50,000
					Total	10,66,90,000

The petitioners have also impugned letters of the respondent dated 31.5.2012 vide which the CAFs for the months of December, 2011, and, January to March, 2012, were not accepted as the same were not submitted within the time limit [Petitions No. 388/12 RCL vs. UOI and 389/12 RTL vs. UOI].

7. It is the contention of the petitioners that they could not produce the relevant Customer Acquisition Forms and related documents like proof of Identity and Address of the customers, for the verification by the TERM Cell as these had been stored in a warehouse and some dispute had arisen between the petitioners and the warehouse owner, namely M/s. Records & Data Warehousing Private Ltd. (RDWPL), who had obtained an ad-interim ex-parte restrain order against the petitioners from accessing these documents.

The petitioners herein had entered into an agreement with M/s. Records & Data Warehousing Private Ltd. (RDWPL) on 28.10.2007 for safe keeping of Customer Application Forms and supporting documents of proof of identity and proof of address of its subscribers. The agreement is annexed with the petition¹⁵[unless otherwise mentioned, the facts are taken from petition no. 48 of 2012]

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¹⁵ Annexure P-7 at pages 176 to 192 of the Paper Book in Petition No. 48 of 2012

Certain disputes arose between the petitioners and RDWPL, who had filed a Petition under Section 9 of the Arbitration & Conciliation Act, 1996 against the petitioner [RCL, hereinafter referred as the petitioner] before the Court of Learned Civil Judge, Bangalore being Petition No. 314 of 2011. An ad-interim restrain order was passed in the petition restraining the petitioner from interfering with RDWPL in taking peaceful possession of the warehouse on 17.8.2011. The petitioner filed its objection to the petition filed by RDWPL. The same were heard and the order reserved on 22.10.2011.

In the meanwhile, as the petitioner was unable to supply all the CAFs and supporting documents to the TERM Cell of the respondent, it made representations to the respondent to extend the time for submission of the documents on the ground of the restrain order and for reasons beyond the control of the petitioner. The respondent, however, imposed penalties vide their impugned demand notices dated 09.11.2011 and 17.11.2011. Aggrieved by the action of the respondent, present petition was filed on 24.01.2012. The Tribunal vide its order dated 08.02.2012, passed an order of injunction restraining the respondent from giving any effect to the impugned orders. It also directed that the petitioner must produce all the relevant data before the concerned TERM Cell within two weeks from the retrieval thereof. The operative part of the order is as under :

“Subject to the condition that in the event the order of learned Civil Court dated 17.8.2011 is modified, the Petitioner must produce all the relevant data before the concerned Term Cell within two weeks from the retrieval thereof, we, for the aforementioned reasons pass an order of injunction restraining the Respondents from giving any effect to the impugned orders dated 9.11.2011 and 17.11.2011.”

8. Vide letter¹⁶ dated 14.5.2012, the petitioner submitted the CAF Forms to the respondent. CAF forms were further submitted vide letters dated 15.5.2012 and 16.5.2012. The respondent, however, asked the petitioner to take back the CAFs for the months other than July 2011 and August 2011 stating that as per the TDSAT order dated 08.02.2012 in Petition No. 48 of 2012, the CAF forms for these months only have been directed to be deposited. The petitioner again approached the Tribunal by way of M.A. No. 238 of 2012 in Petition No. 132 of 2012 on 18.6.2012 praying, inter-alia, for a direction to the respondent to accept the CAF forms submitted by it. The Tribunal vide order dated 02.7.2012 observed that the respondent should accept the CAF forms which the petitioner intends to deliver not only for the months of July 2011 and August 2011 but also for the subsequent months.

9. The petitioner, in support of its pleadings, submitted evidence by way of affidavit of Mr. Bikram Singh Bhadauria S/O Late Col. K.P.S. Bhadauria. The witness stated that the petitioner company has ensured adequate verification of

each and every customer, as per instructions issued by the respondent and have verified all their subscribers before enrolling them. He further stated that as the CAFs and other supporting documents of proof of identity and proof of address are very voluminous in nature, the petitioner had to make special arrangement for its safe-keeping by hiring the services of warehousing companies and that the petitioner had hired the services of RDWPL for various circles. The witness stated that the services for circle of M.P. were provided to the petitioner by RDWPL under agreement dated 06.06.2007 at pages 352 to 365 of the paper book in Petition No. 48 of 2012 and exhibited the same as Exb. PW-1/3. The petitioner further exhibited the copy of petition before the Court of learned Civil Judge, Bangalore in Petition No. 314 of 2012 and copy of an ad-interim ex-parte order dated 17.8.2011 passed by the learned Additional City Judge, Bangalore City as exhibits PW-1/6 and PW-1/7 respectively.

10. Mr. Navin Chawla, learned counsel appearing for the petitioners submitted that the petitioners had completed the CAF forms before acquiring the subscribers but due to the dispute with RDWPL and injunction order passed by the Civil Court, they could not provide the original CAF forms to the respondent for verification. He further submitted that the scanned copies of the CAF forms for the month of July 2011 were provided to the respondent but the respondent did not find the same acceptable as they were not clear. The petitioner did everything to get the injunction order vacated for which it filed an

¹⁶ Annexure-P/28 to the rejoinder filed by the petitioner in Petition No. 132 of 2012 at page 377 of the Paper Book

application before the learned City Civil Court. The said City Civil Court posted the case for orders to 12.10.2011. As the order was not passed, the petitioner moved the High Court of Karnataka at Bangalore vide W.P. No.4530 of 2012 on 12.12.2012. The petitioner also filed a Police complaint regarding breach of trust and omission to produce records on 24.9.2011 with Thana In-charge, MP Nagar Police Station, Bhopal. The consequences of non-production of CAFs in terms of the penalties were brought out in the Police complaint. Mr. Chawla submitted that order of the Court was a *force majeure* condition and though it had the CAF forms, the non-submission of the same was beyond the control of the petitioner.

Mr. Chawla submitted that the purpose and intent of the circulars for verification of the subscribers and CAF forms is not to impose penalties and, therefore, in exercise of power under such circulars the respondent must act reasonably and take into account the circumstances faced by the telecom service providers as the justification or reasons for its non-compliance in the few cases, if any. The respondent cannot act mechanically or shut its eyes to the circumstances. He further submitted that prior to month of July 2011, the petitioner had the compliance rate varying from 95% to 97% which went down to 77.4% in July 2011 and was in the range of 40.56% to 52.14% for the months of August 2011 to November 2011. Subsequent to the month of April, 2012 the rate again went up. Similarly, in the case of Reliance Telecom Ltd., the compliance was in the range of 95% to 97%, which went down during these

months.

Mr. Chawla submitted that circular dated 25.6.2007 does not lay down a rigid or mandatory time frame failure to comply with which will necessarily lead to a penalty.

He submitted that both the demand letter and the letter rejecting the appeal of the petitioner are non-reasoned and, therefore, in violation of natural justice. With regard to this submission, Mr. Chawla relied on *Oryx Fisheries Private Limited Vs. Union of India and Others*¹⁷.

He further submitted that since all these CAFs have been submitted now, the respondent can audit the same for non-compliance and impose penalties accordingly for any violation, and in any case the penalties imposed should not be as per the slab system being followed by the respondent and the same should be as per TDSAT order in Petition No. 252 of 2012 dated 12.4.2012.

11. Mr. Kohli, learned counsel appearing for the respondent, submitted that the petitioners unequivocally undertook to fully comply with all the terms & conditions stipulated in the license agreement executed with the respondent

¹⁷ (2010) 13 SCC 427

and it was their responsibility to maintain the records and produce the same on requisition. In this regard, he drew our attention to clause 3 of the Unified Access Service (UAS) license [Exh. RW-1/2] and the various circulars issued in this regard by the respondent.

He further referred to clause 6.1, terms and conditions of the license agreement, and submitted that petitioner could not have entered into an agreement with a third party. Mr. Chawla, however, argued that as per clause 6.1, the licensee can always employ or appoint agents and employees for provision of the service. Mr. Kohli, persisted that the responsibility of the petitioner's agent lies with the petitioner.

Clause 6.1 of the license is as under :-

*“6.1 The LICENSEE shall not, without the prior written consent as described below, of the LICENSOR, either directly or indirectly, assign or transfer this LICENCE in any manner whatsoever to a third party or enter into any agreement for sub-licence and/or partnership relating to any subject matter of the LICENCE to any/ third party either in whole or in part i.e. no sub-leasing/ partnership/third party interest shall be created. **Provided that the LICENSEE can always employ or appoint agents and employees for provision of the service.**” (emphasis supplied)*

Though we agree with Mr. Kohli that ultimately it is the responsibility of Licensees to maintain and produce the records, it does not mean that a Licensee cannot get its functions performed by an outside agency. Clause 6.1 also provides for the appointment of agents for provision of service and, therefore, we do not find that the petitioner violated any provision of the clause by entering into an agreement with RDPWL for safekeeping of the records.

Mr. Kohli relied on *Avishek Goenka Vs. Union of India and Anr.*¹⁸ and submitted that the petitioner is required to observe 100% compliance of respondent's instructions regarding subscriber verification. With regard to his submission that the responsibility lies fully with the petitioner, he referred to the Indian Contract and Specific Relief Acts (Pollock & Mulla 14th Edition, 2012 para on 'Vicarious Performance') which is as under :-

"In certain circumstances, the promisor may get his promise performed by getting someone else to do it. The promisor continues to be liable on the contract and not the other person actually doing the work. The promisor will be liable for any breach which may occur. The promisee will be bound to accept performance, if it is in accordance with the terms of the contract. The promisee cannot sue or hold liable such other person performing it, though the latter may be liable to the promisee in tort. Such performance is vicarious performance, and differs from an assignment of contract.

He must perform the promise himself, if such is the intention of the parties. Such intention may be gathered from, (a) the express

¹⁸ (2012) 5 SCC 275

terms of the contract; or (b) as an inference from the terms of the contract, its subject matter and surrounding circumstances. In ascertaining the intention of the parties, usage may also be considered. Our useful question to ask would be : did the promisor promise personal performance or did he merely promise a result?”

Mr. Chawla, in support of his submissions that the dispute with RDWPL and the Court injunction due to which it could not provide the original of the CAFs to the respondent was beyond its control, relied on M/s. Shanti Vijay And Co. And Others Vs. Princess Fatima Fouzia and Others¹⁹. Para 45 of the judgment, on which Mr. Chawla puts reliance, is as under :-

“45. The second question is perhaps a more difficult one for the appellants to surmount, though the difficulty was sought to be explained away by saying that they had fulfilled their part of the contract and they should not be deprived of the fruits of their bargain merely because of the Court's injunction. It is unfortunate that this aspect of the case was not submitted to the High Court, and we, therefore, have not the assistance of that Court's opinion. We, however, think that the meaning of Section 56 of the Contract Act is clear. The section, insofar as material, runs as follows:

"56. An agreement to do an act impossible in itself void.

A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor

¹⁹ (1979) 4 SCC 602

could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

We may note that the UAS License has condition 12 relating to *force majeure* . Sub condition 12.1 of the same is as under:

"12.1 If at any time, during the continuance of this LICENCE, the performance in whole or in part, by either party, of any obligation under this is prevented or delayed, by reason of war, or hostility, acts of the public enemy, civic commotion, sabotage, Act of State or direction from Statutory Authority, explosion, epidemic, quarantine restriction, strikes and lockouts (as are not limited to the establishments and facilities of the LICENSEE), fire, floods, natural calamities or any act of GOD (hereinafter referred to as EVENT), provided notice of happenings of any such EVENT is given by the affected party to the other, within 21 Calendar days from the date of occurrence thereof , neither party shall, by reason of such event, be entitled to terminate the LICENCE, nor shall either party have any such claims for damages against the other, in respect of such non-performance or delay in performance. Provided SERVICE under the LICENCE shall be resumed as soon as practicable, after such EVENT comes to an end or ceases to exist. The decision of the LICENSOR as to whether the service may be so resumed (and the time frame within which the service may be resumed) or not, shall be final and conclusive."

We may also note that by order of Ld. City Civil & Session Judge, Bangalore dated 17.8.2011 the petitioner herein was restrained from interfering with the peaceful possession of the warehouse by RDWPL. The order passed is as below :-

“Issuance of notice is dispensed with.

Respondent, its agents or anybody else on its behalf is hereby restrained by an order of exparte T.I. from interfering with the Plaintiff’s peaceful possession of the Warehouse where all its materials are placed and the order of T.I. will be in force till next date.”

In view of this injunction order passed by the City Civil Court, Bangalore we agree with the submission of Mr. Chawla that the same operated as a *force majeure* condition making it impossible for the petitioner to comply with the time frame specified by the respondent for submission of CAFs. We may observe that the petitioner made all possible efforts including filing an application before the City Civil Court and Writ Petition in the High Court at Bangalore.

12. Mr. Kohli submitted that the injunction order of the Court only says “warehouse” and not “warehouses”. He argued that the same was applicable

only to Bangalore and not to M.P. He further submitted that the same was with regard to M/s. Reliance Communications Ltd. and since M/s. Reliance Telecom Ltd. had a different agreement with RDWPL, the same was not applicable to them. Mr. Chawla, however, submitted that though RDWPL had filed petition only against Reliance Communication Ltd., as the dispute was with both RCL and RTL, RDWPL took advantage of the interim order of the Court not only to restrain the petitioner from accessing their CAFs and supporting documents in the State of Karnataka but also in M.P. for both the petitioners.

We agree with Mr. Chawla that under the circumstances, it would have been practically impossible for the petitioners to obtain any records from the warehouse of RDPWL. We may note that the petitioner had also filed a police complaint and taken all possible steps to get the CAFs from the warehouse expeditiously.

13. Mr. Kohli submitted that as per the instructions/guidelines dated 30.9.2009 and 02.02.2011, the petitioner was required to maintain the desired CAFs in both physical and electronic form. He submitted that the petitioner could have submitted the scanned copies of the CAFs. He further submitted that the requisite copies of CAFs for the month of July 2011 were to be deposited by 25.7.2011 much prior to the injunction order dated 17.8.2011 passed by the City Civil Court of Bangalore.

Mr. Chawla, however, submitted that as the dispute had already arisen with M/s. RDWPL, they were not able to obtain the CAFs but they had submitted scanned copies of the same for the month of July, 2011. As the same was not found clear by the respondent, they requested for some time.

14. It is true that verification of subscribers and obtaining CAFs is absolutely necessary to ensure national safety and security and the failure of the petitioner to do so would lead to penalties. We observe that the circular dated 25.6.2009 lays down the procedure, the purpose of which is that service providers including the petitioners are complying with the guidelines in this regard. Let us now examine whether there is a strict time frame followed by the parties in conducting the audit in this regard.

The guidelines regarding subscriber verification were issued by DoT vide circular dated 25.6.2007. As per these guidelines, the service providers shall be requested to submit the CAFs by 25th day of the month. Sample should start flowing from service provider within 3 to 4 days. Para 1 (iii) of these guidelines provide as under:-

“The Service Providers shall be requested to submit the CAFs/CEFs/SEFs by 25th day of the month. However, samples should start flowing from Service Providers within 3-4 days from the date of VTM request.”

As per these guidelines, the July 2011 CAFs were required to be submitted by 25.7.2011. However, the CAF audit report in respect of M/s. Reliance Communications Ltd. for the month of July 2011 was provided by the respondent to the petitioner on September 30, 2011 vide e. mail (page 387 of the paper book). Further the date for signing the report jointly was given as 10.10.2011. The e-mail is as under :-

“manoj Khatri

To

“arun johari”

Dear Johari Ji,

Kindly find attached herewith the CAF audit report in respect of M/s. RCL of the month of July’11 for remarks discussion. The date of joint sign is 10.10.2011.

Manoj Kumar Khatri,

ADG-IV

Govt. of India MOC&I,

Department of Telecom,

TERM Cell MP Bhopal

Mob : 9425605441”

On 20.10.2011, the petitioner represented to the Dy. Director General, TERM Cell, M.P., Bhopal for grant of some more time stating that the matter with the agency, with whom their CAFs are stored, is sub-judice. On

21.10.2011, the respondent again sent a mail to the petitioner stating that the deadline of signed CAF Audit Report was 10.10.2011 and the same has not been sent by the petitioner even after 10 days of the same and that if the same is not signed by 4 P.M. of 21.10.2011, it would be presumed that the report has been seen and signed. The petitioner replied the same on the same date stating that they have already taken up their plea with DDG, TERM Cell, M.P. and were advised to meet the Director, TERM Cell, M.P. but could not succeed due to his non-availability. The e. mail of the petitioner is as under :-

“Dear Sir,

This has reference to the trail mail content.

Would like to mention here that on 19/October/2011 we have taken up our plea with DDG TERM Cell MP. We were advised to met the Director TERM Cell MP.

When we tried speaking/Meeting to Director TERM Cell unluckily we could not succeed due to his non availability.

As regard subjected matter our submission is as below :-

936 CAF’s have been put under various remark’s which are due to submission of scan images of the CAF’s given in sample.

As we have already shared with you that our matter with the agency (with whom our CAF’s are stored) is subjudice and is expected to get closed soon after which we will be in position to retrieve the originals of these CAF’s and produce the same for remark discussion’s.

We have filed a complaint against the agency for not releasing our documents held in their possession. A copy of the complaint is already submitted to your good office.

We humbly request you to kindly allow us some more time for closing the matter.

With Warm Regards,

Arun Johari.”

On 08.11.2011, the respondent replied the petitioner's letter dated 20.10.2011 and rejected the request of the petitioner to allow more time to jointly sign the CAF audit report for the month of July, 2011 on the ground that sufficient time has already passed. The petitioners represented vide letters dated 25.11.2011 and 28.11.2011 to the DDG, TERM Cell, M.P. for not treating the 111 CAFs as not submitted and 788 as non-complied and imposition of penalties stating that they have all the CAFs but due to the matter being sub-judice, they were unable to produce the same. They also annexed copies of earlier correspondence mentioning that they have also filed a Police complaint against the agency, and stated that as an evidence that these CAFs are available with them, they have got the screen shot captured from their internal system for which the CAFs are not submitted or the CAF scan image is not clear. These representations of the petitioners dated were disposed of by letters dated 14.12.2011 from DDG, TERM Cell, M.P., Letter to RTL is as under :-

“To

Nodal Officer

M/s Reliance Telecom Ltd

Bhopal M.P.

Sub : Representation regarding imposition of penalty for 497 CAF,s are being considered as missing

Ref: 1. This office letter No.DDG/TERM/MP/PI/10-11/38 dated 17 Nov. 11

2. Your letter No. RTL/Aug11/CDMA dated 28 Nov. 2011

With reference to the penalty notice issued by this office vide letter dated 17 Nov. 11, M/s RTL has represented vide letter dated 28 Nov. 11. This is to inform that the case has been scrutinized thoroughly and found that the Penalty imposition by TERM MP is as per the DoT instructions in this regard.

Therefore the representation vide letter dated 28 Nov. 11 has been rejected and M/s. RTL is intimated to deposit the penalty at the earliest to avoid any inconvenience.

This has the approval of Competent Authority.

Sd/- O.P. Agarwal

ADG (TERM)

TERM Cell, MP”

15. From the foregoing, it can be seen that though the CAFs for the samples selected by the respondent were to be submitted by 25th day of the relevant month, there is no clearly specified date by which the respondent-DoT has to complete the checking/audit and sign joint audit report. This is also borne out from the fact that the report for the month of July, 2011 was submitted by the respondent to the petitioner as late as September 30, 2011.

It is an undisputed fact that the petitioner has submitted the CAFs subsequently after vacation of the interim order and settlement reached with its agent – M/s. RDWPL. DoT has not examined these CAFs submitted by the petitioner for their compliance with the guidelines and imposed penalties assuming the CAFs not produced by the date of signing of joint audit report, which in any case is not rigidly specified, as missing and non-compliant. Mr.Chawla argued that equity treats the importance of such time-limits as being subordinate to the main purpose and relied on Swarnam Ramachandran (Smt) and Another Vs. Aravacode Chakungal Jayapalan²⁰ . Hon'ble Supreme Court has observed in para 13 as under :-

“13. Applying the above principles to the facts of the present case, we find that there was no justification in claiming, in the circumstances, to treat time as of the essence. At the outset, referring to the original agreement dated 18-2-1981, there is nothing in the express stipulation between the parties to show that the intention was to make the rights of the parties dependent upon the observance of the time-limits. Prima facie, equity treats the importance of such time-limits as being subordinate to the main purpose of the parties. (See Jamshed Khodaram Irani v. Burjorji Dhunjibhai.)”

We agree with the submission of the learned counsel for the petitioner that there is a difference between substantive compliance and procedure to

²⁰ (2004) 8 SCC 689

ensure the same. We can understand the imposition of penalties for substantive non-compliance found after the scrutiny of the CAFs submitted by the petitioner but in our view, imposition of penalties assuming non-compliance and non-supply of CAFs under the circumstances when the petitioner was restrained by an injunction order of the Court is not justified. This is especially so when no rigid date is provided for signing of the joint audit report and the DoT itself takes time in scrutinizing and finalizing these reports.

16. Mr. Chawla further submitted that the respondent-DoT has not taken any step to check the CAFs supplied by the petitioner and as a matter of fact, refused to accept the same and it had to approach the Tribunal and only then these were accepted by the respondent. Mr. Chawla relied on *Avishek Goenka Vs. Union of India and Another*²¹ . Para 8 of this is as under :-

“8. We have already noticed that the rapid expansion of the telecom sector and its impact on development, both, equally impose responsibility on the Government of India, the regulatory body and the various stakeholders in the telecom sector to carry out proper verification of the prepaid SIM cards and ensure national safety and security. To achieve this object, it is primarily for the expert bodies and the Government of India to act and discharge their respective functions.”

²¹ Writ Petition (C) No. 285 of 2010

Mr. Chawla submitted that it is the duty of the respondent to check the CAFs. We agree with the submission. The purpose of obtaining the CAFs and subscriber verification is to ensure that the details regarding the identity and whereabouts of the subscribers availing the services of the petitioner and the similarly placed service providers should be available in case the need arises. The purpose of monthly checking on sample basis is to ensure that the service providers are complying with this important requirement. The purpose of this checking is definitely not to impose the penalties but the penalty is to be used as a deterrent and a means to ensure compliance. In this case, the petitioner could not supply the CAFs due to a dispute between M/s. RDWPL and the injunction order from the court. In our view, instead of assuming non-compliance with the guidelines, DoT should have checked these CAFs immediately after they were made available and if still found non-compliant, it would have been well within its right to impose the penalties.

Mr. Chawla also submitted that in terms of the judgment of the Tribunal in Cellular Operators Association of India & Ors. Vs. Department of Telecommunications & Anr. (Petition No. 252 of 2011 dated 12.4.2012) any penalty, if it could be imposed, had to be calculated on the principles as it is followed in the Income Tax system i.e. rate of financial penalty to be calculated separately for each slab and the total amount of penalty arrived at.

17. Considering the facts of the case, we allow these petitions and quash the penalties imposed by the respondent-DoT by the impugned demand letters. We, however, make it clear that the respondent-DoT is free to scrutinize the CAFs submitted by the petitioner and shall be free to impose penalties for any non-compliance found. We further make it clear that if any penalties are found imposable after the scrutiny, the same shall be imposed only in accordance with the judgment in Cellular Operators Association of India & Ors. Vs. Department of Telecommunications & Anr. in Petition No. 252 of 2011.

There will be no order as to cost.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

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