

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

Dated 29th October, 2014

**Petition No.233 of 2013
(M.A.No.162 of 2013)**

M/s Tata Communications Ltd.	...Petitioner
Vs.	
Union of India & Anr. Respondents

BEFORE:

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

For Petitioner : Mr.U.Hazarika,Sr.Advocate
Ms.Dharitry Phookan,Advocate

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

JUDGMENT

Kuldip Singh: A letter dated 7.3.2013 issued by the respondent to the petitioner asking it to come for a hearing on the basis of a Show Cause Notice dated 30.6.2010 is under challenge in the present petition.

2. The petitioner is a company incorporated under the Indian Companies Act, 1956. It has been permitted to operate as International Long Distance Operator (ILDO), under section 4 of the Indian Telegraph Act, 1885, by virtue of a license agreement dated 5.2.2004.

3. On 1.12.2005, the petitioner entered into a Full Channel Services (FCS) agreement with M/s Singapore Telecommunications (STL). Under this agreement, the parties were to carry out their operations within their respective territorial jurisdiction in which they hold license. We may note here that an International Private Leased Line between two countries, say Country "A" and Country "B", involves two half circuits, one providing bandwidth from Country "A" to "B" and the other from Country "B" to "A". The FCS agreement permits a service provider, such as the petitioner, to provide both the half circuits to a customer in its jurisdiction (Licensed service area). The customer gets a single interface as it has to deal with only one service provider. The customer gets a single bill and the service provider in turn pays to the distant end service provider for its half circuit.

4. On 30.06.2010, the respondent issued a Show Cause Notice to the petitioner, inter-alia, alleging that it had allowed STL to provide IPLC (International Private Leased Line Circuit) directly to the customers in India and obtain payments from them from their account operated in Singapore.

5. On 11.11.2011, the respondent imposed a penalty of Rs. 50 crores upon the petitioner following which, on 30.11.2011, the petitioner filed Petition no. 449 of 2011 before the Tribunal praying,

inter-alia, for quashing and setting aside the demand notice dated 11.11.2011 and show cause notice dated 30.06.2010. The Petition was allowed by the Tribunal vide judgment dated 28.9.2012 observing that the interest of justice would be sub-served if the petitioners are allowed an opportunity of being heard.

6. On 23.10.2012, the respondent wrote to the petitioner that in terms of the order of this Tribunal, it has been decided to give it an opportunity of hearing and on 23.11.2012, respondent no. 2 asked the petitioner to make a presentation before the Committee in DoT on 27.11.2012. On 30.11.2012, the petitioner replied to the respondent's letter dated 23.11.2012 stating that the SCN along with demand notice has been set aside by the Tribunal and that in case the respondent seeks to initiate fresh action, it is required to issue fresh SCN to the petitioner. On 7.3.2013, the impugned notice was issued to the petitioner.

7. On 13.03.2013, the petitioner filed a writ petition No. WP(C) 1699 of 2013 before Hon'ble Delhi High Court¹ and on 18.3.2013, Hon'ble Delhi High Court passed an interim order directing the respondent not to pass any final order as far as petitioner is concerned. Accordingly, the petitioner attended the hearing and gave a presentation to the DoT committee. On 16.7.2013, since the tribunal

¹ The tribunal was not functioning at that time.

had started functioning, Hon'ble Delhi High Court directed the parties to appear before the Registrar of the Tribunal and hence, the present petition.

8. Mr. U. Hazarika, learned senior advocate, appearing for the petitioner, submitted as under :

- (a) The impugned order dated 7.3.2013 proceeds on the basis of show cause notice dated 30.6.2010 which is illegal, void, *non-est*, as the same was set aside by the Tribunal by its judgment dated 28.9.2012. The petitioner in that petition had specifically prayed for quashing and setting aside the notice dated 30.6.2010 and order dated 11.11.2011 imposing the penalty of Rs. 50 crores.
- (b) The show cause notice of 30.06.2010 has been found defective, non-compliant with the principles of natural justice as particulars have not been specified and documents relied upon were not annexed.
- (c) Reliance on the show cause notice of 30.06.2010, which has been categorically held by this Tribunal to be vitiated for non-compliance of the principles of natural justice, is per se illegal and void.

- (d) The respondent, if it chooses to initiate fresh proceedings, would have to issue a fresh show cause notice as the primary assumption/presumption in the said show cause notice was the alleged illegality of the FCS/OSS agreement. This issue of illegality of FCS/OSS agreement has been categorically rejected and negated by this Tribunal in its judgment of 28th September 2012 where it has rendered findings regarding the validity of the FCS/OSS agreement.
- (e) Even the impugned communication of 7th March 2013 is violative of the principles of natural justice for two reasons; firstly, by relying upon a show cause notice dated 30.06.2010 which have been set aside by this Tribunal on grounds of non-compliance with the principles of natural justice; secondly, even the said notice is vague and does not furnish any particulars and gives reference to letters/ references without specifying or providing the same.

9. Mr. K.P.S. Kohli, learned counsel appearing for the respondents submitted that judgment of this Tribunal dated 28.9.2012 was in respect of two petitioners namely the present petitioner (Petition No. 449 of 2011) and M/s Bharti Airtel Ltd. (Petition No. 444 of 2011).

He submitted that no such stand has been taken by M/s Bharti Airtel in terms of the common judgment in Petition No. 449 of 2011 and Petition no. 444 of 2011 and was granted hearing on 10.4.2013. He further submitted that the said contention of the petitioner is false and frivolous and is a ploy to delay the decision on the SCN dated 30.06.2010.

He further submitted that it is settled law that judgment has to be read as a whole and the decision of the court is what is actually decided in the judgment. In regard to this submission, he relied on the judgment of the Supreme Court in Goan Real Estate and construction Limited and Anr Vs. Union of India and Ors.² He submitted that as per the judgment of the Tribunal dated 28.9.2012, the petitioners therein were to be allowed an opportunity of being heard and the petitioner is misconstruing the said judgment to wrongly claim that the SCN dated 30.06.2010 issued to the petitioner has been set aside.

10. We may note the operative part of the judgment of the Tribunal in Petition Nos. 444 and 449 of 2011 as under :

"45. In a case of this nature, therefore, we are of the opinion that the Petitioner has been prejudiced by reason of non-compliance of the principles of natural justice.

² (2010) 5 SCC 388

46. For the reasons aforementioned, we are of the opinion that interest of justice would be sub-served if the Petitioners are allowed an opportunity of being heard.

47. These Petitions are allowed.

The impugned orders are set aside with the aforementioned observations.

However, in the facts and circumstances of the case, there shall be no order as to costs."

11. Though these petitions were allowed and the impugned orders were set aside for the reasons of non-compliance of principles of natural justice, the Tribunal also found that the sole surviving question in the matter was whether action on the part of STL in raising the single invoice on Indian end customers would vitiate the entire agreement and / or by itself would be sufficient to impose penalty?

The relevant paragraphs of the judgment are as under :

"24. Although a great deal of argument has been advanced as to the legal character of the said recommendations, nothing has been pointed out before us to show that the said ITU recommendations are contrary to or inconsistent with any provision of any Parliamentary Act or the Conditions of License.

The OSS/FCS agreement entered into by and between the Petitioners and S-Tel were placed before us on the first date of hearing. Respondents themselves have annexed the said agreements as a part of their Replies.

25. Mr. Kohli, when asked, did not say that the said agreements are in any way illegal being contrary to any statute or public policy.

It is one thing to say that such agreements were drawn in the form as recommended by ITU but it is another thing to say that only because such forms were adopted, the agreements become illegal. The agreements, there cannot

be any doubt or dispute, must conform to the municipal laws and the licenses granted thereunder.

26. Mr. Kohli has taken great pains before us to show that there had been violations of certain provisions of the conditions of license. It has, however, not been shown that the agreements per se were violative of any statute or conditions of license.

27. The sole surviving question, therefore, is as to whether by reason of the action on the part of the STL in raising a single invoice on an Indian end customer would vitiate the entire agreement and/or by itself would be sufficient to impose penalty?" (emphasis supplied)

We agree with Mr. Kohli that to interpret the judgment, it should be read as a whole. Reading the above paras along with the final direction of the tribunal, we are of the view that when an opportunity of hearing is given to the petitioners in terms of the judgment, it has to be in regard to the issue found subsisting in the same.

13. We may note here sub-clause (a) of the prayer made by the present petitioner in Petition No. 449/2011, which is as under:

"(a) That the notice dated 30.06.2010 and the impugned notice/order dated 11.11.2011 imposing the penalty of Rs. 50 crore be quashed and set aside."

We may also note para 15 of the demand letter dated 11.11.2011 vide which the penalty was imposed on the petitioner as under :

"15. Whereas, M/s Tata Communications Limited has violated the clause no. 2.2, 9.1, 11.1, 19.2, 23.23, and 23.26, of the ILD

license. Accordingly, vide this office letter no. 16-05/2010-CS-III dated 30.06.2010, M/s Tata Communications Limited was issued a show cause notice as to why action should not be taken against the company including imposition of penalty under clause 13.3(ii) for violation of terms and conditions of ILD service license. M/s Tata Communications Limited submitted its reply vide letter dated 03.08.2010. The summary of reply given by M/s TCL is as below :"

From the above it can be seen that the SCN dated 30.06.2010 was adjudicated upon in this penalty order and therefore, SCN got merged in the penalty order.

The Tribunal in the judgment dated 28.9.2012 had quashed the impugned orders. Keeping the prayer clause of the petition and the penalty order dated 11.11.2011 in view, we find that in terms of the judgment of the tribunal, the SCN dated 30.6.2010 no longer survives.

We may further note para 3 of the letter dated 7.3.2013, impugned in the present petition, as under :

"3. Accordingly, it has been decided to give an opportunity of hearing to M/s Tata Communications Ltd. on the basis of earlier show cause notice dated 30.6.2010 and other letters/reference issued regarding the said violation of ILD license." (emphasis supplied).

Though the above para refers to the SCN dated 30.06.2010 and some other letters/references, no such specific reference to the letters/reference was made in the SCN dated 30.06.2010 and no such letters/reference have been supplied to the petitioner. In the absence

of these letters / references, we doubt that any opportunity given to the petitioner for hearing and presenting its views would be meaningful.

14. In the aforesaid facts and circumstances of the case, we find that the respondents cannot rely on SCN dated 30.6.2010 and therefore, we quash and set aside the impugned notice dated 7.3.2013.

We, however, make it clear that the respondent shall be free to issue fresh SCN in terms of the Tribunal's judgment dated 28.9.2012 along with all the letters/references and material on which the respondent wishes to rely. Further, the respondent may not pass final orders before giving an opportunity of hearing to the petitioner.

The petition is allowed in above terms and there shall be no order as to costs.

.....
(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

/NC/