

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

Dated 11th August, 2015

Petition No. 190 of 2014

M/s Bharti Airtel Ltd.

... Petitioner

Vs.

Bharat Sanchar Nigam Ltd. and Anr.

... Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON

HON'BLE MR. KULDIP SINGH, MEMBER

HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER

For Petitioner : Mr. Gopal Jain, Sr. Advocate,
Ms. Chinmayee Chandra, Advocate

For Respondent : Ms. Maneesha Dhir, Advocate
Mr. Abhishek Kumar, Advocate
Mr. Prashant Jain, Advocate
Ms. Neha Singh, Advocate

ORDER

By Aftab Alam, Chairperson – The Petitioner, Bharti Airtel Limited (Bharti, hereinafter) has filed this petition challenging the demand of Rs.9,09,88,497/- by the respondent, Bharat Sanchar Nigam Limited (BSNL, hereinafter) as three years' rent for 36 leased lines, laid out by BSNL for the dedicated use by Bharti and given it on lease. The demand is contained in the letter dated 15 January 2014 which was followed by letter dated 26 March 2014

containing the threat that all the Bharti POIs¹ with BSNL would be disconnected in case payment of the impugned demand was not made by 15.00 hours on 31 March 2014. Bharti seeks quashing, *inter-alia* of the aforesaid two letters. According to Bharti, though it was committed to having the lease renewed annually for a minimum period of five years, BSNL had accepted the surrender of 36 lines, on certain terms and conditions, at the expiry of two years and hence, the demand of rent for the next three years was wholly unreasonable and untenable.

The facts of the case are quite simple and may be stated thus. On Bharti's request, BSNL leased out to it 74 dedicated lines of 2 Mbps each under agreement dated 2 May 2002. The terms and conditions stipulated in the agreement are as under:

- “1. The licensee shall submit a commitment letter to BSNL to keep all the leased lines for a minimum period of 5 years.
2. BSNL while collecting the required leased line charges as per the existing guidelines of BSNL Corporate Office, New Delhi shall raise demand note for 2 years charges and the licensee shall pay the amount.
3. The charges collected by BSNL towards the second year will be kept as Security Deposit and this Deposit shall not carry any interest.
4. The licensee is required to renew the leased lines every year and for making the renewal payment by the licensee, the terms and conditions stipulated under chapter 7(Interconnect billing system) of the Interconnect agreement shall hold good.
5. In case the licensee fails to renew the leased lines or fails to make the renewal payment, the security deposit paid under clause 3 above shall be forfeited and this shall be without prejudice to any other action that shall be taken against the failure indicated above by BSNL.”

¹ Point of interconnect.

Clause 1 of the agreement terms required Bharti to submit a commitment letter to keep all the leased lines for a minimum period of five years which Bharti duly submitted. Clause 5 provided that in case Bharti failed to renew the leased lines or to make the renewal payment, the security deposit under clause 3 would be forfeited. It needs to be clarified here that leased lines had fixed annual rental, payable every year in advance. At the time of commissioning, BSNL raised demand notes in advance and Bharti paid the rental for two years. The annual rent for the second year was kept by BSNL as security. At the beginning of the second year, BSNL issued demand note for annual rent for the second year and the security deposit was kept as security for the rent for the third year, and so on.

However, within two years of the commissioning of the leased lines in question, Bharti was able to up-grade its inter-connect device in the Synchronous Digital Hierarchy by entering into an arrangement with BSNL to set up an STM-1². Resultantly a number of the 74 lines leased out by Bharti became redundant and it requested for their surrender, writing in its letter dated 25 November 2003 as under:

“We would therefore like to shift the entire interconnectivity at the various POI locations from a combination of leased lines (**33 E1s at 12 POI locations**) and end-links on copper (**20 E1s at 7 locations**) completely to STM1 (**i.e., all 53 E1s at 13 locations**). Consequent to this shift, the leased lines (33 E1s) and end-links copper (20 E1s) at these 13 locations will no

²A 2 Mbps line, that is, E1 has 32 time slots, each capable of carrying one voice channel. In practice, it carries 30 voice channels, as two time slots are used for synchronization and signalling (TS0 & TS15); an STM-1 (Synchronous Transport Module Level 1) can carry 63 E1s or more than 1800 voice channels.

longer be necessary and as soon as the STM1 equipment is commissioned at any location, we would like to surrender the EIs taken in that location.

EIs for BSC / BTS Connectivity:

In addition to the EIs for POI Connectivity as above, we have also taken leased lines for BSC and BTS Connectivity in various places in Tamil Nadu (8 EIs at 7 places). Subsequent to the commencement of Cellular Operations by BSNL in the Circle, BSNL has expressed their inability to augment these EIs to handle the growth in our traffic due to capacity constraints at BSNL. In view of this, we had to set up own backbone for connectivity purposes. As a result, we would no longer require the above EIs from BSNL and would therefore like to surrender the same.

The amount paid by us for the period from the date of decommissioning of these links by BSNL may be quantified and adjusted against the annual amount payable by us for STM1 next year.”

(emphasis in the original)

BSNL accepted the request on certain terms vide letter dated 6 January 2004 from the Deputy General Manager (NS), TN Circle, Chennai. As the entire case hinges on this letter it is extracted below in full.

“Sub:- Surrender of Leased line – reg.

Please refer to your letter dated 25.11.03, wherein this office was requested to permit the surrender of 61 leased lines and adjust the amount paid by M/s. Bharti Cellular Ltd., from the date of decommissioning these links against the annual amount payable for STM-1 system for the next year.

In this connection the following information are furnished:

1. All the 61 leased lines mentioned in your above cited letter were sanctioned by this office subject to the following conditions:
 - a. The Licensee shall submit a commitment letter to BSNL to keep all the leased lines for a minimum period of Five years.
 - b. BSNL, while collecting the required leased line charges as per the existing guidelines of BSNL Corporate Office, New Delhi,

shall raise demand note for Two years charges and the licensee shall pay the amount.

c. The charges collected by BSNL towards the second year will be kept as Security Deposit and this Deposit shall not carry any interest.

d. The licensee is required to renew the leased lines every year and for making the renewal payment by the licensee, the terms and conditions stipulated under chapter 7(Interconnecting Billing System) of the agreement shall hold good.

e. In case the licensee fails to renew the leased lines or fails to make the renewal payment, the security deposit paid under clause c. above shall be forfeited and this shall be without prejudice to any other action that shall be taken against the failure indicated above by BSNL.

2. Accordingly undertaking to keep these leased lines for a minimum period of Five years and to maintain security deposit with BSNL equivalent to one year's rental was submitted to this office vide your letters dated 22.04.02 and BCL-TN/BSNL/POI-039 dated 16.10.02.

3. Now that M/s. Bharti Cellular Ltd., has proposed to surrender these leased lines before the expiry of the minimum period.

a. The Deposit amount i.e., charges collected by concerned BSNL authorities for 2nd year of rental shall have to be forfeited.

b. Charges collected for the current year of operation from the date of decommissioning shall have to be forfeited and the refund for the balance period will **not** be made by BSNL.

If you are agreeable to the above conditions, kindly **confirm in writing** to this office, for examining the case further for surrender of the leased lines.”

(emphasis in the original)

From the first paragraph of the letter it is evident that while taking the decision on Bharti's request, the Dy. GM was fully conscious of all the terms and conditions of the agreement under which the leased lines were given to Bharti, including Bharti's commitment to keep all the leased lines for a minimum period

of five years. He, nonetheless, relaxed the terms of the agreement. He rejected Bharti's request to adjust the security deposit against the annual maintenance charges for the STM. But accepted the surrender of the leased lines subject to forfeiture of (i) the security deposit (equal to one year's rent) and (ii) rent for the un-expired period of the second year.

In response to the Dy. GM's letter of 6 January 2004, Bharti once again requested, vide letter dated 20 January 2004, that the amount of Rs.3.25 crores deposited by it in advance might be adjusted towards the AMC it was required to pay for the STM equipment taken by it and the balance amount, if any, might be refunded.

The Dy. General Manager (NS) by its letter dated 10 March 2014 wrote back that the adjustment of the forfeited deposit against any other amount payable to BSNL for resources provided was not possible. He further stated that the services extended by means by the leased lines circuits would be withdrawn with effect from their respective dates of expiry. The relevant extract from this letter is as under:

“As per the information furnished in your letter vide (3)³ above, the services extended by means of these leased lines will be withdrawn with effect from the respective expiry date. The security deposit held with us is treated as forfeited in accordance with our letter referred (2)⁴ above **and the agreement stands terminated from the date of expiry.**”

(emphasis added)

³ Reference is to Bharti's letter of 12 February 2004

⁴Reference is to Dy.GM, BSNL's letter of 6 January 2004

In furtherance of the decisions taken by the Dy.GM, BSNL and as communicated to Bharti vide letters dated 6 January 2004 and 10 March 2004, the services extended by 36 out of the 74 leased lines were finally stopped with effect from their respective dates of expiry and instructions to that effect are to be found in an internal letter dated 3 December 2004, addressed by the Dy. GM (NS) to PGM, BSNL, Coimbatore and GM, BSNL, Chengalpattu. The relevant extract from this letter is as under:

“The request of the operator has been examined by this office and the same has been accepted, as per this office letter of even number dated 15.3.04, copy of which is enclosed herewith for your reference.

All the leased lines may be disconnected and the ports may be transferred on the area links of M/s. Bharti Cellular Ltd., available in the respective station with minimum interruption.

An undertaking may be obtained from the operator that they are ready to pay any additional charges as and when demanded by BSNL, in future, for transferring such circuits.”

Notwithstanding the acceptance of the premature surrender by BSNL, on the expiry of the second year period, the accounts section in the field office of BSNL went on to raise invoices for advance payment of the third year rental for those lines. It appears that Bharti protested against the demand for the third year rental (vide its letter dated 22 December 2004) as the surrender of the lines was already accepted by BSNL and in response it got a curious answer from the accounts office, vide letter dated 4 January 2005. As this letter throws good light on the nature of the controversy, the relevant extract from it is reproduced below:

“With reference to the above, it is to inform you that the Circle office has accepted your request for the premature surrender of leased lines and the approval was conveyed to you vide letter cited in your letter. **The circle office has never instructed this SSA not to issue a bill for a broken period.**”

(emphasis added)

This was simply the beginning of a long drawn exchange of letters and meetings between the two sides on the disputed demands at the end of which BSNL stood its ground and issued the impugned demand letter threatening with disconnection of the POIs in case of non- payment of the demand by the specified date.

Ms. Maneesha Dhir took us through many letters from both sides but we fail to find anything in those letters that could justify the demand for the three years rental by BSNL. We find that the initial correspondence on the issue (shortly after the issuance of the invoice for the third year rental) is from the accounts section of the field office of BSNL by officers who are much below in rank to Dy.GM in the zone office. As the issue developed, the matter got referred to the zone office and then to the corporate office but neither in the deliberations there nor in the correspondence with Bharti there is any reference to the decision taken by the Dy. GM (and as communicated to Bharti by his letters dated 6 January 2004 and 31 March 2004) accepting premature surrender of the leased lines on certain terms. The correspondence from BSNL simply starts harping back on the term of the

agreement under which Bharti was committed to maintain the lines for a minimum period of five years.

Ms. Dhir next submitted that Bharti had expressed its willingness to pay the demand and it cannot be allowed to go back on its statement. In support of the submission she invited our attention to some letters from Bharti. In our view the submission is quite unacceptable. First, the letters alluded to by Ms. Dhir do not contain an unequivocal promise to pay the demand. Secondly, those letters are of the year 2014 and were written when BSNL, for realisation of its demand, had disconnected Bharti's POIs, causing serious dislocation of its services. Those letters were thus written under coercive circumstances and cannot be taken as voluntary and wilful promise to pay the impugned demand.

On a careful consideration of the materials on record we are satisfied that the impugned demand is wholly unjustified and unenforceable.

The agreement dated 2 May 2002 under which Bharti was committed to maintain the lines for five years stood novated by the decision of the Dy.GM to accept premature surrender of the lines on the terms and conditions as stipulated in his letter of 6 January 2004. The terms of the agreement, including the one in regard to Bharti's commitment to keep the lines for a minimum period of five years were substituted by the terms mentioned in the letter dated 6 January 2004

and the agreement actually stood terminated from the date of expiry of those lines vide BSNL letter of 10 March 2004.

We may add here that the decision of the Dy.GM to accept premature surrender of 36 leased lines was well founded and it was for good reasons. It may be noted that the leased lines in question were not being surrendered by Bharti gratuitously. Those were being replaced by an upgraded device and system in arrangement with BSNL itself for which BSNL would perhaps receive higher consideration in return.

It appears to us that notwithstanding acceptance of premature surrender of the lines by Bharti, demand for rental for the third and subsequent years were automaton-like issued by the accounts section on the specious plea there were no instructions to them, in black and white, not to raise the demands. Once demands were raised and taxes were paid on the invoices, the organisation did not seem to have the strength to retract the demands on the ground that those were wrongly issued. The safe and prudent course appeared to doggedly pursue the demand until payment was realised or demands were held unrealisable by judicial intervention. This appears to us to be long and short of the case.

For the reasons discussed above, we are clearly of the view that the demand is illegal and is set to be set aside. It is ordered accordingly.

It may be noted here that at the time of the admission of the case, Bharti was directed to deposit Rs.4.5 crores being approximately 50 per cent of the impugned demand. The Tribunal's order 31 March 2014 is as under:

“In the meanwhile, in case the petitioner deposits Rs.4.5 Crores, being approximately 50% of the impugned demand within 10 days, the respondent shall not give effect to the threat of disconnection as contained in the impugned communications dated 15.01.2014 and 26.03.2014.

It is, however, made clear that in case the petition fails, the petitioner will be obliged to make payment of the balance amount with interest as may be directed by the Tribunal. Vice-versa, in case the petition succeeds, the respondent will refund the deposited amount to the petitioner along with interest as may be directed by the Tribunal.”

As the demand is held illegal and it is set aside, it naturally follows that BSNL must refund the deposited amount of Rs.4.5 crores to Bharti along with interest @ 8% per annum from the date of deposit till the date of actual payment.

In the result the petition is allowed but with no order as to cost.

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(AftabAlam)
Chairperson

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(Kuldip Singh)
Member

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(B.B. Srivastava)
Member