

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

Dated 10 May, 2016

**E.A.No. 37 of 2012 in
Telecom Petition No.397 of 2011**

Vodafone Essar Limited & Anr.

...Petitioner

Versus

Mahanagar Telephone Nigam Ltd.

...Respondent

BEFORE:

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER**

For Petitioner : Mr. Manjul Bajpai, Advocate
Mr. Shashwat Bajpai, Advocate

For Respondent : Mr. Chandan Kumar, Advocate

ORDER

By Aftab Alam, Chairperson – The petitioner, a telecom service provider, claims a large amount from the respondent as interest on the interest part of its earlier claim of pass through revenue. The demand is based on the plea that though the principal amount of the claim of pass-through revenue was paid in time, the amount of interest on the principal claim was paid after considerable delay and hence, the respondent, MTNL (another telecom service provider in the public

sector) is liable to pay further interest on that amount. However, as the facts unfold, it would become apparent that no responsibility for the delay in payment of the interest part of the petitioner's claim can be attributed to the respondent and, therefore, no liability for payment of any further interest would attach to it.

The facts are as under.

Earlier, Cellular Operators' Association of India (COAI), an association of telecom service providers, along with a number of individual telecom service providers, including the present petitioner came to the Tribunal in Petition No.10 of 2003 making the grievance, that BSNL and MTNL (the fixed line service providers), acting in contravention of the Interconnect Determination dated 8 January 2001 issued by TRAI were not giving them back the credit of 5% of the pass-through revenue paid by them to the former. As per the prayer clause, the petitioners in that case sought the following reliefs:

“(a) Direct the Respondents to implement the TRAI Determination dated 08.01.2001¹ allowing CMSPs to retain 5% of their pass through revenue paid to the Fixed Operators for calls made by Cellular Subscribers with effect from 08.01.2001;

(b) Direct the Fixed Service Operators to refund/ adjust all the excess amounts received by them from the Cellular Operators towards the said 5% of CMSPs pass through revenues with effect from 08.01.2001 upto 30.1.2001 together with interest thereon computed at prime lending rate of State Bank of India from the date of over payment in each bill by the CMSPs to the FSPs until the actual date of refund/adjustment;

¹ In course of hearing the petitioners agreed that the date could be 25 January 2001 instead of 8 January 2001.

(c) pass such further or other orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

The petition was allowed by judgement and order dated 29 March 2004 in which the Tribunal clearly directed that the principal amount of claim of 5% pass through charges would also carry "interest @ 12% per annum from 01.02.2002 as BSNL and MTNL were allowed to make the payments due from 25.01.2001 by 30.01.2002".

The matter was taken in appeal both by BSNL (Civil Appeal No.5546 of 2004) and by the present respondent, MTNL (Civil Appeal No.6969 of 2004). In the aforesaid appeal, the Supreme Court passed the following interim order on 6 December 2004:

"The learned senior counsel for the appellant states that whatever amount is due to be paid to the respondents under the impugned order shall be adjusted in the amounts to be paid by them from time to time within a period of two months, subject to the respondents' furnishing bank guarantee of a Nationalized Bank, which shall be kept alive during the pendency of this appeal. In case the appellant succeeds, the respondents shall have to pay interest on this amount so adjusted, at the rate as determined by this court.

The interlocutory application is accordingly disposed of."

It is an admitted position (vide paragraph 8 of the execution application in hand) that in pursuance of the interim order, MTNL, on submission of the requisite bank guarantees by the petitioner, gave it full adjustment for the principal amount of the pass through revenue, along with interest at the rate of 12% for the period as

directed by the Tribunal. The amount of interest for Delhi circle for which adjustment was made in the petitioner's favour was Rs.1,46,52,224/- and for the Mumbai circle, Rs.2,59,66,153/-.

Finally, the Supreme Court by order dated 26 October 2010, set aside the Tribunal's judgment and remitted the matter for fresh consideration, in accordance with law. As regards, the interim order passed earlier, the order finally disposing of the appeals observed as under:

"We make clear that we are not expressing any opinion on the merits of the case. The interim arrangement dated 06.12.2004 ordered by this Court shall continue to operate till the disposal of the case by the TDSAT."

Following the remand, the Tribunal once again allowed the petition by its judgement and order dated 13 April 2011. In the operative part of this judgement however, there was no express direction as regards interest on the principal amount of the claim. All that was said in the operative part of the judgement is as under:

"85. We, therefore, are of the opinion that keeping in view the conduct of the respondents, they are estopped and precluded from raising a contention that they have not implemented the order of the TRAI, although the same was implementable in law. But what should be the date from which it is required to be given effect to?

DoT says that the same should be 25.01.2001 and not 08.01.2001. As agreed to by Mr. Ramji Srinivasan, this may be so, but then we do not find any reason as to why such a contention raised in favour of the cellular operators should be made operative only from 31.01.2002.

86. For the reasons aforementioned, the petition is allowed in part and to the extent that the determination of TRAI shall take effect from 25.01.2001.

In the facts and circumstances of this case, there shall be no order as to costs.”

The respondent then, finding no mention of any interest in the Tribunal’s judgment, adjusted back the amount of interest paid in the Mumbai circle vide the reconciliation statements enclosed with letters dated 29 June 2011 and dated 26 July 2011 and with letter dated 6 August 2011 in Delhi circle.

Aggrieved by the action of MTNL in adjusting back the interest part of the petitioner’s claim, the petitioner came to the Tribunal in Petition No.397 of 2011. Along with the aforesaid petition, it also filed an application, being MA No.286 of 2011 in Petition No.10 of 2013 seeking clarification of the judgement dated 30 November 2011. Both the petition and the application were allowed by judgement and order dated 17.02.2012. In this judgement, the Tribunal made it clear that the petitioner was also entitled to interest on the principal amount of claim as prayed for in Petition No.10 of 2013. In this regard, the Tribunal made the following observations in paragraphs 26, 27 and 28 of the judgement:

“26. Having heard the learned counsel for the parties, we are of the opinion that this Tribunal has committed an inadvertent error by not directing grant of interest.

27. It is not a case where the provisions of Sub-section 2 of Section 34 of the Code of Civil Procedure would be attracted.

28. It was required to be borne in mind by this Tribunal that by reason of its order dated 26.10.2010, the Supreme Court of India continued the Interim Order passed by it on 06.12.2004.”

In paragraph 34 of the judgement, it further observed as under:

“34. We, therefore, are of the opinion that a case has been made out for clarification of this Tribunal’s order dated 13.4.2011 that interest on the aforementioned sum, @ 12% per annum was payable to the Cellular operators by the Respondent in Petition No.10 of 2003.”

And finally made the following order, under the heading “Conclusion”:

“38. For the reasons aforementioned, the original Petitions and also the Miscellaneous Applications are allowed.”

From the afore-quoted extracts from the Tribunal’s judgement, it is evident that the Tribunal itself considered it an erroneous omission on its part in not making any direction for payment of interest on the principal amount. It found that in the facts of the case, the petitioner was entitled to interest and accordingly made the position clear.

Against the Tribunal’s order dated 17 February 2012, the respondent preferred an appeal (Civil Appeal No.D-33805/2012). The appeal was admitted by order dated 5 November 2012 but by that order, the respondent was directed to make payment of the petitioner’s dues in terms of the Tribunal’s order which would be subject to the final decision in the appeal.

Following the order of the Supreme Court, the respondent duly paid the interest amount in Mumbai circle on 24 December 2012 and in Delhi circle on 30 December 2012.

It is in these circumstances that the petitioner has once again moved the Tribunal in this application (EA No.37 of 2012) filed in Petition No.397 of 2011 for a direction for payment of interest by the respondent on the interest part of its claim for the period 26.07.2011 and 23.08.2011 to 24.12.2012 for Mumbai circle and for the period 06.08.2011 to 30.12.2012 for the Delhi circle when the amount of interest was adjusted back by MTNL and then credited again in favour of the petitioner.

The order dated 4 January 2013, passed by the Tribunal in the EA takes note of the fact that following the interim order passed by the Supreme Court on the respondent's appeal, the respondent has paid back the amounts in question to the petitioner in Delhi circle on 30 December 2012 and in Mumbai circle on 24 December 2012.

Mr. Manjul Bajpai, counsel appearing for the petitioner strongly argued that the respondent had wrongly withheld the amount of interest payable to the petitioner for the aforesaid period and the petitioner must, therefore, be paid further amount of interest on the amount in question for the period it was wrongly withheld by MTNL.

From the facts enumerated above, it is clear that MTNL acted all through as per the direction of the Tribunal and the Supreme Court and in our considered

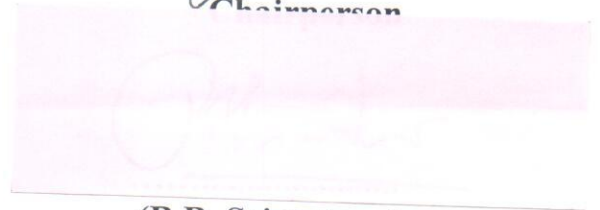
view, in the facts and circumstances of the case, the claim of the petitioner is quite untenable.

Mr. Bajpai, in support of his submission relied upon a decision of the Supreme Court in Sandvick Asia Ltd. Vs. Commissioner of Income Tax-I, Pune & Ors.². It is a case arising under the Income Tax Act and the facts of the case are quite different from the facts in which the present claim arises. We are clearly of the view that in the present case, the decision relied upon by Mr. Bajpai has no application.

We find no merit or substance in the claim filed by the petitioner. The EA No.37 of 2012 is accordingly dismissed.



(Aftab Alam)
Chairperson



(B.B. Srivastava)
Member

sks



² (2006) 2 SCC 508