

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

Dated 25th August, 2017

M.A. No. 216 of 2015

In

Telecommunication Petition No.108 of 2008

Bharti Airtel Limited

...Petitioner

Versus

Bharat Sanchar Nigam Limited

...Respondent

BEFORE:

**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. B.B. SRIVASTAVA, MEMBER
HON'BLE MR. A.K. BHARGAVA, MEMBER**

For Petitioner

: Mr. Harsh Kaushik, Advocate

For Respondent

: Mr. Nalin Kohli, Advocate
Mr. Tejveer Singh Bhatia, Advocate
Ms. Vishakha Ahuja, Advocate

ORDER

By S.K. Singh, Chairperson – Both the parties have been heard in detail in respect of MA No.216 of 2015 that was filed on 04.08.2014 in a disposed of matter bearing Petition No.108 of 2008 for some reliefs by way of restitution.

2. There is no controversy that the applicant Bharti Airtel Ltd. as the petitioner had preferred Petition No.108 of 2008 against a demand made by the respondent Bharat Sanchar Nigam Ltd. (BSNL). A perusal of interim order dated 29.05.2008 discloses that at that stage the impugned demand was approximately Rs.66.30 crores and its non-payment had resulted in disconnection of POIs to the detriment of the petitioner. Considering the suffering of the consumers, this Tribunal observed that some interim arrangement was called for and ordered that on petitioner depositing a further sum of Rs.35 crores with the respondent, the latter will restore the POIs. The petitioner paid the amount of Rs.35 crores as per interim order of this Tribunal. It is also not in dispute that ultimately by final order dated 11.02.2010, this Tribunal held the impugned demand to be bad in law and set it aside with cost of Rs.1 lakh. There was no reference in the final order to the interim arrangement nor there was any indication as to what will happen to the amount of Rs.35 cores deposited by the petitioner.

3. The matter was taken in appeal to Hon'ble Supreme Court where it remained pending for a long time but ultimately Civil Appeal No.8108 of 2010 preferred by the respondent against the order of the Tribunal dated 11.02.2010 was dismissed on 23.09.2016. As noted earlier, the MA under consideration was filed on 04.08.2014 but it remained pending awaiting the judgment of the Supreme Court. Ultimately on 05.10.2016, the order dated 23.09.2016 was

brought to the notice of this Tribunal for considering the prayers made in this MA which are as follows:

“(a) Direct the Respondent to immediately refund Rs.35.00 Crores to the Petitioner along with interest as provided in the Interconnection Agreement on reciprocal basis.

(b) Pass such other and further order(s) as may be deemed fit and proper in the facts and circumstances of the present case.”

4. It is not in dispute that respondent chose to pay back the amount of Rs.35 crores to the petitioner on 19.12.2016. Thereafter the MA has remained pending only for deciding the claim for interest. In support of the MA, learned counsel for the petitioner, Mr. Harsh Kaushik, relied heavily upon principles of restitution on the lines of provisions under Section 144 of the Code of Civil Procedure. He pointed out and relied upon clause 7.5 of the Agreement dated 15.02.2002 which permits interest @ 21% per annum for any delay in payment of bills beyond 15 days.

5. Mr. Kaushik also placed reliance upon judgment of Supreme Court in the case of **State of Rajasthan Vs. J.K. Synthetics Ltd. – (2011) 12 SCC 518** and in the case of **South Eastern Coalfields Ltd. Vs. State of Madhya Pradesh – (2003) 8 SCC 648** to buttress his submission that in case a demand for payment of money is stayed by an interim order but ultimately that challenge is dismissed, even if there is no specific direction for payment of interest, the respondent will be entitled to claim interest on the amount due for the period

covered by the interim order. A perusal of both the judgments show that the proposition is well founded and was accepted by the Apex Court on the principles of restitution as appears from paragraph 23 of the earlier judgment and paragraphs 24 and 25 of the latter.

6. In fact, the judgment in the case of **South Eastern Coalfields** clearly accepts the theory of just compensation by payment of interest which should be accepted in absence of there being a prohibition either in law or contract between the parties. The liability to pay interest was upheld even on other principles such as restitution which has very wide connotation and can be applied in the interest of justice, equity and fairplay even beyond Section 144 of the CPC. Paragraphs 26 and 27 of this judgment deal with this aspect of the matter exhaustively and fully support the case of the applicant in this MA. Another salutary principle that no one shall suffer by an act of the court, was also pressed to come to the same result. It was explained in paragraph 28 that restitution will be attracted by applying the test – “whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered.....”

7. Learned counsel has also placed reliance upon ~~an order~~ of this Tribunal dated 11.11.2005 in Petition No.48 of 2004 to support the same proposition, noted above.

8. Learned counsel for the respondent BSNL, Mr. Nalin Kohli faintly submitted at the initial stage that the prayer made in this MA amounts to a claim for execution of a decree for interest when in fact neither the Tribunal nor the Supreme Court has given any direction either for refund of Rs.35 crores or for payment of interest thereon. He even relied upon a judgment of the Supreme Court in the case of **State of Punjab Vs. Harvinder Singh – (2008) 3 SCC 394** to advance a well-established principle of civil law that an execution court cannot go behind the decree and thereby grant a decree for interest which was not part of the decree passed by the trial court.

9. We have no difficulty in holding that the claim of the applicant in this MA is for restitution and not for execution. In this situation, Mr. Kohli, then submitted that even a petition under Section 144 of the CPC for restitution must be governed by Article 137 of the Limitation Act and therefore, the claim of the petitioner applicant was barred by limitation after lapse of three years from the date of order of this Tribunal i.e. 11.02.2010. He pointed out to paragraph 6 of the reply to show that plea of delay and limitation was raised against the petitioner. The other contention advanced on behalf of respondent is that as per clause 7.6.1 of the agreement even if the petitioner could dispute the accuracy of the bill delivered by BSNL pursuant to the agreement, it was required to raise the dispute before the date specified for payment and it was also obligatory for the petitioner to deposit 50% of the deposited amount, subject to a minimum of

an amount equal to previous month's billed amount. On the basis of aforesaid provision, it was argued that no interest could be claimed for such interim deposits in absence of any provision for interest over such deposits in the agreement. Lastly, in the alternative, it was submitted that the rate of interest claimed by the petitioner is excessive and unreasonable, not really supported by the provisions in the agreement and therefore, even if principles of restitution are held to be applicable in favour of the petitioner the compensation must be realistic and not excessive. According to him, interest at the rate of 7% or 7.5% per annum would be sufficient compensation and that should also be permitted only from the date of judgment of the Supreme Court.

10. Learned counsel for the petitioner applicant has submitted in reply that the cause of action for interest is a continuing one and till it is satisfied, court can always pass suitable orders in the interest of justice and equity. It was also argued that by paying back Rs.35 crores on 19.12.2016, the respondents have themselves clearly admitted that petitioner applicant is entitled for restitution and the payment of such substantial part of the dues amounts to acceptance of the entire liability. Lastly, it was submitted by way of rejoinder that clause 7.6.1 does not apply to the facts of the case because it was not a dispute relating to regular monthly bills rather to a demand of penalty. It was also submitted that payment of Rs.35 crores was not made on the basis of any clause in the agreement but because of interim order of this Tribunal dated 29.05.2008.

11. Having anxiously considered the rival submissions and upon consideration of the relevant facts and the case laws cited by the parties, we have no hesitation in holding that petitioner applicant is entitled to interest by way of restitution. Ordinarily the final judgment and order of this Tribunal passed on 11.02.2010 should have contained specific direction for appropriate action on the part of the respondent in accordance with principles of restitution but even in absence of such explicit direction, once the demand was held to be illegal, the respondent cannot be allowed to unjustly enrich itself by either keeping the principal amount of Rs.35 crores or the benefits flowing from such amount remaining with the respondents for a long period. As noted earlier, the respondent have already paid Rs.35 crores on 19.12.2016. Ordinarily, the cause for restitution would have arisen on 23.09.2016 when the Supreme Court dismissed the appeal of the respondent. The restitution petition would have been within time if it had been filed within three years of such judgment. It cannot be held to be barred by limitation only because it was filed even earlier on 04.08.2014. The fact that the respondent has accepted the liability and paid Rs.35 crores is also of help to the petitioner applicant who has rightly relied upon such action to contest the plea of limitation. Considering the relevant facts, the application is held to be maintainable and not barred by any principle of delay or limitation.

12. The subject matter of Petition No.108 of 2008 was a demand of penalty and strictly not covered by clause 7.6.1 of the agreement and on that basis also the petitioner cannot be deprived of its right to interest by way of restitution. We accordingly hold the petitioner entitled to interest over Rs.35 crores from the date of its payment to the respondent till the amount was repaid to the petitioner on 19.12.2016. For this period of 8 years and 3 months approximately, we allow interest @ 8% only. Such rate of interest, in our view, would be just and sufficient compensation to satisfy the principles of restitution. We direct the respondent to pay the interest in terms of this order within two months from today.

The miscellaneous application is allowed in the aforesaid terms. No costs.

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(S.K. Singh, J)
Chairperson

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(B.B. Srivastava)
Member

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(A.K. Bhargava)
Member

