TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 25th June, 2018

Telecommunication Petition No. 465 of 2012

M/s Tata Communication Limited …Petitioner

Vs.

Mahanagar Telephone Nigam Ltd. …Respondent

BEFORE:

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

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

For Respondent : Mr.Chandan Kumar, Advocate

ORDER

By S.K. Singh, Chairperson – The petitioner is a company engaged in providing national and international long distance telecommunication and internet services under licences granted by the Government of India. The

respondent is a "service provider" within the meaning of the Telecom Regulatory Authority of India Act, 1997 (the Act). The main relief sought through the petition is for recovery of Rs.1,10,57,268/-, which according to petitioner is payable by the respondent for use of two STM-1 NLD bandwidth (Janpath/Nehru Place). Petitioner has alleged that this amount was payable as per agreement between the two but was illegally adjusted by the respondent for unacceptable reasons. Petitioner has also claimed interest amounting to Rs.62,18,994/- till filing of the petition and further interest @ 18% per annum from the date of filing of the petition till the date of recovery. The amount claimed as the principal dues has been explained and justified through a chart at **Annexure-14**.

2. There is no dispute that earlier the petitioner had its corporate name Videsh Sanchar Nigam Ltd. (VSNL). The same was changed to the present name on 28.01.2008. The dispute between the parties is not over the essential facts but only as to whether the respondent has any right and was justified in adjusting the amount claimed herein as the principal amount, from the dues payable to the petitioner by deductions from the bills raised by the petitioner, the first deduction being in December 2009. According to petitioner the basis on which the amounts have been deducted has also not been disclosed by the respondent through any communication.

3. There is no dispute that from the year 2006 till January 2011 the petitioner provided to the respondent two STM-1 NLD bandwidth, one from Kidwai Bhawan(Janpath), New Delhi to Prabha Devi, Mumbai w.e.f. 01.06.2006 and the other from Nehru Place, New Delhi to Fort, Mumbai w.e.f. 11.10.2006.

4. It would be sufficient to notice that on 19.05.2006 the respondent issued a purchase order for supply of four STM-1s of bandwidth between Delhi and Mumbai on lease for one year. In terms of the purchase order such service was offered and the petitioner carried the bandwidth from its Point of Presence (POP) at Delhi to its POP at Mumbai and from there the bandwidth was carried further by the respondent to its premises through its own equipments and fibres. As per understanding, the petitioner provided rack space of about 120 sq.ft. to the respondent at its premises at Delhi and Mumbai free of cost. This space was utilised by the respondent by placing its equipments and optical fibre cable etc.

5. The petitioner rendered its services satisfactorily. The respondent placed another purchase order for the period 31.05.2007 to 31.03.2008 and this was further extended from 01.08.2008 to 30.09.2008. For the entire aforesaid periods the petitioner was not required to arrange for last mile connectivity because the respondent had their own infrastructure available for the same.

6. The respondent placed another purchase order upon the petitioner dated 01.10.2008 for supply of three STM-1st Symmetric, uncompressed, 1:1 NLD

bandwidth between Delhi and Mumbai for the period 01.10.2008 to 30.09.2009. This was extended and the services continued to be supplied by the petitioner till termination by the petitioner on 28.02.2011. Although, purchase order was for three STMs from 01.10.2008, the respondents continued to avail only the existing services i.e. two STM from 01.10.2008 till termination.

7. In the purchase order dated 01.10.2008, some clauses were inserted for the first time which are extracted herein below:

> "**4. SCOPE OF ORDER**
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> ……………
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> iv. Termination of the bandwidth on STM-1 would be done at the MTNL sites/locations in Delhi (Kidwai Bhawan and Nehru Place) and Mumbai (Fountain Head & Prabha Devi) respectively as per the requirement with redundancy in last mile connectivity. For this bandwidth termination purpose, optical/electrical converter, cable and any other hardware/software etc. required, if any, would be arranged by the bidder free of cost."
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> **8. DELIVERY SCHEDULE:**
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> (i) The physical connectivity for bandwidth should be completed within two months from the date of place of Purchase Order."

8. According to petitioner, the aforesaid clauses requiring the petitioner to provide the last mile connectivity was an unnecessary provision which caused surprise. It could result in additional costs to the petitioner without providing

any additional benefit to the respondent. It is the case of the petitioner that respondent did not provide required clarification/permission because of their own problems and also because the service was already available as per the existing arrangement. Petitioner claims that it sought permission through Email dated 16.10.2008 for getting fibre extended and equipment installed upto the respondent's office. This was followed by a reminder Email of 11.11.2008 but no reply was given to either of the Emails. Copies of both the Emails are **Annexure P-7(Colly.)**. Petitioner has also asserted that through its various representations, both oral and written, it sought affirmation and facilities for providing the last mile connectivity but the respondent did not provide the same. It is also the case of the petitioner that in spite of receiving no cooperation from the respondent, within two months of the Purchase Order, in terms thereof it made huge investments to lay fibre till the doorstep of the respondent at Mumbai and Delhi. Petitioner also made request to provide the required rack space for installation of necessary equipments but the respondents did not respond nor gave the required permission to lay fibres in their building nor was rack space provided. However, the services continued to be provided through the existing infrastructure.

9. In December 2009, the respondents deducted an amount of Rs.24,69,076/- from the dues of the petitioner without disclosing the reasons for such deduction. The petitioner guessed that the deduction was made as per dark

fibre rate without petitioner having agreed to any such deduction. It is case of the petitioner that such deduction was not permissible under the terms of the Purchase Order dated 01.10.2008. Through its letter dated 18.12.2009, petitioner sought release of the deducted amount and claims to have raised its grievance that the last mile connectivity could not be created because the respondents did not give access to their building nor gave duct space in the premises. On 07.01.2010, the respondent raised a demand note for Rs.19,19,253/- on account of rack space and duct charges. As per petitioner, such charges were unreasonable and hence it did not make any payment. The demand was revised downwards through a letter demand notice dated 08.11.2011. The respondents, without providing any details, continued to make deductions from the dues payable to the petitioner from October 2008 onwards till termination of services effected by the petitioner on 28.01.2011. Through various letters, petitioner objected to the deductions and requested to release the deducted amounts. However, since no refunds were made and deductions were continued, petitioner chose to terminate the services on 28.01.2011. Ultimately, the respondents refused to refund the deducted amount and communicated their decisions through letters dated 27.12.2011 and 01.01.2012 which have been annexed as **Annexure P-15(Colly.)**. Petitioner has sought to underline the fact that respondents have chosen not to disclose any reasons for making the deductions or for not making a refund of the deducted amount. This led to filing of the present petition on 16.07.2012.

10. In their reply, respondents have raised a defence that because the petitioner failed to provide the last mile connectivity, on 06.11.2009 the Corporate Office of the respondents directed to release payment to the petitioner after deducting the applicable charges for fibre connectivity as already provided by the respondent between their premises and fibre of the petitioner. The deduction was admittedly made by applying the rental charges for dark fibre which was Rs.2.23 lakhs/per pair/Km/year. This defence has been raised by way of preliminary submissions against the dates 06.11.2009 and 20.11.2009 and also in response to paragraph 16. In respect of the demand notes for rack space etc. referred to in paragraph 17 of the petition, there is no dispute that, as replied in paragraph 17, the money demanded was not appropriated by the respondents by way of adjustments etc. because the petitioner did not use the said space. In reply to paragraphs 18 and 19 of the petition, the respondents have admitted that a meeting took place on 22.05.2010. According to respondents, the petitioner was told either to comply with Clause 4(iv) of the Purchase Order or it had to pay the rent for using the fibre of the respondents. The respondents have pleaded that the money saved by the petitioner by not doing the needful is the loss caused to the respondents and that if the respondents had not deducted the amount to recompense itself, the petitioner would have got unjust gain and respondents would have suffered unjust loss. The respondents have denied that they did not permit the installation of last mile connectivity and that they are seeking to benefit from their own wrong.

11. The petitioner in its rejoinder has alleged that although some decisions for last mile connectivity were taken by the respondents in their Delhi office, but there was no coordination between that unit and Mumbai unit. The exercise required shifting of live traffic which had to be done simultaneously at both the ends i.e. in Mumbai and Delhi. In alternative the petitioner has given its own calculation that even if the respondents are found entitled to deduct at the prevailing rate of lease of dark fibre, on the basis of admitted figures of distances, the total charges for dark fibres would come only to Rs.36.66 lakhs and hence, there is no justification for deducting a huge amount of Rs.1,10,58,268/- even as per case of the respondents. In sur-rejoinder, the respondents have disputed the distances and calculated the lease charges as Rs.73,33,640/-.

12. Arguments advanced on behalf of both the parties clearly show that the main issues are:

(i) Whether Petitioner committed such a breach of the agreement (P.O. dated 01.10.2008) which entitled the respondent to deduct the amount in question;

(ii) Whether Clause 16 of the agreement (P.O.) providing for liquidated damaged alone entitles the respondent as a purchaser to levy liquidated damages which is limited to a maximum of 12%; and

(iii) Whether petitioner is entitled to any relief and if yes, then to what extent?

13. The evidence available on record on behalf of petitioner is that of one Shri Kartik Sharma, the authorized representative of the petitioner in this petition and also a Senior Manager. He has sought to support the whole case of the petitioner and has denied the counter-claim of Rs.1,54,664/- made against the petitioner. Another petitioner's witness Shri Rajesh Garg was also a Sr. Manager and he has deposed mainly to state that the petitioner took steps for providing connectivity upto the respondents' buildings in Delhi and also in Mumbai and in support of the same, maps have been exhibited. Nothing material has been pointed out in the cross-examination of these witnesses.

14. Evidence on behalf of respondents is that of one Shri Sanjay Bhardwaj working as SDE(Transmission) at Delhi Office. He has deposed that required permission for Delhi was faxed to the petitioner on 02.03.2009 after communicated dated 20.02.2009 was signed on 28.02.2009. So far as permission for Mumbai is concerned, the same was also faxed as per communication dated 22.04.2009**(Annexure R/2)**. In spite of the desired permission granted, according to the witness, the petitioner failed to do the needful and chose to terminate the contract on 11.01.2011. He has disclosed that an amount of Rs.73,33,640/- was adjusted from the bills of the petitioner towards the lease rent of dark fibre charges. The calculation is set-out in

paragraph B.5 of the sur-rejoinder. He has further deposed that Clause 22 of the P.O. permitted set-off of any claim and accordingly as evident from letter dated 15.03.2012**(Annexure R/13)**, an amount of Rs.24,42,091/- was additionally set-off/deducted for outstandings against leased circuits. According to this witness, the respondents have in total deducted only an amount of Rs.97,75,731/-. He has pointed out typographical error in paragraph B.5 of the sur-rejoinder. He has averred that due to sudden termination of the NLD Bandwidth between Delhi and Mumbai on 11.01.2011, respondents suffered a loss of Rs.1,54,664/-. He has supported the calculation of such loss contained in a part of Annexure R/15. Nothing material has been pointed out in the cross-examination of this witness.

15. As is evident from the case of the parties and their evidence noted above, the material advanced on behalf of the petitioner is that although the Purchase Order (Agreement) required the petitioner to provide for the last mile connectivity, petitioner could not fulfil that obligation because the respondents did not grant the required permission/facilities for laying down such connectivity. It was further submitted on behalf of the petitioner that even if there was some failure on the part of petitioner, the respondent had no power under the law or the agreement to unilaterally deduct a fanciful amount even beyond the provisions for liquidated damages (LD). It was also submitted that if the respondents had suffered any loss or injury, they could have acted only

within the terms of the agreement after giving a proper notice. They could have even given a notice for cancellation and effected cancellation of the agreement but they did not suffer any injury and, therefore, gave no notice and chose not to cancel the agreement. In fact it was renewed/extended after 1 year i.e., beyond 30.09.2008. It was left to the petitioner to cancel the agreement because of arbitrary and fanciful deductions made to the tune of almost 50% of the total money payable to the petitioner.

16. It was also urged by the learned counsel for the petitioner that by way of rental for dark fibre deductions were made for the entire period of 811 days whereas even according to respondents the permission was granted only in or around March/April 2009 and therefore, no deduction could have been made for the alleged failure from the date of the Purchase Order i.e. 01.10.2008.

17. Learned counsel for the petitioner also referred to the clause for liquidated damages and submitted that parties are bound by that clause and hence, damages could not be claimed in excess of what is permitted under that clause. In support of this proposition, he placed reliance upon the judgment of the Supreme Court in the case of **Sir Chunnilal V. Mehta & Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314**. Learned counsel for the petitioner has also questioned the legality and propriety of set-off of Rs.24 lakhs and odd as disclosed in the sur-rejoinder and in the evidence. He has submitted that benefit of the provision for set-off can be

claimed only for an ascertained sum of money duly determined as a liability against the petitioner. He has pointed out that respondents have not come forward with such defence nor there is any evidence to justify such set-off. On this issue, he has placed reliance upon judgment of the Hon'ble Supreme Court in the case of **M/s Lakshmichand and Balchand Vs. State of Andhra Pradesh, (1987) 1 SCC 19**.

18. On the other hand, learned counsel for the respondent had vociferously argued that beyond the amount admitted in the sur-rejoinder and by the witness, further amount alleged to have been deducted by the respondents is not admitted and therefore, out of the claimed amount, only Rs.1,07,00,000/- (approximately) is the admitted deduction and Petitioner has failed to lead any evidence that respondents have made a further deduction of Rs.3,37,000/-.

19. In order to avoid repetition, it is deemed proper to outrightly deal with such defence of the respondents. After noticing the submission, we have no hesitation in rejecting the defence that petitioner has failed to show a deduction of Rs.1,10,57,268/-, the principal amount claimed. The petitioner has shown the entire payments made by the respondents in the calculations at page 79 of the paper-book. If the respondent had paid more than what is shown thereunder, it was for the respondents to make a claim of higher payment and support the same with some evidence. No such claim of higher payment has been raised nor there is any evidence in respect of such submission. Hence, we

find no substance in the aforesaid plea raised by the learned counsel for respondents.

20. After taking us through almost whole of the petition, learned counsel for the respondents could not show anything in support of his plea that the entire claim of the petitioner is a bogus claim and fit to be rejected. The plea of limitation also could not cut any ice because the first deduction was made in December 2009 whereas this petition was filed within 3 years, on 16.07.2017.

21. It was pointedly put to learned counsel to point out provision in the agreement under which the respondents could unilaterally decide the quantum of their loss and deduct the same by labelling the amount as their loss or illegal gain of the petitioner. Learned counsel did not rely upon provisions in the agreement for liquidated damages which could be levied by the respondents. He chose to rely upon Section 70 of the Indian Contract Act, 1872 which reads as follows:

> "**Obligation of person enjoying benefit of non-gratuitous act** - Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

22. In support of his stand, learned counsel pointed out that the agreement (P.O.) is silent and does not provide anything in respect of rental or charges for the unauthorized use of respondent's infrastructure including rental for dark

fibre when the petitioner avoided to provide for last mile connectivity and enjoyed the respondents' infrastructure. In such circumstances, the principle of quasi-contract or restitution in terms of Section 70 of the Contract Act is attracted so as to prevent unjust enrichment of the petitioner at the cost of the respondents. He placed reliance upon judgment of the Hon'ble Supreme Court in the case of **Orissa Industrial Infrastructure Development Corporation Vs. MESCO Kalinga Steel ltd. & Ors., (2017) 5 SCC 86** and also upon a judgment of this Tribunal dated 11.02.2014 in **Petition No.278(C) of 2012** (**M/s Digi Cablecomm Services Pvt. Ltd Vs. Belda Sky Vision, West Bengal**). On careful consideration of the aforesaid judgments, it is found that they dealt with different fact situations in which Section 70 of the Contract Act was found to be applicable. In the facts of the present case the respondents cannot justify the act of unilateral deductions made from the amount payable to the petitioner on the basis of Section 70. In the case or **Orissa Industrial Infrastructure Development Corporation (supra)**, the respondent MESCO got possession of vast tract of land on deposit of Rs.1.25 crores towards the first installment and some other minor payments but the lease deed was not executed because in spite of several opportunities and notice, MESCO did not deposit the balance amount of Rs.22.44 crores and other statutory dues. Ultimately, after more than five years, the appellant corporation gave notice and resumed possession of the land. The amount of Rs.1.25 cores was also forfeited and adjusted towards compensation for use and occupation of the land. Clearly, there was no

agreement or lease governing the use and compensation of the transferred land nor there was any sale deed executed and hence, in paragraph 16 the forfeiture of Rs.1.25 cores was held justified on the basis of Section 70 of the Contract Act and it was pointed out that such action would prevent unjust enrichment. However, the law relating to Section 70 of the Contract Act was discussed further in paragraph 18 in the light of an earlier judgment of the Supreme Court in **Mulamchand Vs. State of Madhya Pradesh, AIR 1968 SC 1218**. Paragraph 16 of the judgment was extracted. The extract discloses that amongst other situations, if services are rendered in terms of a void contract the provisions of Section 70 may be applicable. The three conditions precedent for contracting in Section 70 have been described thus:

> "……………..The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution. In *Bibrosa v. Fairbairn,* 1943 AC 32 Lord Wright has stated the legal position as follows:
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> > "... any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money

> of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution".

23. In the present case, the parties are governed by an agreement which provides for remedies by way of liquidated damages and also termination of the agreement itself. The respondents clearly had the right, if they were so inclined, to sue the petitioner either for specific performances or for damages for the alleged breach of the contract. This fact alone makes Section 70 inapplicable in the present case.

24. The judgment of this Tribunal in the case of **M/s Digi Cablecomm Services (supra)** also relied on Section 70 of the Indian Contract Act because there was no agreement between the parties and therefore, principles of restitution were attracted. We, therefore, find no merit in the defence based upon Section 70 of the Indian Contract Act.

25. At this stage, it falls for consideration as to what relief the petitioner is entitled to on the basis of strength of its own case. For this purpose, it is useful to note at the outset that the petitioner was required to provide the last mile connectivity as per paragraph 4(iv) of the P.O. within two months. It is also not in dispute that petitioner did not provide the required connectivity not only by December 2008 but even by time when it chose to terminate the contract on

11.01.2011. The defence pleaded and argued on behalf of petitioner is that it was neither given access to the buildings/premises of the respondents nor the permission for effecting the last mile connectivity. This stand was sought to be justified by placing reliance on Emails written by the petitioner on 01.06.2010 which is more than a year after grant of permission by Delhi and Mumbai units around March and April 2009. On going through the communication dated 01.06.2010, it is evident that the plea that respondents did not allow entry to the petitioner into their premises in Mumbai has been raised quite belatedly and does not appear to be correct and convincing. Hence, we find petitioner's case to be weak and unacceptable in so far as it puts the blame totally upon the respondent for its inability or failure to provide the last mile connectivity. No doubt there was some delay by the respondents at the initial stage but that alone can not justify or absolve petitioner's total failure.

26. If we had reliable materials to find out the exact cost of providing the last mile connectivity at each of the two premises in Mumbai and Delhi, we would have reduced that much amount from the claim of the petitioner and allowed the rest. That would have served the interest of justice and prevented unjust enrichment of the petitioner. However, in absence of such reliable materials as to actual costs which the petitioner has saved by non-compliance with the requirements of paragraph 4(iv) of the P.O., we have looked closely at the case of both the parties and we find that at best the respondents could have invoked

clause 16 and more particularly, clause 16.2 which provide for liquidated damages in certain eventualities like failure to deliver the stores/services or to install and commission the project in whole or in part. The admitted default on the part of the petitioner can safely be treated as failure or delay affecting the installation/commissioning of a part of the project requiring last mile connectivity. In such a case, as per clause 16.2(b) of the Agreement (P.O.), liquidated damages can be levied on the affected part of the project. As per clause 16.2(c), the liquidated damages must be limited to a maximum of 12%. In the present case the full amount billed and receivable by the petitioner for services rendered is disclosed as Rs.2,15,25,512/-, hence, on account of limitation of 12%, the respondents could not have levied and deducted an amount more that Rs.25,83,181/-. Instead of adopting this lawful course, the respondents proceeded to unilaterally impose rentals at their own rate of dark fibre. Such action of the respondents amounts to adjudicating a claim in its own favour without any authority for such unilateral act either under Section 70 of the Contract Act or under any of the provisions of the Contract(P.O.).

27. We find merit in the submissions advanced on behalf of the petitioner on the basis of judgments in the case of **Sir Chunnilal V. Mehta & Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314** and **M/s Lakshmichand and Balchand Vs. State of Andhra Pradesh, (1987) 1 SCC 19**. Accordingly, we hold that respondents could not have claimed by way of

damages in excess of and beyond the terms of the contract (P.O.). They have also failed to make out a case for set-off. There is no material to show that Rs.24 lakhs and odd was an ascertained and determined liability against the petitioner.

28. As a result of aforesaid discussion, the claim of the petitioner is allowed but in part only. The principal amount which the respondent must refund or pay back to the petitioner would be Rs.1,10,57,268 – Rs.25,83,181= Rs.84,74,087/-. Petitioner has also claimed an amount of Rs.66,33,414/- by way of interest from the date the amounts became due and upto 15.07.2012. It has calculated this amount by applying a rate of 18%. The calculations are in **Annexure P-14** which discloses the dates when the short payments were made after deductions. We are not persuaded to allow interest @ 18% in absence of any such stipulation in the Agreement (P.O.). Hence, while allowing the principal amount of Rs.84,74,087/- in favour of the petitioner, we direct payment of interest at the rate of 9% from the date the amounts became due upto the date of this judgment/order.

29. Let a decree for the principal amount as well as for the interest in terms of this order as indicated above be prepared at the earliest preferably within one month. The respondents should satisfy the decree within three months from today otherwise after three months the entire decretal amount shall be payable

along with interest @ 12% per annum till realized. However, in the facts of the case, there shall be no order as to costs.

…..…………..…
(S.K. Singh, J)
Chairperson

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(A.K. Bhargava)
Member

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