TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI
Dated 11th February, 2010

Petition No. 3 of 2004

Escotel Mobile Communications Ltd
A-36, Mohan Co-operative Industrial Estate
Mathura Road
New Delhi-110 044 …. Petitioner

Versus

1. Department of Telecommunications
Ministry of Communications
Govt. of India
Sanchar Bhawan
20, Ashoka Road
New Delhi
[through its Director (LF)]

2. Director (LF)
Licensing Finance Cell
Ministry of Communications
Department of Telecommunications
Sanchar Bhawan, 20, Ashoka Road
New Delhi – 110 001

3. Senior Accounts Officer (LF-IV)
Govt. of India
Department of Telecommunications
1300 Sanchar Bhawan, 20, Ashoka Road
New Delhi – 110 001 …. Respondents

BEFORE:
HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G. D. GAIHA, MEMBER

For Petitioner : Mr. Punit D. Tyagi, Advocate

For Respondent : Mr.Kuldip Singh, Advocate

O R D E R

S.B. Sinha

This petition raises a short question.

2. The petitioner was asked to make payment of the principal amount towards shortfall in payment of licence fee of a sum of Rs. 4.85 crores on or about 30.5.2002. A Demand Draft was prepared on the said date. The said Demand Draft could not be deposited with the respondent as the representative of the petitioner reached its office beyond the banking hours. The said Demand Draft, however, was admittedly deposited and credited in the account of the respondent on 31.5.2002.

Despite the same, on the premise that the petitioner was in willful default in payment of license fee for a sum of Rs.4.85 crores, penalty of Rs. 7.31 crores representing 150% of the shortfall of the licence fee was levied.

3. The respondent contends that as the provision contained in clause 6.8 is penal in nature, the same would be attracted automatically in case of default in payment of license fee and in view of the fact that the payment was not made by the petitioner by 30.5.2002, the penalty has rightly been imposed, being the genuine pre-estimate to compensate the loss of the respondent.

4. With a view to appreciate the rival contentions of the parties, we may notice the admitted fact of the matter.

The petitioner was granted license to establish, maintain and operate cellular mobile telephone service in Kerala, Haryana and Uttar Pradesh (West) Circles. In the year 1999, 'Migration Package' was offered to the petitioner which was accepted by it, pursuant whereto a deed of amendment to the license was executed by and between the parties on or about 25.9.2001/18.01.2002.

5. It is accepted that a judgment was rendered by this Tribunal on 09.04.2002 directing the respondents to modify its demand, on the basis whereof, higher amount of license fee, interest etc. has been charged.

An advance license fee of Rs. 7.71 crores was paid by the petitioner on 15.4.2002 for the quarter of April – June, 2002.

6. The petitioner has contended which has neither been denied nor disputed that apart from the said amount, no other amount was due from it. By reason of a letter dated 24.4.2002, the petitioner had asked for refund of a sum of Rs.10,63,35,275/- which became payable in terms of the judgment of this Tribunal. The amount was neither refunded nor adjusted from the balance amount of the license fee payable by the petitioner.

7. It was on the aforementioned premise that an offer of the amount of shortfall was made on 30.5.2002. It furthermore stands admitted that respondent had not preferred any appeal before the Supreme Court of India, against the judgment of this Tribunal dated 09.04.2002 till that date. The petitioner also did not prefer any appeal. The respondent preferred an appeal before the Supreme Court of India against the said judgment only on or before 04.07.2002.

8. The question as whether the action of the respondent in charging penal interest @ 150% of the shortfall by reason of the aforementioned Order dated 3.10.2002, is justified, must be judged in the aforementioned factual matrix.

9. For the purpose of disposal of this matter, we may proceed on the basis that clause 3.68 represents a mutually agreed amount between the parties to pay a pre-determined sum by way of damages. In a situation of this nature, it is difficult to appreciate the contention of the respondent that imposition of penalty would be automatic. Even if the contention of the respondent is correct, the contracting parties were be at liberty to waive imposition of penal interest. Even otherwise the terms of the amended license do not suggest that clause 3.8 is a 'sunset' clause.

10. The specific stand of the respondent, which we will assume in this matter to be correct that the provisions relating to levy of penal interest is only contractual in nature and not statutory.

Even in a situation like the present case, the respondents, being a 'State', within the meaning of Article 12 of the Constitution of India, is expected to act fairly and reasonably, even in a matter involving contract-qua-contract.

In Dwarkadas Marfatia & Sons. Vs. Board of Trustees of the Port of Bombay - 1989(3)SCC 293, the Supreme Court of India observed as under:

> "25. Therefore, Mr.Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted "State" within Article 12 of the Constitution in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reliance may be placed on the observations of this Court in E.P. Royappa v. State of Tamil Nadu, Maneka Gandhi v. Union of India, R.K. Shetty v. International Airport Authority of India, Kasturi Lal Lakshmi Reddy v. State of J & K and

Ajay Hasia v. Khalid Mujib Sehravardi. Where there is arbitrariness in State action. Article 14 springs in and judicial review strikes such and action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14. The observations in paras 101 and 102 of the Escorts case read properly do no detract from the aforesaid principles."

While acting in fairness to a party to the contract, the State is expected to take into consideration the conduct of the other party thereto.

Admittedly, the amount of shortfall could be tendered to the respondent within a period of 60 days from the date of expiry of the financial year, i.e., till 30.5.2002. The petitioner prepared the DD and tendered the same to the respondent within the said period. Tender of the said amount could be effected till the end of the day, i.e., 12 O'Clock in the night and in any event at any time before the office hours were over. Tender of a payment validly made, thus, could not have been refused only on the premise that banking hours were over.

The respondent, therefore, could not have taken advantage of its own wrong.

'Lex non cogit ad impossibilia' is a well known maxim, which means 'law does not presume a thing to be done which is impossible to be performed'.

In Rosali V. Vs. Taico Bank and Ors. – AIR 2007 SUPREME COURT 998, the Supreme Court of India held as under:

"(ii) lex non cogit ad impossibilia (the law does not compel a man to do that what he cannot possibly perform) [See Ram Chandra Singh (supra) and Board of Control For Cricket in India (supra)]

30. The term "immediately", therefore, must be construed having regard to the aforementioned principles. The term has two meanings. One, indicating the relation of cause and effect and the other, the absence of time between two events. In the former sense, it means proximately, without intervention of anything, as opposed to "mediately". In the latter sense, it means instantaneously.

31. The term "immediately", is, thus, required to be construed as meaning with all reasonable speed, considering the circumstances of the case. [See Halsbury's Laws of England, 4th Edition, Vol. 23, para 1618, p. 1178]

32. In a given situation, the term "immediately" may mean "within reasonable time. Where an act is to be done within reasonable time, it must be done immediately. [See Gangavishan Heeralal v. Gopal Digambar Jain and Ors., AIR1980MP119; Keshava S. Jamkhandi v. Ramachandra S. Jamkhandi, AIR1981 Kar 97 at 101; Ramnarayan v. State of M.P., AIR 1962 MP 93; R. v. Inspector of Taxes (1971) 3 All ER 394 and R. v. HU Inspector of Taxes (1972) 1 All ER 545 In Bombay Dyeing (supra), this Court observed:

> In 'The Interpretation and Application of Statutes', Reed Dickerson, at p.135 discussed the subject while dealing with the importance of context of the statute in the following terms:
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> .....The essence of the language is to reflect, express, and perhaps even affect the conceptual matrix of established ideas and values that identifies the culture to which it belongs. For this reason, language has been called "conceptual map of human experience.

33. In K.S. Muthu v. T. Govindarajulu and Anr. 2000(4) SCALE 175 , this Court opined:

"…….In the circumstances when the Appellant was not in a position to perform the direction given by the Court in view of the holiday, the Court cannot expect the Appellant to perform what is impossible....

34. In Crawford on Statutory Construction at page 539, it is stated:

"271. Miscellaneous Implied Exceptions from the Requirements of Mandatory Statutes, In General.- Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their jurisdiction in considerations of justice. It is a well known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to be of a sufficient caliber to excuse or justify a technical violation of the law. (Emphasis supplied)

[See also Dove Investments Pvt. Ltd. and Ors. v. Gujarat Industrial Inv. Corporation Ltd. and Anr. (2006)2 SCC 619: AIR2006SC1454].

In Aneeta Hadav Vs. Godfather Travels and Tours Pvt Ltd, 2008(3) SCC 703, one of us opined:-

"17. The question as to whether a company can be proceeded against when a mandatory imprisonment is prescribed in law came up for consideration before a Constitution Bench of this Court in Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors. [2005]275ITR81(SC) wherein this Court upon considering a large number of decisions as also the principle *"lex non cogit ad impossibilia"* opined:

30. As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely, those under Section 13; Clause (a) of Sub-section (1) of Section 18; Section 18A; Clause (a) of Sub-section (1) of Section 19; Sub-section (2) of Section 44, for which the minimum sentence of six months' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than Rs. one lakh, and that they could be prosecuted only when the offences involve an amount or value less than Rs. one lakh.(Emphasis supplied)

Even otherwise, in a case of this nature, a mandatory provision may also be treated to be directory.

11. It is furthermore of some significance to notice that in Francis Bennion's 'Statutory Interpretation' at page 33, the learned author opined :-

"Where a requirement arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequence Parliament intended should follow from failure to implement the requirement. This is an area where legislative drafting has been markedly deficient. Drafters find it easy to use the language of command. They say that a

thing 'shall' be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the drafter is not expressed in the statute. Yet the courts are forced to reach a decision. It would be draconian to hold that in every case failure to comply with the relevant requirement invalidates the thing done. So the courts' answer, where the consequences of breach are not spelt out in the statute, has been to devise a distinction between mandatory and directory duties. The distinction is illustrated by Bowen LJ's dictum concerning an enactment requiring consent to the initiation of legal proceedings. It directs what ought to be done… But it does not oblige the Court to close the gates of mercy upon the applicant, but enables it to stay proceedings until [consent is obtained]." (Underlining is ours for emphasis)

The action on the part of the respondent, therefore, deserved a strict scrutiny.

Levy of penal interest involves serious civil consequences. In this case, a sum of Rs. 7.31 crores has been levied as penalty, practically for no fault on the part of the petitioner. The amount if directed to be paid, shall cause immense prejudice and hardship to the petitioner. We, therefore, are of the opinion that the impugned demand cannot be sustained. It is set aside accordingly.

12. For the reasons aforementioned, this petition is allowed. The impugned direction is set aside, with costs. Counsel's fee assessed at Rs.1,00,000 (Rupees One Lakh Only).

……..... J
(S.B.Sinha)
Chairperson

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(G. D. Gaiha)
Member