TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED THE 9th MARCH, 2005

PETITION No.6 OF 2005

Bharti Infotel Limited …Petitioner

Vs

Union of India & Anr. …Respondents

BEFORE:

HON'BLE MR. JUSTICE D.P. WADHWA,CHAIRPERSON

LT.GEN.D.P. SEHGAL(RETD.),MEMBER

For Petitioners	:	Mr.T.R.Andhyarujina, Senior Advocate with Mr.Ramji Srinivasan, Mr.Gagan Sareen,Advocates
For Respondents	:	None

Catchwords

[Licence fee – claim for refund – UASL regime – one licence in circle becoming surplus – refund not permissible either in law or as per terms of licence – petition dismissed]

O R D E R

This is a petition filed by the petitioner, a service provider under Section 14 of the Telecom Regulatory Authority of India Act, 1997 (for short, the Act), to adjudicate upon the dispute between the petitioner as a licensee and Union of India, in the Department of Telecommunication (DoT), as the licensor. Petitioner seeks the following reliefs:

"(a) declare that the surrender of the Licences by the Petitioner was caused directly on account of the Regulatory acts of the introduction of a Unified Access Service Licence Regime and therefore, was involuntarily and not on account of any breach by the Petitioner;

(b) direct the Respondent to refund to the Petitioner such Entry Fee paid under the Surrendered Licences with effect from the date of surrender of the Licences, together with interest

@18% per annum on such amounts till the date of payment; or

(c) alternatively, direct the TRAI to issue Recommendations on the Surrender Policy to enable the Government to frame appropriate Guidelines or otherwise granting suitable relief, not later than two months from the date of judgment (and retrospectively applying the same to the Petitioner in respect the Surrendered Licences) and

(d) award costs;"

The petitioner says its earlier name was Bharti Telenet Ltd., now it is Bharti Infotel Ltd. It is stated that the petitioner is one of the subsidiary companies of the parent company M/s. Bharti Televentures Ltd. It is one of the two major companies in the group and the other company being M/s. Bharti Cellular Limited/Bharti Mobile Ltd. Petitioner was holding basic licenses in five circles namely Madhya Pradesh, Haryana, Karnataka, Tamil Nadu and Delhi. It has surrendered four licenses of the circles – Haryana, Karnataka, Tamil Nadu and Delhi. It says it had to surrender the licenses as these basic licenses became surplus on account the fact that a sister company Bharti Cellular Ltd. which is holding licenses for providing mobile services in these Circles got Unified Access Service Licenses (UASL) under which Bharti Cellular Ltd. could also provide not only mobile services but also basic services. Petitioner, therefore, says that surrender was done under the changed policy of DoT which made basic licenses held by the petitioner surplus or redundant. According to the petitioner it was meaningless to provide basic service both by Bharti Cellular Ltd./Bharti Mobile Ltd. and the petitioner under the same group, being subsidiaries of Bharti Televentures Ltd. and that would have duplicated the resources for maintaining parallel infrastructure. Petitioner, therefore, perforce, had to surrender the four licenses except for the license held for Madhya Pradesh circle and seeks refund of the license fee paid for getting basic licenses in the aforesaid four circles i.e. Haryana, Tamil Nadu, Karnataka and Delhi. However, during the course of arguments it was submitted by Mr.T.R.Andhyarujina, learned Senior Advocate appearing for the petitioner that petitioner does not want full refund but pro-rata refund be allowed, though prayer is wider, as petitioner did make use of the licenses before the UASL license regime came into being.

Conditions of payment of license fee which are relevant for our purpose are:

"5.1 LICENSEE shall pay one time Entry Fee of Rs. 10 crores (Rupees Ten crores only for Haryana Service Area), which shall be non-refundable and shall be payable before signing of Licence. There is no separate entry fee payable for allocation and usage of spectrum in a service area for deploying Wireless Access Systems.

5.2 LICENSEE FEE: In addition to the Entry Fee described above, Annual LICENCE fee in the from of revenue share @ 10% (Ten per cent) of Adjusted Gross Revenue (AGR) shall be payable. The AGR is defined in definitions".

To understand the petitioner's grievance a little background of the case may be worthwhile to note.

Earlier Telecom Policy provided for only two licenses (duopoly) in any telecom circle. Under this policy petitioner got basic licenses for telecom circle Madhya Pradesh on 28.2.97 for a fix fee of Rs.654.50 crores per annum over the a period of 15 years. In April, 1999 new Telecom Policy (NTP 99) was announced by the Central Government. Now basic services are open to unlimited competition abolishing heretobefore duopoly, and at the same time introducing a revenue-sharing license fee regime instead of previous fixed fee regime. The Central Government offered migration package dated 22.7.99 to all the services providers, basic and cellular, whereby they could migrate to new revenue sharing regime. The petitioner migrated to the new regime w.e.f. 1.8.1999. Now under the migration policy license fee was in the form of entry fee and thereafter service providers were to share the revenue with the licensor on percentage basis of their gross revenue. The effect of migration policy was acceptable by the petitioner and the result was for Madhya Pradesh Circle entry fee was assessed at Rs.35.33 crores as on 31.7.99.

The petitioner obtained basic licenses for four circles in question in 2001 after the migration package came into being. Grant of these licenses was, however, subject to outcome of petition filed by the Cellular Mobile Service Providers (CMSPs) against Union of India challenging the mobility of the basic operators to provide wireless in local loop [WLL(M)]. Petition filed by CMSPs was dismissed by the TDSAT. It was held that with the march of technology, convergence was blurring the distinction between delivery systems, resulting in the need to take a fresh look at the extant licensing policy.

Thereafter, Telecom Regulatory Authority of India (TRAI) issued consultation papers on 16.7.2003 seeking views on the introduction of Unified Access Service Licenses (UASL) between basic and cellular services. Recommendations of the TRAI dated 27.10.2003 for USAL were accepted by the Central Government on 11.11.2003. Central Government issued Addendum to NTP 99 that "Government in the public interest in general and consumer interest in particular and for the proper conduct of telegraphs and telecommunications services, has decided that there shall also be the following categories of licenses for telecommunication services:

(i) Unified Licence for Telecommunication Services permitting Licensee to provide all telecommunication/telegraph services covering various geographical areas using any technology;

(ii) Licence for Unified Access (Basic and Cellular) Services permitting Licensee to provide Basic and/or Cellular Services using any technology in a defined service area".

At the same time , guidelines were issued. Some of the guidelines relevant for our purpose would be as under:

"(i) The existing operators shall have an option to continue under the present licensing regime (with present terms & conditions) or migrate to new Unified Access Services Licence (UASL) in the existing service areas, with the existing allocated/contracted spectrum.

(ii) ……

(iii) The service providers migrating to Unified Access Services licence will continue to provide wireless services in already allocated/contracted spectrum and no additional spectrum will be allotted under the migration process for Unified Access Service Licence.

(iv) …….

(v) The Unified Access service providers are free to use any technology without any restriction.

(vi) No additional entry fee shall be charged from CMSPs for migration to UASL. For Basic Service Operators (BSOs), the entry fee for migration to the Unified Access Service Licence for a Service Area shall be equal to the entry fee paid by the Fourth Cellular Operator for that Service Area, or the entry fee paid by the BSO itself, whichever is higher. While applying for migration to UASL, the BSO will pay the difference between the said entry fee for UASL and the entry fee already paid by it.

(vii) …….

(viii) These Basic Service Operators who do not wish to migrate to the full mobility regime, would only be required to pay the additional fee for Wireless in Local Loop (M), with mobility confined strictly within Short Distance Charging Area, as prescribed separately".

Petitioner says when consultation papers issued by TRAI, petitioner brought to its notice of TRAI the difficulty that would be faced by the Group (flagship company holding separate basic and cellular licenses in the same service area). TRAI did not pay any attention to the issue raised by the petitioner. When guidelines were issued petitioner again raised the same point but there was no response. Ultimately by letter dated 23.6.2004 petitioner sought to surrender the four licenses in the subject circles pointing out:

> "5. Bharti is therefore now compelled to make the following impossible choice:
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> - Continue to provide fixed line services under the original Fixed License. This is impractical since the other companies in the Bharti group (Bharti Cellular Ltd. & Bharti Mobile Ltd) can now provide the fixed services under UASL and it would be meaningless to provide the same service under two licenses. Such a step would also mean unnecessary duplication of resources for maintaining a parallel infrastructure.
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> - Convert the Fixed Licenses in the Affected Circles to UASL by paying a huge additional license fee. This is also unviable since we already hold UASL licenses in all the Affected Circles for which we continue to pay annual revenue share

The licenses were surrendered by letter dated 3.8.2004 demanding refund of the license fee. Since this was not agreed to by the DoT, this petition came to be filed. As regards the licence of Madhya Pradesh circle is concerned, petitioner has claimed that though it surrendered the basic licence of this circle as well by its letter dated 11.10.2004, there was not any formal communication from the Government accepting the surrender of the licence as in respect of four other circles. The petitioner, therefore, claims that since 60 days notice period under the licence expired without any communication from the Government, this surrender of Madhya Pradesh circle would be deemed to have been accepted. Strangely, this particular para in the petition is in italics unlike other paragraphs. There is no prayer if the surrender in the case of Madhya Pradesh circle was in accordance with the licence conditions and as such there is no need for us to go into that question.

Nothing has been said as to how this Tribunal can direct the TRAI to make recommendations and therefore, we do not propose to deal with this part of the prayer.

We put it to the learned senior counsel for the petitioner under what terms of the licenses or any provision of law, petitioner can seek refund of the license fee in face of the specific condition in the license that license fee is non-refundable. No such term in the license has been pointed out. On the question of legal submission it is stated that it is a case which turns on the frustration of the terms

of license and since there was impossibility of the performance of the license condition the contract is frustrated. Reliance was placed on Section 56* of the Contract which provides as to the consequences where the contract do an act which after the contract is made, become impossible.

Mr.Andhyarujina, learned senior counsel for the petitioner submitted that the surrender of the license was an involuntary act inasmuch as it was change in the policy

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"56* Agreement to do impossible act. – An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful. – A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful. – Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

by the Government on the basis of which guidelines issued which resulted in the license becoming surplus. He said that circumstances had been created by the change of the policy which has made the operation of the license impracticable. In support of his submissions Mr. Andhyarujina referred to a decision of the English House of Lords in the case of F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co.Ltd. [1916-17] All E.R. Rep. 104 = (1916) 2 AC 397, where a distinction is sought to be made between impossibility and impracticable. Decision of the House of Lords in the case of F.A. Tamplin Steamship Co. Ltd. has been considered by the Supreme Court in various judgements starting with AIR 1954 SC 44 - Satyabrata Ghose vs. Mugneeram Basngur and Co. & Anr.. where the Court observed as under:

> "We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of section 56 of the Indian Contract Act. It would be incorrect to say that section 56 of the Contract Act applies only to cases of

physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that, to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and is not permissible to import the principles of English law 'dehors' these statutory provisions. The decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those which have come before our courts.

In Boothlinga Agencies vs. V.T.C. Poriaswami Nadar – AIR 1969 SC 110, the Court considered the provisions of Section 56 of the Indian Contract Act, relating to the doctrine of frustration and said as under:

"10. The doctrine of frustration of contract is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It should be noticed that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties:

The Court thereafter examined various judgments of English Courts where a case of supervening illegality is treated as an instance of frustration of contract and observed as under:

"13. In English Law therefore the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in S. 56 of the Indian Contract Act lay down a positive rule of law and English authorities cannot therefore be of direct assistance, though they have persuasive value in showing how English courts have approached and decided cases under similar circumstances.

In the case of Industrial Finance Corporation of India Ltd. vs. Cannanore Spinning and Weaving Mills Ltd. and Ors. – (2002) 5 SCC 54 , the Court the Court observed:

"42. Needless to record that on a true perspective of Section 56 of the Contract Act, three essential conditions appear to be the realistic interpretation of the statute. The conditions being: (i) a valid and subsisting contract between the parties; (ii) there must be some part of the contract yet to be performed; and (iii) the contract after it is entered into becomes impossible of performance.

Impracticable is not the same thing as impossible. In any case if a contract becomes impracticable, it has to be so from the point of view of both the parties. We do not think reliance on the provisions of Section 56 of the Contract Act is of any relevance. This Section is inapplicable.

The real ground of surrender of the licenses would be that the petitioner does not wish to run two establishments to run the same service. Petitioner has not challenged the guidelines because its sister company Bharti Cellular Ltd./Bharti Mobile Ltd. has taken advantage of that as it migrated to UASL without payment of any additional entry fee. It may also be noticed that this sister company which was earlier providing cellular services could provide basic services as well without making further payment of license fee or entry fee for providing basic services. It would appear it is purely a commercial decision of the petitioner to surrender these four licenses. Petitioner is not entitled to refund of entry fee for the licenses so surrendered either in law or as per the terms of the licenses.

We do not find any merit in the petition. It is accordingly dismissed.

……..……..J

(D.P. Wadhwa)

Chairperson

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(D.P.Sehgal)

Member