

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

Dated 25th January, 2021

**MA No.235/2020
in
Telecom Petition No.351 of 2013**

Tata Communications Ltd.

.....Petitioner

Vs.

Bharat Sanchar Nigam Ltd.

.....Respondent

BEFORE:

HON'BLE MR.JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

For Petitioner

: Mr. Meel Malhotra, Sr. Advocate
Mr. Mansoor Ali Shoket, Advocate
Mr. Kunal Singh, Advocate
Ms. Sheniza Farid, Advocate

For Respondent

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

ORDER

By S.K. Singh, Chairperson – This petition was filed on 07.03.2013 with the following prayers:

- “(a) Quash and set aside the impugned Circular No.103-7/2007-Comml dated 06.01.2009;
- (b) Quash and set aside the various supplementary demand notices issued by the Respondent No.2 to 10 as detailed in Annexure P-94.
- (c) Direct the Respondent No.3, 5 and 8 to refund the amounts of Rs.48,02,531/- paid by the petitioner in terms of paragraph 67.
- (d) Award interest @ 18% p.a. on amounts in prayer (c) above from the date of payment till the date of realization.
- (e) Restrain the Respondent No.10 from holding back/ disallowing/delaying any technical requests of the petitioner regarding POI roll-out, augmentation, decommissioning/surrendering of POI, removal of equipments from decommissioned POIs, upgradation of equipment at existing POI, switch migration, media shifting, TG re-configuration against their claims in the impugned demand notices during the pendency of the petition.
- (f) Pass any other and further orders as this Hon’ble Tribunal may deem fit in the facts and circumstances of the case; and

for this act of kindness, the petitioner, as is duty bound, shall ever pray.”

2. Along with the petition, MA No.271/2013 was also filed seeking stay of the circular dated 06.01.2009 and also of the disconnection notice dated 11.07.2013 issued by the Tamil Nadu Telecom Circle and similar disconnection notices dated 21.07.2012 and 27.08.2012 issued by Uttar Pradesh(West) Telecom Circle. Para 1 of the petition succinctly states the grievance of the petitioner as follows:

“1. That by way of the present petition, the Petitioner seeks to challenge the validity of the internal circular No.103-7/2007-Comml dated 6.1.2009 issued by the Respondent No.1 herein and the consequent invoices raised by the various state telecom circles of the Respondent No.1 whereby, the Respondents have sought to impose a levy of six months charges in lieu of notice for decommissioning of the infrastructure (active and passive charges) Poles (Points of Interconnect). The minimum contractual period for hiring of infrastructure is one year, the agreement between the parties does not specify any notice period in this regard and the Respondent No.1 by an internal circular to its field units has unilaterally amended the terms of the contract by providing/ imposing a minimum notice period of 6 months towards decommissioning of POIs and surrendering of infrastructure thereof or pay 6 months charges in lieu of disconnection. The field units of the Respondent i.e. Respondent No.2 to

Respondent No.10 have raised demand notice in terms of the above said circular and the Petitioner by means of the present Petition is seeking the set aside of the circular of 06.01.2009 and invoices/demand notices raised in terms of such circulation.

3. The petition was admitted and notice was issued on the application for stay on 08.10.2013. The Bench indicated the time for reply and rejoinder and directed the matter to be put-up before the Registrar for getting the case ready for hearing. No date was fixed for hearing the stay matter. Time for filing reply was extended repeatedly because the matter warranted information from 9 circles. On 10.09.2014, the matter was put-up before the Bench after the pleadings were complete. The matter was directed to be listed on 28.11.2014 under the heading "for hearing" but could not be taken up.

4. MA No.235/2020 was filed on behalf of the petitioner on 10.11.2020 to challenge the legality and validity of a demand for the balance outstanding against the petitioner as on 29.02.2020, made through email dated 22.07.2020(Annexure A/2) to MA No.235/2020 and also of Annexure A/1 dated 28.10.2020, a notice for disconnection of POIs due to non-payment of the outstanding dues.

5. MA No.235/2020 was listed for consideration on 23.11.2020. After hearing the parties it transpired that the demand was part of the same demand which was involved in the main petition but the amount had come down because of certain payments made by the petitioner. On 23.11.2020 the following order was passed granting interim protection to the petitioner till the next date:

“Heard learned senior counsel for the petitioner, Mr. Meet Malhotra and Mr. Tejveer Singh Bhatia, learned counsel for the respondent, Bharat Sanchar Nigam Limited in respect of M.A. No. 235 of 2020.

It appears that now respondent have made a fresh demand for payment of part of an earlier invoice for Rs. 24 lakhs and odd while the earlier invoices of 2012 is under challenge in the instant main petition.

It further appears that the present demand is part of the total demand made in the year 2012 for approximately Rs. 68 lakh, out of which, 46 lakh was paid by the petitioner.

The order-sheet discloses that the prayer of the petitioner for interim protection was not taken up probably because the respondent did not reiterate their demand or threatened with coercive action.

As prayed on behalf of the respondent, one week's time is granted for filing a reply. Time for rejoinder shall be considered, if required, on the next date.

No coercive steps shall be taken on the basis of fresh demand till the next date.

Post the matter under the same head on 9.12.2020.”

6. After the filing of the reply and rejoinder to the MA, the matter was taken up on 23.12.2020 when the following order was passed:

“Learned counsel for the petitioner submits that if hearing of the M.A. is taken up, it will amount to hearing of the main petition itself and may require some time. He prays for listing of the matter on any convenient date so that the M.A may be considered in the light of reply and if possible the petition may be decided accordingly. The other side has no objection.

Post the matter under the same head on 19.01.2021.

Interim order to continue till the next hearing.”

7. The matter was finally heard on 19.01.2020. On that date some reluctance was shown on behalf of the petitioner in arguing the main petition. On the insistence of the other party, MA No.235/2020 was heard for deciding whether interim protection in favour of the petitioner should continue or not.

8. On behalf of petitioner/applicant two issues have been highlighted to support the stand that petitioner has a good case. The first is a technical issue of limitation,

not with respect to the original demands under challenge in the petition but with respect to the remaining part of that demand which is outstanding after adjusting the payments admittedly made by the petitioner and which is Rs.21 lakhs and odd indicated in the demand dated 22.07.2020. Applicant's stand is that it has paid the rest demand but not the balance amount being demanded because it arises due to unilateral terms imposed by the respondent. According to the learned Senior Counsel for the applicant, since there was no stay order passed by this Tribunal the respondent should have pursued their original demand and as they did not do so for more than three years, their demand again being made in 2020 is barred by limitation.

9. So far as the above issue is concerned, the applicant has placed reliance upon Sections 9 and 15 of the Limitation Act, 1963. Section 9 prescribes that once the time for institution of suit etc. has begun to run, no subsequent disability or inability would stop it. Section 15 provides for exclusion of time in computing the period of limitation and specifically provides that if the institution of a suit or execution of a decree has been stayed by injunction or order, the period covered by such order should be excluded. Learned counsel has also placed reliance upon a judgment of the Hon'ble Supreme Court reported in **Siraj-ul-Haq Khan & Ors.**

Vs. The Sunni Central Board of Waqf, U.P. & Ors. – AIR 1959 SC 198 to support and elucidate the aforesaid provision in Section 15 of the Limitation Act.

10. The aforesaid plea, in the facts of the case has no merit, at least, *prima facie*. The bar of limitation as provided in Section 3 of the Limitation Act requires a court to dismiss every suit instituted, appeal preferred and application made after the prescribed period, even if limitation has not been set-up as a defence. In the present case, the respondent by reiterating its demand for unpaid demand of 2012-13 has only reminded the applicant/petitioner that even as a public sector undertaking required to act fairly, the respondent cannot wait for passing of an order of stay indefinitely, even when notice in stay matter has been issued in this matter long back. Clearly, such demand does not amount to filing of any suit, appeal or application and is not covered by the provisions of the Limitation Act. The judgment in the case of **Siraj-ul-Haq Khan(supra.)** is on Section 15 which does not apply in this case.

11. As a respondent, BSNL is entitled to defend its demand and take all defence and steps not prohibited by law. It is difficult to sustain the technical plea of limitation in the present case even on the principle of fairness because the respondent is fully entitled to defend itself when its cause is justifiable and can

fairly reiterate its demands raised earlier, in spite of pendency of the present petition, when the petitioner/applicant only got notice issued in the stay matter and did not pursue the stay matter any further. Hence, no merit is found in the plea of limitation so as to make out a *prima facie* case in favour of applicant.

12. The other plea is that the interconnect agreement does not prescribe a notice period of six months and payment in lieu thereof hence imposition of such a condition is an unilateral action in violation of the agreement and therefore, arbitrary.

13. Learned Senior Counsel for the applicant has placed reliance on Clause 2.1.9 to highlight that only rental for use of requisite space and mounting is to be determined by the respondent, the provider of such facility. Arrangements for installation, operation etc. is to be arrived at by mutual agreement. He also referred to Clause 3.5.2 which provides for mutually agreed timeframe for removal of interconnect capacity. Admittedly, the present case does not relate to removal or cessation of interconnect capacity which is subject matter of Chapter 3 in which Clause 3.5.2 finds place.

14. On the other hand, learned counsel for the non-applicant/respondent has placed strong reliance upon Clause 2.1.9, referred to earlier and also upon Clause 6.3.3. which reads as follows:

“6.3.3 OTHER CHARGES

It shall not be mandatory for BSNL to provide any infrastructure to NLDO which NLDO itself is supposed to arrange.

For the infrastructure referred to in para 2.1.9 like space in BSNL's building, provision of power supply, air conditioning, mounting of antennas on towers or building tops if feasible for the interconnect link, the charges and other terms & conditions for the same shall be as prescribed by BSNL from time to time separately.”

15. Learned counsel for the respondent has submitted that in Clause 2.1.9 the determination of rental has been left totally in the hands of the respondent. The arrangement for installation, operation and maintenance of the equipments alone is to be by mutual agreement. In the present case this clause is not attracted because the terms and conditions impugned relate only to use of the space and not to any arrangements. It has been highlighted by learned counsel that not only the charges but other terms and conditions for providing space and other infrastructure is to be decided by BSNL from time to time and therefore, there is no merit in the claim of the applicant that the terms and conditions requiring prior notice are beyond the powers conferred by the agreement.

16. Learned counsel for the respondent has also placed reliance upon a judgment of this Tribunal dated 18.03.2019 in the case of **Cellular Operators' Association of India & Ors. Vs. BSNL**(Annexure B to the reply to the MA) wherein unilateral revision of rates by BSNL in terms of the provisions of the agreement was upheld by placing reliance upon two judgments of the Hon'ble Apex Court indicated in Para 12 of that judgment and an earlier judgment of this Tribunal dated 20.08.2014 in Petition No.403/2013 (**Tata Communications Ltd. Vs. BSNL**).

17. Since the agreement can validly give power to a party to decide a given matter unilaterally as held by the Apex Court in several judgments, although the earlier judgment of this Tribunal related only to classification of cities and revision of rates under the same agreement, the principle is applicable even when BSNL proceeds to exercise such power to lay down terms and conditions for allotment of space. In the present case Clause 6.3.3 shows clearly that such power is given to respondent BSNL.

18. In view of the aforesaid discussion, for the purpose of deciding whether the interim protection should continue in favour of the petitioner or not, this Tribunal

finds merit in the case of the respondent as discussed above. It is found that not only the petitioner does not have a good *prima facie* case but it will also suffer no irreparable loss or injury if it has to pay the balance dues of Rs.21 lakhs and odd. Such payment, if made, will be subject to the outcome of this petition. One week's time is granted to make the payment and hence no coercive action shall be taken for one week from today.

19. With the aforesaid observation the interim relief granted to the petitioner on 23.11.2020 that no coercive steps shall be taken on the basis of fresh demand is vacated with effect from one week hence.

20. Since the petition is of the year 2013, it should be heard urgently. Put up on 22.07.2021 for hearing before an appropriate bench as first case subject to part-heard, if any.

(S.K. Singh)
Chairperson