

(2014) 02 TDSAT CK 0001

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Execution Application No. 45, 46 Of 2012 In Petition No. 142, 143 Of 2007

M/s Reliance Communication Ltd.

APPELLANT

Vs

Bharat Sanchar Nigam Ltd

RESPONDENT

Date of Decision : 13-02-2014

Acts Referred:

Citation : (2014) 02 TDSAT CK 0001

Hon'ble Judges : Aftab Alam, J;Kuldip Singh, Member

Bench : Division Bench

Advocate : Ramji Srinivasan, Manali Singhal, Santosh Sachin, A. P. Singh, Maneesha Dhir, K. P. S. Kohli, Neha Singh, Maninder Singh, Ravi Sikri, Deepansh Yadav

Final Decision : Dismissed/Allowed

Judgement

Aftab Alam, Chairperson - Reliance Communications Limited (Reliance) earlier filed petitions claiming refund of large sums of money from Bharat Sanchar Nigam Limited {BSNL}¹ and Mahanagar Sanchar Nigam Limited (MTNL)². Those two petitions were allowed in part by a common judgment passed by the Tribunal on 17 October 2012 and the matter presently lies in appeal before the Supreme Court. The Supreme Court has declined to pass any interim order of stay in the appeals filed by MTNL and BSNL and hence, Reliance has filed these two Execution Petitions asserting that in terms of the Tribunal's judgment on its claim for refunds, it is entitled to be paid Rs.16.43 crores (inclusive of interest calculated up to 31 Oct. 2012) from BSNL and Rs.330.83 crores (inclusive of interest calculated up to 31 Oct. 2012) from MTNL. Besides the aforesaid sums, Reliance also claims from each BSNL and MTNL, proportionate costs of the litigation and the Counsel's fee fixed by the Tribunal at Rs.1lakh.

Both BSNL and MTNL have filed their respective responses maintaining that reliance is not entitled to be paid anything from them and the Execution Petitions are liable to be dismissed.

The question, therefore, is what Reliance is held entitled to under the judgment? And in order to find that, it is necessary to briefly examine the relief(s) that Reliance asked for in the two petitions and the circumstances in which it came to the Tribunal seeking those relief(s).

Reliance had launched a plan, called "Home Direct Calling" (HDC), purportedly in accordance with a scheme of the International Telecommunication Union. The plan mainly targeted Indians living or visiting abroad. The subscriber to the plan would be told that for calling a number in India (s)he should not dial the desired number directly but instead dial a certain assigned number. The call would thus land on the Reliance network and from there it would be handed over to the other Access Provider with a Calling Line Identification showing a national number. The international code (00) and the country code (e.g., 4 for UK, 1 for USA) would be deleted and replaced by local numbers (e.g., 022 3239, 033 3239 or 044 3239) so as to make the origin of the call appear from inside the country. Thus disguised, the call would be landed/terminated on trunk groups of BSNL or MTNL (as the case may be) other than those meant for International Long Dialing calls. The trunk groups of BSNL and MTNL would accept the call as originating from Mumbai, Kolkata or Chennai, process it and raise bill against Reliance accordingly.

When the matter came to light, the department of telecommunication took a serious view of it and slapped Reliance with penalties of Rs.50 crores on each of its three licences. Reliance challenged the imposition of penalties by the DoT before the Tribunal in Petition no. 3 of 2005. It was contended on its behalf that its plan was quite legitimate and within the provisions of the licence. On behalf of the DoT it was maintained that besides being deceitful and in violation of the terms of the licence, the tampering of the Calling Line Identification (CLI) of the call coming to India from abroad was also fraught with grave national security risks. The Tribunal by judgment and order dated 4 March, 2005 dismissed the petition and upheld the imposition of penalties against Reliance. Against the order of the Tribunal, Reliance filed an appeal³ before the Supreme Court but it was eventually withdrawn and was dismissed as such by order dated 29 September 2010.

The manner in which Reliance had executed its plan had also caused huge loss of revenue to BSNL and MTNL. For international long distance calls to fixed lines, in addition to the terminating charge, an Access Deficit Charge(ADC) was payable by the International Long Distance Operator (in this case Reliance) to the Access Service Provider (in this case MTNL and BSNL). By sending the international calls as local calls the terminating service providers were denied these charges. It needs to be noted that the ADC payable to Access Providers (MTNL and BSNL) for handling international calls, at that time, was Rs.4.35 per minute per calls. Accordingly, both BSNL and MTNL raised demands against Reliance for the period 1 May 2004 to 16 September 2004 when the plan was in operation. The demands also included liquidated damages chargeable under clause 6.4.6 of the

Interconnect agreement between Reliance and BSNL. Significantly, in the Interconnect Agreement between Reliance and MTNL there was no clause 6.4.6 or any other provision for liquidated damages.

To recover its losses, the BSNL corporate office raised a demand of Rs.319.05 crores against Reliance vide disconnection notice dated 7 June 2005 and similarly Delhi and Mumbai circles of MTNL made demands against Reliance aggregating to Rs.341.47 crores.

According to Reliance, it was forced to pay very large sums of money demanded by BSNL and MTNL under pain of disconnection. However, having paid the demands raised by BSNL and MTNL under protest, Reliance once again came to the Tribunal making the grievance that it was compelled to pay BSNL and MTNL far in excess of what was lawfully due to them. It, accordingly, made the claim for refunds.

The claim of refund in the case of BSNL was as under:

S.No.

Ground of Refund Claim

Amount

1

BSNL charging penalty even in respect of those Trunk Groups where HCD calls have not been terminated

from Petitioner's network.

10,80,59,782

2

BSNL raised bills in excess of total minutes terminated on BSNL's network.

36,72,31,885

3

BSNL applying wrong rates per minutes i.e. instead of 4.25 BSNL is applying 4.55 per minute

3,13,493

4

BSNL applying wrong calculation method for charging on MCUs without applying proper pulse rates

5,78,94,615

5

BSNL charging wrong routing of calls even after
16.09.2004.

13,71,28,100

6

BSNL raised bills even for some months twice over
1,27,23,844

7

BSNL charged penalty even without raising bill
43,29,59,119

TOTAL

111,63,10,838 Crs.

And in the case of MTNL:

Grounds of Refund Claim

Amount

MTNL Delhi

Amount

MTNL Mumbai

1

MTNL Delhi raised bills in excess of total minutes charged
terminated on

MTNL Delhi's network

28,715,113

2

MTNL Delhi charged penalty with respect to TGs where no HCD
calls were

routed by RCOM

164,02,18,230

3

MTNL Mumbai raised bills in excess of
total minutes charged terminated on MTNL Delhi's network
49,35,49,577
(48,58,48,939 +
77,00,638)

MTNL Mumbai charged penalty with respect to TGs where no HCD calls were
routed by RCOM

54,98,63,656
(14,97,54,353 +
94,275,932 +
30,58,33,371)

TOTAL

166,89,33,343

Crs.

104,34,13,233Crs.

TOTAL MTNL (MUMBAI + DELHI)

271,23,46,576 Crs.

The Tribunal, after hearing the parties through a prolonged proceeding passed
the judgment and order dated 17 October 2012 allowing the Reliance's petitions
in part. Against the judgment of the Tribunal both Reliance as well MTNL and
BSNL have preferred appeals that remain pending before the Supreme Court.

Here it would be apposite to examine what reliefs are claimed in the appeals so
as to see how the Tribunal's judgment is construed by the parties to it.

In the appeal filed by MTNL4, in paragraph 1of the memo, defining the limits of
the appeal it is stated as under:

"The appellant is filing the present appeal against the judgment and Order dated
17.10.2012 in appeal no. 143/2007 (sic Petition no. 143 of 2007) passed by the
Ld. Telecom Disputes Settlement Appellate Tribunal (TDSAT) whereby the appeal
filed by the respondent was partly decreed with the directions to the Appellant
herein to reconcile the bills with respect to penalty levied by the Appellant in
terms of clause 6.4.6 of the Interconnect Agreement entered into between the
parties with further directions to the appellant herein to re- issue the bills in the
light of findings arrived at in the judgment and refund the excess amount to
Respondent with the interest @9% p.a. from the date of deposit till date of filing
of the petition and interest @6% p.a. pendent lite and future."

(emphasis added)

The MTNL appeal is thus restricted to the direction of the Tribunal for reconciliation of its accounts with those of Reliance and issuance of fresh bills on that basis and to refund the excess amount to Reliance with interest at rates as directed by the Tribunal.

In the appeal filed by BSNL⁵, the scope of the appeal is described in the "synopsis and list of dates" as under:

"From the above, it may be noted that out of total sum of Rs.111.63 crores prayed for refund by the respondent for violations on account of HCD calls, Appellant/BSNL has to reconcile only for claim no.1, i.e. towards "Appellant/BSNL charging penalty even in respect of those Trunk Groups where HCD calls have not been terminated from the Respondent's network" which claim is only for Rs.10,80,59,782/-. Out of the total claim of Rs.10,80,59,782/-, as already noted above, certain claim has been rejected. Thus, in terms of impugned judgment dated 17.10.2012, Appellant is liable to reconcile only for the balance amount.

"Therefore the Appellant has preferred the present Civil Appeal wherein it has been directed to reconcile its bills/CDRs regarding the claim of Respondents under the Claim no. 1, i.e. "Appellant/BSNL charging penalty even in respect of those Trunk Groups where(sic) HCD Calls have not been terminated from the Respondent's Network."

(emphasis added)

BSNL thus seems to understand that under the Tribunal's judgment its liability is limited to Reliance's claim at serial no.1 (of the table at page 5 of the judgment) and the liability is only to reconcile its bills/call data records with those of Reliance in respect of its claim of Rs.10,80,59,782=00 regarding charge of penalty even in respect of those Trunk Groups where HCD Calls had not been terminated from Reliance's network.

Reliance, in paragraph 1 of its memo of appeal laid out the parametre of its appeal by stating as follows:

"The Appellant vide the present Appeal is partly challenging the impugned judgment inter-alia to the extent as mentioned herein below at point (A) and (B). Appellant seeks enhancement of the awarded rate of interest by modification of the relevant part of the impugned judgment as mentioned under point (C) herein below:

A. Ld. TDSAT dismissed the Appellant's Refund claim of Rs. 36,72,31,885/- with respect to 'Excess Minutes' wherein Respondent/BSNL wrongly and incorrectly raised the bills in excess of total number of minutes terminated on Respondent/BSNL network without producing the call data records maintained by it and which were conclusive as per BSNL's Interconnect Agreement.

B. Ld. TDSAT dismissed the Appellant's Refund claim of Rs. 43,29,59,119/- with

respect to "Demands without raising Bills" wherein Respondent/BSNL imposed penal demands even without raising any Bill despite clause in the Interconnect Agreement requiring bills to be raised in time showing all details.

C. *Ld.* TDSAT has wrongly and unreasonably granted interest on the Refunds allowed in favour of the Appellant at the lesser rate of 9% for the Pre-lite period and the reduced rate of only 6% per annum for pende-lite and post-lite period."

(emphasis added)

Thus in the appeal filed by Reliance it is expressly stated that in so far as BSNL is concerned, its claims at serial nos. 2 and 7 (of the table shown at pages 4 and 5), for Rs.36,72,31,885=00 and Rs.43,29,59,119=00 respectively were rejected. It does not say anything expressly in respect of its claims at serial nos. 1,3,4,5 and 6 and in the appeal does not seek any relief in regard to those items of its claim against BSNL. The claims at serial nos. 1,3,4,5 and 6 add up to Rs.31,61,19,834=00 (without interest), nevertheless, in the Execution Petition the claim against BSNL is restricted to only Rs.16.43 cr. (inclusive of interest up-to 31 Oct. 2012).

As regards the claim against MTNL, from the respective appeals filed by the two, Reliance seems to believe that its claims against MTNL were allowed in full and hence, the only grievance that it makes in its appeal before the Supreme Court (under point "C") is in respect the rate of interest allowed by the Tribunal. But from the appeal of MTNL it appears that, according to it, the judgment of the Tribunal obliges it only "to reconcile the bills with respect to penalty levied by the Appellant in terms of clause 6.4.6 of the Interconnect Agreement entered into between the parties" and further "to re-issue the bills in the light of findings arrived at in the judgment and refund the excess amount to Respondent with the interest @9% p.a. from the date of deposit till date of filing of the petition and interest @6% p.a. pendent lite and future".

It is thus to be seen that the judgment of the Tribunal is being read and construed vastly differently by the parties to the judgment. It, therefore, becomes necessary to examine the judgment and tell each of the parties what are their respective rights and liabilities under it.

From the claims raised by Reliance, at serial no. 1 against BSNL and at serial nos. 2 and 4 against MTNL, it is evident that one of its main grievances was that penalties were imposed against it by both BSNL and MTNL even in respect of trunk groups where not a single HCD call was ever terminated/landed. It was contended that there could be no justification for imposing penalty in respect of trunk groups through which no HCD call was ever routed. It was further submitted that the its Call Data Records for the relevant period will fully establish that no HDC calls ever terminated at a number of trunk groups in respect of which both BSNL and MTNL had demanded and realized from it large amounts as penalty and permission was sought for production of the Call Data Records to show that penalty was charged even in respect of such trunk groups where not a

single HCD call ever terminated. The Tribunal allowed the prayer for production of CDRs made on behalf of Reliance by order dated 2 August, 2011 making it, however, clear that the respondents, BSNL and MTNL would not only be entitled to cross-examine the Reliance witness but would also be entitled to examine their own witnesses.

In pursuance of the permission granted by the Tribunal, Reliance brought on record 3 DVDs purporting to contain the Call Data Records of all the calls originating from its network and getting terminated at the networks of BSNL and MTNL during the period 1 May 2004 to 15 September 2004. It also examined one Mr. Sengupta as witness in both the cases to explain about the preparation of the DVDs from the raw Call Data Records. Mr. Sengupta was cross-examined both on behalf of BSNL and MTNL.

In its turn MTNL examined two witnesses but it did not produce its Call Data Records for the relevant period or any other material or document. BSNL did not examine any witness and did not produce any material or document.

On a detailed consideration of the evidence adduced by Reliance (in the form of the DVDs and the deposition of its witness Mr. Sengupta) the Tribunal came to hold and find that the DVDs could not be said to be true and faithful copies of the entire Call Data Records for the period in question. Those were unreliable and could not form the basis of the Reliance's claim against MTNL and BSNL (see paragraphs 46, 47, 48, 69, 70 and 71 of the Tribunal's order).

However, having found that Reliance had not been able to establish its claims against BSNL and MTNL, the Tribunal proceeded to observe that the allegation being of gross overcharging by MTNL and BSNL, it was incumbent upon them to establish the correctness of their demands raised against Reliance. The 'primary burden', the Tribunal said, was thus upon MTNL and BSNL to produce their own CDRs and adduce evidences to establish the correctness of their demands and to controvert the allegation of overcharging (see paragraph 88 of the judgment). The Tribunal repeatedly commented adversely on MTNL and BSNL for their failure to produce their own CDRs and to lead competent and reliable evidence to show that all their demands related to trunk groups where calls were landed hiding the Caller-Line-Identity. The Tribunal repetitively observed that though MTNL examined two witnesses, in the absence of its CDRs their depositions were of no use to establish the correctness of its demand raised against Reliance. And BSNL did not care to examine any witness at all (see paragraphs 52, 53, 56, 57, 59, 60, 62 and 63; Re. BSNL see paragraph 86). The Tribunal accordingly drew adverse inference both against MTNL and BSNL (see paragraph 90 of the judgment).

The Tribunal held that though Reliance had not been able to prove the foundational facts necessary to establish that clause 6.4.6 (of the Inter-connect Agreement) could not have been invoked, MTNL and BSNL had also failed to prove the necessary ingredient thereof (see paragraph 101 of the judgment).

In paragraph 130 of the judgment, the Tribunal further held as under:

"When the claims and counter-claims made by the parties cannot be determined conclusively, we are of the opinion, that the parties should reconcile their accounts. However, to the extent, it is possible to determine the issues between the parties, the same would be done.

We, therefore, are of opinion that the petitioner may be entitled to a decree for a declaration that the parties would be entitled to reconcile their accounts on the basis of their respective records in the light of the findings recorded herein.

We shall consider the other claims of the petitioners only on that basis".

(emphasis added) Proceeding then to the issue of basic service operators (BSO) licence with MTNL, the Tribunal in paragraphs 140 to 142 of the judgment held and found as under:

"140. In absence of clause 6.4.6, in the basic service interconnect agreement the bills could be raised on that basis. It is not in dispute that in basic service agreement no clause in the nature of Clause 6.4.6 exists.

141. Mr. Vashishth appearing on behalf of the MTNL did not refute the said contention of the Petitioner. No liquidated damages could, therefore, be imposed relying on or on the said basis if such a clause does not exist.

The Respondent has raised bills for the Delhi and Bombay circles, in regard where to it has charged a sum of Rs.96,78,31,996.00 in respect of BSO wireless service, as would appear from the following:-

"Provisional bill for incoming call charges under IU

Account No. 000425 Name Reliance Infocom Ltd. Service: BSO-WIRELESS
Service Future 200, IInd Floor,

Bill Date: 06-OCT-04 Comm. Section

Due Date: 21-OCT-04 Bandra Kurla Complex Billed From: 01-MAY-04 To 31-AUG-04 Mumbai - 400085

Net Amount Payable (Rs.) 967,831,996.00

Net Amount Payable (In Words) NINETY SIX CRORES SEVENTY EIGHT LACS
THIRTY ONE THOUSAND NINE HUNDRED NINETY SIX.

142. The BSO license by and between the Petitioner and MTNL having contained no clause analogous to clause 6.4.6, it would not be entitled to invoke the same.

It was, therefore, obligatory on the part of the Respondent - MTNL to establish as to how much damage it had suffered. If for the said purpose it was required to file a petition before this Tribunal, therein also it was required to establish the amount of reasonable damages, it might have suffered.

The Petitioner having regard to the aforementioned legal position would be entitled to a decree on that account."

(emphasis added)

Coming then to Reliance's claim against BSNL, the Tribunal took-up some of the items of the claim one by one. Beginning, in paragraph 150 of the judgment, to deal with the claim at serial no.5 regarding BSNL charging wrong routing of calls even after 16.09.2004, the Tribunal recorded its finding at the end of the paragraph as under:

"From the above deposition, it cannot be said to have been established that there was HCD calls after 16.09.2004.

The petitioner by providing the CDRs cannot be said to have proved the same."

In paragraph 151, the Tribunal took-up the claim at serial no.6 regarding BSNL raising bills for certain months twice over and rejected the claim by holding in paragraph 155 as under:

"Apart from the aforementioned letter, the Petitioner has not brought on record any evidence worth the name to show how and in what manner the bills have been raised for some months twice over. The Petitioner was required to prove the said issue.

We are of the opinion that the Petitioner was(sic) failed to do so."

The Tribunal then dealt with the claim at serial no.7 regarding BSNL charging penalty even without raising the bill and rejected the same in the concluding part of paragraph 157 by observing as under:

".....Moreover, Petitioner should have proved the same by bringing on records some documents. PW-1 in this connection has also not filed any proof or stated certain fact which was true to his knowledge."

It also rejected claim at serial no.2 relating to bills allegedly raised in excess of the total minutes terminated on BSNL's network and in paragraph 164 held as under:

"We have noticed heretobefore that the Petitioner in the case of BSNL has not been able to prove its claim for excess minute charges. Applying the same principle, this claim is rejected."

The Tribunal thus expressly rejected Reliance's claim against BSNL as at serial nos.2, 5,6 and 7. Finally in the concluding paragraph 167 of the judgment the Tribunal made the following order:

"For the reasons aforementioned declarations issued by this Tribunal, the Respondents are hereby directed to re-issue the bills in the light of the findings arrived at heretobefore and refund the excess amount to the Petitioner with interest at the rate of 09 per cent per annum from the date of deposit till the

date of filing of this petition.

Keeping in view the fact that the Petitioner also filed applications for adjournment of this petition sine - die, it is directed that interest at the rate of 6 per cent per annum shall be payable pendente lite and future.

These petitions are allowed in part and to the aforementioned extent.

The Petitioner is also entitled to proportionate costs. Counsel's fee assessed at Rs.1.00 lakh in each case"

It is thus clear that the direction to re-issue the bills in light of the findings arrived at in the earlier part of the judgment, in case of BSNL relates to the claim at serial no.1, and in case of MTNL to claims other than the one for Rs.96,78,31,996=00 charged under the Provisional bill for incoming call charges under IU.

In light of the discussions made above, it appears to us that BSNL has correctly construed the judgment of the Tribunal and as it appears from its response it has already complied with the directions given to it.

However, in regard to Reliance's claim against MTNL, both Reliance and MTNL seem to have completely misread the Tribunal's judgment. Reliance seems to believe that its claim against MTNL was fully allowed and MTNL seems to take the position that Reliance's claim against it was rejected in entirety. Whereas the fact of the matter is that the Tribunal gave a decree in favour of Reliance against MTNL for the sum of Rs.96,78,31,996=00 (vide paragraphs 141 and 142 of the judgment). There is no escape from the fact that in terms of the judgment of the Tribunal, MTNL is liable to pay the sum of Rs.96,78,31,996=00 crores along with interest as directed in paragraph 167 of the judgment to Reliance. Additionally both BSNL and MTNL are required to pay to Reliance the sum of Rs.1,00,000=00 each as the proportionate cost of litigation. We direct accordingly.

In the result, Execution Application no.45 of 2012 in petition no.142 of 2007 is dismissed and Execution Application no.46 in petition no.143 of 2007 is allowed to the extent indicated above.