(2011) 08 TDSAT CK 0001

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Miscellaneous Application No. 96, 97 Of 2011 In Petition No.142, 143 Of 2007

M/s Reliance Communication Ltd. APPELLANT

Vs

Bharat Sanchar Nigam Ltd RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:
Code Of Civil Procedure, 1908 — Order 6, Order 14 Rule 1, Order 14 Rule 2, Order 14 Rule 3, Order 14 Rule 7, Order 7 Rule 14, Order 18 Rule 17

Citation : (2011) 08 TDSAT CK 0001

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : C.S. Vaidyanathan, Navin Chawla, Manali Singhal, Maninder Singh, Tejveer Singh Bhatia, Pratibha M. Singh, Arun Kathpalia, Angad Metha

Judgement

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S.B. Sinha, J

These two applications involving common questions of fact and law were taken up for hearing together and are being disposed of by this common judgment.

The parties hereto are service providers within the meaning of provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time (the Regulations).

The petitioner on the premise that it had delivered international calls in the POI's of respondent known as 'Home Country Direct' calls (HCD), the Union of India imposed a fine of Rs.50 crores in respect of each of the licenses held by it.

Questioning the imposition of the said penalty, the petitioner filed a petition before this Tribunal which was marked as Petition No.3 of 2005. By an order dated 4.3.2005, the said petition was dismissed by this Tribunal agreeing with the contention of respondent that petitioner resorted to 'such' modus operandi which was a criminal act on its part and/or commission of 'fraud'.

An appeal was preferred thereagainst before the Supreme Court of India which was marked as Civil Appeal No.4982 of 2005.

Concedingly, the parties hereto have entered into interconnection agreements inter alia containing the following clauses of BSNL and MTNL respectively:-

Clause 6.4.6 - "The CLI based barring facility shall be activated at the POIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Wherever it is technically not feasible to activate CLI based barring, periodic monitoring of the incoming trunk group shall be done by BSNL to ensure this objective. The calls received by BSNL without CLI or modified/tampered CLI from UASL shall be charged at the highest slab i.e. as for ISD calls. In case such calls are received by BSNL on any trunk group, then all the calls recorded on this trunk group shall be charged at the rates applicable for IUC of incoming ISD Calls from the date of provisioning of that PoI or for the preceding two months, whichever is less...."

Clause 6.4.6. - If MTNL detects that incoming international calls are being handed over or have been made over to MTNL at any other port which is not meant for carrying such calls, MTNL shall be free to charge NLDO minimum access charge for incoming International calls as at clause 6.4.2 above for all the calls recorded on theses ports from the date of provisioning of the POI or for the preceding two months whichever is less apart from taking other legal actions including disconnection of POIs or temporary suspension of the Interconnection Agreements. No terminating calls other than International calls shall be accepted form NLDO without CLI. In case of calls without CLI, termination charge as per clause 6.4.2 above shall be charged from NLDO.

The respondents issued bills invoking the aforementioned clause 6.4.6 for the sums specified therein, namely, Rs.320,125,199/- in the case of MTNL Delhi and Rs.305,833,372/- in the case of its Mumbai Networks respectively. BSNL also raised a bill for a sum of Rs. 110.02 Crores.

These petitions were filed on or about 7.9.2007. The petitioner, however, moved the Delhi High Court contending that the interconnection agreement contains an Arbitration Clause.

By an order dated 12.8.2008, at the request of the petitioner the matter was adjourned sine die inter alia on the premise that the aforementioned CA No.4982/2005 was pending. It is stated that the petitioner withdrew the said statement whereupon notices were issued on 22.9.2008.

A Transfer Application was filed by respondents before the Supreme Court of Indian and by an order dated 14.12.2009 further proceedings before this Tribunal were directed to be stayed. In that view of the matter the proceedings of these cases were again adjourned sine die.

The petitioner, however, withdrew the said appeal being Civil Appeal No.4982 of 2005.

On the premise that no matter was pending before the Supreme Court of India, the Transfer Petitions filed by respondents were also dismissed by an order dated 26.11.2010.

The respondents were given time to file reply and the petitioner was given an opportunity to file rejoinder thereto. Whereas BSNL filed its reply on 4.11.2011, MTNL did so on 24.1.2011.

The matter was directed to be put up for hearing on 7.3.2011 by an order dated 9.2.2011.

On that date no prayer was made that any specific issue between the parties need be framed as envisaged under Order XIV Rule 1 of the Code of Civil Procedure, 1908 nor any prayer was made for adduction of oral evidence.

From 7.3.2011 to 11.3.2011, these matters remained on board having been listed under the heading "For Hearing". A prayer, however, was made for hearing of the matter on 11.3.2011 before a Bench of this Tribunal for adjournment which was allowed, and 17.3.2011 was fixed for hearing.

On or about 14.3.2011, however, the present applications were filed. Both the respondents have filed replies thereto.

Mr. C.S. Vaidhyanathan, learned senior counsel appearing for the applicants would contend that keeping in view the points involved in these matters, it is essential to adduce oral evidence at least in regard to the following issues which have been raised in the petition.

(i) Is MTNL entitled for charging penalty even in respect of those trunk groups where the calls have not been terminated from the Petitioner's network to MTNL's network at all?

(ii) Can MTNL be allowed to charge for the alleged wrong routing of the calls for the number of minutes which are far in excess of the actual number of minutes terminated on their network?

(iii) Can MTNL be allowed to change the alleged penalty even for the period after the Petitioners had stopped HCD service on 16.9.04?

Similar issues arose in the case of BSNL also.

Learned counsel would furthermore draw the attention of this Tribunal to paragraphs 80, 80.1, 80.2, 80.3 and 80.4 of the petition to contend that the bills contained a large number of errors and far in excess for the actual minutes terminated on MTNL's POIs. Drawing my attention to the provisions of Order XIV Rule 1, AND Rule 2, Rule 3 and Rule 7 or XVIII of the CPC, it was urged that the petitioner should be given an opportunity to adduce oral evidence.

It was, however, accepted that the counsel for the petitioner might have been remiss in drawing the attention of this Tribunal that issues were required to be framed and/or oral evidence was required to be adduced.

Mr. Maninder Singh learned counsel for the BSNL and Mr. Arun Kathpalia, learned senior counsel appearing on behalf of the MTNL, on the other hand urged -

(a) the issue involved in these petitions having been determined by this Tribunal and the appeals preferred thereagainst before the Supreme Court of India having been withdrawn, the finding of this Tribunal that the petitioner is guilty of commission of fraud and the acts on its part in respect of HCD calls are fraudulent in nature must be held to have attained finality and in that view of the matter, the application seeking leave of this Tribunal to lead oral evidence must be dismissed.

(b) The respondents at the material time having not been raising their bills on CDR basis but only on MCU basis, the impugned bills were raised in terms of the provisions of Clause 6.4.6 of the interconnect agreements.

(c) The validity or otherwise of the bills drawn on MCU basis having never been questioned, the petitioner cannot be permitted to raise any issue that it was entitled to show that the bills were excessive in nature.

(d) The petitioner has not made out any ground for adduction of oral evidence as:-

(i) The acts of omission and commission on the part of the petitioner, namely, making of HCD calls is no longer res integra.

(ii) The respondent had been raising bills on MCU basis;

(iii) The transfer petition was not allowed as it had become infructuous; the petitioner having withdrawn its appeal;

(iv) It is not correct to contend that the petitioner had not been given an opportunity to adduce oral evidence as an opportunity had been granted to the petitioner to file additional documents which it did not avail.

(v) The petitioner, as would appear from the statements made in para 8 of the petition, was even not sure as to whether it would file any document or not.

(vi) The matter having remained on board and the petitioner having obtained an adjournment could not have filed the instant applications, having not raised any contention that it wanted to file any additional document or and/or wanted to adduce evidence.

(vii) Production of document and production of evidence stand on different footings and having regard to the provisions of the CPC all documents were required to be filed with the pleadings and/or at the first hearing of the suit which is the date for framing of issues and not at a subsequent stage.

The record of this case show that the matter has been pending for a long time. At one stage, counsel for the petitioner stated that the matter pending before the Supreme Court of India would have a bearing on these petitions and thus he would like to await the decision of the Supreme Court before proceeding with this matter.

At a later stage, the respondents filed an application for transfer before the Apex Court presumably on the premise that the decision in the appeal by it would be sufficient for disposal of these petitions one way or the other.

For reasons best known to it, the petitioner withdrew its appeal. There may, thus, be some substance in the contention of respondent that the invocation of Clause 6.4.6 as also having regard to the decision of the Supreme Court of India in BSNL vs. Reliance and BSNL vs. Tata 2011 reported in 1 SCC, would have been sufficient to dispose of these petitions but, prima facie, applicability of the said clauses of the interconnection agreement is required to be considered to the effect as to whether the respondents were right in invoking Clause 6.4.6 of the interconnection agreement although, the calls were transferred in the specified trunkgroup as in the case of BSNL and the calls recorded on a port other than the one which was meant for carrying such calls is required to be determined in case of MTNL.

It is true that the matters before us are pending for a long time. It is also true that a part of the blame for delay in disposal must be shared by the petitioner. It is also beyond any doubt or dispute that the petitioner in terms of Order VII Rule 14 of the Code of Civil Procedure should have at an appropriate stage produced the CDRs on the basis whereof it intended to lay a contention that the bills were either not payable or in any event excessive in nature.

The petitioner should have also drawn the attention of this Tribunal that issues were required to be framed and it would adduce oral evidence.

This Tribunal is statutorily enjoined with a duty to dispose of the petitions filed before it within a period of three months.

It is also the duty of the parties, therefore, to raise all contentions and file all documents at an appropriate stage which are in their power or possession.

Adduction of any oral evidence in a proceeding before this Tribunal cannot be claimed as a matter of right keeping in view the fact that all petitions are required to be disposed of as expeditiously as possible.

If that be so, adduction of additional evidence cannot also be claimed as a matter of right.

In a case of this nature, however, this Tribunal cannot refuse to consider that a party should not suffer so immensely because of the fault on the part of its counsel.

The provisions of the Code of Civil Procedure and/or the provisions akin/

analogous thereto to which our attention has been drawn ordinarily may have to be applied in an original proceeding.

The petitioner, therefore, ought to have followed the procedures laid down in the code as it itself placed strong reliance on the provisions of Order VII Rule 14 and Order 14 Rule 2 CPC.

Rejoinder is not a pleading within the meaning of Order VI of CPC.

All documents, therefore, should have been produced before this Tribunal, at the first hearing of the suit which is the date of framing of the issues.

The petitioner had been given an opportunity to file additional documents and there was, thus, absolutely no reason as to why such documents were not filed.

Mr. Vaidyanathan would urge that the contentions of the respondent in its reply before this Tribunal that petitioner had no further document/ evidence was to be filed or repeated opportunities have been granted to it for filing rejoinder or additional document are not correct, but we have no doubt in our mind that an impression was given at the bar that no oral evidence may be adduced.

If no oral evidence was to be adduced, for determination of the lis between the parties, the day of first hearing, issues in terms of Order XIV Rule 1 CPC were not required to be framed.

Mr. Singh and Mr. Kathpalia have relied upon the decision of the Supreme Court of India in Hameed Vs. Kummottummal Kunhi P.P. Amma reported in (2007) 15 SSC155, Vadiraj Naggapa Vernekar (D) Vs. Sharadchandra Prabhakar Gogate reported in (2009) 4 SSC 410, K.K. Velusamy Vs. N. Palanisamy reported in JT201194) SC38, to contend that a party should not be allowed to fill up omissions in the evidence of the witness or fill lacunae therein.

The power of a court to take additional evidence is contained inter alia in Order XVIII Rule 17 CPC K.K. Velusamy Vs. N. Palanisamy (supra) the Apex Court has held:-

"The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vadiraj Naggappa Vernekar Vs. Sharadchandra Prabhkar Gogate MANU/SC/0448/2009: 2009 (4) SCC410. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination- in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto or at the request of any parity, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions. "

While no exception can be taken to these principles which have been also noticed by this Tribunal in Zee Turner & Ors. vs Telecom Regulatory Authority of India Act, 1997 , Appeal No.3 (C)/2010, we cannot lose sight of the fact, that :-

(i) The billed amounts are very huge;

(ii) Sufficient materials have been placed on record to show that a contention has been raised that at least a part of the bills was beyond the agreement;

(iii) The party should not ordinarily suffer because of a mistake on the part of the counsel. It cannot certainly suffer because of a mistake on the part of the Court.

I am, therefore, of the opinion that the petitioner should be permitted to file CDRs which are stated to be six in number, and prove the same only to bring on record the foundational facts necessary to establish that Clause 6.4.6 could not have been invoked by respondents in these matters.

The petitioner, however, cannot be permitted, in view of its conduct, nor has it been seriously pressed before us to lead oral evidence, so far as the bills which have been raised only on the basis of Clause 6.4.6 to the extent the same is applicable.

By resorting to such a course, the petitioner would not prejudice the case of the respondents which cannot be monetarily compensated. Moreover, the respondents not only would be entitled to cross-examine the witnesses of the petitioner but would also be entitled to examine its own witnesses.

Mr. Vaidanathan submitted that the petitioner would file six CDRs, copies whereof may be served upon learned counsel for the respondent within one week.

Affidavit(s) of witnesses of the petitioner must be filed within two weeks from date, with advance copies thereof served on the counsel for the respondents.

Respondents may file affidavit(s) of their witnesses within one week thereafter. These applications are allowed in part and to the extent mentioned hereinbefore but subject to payment of costs of Rs.50,000/- in each of the petitions. The costs must be paid within the period of two weeks from date.