
(2022) 03 TDSAT CK 0038

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Telecom Petition No.280 Of 2014

Power Grid Corporation of India

APPELLANT

Vs

Tulip Telecom Ltd

RESPONDENT

Date of Decision : 11-03-2022

Acts Referred:

Evidence Act, 1872 — Section 65B
Companies Act, 1956 — Section 445(3)

Citation : (2022) 03 TDSAT CK 0038

Hon'ble Judges : Shiva Kirti Singh, Chairperson; Subodh Kumar Gupta, Member

Bench : Division Bench

Advocate : Harsh Kaushik, Abhay Chattopadhyay, Sachin Akhoury, Kunal Sharma, Shubhendu Bhattacharya

Final Decision : Allowed

Judgement

S.K. Singh, Chairperson

1. Petitioner is a public sector undertaking carrying on, amongst others, the business of providing Telecom Bandwidth Services to different telecom operators, government agencies etc. through its optical fibre network covering almost the whole country. In this capacity, it is a service provider who in the year 2001 acquired Infrastructure Provider Category – II (IP-II) Licence from the Department of Telecommunication (DoT), Government of India. In 2006 it obtained National Long Distance (NLD) Licence also to provide end-to-end Bandwidth Services.

2. The respondent company began to avail bandwidth services of leased line bandwidth capacity links of different capacity connecting various cities across the country provided by the petitioner since 2004. Before both the parties entered into a formal Comprehensive Capacity Agreement on 06.08.2009, services were provided to the respondent on the basis of Purchase Orders (POs). The initial Comprehensive Capacity Agreement was further renewed for two years w.e.f. 01.04.2012 to 31.03.2014. The cause of action for filing the petition arose on

01.10.2013 when petitioner issued a notice for disconnection of service to the respondent on account of outstanding dues. The notice is Annexure P-18. It shows the outstanding amount from the third quarter of 2012-13 till second quarter of 2013-14 as Rs.13.54 crores. Further notices were given to clear the outstanding dues on 12.11.2013 and finally on 05.12.2013. Thereafter on 11.12.2013, the petitioner disconnected all the services and the agreement between the parties came to an end.

3. The prayer in the petition reads as follows:

"a. Order/decreed in favour of the Petitioner and against the Respondent for an amount of Rs.17,01,22,125/- (Rupees Seventeen Crore One lakh twenty two thousand one hundred and twenty five only) being the outstanding liability towards the services received by the Respondent.

b. an order awarding an amount of Rs.1,46,50,421/-(Rupees One Crore forty six lakhs fifty thousand four hundred and twenty one only) as interest at the rate of 10% in favour of the Petitioner on the aforesaid payment of Rs.17,01,22,125/- (Rupees Seventeen Crore One lakh twenty two thousand one hundred and twenty five only) as on 31st March, 2014.

c. An order awarding an amount of Rs.55,89,685/- (Rupees Fifty Five Lakhs Eighty Nine Thousand Six hundred and Eighty Five only) as TDS amount in favour of Petitioner or the TDS certificates.

d. Cost of equipment Rs.2,53,54,404/- (Rupees Two Crore Fifty Three Lakhs Fifty Four Thousand Four hundred and Four only) or return of all equipments in working condition.

e. Interest of 10% for delay in returning the equipments to the Petitioner.

f. An order providing pendent-lite interest at the rate 10% per annum in favour of the Petitioner.

g. Pass an order awarding costs to the Petitioner.

h. Pass such other and further order(s) as this Hon'ble Tribunal may deem fit and proper with respect to the facts and circumstances of the present case."

The amount of Rs.17.01 crores approximately claimed in prayer (a) is for bandwidth charges covered by rates disclosed in the purchase orders or as per the agreement. Prayer (b) is an amount claimed as interest at the rate of 10% as provided in Clause 2.2 (Part-II) of the agreement, amounting to Rs.1.46 crores approximately. Prayer (c) is claim for Rs.55,89,685/- as TDS amount deducted by the respondent or for TDS certificates for the said amount. Prayer (d) is for Rs.2.53 crores approximately as cost of equipment taken by the respondent for end-to-end services from the petitioner which could not be returned in terms of the agreement. In alternative the prayer is for return of all those equipments in working condition. Interest of 10% has been claimed as prayer (e) for delay in return of the equipments and prayer (f) is for pendente

lite interest @ 10% per annum. Petitioner has also prayed for costs.

4. In support of its money claims the petitioner has annexed the agreement [Annexure P-2(colly.)]. It has been shown that the agreement spells out the service fee, service reliability, obligations of the parties, liability of the customer/respondent to return the terminal equipments in working condition and also the termination rights. Relevant parts of the agreement have been highlighted by the learned counsel for the petitioner to oppose the counter-claim of the respondent and to support of the monetary claims of the petitioner.

5. It is useful to note here the various communications between the parties which have been annexed to the petition. Through letter of 13.08.2012 (Annexure P-3) petitioner requested the respondent to clear the outstanding dues till the second quarter of financial year 2012-13 for Rs.6.24 crores. The respondent vide letter dated 18.08.2012 (Annexure P-4) indicated the timeframe for paying the outstanding dues. Annexure P-5 is a letter dated 19.09.2012 whereby the petitioner reminded the respondent to release payment in terms of earlier assurance. Email dated 31.10.2012 [Annexure P-6(colly.)] was sent by the petitioner to inform the respondent of dishonouring of two cheques of the respondent for a total amount of more than Rs.1.34 crores. The outstanding liability of the respondent was shown as Rs.10.76 crores as on 26.10.2012. The reply email of the respondent assured payment through RTGS or demand draft. Annexure P-7(colly.) contains a corporate guarantee from the respondent dated 06.11.2012 and also a letter dated 07.11.2012 acknowledging dues for the services till September, 2012 and also a payment plan.

6. Some payments were made by the respondent in November and December, 2012 but two cheques dated 31.01.2013 and 10.02.2013 in total for an amount of Rs.2.61 crores approximately were dishonoured in April, 2013. After giving a notice through email dated 04.04.2013 to pay the cheque amounts through RTGS, the services were disconnected on 05.04.2013 for failure to make the payments. The respondent's email of 05.04.2013 (Annexure P-10) mentioned subsequent payment as well as assurance for further payment. While highlighting that it was currently facing cash deficit, a request was made to continue the services by restoration of disconnected services. The services were restored. By Annexure P-11 petitioner pointed out the arrears of Rs.7.7 crores till the fourth quarter of the financial year 2012-13 and requested to clear the same. By Annexure P-12(colly.) petitioner sent a reminder that the outstanding dues have not been paid in spite of assurance made earlier. In the same series of emails, on 02.05.2013 respondent responded to the threat of disconnection and assured to pay Rs.3 lakhs, the outstanding of second quarter of 2012-13 and promised that a date-wise schedule would be sent for clearing the outstanding dues upto third quarter of financial year 2012-13, by May, 2013. On 23.05.2013 through letter dated 23.05.2013 (Annexure P-13) the respondent sent a detailed schedule for payments with respect to dues till fourth quarter of 2012-13. This showed the admitted outstanding till then to be Rs.7.60 crores. The reasons given for delay

in payment were corporate debt crisis and cash deficit. Further correspondences in respect of dues and threat of disconnection are contained in letters of petitioner dated 08.07.2013 (Annexure P-15) and 15.07.2013 (Annexure P-16). The letter of 15.07.2013 indicated an outstanding of about Rs.10.91 crores upto June, 2013 and also informed the respondent that recently three cheques amounting to Rs.1.62 crores given by respondent had been dishonoured for lack of sufficient funds. On 31.07.2013 services were disconnected but were reconnected because of payment of Rs.54 lakhs against a dishonoured cheque. In August, 2013 the respondent paid Rs.25 lakhs and Rs.20 lakhs through two transactions but the entire amount even against the dishonoured cheques was not paid leading to disconnection. Respondent issued four cheques and hence the services were restored immediately. Later two of the cheques were dishonoured and only a small amount of Rs.34 lakhs approximately was received by the petitioner.

7. By Annexure P-18 notice dated 01.10.2013 petitioner demanded the total dues of Rs.13.54 crores for the period till September, 2013. By letter dated 10.10.2013 respondent acknowledged the receipt of the notice and promised to pay the entire dues with interest by 31.03.2014 but the dues were not cleared in spite of further notice dated 05.12.2013 (Annexure P-23) which led to final disconnection on 11.12.2013. Thereafter, petitioner sent a legal notice dated 23.12.2013 (Annexure P-24) for an outstanding amount of Rs.17,29,54,270/- along with interest of Rs.1,01,78,509/-. The letter of petitioner dated 21.01.2014 (Annexure P-25) required the respondent to return the equipments as per clause 5.3 of the agreement or to pay the cost. By letter dated 19.02.2014 (Annexure P-26) the respondent authorised the petitioner to retrieve the equipment from the concerned premises. However, the occupiers of the premises did not permit the retrieval of the equipments and therefore, in this petition filed on 30.05.2014 claim has been made also for the equipments as per their value shown in a list which is annexed as Annexure P-27. The authorised purchase orders and invoices for the services of the petitioner to the respondent have also been annexed as Annexure P-28(colly.).

8. The respondent company appeared in response to the notice of this petition and filed a written statement/reply along with counter-claim on 09.12.2014. The reply has been filed through an advocate and is supported by verification by Shri H.S. Bedi, Managing Director of the respondent company. The counter-claim is on different accounts. For incorrect billing/disputed bills the claim is for Rs.1.20 crores approximately and for alleged non-performance or service deficit issues, the claim is for Rs.56.29 lakhs, totalling Rs.1.76 crores approximately. Further amount of Rs.62.94 crores has been claimed on account of alleged losses and damages caused due to alleged default acts and wrong deeds of the petitioner which allegedly resulted in failure on the part of the respondent to meet its obligations for adequate services to its customers. Interest has been claimed on the counter-claim @ 18% per annum.

9. From the statements at the bar and other materials it transpires that a winding-up petition in respect of respondent company was filed on 04.07.2013. Provisional Official Liquidator was appointed on 12.02.2015, order of winding-up was passed on 29.07.2019 and thereupon Official Liquidator became the Liquidator for effecting the order of winding-up. The reply and counter-claim were filed before the appointment of Official Liquidator as already noted. The records disclose that on behalf of petitioner evidence affidavit of witness, Rajesh Kumar Singh along with a certificate under Section 65B of the Indian Evidence Act was filed on 13.07.2018. The said witness has claimed on affidavit that he is a Chief Manager in Telecom Department of petitioner company. He is in service of the petitioner since 2004 and was closely associated with the services and the agreements relating to the respondent. Some of the correspondences were made by him on behalf of the petitioner company and copies of some were marked to him. No prayer was made for oral examination of that witness and his evidence affidavit has remained unrebutted because neither the witness was sought to be orally examined nor cross-examined. No evidence was filed on behalf of the respondent. These facts are clear from orders passed on 16.08.2018 and then on 19.09.2018 when with the agreement of the respondent's counsel representing the OL, evidence was closed.

10. It is found that there is absolutely no basis for the counter-claims made along with the reply and no evidence has been led in support of said claims. The only documents which may have some evidentiary value are copies of emails for the period 03.01.2013 to 31.10.2013 filed with the written statement. On going through some of the emails at the instance of learned counsel representing the respondent through the OL, it was found that ordinary day-to-day complaints with regard to troubles or disruption etc. over a period of time are part of the said document. The reply emails in the link clearly show that most of the time the complaints were immediately attended and at times it was pointed out that the defect lay with the system of the respondent. During those relevant periods no deficit in service was made the basis of any claim in terms of the agreement which permits claim only when the failure or outage exceeds a certain percentage. There is no material to show the percentage of outage or that it is beyond the permissible limits. The claim for indirect loss is also not permissible as per the terms of the agreements. Hence the counter-claims are found to be totally unsustainable and are rejected in absence of any evidence in support.

11. So far as the petitioner's claims are concerned, it is submitted on behalf of the petitioner that there is sufficient documentary evidence to support the entire claim and additionally a competent officer has filed his evidence affidavit to support all the relevant facts most of which were in his knowledge as he was dealing with the matter himself. He has also supported the documents such as letters and emails in addition to the agreement and hence such documentary evidence cannot be ignored only on account of a plea on behalf of the respondent that there has been no oral examination of the witness and therefore, documents have not been proved strictly in the way required by oral evidence. It has further

been pointed out that the reply of the respondent is a bald denial of entire petition but no counter evidence by way of witness affidavit or documents have been filed to support the denial of claims. The emails, already noticed, do not affect the merits of the petitioner's claim. As noticed earlier the emails are in the nature of routine complaints which were mostly attended immediately. There is no proof of making available of TDS certificates mentioned in prayer (c).

12. Learned counsel for the respondent has criticised the witness of the petitioner as a hearsay witness and has further submitted that as per Section 65B, on account of required certificate the emails can be looked into as correct copies but the contents of documents has not been properly proved because neither the writer of the document nor typists etc. have filed any affidavit. It has also been submitted that some of the letters and emails which amount to admission of the arrears claimed through this petition should not be relied upon because in the reply it has been alleged that the same were issued or sent by the respondent on account of threat and coercion. He has pleaded for not accepting the statement of account furnished by the petitioner but has offered no explanation as to why the respondent has not furnished its own statement of account if it wanted to challenge the accounts of the petitioner.

13. In the rejoinder, the bald denials of the respondent have been seriously objected to. The plea of threat and coercion by a public sector undertaking like the petitioner is on its very face unbelievable and the same has also been clearly denied in the rejoinder.

14. The technical defence taken by the respondent does not affect the merits of the petitioner's claim nor it creates any doubt in respect of large number of documentary evidence which has been produced on affidavit and supported by the witness by a statement on affidavit. It is also found that the witness is a competent witness for proving the facts and documents relating to transactions of a juristic person, the petitioner corporation. There is no good reason to doubt the evidentiary value of the contemporaneous letters and emails exchanged between the parties and the facts emerging therefrom which support the petitioner's case about outstanding arrears arising due to growing financial ill-health of the respondent. The respondent has not denied its own letters and emails which are available on records as annexures to the petition and go to support petitioner's case in a big way. On the touchstone of preponderance of probabilities, the case of petitioner is found to be more acceptable in comparison of that of the respondent.

15. The TRAI Act vests this Tribunal with the power to take evidence on affidavit and during last 4-5 years this Tribunal has passed several orders to the effect that oral evidence shall be permitted only on application in exceptional circumstances. Instead of filing any application the respondent agreed and the evidence was closed without there being any evidence by way of affidavit on behalf of the respondent.

16. Learned counsel for the respondent has submitted that the appointment of Official Liquidator in February, 2015 will have the effect of discharge of all the officers of the respondent company and therefore, their negligence in contesting the petition should be ignored. The contention is without any merit. The officers of the respondent company filed the reply and counter-claim in December, 2014, well before the appointment of the Official Liquidator and otherwise also the provisions of the Companies Act such as Section 445(3) relating to discharge of officials indicates that officials will be discharged only after order of winding-up and appointment of Liquidator in place of provisional Official Liquidator. That took place much later in 2019. But in any case the provisional Official Liquidator was representing the respondent company from before when the relevant orders that there shall be no cross-examination of the witness and for closure of the evidence were recorded in 2018.

17. In the facts of the case it is clear that petitioner has proved its case in all material aspects through documentary as well as affidavit evidence of a competent witness. On that basis, prayers (a), (b), (c) and (f) are allowed. So far as prayer (d) for cost of equipment and interest @ 10% for delay in returning is concerned, the materials on record do not clarify the time and method of computation of the cost claimed. The date of purchase of the equipments appears to be the basis because no chart showing deduction on account of depreciation is available on record. The equipments, in ordinary course of business ought to have been made available for end-to-end services at least at the time of agreement in 2009 or soon thereafter. When the petition was filed in 2014, the equipments would be about four years old and therefore, it is not deemed just and proper to allow the entire claim for Rs.2,53,54,404/-. This claim is allowed only to the extent of 50% of the amount claimed i.e. for Rs.1,26,77,202/- only. The claim for interest @ 10% for delay in returning the equipments is not found acceptable for lack of any specific provision in the agreement for award of any interest on such delay.

18. As a result, the claim of the petitioner is decreed for –

(a) Rs.17,01,22,125/- (Rupees Seventeen Crores One Lakh Twenty Two Thousand One Hundred and Twenty Five only),

(b) Rs.1,46,50,421/- (Rupees One Crore Forty Six Lakhs Fifty Thousand Four Hundred and Twenty One only),

(c) Rs.55,89,685/-(Rupees Fifty Five Lakhs Eighty Nine Thousand Six Hundred and Eighty Five only); and

(d) Rs.1,26,77,202/- (Rupees One Crore Seventy Seven Thousand Two Hundred and Two only).

The aforesaid amounts will be payable along with pendente lite interest @ 10% per annum from 01.06.2014 (after filing of petition on 30.05.2014) till the date of this order. The respondent is directed to pay the entire decretal amount along

with pendente lite interest within one month from today failing which further interest @ 10% per annum will be payable to the petitioner on the entire decretal amount from the date of this order till the date of payment.

19. The petition is allowed in terms of the aforesaid order along with a cost which is quantified as Rs.1 lakh to be payable to the petitioner within one month. In case the decretal amount is not paid within the time indicated the petitioner would be entitled to recover the same together with interest and cost from the respondent through any appropriate proceeding including Execution, in accordance with law. Registry shall prepare a decree accordingly at the earliest, preferably within two weeks.