
(2013) 01 DEL CK 0361

In the Delhi High Court

Case No : Writ Petition (C) 243 of 2013 and CM 503 of 2013

Reliance Communications Ltd. and Another

APPELLANT

Vs

Bharti Airtel Ltd. and Another

RESPONDENT

Date of Decision : 22-01-2013

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2013) 01 DEL CK 0361

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Ramji Srinivasan, Mr. Lakshmeesh Kamath, Mr. Kawaljit Singh Bhatia, Mr. Vivek Paul Oriel and Ms. Kabita Das, for the Appellant; Maninder Singh Mr. Gopal Jain, Ankur Sood and Mr. Kunal Kaul, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Sistani, J.—Present petition has been filed by petitioner under Article 226/227 of the Constitution of India seeking a direction to modify/set aside the order dated 3.12.2012 passed by Telecom Disputes Settlement and Appellate Tribunal (hereinafter referred to as the TDSAT) in Petition No. 824/2012, filed by the petitioners herein, whereby the Tribunal has directed the petitioners to pay 50% of the amount demanded by the respondents @ 10 paise per SMS on the net inflow on traffic basis with effect from the date of filing of the said petition. The Tribunal has also directed that no SMS Termination Charges will be payable by either of the parties during the pendency of the said petition before the Tribunal. As per the petition, the petitioners and respondents in terms of the IUC Regulation applicable for the relevant period, entered into Interconnect Agreements/arrangements for different telecom service areas for interconnecting their network for providing the telecommunication services (including voice and non-voice) to their customers. On 29.10.2003 Telecom Regulatory Authority of India (TRAI) notified the usage charges Regulations, 2003, which superseded the earlier Regulations dated 24.1.2003 and its amendment dated 27.3.2003 and

16.6.2003. On 19.8.2004 the petitioners and respondents in a meeting held on 19.8.2004 discussed the issue of SMS Termination Charges and agreed to follow the "Bill and Keep method" on reciprocal basis. Both the parties also agreed to continue to raise the bills on each other for exchange of SMS between the two networks, however, it was also agreed that no payment shall be made by either party till such time consensus is not reached on the issue. It is also the case of the petitioner that the petitioners and respondents reiterated in the minutes of the meeting held on 4.1.2006 that the agreement arrived on 19.8.2004 with regard to continuance to raise bills on each other for exchange of SMS between the two networks would be complied with i.e. no payment shall be made by either party for SMS termination. Further as per the petition, by a communication dated 12.1.2006, the petitioners reiterated that the issue of SMS termination charges was discussed in the meeting wherein the respondents had been categorically informed that no payment would be made for the SMS termination bills raised by the respondents. By the communication dated 25.1.2006 respondents consented to the petitioners that they are agreeable on the understanding that both Reliance and Bharti shall follow the principle of "bill and keep" for SMSs, post March, 2004. Thereafter the respondents vide their letters dated 29.9.2009 and 16.10.2009, addressed to the petitioners, sought modification of the existing agreements/arrangements of "bill and keep" between the parties suggesting charging of 10 paise per SMS as SMS Termination Charges. The petitioners vide their communication dated 21.10.2009 informed and clarified to the respondents that they do not want to change the existing arrangement of bill and keep for SMS termination and do not want to charge for SMS termination. The respondents again vide communication dated 28.7.2010 sought to levy SMS charges @ 10 paise per SMS and acknowledged the mutual understanding arrived at between the parties in 2004 with regard to "Bill and Keep method" and non-payment of SMS charges. The TRAI vide its letter dated 22.2.2011 directed all the service providers to stop applying termination charges on SMS in a discriminatory manner. In spite of the fact that the petitioners and respondents were not paying each other any SMS Termination Charges for termination of SMS on their respective network in terms of their existing interconnect agreements and the TRAI's decision to continue with the policy of forbearance in the matter of IUC on SMS, respondent no. 1 vide its communication dated 15.3.2011 unilaterally proposed to revise the interconnection agreement from admittedly "Bill and Keep method" to SMS Termination Charges @10 paise per SMS and also sent a draft Supplementary Interconnect agreement detailing the terms and conditions of IUC for SMS. Since the petitioners were not agreeable to the unilateral change, they did not sign the draft supplementary interconnect agreement. By the communication dated 8.10.2012 the respondents repeated its demand for execution of agreement for 10 paise per SMS Termination charges, which was denied by the petitioners vide its communication dated 14.5.2012 and the petitioners followed the principles of non-discrimination. Thereafter the respondents unilaterally sought to impose SMS termination charges @ 10 paisa per SMS w.e.f. 1.4.2011 till August, 2012,

on the petitioners. The respondents raised a demand of Rs. 11.86 crores on the petitioners and also threatened to take coercive action including withdrawal of interconnection for SMS Services in case the petitioners did not execute a fresh interconnection agreement for interconnection of SMS Services @ 10 paise per SMS and did not pay the demand. The petitioners vide its letter dated 30.10.2012 requested the respondents to abide by the terms of the arrangements and maintain the SMS services on "bill and keep" basis. On 10.11.2012 the respondents disconnected the SMS points of interconnection for the Mumbai circle of petitioner no. 1 and also threatened to withdraw/disconnect interconnection of the SMS services of the petitioners network in other circles. The petitioners vide its communication dated 10.11.2012 reiterated their stand of SMS Termination charges on the principle of "bill and keep" and requested the respondents to unblock the SMS Termination. On 11.11.2012 respondents disconnected SMS services of petitioners in Bihar and Madhya Pradesh circles.

2. Aggrieved by this action of the respondents and threatened by the disconnection of service in remaining circles, the petitioners approached the TRAI by filing Petition No. 824/2012. On 12.11.2012, the Tribunal, while admitting the petition, directed the respondents not to disconnect the SMS services to the petitioners network and further directed that where the SMS services of the petitioners have already been withdrawn like Bihar, Madhya Pradesh and Mumbai, the same shall be restored. Order dated 12.11.2012 reads as under:

Admit.

Mr. Navin Chawla accepts notice on behalf of the Respondent.

2. This petition has been filed to set aside the demand raised by the respondent for Rs. 11.86 crores upon the petitioner for SMS termination charges.

Further, the SMS services of the petitioner's network have been disconnected for Mumbai circle on 10.11.2012 and for Bihar and M.P. on 11.11.2012. The petitioners are apprehensive that SMS services may be disconnected on the other service areas also at any time in view of the letter of the respondent dated 8th October 2012.

3. Mr. Meet Malhotra and Mr. Maninder Singh, learned senior counsels appeared on behalf of the petitioner and the respondent respectively and made short submissions on the interim prayer.

4. As contentious issues have been raised by both the parties and there is need to hear both the parties in detail for considering the interim order, respondent is directed to file a short reply within one week and rejoinder thereto, if any be filed within three days thereafter.

Put up the matter for hearing on interim prayer on 22nd November 2012 under the heading "for orders".

Meanwhile, SMS services to the petitioner's network will not be disconnected.

Where the SMS services have already been withdrawn like Bihar, Madhya Pradesh and Mumbai, the respondent is directed to restore the same today itself. However, these orders will be without prejudice to the rights and contentions of the parties and is subject to any other or further orders that may be passed by this Tribunal.

3. Upon hearing the parties, the aforesaid order dated 12.11.2012, has been modified by the Tribunal on 3.12.2012 whereby the Tribunal has protected the petitioners and directed the respondents that SMS services of the petitioners shall not be disconnected and if disconnection has taken place in any circle, the same shall be restored with immediate effect, subject to condition that the petitioner would start paying 50% of the amount demanded by the respondents @ 10 paise per SMS on net inflow on traffic basis. In effect the Tribunal has directed the petitioner to pay @ 5 paisa per SMS on the net inflow on traffic basis.

4. Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of the petitioners, submits that the Tribunal has exceeded its jurisdiction and has in fact re-written an agreement, which is not in existence between the parties. Senior counsel further submits that by passing the impugned order dated 3.12.2012 the Tribunal has vacated the status quo order, which was in existence between the parties for more than a decade. Senior counsel has strongly placed reliance on the minutes of the meeting between the petitioners and the respondents and more particularly the communication dated 25.1.2006 issued by the respondents to the petitioners in reply to a letter addressed by the petitioners to the respondents.

5. Learned senior counsel for the petitioners submits that a bare reading of the communication dated 25.1.2006 would show that the respondents had principally agreed on the understanding that the parties would follow the principle of bill and keep for SMSs, post March, 2004, till such time as the telecom industry as a whole agrees to levy of SMS Termination Charges against all the operators in a non-discriminatory manner. Senior counsel further contends that there was no occasion for the learned Tribunal to have varied the order and subjected the petitioners to terms for granting protection against termination.

6. Mr. Maninder Singh, learned senior counsel for the respondents, who enters appearance on an advance copy, submits that a similar situation had arisen in Petition No. 430/2011 filed between Tata Teleservices Limited and Bharti Airtel Limited and in Petition No. 130/2012 between Aircel Cellular Limited and Bharti Airtel Limited. Senior counsel further submits that the TRAI in its judgment dated 24.9.2012 in Petition No. 130/2012 had passed the following directions, which have also been mentioned by the Tribunal in the impugned order dated 3.12.2012:

36. It is seen that no agreement has been executed between the parties for interconnection charges for SMS. The SMS services between the parties are based on unwritten understanding. If one party does not want to continue the

arrangement, without charges, we cannot force that party to continue with the arrangement. Therefore, in the present case, it is for the respondent to terminate the existing arrangement, if it so wishes.

7. Learned senior counsel for the respondents submits that in spite of the demand raised by the respondents for SMS Termination Charges @ 10 paise per SMS the learned Tribunal with a view to balance the equities has directed the petitioners to pay only @ 50% and has also restrained the respondents from terminating the services of the petitioners. Senior counsel contends that the Supreme Court of India while admitting the appeal against the order of TDSAT has not granted any stay and in effect not only the appellants have been directed to pay but both the service providers are also paying. In addition thereto, after negotiations, 87% of the service providers have agreed to pay @ 10 paise per SMS. Learned senior counsel for the petitioners, however, submits that petitions filed by TATA Services Limited (supra) and Aircel Cellular Limited (supra) are factually different than the petition filed by the petitioners herein before the Tribunal and the orders passed in the aforesaid matters would have no bearing to the facts of the petition filed before the Tribunal. Senior counsel further submits that while passing the impugned order the learned Tribunal has also taken into consideration the three broad principles for grant of interim relief that is (i) strong prima facie case; (ii) balance of convenience; and (iii) irreparable loss.

8. I have heard learned counsel for the parties, considered their rival contentions, carefully perused the impugned order dated 3.12.2012 passed by the learned Tribunal and the documents placed on record. While passing the impugned order dated 3.12.2012, the Tribunal has not only taken into consideration the submissions made by counsel for both the parties but also considered the factual aspects regarding the agreement/arrangement between the parties about SMS services and whether the demand raised by the respondents through its letter dated 5.10.2012 is in accordance with Telecommunication Interconnection Usage Charges Regulations 2009. The Tribunal has further considered that whether the charges raised by one party fulfill the criteria of reciprocity, transparency and non-discrimination. The learned Tribunal has also taken into consideration that initially, as per the agreement between the parties, the parties were liable to pay @ 40 paisa and @ 30 paisa per SMS, however, this aspect of the agreement was kept in abeyance.

9. It is no longer *res integra* that the powers of the High Court under Articles 226 and 227 of the Constitution of India, are very wide, however, the same are to be exercised not as a Court of Appeal, and the High Court should be slow to interfere unless there is grave miscarriage of justice. [See *Classic Equipments (P) Ltd. Vs. Johnson Enterprises and Others*,]. Also see *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, and more particularly at para 7.

10. A perusal of the impugned order dated 3.12.2012 passed by the Tribunal would show that the Tribunal has taken into consideration the submissions of both the parties. The Tribunal has balanced the equities and also directed the

petitioners to pay @ 5 paisa per SMS instead of @ 10 paise, which was demanded by the respondents. This order is applicable from the date of filing of the petition before the Tribunal. The past dues, if any, to be paid to the respondents, have not been considered by the Tribunal. The Tribunal has further protected the rights of the petitioner by directing that the SMS service of the petitioner shall not be disconnected and if disconnection has taken place in any circle, the same shall be restored with immediate effect, subject to the condition that petitioner will start paying 50% of the amount demanded by the respondent @ 10 paisa per SMS on net inflow on traffic basis. The Tribunal has further protected the rights of the petitioner by directing that this amount will be calculated and paid w.e.f. the date of filing of the petition.

11. In view of above, I find no infirmity in the impugned order passed by the learned Tribunal on 3.12.2012. Accordingly, writ petition and application stand dismissed. Needless to say that the arrangement, as directed by the Tribunal, is only as an interim measure and subject to final orders, which may be passed by the Tribunal in the petition filed before the Tribunal. It is made clear that any observation made by this Court in the order passed today is only for the purpose of deciding the present writ petition and application and the same is not on the merits of the matter. Learned senior counsel for the respondents on instructions submits that reply to the petition filed before the Tribunal is ready, the same has been sent to the respondents for signatures, and it will be filed within one week from today. Both the parties agree that they will not take any unnecessary adjournment to enable the Tribunal to decide the matter expeditiously.