

(2004) 11 DEL CK 0001
In the Delhi High Court
Case No : OMP No. 398 of 2004

Reliance Infocomm Limited		APPELLANT
	Vs	
Bharat Sanchar Nigam Limited		RESPONDENT

Date of Decision : 04-11-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 5, 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Telecom Regulatory Authority of India Act, 1997 — Section 15

Citation : (2005) 3 CompLJ 368

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Mukul Rohtagi, Milan Sethi, Atul Dayal, R. Sasi Pribhu, Shalini Gupta and Ashwin Dave, for the Appellant; Rajiv Nayyar Maninder Singh, Pratibha M. Singh and Ankur Talwar, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—The prayers in this Petition are that Bharat Sanchar Nigam Limited (BSNL in short) be directed to continue to provide to Reliance Infocomm Limited (RIL in short) of Interconnect Facilities at all points of Interconnection in accordance with the Inter-Connection Agreement subsisting between the parties regarding ILD, NLD and UA services and further that BSNL be restrained from disconnecting the Petitioners Points of Inter-connect or acting upon the threats of disconnection contained in its letter dated 29th October, 2004.

2. The matter has been argued in great detail as the Respondent is also represented by Mr.Rajiv Nayyar. The letter dated 29th October, 2004 (Annexure P20) is on the subject of `Violation of NLD service Interconnect Agreement-Unauthorised routing.' This letter refers to RILs communication dated 14th October, 2004? The stand of the Respondent can be gleaned from the said letter which is Therefore reproduced verbatim:

Bharat Sanchar Nigam Limited

(A Government of India Enterprise)

611, Statesman House, B-148, Barakhamba Road, New Delhi.-1

No. 431-2/2004-RegIn Dated 29th October 2004 To

M/s. Reliance Infocomm Limited,

13th Floor, Vijaya Building,

17 Barakhamba Road, New Delhi-110001.

Subject: Violation of NLD Service Interconnect Agreement-Unauthorised routing.

Please refer to your office letter No. RIL/BSNL/04-05/267 dated 14th October, 2004 addressed to CMD, BSNL requesting to accept payment of Rs. 53.71 crores with an intention to amicably settle the issue with BSNL stating that these deposits are subject to adjustment against the final decision reached by the BSNL HQ on this issue and further requested to issue necessary directives to the BSNL field units to restore all the disconnected POIs and not to disrupt any more POIs till a final decision is taken by BSNL HQ. You had further stated in this letter dated 14.10.2004 that the decision of BSNL HQ would be acceptable to M/s. Reliance Infocomm Limited (RIL).

2.0 Also, refer to your letter No. RIL/BSNL/04-05/2079 dated 26.10.2004 on the same subject wherein you had stated that M/s. Reliance Infocomm Limited (RIL) had started providing HCD services in May 2004 and that M/s. RIL had started routing all the HCD service calls on ILD trunk routes from 16th September, 2004 Further, in this letter dated 26th October 2004 you have also raised the issues with respect to Notices and the demand notes being issued by the various field units of BSNL. It has also been stated that you had not violated clauses 2.1.9.2 and 2.5 of BSO Interconnect Agreement and Clauses 2.1.13.1 and 2.1.13.2 of NLD Interconnect Agreement; and that the penalty has been charged at some locations for the period when POIs were not even opened for traffic. You had further requested to form a committee to look into these issues and settle then as per Interconnect Agreement.

3.0 In this context you may refer this office letter No. 431-2/2004-RegIn dated 8th October, 2004 wherein it had already been conveyed to you that the activity of illegal hand-over of incoming international call as domestic calls by tampering of CLI is not 'Home Country Direct Service'. It was also conveyed to you that without prejudice to above, there is neither any agreed arrangement between M/s. Reliance Infocomm Ltd. and BSNL for any service called 'Home Country Direct Service' nor any provision in the License and Interconnect Agreement to tamper with the CLI and terminate calls as domestic call in BSNL's network.

4.0 The issue has been further deliberated and found that there has been clearly a violation of terms and conditions of Interconnect Agreement of NLD services and Basic Services as the case may be wherever you have illegally handed over incoming international calls with CLI tampered as domestic calls to BSNL. It is to

inform you that the BSNL field units are fully correct in raising bills for penalty amount and arrears of ADC and issuing disconnection notices to M/s. RIL for violation of various clauses of NLD and Basic service Interconnect Agreement.

5.0 On receipt of the payment of Rs. 53.71 crores and based on your request, as mentioned in para 1.0 above, it was decided to reconnect the POIs wherever disconnected and defer disconnection of POIs at other locations of M/s. RIL under misuse of tampering of CLI till further orders because the bills raised by BSNL field units till that date as reported to BSNL HQ were of the order of about Rs.48 crores. The BSNL field units were to continue to raise bills for arrears to M/s. RIL wherever tampering of CLI is detected after analyzing the CDRs as per the terms and conditions of the Interconnect Agreements.

6.0 Information has now been received from many BSNL field units regarding bills raised for arrears of ADC at various locations of POI of M/s. RIL. As per present information available with BSNL Corporate Office the bills for the arrears have been raised at 353 POI locations and the amount of bills raised, for arrears of IUC including ADC and penalty as per terms and conditions of the interconnect Agreement, till now to M/s. RIL is Rs. 182.7 crores. The bills of arrears for balance POI locations are being raised to you by BSNL field units.

7.0 In addition to above, arrears of IUC including ADC for incoming international traffic with tampered CLI as domestic calls terminated in mobile networks of various private operators as well as M/s. Reliance Infocomm Limited are also pending, bills for which are also being raised to you. This is in addition to arrears to be recovered from you for such international traffic transited by you through MTNL, meant for termination in BSNL, for which MTNL has not billed you as yet.

8.0 I am directed to convey you further that the amount of Rs. 53.71 crores paid in BSNL Headquarter has been adjusted against some of the bills raised by BSNL field units at various POI stations up to 13th October, 2004 as per the list enclosed at

Annexure-1. For balance amount against these POI stations and for remaining POI stations, M/s. RIL should immediately deposit all pending dues directly to various field units of BSNL against the bills raised by respective BSNL field units within a period of one week. In case, the BSNL field units do not receive payment of such bills raised within a period of 7 days from the date of issue of this letter (i.e. by 5th November 2004) then BSNL field units shall be free to take action as per provision of the Interconnect Agreement.

9.0 It is further to inform you that the committee, as requested by you in your above referred letter dated 26th October 2004, cannot be formed at BSNL Corporate Office level to look into the individual cases related to amount of such bills issued by various BSNL field units for penalty and arrears of ADC. You may take up such cases with the concerned POI in-charge of BSNL for resolving the same after making all the payments due to the concerned BSNL field unit in this regard.

Sd/-

(Mahipal Singh)

Jt. DDG (Regulation-I)

29th October 2004

Ph:011 23714522

Enclosure: Annexure-1 regarding apportionment of amount of Rs. 53.71 crores to various field units.

Copy to

1. All CGMTs BSNL Telecom Circles/Metro Districts/Maintenance Regions with a request to disconnect all POIs of M/s. RIL, wherever notice for misuse and bills for the arrears have been raised but M/s. RIL does not make all payments due to BSN, after adjusting amount apportioned by BSNL Corporate Office against individual POI station as detailed in Annexure-1, within prescribed time period of 7 days i.e. till 5th November 2004 without seeking any further instructions, from BSNL Corporate Office, in this regard. Traffic analysis of all other POIs may be carried out and in case any such discrepancies are detected, action may be taken in accordance with the Interconnect Agreement.

2. DDG (CA)/DDG(TRF/DDG(NM, BSNL Corporate Office, New Delhi for information and necessary action please.

3. Mr. Rohtagi, learned Senior Counsel appearing for RIL had stated that the Petitioner had received peremptory Orders from the Government of India, Department of Telecommunication, New Delhi to discontinue its extant practice adhered to by RIL within one hour. This happened because the ""Government has consistently maintained that the Calling Line Identification shall not be changed. Further, the handing over of the telecommunication traffic has to be as per the provisions of the license agreement and Regulations issued by Telecom Regulatory Authority of India from time to time as per provisions of Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as `TRAI Act`) and such handing over of the traffic has also to be as per the mutual agreed interconnection agreements. Hence M/s Reliance Infocomm Ltd. is directed to discontinue such features within one hour of the receipt of this letter and should explain within fifteen days of the receipt of this letter as to why appropriate action including imposition of penalty may not be taken against M/s Reliance Infocomm Ltd. for violation of terms and conditions of the licenses as indicated above.""

4. Mr. Rohtagi has forcefully argued that the manner in which RIL has conducted its business does not infract any of the covenants of the Interconnect Agreement. It is evident from the correspondence exchanged between the parties as well as with the Government of India that the interpretation of RIL of the Interconnect Agreement is that its Home Country Direct Service is not vocative of the

Agreement even though a change has been effective in the CLI.

5. The following clauses of the ""INTERCONNECTING AGREEMENT"" dated 1st November, 2002 have been relied upon by learned counsel for the parties:

RIL shall terminate its traffic on to the network of BSNL as mandated by TRAI from time to time. RIL and BSNL shall deliver all calls on each other's network with CLI in the terminating SDCA. Both parties reserve the right to reject calls without CLI.

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No by pass of traffic shall be resorted to by any party by picking up and/or delivering the traffic at any point other than as permitted under the terms and conditions of the license agreement or as agreed herein. In case unauthorized diversion in routing comes to notice, the other party shall be free to disconnect the POI in that area, after intimating the defaulting party one week in advance. Moreover, the resources shall be used for the purpose for which these have been earmarked and no other service shall be offered by utilizing such resources without agreement of other party or the explicit written consent of BSNL.

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Incoming international calls, inter-circle STD calls from fixed networks and inter-circle STD calls from WLL(M) and cellular networks shall be handed over to BSNL at its SDCC tandem exchange by RIL on separate ports for the purpose of traffic measurement and revenue sharing. The traffic on each port or group of ports will be limited to the type mentioned above.

In case it is detected that incoming international calls or inter-circle STD calls from cellular network and WLL(M) subscribers are handed over to BSNL on any port other than the earmarked ports, BSNL shall be entitled to bill RIL for the termination charge applicable to the highest slab for all calls recorded on that port for the proceeding two months or the date of provisioning of that POI whichever is later.

.....

BSNL shall charge RIL @ Rs.4.40 per minute for termination of these calls in BSNL's network in the same SDCA. It shall charge @ Rs.5.00 per minute for calls terminating in other fixed networks and transited via BSNL's network.

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If BSNL detects that incoming international calls are being handed over or have been made over to BSNL at any other port which is not meant for carrying such calls, BSNL shall be free to charge RIL minimum access charge for incoming international calls as at clause 6.4.2 above for all the calls recorded on these ports from the date of provisioning of that 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 from RIL without CLI. In case of calls without CLI, termination charge as per clause 6.4.2 above shall be charged from RIL.

6. By letter dated 22nd September, 2004 BSNL had notified RIL inter alias to the following effect-

""M/s Reliance Infocomm Limited (RIL) has violated the terms and conditions of the Interconnect Agreement, License Agreement as well as instructions of the Licensor and TRAI by tampering CLI of incoming international calls and terminating them into BSNL's network as domestic calls. By doing so, M/s RIL has not only bypassed the admissible ADC payable to BSNL but has also violated the prescribed guidelines required for security purposes.

.....

Further, it has been stated that M/s RIL has informed DoT on 8th September 2004 about the Home Country Direct Service. It is to inform you that the handover of incoming international calls by M/s Reliance Infocomm Limited (RIL) as an NLDO with tampered CLI was detected in Ahmedabad in Gujarat Circle of BSNL in the month of August 2004 itself. This was much before your alleged presentation to DoT on 8th September, 2004 regarding ITU-T recommendations on Home Country Direct Service which indicates that our had been handing over such unauthorized calls to BSNL since long.

BSNL does not have any agreement with M/s RIL for provision of Home Country Direct Service in the network of BSNL. Operation of such services for termination of incoming international calls in BSNL's network by M/s RIL is, Therefore, not permitted.""

7. This defense of RIL is available in its letter dated October 19, 2004 (Annexure P18) inter alias in the following passage.

It is denied that RIC UASL has engaged in the ""tampering"" of the CLI. In any event and without prejudice to the other submissions made, presentation of switch CLI can not be termed as ""tempering with CLI"" , because the same is a normal feature in any net work including those of BSNL/MTNL where the operator assisted services are provided, whether through the operator or through IVRS. Moreover, this is not in violation of the Interconnect agreement.

In the second stage of the call, the corresponding domestic calls originated on the request of the calling party are handed over by RIC (UASL) to the other interconnected operators. Since these calls were originating from the HCD switch, the call CLI wa that with the National Significant number.

The concern here may be the requirement of CLI for the security purposes. In these regard it is stated that even in the HCD service, the entire call detail records from abroad to India are maintained and are available. The calls can be

monitored, intercepted for call records can be traced by the designated security agencies, like any other call traffic. Therefore, the service does not pose any security threat.

8. Mr.Nayyar has raised a preliminary objection regarding the maintainability of this Petition on the grounds that RIL ought to have approached the Telecom Dispute Settlement and Appellate Tribunal (TDSAT) which has been established as a consequence of the amendment to the Telecom Regulatory Authority of India Act, 1997 by the introduction of Section 14 therein. Mr.Nayyar has drawn to attention Section 15 of the TRAI Act which in his opinion ousts the jurisdiction of Civil Courts and prescribes that

""no injunction shall be granted by any Court or other authority in respect of any action taken in pursuance of any power conferred by or under this Act."" It is his contention that the TDSAT assumes the character or wears the mantle of a judicial authority and Therefore possesses the power to issue injunctions and other interim measures as envisaged in Section 9 of the Arbitration and Conciliation Act, 1996. To the contrary, Mr.Rohtagi has vociferously contended that this Court retains the power to pass appropriate Orders u/s 9 or the appointment of an Arbitrator u/s 11 of the Arbitration and Conciliation Act because of the avowed existence of an Arbitration clause between the parties. He has laid emphasis on the non-obstante language contained in Section 5 of the Arbitration and Conciliation Act which, in his understanding, would uncontrovertibly prevail over any provision of the TRAI Act or any other statute where this language is not found. Mr.Nayyar, however, has invited the consideration of the Petition on its merits, without prejudice to the contention that this Court would not possess jurisdiction to entertain this Petition. Hence it is not necessary to answer this legal nodus.

9. Mr.Rohtagi has submitted that since BSNL has imposed the payment of a penalty, and as both parties are financially solvent, the balance of convenience would be to maintain status-quo while awaiting the decision in the Arbitration. He had also reiterated, in particular, the following grounds in the Petition:

Even assuming for the sake of arguments that HCD services provided by the petitioners were liable for being treated as ILD calls and full IUC and ADC charges are payable to the respondents, even then such payment for the entire period in dispute, i.e. in May 2004 to 16th September 2004 would not exceed Rs.29 crores. The petitioners have not only made this payment but have also made an additional payment of Rs.29 crores. The demands made by the respondent of Rs.182.07 crores are not for any dues towards ADC arrears, but are in the nature of penalty. In any case there is no legal or factual basis for such demand. On the basis of the petitioners' records which are audited/scrutinized by auditors of international repute, these figures would be verified.

The demand for the penalty amount is thus clearly on surmise and conjectures in addition to the same being illegal.

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The Respondents have over 90 lacs subscribers on their Unified Access Service license and the Petitioners handle approximately 1 crores minutes of calls on Long Distance Services and more than 60 lacs minutes of calls on International Long Distance Services daily. By the threatened actions of the Respondents, these services are sought to be disturbed which is clearly impermissible and Therefore immediate orders are necessary so that the Petitioners' services are not disturbed and subscribers and consumes do not suffer unnecessarily because of highhanded and arbitrary actions on part of the Respondents.

10. I have considered the rival contentions concerning the grant of the relief prayed for in the Petition. It is well settled that the powers vested in this Court by virtue of Section 9 of the Arbitration Act must be exercised in consonance with equity which tempers the grant of any discretionary relief. The scope of Section 9 of the Arbitration and Conciliation Act, 1996 is in pari materia with Order XXXIX of the Civil Procedure Code. The observations in M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, , are indeed apposite and immediate come to mind-

In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, Therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.

11. In order to be entitled to discretionary relief, RIL should not be seen to have approached this Court with unclean hands. It must also establish that it has a prima facie case i.e. that the manner in which it has conducted its business is in consonance with the Interconnect Agreement, the salient provisions of which have been reproduced above. A reading of the Agreement prima facie leads to the conclusion that RIL has surreptitiously breached the covenants and obligations contained in the Interconnect Agreement with the purpose of withholding monies which appear to be due to BSNL. For telephone calls emanating from the United State of America or outside India from third party subscribers distinct from RIL itself, the so called Home Country Direct service

cannot be employed. It is difficult to conceive such an activity as a 'Direct Service'. It is also not in dispute that by changing the CLI and thereby disguising and attempting to change an international call to a domestic one, the liability of IL towards BSNL has been drastically reduced. Assuming that RIL was within its contractual rights to use the Home Country Director Service even for telephonic traffic of third parties, there would scarcely have been any need for RIL to change the called identification unless it had itself understood its business activity to be contrary to the Interconnect Agreement. There is a vast difference between the liability of Rs.5.00 or 4.40 per minute and 0.30 corresponding to local call charges which RIL has been paying to BSNL.

12. At this stage, the existence of a prima facie case is wholly absent. Moreover, prima facie it is evident that the manner in which RIL has conducted its business activities is in dishonest breach of the Interconnect Agreement. Such a party is not entitled to any discretionary relief. So far as the balance of convenience is concerned, it is the common case that both parties are financially solvent having mutual dealing running into Crores of Rupees every month. Therefore in the event of the Arbitration Award being rendered in favor of RIL, there ought to be no difficulty in making the recoveries/adjustments. Moreover, although the word 'penalty' has been used in the correspondence, BSNL has only demanded amounts envisaged in the Agreement itself.

13. In these circumstances, I am of the view that a case has not been made out for the issuance of an injunction or any other interim measures as envisaged in Section 9 of the Arbitration and Conciliation Act, 1996. The observations made on the merits of the case are of a prima facie character and would not bind the person/authority who has to finally and fully decide upon the disputes between the parties.

14. The Petition is dismissed. Parties to bear their respective costs.

15. A copy of this Judgment be given dusty to counsel for the parties under the signature of the Court Master.