
(2022) 03 TDSAT CK 0026

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Telecom Petition No.32 Of 2021

Tata Power Company Ltd

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 09-03-2022

Acts Referred:

Citation : (2022) 03 TDSAT CK 0026

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

Bench : Division Bench

Advocate : Vikas Singh , Mansoor Ali Shoket, Nitin Kala, Deepeika Kalia, Kunal Singh, Apoorv Kurup, Akshata Singh

Final Decision : Allowed

Judgement

S. K. Singh, Chairperson

1. This petition was filed on 3.8.2021. The main prayers in paragraph 66 of the petition are as follows:

(a) Direct the respondent to release the PBG No.49580IGL0010720 issued by the petitioner in favour of the respondent in respect of its ISP License in terms of clause 10.5.4 of its ISP License and issue an appropriate letter in this connection to the concerned bank; and

(b) Set aside the respondent's letter dated 09.07.2021 issued to Citibank directing Citibank to encash the petitioner's above mentioned PBG and remit it to the respondent; and

(c) Pass such other and further order(s) in favour of the petitioner and against the respondent as may be deemed fit and proper in the facts and circumstances of the case.

2. At the time of admission, as would appear from order passed on 5.8.2021, the petitioner pressed for suitable interim reliefs. The principal contention on behalf of the petitioner has been that its license agreement dated 22.8.2003 for

provision of Internet Service (including Internet Telephony) was effective from 24. 8.2000 for 15 years and set to expire on 23.8.2015. But the petitioner surrendered its ISP License on 30.8.2006 by communicating Board's resolution of 16. 3.2005 through a letter dated 30.8.2006 (Annexure P-6). It is petitioner's case that in terms of Clause 10.3 the respondent had no option but to accept the surrender in view of undisputed Board resolution and return the Performance Bank Guarantee(PBG) in terms of clause 10.5.4 Schedule 'C' of the License Agreement on expiry of six months of termination of the License. Lawful dues alone, if any, could be demanded by the respondent within six months before release of the PBG. It is further case of the petitioner that to the knowledge of the petitioner there are no dues payable for the license in question nor there has been any demand of dues since 2006. After several correspondences, petitioner filed a representation dated 28.4.2020 (Annexure P-5) with a prayer for return of the PBG. Thereafter by the impugned letter dated 9.7.2021 (Annexure P-3) the respondent directed petitioner's banker, Citibank that the PBG of petitioner was valid upto 16.8.2021 and in case it was not renewed before that date, the PBG should be encashed and the proceeds should be remitted to DoT's specified account. According to the petitioner, the above action of the respondent in not returning the PBG in spite of demand and asking for its further renewal is arbitrary, illegal and against the terms of the License Agreement.

3. On the request of the respondent some time was granted for completion of pleadings and by an interim order this Tribunal directed the petitioner to get the PBG renewed only for 3 months. The respondent was restrained from encashing the bank guarantee without taking leave of the Tribunal. After the filing of reply and rejoinder, the interim order was reconsidered on 10.11.2021. The Tribunal did not allow the respondent's prayer for further extension of the bank guarantee, however, in the interest of justice the petitioner was directed to submit an undertaking that if required by the final order it shall renew the bank guarantee. Required undertaking has been furnished to the Tribunal.

4. On 10.11.2021 after the hearing began, a simple prayer was made on behalf of the respondent that it may be permitted to file an affidavit for bringing on record some facts which had been missed in the reply. No permission was sought for amending the reply or for an additional reply. Pursuant to such permission an additional affidavit has been filed to which objection has been taken in the rejoinder in addition to submissions on merits by way of rejoinder. Thereafter the matter has been heard in detail and order was reserved on 28. 2.2022.

5. In the counter-affidavit the respondent has admitted that the petitioner applied for surrender of its ISP License through a letter of 5.7.2006 which was received in their office on 7.7.2006. Further letter of the petitioner dated 30. 8.2006 was received on 4.9.2006. The request of surrender was processed and some documents for surrender were found incomplete hence the respondent vide letter dated 5.9.2006 called for the required documents. Petitioner submitted the documents vide a letter dated 7.10.2006, received on 10.10.2006. It is claimed

that for some discrepancy in the documents, the respondent issued after 8 years on 24.9.2014 another letter calling for some documents. The petitioner allegedly did not submit the complete documents for surrender therefore letter accepting the surrender was not issued.

6. It is the case of the respondent that it is entitled to ask for proof of payment of license fee in the past as well as upto date audited accounts with audit reports and since dues could not be ascertained for want of all the documents, respondent is entitled to insist upon renewal of the PBG. In specific reply to paragraph 9 of the petition wherein the petitioner has pleaded that it has no dues to pay to the respondent nor any demand has been raised, the stand in the counter-affidavit in para 20 is that the respondent can work out the dues and raise a demand only after petitioner submits all the documents including upto date audited accounts. It has been asserted that petitioner was required to submit license fee at the rate of 6% of AGR from 1.1.2006 as per amendment in respect of license fee dated 3.3.3006 in the License Agreement.

7. In the rejoinder the petitioner has taken the stand that the respondent has raised an irrelevant issue for subsequent accounts when the issue is for release of PBG due to surrender of license. Petitioner has highlighted Clause 10.3 of the License Agreement whereby, under then prevailing regime the only requirement for surrender was giving of an advance notice of 30 days to DoT/Licensor. If service was being provided to subscribers, then a 15 days notice was needed for withdrawal of service. Clause 10.3 does not require submitting of documents including audited accounts as a pre-condition to an effective surrender is the foundation of petitioner's claim for return of PBG.

8. In the rejoinder, on merits it has been clarified that as per ISP License the petitioner was required to pay only a nominal annual license fee of Rupee One which was paid till the time of surrender. In respect of introduction of concept of AGR based license fee through amendment dated 3.3.32006, it has been pleaded that it did not have automatic application to all ISP Licenses. Para 3 of the amendment required a licensee to convey its acceptance within 15 days along with fresh FBG. The petitioner neither gave its acceptance nor furnished the FBG required by the amendment. According to the petitioner the amendment in the License Agreement was never applicable to the petitioner because its Board of Directors, the highest authority for taking any decision on behalf of the Company, had in its resolution of 16.3.2005 resolved to surrender the license in question and the surrender was communicated on 30.8.3006.

9. During hearing reliance has been placed by the petitioner upon Clause 10.3 and 10.5.4 of Schedule "C" of the License Agreement. For the sake of convenience they are extracted herein below:

"10.3 TERMINATION FOR CONVENIENCE:

If the LICENSEE desires to surrender the licence, it shall give an advance notice of 30 days to the Licensor to this effect. If the service is in operation, the

licensee shall also intimate its subscribers of consequential withdrawal of service by serving a 15 days notice to them. The financial liability of the licensee company for termination of the licence for convenience shall be as below:-

(a) After start of service:- If during the notice period, acceptable level of service is not delivered to the customer, the licensee shall forfeit all claims on the Performance Bank Guarantee which shall be encashed and the amount shall be adjusted towards damages.

(b) Before start of service:- The licensee can surrender the licence by paying surrender charges equivalent to 5% of the Performance Bank Guarantee (PBG) amount i.e. Rs.10 lakh for category 'A' , Rs.1 lakh for category 'B' and Rs.15,000 for category 'C' licences respectively. The PBG shall be returned after termination of the licence and ensuring clearance all dues as per Clause 10.5.4."

"10.5.4 The Performance Bank Guarantee, if due, shall be returned to the licensee company 6 months after the termination of the licence and after ensuring clearance of any dues which the licensee company is liable to pay."

10. There is no controversy that Clause 10.3 provides for termination / surrender of the license for convenience. In the case of petitioner the service was not in operation and hence there is no issue relating to requirement to inform the subscribers. The surrender is before start of service and is governed by Clause 10.3(b). Petitioner's license was in category "A".

11. Learned counsel for the petitioner has submitted that respondents cannot derive any advantage from their reply dated 5.9.2006(Annexure R-1) on the subject of surrender of petitioner's license. It was shown that in the said letters which is in a cyclostyle format, only the requirements at paragraphs (e), (f), (g), (h) and (j) have been ticked for seeking documents / informations as per those clauses. This is also evident from petitioner's reply to said letter contained in Annexure P-8, dated 7.10.2006. Those very clauses have been replied in seriatim through paragraphs (a) to (e). With regard to intimation that the request letter for surrender should be signed by authorized signatory only, mentioned in paragraph (f), it was intimated that request letter for surrender has already been acknowledged by the respondent on 4.9.2006. It was further submitted that no issue remained with regard to surrender of the license with 30 days notice, the only issue is for return of the PBGs to the petitioner. On this issue the respondent preferred to sit tight for several years because they were not in a position to show any dues against the petitioner for the period prior to surrender specially when petitioner did not prefer to run the license under the AGR regime and did not give any consent either in writing or by conduct.

12. Learned counsel for the petitioner has placed reliance upon a judgment of the Hon'ble Supreme Court in the case of J. K. Industries Ltd Vs. Chief Inspector of Factories & Ors, reported in (1996) 6SCC665 for the proposition that Board of Directors of a Company is the supreme authority to take decisions on behalf of the company. Although the proposition has not been contested, the judgment in

the case of J.K. Industries was rendered in a different context altogether. On behalf of the petitioner reliance has also been placed upon a judgment of this Tribunal dated 8.9.2005 in the case of Vertec Communications Ltd Vs Union of India, 2005 SCC OnLine TDSAT 66. In that case the same very conditions of license, clause 10.3 and 10.5.4 fell for consideration. This Tribunal considered the defense of the respondent that there can be no unilateral surrender of license but rejected the plea by holding that clause 10.3 provides for termination for convenience and does not provide for the acceptance or non-acceptance of the surrendered license by the licensor. It was also held that as a consequence of surrender after advance notice of 30 days, Clause 10.5.4 obligates the return of the bank guarantee by the licensor after expiry of 6 months by making adjustments towards any dues which the licensee is liable to pay as on the date of surrender. This Tribunal referred to and found support from judgment of the Apex Court in the case of Makharia Brothers Vs. State of Nagaland, reported in AIR 1999 SCC 3466.

13. Learned counsel for the respondent has made a submission that the surrender of license was not made by a simple communication as a notice of 30 days, rather it was communicated along with resolution of Board of Directors dated 16.3.2005 which contained an additional resolution that Mr. Rahul Choudhary (CEO, Broadband) is authorized to take all necessary steps including signing of any letters, undertakings and other documents as may be required by DoT in this regard. On the basis of the aforesaid additional resolution, it has been contended that the communication of surrender by any officer other than Mr. Rahul Choudhary, even if the other officer is authorized signatory of the company, would not be valid intimation of surrender on account of Board's additional resolution and therefore petitioner cannot claim that its license stood surrendered after 30 days of the intimation. Learned counsel has pointed out that in paragraph (f) of Annexure R-1 it was mentioned that request letter for surrender should be signed by authorized signatory only.

14. The aforesaid plea of the respondent deserves to be rejected summarily because there was no specific objection to letter of surrender being signed by General Manager of the Company Mr. Ashok Mitra or that he is not an authorized signatory. Further, no query was ever made as to whether Mr. Mitra was an authorized signatory or not. In ordinary course of business it would be safe to presume that the acts done by General Manager of the Company were regular and under authority vested by the Company. During arguments it has been submitted that Mr. Mitra was a higher official and was an authorized signatory and such stand was never challenged.

15. Learned counsel for the respondent has referred to and relied upon an order of TDSAT dated 30.5.2018 in T.P.No.418 of 2018 to support the stand on AGR vide amendment of agreement dated 3.3.2006. That order prima facie does not apply to case of the petitioner in view of clear stand that it did not accept the amendment and the same cannot be imposed unilaterally. In any case, if

respondent seriously want to raise any demand against the petitioner after surrender of license in 2006, they may proceed as per law. It is not necessary to prejudge such an issue. On behalf of the respondent reliance has been placed also upon judgment of the Apex Court in the case of Rithwik Energy Generation Pvt Ltd & Others, (2018) 17 SCC 223 to support the plea that surrender by written intimation with resolution of Board of Directors is not as per mandatory requirements of Clause 10.3 referred earlier. This stand is not at all supported by above judgment. In that case it was concluded in paragraph 21 that plea of substantial compliance is no answer to a mandatory requirement. This has no application to the facts of the case. Here the respondent has failed to show any infraction of Clause 10.3 by the petitioner Company.

16. The plea of the respondent is found to be an after thought. It was never raised after Mr. Mitra submitted his reply dated 7.10.2006 meeting paragraphs ticked in letter dated 5.9.2006. The said plea is rejected. The additional resolution of the Board of Directors was for internal guidance of the Company officers and not for use of the respondent or any outsider. This part of the resolution was not required to be communicated to the respondent. In the facts of the case, it is not a material issue and does not affect the surrender of license as per unchallenged resolution of petitioner Company.

17. It is also found and held that subsequent correspondences made in the year 2014 or in 2021 requiring the petitioner to submit various documents and accounts are of no help to the respondent because the license could be surrendered by the petitioner and it was in fact surrendered under the authority of Board of Directors which has not been questioned. As a result, it is found that Clause 10.3 stood satisfied and after 30 days of the surrender intimation in 2006, the License Agreement itself came to an end. Six months thereafter, in absence of any demand being raised against the petitioner, the PBG of Rs. 2 crores had to be returned as a consequence of the surrender. This obligation, the respondent failed to honour and caused unnecessary financial burden upon the petitioner who had to keep the PBG renewed for long number of years. The demand for accounts for the period after the surrender is without any authority because the License Agreement had come to an end. Hence, the respondent must now return the PBG which has not been renewed on account of interim orders of this Tribunal, within four weeks from today. In case the PBG is not returned within the time indicated, all concerned shall treat the PBG as cancelled and nullified by this order.

18. The petition is accordingly allowed by granting prayers (a) and (b) made in paragraph 66 of the petition.

19. The matter stands disposed of accordingly along with MAs, if any. However, there shall be no order as to costs.