(2021) 07 TDSAT CK 0013

In the Telecom Disputes Settlement And Appellate Tribunal

Case No : Telecom Petition No. 59 Of 2020

Tata Teleservices Ltd APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 08-07-2021

Acts Referred:

Citation : (2021) 07 TDSAT CK 0013

Hon'ble Judges : Shiva Kirti Singh, CP

Bench : Single Bench

Advocate : Mansoor?Ali Shoket, Kunal Singh, Abhay Prakash Sahay

Final Decision : Allowed

Judgement

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S.K. Singh, Chairperson

1. This petition was filed on 14.10.2020 and was admitted for hearing by the first order passed two days later. The first order dated 16.10.2002 reads

as follows:-

â??Admit. No notice need be issued as respondent has appeared through counsel on advance notice.

Heard learned counsel for the petitioner and Learned counsel for respondent - UOI, Mr.Sahay.

Prima-facie, the submissions made on behalf of the petitioner that inspite of there being no dispute raised by the respondent in respect of

petitionerâ??s working of accounts during the last 10 years since the agreement expired, with-holding of petitionerâ??s bank guarantee is arbitrary

and contrary to the spirit of relevant provisions in the agreement relating to retention of bank guarantee.

As prayed on behalf of respondent, four weeksâ?? time is granted for filing reply so that if possible, matter may be finally disposed of on the next

date. Rejoinder, if required may be filed within two weeks from the receipt of a copy of the reply.

Post the matter under the head â??for directionsâ?? on 9.12.2020.

Till the next date, the respondent shall not take any steps to invoke and encash the bank guarantee(s).â??

2.Â On 09.12.2020 learned counsel for the respondent prayed for and was granted four weeksâ?? further time for filing reply by way of last

opportunity. It was made clear that if for any reason further time has to be granted it shall be on appropriate costs. On account of four weeks further

time for rejoinder, the matter was fixed for 03.02.2021 when two weeksâ?? further time was granted for reply on account of personal ground of

learned counsel, but by way of last opportunity. On 22.02.2021 as an extra-ordinary indulgence three weeksâ?? time was granted without costs but it

was made clear that no further indulgence shall be granted and further time if sought properly by filing application will be allowed only on appropriate

costs. On 17.03.2021 again an oral prayer for further time to file reply was allowed with disapproval of such practice and with a cost of Rs.10,000/- to

the other side but the time granted was not availed. The respondent did not file reply nor paid the cost but raised a preliminary issue of jurisdiction on

which both the parties have been heard in detail whereafter order was reserved on 06.04.2021. In that order of 06.04.2021, it has been made clear

that â??On merits, the claim of the petitioner that the respondent be directed to release the particular Performance Bank Guarantee

issued by the petitioner in favour of the respondent in respect of AP Circle in terms of Clause 19 of the agreement and also be directed

to issue an appropriate letter in this connection to Union Bank of India, has not been contested by filing any reply. But the preliminary

issue relating to jurisdiction requires serious consideration because the outcome of the petition will depend much on the decision in

respect of preliminary objections noted aboveâ??.

3.Â The simple prayer made in the petition is to â??direct the respondent Union of India to release PBG No.49580IGL0010720 issued by the

Petitioner in favour of the Respondent in respect of AP circle in terms of Clause

19 of the Agreement and issue an appropriate letter in this

connection to Union Bank of Indiaâ??.

4.Â In the petition a copy of the Agreement dated 31.03.2002 has been annexed as Annexure P-1 claiming that it is between the petitioner and the

respondent, Union of India, for â??Subsidy Disbursement for Operation and Maintenance of Village Public Telephonesâ? under the Universal Service

Obligation (USO) in Andhra Pradesh Circle. The Agreement shows that it has been executed by and between the President of India acting through a

named officer, Deputy Administrator (USF), Department of Telecommunication (DoT), New Delhi as the First Party and the petitioner as the Second

Party which has been described and called as the Universal Service Provider or USP. The Agreement for Operation and Maintenance of VPT s was

for the service area - Andhra Pradesh and valid for 7 years from 31.03.2003. In terms of said agreement petitioner was required to furnish PBG. A

copy of the latest bank guarantee dated 04.02.2020 for Rs.30 lakhs valid upto 04.02.2021 is Annexure P-2. A part of the order dated 06.04.2021 has

been extracted earlier in part to highlight that on merits of petitionerâ??s claim there is no contest by filing reply. However, it is deemed appropriate

to extract Paras 3 to 10 which have remained uncontroverted. They are as follows:

â??3. It is submitted that the Petitioner has furnished a PBG to the Respondent for a sum of Rs.30 lakhs in AP circle as per Clause 19.1 of the Agreement. The said

PBG was to be released by the Respondent in terms of Clause 19.2 of the Agreement either after six months from the expiry of the Agreement or after finalization of

accounts. The Agreement expired on 31.03.2010 and extended period of six months expired on 31.09.2010. More than 10 years have passed since the expiry of the

Agreement, and yet, the Respondent has failed to release the Petitionerâ??s PBG. In the meantime, the Petitioner has not only had to keep the PBGs alive under the

threat of invocation but also bear the charges etc. for the same.

4.Â Moreover, it is submitted that either during the subsistence of the Agreement or till 2019, not once had the Respondent alleged that the Petitioner had not acted

in accordance with its obligations under the Agreement or had in any manner breached/violated the terms of the Agreement, even though the Respondent was

specifically empowered under Clauses 7.2, 7.4 and 22.2 of the Agreement to terminate for breach and/or conduct an enquiry to determine whether there had been any

breach. It is submitted that despite not claiming or even alleging or inquiring into a possible breach, the Respondent refused to finalise the accounts of the Petitioner

and release its PBG. In fact, the only allegation of the Respondent had been with respect to an alleged outstanding amount of Rs.2,05,225/-, which also the Petitioner

has repeatedly and unequivocally expressed its willingness to pay and accordingly, even asked the Respondent for details of the account in which such amount may

be deposited.

5.Â It is submitted that the Petitioner by its various communications, detailed below, had requested the Respondent to release the PBG in light of the expiry of the

Agreement and the passage of substantial time since then. However, the Respondent failed to release the PBG and for the first time vide its letter dated 06.03.2019,

i.e., more than 9 years after the Agreement expired, suddenly started claiming a breach of the Agreement by the Petitioner and threatening to encash the

Petitionerâ??s PBG on account of such alleged breach. In the said letter, the Respondentâ??s claim is that the Petitionerâ??s failure to claim subsidy in the last 7

quarters of the Agreement implies that the Petitioner failed to operate and maintain VPTs during this period and is therefore in breach of the Agreement. A copy of

the Respondentâ??s letter dated 06.03.2019 issued to the Petitioner is annexed hereto and marked as Annexure P-3.

6.Â It is submitted that the Respondent in the said letter has strangely refused to release the PBG on the assumption that the Petitioner has breached the Agreement

merely because it did not lodge a claim for subsidy. The allegation of breach, which has been made more than 9 years after the Agreement expired, is without any

basis and it is not clear as to how the Respondent has assumed that the

Petitioner has not performed its obligations merely on basis that the Petitioner did not lodge

its claim for subsidy. It is categorically submitted that such stand of the Respondent is illogical, without any rational and it untenable.

7.Â Â In fact, the Respondentâ??s assumption that the Petitioner has not performed its obligation and was hence dissuaded to file a claim for subsidy is

unsustainable and contrary to the facts as recognised by the sectoral regulator itself, i.e. TRAI, in its Report dated 22.07.2010 depicting the trends in telephone

subscribers and tele-density in India (the â??Reportâ?). Annexure 1.5 of the Report (@ internal pg.102 of the Report) clearly establishes that the Petitioner had

installed and was maintaining 1358 VPTs in AP circle, which is more than the 1314 VPTs the Petitioner was required to install and maintain in terms of Clause 17.1 of

Agreement. A copy of TRAIâ??s Report dated 22.07.2010 depicting the trends in telephone subscribers and teleÂ¬density in India is annexed hereto and marked as

Annexure P-4.

8.Â Â It is submitted that in terms of the Agreement, the only purpose which the PBG is furnished is to secure the Respondent towards the installation and

maintenance of the VPTs during and six months after the expiry of the Agreement. To that extent, there is no doubt that the Petitioner has acted in compliance with

the Agreement and has installed and serviced VPTâ??s in AP circle during the entire duration of the Agreement, including the period 01.07.2008 till 31.03.2010, and in

fact, even after the expiry of the Agreement. Thus, the assumption that the Petitioner has not installed, maintained and operated the VPTs is contrary to the

established facts and clearly reflects complete nonÂ¬application of mind. It is submitted that such an unfounded assumption cannot be the basis for claiming a

breach of the Agreement and consequently, refusing to release the PBG under the Agreement, that too ten years after the expiry of the Agreement.

9.Â Â It is submitted that finalization of the accounts is the obligation of the Respondent. As far as the Petitioner is concerned, it has fulfilled its obligations, while

also keeping the PBG alive. Further, as already made clear to the Respondent, the Petitioner is willing to immediately deposit the alleged outstanding amount of

Rs.2,05,225/- without prejudice to the fact that such amount does not show as outstanding in the Petitionerâ??s accounts. Accordingly, the Respondent is under

obligation to release the PBG in terms of Clause 19.2 of the Agreement and there is no reason/ground for the Respondentâ??s failure to release the PBG.

10.Â Â It is submitted that the Respondentâ??s refusal to release and revise the PBGs is not only contrary to the express terms of the Agreement but also reflects

the sole intention of the Respondent to somehow maximize its revenue at the cost of the Petitioner.â??

5.Â In view of the case of the petitioner noted above and which has remained uncontroverted, the prayer of the petitioner for release of the PBG

deserves to be allowed on merits. Denial to release the same is clearly arbitrary and against the spirit of Agreement between the parties.

6.Â Even without filing a reply, the respondent has raised some objections by way of preliminary objections during the course of arguments. The first

objection is that this Tribunal does not have jurisdiction because the respondent is neither a licensor/licensee nor a service provider. The other

objection is that even if this Tribunal has jurisdiction, the same is affected by an arbitration clause in the agreement and that would also lead to lack of

jurisdiction in the Tribunal to entertain the petition.

7.Â There is no controversy that the dispute relates and arises from an Agreement dated 31.03.2003 (Annexure P-1) between the President of

India acting through Deputy Administrator(USF), Department of Telecommunications(DoT), Sanchar Bhawan, New Delhi and M/s Tata Teleservices

Ltd., the petitioner. The first page of Annexure P-1 describes that the Agreement is for subsidy disbursement for operation and maintenance of

VPTs under Universal Service Obligation in Andhra Pradesh Service Area. This Agreement is essentially for operation and maintenance of VPTs in

the contracted service area and Para 6 clarifies that it is an additional obligation and does not modify the obligations for providing VPTs under the

Basic Service Licence dated 04.11.1997 for Andhra Pradesh Area. The two conditions for release of bank guarantee are mentioned in Para 8.2. Para

10 provides for settlement of disputes through arbitration. Clause 13 of the agreement mentions the other obligations and provides that the universal

service provider shall be bound by the terms and conditions of the agreement as well as by orders, directions and regulations of Telecom Regulatory

Authority of India(TRAI) as per provisions of the TRAI Act, 1997 and instructions that may be issued by the Administrator. The statutory provisions

and rules under the Indian Telegraph Act and Indian Wireless Telegraphy Act and orders passed under those statutes shall also be binding on the

Universal Service Provider.

8.Â On behalf of respondent it has been contended that by the Indian Telegraph Amendment Act 2003, the Indian Telegraph Act 1885 was amended

to create a separate fund named as Universal Service Obligation Fund which shall be under the control of the Central Government and it shall be

released exclusively for meeting the Universal Service Obligation. The Central Government in the Department of Telecom made provisions and

appointed an Administrator for Universal Service Fund (USF) Management and Implementation of Universal Service Support Policy. The

Administrator is of the rank of Secretary to the Government of India and is required to function as an attached office of Department of

Telecom(DoT). The Administrator has the powers of Head of Department and is required to report directly to the Minister of Communications &

Information Technology. He has to implement the policy in accordance with the guidelines of the Government and all important matters of policy

affecting licence conditions of service providers has to be dealt with in coordination and active consultation with Department of Telecom.

9.Â On a careful reading of the materials filed as Annexure-A to the Written Arguments of the respondent which include the matters relating to the

Fund Administrator, it is not at all in doubt that for the convenience of administration alone the office of Administrator of Universal Service Fund has

been created as a part of Department of Telecom. The agreement between the petitioner and the Union of India refers to statutory obligations which

are enforced by the DoT as a licensor or as a service provider and the dispute at hand cannot be described as one beyond the jurisdiction of TDSAT.

The respondent, Union of India, is the licensor for the Basic Service Providers such as the petitioner and the functions of maintenance of VPTs in the

contracted service area would essentially be functions of a service provider for telecom services. The work of maintenance of VPTs has been

entrusted to the basic service provider on terms and conditions mentioned in the agreement and a dispute arising therefrom would also be covered as a dispute between two service providers who also happen to be the licensor and the licensee.

10.Â Â In view of the aforesaid discussions and findings the preliminary objections of the respondent are found to have no merits.

11.Â Â Even if in the past parties to such agreements have resorted to arbitration clause, such clause, as per established law will not affect the

statutory jurisdiction of TDSAT created as an expert body specifically for adjudication of such disputes. Hence, both the preliminary objections are

found to have no merits.

12.Â Â As a result of aforesaid discussion, the petition is allowed. The financial bank guarantee in question shall be released in favour of the

petitioner forthwith. In the petition, the petitioner has admitted that it is willing to repay an alleged excess subsidy of approximately Rs.2.05 lakhs to the

respondent as mentioned in Annexure P-13. The petitioner should pay that amount and within one week of such payment, the bank guarantee of the

petitioner shall be released to the petitioner. In any case, henceforth after payment of Rs.2.05 lakhs, the petitioner will be under no legal obligation to

renew and maintain the said bank guarantee.

13.Â The petition is allowed to the aforesaid extent. There shall be no order as to costs.

