

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 6th July, 2011

+ W.P.(C) 4615/2011 & CM No.9367/2011 (for stay)

RELIANCE COMMUNICATIONS LTD. Petitioner

Through: Mr. Ramji Srinivasan, Sr. Adv. with
Ms. Manali Singhal & Mr. Santosh
Sachin, Advocates.

Versus

BHARAT SANCHAR NIGAM LTD. Respondent

Through: Mr. Maninder Singh, Sr. Adv. with
Mrs. Pratibha M. Singh, Mr. Tejveer
Bhatia & Mr. Sudesh Chatterjee,
Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported
in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The writ petition impugns the interim orders dated 18th April, 2011, 27th May, 2011 and 3rd June, 2011 of Telecom Disputes Settlement & Appellate Tribunal (TDSAT) in different petitions/clarification

applications filed by the petitioner and the order dated 8th June, 2011 of TDSAT dismissing the application filed by the petitioner for review of the order dated 27th May, 2011 (supra). The petitioner also seeks to restrain the respondent from disconnecting any points of interconnections (POIs) of the petitioner and seeks restoration of all interconnections already disconnected, pending decision of the petitions preferred by the petitioner before the TDSAT. The petitioner further claims the relief of restraining the respondent from taking any other coercive action or from encashing the Bank Guarantees furnished by the petitioner, till the decision of the petitions/proceedings pending before TDSAT.

2. The petitioner has in the petitions filed before TDSAT challenged the various monetary demands made by the respondent on the petitioner. The said demands arose as a consequence of decision in an earlier dispute between the parties. The said dispute *inter alia* was, whether telecom services being provided by the petitioner to its customers are fixed line services as contended by the petitioner or mobile services as contended by the respondent. TDSAT found the services to be the mobile services. The

said decision was upheld by the Supreme Court. It was in pursuance thereto that the respondent raised demands on the petitioner, either for refund of the amount paid by the respondent to the petitioner for a certain period on the premise of the services rendered by the petitioner to its customers being fixed line services or for payment of amounts for other period which were payable by the petitioner upon the services rendered by the petitioner having been held to be mobile services. The respondent threatened the petitioner with coercive steps including of disconnection of POIs and/or encashment of Bank Guarantees for non-payment of the said demands.

3. The petitioner preferred petitions before the TDSAT questioning the correctness of the said demands of the respondent and sought interim stay of the said demands during the pendency of the challenge before TDSAT.

4. It may also be mentioned that the demands pertained to several licenses / agreements issued / between the parties, qua different areas/Circles.

5. The demands comprised of the principal amount and interest for delay.

6. TDSAT has vide interim orders impugned in this writ petition, stayed coercive action by the respondent against the petitioner till the final disposal of the petition before it, subject to payment of certain amounts by the petitioner to the respondent.

7. Interference with such interim orders which are essentially discretionary in nature is limited even in appeal. The scope of interference in exercise of powers of judicial review would be still narrower.

8. Upon the same being put to the senior counsel for the petitioner, he has contended that the challenge is on the ground of inconsistencies in the orders aforesaid as well as inconsistency between the orders aforesaid and other interim orders made by the TDSAT being orders dated 11th February, 2011 and 1st March, 2011 in other similar petitions preferred by the petitioner.

9. The senior counsel for the petitioner has contended that the demands under challenge before the TDSAT pertain to three periods i.e.:-

- (i) 1st February, 2004 to 13th November, 2004;
- (ii) 14th November, 2004 to 26th August, 2005; and
- (iii) 27th August, 2005 to 28th February, 2006.

With reference to the order dated 11th February, 2011 it is pointed out that even though the demand subject matter thereof pertained to all the three periods, coercive action against the petitioner was restrained subject to the petitioner depositing the entire principal amount and 50% of the amount of the interest as per the agreement and only for the period from (a) 14th November, 2004 upto 26th August, 2005 and (b) 27th August, 2005 to 28th February, 2006 only. It is contended that there was thus absolute stay with respect to the period from 1st February, 2004 to 13th November, 2004. The senior counsel for the petitioner further invites attention to the order dated 1st March, 2011 which clarified that the interest had to be computed for the period of delay beyond thirty days, in terms of the agreement between the parties.

10. The order dated 18th April, 2011 impugned in this writ petition arose out of applications of the petitioner for clarification of the earlier interim

orders and pertains to all regions/circles, demands with respect whereto impugned by the petitioner were pending adjudication before TDSAT. The contention of the petitioner was twofold. It was firstly contended that the principal amount should be directed to be paid only for the period from 14th November, 2004 to 28th February, 2006 and not for the period from 1st February, 2004 to 13th November, 2004. The second contention was that the interest of which the petitioner had been directed to deposit 50%, should be calculated only from the date after the bills were raised and not from the original date.

11. It was the stand of the respondent that the demand for the period 1st February, 2004 to 13th November, 2004 was for refund of the amounts paid by respondent to the petitioner treating the petitioner's service as fixed line services. It was however conceded that there was an error in the demand for the said period insofar as for an amount of ₹7 crores and thus the demand for the period 1st February, 2004 to 13th November, 2004 insofar as for the said ₹7 crores was withdrawn by the respondent.

12. TDSAT vide order dated 18th April, 2011 clarified that save for the said amount of ₹7 crores, the rate of interest on the amount of refund for the period prior to 14th November, 2004, for the purposes of interim order would be 12% and not 24% as provided in the agreement.

13. It was the contention of the petitioner that since the demands of the respondent were payable within thirty days of raising of the bill therefor and were to attract interest at 24% per annum, only if not paid within the said time and further since the respondent had not raised any bill on the petitioner during the pendency of the dispute as to whether the services provided by the petitioner were fixed or mobile and had raised the bills only after the decision of the Supreme Court, it could claim interest only from thirty days after the bill and not from an earlier date as had been done. TDSAT in the order dated 18th April, 2011 held that since bills could not be raised owing to the pendency of the disputes as to whether the services were fixed or mobile, interest was payable from the date when the amounts were due.

14. The contention of the senior counsel for the petitioner thus is that

there is an inconsistency in the order dated 11th February, 2011 and the order dated 18th April, 2011; while on 11th February, 2011 no amount for the period 1st February, 2004 to 13th November, 2004 was directed to be paid, on 18th April, 2011 not only the principal amount for the said period less ₹7 crores but also interest thereon was directed to be paid; similarly while on 11th February, 2011, 50% of the amount of the interest payable in accordance with the agreement was directed to be paid, the direction on 18th April, 2011 for payment of interest is beyond the terms of the agreement; under the agreement interest was payable only for delay in payment beyond thirty days of the bill.

15. The grievance with respect to the order dated 27th May, 2011 is that it wrongly records that the counsel for the petitioner had agreed that interest will have to be paid from the date when the amount became due in the first instance and that the respondent is liable to get back its money which it paid to the petitioner during the period 1st February, 2004 to 13th November, 2004.

16. Review, which was dismissed vide order dated 8th June, 2011, was sought on the aforesaid aspect.

17. The senior counsel for the respondent appearing on advance notice has at the outset contended that the challenge by the petitioner to the order dated 18th April, 2011 is not maintainable owing to the petitioner having earlier preferred W. P. (C) No.3909/2011 challenging the same order dated 18th April, 2011 and which writ petition, after some arguments was withdrawn on 1st June, 2011 in order to file review petitions before the TDSAT. It is contended that the petitioner having filed the earlier writ petition impugning the order dated 18th April, 2011, is not entitled to maintain this second petition impugning the same order. It is yet further contended that once the challenge to the order dated 18th April, 2011 fails, the challenge to the other subsequent orders also fails.

18. It is yet further pointed out that though the earlier writ petition being W.P.(C) No.3909/2011 (supra) was withdrawn stating that review petition would be filed before TDSAT but no review of the order dated 18th April, 2011 was applied for and the review dismissed vide order dated 8th June, 2011 impugned in this writ petition was sought of the order dated 27th May, 2011.

19. It is yet further contended that different orders between which

inconsistencies is pointed out pertain to different regions/circles and thus there is no question of any inconsistency. It is also the contention that the reliefs claimed in this writ petition are beyond the scope of judicial review and The Telecom Regulatory Authority of India Act, 1997 provides for an appeal against the orders of TDSAT to the Supreme Court.

20. I have during the hearing enquired whether the basis for the demand for the period 1st February, 2004 to 13th November, 2004 is the same as for the subsequent period. The senior counsel for the respondent answers in the affirmative. The senior counsel for the petitioner is unable to controvert that while for the period 1st February, 2004 to 13th November, 2004 refund is claimed of the amounts paid by the respondent to the petitioner on the premise of the services provided by the petitioner being fixed and which would not have been payable had the services been treated as mobile, the demand for the period thereafter is for the amount which would have been payable by the petitioner to the respondent had the services been treated as mobile and not fixed. Thus the basis for the demand for the entire period is the same.

21. TDSAT is a special body created for adjudication of the special

nature of disputes arising under the TRAI Act. Such disputes besides technical also have a commercial flavour to the same. Those manning the said Tribunal are intended to be experts with special technical and commercial knowledge. It is the settled principle in law that the interference with orders much less interim orders of such specialist Body has to be minimal.

22. The senior counsel for the petitioner faced with the aforesaid relies upon *Star India P. Ltd. Vs. Life Style Communication P. Ltd.* 146 (2008) DLT 230 where this Court held that judicial review of orders of TDSAT is permissible. However I find that even in *Star India P. Ltd.* it was held that where the order of such a Tribunal is an interim one—jurisdiction of this Court gets even more circumscribed and orders can be interfered with only where they disclose manifest error apparent on the face of the record such as when they are based on clear ignorance or utter disregard of provisions of law and grave injustice or gross failure of justice has been occasioned.

23. The aforesaid parameters are not satisfied in the challenge made in the present writ petition. The demand impugned in the proceedings before TDSAT as aforesaid is monetary and according to the senior counsel for

the petitioner himself running into crores of rupees. The grant of interim relief is on the touch stones of *prima facie* case, irreparable loss, balance of convenience and also of public interest, as recognized in:-

- (a) ***Shiv Kumar Chadha Vs. MCD*** (1993) 3 SCC 161.
- (b) ***Mahadeo Savlaram Shelke Vs. Pune Municipal Corporation*** (1995) 3 SCC 33.
- (c) ***Ramniklal N. Bhutta Vs. State of Maharashtra*** AIR 1997 SC 1236.
- (d) ***ONGC Ltd. Vs. Saw Pipes Ltd.*** AIR 2003 SC 2629.
- (e) ***Chancellor Masters and Scholars of the University of Oxford Vs. Narendra Publishing House*** 2008 (38) PTC 385.
- (f) ***F. Hoffman-La-Roche Ltd. Vs. Cipla Ltd.*** MANU/DE/0381/2009.
- (g) ***Smt. Ishmali Devi VS. DDA*** MANU/DE/1838/2009.

24. The general principle is that there will be no stay of such monetary demands. Civil Procedure Code lays down that there shall be no stay of money decrees except on deposit of decretal amount in the Court or furnishing security therefor.

25. TDSAT in the present case has granted stay of part of such demands. While the petitioner has been asked to deposit entire principal amount, it has been directed to pay only 50% of the claim for interest. No error requiring interference in exercise of judicial review has been pointed out in the said orders.

26. As far as the argument of the senior counsel for the petitioner of inconsistency is concerned, I may notice that the order dated 11th February, 2011 on which strong reliance has been placed neither states that there shall be stay of demand insofar as for the period 1st February, 2004 to 13th November, 2004 nor gives any reason therefor, though undoubtedly directs deposit only qua the subsequent period. It is only by reference to the petition in which the said order was made that it is contended that the demand challenged therein was also for the earlier period. However, the said order cannot be said to be unequivocal or unambiguous insofar as the demand for the earlier period i.e. prior to 14th November, 2004 was concerned. As aforesaid, the basis of demand for entire period is the same and it cannot be said that challenge by the petitioner to demand for one period has more strength than the challenge for other period.

27. The principal of finality of decisions also does not apply to such interim orders. A Court/Tribunal is entitled to vary/alter interim orders at any time. In the absence of TDSAT having expressed any unambiguous view that the petitioner had a *prima facie* case against the demand for the period 1st February, 2004 to 13th November, 2004, the order dated 11th February, 2011 cannot be the anchor for the argument of inconsistency. Since the demands pertained to several Circles, it is well nigh possible that a Court/Tribunal in the petitions initially brought before it, may pass interim order on condition of deposit of a certain amount only but upon being faced with a large number of petitions and realizing the magnitude of the demand deem it appropriate to alter the conditions for the interim order and require deposit of something more than what was directed in the initial petitions/orders. Of course, the senior counsel for the petitioner contends that no such reason has been recorded by TDSAT in the present case. However the myriad reasons which weigh with the Court/Tribunal in imposing conditions for grant of interim relief are not always expressed and as long as this Court does not find any error in the order, it would not interfere with the same.

28. I also do not find any inconsistency in the orders insofar as earlier directing payment of interest in accordance with the agreement and subsequently clarifying the period for which interest has to be computed. TDSAT in the order dated 18th April, 2011 has given reasons for deposit of 50% of the interest calculated from the date when the payment *prima facie* became due from the petitioner to the respondent irrespective of whether bill therefor had been raised or not. Such reasons are not found to be preposterous or in disregard of any provision(s) of law. When a dispute as to whether certain amounts are at all payable or not is pending consideration, the view taken by TDSAT that it was not necessary for the respondent to raise bills, cannot be said to be unknown in law.

29. Last but not the least, it cannot be lost sight of that the petitioner is engaged in a commercial venture and it is not the case of the petitioner that it is unable to comply with the condition or that the condition if allowed to stand would make the interim order illusory. The defence of the petitioner of the payments being not due has already been negated till the Apex Court. The only challenge now is to computation and/or as to whether the demands are within the limitation or not and/or from what date interest can

be computed. All these questions are to be adjudicated finally by TDSAT and the petitioner has no indefeasible right of stay of demand pending challenge thereto.

30. There is also merit in the contention of the senior counsel for the respondent that the petitioner is not entitled to a second round of challenge to the order dated 18th April, 2011 (supra). The petitioner indeed is found to be indulging in judicial adventurism.

31. Thus while dismissing the writ petition I also impose costs on the petitioner of ₹40,000/- payable to the respondent within four weeks of today.

**RAJIV SAHAI ENDLAW
(JUDGE)**

JULY 06, 2011

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(corrected and released on 14th July, 2011)