In the High Court of Punjab and Haryana at Chandigarh

RSA No.3916 of 1999(O&M)

Date of Decision:27.5.2019

M/s Fairdeal Telecom Private Limited ---Appellant

Vs.

Union of India and others ---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr.Puneet Jindal, Senior Advocate
with Mr. Tajinder Singh, Advocate, for the appellant

Mr. Anil Rathee, Advocate, for the respondents

Rekha Mittal, J.

CM No. 2731-C of 2019

As the relief sought to be added by way of amendment is based upon the facts already pleaded in the plaint coupled with that no prejudice shall be caused to the respondent in case the proposed amendment is allowed, the application filed by the appellant for amendment of the plaint is allowed.

Amended Plaint is taken on record.

Disposed of accordingly.

RSA- 3916 of 1999

Challenge in the present appeal has been directed against judgment and decree dated 22.1.1999 passed by the Additional District

Judge, Jalandhar whereby appeal against the judgment and decree dated 29.7.1997 passed in favour of the plaintiff-appellant was allowed, judgment and decree dated 29.7.1997 passed by the Civil Judge (Senior Division), Jalandhar (hereinafter referred to as "the trial court") is set aside and suit filed by the appellant-plaintiff was dismissed.

Indisputably, an agreement dated 23.6.1989 (Ex. P3) was executed between M/s Fairdeal Telecom Private Limited and Telecom District Jalandhar for installation of local S.T.D. and I.S.D. pay phones at selective locations. The relevant and material clauses of the agreement around which controversy in the present appeal revolves are contained in paras 4, 6, 10 and 21 of document Ex. P3, reproduced hereunder for ready reference:-

> "4. The Operating Agency will use Department of Tele Communications type approved Telephone Instrument and the accommodation and the Booth at his own costs. However the Deptt. Will extend all co-operation to the Operating Agency to find suitable accommodation where ever possible.
>
> 6. The Operating Agency will be permitted to charge Rs. 1/- per Unit from the Public for the calls made from the Pay phone. The Operating Agency will pay to the Department 80 paisa per metered call unit in case for pay phone with S.T.D, facility and @ 60 paisa per metered call Unit in case of pay phone with only for local call facility (On the basis of calls recorded in the Exchange). The Operating Agency can retain 20 paisa for each metered call Unit for pay phone with STD facility and 40 paisa for pay phone with only local call facility.

10. The pay phone will be of 'stand-alone' type. The Operating Agency will also not depend upon any special electrical signals like metering pulses etc. from the exchange for charge indication to the user.

21. The Operating Agency shall also have the right to replace the pay phones with advance, improved and modified versions as and when they may be introduced after due approval from the department of telecommunication."

There is no denial that Operating Agency namely Fairdeal Telecom Private Limited did not install 'Stand-alone' type pay phones but installed some other pay phones on account of which there arose dispute between the parties with regard to payment to be made to the Operating Agency, in terms of clause 6 of the agreement, reproduced hereinbefore.

` Counsel for the appellant would argue that Subhash Chander, Legal Staff DW1 has admitted in his cross examination that before commissioning the PCO connection test report is sought. He further stated that instruments manufactured by M/s Anjlim Enterprises were on the approved list of Department. B.R.Ahir DW2 had stated that the instrument installed by the party is mentioned in the test report. The connection is given by the Department to any party only if approved instrument is installed. Baldev Singh, Deputy General Manager (Retired) DW6 had stated in cross examination that one of the instruments on the approved list is of Intellitrect type manufactured by Anjlim Enterpises. At that time, Intellitrect instrument was installed by the plaintiff which was on the approved list. He would also point out towards Ex. P5. It is argued that in view of documents on record and the facts admitted by witnesses of the Department with regard to giving test report containing the nature of instrument installed by the Operating

Agency, the respondents are stopped by their act and conduct to raise an issue that since the operating agency did not install pay phone 'stand by', the appellant is not entitle to charges at the rate agreed in view of clause 6 of agreement Ex. P3. He has pressed into service clause 4 of the agreement to say that as the Operating Agency was allowed to use Department of Telecommunication type approved telecom instrument, the respondents can not derive any advantage to their contention from clause 10 or/and 21 of the agreement to escape their liability to pay outstanding amount in discharge of their obligation under the agreement particularly clause 6 thereof. It is further argued that the first Appellate court seriously erred by reversing the judgment and decree passed by the trial court, therefore, the judgment and decree passed by the first Appellate Court may be set aside and that of trial court may be restored. Counsel would inform that objections raised by the respondents with regard to non-maintainability of suit for mandatory injunction in place of suit for recovery on payment of requisite court fee no more subsists as application filed by the appellant for amendment of plaint stands allowed and the appellant has already paid requisite court fee on the amount sought to be recovered from the respondents-defendants.

Counsel representing the respondents, on the contrary, would submit that the appellant can not claim any relief on the basis of clause 4 read in isolation. On the contrary, the relevant clauses of the agreement namely 4, 6, 10 and 21 are to be read in conjunction to have harmonious construction as to what the parties intended when they entered into agreement Ex. P3 to install local STD and ISD pay phones at selective locations as offer given by the Operating Agency i.e. Fairdeal Telecom Private Limited to run pay phone at its own costs was accepted by the Department. It is further argued that clauses in the agreement are clear and do not admit any ambiguity or interpretation. As per clause 10, it was specifically agreed between the parties that pay phone will be 'stand-alone' type. Under clause 21, the Operating Agency was given right to replace the pay phone with advance, improved and modified versions as and when they are introduced but after due approval from the Department of Telecom. It is argued that there is nothing on record suggestive of the fact that the appellant installed 'stand-alone' type pay phones or the same were replaced with some advanced/improved/modified versions after approval from the Department of Telecom, therefore, the appellant is guilty of violating the terms and conditions of agreement and disentitled itself to enforce clause 6 for payment of charges at the rate agreed between the parties. He would apprise the court that at the stage of grant of interim injunction in the present litigation, the dispute was raised before this court in CR No. 2114 of 1991 and in pursuance of order dated 9.8.1991 passed in the aforesaid petition, the appellant changed apparatus which was earlier installed and since then the Department made payment to the Operating Agency as per rates fixed in clause 6 but for the disputed period the appellant was paid according to slab system.

Counsel representing the appellant, in reply has not denied filing of CR No. 2114 of 1991 and order passed therein. Rather he would apprise that order dated 9.8.1991 has been reproduced in sub para (iv) of para 3 of the grounds of appeal. It is argued that the appellant agreed to change the apparatus in order to settle the dispute for future but the said fact does not create estoppel against the appellant to assert its right of recovery, on the basis of agreed terms and conditions between the parties.

Clause 4 of the agreement basically deals with the issue that approved Telephone Instrument and accommodation and the Booth will be used by the Operating Agency at its own costs. This clause does not deal with the type of telecom instrument that was required to be installed by the Operating Agency. On the contrary, type of pay phone which was required to be installed by the Operating Agency is clearly indicated in clause 10 that says that pay phone will be of 'stand-alone' type. Under clause 21, the Operating Agency could replace pay phone with the advance/improved/modified versions as and when introduced but after due approval from the Department of Telecommunication. Since in the present case, admittedly, the operating agency did not install 'stand-alone' type pay phone, it cannot be heard to say that clause 10 of the agreement is not relevant or the same is futile and useless keeping in view the words used in clause 4 that the Operating Agency will use telecommunication type approved telecom instrument. No evidence has been led by the appellant that telecom instrument which was installed by the Operating Agency was ever got approved from the Department of Telecommunication before it was installed by the Operating Agency. There is nothing on record suggestive of the fact that terms and conditions of agreement Ex. P3 were ever modified with concurrence of the parties. In the given circumstances, the appellant cannot derive any advantage to its contention from the facts elicited in cross examination of witnesses of the defendants or the document that the Department has approved the apparatus manufactured by Anjlim Agency. In this view of the matter, I do not find an error much less illegality in the judgment impugned, warranting intervention.

No other point has been raised.

For the foregoing reasons, the appeal fails and is accordingly dismissed with costs.

(Rekha Mittal)
Judge

27.5.2019

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