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Court : Telecom Disputes Settlement and Appellate Tribunal TDSAT

Decided On : Sep-12-2012

Judge : S.B. Sinha, Chairperson &Amp;amp; the Honourable Mr. P.K. Rastogi, Member

Appeal No. : Petition No.468 of 2011 (M.A. No. 248 of 2011)

Appellant : M/S. Loop Telecom Ltd.

Respondent : Union of India and Another

Advocate for Pet/Ap. : For the Petitioner: Navin Chawla, Mankiya Khanna, Ms. Shikha Sarin, Advocates. For the Respondents : K.P.S. Kohli, Abhishek Kumar, Ms. Debopama Roy, T.S. Nanda, Ms. Maneesha Dhir, Advocates.

Judgement :

The Petitioner, a licensee in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1885, has filed this petition praying inter-alia for the following relief :-

“Direct the Respondents to reduce the Performance Bank Guarantee in respect of various telecom circles mentioned hereinabove where Phase 1 roll out obligations have been duly fulfilled by the Petitioner.”

2. Although, initially this petition was filed in respect of all the circles, for which the Petitioner holds licences, in terms of an order dated 05.01.2012 this petition has

been kept confined to the West Bengal circle only.

The Petitioner, however, despite an undertaking to file separate petitions in respect of the other circles, did not file the same.

The Petitioner has furnished performance bank guarantees for a sum of Rs.5 crores for the State of West Bengal.

3. Mr. Navin Chawla, learned counsel appearing on behalf of the Petitioner would contend :-

(i) The Performance Bank Guarantee being governed by clause 21.1 of the licence agreement was required to be reduced to fifty percent as the Petitioner has completed its first phase of roll out obligations;

(ii) Such compliance must be inferred having regard to the fact that the Petitioner had not been allotted spectrum in three out of 25 districts in the State of West Bengal;

(iii) The Respondent, in view of the decision of this Tribunal in

Unitech Wireless (Tamilnadu) Pvt. Ltd. and Ors. Vs. Union of India disposed of on 13.01.2012, cannot insist on payment of the amount of liquidated damages to the extent of Rs.6.75 crores.

4. Mr. K.P.S. Kohli, learned counsel appearing on behalf of the Respondent, on the other hand, would contend that the Petitioner having not questioned the demand of liquidated damages for a sum of Rs.6.75 crores in respect of the first phase of roll out obligations, this Tribunal may not issue any direction in this behalf.

5. Clause 21.1 of the licence conditions is in two parts.

The first part deals with the completion of the first phase of the roll out obligations in terms whereof the licensees are to complete their roll out obligations on self-certification. The Respondent is to reduce the amount of performance bank guarantee, if the second phase of roll out obligations are met.

The Petitioner has filed a large number of documents in this petition in respect of all the circles, for which the Petitioner holds licence.

The Respondent has demanded a sum of Rs.6.75 crores towards liquidated damages for the circle of West Bengal inter-alia on the premise that it did not register itself with the TERM Cell for the 3rd District Headquarter till date of issuance of the said letter i.e. from 08.01.2010 till 20.12.2010 for a period of fifty weeks.

The Petitioner protested thereagainst.

6. Mr. Navin Chawla would contend that from the demands made by the Respondent itself on 27.01.2010 in respect of Rampurahat Municipal area and Arambagh Municipal area, it would appear that sums of Rs.1,57,500/- and Rs.1,40,000/- were demanded and deposited respectively for carrying out the test, it must be held that the Petitioner has complied with its roll out obligations in respect of aforementioned two towns as would appear from the Petitioner's letter dated 27.01.2010 and the deposit thereof has been accepted by the TERM Cell.

7. Our attention has furthermore been drawn to the self-certification of the Petitioner with regard to its ten percent roll out obligations in respect of West Bengal service area in terms of a letter dated 03.02.2010, which reads as under:-

"This is with reference to Clause No. 21.1 of our UAS Licence Agreement, which stipulates that the Performance Bank Guarantee shall be reduced to Rs.10/5/1 crores for category A/B/C service areas on self certification provided by the Licensee. The said clause is reproduced below for your ready reference :

Further on completion of one year from the effective date of licence and after meeting the coverage criteria stipulated for first year, the PBG shall be reduced to Rs.10/5/1 crores for category „A?/?B?/?C?service areas on self-certification provided by the Licensee.

We hereby Self Certify that we have completed 10% Roll Out in West Bengal Service Area and have offered our network for TERM Testing.

In view of the above, we request you to kindly reduce the Performance Bank Guarantee to Rs.5 crores for West Bengal Service Area."

8. The Petitioner had made a representation on or about 20.01.2011 in respect of the aforementioned circles, stating :-

"However, the above mentioned letter of DoT has captured a wrong date of 20.12.2010 and has wrongly calculated the LD. A copy of TERM Registration Certificate in respect of Rampurahat and Arambagh towns issued by TERM Cell clearly mentioning the dates of registration as 27.1.2010 are enclosed for your ready reference. Loop has, therefore, registered with the TERM Cell for coverage testing of at least 10% of the DHQs within one year of date of allocation of the startup spectrum and has complied with the licensing conditions.

3. We also wish to draw your attention to the fact that although Loop Telecom had executed the UASL on 3.3.2008, and had immediately applied for the GSM Spectrum, however, till date we have not been allocated the GSM Spectrum for North 24 Parganas, Bardhaman and Darjeeling districts of West Bengal Service Area. Needless to mention, the spectrum allocation in the entire Service Area is very important for timely, efficient and economical Roll-out of Network in a Service Area."

9. In these proceedings, the question as to whether the Petitioner has been supplied with spectrum in respect of North 24 Praganas, Burdwan and Darjeeling districts has not been disputed.

The Respondent in its reply has merely stated that the Petitioner has not yet got itself registered, alleging :-

"5. It is further pertinent to mention that additional liquidated damages have also been imposed by the Respondent upon the Petitioner in respect to 21 circles mentioned above. The Respondent has also issued show cause notice to the Petitioner for termination of licences in respect of Kolkata, Andhra Pradesh, Madhya Pradesh, Rajasthan, Uttar Pradesh (East) , Orissa and Haryana.

6. That it is pertinent to note that the LD for delay in rollout of network in first phase (within one year) was imposed on interim basis as the Petitioner had registered with TERM Cells for service testing was under process. The Petitioner has stated that it has received service test certificates from TERM Cells.

7. That in respect of third rollout obligations and the claim of the Petitioner that it has rolled out its network in above stated 21 Service Areas, it is submitted that the same is under examination with the Respondent. It is stated that for delay, if any, in rollout of network as part of third year rollout obligations, action as per license condition is yet to be taken."

10. No show cause notice for termination of licence has, however, been issued in respect of the West Bengal circle.

This Tribunal is also not concerned with the question as to whether the Petitioner has complied with the second phase of its roll out obligations or not.

In para 10 of its reply, the Respondent stated as under :-

"10. It is pertinent to submit that the Respondent is unable to calculate the liquidated damages for the balance obligations in view of the judgment passed by this Hon?ble Tribunal inasmuch as ;whether to consider the relevant date as the date when the Microwave Access Spectrum is allocated or the date of allocation of GSM spectrum and hence LD for the 2nd phase is yet to be assessed and reduction of PBG at this stage would seriously prejudice the Respondent.

22-23. That the contents of Para No. 22 and 23 of the petition are matter of record are wrong and denied. It is reiterated that the Respondent is unable to calculate the liquidated damages for the balance obligations in view of the judgment passed by this Hon?ble Tribunal inasmuch as whether to consider the relevant date as the date when the Microwave Access Spectrum is allocated or the date of allocation of GSM spectrum and hence LD for the 2nd phase is yet to be assessed and reduction of PBG at this stage would seriously prejudice the Respondent."

11. A demand for additional liquidated damages had been issued. The same, however, has been quashed by this Tribunal inter-alia in Petition No.34 of 2012

which was heard analogously with Petition No.5 of 2012.

12. The question as to whether the performance bank guarantees are to be returned or not, was the subject matter of the recent decision in Etisalat DB Telecom Pvt. Ltd. vs. Union of India being Petition No. 443 of 2011, wherein a decision of this Tribunal in Aircel Ltd. Vs. Union of India being Petition No. 491 of 2011 and Sistema Shyam Vs. Union of India has been noticed in the following terms :-

“A bare perusal of Clause 21.1 would clearly go to show that at the first instance i.e. after one year the same has to be reduced to 50%. The period of one year has been fixed keeping in view only the roll out obligations on the part of the licensee, so far as the coverage of the license areas are concerned.

The interest of public has been kept in view therefor. The extent of damages by way of liquidated damages have been quantified on the basis of length of delay caused by the licensee in providing for the telecom service contemplated under the licenses.

Upon successful completion of the roll out obligations, the performance bank guarantees are to be released.”

It was further opined:

“If Mr. Mishra?s submissions are to be accepted, no occasion would arise for reduction of the amount of the performance bank guarantee and ultimate release thereof. It cannot, therefore, be given any effect. Performance bank guarantees would, therefore, have to be kept alive for the entire term of the license i.e. 20 years.

This Tribunal in this case would assume that failure on the part of the licensee to abide by its obligation in Clause 34.1 may entail civil consequences but the amount due therefor were required to be calculated.

Such dues, if any, may fall within the purview of the financial bank guarantee as contemplated under Clause 21.2 of the license and not 21.1.”

Clause 34 along with Clauses 8 and 35 have been amended by the Respondent in terms of a circular letter dated 10.2.2009, the relevant portions whereof read as under:

"(iii) In non-metro service areas, the licensee shall ensure that in first phase of roll out obligation at least 10% of DHQs where startup spectrum has been allocated are covered within one year of such spectrum. The date of allocation of frequency shall be considered for computing a final date of roll-out obligation.

(vi) Coverage of a DHQ/town shall mean that at least 90% of the area bounded by the Municipal limits shall get required street level coverage

(vii) The date of application for SACFA or date of allocation of frequency, whichever is later, shall be taken into account for the purpose of calculating average delay in SACFA clearance.

(xi) Date of registration by TEC/TERM is to be treated as date of meeting the roll-out obligation in case of coverage criterion is met for roll-out obligation on testing."

13. It appears from the notice of demand that the Petitioner was to fulfill its roll out obligations by 08.01.2010, the date of allocation of spectrum having been shown as 09.01.2009.

14. Mr. Chawla's submission that the Respondent has not supplied spectrum in respect of three districts and, thus, it cannot ask the Petitioner to complete its roll out obligations in respect of three districts appears to be well founded.

In Unitech Wireless (Tamilnadu) Pvt. Ltd. Vs. Union of India, being Petition No. 1 of 2011, wherein inter-alia this Tribunal in its order dated 13.01.2012 stated the law thus :-

"Indisputably in terms of the original license, the licensee was to comply with its roll out obligations in respect of 10% of the District Head Quarters in the first phase i.e. within a period of one year, and 50% of the District Head Quarters within three years from the effective date of license.

The effective date of license in the instant case was 25.01.2008.

The Petitioner was allocated start up spectrum on or about 09.03.2009.

The Respondent on the premise that the Petitioner has failed to comply with its roll out obligation has imposed a penalty of Rs.6.35 crores by an order dated 19.01.2011.

The said order is in question herein.

172. Mr. Dayan Krishnan, learned counsel appearing on behalf of the petitioner would contend that having regard to the Clauses (iii) and (x) of the said amendment, the impugned order is wholly unsustainable.

The said clauses have been noticed by us earlier. Since the spectrum had been granted in respect of two district headquarters only 10% whereof would be 0.2, it was not possible for the Petitioner to comply with its roll out obligation."

15. In this case, the TERM Cell has granted registration to the Petitioner as would appear from the impugned demand itself. However, the L.D. amount of Rs.6.75 crores has neither been paid nor been stayed by this Tribunal.

16. In this view of the matter, we are of the opinion that the Respondent may reduce bank guarantee to the extent of fifty percent subject to the condition that the Petitioner either pay the demanded amount of Rs.6.75 crores or scrutinized the same by bank guarantee.

17. This petition is disposed on the aforementioned terms without any order as to costs.

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