**Union of India and Others Vs. Datapro Information Technology Ltd.**

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**SooperKanoon Citation** : sooperkanoon.com/941605

**Court** : Telecom Disputes Settlement and Appellate Tribunal TDSAT

**Decided On :** Apr-15-2010

**Judge** : S.B. Sinha, Chairperson, Honourable Mr. G.D. Gaiha, Member &Amp; Honourable Mr. P.K. Rastogi, Member

**Appeal No.** : Petition Nos.7 of 2002, 163 of 2006 & 7 of 2002

**Appellant** : Union of India and Others

**Respondent** : Datapro Information Technology Ltd.

**Advocate for Pet/Ap.** : FOR THE PETITIONERS: VIBHU BHAKRU, RAJEEV KUMAR, MANEESHA DHIR, K.P.S. KOHLI, ADVOCATES. FOR THE RESPONDENT: MANEESHA DHIR, K.P.S. KOHLI, ARUN KATHPALIA, VIRENDER SINGH THAKUR, VIBHU BHAKRU, ADVOCATES

**Judgement** :

S.B. Sinha

Both these petitions being inter-related were taken up for hearing together and are being disposed of by this judgment.

The fact of the matter is as under.

The Datapro Information Technology Ltd., (hereinafter called and referred to for the sake of brevity as “the Licensee), entered into the business of providing

Electronic Mail Service.

Indisputably, in the year 1992, the Union of India (hereinafter called and referred to as “the Licensor”), invited proposal for setting up various ‘Value Added Services’, including, ‘E-mail’. A license agreement was entered into by and between the parties on or about 3.6.1994 in terms whereof, the licensee was required to make available service in at least 5 service areas within a period of 12 months. The said agreement, inter alia, contained the following terms:-

“1.7. The resources required for operation of the Services and for extending them over the network of the DOT will be mutually agreed between the parties. The resources may include but are not limited to - physical junctions, PCM derived channels, private wires, leased lines, data circuits, other communication elements. The Licensee may apply for and obtain from the Authority the desired resources. The Authority reserves the right to grant such resources, on such terms and conditions as it may decide. The operation and tariff for the traffic passed through these resources as well as provision of these resources shall be governed by the prevailing rules and the guidelines of the DOT on the subject.

4.1 The date of delivery of the service stipulated in clause 3.3 shall be deemed as the essence of the license and the service must be brought into commission not later than the date specified therein. Extension will not ordinarily be given. Should, however, the service be brought into commission after the expiry of the licensed date of commissioning, without prior concurrence of the licensing authority and be accepted by it, such commissioning will not deprive the Authority of its right to recover liquidated damages under this article. When however, the commissioning of the Service is effected within 15 days of the licensed commissioning period, the Authority may accept the Services and in such cases the provision of the condition 4.2 will not apply.

8.1.1 The Authority, may, subject to the provisions of clause 8.2 hereof and without prejudice any other remedy for breach of any conditions of license, by written 90 days notice issued to licensee terminate this license in whole or in part, under any of the following circumstances:

(a) If the Licensee fails to provide any or all of the Services within the time period(s) specified in the license or in any extension thereof granted by the Authority;

(b) If the Licensee fails to perform any other obligation(s) under the license including timely payments due to Authority;

(c) If the Licensee, in either case of the above circumstances, does not rectify the failure within a period of 30 days (or such longer period as the Authority may authorize in writing) after the receipt of the default notice from the Authority.

Schedule C : COMPLIANCE STATEMENT

This company hereby agrees to fully comply with all Technical, Commercial and General conditions of Tender document No. 842-4/94-TM including amendments/clarifications issued by the Department of Telecom without any deviations and reservations and OR/GR specifications for Electronic Mail Service as per specifications No. V/EML-01/02.AUG 94 of Telecommunications Engineering Centre, Department of Telecommunications."

According to the licensee, it had requested the licensor to provide leased lines and subscriber access lines on priority, inter alia, on the premise that commencement of the service was dependent thereupon. A request was also made to issue necessary instructions to various local telephone departments in various cities to treat the petitions submitted by them as special categories and lines be released on highest priority. The licensor issued a Circular to all the Chief General Managers of the Telecom Circles in regard to the provisions of leased circuits to licensed value added service providers on or about 25.8.1994. The Licensee, yet again asked the Licensor by a letter dated 21.11.1994 informing it in regard to the delay in providing leased lines as also the fact that the telecom authorities had been insisting on the charges which was twice over the regular leased line charges from the service providers.

Another major problem, which according to the petitioner, was faced by the Licensee, related to connectivity which was to be provided by the Videsh Sanchar

Nigam Limited (VSNL) (Respondent No. 3).

According to the Licensee, however, the system called GEMS 400, providing for international connectivity adversely affected the delivery and receipt of messages to the extent of 42 out of 200 international destinations. The licensee companies were also charged for the period when even basic infrastructure in terms of leased lines and GEMS 400 gateway impressed had not been put in place. According to it, by reason of various acts of omissions and commissions on the part of the licensor, the licensee suffered enormous business loss.

It is, however, not in dispute that the licensee finally commenced its commercial operations on or about 30.3.1995. The Licensor by August, 1995 started providing e-mail and internet service as a service provider. Questioning the aforementioned acts on the part of the licensor, the licensee filed an application before the Telecom Regulatory Authority of India (TRAI). On or about 4.2.1998, a show cause notice was issued by the licensor asking it to show cause why the license agreement should not be terminated for non-payment a sum of Rs.17,50,000 towards licensee fee. While the matter was pending before TRAI, the 3rd Respondent also asked the licensee to make all payments by 10.8.1998 in terms of its letter dated 3.8.1998 although the licensee denied and/or disputed its liability, the PMRD connection was disconnected. The licensee furnished Bank Guarantees to the tune of Rs. 35 lakhs consisting of two performance Bank Guarantees for Rs. 5 lakhs each and one financial Bank Guarantee for Rs. 25 lakhs.

Questioning the said act of invocation of the Bank Guarantees by the licensor, the licensee filed a suit in the Court of Civil Judge, Senior Division, Pune claiming inter alia the following reliefs:-

a. It be declared that the charge of licence fees of Rs. 130 Lakhs and demand of Rs. 38 Lakhs as arrears of Licence Fees by the Defendant no. 1 to the Plaintiff is illegal, unfair, arbitrary, contrary to law and void ab-initio and not enforceable in law.

b. It be further declared that the letter dated 23/7/98 issued by Defendant no. 1 to Defendant no. 2 which is illegal, contrary to law, void ab-initio and not enforcible in law.

The licensee, thus, did not pray for any damages against the licensor nor claimed refund of the license fees paid by it. Admittedly, the license was abruptly terminated on 18.12.1998.

By reason of an order dated 21.8.2001, TRAI while upholding the demand for the charges levied for the leased line rental, also upheld the contentions of the licensee that delay had been caused on the part of the respondent in providing leased lines / telephone lines, the licensor was asked to investigate the cause therefor as well as the complaints in regard to the performance and reliability of GEMS 400 system. In the said suit, the respondent filed an application inter alia invoking the arbitration clause. One Mr. N.K. Mathur was appointed as an arbitrator. He entered into the reference.

The licensee filed a writ petition before the High Court of Judicature at Bombay which was marked as Writ Petition No. 6545 of 2002. An order of injunction was prayed for and was granted by the High Court on or about 19.3.2003.

While the aforementioned suit was pending, the licensee filed the petition on or about 1.3.2002, praying for the following reliefs:-

1. Quash and set aside the Show Cause Notice dated 4.2.1998;

2. Quash and set aside the letter of termination dated 18.12.1998;

3. Direct the Respondents to refund the license fee paid by the Petitioner to the Respondent/s including the amount encashed by the Respondent/s by invocation of the bank guarantees provided by the Petitioner for such period as the Respondents had failed to provide the infrastructure i.e. international gateway and leased lines;

4. Direct compensation for all the business losses since the losses were the direct result of obsolete technology imposed by the Respondent/s, delay in providing

infrastructure, deficiency in service by all the Respondent/s and also their becoming direct competitors of the Petitioner through Internet and E-mail services since August, 1995;

5. Declare that the Respondent/s are not entitled to recover any additional amounts from the Petitioner;

As the said suit was pending, this Tribunal by an order dated 9.12.2002 refused to entertain this petition. An undertaking was given by the licensee to withdraw the said suit. This Tribunal furthermore noticed that the arbitration proceedings had also been initiated. A preliminary objection was also raised with regard to continuation of the proceedings before this Tribunal inter alia on the premise that the arbitration proceedings had been continuing. In its order dated 18.12.2003, having regard to the pendency of the aforementioned writ Petition before the Bombay High Court, staying the arbitration proceeding, at the suggestion of the counsel for the parties, this petition was adjourned sine die.

However, when the matter was listed again before this Tribunal again on 19.9.2005, it was observed as under:-

“On 18.12.2003, on a representation made by the learned counsel for petitioners that a Writ Petition in the Bombay High Court which raised a connected issue was pending therefore, this matter was adjourned sine die to await the decision in that petition. But till date, the petition before the Bombay High Court is not decided. That being the case, we cannot keep this petition pending any further. Therefore, list the matter for final hearing on 18.10.2005.”

However, in the mean while, the suit was withdrawn by the licensee upon making a statement before the learned Civil Judge that the disputes between the parties had been settled.

Realising that a mistake has been committed, an application for a review was filed which was dismissed, whereagainst a Writ Petition was filed before the High Court of Bombay. The said writ petition was also dismissed by an order dated 26.10.2005.

Before this Tribunal, however, a contention was raised that the jurisdiction of Civil Court having expressly been barred in terms of Section 15 of the TRAI Act, 1997, the entire proceedings before the Civil Court were nullities and in that view of the matter it is necessary for this Tribunal to enter into the merit of the matter.

This Tribunal, in its Order dated 29.3.2006, observed as under:-

“7. Without going into the correctness of the submissions made by the learned counsel for the petitioner in regard to maintenance of this petition at this stage, we are inclined to consider this petition along with all other issues that arise for consideration including the question of maintainability.”

However, pursuant to or in furtherance of the leave granted to the licensor, a fresh petition was filed by it which has been marked as P. No. 163/2006 praying inter alia for a decree for a sum of Rs. 12124894.00, the details whereof are as under:-

A. Outstanding Amount

1. Balance of license fee for 3.6.98 to 2.9.98

3,00,000.00

2. License fee for the period from 3.9.98 to 2.12.1998

10,00,000.00

3. License fee for the period from 3.12.98 to 17.12.98

2,50,000.00

Total : 15,50,000.00

B. Interest upto 31.03.2006.

10574894.00

Grand Total : 12124894.00

The said counter-claim inter alia was filed on the premise that the license having been terminated in terms of clause 8.2 of Schedule ‘C’ of the agreement, the licensee was required to pay the stipulated licensee fee for the period up to 17.12.1998 as well as interest thereupon for delay in making payment at the highest commercial lending rate of the State Bank of India.

Mr. Vibhu Bhakru, the learned counsel appearing on behalf of the licensee would submit as under:-

(i) Although the Civil Court as also the High Court have refused to recall its Order permitting the licensee to withdraw the suit on the ground of pendency of this Petition before the Tribunal, despite the fact that only a mistake had been committed by its counsel that the matter has been settled between the parties; this Tribunal having the exclusive jurisdiction to determine the disputes or differences between the parties, the institution of the Civil suit as also of subsequent proceedings therein should be ignored.

(ii) The arbitration proceeding before the Arbitral Tribunal being also without jurisdiction, would also be a nullity and, thus, the same should also be ignored.

(iii) The licensee having been pursuing the Civil suit before the learned Civil Judge, Senior Division, Pune, the present Petition cannot be held to be barred by limitation.

(iv) The licensor having failed and/or neglected to perform its contractual obligations in terms of the license agreement, it has not only made itself dis-entitled to claim the stipulated amount towards the license fee but also has made itself liable for payment of damages.

Ms. Manisha Dhir, the learned counsel appearing on behalf of the respondent, on the other hand, urged:-

(i) The relationship between the parties being governed by the provisions of the license agreement in terms whereof, the licensee was required to pay a minimum of Rs. 25 lakhs by way of license fees and same being admittedly due, the counter-claim should be allowed.

(ii) The claim petition filed by the licensee is barred by limitation as the license agreement admittedly had been terminated with effect from 18.12.1998.

Indisputably, the parties had entered into a license agreement on or about 3.6.1994 for the purpose of establishing, maintaining and operating e-mail services for a period of five years. The licensee admittedly was required to provide service at least in five service areas within a period of 12 months from the date of execution of the said agreement upon making all arrangements, providing the infrastructure facilities and installation of all the equipments to provide the service. Indisputably, the licensee was to pay the license fee with effect from 3.6.1994.

We have noticed heretobefore, the essential terms and conditions of the license.

We have also noticed heretobefore that the licensee had failed to pay any amount towards license fee after 3.9.1997.

Indisputably, the licensor, by a notice dated 4.2.1998 asked the licensee to pay the outstanding amount of license fee being Rs. 17.5 lakhs along with interest at the stipulated rate. It is also not in dispute that the licensor has encashed the Bank Guarantees for a sum of Rs. 35 lakhs on or about 23.7.1998.

The licensee filed a suit in the Civil Court. The licensor, however, invoked the arbitration clause whereupon by an Order dated 10.2.1999, the suit was directed to be stayed and the parties were granted liberty to refer their disputes and differences to arbitration, pursuant whereto, Shri N. K. Mathur was appointed as a sole Arbitrator. The arbitration proceedings continued upto April, 2003 whereafter, as noticed hereinbefore, the licensee filed a Writ Petition before the Bombay High Court which stayed the arbitration proceeding.

It is at that stage that the licensee approached this Tribunal. It is not necessary to refer to various stages of proceedings before this Tribunal. The license agreement admittedly was terminated by the licensor with effect from 18.12.1998. Indisputably, therefore, the license fee was payable up to 17.12.1998.

We may notice the letter of the licensor terminating the license being dated 18.12.1998, which reads as under:-

“This is with reference to notice dated 4.2.98 served on you to show cause for termination of aforesaid licence due to breaches and defaults committed by you by not paying the licence fee in accordance with the terms and conditions of the Licence Agreement.

2. You have also failed to respond to the show-cause notice dated 4.2.98, and it is now to terminate the licence agreement at your risks and costs with immediate effect for various defaults and breaches. Therefore, Licence Agreement No. 845-13/93-TM dated 3.6.94 is hereby terminated with immediate effect i.e. date of issue of this letter in accordance with Condition 8, Schedule ‘C’ Part II of the Licence Agreement, sub-condition 8.1, “Termination for Default.”

3. You are also called upon to make immediate payment of Rs. 13 lakhs towards licence fee due (excluding interest component) as on 30.11.98. Regarding interest, LD charges (if any) and any other dues will be intimated in due course. You are requested to make the above payments immediately by means of DD drawn in favour of Pay and Accounts Officer, DOT HQrs., New Delhi-110001.

4. This termination of licence is without prejudice to any other remedy for breach of conditions of the licence agreement and non payment of outstanding Government dues. Liabilities arising out of termination of the licence will be intimated separately.

Kindly acknowledge receipt of this letter.”

The contention of Mr. Bhakru that this Tribunal having exclusive jurisdiction to determine the disputes and differences between the parties, the proceedings before the Civil Court should be totally ignored, could have been accepted, provided, pursuant to the direction of this Tribunal, the licensee would have withdrawn the suit unconditionally. Before the Civil Court, a wrong representation was made that the disputes and differences between the parties had been resolved. It is on that premise that the suit was permitted to be withdrawn. We have also noticed hereinbefore that the review application filed thereagainst was dismissed. Even the writ petition filed before the Bombay High Court questioning the correctness of the said Order has also been dismissed. Withdrawal of the said suit, would amount to abandonment of claim by the petitioner within the meaning of the provisions of Order 23 Rule 1 of the Code of Civil Procedure, 1908. It is well known that a high public policy is involved with said provision that a fresh suit would not lie without obtaining any leave therefor. [See Sarguza Transport Service Vs. STAT - 1987(1) SCC 5]. [See also Sarva Shramik Sanghatana (KV), Mumbai Vs. State of Maharashtra and Ors. - 2008(1) SCC 494].

Furthermore, the licensee was all along aware that the Civil Court had no jurisdiction to entertain the suit. It even before the Civil Court had not prayed for passing of a decree for refund of the license fee and/or damages against the licensee for its alleged acts of omissions and commissions. The licensee even had approached TRAI, which in terms of the provisions of the Act at the relevant time, had the exclusive jurisdiction, not only to implement its regulations but also adjudicate upon the disputes and differences between a licensor and a licensee.

TRAI had upheld a part of the contention of the licensee. However, the same was not implemented.

The licensee, it would bear repetition to state, questioned only that part of the action on the part of the licensor which related to encashment of Bank Guarantee and had sought for a declaration in the suit but no consequential reliefs in regard to refund the license fee and damages were prayed for. Indisputably, the licensee could have done so. When the Civil Suit was filed, the plaintiff having regard to the provisions contained in Order II Rule 2 of the Code read with Explanation IV appended to Section 11 thereof should have raised its entire claim. It should not have, thus, filed a suit in relation to a part of the claim. It did so at its own risk.

This petition is otherwise bared by limitation.

It is also not a case where even any averment had been raised that the licensee had been pursuing its claim bonafide as is required under Section 14 of the Limitation Act, 1963.

The licence having been terminated, this Petition before this Tribunal ought to have been filed within a period of three years. The period of limitation for filing this

Petition, therefore, expired on 17.12.2001. We have noticed hereto before that this Petition was filed only on 1.3.2002. The Petition before this Tribunal being an original one, Section 5 of the Limitation Act, 1963 would not be attracted. Sufficient averments, as noticed hereinbefore, have not been made to attract the provisions of Section 14 of the Limitation Act, 1963.

Once the Petition is held to be barred by limitation, as also Order II Rule 2 of the Code of Civil Procedure, all the contentions of the petitioner must be rejected.

The licensee was bound to pay the license fees in terms of the agreement. It could have avoided its contractual obligation to pay license fee only when a breach of contract on the part of the licensor could have been proved. The licensee cannot, thus, be permitted to raise the said contention in this petition. Furthermore, no evidence at all has been brought on record to show as to what was quantum of damages suffered by it. For the purpose of sustenance of its claim, the licensee was not only to prove breach of contract on the part of the licensor, it was also bound to show the quantum of damages it had suffered. Had such evidence been adduced by the parties herein, this Tribunal, if at all, could have entered into the merit of the matter so as to enable it to pass a decree in favour of either the licensor or the licensee.

Submission of the learned counsel is that although in its petition the licensee was not in a position to advance its claim, it can do so as a defence in the counter-claim. We do not agree. If the claim of the licensee cannot be entertained on the grounds stated hereinbefore, in our considered opinion, it cannot be permitted to raise the same contentions even by way of defence. This Tribunal cannot pass inconsistent decrees. In other words, whereas on the technical grounds of limitation, Order XXIII Rule 1, Order II Rule 2 or Explanation IV appended to Section 11 of the Code it becomes impermissible for this Tribunal to entertain the claim of the licensee, it would be wholly illogical to allow it to agitate the same contentions as a respondent in the petition filed by the licensor herein.

The petitioner, could not have, save and except just grounds could not have been absolved from paying license fee. The counter-claim raised by the respondent is not denied or disputed.

It has also been so held by this Tribunal recently in M/s Archana Telecom Services Ltd Vs. UOI and Ors in P. No. 138 of 2006 disposed of on 12.2.2010.

We, therefore, are of the opinion that the counter-claim of the licensor must be allowed.

It is stated before us by Ms Dhir that the interest has been calculated in terms of Clause 20.1 of the agreement, by reason whereof, the interest was to be charged at the highest commercial lending rate of the State Bank of India applicable on date on which the payment became due, i.e., 18.12.1998. Relying on or on the basis of the statement made by the licensor and having regard to the fact that no other contention had been raised before us by the licensee, we also pass a decree for a sum of Rs.12124894.00.

However, having regard to the peculiar facts and circumstance of the case and particularly in view of the fact that at least a part of the contention raised by the licensee herein had been upheld by TRAI, we are of the opinion that interest of justice would be sub-served if the licensor is refused pende lite, and future interest as also the costs of this petition. The licensee, however, is hereby directed to pay the decretal amount within a period of 90 days from date, failing which interest @ 15% p.a. shall be payable from the expiry thereof till the date of realization.